State of New Jersey
Department of Education
Trenton

NEW JERSEY
SCHOOL LAW DECISIONS

January 1, 1972, to December 31, 1972

State of New Jersey
Department of Education
Trenton

NEW JERSEY
SCHOOL LAW DECISIONS

January 1, 1972, to December 31, 1972

SCHOOL LAW DECISIONS
1972

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

Court Reporting and Secretarial Institute,
a corporation of the State of New Jersey,

Petitioner,

v.

Roberts, Walsh Stenotype School
and the Plaza School,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Seymour Chase, Esq.

For the Respondents, Goodman, Stoldt and Breslin (Roger W. Breslin, Esq., of Counsel)

The Court Reporting and Secretarial Institute, a corporation of the State of New Jersey, hereafter "petitioner," contests the licensing by the State Department of Education of the Roberts, Walsh Stenotype School.

This matter is submitted to the Commissioner of Education on the pleadings of counsel pursuant to an ORAL OPINION of Judge Eugene L. Lora, New Jersey Superior Court, Chancery Division, Bergen County, rendered on March 26, 1971. In that opinion, Judge Lora retained jurisdiction and did not dismiss the complaint; however, he remanded the matter to the Commissioner of Education for the sole determination of the following issue:

> "Is the Roberts, Walsh Stenotype School properly licensed by the New Jersey State Department of Education to operate at the Plaza School in Paramus?"

This issue was formalized at a conference of counsel and the hearing examiner on November 8, 1971.

Petitioner alleges that the Robert, Walsh Stenotype School and the Plaza School "*** have not set forth nor maintained any separate catalog or curriculum as required by the standards for approving New Jersey schools of business and schools for business machine training. ***The defendants have merely taken the catalog from the East Orange school and are using the material from the East Orange school in the new program [at the Plaza School]. Therefore [petitioner avers] they have not even made an attempt to set up the proper standards and are completely disregarding standards put out by the Department of Education ***." Petitioner's Brief, pp. 9-10

An appeal to the Commissioner of Education was made by a representative of the Court Reporting and Secretarial Institute by letter dated March 22, 1971, which reads in part as follows:

"*** Under a recent ruling of your Department and more particularly Mr. Louis Galleoni (sic) of the Private Business School Department, your Department has allowed the Roberts, Walsh Stenotype School of East Orange and the Plaza School of Paramus, New Jersey to enter into a non-competitive agreement whereby Roberts, Walsh Stenotype School would open a stenotype division within the Plaza School teaching subjects of court reporting and secretarial uses on the shorthand machine.

"It is my belief that this agreement is collusive and is non-competitive in nature and as such is illegal.***"

Petitioner alleges further that the license of the Roberts, Walsh Stenotype School "*** was illegally issued and is without validity as being in restraint of trade and commerce and obtained by the defendant *** without full adequate and proper disclosure and without meeting the requisite requirements for the issuance of the same.***" Petitioner's Verified Complaint, p. 7a

Respondents deny each and every allegation made by petitioner and aver that:

"***2. Roberts, Walsh Stenotype School is a business school licensed by the New Jersey Department of Education and conducts an approved course in the use of the stenotype machine, together with related skills. The defendant Plaza School is also a business school licensed by the New Jersey Department of Education which teaches various approved business courses but which, at the present time, does not offer a course in the use of the stenotype machine.

"3. Recently an oral agreement was made between the operators of the Plaza School and the Roberts, Walsh Stenotype School whereby the Roberts, Walsh Stenotype course would be offered to the public as a division of the Plaza School. Under said agreement, the Roberts, Walsh Stenotype School would supply its approved curriculum and its instructors to the Plaza School and make use of the Plaza School physical facilities at the Garden State Plaza, Paramus, New Jersey, in teaching the courses. The agreement further provides that Roberts, Walsh Stenotype School would be compensated for the use of its curriculum and instructors by receiving a certain percentage of the profit made on the stenotype course by the Plaza School. It is contemplated that the stenotype course at the Plaza School will begin operations in June 1971. The tuition to be charged for the course will be $400 per quarter, which is the same tuition which is charged by the Roberts, Walsh Stenotype School in East Orange. This tuition is actually higher than the tuition presently being charged by the plaintiff, which I believe to be $360 per quarter.

"4. Both before and after the filing of the plaintiff's complaint in this case, I, along with Alvin Roberts, another officer of Roberts, Walsh Stenotype School, had conferred on several occasions with Mr. Louis Galleoni [sic] of the New Jersey Department of Education, concerning our plan to

> establish a stenotype school as a division of the Plaza School. Mr. Galleoni [sic] has indicated to us that there is nothing in the regulations of the State Department of Education to prohibit or prevent a licensed business school offering one particular course to become allied with another licensed business school which does not offer that particular course."

Respondents assert, therefore, that they are indeed properly licensed by the State Department of Education to conduct a court reporting school on the premises of the Plaza School in Paramus and that their agreement, *supra*, violates no rule or regulation of the Department of Education.

The authority of the Commissioner to license private schools such as those herein named is granted pursuant to *N.J.S.A.* 18A:69-1, which reads in part:

> "This article shall apply to:
>
> "*** (b) Every private school charging tuition or fees, except institutions under the jurisdiction of or subject to inspection by the state board of control of institutions and agencies, and schools licensed by the board of beauty culture control in the state department of health, pursuant to Title 45, chapter 4A, of the Revised Statutes, which operates a program of trade and technical education or which gives preemployment or supplementary training, or both, in the fields of industry, agriculture, music or art, or in any combination of them, and, which school is established and operated in this state."

There can be no question, therefore, that the schools herein named are subject to the applicable statute for licensing by the Department of Education. *N.J.S.A.* 18A:69-2 reads as follows:

> "Every such school shall be required to register with the commissioner and shall not be permitted to operate unless it receives a certificate of approval issued by the commissioner under rules of the state board."

Examination of all facilities of such schools is vested in the Commissioner pursuant to *N.J.S.A.* 18A:69-4, which provides:

> "The county superintendent of schools or other educational officer designated by the commissioner shall be empowered to visit the premises of any such school and conduct a full and complete examination of all facilities thereof at any time during the period of operation thereof. Each such school shall be required to furnish such information and reports from time to time as the commissioner shall deem necessary and proper and in the manner and on forms to be prescribed by him."

Accepting the applicability of *N.J.S.A.* 18A:69-1, *supra*, respondents complied with the requirements of *N.J.S.A.* 18A:69-2, *supra*.

By letter of April 1, 1971, respondents requested and were granted permission to operate a court stenotype course at the Plaza School. The Plaza School was visited several times prior to its licensing by personnel of the Department of Education appointed by the Commissioner. Its program and facilities and the program of the Roberts, Walsh Stenotype School were found to meet all the requirements of the applicable education laws and the rules of the State Board of Education. Therefore, the following letter of approval dated April 2, 1971, was sent to respondents:

> "In response to your request, permission is hereby granted to offer the Roberts, Walsh Stenotype School Course at the Plaza School, Garden State Plaza, Paramus, New Jersey.
>
> "It is understood that the Machine Shorthand and Court Reporting portions of the course will be taught by certified shorthand reporters approved by this office and the English and typing portions will be taught by approved teachers from the staff of the Plaza School.
>
> "It is further understood that both Roberts, Walsh Stenotype School and the Plaza School will be jointly responsible for the complete training of students enrolled in the Roberts, Walsh Stenotype School Course at the Plaza School.
>
> "Sincerely,
>
> Louis V. Galloni, Director
> Private Business and
> Correspondence Schools
> Division of Vocational Education"

The Commissioner finds no violation of any of the statutes, *supra*, or of the State Board of Education rules pursuant thereto; nor does he find the approval letter of April 2, 1971, *supra*, inconsistent with these statutes and rules.

Having determined, therefore, that respondents have satisfied the requirements of the applicable education laws and the rules and regulations of the State Board of Education, the Commissioner holds that respondents are properly licensed by the issuance of the appropriate State Department of Education certificate of approval.

For the reasons expressed herein, the petition is dismissed.

COMMISSIONER OF EDUCATION

January 4, 1972

Robert B. Lee,

Petitioner,

v.

Board of Education of the Town of Montclair, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Althear A. Lester, Esq.

For the Respondent, Charles L. Hemmersley, Esq.

Respondent, the Montclair Board of Education, hereinafter "Board," moves to dismiss a petition brought by petitioner, a teacher formerly in its employ, whose teaching contract was not renewed for the 1971-72 school year. The Board maintains it was entitled to let petitioner's contract expire by its terms without renewal and without a statement of reasons and a hearing, but that it gave him both in any event. Petitioner opposes the Motion on the grounds of an allegation that there is a question of fact; namely, whether or not the Board's failure to renew his contract was for the reasons it stated or for another reason, i.e. because petitioner did in fact criticize the Board.

A hearing on the Motion was conducted by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton, on November 15, 1971. Briefs have been filed by counsel. The report of the hearing examiner is as follows:

Petitioner is a non-tenure teacher, who was employed by the Board under two full-year contracts to serve as a guidance counselor during the period September 1969 to June 1971. On June 30, 1971, his second yearly contract expired by its terms, and it was not renewed for a third year by the Board.

This non-renewal, according to petitioner, was improper for two basic reasons. In the first instance, he alleges that his caseload of 419 students was inordinately large and that it contained a large number of problem students. Therefore, he opines, his efficient handling of the burdensome assignment could not be a condition for contract renewal. He further avers that public employment may not be subjected to any conditions and that substantially fair and non-discriminatory treatment must be afforded to everyone similarly situated. In support of these contentions, he cites *Keyshaw v. Board of Regents*, 345 *F.* 2*d.* 236 (2*d. cir.* 1965); *Wierman v. Updegroff*, 344 *U.S.* 183, 192, 73 *S. Ct.* 215, 219 (1966).

Secondly, petitioner states that he wrote a letter to the President of the Montclair Board of Education in early March 1971 and served a copy of this letter on the President on March 18, 1971. Petitioner alleges that this letter was thought by the Board to be critical of certain aspects of its program of education. In petitioner's view, the question of what, if any, effect this letter had on the Board's later decision, on March 22, 1971, not to renew his contract must be resolved at a hearing before the Commissioner, despite the fact that the Board stated a series of other reasons for its decision, and later afforded a full adversary-type hearing to him with respect thereto.

In support of this contention, petitioner cites *Mitchell Klein v. Board of Education of the Township of Weehawkin, Hudson County*, decided by the Commissioner June 2, 1971, wherein Klein alleged that he was dismissed from his employment because he exercised a constitutionally-protected right to free speech, and was afforded a hearing by the Commissioner to explore that allegation. In the instant matter, petitioner maintains that he had a similar right to exercise free speech, that he did so, and that this was the reason the Board failed to renew his contract.

However, at this juncture, the hearing examiner believes that there is no adequate or convincing offer of proof contained in the factual context of this case that the Board based its judgment *sub judice* on such a reason. There is an implication, a conjecture, that the timing of the publication of a letter that petitioner wrote and the decision of the Board, made shortly thereafter, were more than coincidental, and that in fact they bore the relationship of cause and effect. In this regard, the hearing examiner notes that there is no evidence to indicate that petitioner ever raised even this implication at the time of his hearing.

The Board maintains that the real reasons for its decision not to renew petitioner's contract were those which it gave to him on or about May 9, 1971, and which are attached to the petition. These reasons were contained in a document which was headed "Major Administrative Reasons for Not Recommending a Contract for Mr. Robert B. Lee for 1971-72" and are listed as follows:

> "1. Failed to work out a plan to interview all of his counselees and consequently failed to finish program plans for 238 of his 366 regularly assigned 9th grade students and, as a result, denied these students the services of a guidance counselor.
>
> "2. Because of a lack of communication with most of the members of the guidance staff and faculty, he denied himself reasonable professional growth which comes from sharing in the experiences of others, and which caused him to have less with which to guide his counselees.
>
> "3. Lack of knowledge of course offerings and individual teachers limited the effectiveness of the educational guidance provided to counselees.

"4. Failure to take up concerns and problems with his immediate supervisors made it impossible to define and resolve problems.

"5. Failure to follow through on procedures relative to course changes thus creating problems for his counselees.

"6. Lack of use of permanent record card, report card, and schedules with counselees thus denying counselees total services expected of a counselor.

"7. Failed to discourage students from cutting classes and demonstrating on his behalf in his own efforts to get a contract for the next year.

"8. Failure to comply with school regulations in the areas of certification, parking regulations and use of professional days.

"9. Causing embarrassment to the school by causing creditors to seek help of the school."

The Board further avers that petitioner had "much more in the way of due process than any decision of the Commissioner or the courts ever have said he should be entitled to." (From the Brief of the Board in support of the Motion) In this regard, the Board states that:

1. petitioner was given a three-day hearing by the whole Board of Education.

2. a moderator suggested by petitioner presided.

3. petitioner was represented by able counsel of his choice.

4. documents and written statements on his behalf were offered in evidence and school superiors who testified against him were subjected to cross-examination.

5. following the hearing, the Board rendered a twenty-five page opinion (attached to the Motion herein), which considered the evidence and gave detailed reasons for the final decision not to renew petitioner's contract. In this regard, the Board avers that none of the reasons it gave supports the allegations of petitioner contained herein.

Finally, the hearing examiner observes that a letter, also attached to the Petition and marked at the hearing on the Motion as P-1, was addressed to petitioner by the Superintendent of Schools and dated April 1, 1971. This letter was severely critical of petitioner's letter discussed, *supra*, and contains a number of administrative directions to petitioner. However, there is no evidence that the Superintendent's letter was authorized by the Board or that the points of view it expressed were a factor in the Board's deliberation or in its later decision *sub judice* herein.

* * * *

The Commissioner has reviewed the report of the hearing examiner and notes that petitioner contends that the facts contained herein are similar to those found in *Mitchell Klein, supra,* and that, accordingly, a hearing before the Commissioner, or a representative appointed by him, should be afforded in this instance as it was in *Klein.* However, the Commissioner cannot agree that such a posture has a basis in fact.

Specifically, the Commissioner observes that in *Klein* there was a firm avowal by petitioner that he was "advised" by the President of the Board of Education that his (Klein's) "*** discharge was based upon a conversation which petitioner had had with the Mayor of the Town of Weehawkin wherein petitioner had criticized the school system***" (From the report of the hearing examiner). Although, in that instance, the avowal was denied by the President of the Board, the factual and specific nature of the charge was a proper subject of proof.

However, in the instant matter there is no similar offer of specific proof. Instead, the Commissioner is asked in effect to explore an allegation that stems from a conjecture on petitioner's part to the effect that his letter criticizing the school system was the reason that the Board did not renew his contract. There is no allegation here, as in *Klein,* that he was told that this motivated the Board's action, and the letter of reprimand from the Superintendent to petitioner for failure to employ the proper channel for his grievance cannot, in the Commissioner's judgment, stand as a substitute in this regard. This judgment gains substance from the fact that in the instance *sub judice,* the Board did give reasons, and the one listed by petitioner is not among them. To the contrary, the Board categorically denies that the letter of petitioner, and the expression of opinion it contained, played any part in its deliberation.

Under such circumstances and because, without legal compulsion and on its own initiative, the Board publicly stated the reasons for its decision not to renew petitioner's contract and afforded him the opportunity of a full hearing on the merits thereof, the Commissioner holds that there is no reason for his intervention in this matter. The Board's actions herein were certainly deliberate and time consuming; naked and unsupported allegations are insufficient to establish grounds for action. *George A. Ruch v. Board of Education of Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7, 10, affirmed by State Board of Education, 1968 *S.L.D.* 11, affirmed by the New Jersey Superior Court, Appellate Division March 24, 1969; *John Ruggiero v. Board of Education of Greater Egg Harbor Regional School District,* decided by the Commissioner March 17, 1970; *U.S. Pipe and Foundry Company v. American Arbitration Association,* 67 *N.J. Super.* 384 (*App. Div.* 1961)

Further, the Commissioner holds that the judgment made by the Board in this instance was one it made within the scope of its statutory authority. Therefore, absent a weighty and forceful offer of proof that the action was arbitrary or that it was taken for proscribed reasons, the Commissioner will not substitute his own discretion in this matter for that of the Board.

With respect to such decisions of local boards of education, the Court said in *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (*App. Div.* 1965):

> "*** 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.***"

Also, in *Kenny v. Board of Education of Montclair*, 1938 *S.L.D.* 647, affirmed State Board of Education 649, 653, the State Board stated:

> "*** The School Law vests the management of the public schools in each district in the local boards of education and unless they violate the law or act in bad faith, the exercise of their discretion in the performance of duties imposed upon them is not subject to interference or reversal.***"

Having found no reason for his intervention in this matter, the Commissioner further finds that petitioner has no inherent right to employment in the Montclair School District. This finding is founded on the opinion of the Court in *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962) in which the Court said in quoting *People ex rel. v. Chicago*, 278 *Ill.* 166 *L.A.A.* 1917 *E.* 1969 (*Sup. Ct.* 1917):

> " 'A new contract must be made each year with such teacher as the board desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The *board has the absolute right* to *decline to employ* or to re-employ any applicant *for any reason whatever or for no reason at all.*" (*Emphasis supplied.*)

Accordingly, since the Board in this instance has exercised its right to decline to reemploy, and since there is no credible offer of proof that its action was for statutorily or constitutionally-proscribed reasons, the action of the Board must be sustained.

Accordingly, the Motion of the Montclair Board of Education is granted. The petition is dismissed.

COMMISSIONER OF EDUCATION

January 14, 1972

John Cervase,

Petitioner,

v.

**Board of Education of the City of Newark,
Essex County,**

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, John Cervase, Esq., *Pro Se*

For the Respondent, Victor De Filippo, Esq.

Petitioner, a citizen resident in Newark and a member of the Newark Board of Education, hereinafter "Board," alleges that a resolution of the Board adopted on November 30, 1971, which authorized the display of the banner known as the "Black Liberation Flag" in certain schools of the City is contrary to State and Federal law. He requests the Commissioner to reverse the action. The Board avers that its resolution was a proper one taken pursuant to discretionary powers to it by statute, and that no specific prohibition exists in law to bar its implementation.

A hearing in this matter, limited to oral argument of counsel, was conducted on January 14, 1972, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

On November 30, 1971, the Board met in regular session, and at a time shortly past midnight, after some members had departed, it approved the following resolution by a vote of five in favor and none opposed: (PR-1)

> "Mr. Hamm moved, seconded by Mr. Jacob, that a Black Liberation Flag, the same size, the same quality as the American Flag, be placed in every classrooms (sic) where there is a 50% or more black enrollment."

Subsequent to passage of this resolution, petitioner obtained a court order to bar immediate implementation of it *pendente lite*, and now seeks separate rulings from the court and the Commissioner that the resolution is *ultra vires*.

Petitioner avers that the function of the public school is, or should be, to educate students and not to indoctrinate them, and that, in this regard, the Black Liberation Flag has no educational value.

Additionally, petitioner avers that the Board's resolution, if implemented:

1. would discriminate against racial and ethnic groups, other than black, unless individual flags representing other respective allegiances are flown in like manner;

2. amounts to a conspiracy with other persons, who are not members of the Board, to deprive petitioner, and the public generally, of schools that are free from any doctrine or propaganda that favors one group of students over others similarly situated;

3. would authorize the display of a banner that is not an innocent symbol but a concrete representation of ideas, which would be inimical to our form of government and to community and State efforts to bring people of all races together, rather than to drive them apart.

The Board maintains that there is no evidence or offer of proof that its action approving the resolution (PR-1) was arbitrary, unreasonable, or capricious, and that the action must be judged, therefore, as a proper exercise of discretion on its part. In this regard the Board relies on *N.J.S.A.* 18A:11-1, which provides in part:

"The board shall ***

(c) Make, amend, the repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and management of the public schools ***."

and observes that there is no statute, rules of the State Board or prior decision of the Commissioner, which specifically or by implication, stands as a bar to the action *sub judice*. Additionally, the Board avers that the Black Liberation Flag stands as a symbol, and that such symbolism should not be barred by petitioner's view of the symbolism as either right or wrong.

* * * *

The Commissioner has reviewed the report of the hearing examiner and notes, in particular, that the Board relies on the statute, *N.J.S.A.* 18A:11-1, *supra*, as the authority for its action in the matter *sub judice*. The Commissioner is not unmindful of the broad sweep of the mandate contained in that statute.

However, the Commissioner has a parallel authority for supervision of the State's schools which is given to him by the statute, 18A:4-23, which provides in part:

"The Commissioner shall have supervision of all schools of the state receiving support or aid from state appropriations *** and he shall enforce all rules prescribed by the state board."

In interpreting the Commissioner's role with respect to supervision of the State's schools and with respect to deciding "controversies and disputes" pursuant to the statute, *N.J.S.A.* 18A:6-9, the Supreme Court of New Jersey said in *Charles B. Booker et al. v. Board of Education of the City of Plainfield, Union County*, 1963 *S.L.D.* 136, affirmed State Board of Education 1964 *S.L.D.* 167, reversed and remanded New Jersey Supreme Court, 45 *N.J.* 161 (at p. 175), with regard to the specific subject of racial discrimination, but in interpretation of the Commissioner's power derived from *R.S.* 18:3-14 [now *N.J.S.A.* 18A:6-9]:

> "*** That statute provides that the Commissioner shall decide all controversies and disputes under the school laws or under the rules and regulations of the State Board or of the Commissioner. Its *comprehensive terms* were liberally implemented by the opinions of this Court in *Laba v. Newark Board of Education*, 23 *N.J.* 364, 381-384 (1957)***." (*Emphasis supplied.*)

and at page 177:

> "*** the Commissioner is to decide all controversies and disputes arising under the school laws or under the rules of the State Board or of the Commissioner, and that this involves a responsibility on his part to *make independent determinations*, giving due weight, of course, to the findings and actions and the measure of discretions vested below. 25 *N.J.* at 606; *cf. Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 295-97 (*App. Div.* 1960).***"

Stated in another manner, the Commissioner has been vested by the Courts with broad powers to decide disputes in matters involving racial discrimination and in all other matters involving controversial exercise of discretion by local boards of education. The matter *sub judice*, in the Commissioner's judgment, is such a matter.

Pursuant to authority granted to him by the statutes referred to, *supra*, and by the Courts, the Commissioner has reviewed the respective arguments of counsel on the merits of the Board's resolution (PR-1) and determines that the resolution is:

1. ill-advised
2. divisive
3. *ultra vires*

These determinations will be reviewed in brief detail below:

I.

The Board's resolution (PR-1) is ill-advised because it clearly implies that the Black Liberation Flag is intended to be a symbol and to be displayed in such a fashion to command the respect, if not the allegiance, of all of the students enrolled in the classes of the schools over which it flies. The Commissioner

recognizes the efforts of the Newark Board of Education to express a highly-deserved pride in the struggle and accomplishments of Black Americans. These accomplishments and this struggle are an integral part of the American experience. However, the Commissioner observes that symbols in a democracy such as ours have, or should have, special meaning for they represent an uncoerced agreement on what represents our finest hopes and aspirations.

In this regard, it is true, that in our history as a nation, many symbols in the form of banners and insignia have appeared from time to time, and, oftentimes those most zealously displayed have been of the most transitory nature. However, in 1777 the Continental Congress adopted the first national flag which, with modifications in the number and arrangement of stars, has endured to the present day because of the universality of its acceptance. The Commissioner holds that other symbols of allegiance, such as that herein, which lack this universality of acceptance from all of our people, have no place in the schools of the Board or in the schools of this State.

II.

The Board's resolution (PR-1) is divisive and contrary to the spirit of expressed prior opinions of the Commissioner and the Courts that controversy must be resolved so that equal educational opportunity may be afforded to all. In this respect, the Commissioner said in *Deborah Spruill, et al. v. Board of Education of the City of Englewood, Bergen County*, 1963 *S.L.D.* 141, affirmed State Board of Education 147 (at p. 146):

> "Although the controversy which the Commissioner is asked to decide in this and similar cases is centered around the question of civil rights it must be remembered that so far as the schools are concerned their *fundamental purpose* is the *proper conduct of the educational process.* Controversy must be resolved so that teachers and school leaders may go ahead with the task of improving educational opportunities for *all pupils*.***" (*Emphasis supplied.*)

In the Commissioner's view, the matter *sub judice* is just such a controversy, and he holds that the Board's resolution (PR-1) is so devisive on its face that it impedes, rather than advances, the task of improving "educational opportunities for all pupils" of the schools under the jurisdiction of the Board. It should be noted, at this juncture, that the sole criteria for the placement of the Black Liberation Flag in the schools is that it be "*** placed in every classrooms (sic) where there is a 50% or more black enrollment." It is readily apparent, in the Commissioner's view, that such a criteria – one based on race alone – cannot have the universality of approval which is necessary if it is to advance the educational opportunities *for all* pupils, and that, since this is so, divisiveness must be the inevitable result if the resolution is implemented.

III.

The Commissioner holds that the Board's action in the adoption of the resolution (PR-1) is *ultra vires* because a review of the statutes makes it clear that the Legislature has already spoken with regard to flag and banner display. Since this is so, it is the Commissioner's best judgment that a local board of education should not assume for itself the onerous task of accepting or rejecting other symbols.

In this regard, in the statutes, *N.J.S.A.* 52:2-1 *et seq.*, the Legislature described the great Seal of the State, established a State Flag (52:3-1), discussed its display (52:3-2 and 52:3-3), and mandated guidelines with respect to the display of "*** the flag or emblem of any foreign state or country ***." (52:3-4) In a further expression with respect to flags or emblems, the Legislature stated that certain offenses against the flag of the United States, or the State Flag, were to be classified as "misdemeanors." (*N.J.S.A.* 2A–107-1,2,5) Additionally, in the statutes, embodied in *N.J.S.A.* 18A, Education, there is one specific statute (*N.J.S.A.* 18A:36-3) with reference to flag display in the schools, and this statute, stands today in the following form as the sole authorization in this regard:

"Every board of education shall:

"(a) Procure a United States flag, flagstaff and necessary appliances therefore for each school in the district and display such flag upon or near the public school building during school hours;

"(b) Procure a United States flag, flagstaff and necessary appliances or standard therefore for each assembly room and each classroom during school hours and at such other time as the board of education may deem proper; and

"(c) Require the pupils in each school in the district on every school day to salute the United States flag and repeat the following pledge of allegiance to the flag: 'I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation, under God, indivisible, with liberty and justice for all,' which salute and pledge of allegiance shall be rendered with the right hand over the heart, except that pupils who have conscientious scruples against such pledge or salute, or are children of accredited representatives of foreign governments to whom the United States government extends diplomatic immunity, shall not be required to render such salute and pledge but shall be required to show full respect to the flag while the pledge is being given merely by standing at attention, the boys removing the headdress."

Since the Legislature, by promulgation of this statute, did address itself to the matter of which flag or flags shall be present in the schools of New Jersey, since it has treated flag display extensively in other statutes, it must be presumed, in

the Commissioner's judgment, that the expression of legislative wisdom is complete, and that the Legislature has spoken comprehensively on this important matter. Therefore, the Commissioner holds that local boards of education may not speak in a contrary manner, or additional authorization to the legislative prescription.

For the reasons advanced, *supra*, the Commissioner holds that the resolution (PR-1) adopted by the Board of Education of the City of Newark, on November 30, 1971, was an improper exercise of its discretion and *ultra vires*. Therefore, the Commissioner directs the Board to desist from any action to implement the resolution, *supra*, unless or until, a new promulgation by the New Jersey Legislature specifically confers such authority on the Board.

Nothing in this decision should be interpreted to mean, however, that displays of flags and banners expressing various cultural, national or organizational ideals are prohibited from the classroom when their presence is considered advisable for educational purposes.

COMMISSIONER OF EDUCATION

January 26, 1972

John Cervase

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,

Respondent.

STATE BOARD OF EDUCATION

Decision

For the Petitioner-Appellant, John Cervase, Esq., *Pro Se*

For the Respondent-Appellee, Victor A. DeFilippo, Esq.

The Decision of the Commissioner of Education is affirmed for the reasons set forth therein.

October 4, 1972

In the Matter of the Election Inquiry in the South Brunswick District, Middlesex County

COMMISSIONER OF EDUCATION

Decision

Petitioner, a member of the South Brunswick Board of Education, alleges that the drawing for ballot position for the 1972 school election was conducted improperly in that this function was performed by unauthorized persons using an incorrect container and slips of paper instead of cards. Petitioner prays for relief in the form of an Order by the Commissioner of Education setting aside the results of the drawing for ballot position and directing the Secretary of the Board of Education to conduct a second drawing.

An inquiry was conducted on Monday, January 24, 1972, at the Middlesex County Vocational and Technical High School, East Brunswick, by a hearing officer appointed by the Commissioner of Education. The report of the hearing officer is as follows:

The essential, relevant facts are not in dispute. Testimony and documentary evidence were adduced concerning the entire procedure of the drawing for ballot position held December 31, 1971. The witnesses included petitioner, the President of the South Brunswick Board of Education, the Board Secretary, the Board's manager of transportation, who actually conducted the drawings, three candidates for the 1972 school board election, and one additional citizen, who witnessed the drawing. The testimony of these individuals was almost identical with only minor exceptions.

Approximately one week prior to the date for the ballot position drawing, the Board Secretary asked one of his subordinates, the Board's manager of transportation and maintenance, to conduct the drawing on December 31, 1971, at 8:00 p.m. because the Secretary expected to be absent from the community on that date. The Board Secretary instructed the manager as to the proper procedure for conducting the drawing, and also directed the manager to bring a witness to observe the drawing, scheduled for New Year's Eve, in the event that no one else was in attendance. The Board Secretary prepared the box and five folded slips of paper on which he had printed the names of five candidates. The Board Secretary also instructed his secretary and his assistant to enter slips for any additional candidates, who might present election petitions on the following day in his absence. A sixth candidate did file a petition on the last day for this purpose, and accordingly the Board Secretary's assistant and secretary added a sixth folded slip to the box and sealed the box (Exhibit R-1) in preparation for the drawing.

During the afternoon of December 31, 1971, the manager of transportation and maintenance secured the sealed box containing the six folded slips of paper from the office of the Board Secretary. He requested his neighbor, Mr. Raymond Steele, Jr., to accompany him to the schoolhouse where the

drawing was scheduled to be held. In addition to these two gentlemen, petitioner and three candidates were present for the drawing on December 31, 1971. The manager shook and turned the box, removed the tape which sealed the aperture of the box and slotted the top to permit a hand to enter the box. The manager asked Mr. Steele, a legal voter of the school district, to hold the box above eye level, and he proceeded to draw the slips from the box one at a time and to record the drawn names on the provided form. One of the candidates testified that he read each name from the slips as the manager called them out to those in attendance. This witness also testified that each of the names was announced accurately in the order drawn.

At the conclusion of the drawing, the manager placed the six slips of paper back in the box, inserted the recorded list in the aperture, sealed the box and deposited it in the office of the Board Secretary before leaving the schoolhouse.

An examination of the box and contents (Exhibit R-1) by the hearing officer discloses that it is approximately the size of a shoe box with the lid taped down by several layers of paper masking tape. Two slots have been cut from each end of the aperture toward one long side of the rectangular box. The box contains six slips of plain white paper of identical size and thickness upon which are printed in blue ink the names of the six candidates. Five of the names appear to have been printed by the same hand, and one slip contains a candidate's name printed in blue ink, but in substantially different lettering. All six slips were folded twice in an identical manner. In the judgment of the hearing examiner, differentiation among these slips by anyone drawing them *ad seriatum* from the box held above eye level would not be possible.

The Board Secretary testified that he had intended to notify the President of the Board that he would be absent on December 31, 1971, the date of the drawing, and that the manager of transportation would replace him. Because of an extremely busy schedule during the week preceeding the drawing date the Secretary stated that he inadvertently forgot to notify the Board President.

The Board President testified that she was made aware of petitioner's complaint at a Board meeting held January 10, 1972. On January 15, 1972, she ratified the appointment of the school official chosen by the Board Secretary to conduct the drawing. This ratification statement (Exhibit R-2) of the Board President reads as follows:

> "I am satisfied that all legal requirements for the drawing of candidates names for position on the official ballot for the February 8, 1972 Annual School Election, as provided by N.J.S.A. 18A:14-13, were properly observed and, I, hereby, ratify the Board Secretary's choice of the school official who conducted such drawing in an orderly and impartial manner.
>
> January 15, 1972 signed *Jeanne T. Reock*
> President
> Board of Education
> South Brunswick"

Both petitioner and counsel for the Board of Education argued their respective understandings of the applicable law in this matter.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter. The Commissioner concurs with the conclusion of the hearing examiner that there is no dispute regarding the relevant material facts. The issue in the instant matter is whether the facts as set forth comply with the requirements of the applicable statute (*N.J.S.A.* 18A:14-13), which reads in pertinent part as follows:

> "The position which the names of candidates shall have upon the annual school election ballot in each school district shall be determined by the secretary of the board of education of the district by conducting a drawing in the following manner:
>
> a. The drawing of names shall take place at eight P.M. on the day following the last day for filing petitions for the annual school election at the regular meeting place of the board of education. In case the day fixed for the drawing of names falls on a Sunday, the drawing shall be held on the following day. The drawing shall be done by the secretary, or in the event of his sickness or disability or absence from the district, by a person designated by the president of the board of education. The person making the drawing shall make public announcement at the drawing of each name, the order in which the name is drawn and the term of office for which the drawing is made.
>
> b. A separate drawing shall be made for each full term and for each unexpired term, respectively. The names of the several candidates for whom petitions have been filed for each of the terms shall be written upon cards of the same size, substance and thickness. The cards shall be placed in a covered box with an aperture in the top large enough to admit a man's hand and to allow the cards to be drawn therefrom. The box shall be turned and shaken thoroughly to mix the cards and the cards shall be withdrawn one at a time.*** "

The admitted error in the Board's drawing procedure was the substitution of another school official for the Board Secretary. There is no allegation that the substitute official acted in bad faith or in a fraudulant or improper manner in the conduct of the drawing. Nor would the testimony of the witnesses who observed the drawing support such an allegation. The failure of the Board Secretary to notify the President of his anticipated absence is clear. There is no evidence that this failure was intentional. The Board President did ratify the selection of another school official by the Board Secretary, although this ratification was performed on January 15, 1972. (Exhibit R-2) Although the Commissioner sees no reason other than lack of proper care as the cause of the

entire problem herein controverted, he does not condone such an action. In view of the fact, however, that the actual drawing procedure did otherwise substantially comply with the statutory requirements, the Commissioner will not set aside the results on these grounds.

The Commissioner takes notice of the words of the Court in *Dimon v. Ehrlich et als.*, 97 *N.J. Super.* (*App. Div.* 1967), which are pertinent to the instant matter. The Court stated the following at p. 88:

> "*** the fact that two people rather than one were actually involved in the here questioned draw procedure is irrelevant. So far as the statutory language and intent are concerned, one person may perform the entire operation. The reliance of the statute for a fair draw is upon the identical physical character of the cards used and upon the thorough shaking and turning over of the box after the cards are placed in it; this, of course, under the implicit assumption that the official will not look into the box when drawing the card from it. ***"

In the instant matter the slips used were of an identical character as required, and accordingly did meet the intent of the applicable statute. *N.J.S.A.* 18A:14-13, *supra* The Commissioner cautions this Board and all other local boards of education to make certain in the future that the exact requirements of the statute, *supra,* is met. The use of cards as stated in the statute will eliminate disputes of this type in the future. In the judgment of the Commissioner, the requirement for cards "***of the same size, substance and thickness ***" is intended to dispel any assumption that the drawer may be able to differentiate among the various names in the box by feeling each item with his hand. If the statute is followed exactly, such an assumption could hardly arise.

The Commissioner finds no relevance in the fact that a legal voter of the school district other than the drawer of the names, held the box during the drawing. From the evidence before the Commissioner, it is clear that a fair drawing was conducted which essentially complied with the requirements of the statute. *N.J.S.A.* 18A:14-13, *supra. Dimon v. Ehrlich et als., supra*

The Commissioner finds and determines that the drawing for ballot position in the South Brunswick School District was conducted in a proper and lawful manner. The Commissioner is constrained to notice that if a contrary decision had been reached, a grave problem would ensue because of the need to print sample ballots and regular ballots and to make available both civilian and absentee ballots for the February 8, 1972, school election.

Accordingly, the complaint of petitioner is dismissed.

COMMISSIONER OF EDUCATION

January 26, 1972

Rocco Petroni,

Petitioner,

v.

Board of Education of the Southern Gloucester County Regional High School District, Gloucester County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Higgins & Trimble (John W. Trimble, Esq., of Counsel)

For the Respondent, Samuel Bullock, Esq.

Petitioner, a certified public accountant, avers that his appointment by the Southern Gloucester County Regional Board of Education, hereinafter "Board," to serve as its auditor for the 1970-71 school year, carried with it the entitlement to audit the books of the Board for that year during the three-months' period subsequent to July 1, 1971. The Board admits that petitioner was appointed as its auditor for the 1970-71 school year, but maintains that its appointment of a new auditor for the 1971-72 school year conferred on the new appointee the legal obligation to audit the financial records of the district for the prior year. Respondent moves at this juncture for summary judgment on the pleadings.

A hearing on the Motion was conducted on December 16, 1971, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The facts basic to this adjudication are not in dispute.

Petitioner was first appointed by the Board as its auditor in November 1958 by motion of the Board. (R-3) He was reappointed as auditor in each of the succeeding years up to, and including, an appointment in February 1970 by similar motions. (R-1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13) His last appointment as auditor was on February 9, 1970, and it was worded as follows:

> "Motion by George Dean and seconded by John Borelli that the District appoint Rocco Petroni as auditor to the Southern Gloucester County District for the 1970-71 school year." (Exhibit R-1)

However, on April 5, 1971 – just fourteen months later – the Board unanimously approved the following proposal which conferred on a new man the responsibility as auditor, which petitioner had previously assumed, from the date of July 1, 1971, for the succeeding years:

> "Motion by James Brown and seconded by Carl Vandergrift that the District appoint Joseph Sorelle of Glassboro, New Jersey as Auditor for the Southern Gloucester County District for the 1971-72 school year, July 1, 1971 to June 30, 1972." (Exhibit R-2)

Subsequent to this action of the Board, the Secretary of the Board addressed the following letter to petitioner on June 25, 1971:

> "On April 5, 1971 the Board of Education of the Southern Gloucester County Regional High School District adopted a resolution appointing Mr. Joseph J. Sorelle as Auditor for the school year 1971-72. Accordingly, any services rendered of the Auditor subsequent to June 30, 1971, which includes the examination of accounts for the Fiscal Year ended June 30, 1971 are the responsibility of Mr. Sorelle.
>
> "The Board wishes to thank you for all you have done in the past and is confident that you will cooperate with Mr. Sorelle to facilitate an orderly transition of work."

In petitioner's view, he was thus illegally barred, in this instance, from performing the culminating activity of an auditor's year – the conduct of the annual audit of the pertinent books and records of the Board for the prior 12-months' period when he was officially its auditor. Petitioner maintains that, in the nature of his work, the audit as such must *follow* the completion of a year, but that it is nevertheless the responsibility of the auditor of record to complete the work of the year, i.e. to conduct the audit, and that no new appointee may assume this task. Petitioner supports these contentions with an argument that during the 1970-71 school year, it was he who acted as the Board's advisor in many instances, and that his work during that year best qualified him to conduct a review of all the year's transaction. (See P-2, 3)

The Board argues in effect that its appointment of an auditor each year is one that carries with it the responsibility to conduct the next succeeding official audit, which is required by statute (*N.J.S.A.* 18A:23-1), and that in each instance this audit is for the books of the prior year. In support of this contention, it attaches vouchers to each of its exhibits. In general, these vouchers were submitted by petitioner in October or November for each of the years (1958-1970) when he served as auditor.

It is noted here that while respondent submitted these vouchers, petitioner also states that they buttress his own contention, and that he should, in similar manner, have been entitled to complete the audit for the 1970-71 school year in the fall of 1971, as he had in the past. However, the hearing examiner holds that the vouchers as submitted support neither position.

Finally, the hearing examiner notes that in reality the petition herein is moot, since the audit of the Board's books has been completed for the 1970-71 school year by the Board's new appointee, and the Commissioner has no relief that he can afford with respect to the specific prayers of petitioner originally

stated in his petition on August 2, 1971. However, petitioner now evidently maintains, according to a letter from counsel dated November 17, 1971, that he is entitled to a fee of $1,000 because he was the "statutory auditor for the year 1970-71," and for this reason and because there seems to be no similar case on point, the hearing examiner recommends that the Commissioner address himself to the issues raised by the contentions reported, *supra;* namely,

1. Did this appointment of petitioner by the Board as its auditor for the 1970-71 school year carry with it the entitlement for petitioner to audit the Board's books following the conclusion of the year on June 30, 1971?

2. If the appointment did carry this entitlement, is petitioner now entitled – despite a failure to promptly prosecute a claim – to the payment by the Board of the usual fee?

* * * *

The Commissioner has reviewed the report of the hearing examiner and will address himself to the primary issue as stated.

The statutes that govern school audits are those contained in *N.J.S.A.* 18A:23-1 *et seq.* The first of these statutes (18A:23-1) states:

> "The board of education of every school district shall cause an *annual* audit of the district's accounts and financial transactions to be made by a public school accountant employed by it, which audit shall be completed not later than *three months after the end of the school fiscal year.*" (*Emphasis supplied.*)

The scope of the auditor's duties, as delineated by the succeeding statute, *N.J.S.A.* 18A:23-2, is mandated to embrace all financial affairs of the school district "*** from the date of the last annual audit to the date of the audit in question."

Thus, it is clear from a reading of these and related statutes that: (1) an auditor must principally perform an "annual" task, (2) this task must be performed "*** not later than three months after the end of the fiscal year," (18A:23-1) and (3) the scope of the audit should be an inclusive one including in its review all of the financial affairs of the district "from the date of the last audit to the date of the audit in question."

Compared to the precise mandates that the statutes, *supra*, impose, the petition herein strains credulity since in April 1971, the Board appointed a new auditor who would be barred – by petitioner's version of what the new auditor's task should be and when it should be carried out – for a period of approximately 15 months from commencing the principal work an auditor must perform. This principal work is the conduct of the annual audit. It must be

noted, too, that such an interpretation of the effective date when a new auditor should begin his work would assign to the new appointee the performance of his principal task in a period beyond the life of the Board that appointed him.

The Commissioner holds that such an interpretation flies in the face of reason and that, instead, the Board's appointment of a new auditor for the 1971-72 school year carried with it the assignment to audit the books of the school district for the year of 1970-71 in the same way as the appointment of petitioner as auditor for the 1970-71 year carried with it the assignment to audit the books for school year 1969-70.

Having noted that the facts which are essential to the adjudication *sub judice* are not in dispute and having found that petitioner's complaint founded on these facts is without merit, the Motion for Summary Judgment is granted, and the petition herein is dismissed.

COMMISSIONER OF EDUCATION

January 28, 1972

Beatrice Wharton, as mother and next friend of Raymond Wharton, a minor and individually and on behalf of all others similarly situated,

Petitioner,

v.

Board of Education of the City of Bridgeton, Earl Freeland, Superintendent of Schools, and Anthony Pekich, Principal, Cumberland County,

Respondents.

COMMISSIONER OF EDUCATION

Decision on Motion

For the Petitioner, Ronald Heksch, Esq.

For the Respondents, Samuel J. Serata, Esq.

Petitioner, the mother of a fourteen-year-old boy, hereinafter "R.W.," expelled by the Bridgeton Board of Education, hereinafter "Board," alleges that R.W.'s expulsion from school by the Board was arbitrary, capricious and discriminatory, and that, prior to the Board's action, he was denied lawful due process. The Board denies that its actions considered herein were improper, and contends that R.W. was afforded a hearing by the Board, that he was represented by counsel at this hearing and that cross-examination of witnesses who appeared against him was allowed.

A hearing on petitioner's Motion for *pendente lite* relief was conducted on December 13, 1971, at the office of the New Jersey State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

R.W. was a senior in Bridgeton High School when, on October 7, 1971, he was involved in an altercation with another student. As a result of the altercation, he was suspended by the school administrators. Some time shortly thereafter, R.W. was afforded an interview by the school principal, and this school official evidently then forwarded a record of the alleged altercation and a recital of R.W.'s prior behavioral problems to the Superintendent of Schools for transmittal to the Board. A review of R.W.'s school record in this regard shows a total of ninety-three infractions of school rules over a five-year period.

On October 21, 1971, R.W. was notified by the Superintendent that he would be given a hearing by the Board on the complaints against him on October 25, 1971, and told in general what the charges against him were. On that latter date:

1. R.W. was present for the hearing and was accompanied by counsel of his choice;

2. witnesses, including teachers who were eye-witnesses to R.W.'s actions, appeared against him, and their testimony was subjected to the cross-examination of counsel;

3. R.W. was given an opportunity to present his own version of the alleged incident;

4. a transcript of the hearing was developed by a certified court reporter.

The above digested recital of events was developed from a review of the pleadings and the arguments of counsel at the hearing.

However, at this juncture petitioner complains that the Board's action *sub judice* was improper in three respects.

In the first instance petitioner maintains that the interval of time between receipt of notice of the hearing to be afforded R.W. by the Board, and the hearing itself, was too short and precluded a proper defense. She also complains that the charges against R.W. were not specific at the time of the notice. To these complaints, the Board replies with a statement, not refuted in oral argument, that no delay in proceedings or request for more specificity in charges was requested on October 25, 1971, and that R.W. would have been given an additional time to prepare his defense if it had been requested.

Secondly, petitioner avers that the Board's action was arbitrary, capricious and discriminatory and that it failed to weigh the altercation – at issue as the

primary charge *sub judice* – in the perspective of the causes which provoked it. Petitioner further avers that the punishment meted out to R.W., as a black student, was similar to other such punishments administered in like manner in previous years to other blacks alone, and that in this respect, the punishment was discriminatory. The Board while denying the charge of discrimination, nonetheless does admit that all three of those students expelled by it in a recent two-year period were black.

Finally, counsel for petitioner avers that a review of R.W.'s record in his recent school years indicates that there is, and has been, evidence of social and emotional maladjustment so clear as to have required classification in some special education category for him, and that the Board can hardly complain, at this juncture, when R.W.'s behavior is other than acceptable. The Board maintains that R.W. was given a psychological examination, but that there was no conclusive finding that mandated a program of special education.

The hearing examiner has requested a copy of existing psychological reports to accompany the record and the petition.

* * * *

The Commissioner has reviewed the report of the hearing examiner and observes that the principal contentions in this matter are concerned with whether or not R.W. was afforded proper due process by the Board prior to the time it took the action to expel him from further school attendance. In this respect, the instant petition is similar to a number of others considered by the Commissioner and the courts in recent years wherein an action of expulsion was the ultimate penalty imposed on a student or students. *State ex rel Sherman v. Hyman*, 180 *Tenn.* 99, 171 *S.W.* 2*d* 822 (1942), *cert. den.* 319 *U.S.* 748 (1943); *Dixon v. Alabama State Board of Education*, 294 *F.* 2*d* 150 (5th *Cir.* 1961); *John Scher v. Board of Education of the Borough of West Orange, Essex County*, 1968 *S.L.D.* 97; *Eugene Kelly v. Vineland Board of Education*, decided by the Commissioner September 8, 1970 (Motion), and May 27, 1971 (Merits).

In both the *Scher* and *Kelly* decisions, *ante*, the Commissioner observed that the expulsion of a pupil from school attendance is the single most important form of punishment which a board of education may impose, and that it may not be imposed lightly. To the contrary, the Commissioner held that when such an action is contemplated, the student has an entitlement to a full hearing before the board, and both the Commissioner and the courts have established the guidelines for the hearing that should be afforded in such instances.

In the *Scher* case, *supra*, the Commissioner quoted from *State ex rel Sherman v. Hyman*, *supra*, in an effort to establish such guidelines, as follows:

> "***We think the student should be informed as to the nature of the charges as well as the names of at least the principal witnesses against him when requested, and given a fair opportunity to make his defense. He

> cannot claim the privilege of cross-examination as a matter of right. The testimony against him may be oral or written, not necessarily under oath, but he should be advised as to its nature, as well as the persons who have accused him.***"

The Commissioner quoted from *Dixon v. Alabama, supra,* in even more detail, and ended his quotation with these sentences with respect to proper due process requirements:

> "***In the instant case, the student should be given the names of the witnesses against him and an oral or written report of the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.***
>
> If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.***"

In a recent decision of a New Jersey Court, that of *R.R. v. Board of Education, Shore Regional High School,* 109 *N.J. Super.* 337 (1970), the Court established similar guidelines for the conduct of such a hearing, and they are equally applicable in the instant matter. Specifically the court said:

> "***The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testified. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we

feel that the requirements of due process of law will have been fulfilled. [at 294 *F.* 2*d*, at 158-159]***."

In the instant matter the Commissioner holds that the evidence clearly shows that the Board did, in fact, grant proper due process to R.W. in a manner consistent with the enunciated guidelines, *ante*, and that the Board did conduct a full adversary hearing. R.W. was represented by counsel, and he had an opportunity to confront those who testified against him and to testify in his own behalf.

It is equally clear that the Board's subsequent decision to expel R.W. from its school program was a decision it is empowered by law to make, since *N.J.S.A.* 18A:37-5 provides, *inter alia*, that:

"*** the *power* to reinstate, continue any suspension reported to it or *expel a pupil shall be vested in each board.*" (*Emphasis supplied.*)

Since this is so, the Commissioner must also hold, as he and the courts have often held in the past, that "*** it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to local boards." *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, affirmed State Board of Education 15 (1946), 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948)

The Commissioner finds no merit in the argument that R.W. was not afforded proper time to prepare defense prior to the hearing. There is no offer of proof that an extension of time was ever requested for this purpose or that it was refused him.

Additionally, in the Commissioner's view, the allegation that R.W.'s school placement was an improper one and that in some way the Board must, therefore, bear a share of the blame and mitigate its penalty, is an argument both tardy and unsubstantial. It stands as an allegation alone in opposition to the finding of a certified child study team that special class placement for petitioner was not required.

Having found no legal reason to interpose another judgment in this matter, the Commissioner is constrained, however, to remind the Board, as he did in *Scher, supra*, that "*** while such an act (of expulsion) may resolve an immediate problem for the board, it may likewise create a host of others***." Not the least of these, in this instance, are the problems that may be created for R.W., for the community at large, if a diploma is permanently denied to him and if, as a result, job opportunities prove to be few or non-existent. To obviate this ultimate result, the Commissioner directs that the Board provide an offer of alternate instruction, either in evening school or at home, for either a regular or an equivalency diploma. In this respect the Commissioner will retain jurisdiction in this matter and will expect, within a ten-day period following issuance of this decision, to be apprised of the Board's determination.

For the reasons stated, *supra*, the Motion for relief *pendente lite* is denied except that the "alternative form of education" listed as the third and principal prayer of the petition is granted. Since this is so, there is no further substantive relief that the Commissioner can afford to petitioner, and, accordingly, the petition itself is also dismissed.

COMMISSIONER OF EDUCATION

January 28, 1972

Cornelius T. McGlynn,

Petitioner,

v.

Board of Education of the Township of Lumberton, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Miller, Myers, Matteo and Rabil (Michael D. Matteo, Esq., of Counsel)

For the Respondent, Parker, McCay and Criscuolo (William W. Webster, Esq., of Counsel)

Petitioner demands judgment that his services as Superintendent of Schools in the employ of the Lumberton Township Board of Education, hereinafter "Board," have earned for him the rights and privileges of tenure in that position. The Board denies that petitioner has the requisite accrual of service necessary for tenure as Superintendent and maintains that, in any event, its notice to petitioner that his contract as Superintendent would not be renewed for the ensuing contract year was timely and must be considered as of controlling legal effect.

A hearing in this matter was conducted on December 3, 1971, at the meeting room of the Burlington County Freeholders, Mount Holly, by a hearing examiner appointed by the Commissioner. Briefs were subsequently filed by counsel. The report of the hearing examiner is as follows:

The hearing of December 3, 1971, was a short one which was limited to the testimony of petitioner and the Secretary of the Board and the submission of six documents in evidence. However, in addition, by agreement of counsel, it was stipulated that during the entire period from July 1, 1969, through and including June 30, 1971:

1. petitioner was certified as a school administrator;

2. petitioner held tenure as a school principal in the employ of the Board; and

3. petitioner held the office and performed the duties of Superintendent of Schools.

Two contracts that attest to this employment as "Superintendent" (PR-1 and PR-2) were accepted in evidence. The first contract engaged petitioner's services in that capacity:

"*** from the first day of July 1969 to the 30th day of June 1970 ***."

The second contract employed petitioner as "Superintendent"

"*** from the first day of July 1970 to the 30th day of June 1971 ***."

Since it is agreed that petitioner served the stated terms of the contracts, *supra*, in the capacity of Superintendent – a fact not in controversy – petitioner's service as Superintendent of Schools embraced the whole of two calendar years. However, petitioner stated in his testimony at the hearing that in actuality he continued to serve in the position of Superintendent of the Lumberton Township Schools for thirteen additional days before he received specific direction from the Board to absent himself from his office and from school property. Since this testimony was not contradicted, it must stand as fact, although there is no parallel finding that he ever received compensation for this thirteen-day period of work.

In this latter regard, petitioner testified that his name was listed on the payroll voucher approved by the Board at its meeting of July 13, 1971, but that he has not received his regular salary for this thirteen-day period. He avers, however, that he did sign and cash a petty cash check on July 14, 1971.

While petitioner's specific service during the two-year period *sub judice* is not in question, but is a stipulated fact, it is also clear from the evidence that that Board had indicated to petitioner in March 1971 that it did "not intend" to renew his contract as Superintendent for the 1971-72 school year beginning on July 1, 1971. This evidence is found in a letter (PR-4) sent to petitioner by counsel to the Board on April 7, 1971, which reads in its entirety as follows:

"Robert Kilbeck, president of the Board of Education, asked me to write you this letter. I am sure that from the lack of a vote-of-confidence at the regular meeting of March 9, and the lengthy discussions with you at the executive meeting of the Board held on March 23, you understood that the Board does not intend to renew your contract for the position of superintendent.

"The Board has the duty of immediately planning for next year and realize that you have tenure in the position of principal. On the basis of the above the Board would like to know by their next regular meeting whether you intend to accept the position of principal for the coming year."

There is no evidence that petitioner ever replied to the query, *supra*, as to whether he did not or did "intend to accept the position of principal."

At a later date, on April 26, 1971, the Board met again, in a special meeting, and although, in the call of the meeting (P-1), there is no evidence that a discussion of the Superintendent's status was to be conducted, such discussion did in fact take place. As a result, the Board, by a vote of 5 to 4, instructed its counsel to write the following letter (PR-3) to petitioner:

"The Board of Education of the Township of Lumberton asked me to advise you that you will not be offered a contract as superintendent in said school district for the school year 1971-72."

It is noted here again that despite these letters, petitioner continued his service as Superintendent of Schools up to and including the day of June 30, 1971, and thereafter, by petitioner's uncontroverted testimony, to July 13, 1971.

However, on the evening of July 13, 1971, the Board met again in regular session, and passed the following resolution by a vote of five votes in favor and four against:

"RESOLUTION

"WHEREAS, Cornelius T. McGlynn was appointed and designated by this Board of Education as Superintendent of Schools for the term of 1 year, commencing on July 1, 1969, and expiring June 30, 1970, which appointment was renewed for a 1 year period commencing July 1, 1970 and ending June 30, 1971; and

"WHEREAS, William P. Kiernan was appointed and designated by this Board of Education as Principal for the period commencing August 1, 1969 and expiring June 30, 1970, and which appointment was renewed for the period commencing July 1, 1970 and expiring June 30, 1971; and

"WHEREAS, Cornelius T. McGlynn and William P. Kiernan were informed by this Board on or about March 23, 1971 and other dates that their contracts in the positions of Superintendent and Principal, respectfully, would not be renewed upon their expirations on June 30, 1971; and

"WHEREAS, Cornelius T. McGlynn has tenure in the position of principal by reason of his prior service in that position and his fulfillment of the statutory requirements for tenure; and

"WHEREAS, William P. Kiernan has tenure in this position of teacher by reason of his prior service in that position and fulfillment of the statutory requirements for tenure; and

"WHEREAS, this Board has offered Cornelius T. McGlynn the position of principal for the 1971-72 School Year; and

"WHEREAS, this Board has offered William P. Kiernan the position of teacher for the 1971-72 School Year; and

"WHEREAS, neither Cornelius T. McGlynn nor William P. Kiernan has accepted contracts for the positions offered to them:

"NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Township of Lumberton that the positions of Principal and Teacher are presently vacant have been vacant since June 30, 1971; and

"BE IT FURTHER RESOLVED that Cornelius T. McGlynn and William P. Kiernan, by reason of their failure to accept contracts offered to them for the 1971-72 School Year, are no longer in the employ of this Board of Education."

Thus, the following issues are posed for the Commissioner's adjudication:

1. Was petitioner obligated to respond to the query contained in Exhibit PR-4, and to indicate whether or not he did in fact "intend to accept the position of principal" for the 1971-72 school year? If he was obligated and if he did not reply, was he barred from a tenure right to this position?

2. Regardless of petitioner's tenure position as principal with the Lumberton Township Schools, had he, by his service through June 30, 1971, accrued a tenure status in the position of Superintendent, as of the close of the regular work day on that date?

Petitioner contends that he had in fact accrued a new tenure right at the completion of the work day on June 30, 1971, and that this completion of a two-year period of service as Superintendent is not abridged or tempered in any manner by the fact that the Board had previously indicated it would not renew his contract for this employment for a third year. In petitioner's view, from the date of July 1, 1971, he had a continuing tenure contract as Superintendent of Schools, and no further affirmative action of the Board was needed or necessary.

The Board disputes these contentions. It maintains, in the first instance, that petitioner had more than the required notice that his employment would be terminated, and that the Board's intentions were clear in this regard in April of 1971. To support the avowal, the Board cites *Robert T. Currie v. Board of Education of the School District of Keansburg, Monmouth County*, 1966 *S.L.D.* 193, 195. In that decision, the Commissioner said he looked to the "clear intention" of the Board rather than to the "technical perfection of its language."

Secondly, the Board cites *Florence Fitzpatrick v. Board of Education of the Borough of Wharton, Sussex County*, decided by the Commissioner April 30, 1970, and *Michael J. Keane v. Board of Education of Flemington-Raritan Regional School District, Hunterdon County*, decided by the Commissioner July 1, 1970, in support of its contention that the statute, *N.J.S.A.* 18A:28-6, has previously been interpreted to mean that a tenured teaching staff member transferred or promoted to a new position must serve in that position for a period that "exceeds two years" (*Fitzpatrick, supra*) or that is "more than two years." (*Keane, supra*) This statute reads as follows:

> "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, 1963, 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." (*Emphasis supplied.*)

* * * *

The Commissioner has reviewed the report of the hearing examiner and notes that respondent points to the use of the words "more" and "exceeds," in prior decisions of the Commissioner, to advance an argument that, by interpretation of the Commissioner, there is more involved with the accrual of a tenure status than is clearly prescribed by the words "***after the expiration of a period***." Such an argument, in the Commissioner's judgment, is fallacious on its face since it would add a dimension to the tenure law by administrative dictum which the Legislature did not add, by its own prescription. However, if clarification is needed on this narrow point, the Commissioner simply points again to the words of the statute that state that a teaching staff member may not attain tenure in a new position until "*** after the expiration ***" of the

required period. Stated conversely, the statute mandates that when service of a teaching staff member has been rendered for the complete period required by statute a tenure status is accrued at the precise moment when the requisite period has expired. From that time forward, in the Commissioner's view, the teaching staff member has tenure.

The Commissioner observes that the paramount question to be decided in this adjudication is whether or not petitioner had accrued a tenure entitlement as Superintendent of Schools as of the close of the regular work day on June 30, 1971. If he had, the other questions posed for determination are academic.

To acquire a tenure right, all of the precise conditions laid down in the applicable statutes must be met. *Ahrensfield v. State Board of Education*, 126 *N.J.L.* 543, 18*A.* 2*d* 656 (1941) The applicable statute in the instant matter is *N.J.S.A.* 18A:28-6, *supra*, since it is a stipulated fact that petitioner was a "teaching staff member under tenure" as a principal in the Board's employ during the period *sub judice*, and since had been "promoted with his consent to another position" in July 1971.

It is clear to the Commissioner that petitioner's service as Superintendent of the Lumberton Township Schools met all of the "precise conditions" of this statute (*N.J.S.A.* 18A:28-6, *supra*), which are requisite for the accrual of a new tenure right. These "precise conditions" in this instance may be enunciated succinctly, as follows:

1. Petitioner was a tenured employee of the Board in June 1969.

2. On July 1, 1969, he began service as a Superintendent of Schools in the

Board's employ.

3. In the succeeding two-calendar-year period, he served in this position under a proper certificate.

4. The day of June 30 marked the "expiration of a period of employment of two consecutive calendar years in the new position" that petitioner held.

Therefore, the Commissioner holds that after the expiration of the statutorily-mandated period, petitioner held a new tenured status in the position of Superintendent of the Lumberton Township Schools, and that he could not be removed from that position except in the manner prescribed in the statutes.

This finding is founded on the decision of the New Jersey Supreme Court in the matter of *Gladys M. Canfield v. Board of Education of the Borough of Pine Hill, Camden County*, 97 *N.J. Super.* 483, 235, *A.* 2*d.* 233; 51 *N.J.* 400 (1968). The Supreme Court, in this decision, based its reversal on the dissenting opinion of Superior Court Justice Gaulkin, which was enunciated in the decision of the Appellate Court. Justice Gaulkin said:

> "*** It seems to me that tenure and contract are two different concepts; *tenure* is statutory and *arises only by passage of the time fixed by the statute*, and the discharge of an employee before the passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached would have extended to a date which would have given tenure. *Cf. Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65, 73-74 (1962). ***"

In the instant matter the Board could have removed petitioner from the performance of his duties as Superintendent at any time prior to June 30, 1971, and thus barred a new tenure status for him, even though the contract (PR-2) was in full force and effect, if it had chosen to do so. Under such circumstances, the Board would have been obligated to pay petitioner's salary according to the contract's terms, but petitioner's service as Superintendent would have ceased, and he would not have acquired a new tenure status. As Justice Gaulkin said, "such a (discharge) before the 'passage of the required time' " would have barred the new tenure right.

However, the Board did not proceed in this manner or indicate that this was its "intention". It did not discharge petitioner from the performance of his duties. Tenure therefore accrued at the expiration of a period of two calendar years, and the Board's letter of April 27, 1971, (PR-3) in which it stated that petitioner would "not be offered" a contract for the 1971-72 school year is of no effect, since on July 1, 1971, petitioner had a continuing contract not dependent on an offering of the Board.

Having found that petitioner is under tenure as the Lumberton Township Superintendent of Schools, the Commissioner finds additionally that he was improperly suspended by the Board from his performance of the duties of said office of Superintendent on July 13, 1971. Therefore, the Commissioner directs:

1. that petitioner be restored to the position of Superintendent of the Lumberton Township Schools forthwith, and

2. that he be given all the salary and other benefits which are rightfully due him from the date of July 1, 1971, to the present time, subject only to mitigation resulting from his earnings during that period.

COMMISSIONER OF EDUCATION

February 3, 1972

Pending before Superior Court of New Jersey

**In the Matter of the Tenure Hearing of Edmund Guerini,
School District of the City of Burlington,
Burlington County.**

COMMISSIONER OF EDUCATION

Decision

For Complainant Board of Education, John E. Queenan, Esq.

For Respondent, William V. Eisenberg, Esq.

Seventeen written charges have been certified to the Commissioner of Education by the Burlington City Board of Education against Edmund Guerini, a teacher under tenure in the Burlington City Schools, alleging insubordination, conduct unbecoming a teacher, and failure to follow directives of the Board.

A hearing on the charges was conducted at the office of the Burlington County Superintendent of Schools and in the County Office Building in Mount Holly over a period of 13 days beginning on April 7, 1970, and ending on February 11, 1971, by a hearing officer appointed by the Commissioner. Briefs and memoranda of counsel were subsequently filed, the final memorandum having been received on November 10, 1971.

The findings, conclusions, and recommendations of the hearing examiner as to each of the charges are as follows:

CHARGE 1

> "Ignoring directive of administration in that on April 5, 1968 he appeared on stage while High School musical play was being given and stated that the High School students would put on a talent show to raise funds for Dr. Martin Luther King Scholarship Fund and that it had been approved by administration, when, in fact no such approval had been sought or given."

A brief review, of some of the events immediately encompassing the date mentioned in this charge, as developed in the testimony adduced at the hearing, is essential to a full understanding of the testimony offered on this and several subsequent charges. Burlington City High School, in which respondent was employed as a teacher, enrolls a racially mixed population of students residing in the City itself and certain sending districts. The assassination of the Rev. Martin Luther King had occurred on April 4, 1968. The emotional response of the student body to the news of the assassination was intense, and on the morning of April 5 some 40 or more of the pupils had "walked out" of the school. On the urging of teachers, administrators, and community leaders, most of these pupils returned to the school after their brief demonstration, and met with other pupils in the school auditorium during the morning. In addition to the disruption of normal school routines by these events, the school was scheduled to present that evening the first of two consecutive performances of the musical

show, "Bye, Bye, Birdie," involving several dozen pupils and ten or more teachers associated with the cast and technical crews. It may reasonably be concluded that April 5 was a day of confusion, excitement, and some degree of apprehension. The principal testified that rumors reached him of a boycott of the show by black pupils associated with it, although there is no evidence that such a boycott occurred.

Into these events and circumstances respondent's alleged activities are cast. The testimony establishes that early in the morning of April 5 respondent approached the principal with a proposal to "do something" for the black community – trips to Philadelphia, scholarships, a talent show, a cultural fund. The principal's response was one of tentative approval, saying that thought and planning were required. Respondent avers that later in the morning he again spoke to the principal, more specifically proposing that he make an announcement at the evening's performance concerning a King memorial fund and a talent show to raise money for the fund. Respondent claims that the principal gave approval for the announcement, but cautioned him not to fix a date for a talent show or otherwise commit the Board of Education.

There is no question that an announcement was made. Respondent told one of the teachers in charge that he had been given approval by the principal to make an announcement. The exact language of the statement cannot be determined. Complainant's witnesses assert their impression that the announcement stated that the talent show and fund were approved by the administration. Respondent claims that he said only that the administration had promised "to go along" with the proposal. In any event, the hearing examiner finds that any interpretation of any approval must be confined to a general agreement of the principal, rendered in tension and confusion, of which neither side has clear and precise recollections. The principal testified that when he heard the announcement it was a surprise to him. The Superintendent of Schools had been given no forewarning, and he too was surprised to hear the announcement. Members of the audience, who must be assumed not to be generally knowledgeable of the ultimate responsibility of the Board of Education to approve all school functions, could not be expected to interpret the statement, even in the broad language asserted by respondent, as other than appropriate administrative sanction, and the hearing examiner so finds. This fact becomes significant to later events specified in a subsequent charge, as well as to the remark made by respondent to the Superintendent at the rear of the school auditorium after the announcement had been made. The Superintendent testified to his impression that respondent approached him and said, "You didn't know that you had approved this, did you?" The principal, standing nearby, corroborates this version. Respondent asserts that he said, "You didn't know you were getting involved, did you?" The Superintendent flatly denies hearing respondent's version. In light of all the circumstances, the hearing examiner concludes that respondent was so fully convinced of the usefulness and rightness of his proposal that he was led, or misled, to the further conviction that he had all the authority he needed to commit the school administration, by clear implication, to approval of his proposal, even though he had been cautioned not to make such a commitment. Although the entire incident as set

forth in this charge must be measured in terms of the tense and confused emotional climate which prevailed, in which all the witnesses were involved, the charge must be deemed to have been proved.

CHARGE 2

> "Ignoring directive of administration in that on April 9, 1968 while a Dr. King Memorial Service was being held he caused to be included in a printed program an announcement that the school musical "Bye Bye Birdie" would be held on April 10, 1969 at the High School auditorium to raise funds for Dr. King Memorial Fund, without seeking or obtaining approval of administration or consulting directors of the said play, causing friction among staff."

In the hours and days following the second scheduled performance of "Bye, Bye, Birdie" on April 6, the idea of a third performance of the show germinated, and grew. It was testified that it is normal for a student cast to want to give additional performances of a successful play, and the idea found a measure of approval among at least some of the faculty. The evidence does not establish that respondent originated the idea of an additional performance, although it is clear that he concurred, and, in fact, he testified that he discussed the matter with the principal after church on the following Sunday morning. On Monday morning, April 8, a meeting of the cast was called to consider a third performance, and the cast agreed to such a performance for the benefit of the proposed King Memorial Fund. A meeting of several members of the faculty involved with the production was also held on Monday morning, and the hearing examiner finds that the principal approved the plan for a third performance, subject to consent of the publisher, and authorized a telephone call to the New York publisher's office to obtain such consent. The teacher who made that call testified that he told the publisher that the additional performance would be staged under the auspices of the School Board.

Concurrently with these events, plans were being formulated for a county-wide Martin Luther King memorial service to be conducted at the Burlington City High School athletic field on April 9. The planning committee comprised citizens of both the city and the county, including the Burlington City Superintendent of Schools. It was agreed that the program for the service should contain only "related" materials, and the clergyman responsible for the publication of the program testified that he considered the announcement offered by respondent "related" and after consultation with others of the planning committee, approved its inclusion in the program. Administration witnesses generally deny giving any prior approval of the announcement, and assert that they were surprised to see it. Respondent, however, claims that he had shown the announcement to the principal, who approved it. Respondent further asserts that he was publicity director for the show, and the weight of evidence supports this assertion. In any event, the third performance had been planned and scheduled, albeit the Superintendent testified that the school authorities had been "put in a corner and couldn't back out." It is not to be expected that school authorities would have a clear recollection of having prior knowledge of the announcement, if indeed it had been called to their attention.

Committed as he was, respondent took the proposed announcement to the person having responsibility for its publication. The hearing examiner finds no directive of the administration that respondent ignored, either intentionally or by oversight, or that respondent failed in any responsibility to either administration or the directors of the play, or that by the publication of the announcement the school administration was improperly committed beyond the point to which it had already consented. The hearing examiner finds that this charge has not been sustained, and recommends that it be dismissed.

CHARGE 3

> "He was insubordinate and disrespectful to the Superintendent of Schools on April 9, 1968 when advised that he did not have approval of the Board of Education for the announcements in Charge 1 and 2. He stated in a loud, belligerent manner to the Superintendent, 'Who do you think you are that you can tell me what I can do?', and continued to argue that the Superintendent had no authority to tell him what to do, until Superintendent was forced to walk away from him."

On the High School athletic field prior to the memorial service, the Superintendent, who had already seen the program announcement referred to in Charge No. 2, met respondent and censured him for making unauthorized announcements. Although respondent does not recall making the specific statement attributed to him in this charge, the hearing examiner is convinced that the exchange between the Superintendent and respondent was mutually angry, with both parties remaining adamant in their respective positions. The testimony on this charge demonstrates that the differences with respect to control of the memorial fund, which will be more fully considered in a later charge, had already crystallized, and respondent recognized that he was in a defensive posture. In recognition of the position of the Superintendent, it must be concluded that respondent's angry words were disrespectful, but in further recognition of the totality of the circumstances, it cannot be found that in an angry argument such as occurred here, he was insubordinate, and to that extent the hearing examiner recommends that the charge be dismissed.

CHARGE 4

> "Ignoring directives of Vice-Principal and School Board that all school funds must have an accurate accounting, in that he distributed tickets for a talent show for sale to students without knowing the number he handed out or to whom given and when advised of his error he ignored advice and continued same conduct on a musical show so that it was impossible to determine an accurate accounting of funds."

This charge is in two parts, the first relating to respondent's accounting for tickets for a talent show, and the second relating to accounting for tickets for a musical show. As to the first part, the testimony fails to establish that respondent had any connection with the sale of tickets for a talent show, except insofar as such tickets were sold by pupils in his own homeroom. It is therefore

recommended that this part of the charge be dismissed. As to the sale of tickets for a musical show, the charge does not specify the show, but the testimony clearly relates to the third performance of "Bye, Bye Birdie" on April 10, 1968. Tickets for this performance were prepared by a pupil. It was testified that the tickets were either mimeographed or dittoed on paper, and cut apart, not printed on heavier ticket stock as was customary for school affairs. Although respondent avers that the tickets were numbered, other witnesses have no clear recollection of numbered tickets. Another teacher present on the athletic field after the memorial service testified that she observed pupils selling tickets and handling money in a careless fashion, and offered her assistance. The money she received from the pupils was turned over to respondent, she testified, on the basis of her understanding that he was responsible for ticket sales. Respondent testified that he had kept a record of ticket distribution and sales, but had not preserved the record. The hearing examiner finds that the weight of the testimony establishes that in the handling of ticket sales for the benefit performance of "Bye, Bye, Birdie," respondent did not follow established procedures at the High School.

CHARGE 5

> "Insubordination in that when directed to account for the receipts of musical show held on April 10, 1968 he reported on April 11, 1968 that the funds were in an account in his name, and when directed to turn money into Activities Fund of school by principal on April 11, 1968 he failed to comply with directive. It became necessary on April 24, 1968 to give a directive to Mr. Guerini in writing to surrender funds to school Activities Treasurer."

Testimony and exhibits show that on April 8, 1968, respondent opened a bank account with the deposit of his personal check for $5.00 in the name of "Martin Luther King, Jr. Memorial Fund." (R-7) Deposits of $238.00 on April 9 and $278.80 brought the total deposited to the Fund to $521.80. Respondent testified that approximately $100.00 of this total represented private contributions over and above receipts from ticket sales for the third performance of "Bye, Bye, Birdie." On April 22 respondent signed a check on this account for $115.00 to the publishers of the play for the royalty payment. Differences over control and use of the fund developed from the time of the proposal of creating the fund on April 5. Respondent conceived of the fund as a community activity having broad cultural aims, of which scholarships might be only one part. At the first suggestion of the fund, the principal suggested that time and planning were required, and that the Board of Education should not be committed by any statement about the fund. Polarization of feelings and beliefs around these differences developed rapidly. Respondent testified that very early the Superintendent had insisted that the fund must be a scholarship fund. Respondent believed that the fund was "his" fund to control, and he testified that this belief was strengthened on April 9 when the teacher mentioned in Charge No. 4 turned over to him the money that she had received from pupils on the athletic field. That same teacher was in charge of ticket sales and collection

at the door on April 10, and when respondent insisted that she turn over to him the evening's receipts, she advised him that what he was doing was "illegal," and prepared two copies of a signed statement that she was remitting the money to respondent. One copy of the statement was given the next morning to the treasurer of the school activity accounts. The treasurer testified that on April 11 he spoke to respondent about depositing the ticket receipts. Respondent refused, insisting that the money was not school funds, and stating that he was depositing it in an account in his name. The witness asserts that he advised respondent that such a disposition could cause him trouble, and said that at least the account should be in some non-personal form. The principal also testified that he told respondent that the deposit should be made to the school activity account. The vice-principal testified that he told respondent "at least four times" to deposit the money with the school activities treasurer. The Superintendent was informed of the problem, and on April 24 a letter (P-10) was delivered to respondent, directing him, in the name of the Board of Education, to "return immediately the money which was raised at the school show of Bye Bye Birdie on April 10th" to the school treasurer. It should be noted that the schools were closed for spring vacation from April 12 to April 22. Respondent discussed the letter with the Professional Rights and Responsibilities Committee of the local teachers' association and was advised to turn the money over to the school. On April 26 respondent drew a check on the Fund in the amount of $391.80 to the order of the school treasurer (R-6), and delivered the check to the treasurer on April 29. The treasurer testified that at no time did he receive an accounting of the receipts and disbursements of the Fund, as he did from all other school activities in accordance with published regulations. (P-4)

The hearing examiner finds that from the outset respondent had been amply advised by his administrative superiors and his colleagues that the receipts from the April 10 musical production were regarded as school activity funds and should be handled as such. While there is no basis for any question of respondent's personal integrity with respect to these moneys, it is clear that he was contumacious in his refusal to deposit, in school accounts, funds derived from a performance utilizing solely the facilities, mechanisms, and personnel of the school, as well as being careless in following the accounting procedures designed for the protection of others' money as well as for his personal integrity. The hearing examiner finds this charge sustained by the weight of the believable evidence.

CHARGE 6

"Insubordination and disrespect on April 25, 1968 to Superintendent in that he phoned from Main High School office phone in presence of other teachers to Superintendent and stated in a loud and boisterous manner that he did not like the harsh wording of letter, and the funds were his to do as he pleased and the Superintendent could not tell him what to do with the money, and when told that if he failed to follow the directive he would be charged with misuse of school funds and insubordination, he shouted, 'You have insubordination of the brain,' and hung up."

The letter (P-10) which directed respondent to deposit the April 10 receipts with the school treasurer caused respondent to make a telephone call from the High School office, in the presence of the principal and other teachers, to the Superintendent. The testimony establishes that the conversation was substantially as charged, the principal difference turning on the quotation cited in the charge. Respondent avers that because of a previous incident involving the Superintendent's use of the word "insubordination" in a bulletin, he believed that the Superintendent was preoccupied with the concept of insubordination. Respondent asserts that the phrase he used was "on the brain." The Superintendent conceded in cross-examination that respondent could have used the preposition "on" instead of "of," but he sees no difference. The principal, some 15 to 18 feet away from the telephone at the time, is sure that the quotation as charged is correct. A teacher who was present testified that she is "pretty sure" that respondent used the words "insubordination of the brain." The weight of the evidence supports a finding that respondent used the expression as charged. Again it must be concluded that respondent was disrespectful, and his choice of a time and place for this conversation was clearly in bad taste. However, recognizing that this conversation was the climactic event in a dispute of over two weeks concerning authority over the fund, the hearing examiner does not find in the argument itself, or the language used, an act of disobedience which could be deemed insubordinate, and in that respect it must be recommended that the charge be dismissed.

CHARGE 7

> "Conduct unbecoming a teacher in that Mr. Guerini stated before a group of teachers in the faculty room that if he was disciplined, he would lead the students out the door."

After some preliminary testimony on this charge by the Superintendent and testimony of the principal that his knowledge was based on hearsay, this charge was withdrawn on July 22, 1970.

CHARGE 8

> "Failure to follow Board directives in that he collected money for a trip to the opera on May 28th and publicized this activity without first obtaining approval of administration and Board."

On several occasions prior to this incident in the 1967-68 school year, respondent had organized and conducted pupil trips to the opera, with the approval of the school administration. With respect to this incident, it was testified, and not denied, that respondent publicized the trip and collected money for it before filing application for approval and receiving such approval. This act was defended by respondent as necessary in order to make adequate ticket reservations well in advance of the performance. The principal testified that he had reminded respondent of the necessity for proper authorization, that he anticipated no difficulty in getting it, but that rules must be followed. The

principal quoted from the teachers' handbook to this effect: "Planning trips before approval is unwise." The school district's "Administrative Regulations and Instructions to Teachers, Revised, 1967-68" (P-2) makes the following opening statement:

> "1. *Educational Field Trips* are approved by the Board of Education. Teachers desiring such trips *must plan far in advance* and *present their request* to their principals and superintendent for approval."

Absent any explanation by respondent of his failure to make plans far enough in advance that time would be available both for securing the necessary administrative approval and for collecting money and placing an order for tickets, the hearing examiner concludes that respondent in this instance relied upon his past success in getting approval and exceeded his authority. The charge is sustained by the weight of the evidence.

CHARGE 9

> "Insubordination on May 13, 1968 when asked by President of Board of Education whether or not he would follow the directives of the Superintendent; he stated that he would consider whether he thought it was right or wrong; and if he felt it was right, he would comply. If not, he wouldn't comply, and stated he had a resentment against the Superintendent because of a previous matter."

The closing paragraph of the letter (P-10) which directed respondent to turn over the money collected for the April 10 performance of "Bye, Bye, Birdie" reads as follows:

> "The Board of Education took no action on your request for the use of the auditorium for a talent show until this matter could be fully discussed with you. You are, thereby, requested to appear before the Board of Education on May 13th at 9 P.M."

It is apparent that respondent discussed this request with the Professional Rights and Responsibilities Committee (see Charge No. 5, *ante*), for the letter written to respondent by the president of the Teachers' Association and countersigned by the chairman of the Committee (R-9) reads as follows:

> "The attempts of the Professional Rights and Responsibilities Committee to eliminate the need for a meeting between you and the Board of Education have proved unsuccessful.
>
> "If, after this meeting, you feel a need to seek help from this committee, please feel free to approach us again."

Both this charge and the testimony thereon show that the substance of the meeting went beyond a full discussion of respondent's request for approval of use of the auditorium for a talent show. The testimony of the President of the

Board shows that respondent was questioned with regard to each of the incidents which became the subject of Charges 1 through 7, and that he was directly asked to respond whether he would follow the directives of the Superintendent. (Tr., June 8, 1970, pages 570, 571). The President testified that he "kept after him for possibly 15 or 20 minutes" to get an affirmative answer to this question (*Id.*, p. 576), because the President believed that if such an answer were not given, other members of the Board would then and there have voted to prefer charges of insubordination against respondent. (*Id.*, p. 571)

Respondent's testimony affirms that he was pressed to say that he would follow the directives of the Superintendent. However, he asserts that the question was hypothetical, and that he refused to say that he would follow a directive that he believed to be unlawful or against his conscience. He asked repeatedly, he says, that specific examples be given, and received no satisfaction. The President insisted, he testified, that he and others made it clear that respondent's duty was to obey the Superintendent's directive, and if he then had a complaint he would have recourse to the Board. It was the President's further testimony that in the end respondent agreed that he would obey the Superintendent. The President had no clear recollection that respondent had applied for use of the auditorium for a talent show prior to the date of this meeting, nor does the testimony suggest that this request was discussed with respondent at the meeting. The hearing examiner is led to the conclusion that the meeting evolved into an inquiry into respondent's prior conduct and his attitude toward the Superintendent. The fact that respondent ultimately accepted the Board's position cannot now be supportive of a charge of insubordination, and the hearing examiner recommends that this charge be dismissed.

CHARGE 10

> "Conduct unbecoming a teacher in that on February 27, 1969 Mr. Guerini met with a group of approximately eight students in his classroom during the period beginning about 7:30 p.m. which had been designated by the school administration for parent's visitation conferences. It was the teacher's duty at that time to make himself available for such conferences. Instead, at this meeting with the students, he sought to inflame them to disrupt normal school procedures by making such statements as the following:
>
> (a) 'How many more of your people are going to be killed before you get angry and do something about it?'
>
> (b) 'Teachers say it would be nice around here if the blacks weren't here'.
>
> (c) 'Students can wear black gloves in school.' "

On the date specified in this charge, an "International Dinner" was held at the school. Respondent attended, taking three black pupils as his guests.

Following the dinner was a period of about an hour and a half during which teachers were to be available in their rooms to meet with parents. Later there was a panel discussion in the auditorium, in which some pupils were to participate. There is no question that following the dinner several black pupils went to respondent's room, and a lively discussion of grievances and problems of black pupils took place. Respondent was, in fact, the advisor of the Burlington County NAACP Youth Council. Respondent testified that during this discussion only one parent appeared, and she only to say hello. The principal, vice-principal, and disciplinarian were in the High School office during this time. It was testified that a parent came to the office inquiring for respondent, and rather than calling respondent through the intra-school telephone system which was located in another part of the office area, the principal switched on the classroom intercom system. He heard respondent's voice, among others, and knew that respondent was in his room. The subject of the discussion which the principal and his associates overheard caused them to listen further, and they testify that they heard the three quoted statements essentially as charged. The vice-principal, who testified that he felt a duty to listen, made notes of the discussion and subsequently prepared a report of the incident to the Superintendent. However, this witness could not recall the exact context of the statements attributed to respondent.

Respondent, and other witnesses who were in the classroom at the time of this event, testified that there were in fact several discussions going on simultaneously. They testified that respondent counseled them to engage in constructive activities to correct racial injustices, and that he advised them that violent conduct was self-defeating. As to statement (a), it was testified that the word "angry" was not used, and the statement occurred in the context of a need for constructive action. Statement (b), it was testified, was not made by respondent, but there was a question raised by the black pupils about racist attitudes of teachers, and respondent said that there was one teacher, whom he refused to identify to them, who exhibited racist attitudes. Statement (c) was denied by respondent and the pupil witnesses; a discussion of the Supreme Court decision on the wearing of armbands (*Tinker v. Des Moines Independent School District*, 393 *U.S.* 503, 89 *S. Ct.* 733 (1969) had led to a question of whether that decision applied to the wearing of black gloves. Respondent denied, and these witnesses corroborated his denial, that he had said that students *can* wear black gloves in school, but it is clear that he spoke to the *question* of whether they can.

Complainant's case rests upon the recollection of certain dramatic statements. The witness who took written notes of what he had heard on the intercom could not recall the context of the alleged statements. (Tr., July 22, 1970, pages 718-724, 727-728); his testimony rested upon his recollection of the general tenor of the discussion which he overheard and his written notes of what he deemed important at the time. The inability or failure of complainant's witnesses to recall the total context in which the alleged statements were made renders it impossible to find that these statements constitute either effort or intent of respondent to inflame pupils to disrupt normal school procedures. The hearing examiner recommends that this charge be dismissed.

CHARGE 11

"Conduct unbecoming a teacher and insubordination in that on March 4, 1969 at 1:20 P.M. he was not teaching his class and was reading a newspaper while students were unsupervised and when the Superintendent entered room and walked around he ignored him and continued to read paper. When Superintendent left, he said to students, 'Hierarchy was just in, he was obviously looking for something and is here for a purpose', and during 7th period Latin 3 and 4 class he discussed with students for one-half hour what had happened during Superintendent's visit."

On the date specified in this charge, an incident had occurred in which certain pupils had worn black gloves in the school. (See *Robbins v. Board of Education of Burlington*, decided by the Commissioner January 21, 1971) The Superintendent testified that there was some agitation among some of the students and that several persons (presumably administrators and faculty) were "cruising the hallways" to make sure that everything was calm in the school. He observed pupils were entering and leaving respondent's classroom and that there was considerable noise in that area. He entered the classroom and observed (1) respondent reading a newspaper, (2) pupils sitting on desk tops, (3) boisterous conduct, (4) pupils "just having a social time." He testified that he walked all around the room but that respondent never stopped reading the newspaper. The Superintendent left the room and notified the vice-principal, who was then in charge in the absence of the principal. The confusion in the vice-principal's recollection concerning this event (Tr. June 8, 1970, pages 647-651) renders his testimony of no weight. Respondent admits that at the end of the class period, some ten minutes before the dismissal time, he had given the class a "break," in conformance with some earlier comments of the principal about pupils' attention span. He admitted that he was reading a newspaper and observed the Superintendent entering the room, looking at a bulletin board, and leaving. He claimed that while there was some talking among the pupils, most of them were in their seats, "having a relaxed break." Although respondent avers that the principal had approved the use of a "break," and this statement was not directly refuted, the head of the social studies department testified that he had given respondent approval to experiment with a "break" in mid-period for informal discussions. As to the statement attributed to respondent immediately following the Superintendent's visit, and during subsequent class periods, respondent testified that several pupils had questioned him about the incident, out of their concern that respondent was "finished" in the eyes of the administration.

Omitting any question of teaching efficiency with respect to this use of ten minutes of class time, the hearing examiner finds that respondent exceeded his authority in permitting what the evidence establishes as essentially unlicensed misuse of a portion of the learning session, and to this extent the charge is sustained. The evidence on the remainder of the charge is inconclusive, and the hearing examiner recommends that this portion of the charge be dismissed.

CHARGE 12

"Conduct unbecoming a teacher in that on March 5, 1969 he did threaten a teacher because she followed the Administration directive to send any student wearing black gloves to the office, and stated in a loud threatening, belligerent manner that she would be arrested and sent to jail for sending a student to the office for wearing the black glove."

It has been stated heretofore (Charge No. 11, *ante*) the "incident" of the black gloves, caused some commotion in the school. The teacher mentioned in this charge that she had sent to the school office one of the pupils wearing a black glove. Sometime later in the day respondent had discussed with her the possibility of infringement of civil rights in her action, and the question of whether one could be sent to jail for such action. The teacher testified that she was upset, but did not feel threatened by what she termed an "intellectual," rather than personal, discussion with respondent. She further testified that she refused to give a signed statement concerning the incident to the Superintendent. Respondent avers that he did not threaten the teacher but that at a later time he did apologize to her for having upset her. In the light of the teacher's unequivocal denial that she had been threatened, the hearing examiner recommends that this charge be dismissed.

CHARGE 13

"Conduct unbecoming a teacher in that he failed to teach the prescribed course of study as approved by the State Board of Education, making it necessary to give him a written directive dated and delivered March 11, 1969 from the Board of Education to teach and confine his teaching to the subject matter of teaching assignment and follow the prescribed course of study and the syllabus established by the Language Department and the History Department."

As a result, at least in part, of certain complaints reaching the school administration and Board of Education from parents, pupils, and the Board of Education of a sending district complainant Board of Education directed that respondent be informed, *inter alia*, that:

"He is to cease using the classroom to expound on his philosophy, his political and religious opinions. He is to teach the subject matter of his teaching assignment and follow the prescribed course of study and the syllabus established by the Language Department and the History Department. He is to teach the entire class period of all assigned classes."

This directive, and others, were embodied in a letter dated March 11, 1969, (P-12), delivered to respondent by the Superintendent in the presence of four members of the High School administrative staff who were in the language of the letter, "of the opinion that Mr. Guerini is responsible for the student activities which have disrupted the normal school procedure." Respondent was not permitted to discuss the contents of the letter with those present.

Respondent contends that the charge under consideration is a charge of inefficiency, and that the letter constitutes the 90-day notice prescribed by statute, *N.J.S.A.* 18A:6-12. Since respondent was suspended shortly after he received this notice, he argues tht he was denied the 90-day period provided in the statute. He therefore moves that this charge be dismissed on procedural grounds. The hearing examiner recommends that this motion be denied, and that the charge be considered in the context of the letter-directive (P-12) which proposes that respondent had embarked on a willful course of action which, if sustained, would constitute unbecoming conduct. The letter directed respondent also to cease:

(a) using his position and school facilities to promote disruptive activities.

(b) taking pupils out of or holding them from reporting to other assigned subject areas.

(c) carrying conversational material from teachers' rooms to pupils for purpose of antagonizing them.

(d) discussing in and around school facilities racially oriented materials and topics which might be disruptive, and "planning of a walkout and any other (sic) means of disrupting normal school procedures."

In the total context of P-12, the charge herein fails for lack of substantial proof. Such discussions as had been had with respondent concerning his teaching were based on scattered complaints, and not on direct observation, except as set forth in Charge No. 11, *ante*. On the other hand, there was ample testimony of pupils that respondent, in addition to teaching skills and developing course content, attempted to encourage thoughtful responses in pupils by relating ancient literature (*e.g.*, Virgil's *Aeneid*) and the United States history (*e.g.* post Civil War) to contemporary issues and problems. While civil rights was, expectably, one of these issues, the testimony shows that the discussions touched also on political, religious and economic topics. While such discussions were not specifically provided for in the courses of study, the former heads of both the language and history departments, as well as the Superintendent, agreed that showing relevance of course content to modern events is good teaching. Respondent asserts, and the pupils who testified confirm, that respondent did not seek to impose his philosophical or other views upon his pupils. Respondent further avers that he never consciously and intentionally failed to follow the course of study. Rebuttal testimony by the teacher who took over respondent's teaching duties following his suspension in late March 1969 was given by an admittedly inexperienced teacher, and is not definitive on the question of the extent to which respondent had followed the course of study up to the point of his suspension. The hearing examiner finds that conduct unbecoming a teacher has not been shown in respect to a willful failure to teach the prescribed courses of study and syllabi, and recommends that this charge be dismissed.

CHARGE 14

"Insubordination in that after receiving the aforesaid written directive he proceeded to discuss the directive with all his classes on March 11, 1969 and discussed with his classes the problems with administration."

It is not denied that when respondent returned to his classes after receiving the directive contained in P-12, *ante*, he told his classes that henceforth there would be no further discussions of current topics and that they would adhere closely to the textbook content of the course. Respondent also agrees that while he did not read or otherwise discuss with his pupils the content of P-12, he did say that things were "adding up," and that he would need their help. He asked them to evaluate him as a teacher, in terms of what was accomplished or not accomplished in his classes.

It is also clear that after he had left the office after receiving P-12, the administrative personnel felt a duty to monitor respondent's classroom on the school intercom system. Various administrators, including the Superintendent, principal, and vice-principal listened for up to 15 or 20 minutes at the beginning of one or more of respondent's teaching periods throughout the day on March 11, 1969. The vice-principal made tape recordings of the class proceedings. Complainant's witnesses testified essentially that what they heard is what respondent admitted.

It must be found, therefore, that for up to at least 15 minutes of each class period on March 11, 1969, respondent, by his own will, did not follow the prescribed course of study as directed by P-12, but did instead involve his pupils in a discussion of his professional problems with the school administration and Board of Education. The charge herein is sustained by the evidence.

CHARGE 15

"Conduct unbecoming a teacher and improper interference with the administration of school in that on March 21, 1969 when one of the students distributing the underground newspaper was detained in the office for several periods he went to nurse and other teachers and accused the administration of violating the student's constitutional rights and falsely stated that the student was not even allowed lunch."

On the final day of the visitation by a school evaluation team representing the Middle States Association of Colleges and Secondary School, the pupil mentioned in this charge had been sent to the school office early in the day for distributing a so-called underground newspaper, "Black Ink." The principal testified that the pupil had been detained in the office throughout the morning and was not permitted to go to the cafeteria during his regular lunch period. The pupil was later offered the opportunity to have lunch, but when he learned that he was to be suspended and sent home, he declined the offer. Meanwhile one of his friends approached respondent and asked his assistance in getting the pupil released, suggesting that there may be a violent response among the pupils if he

weren't. When respondent demurred, a question was raised about the sincerity of respondent's concern for racial injustice. Respondent then accompanied the friend toward the office, unsuccessfully seeking assistance en route from the school disciplinarian and the school nurse. As they neared the office, they encountered one or more of the evaluators talking with the disciplinarian. Although respondent has no recollection of speaking to the evaluators, but does recall that the pupil accompanying him spoke, one of the evaluators called as a witness testified that respondent told him that a pupil was being held "captive" in the office. While respondent was not irrational, the witness testified, he was excited and concerned. The chairman of the evaluating team, who was also present, was described as flabbergasted and shaken by the incident. The requested intervention of the evaluators was not granted. It is clear from the testimony of the pupil who had sought and gained respondent's assistance that the pupil was under the impression that it was proper for pupils to take their problems to the evaluators. The hearing examiner is convinced that respondent was controlled by his desire to avoid any unpleasant or improper "incident." That he was carried away by this concern to the extent that he intervened, and allowed a pupil under his control to intervene directly with the evaluators in a matter which was obviously an internal administrative one is also clear. There is no evidence to support the specific charge that respondent accused the administration of violating a pupil's constitutional rights, and certainly he had no way of knowing that the pupil had been offered the opportunity to have lunch. At most, therefore, respondent exercised poor judgment by his actions and conduct. To this extent the charge is sustained.

CHARGE 16

"Conduct unbecoming a teacher in that at the public meeting of the Board of Education held July 14, 1969 Mr. Guerini committed the following insubordinate and improper acts:

"(a) When he inquired of the Board Secretary why his earlier manifest for remedial education was not on the agenda, the Secretary said he took his orders from the Board and its President. Mr. Guerini then commented: 'Oh you mean that dictator.'

"(b) He refused to stand up in the meeting when speaking after the Chairman requested Mr. Guerini specifically as well as all other members of the audience, to stand up so that they could be heard when addressing the Board.

"(c) Mr. Guerini publicly accused the Superintendent of Schools of making false accusations against him when he accused Mr. Guerini of misusing school funds and of being insubordinate.

"(d) He falsely charged that the Superintendent of Schools was seeking the dismissal of the Principal of the High School, and alleged that the Superintendent 'has completely disorganized the High School.' "

In late March 1969 respondent was suspended from his duties, with pay. At the June meeting of the Board a group of pupils, through respondent, had submitted to the Board of Education a list of demands, largely dealing with the High School curriculum, which was popularly called a "black manifesto." Respondent, along with at least one pupil and a clergyman, attended the July 14 Board meeting to learn of the Board's response to the manifesto. There is no significant conflict in the testimony to question that respondent's actions and statements at that meeting were essentially as set forth in the charge and the testimony is in harmony with the official minutes of the meeting. (P-16) As to (a), respondent agrees that he "may have" made the quoted remark. As to (b), respondent testified that he felt he was being badgered, and saw no need to stand since he was no more than ten feet from the Board and could easily have been heard. With respect to (c), respondent testified that he asked the Board to hear four charges that he wished to make against the Superintendent, in order to bring about his dismissal. The statement concerning the principal in (d) is based upon reports which the faculty association's negotiating team had made in his presence. The testimony of two members of the negotiating team lends credence to an impression that the principal's position may have been in some jeopardy, and that some members of the team did convey this impression. Respondent further believed that the Superintendent had lost the confidence of black pupils, and had improperly interfered in the administration of the High School.

Respondent raises as his defense against this charge his right to appear as a citizen and speak on matters of concern to the schools. To deny him this right, he claims, would be to deny him his constitutionally guaranteed right of free speech. Respondent relies upon the decision of the *United States Supreme Court* in *Pickering v. Board of Education*, 391 *U.S.* 563 (1968), in support of his claim that "absent proof of false statements knowingly and recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. (*Id.* at p. 574) The hearing examiner does not find proof in the testimony that respondent knowingly and recklessly made false statements at the meeting. The hearing examiner does find that the facts in relation to this charge fall sufficiently within the ambit of *Pickering* that the conclusions of the Supreme Court are controlling herein. The examiner further finds that respondent willfully defied the Board President's order that he rise to speak, but it is obvious that the presiding officer had the power then and there to deal with a recalcitrant speaker, respondent or otherwise. It must also be remembered that respondent had been suspended, that he had just been informed that formal charges seeking his dismissal had just been adopted (P-16), and he was understandably angry and defensive. The hearing examiner does not find that respondent was insubordinate, however disrespectful and impolite his remarks may have been. It is therefore recommended that this charge be dismissed.

CHARGE 17

> "By his contemptuous and insubordinate conduct and false and irresponsible public statements, Mr. Guerini has caused great embarrassment to the Board of Education, the Superintendent of Schools,

the Administration and the Faculty of the School System, and has also caused dissension among the Students."

In the course of the hearing the hearing examiner ruled that this charge was a summarization of the previous sixteen charges, and that it lacks such specificity as would enable respondent to prepare a proper defense. After an initial offering of evidence in the form of newspaper clippings, which were rules improper, no further testimony was received specifically on this charge. Pursuant to the authority granted by *N.J.S.A.* 18A:6-16, the hearing examiner dismissed this charge.

In summary, the hearing examiner finds that Charges Nos. 1, 4, 5, 8 and 14 have been sustained by the weight of credible evidence. He finds that Charges Nos. 11, 15 have been sustained in part. He further finds that Charges Nos. 2, 3, 6, 9, 10, 12, 13 and 16 have not been sustained and recommends that they be dismissed. Charge No. 7 was withdrawn, and Charge No. 17 was dismissed by the hearing examiner.

* * * *

The Commissioner has reviewed the findings, conclusions, and recommendations of the hearing examiner as set forth herein, and concurs therewith. The Commissioner concurs also with the hearing examiner's dismissal of Charge No. 17 for the reasons stated, and observes also that even if testimony had been taken to establish that embarrassment had resulted from respondent's actions and statements, embarrassment of itself would not be sufficient to warrant dismissal or reduction in respondent's salary. The question before the Commissioner, therefore, is whether the proved charges are sufficient to warrant such penalty, and, if so, what that penalty should be.

The Commissioner cannot in any sense condone the misconduct demonstrated by respondent in the actions and statements found in the charges sustained wholly or in part against him. Schools cannot operate effectively when individual teachers ignore, disobey, or are indifferent to the rules and procedures which have been designed for the good order of the school and the welfare and protection of the pupils. Such misconduct is not tolerated among pupils; it can no more be tolerated among teachers.

On the other hand, just as it is important to understand the motives of disobedient pupils, so it is essential to look further than the acts themselves in the conduct of respondent. Assuming that the beginning of respondent's difficulties is to be found in Charge No. 1 and the charges immediately following – and there is no basis for another assumption – we find a teacher deeply concerned by the assassination of Dr. Martin Luther King and desirous of expressing that concern in a tangible, visible way. In the emotionally charged atmosphere of April 5, 1968, there was inadequate mutual understanding and communication between respondent and his principal, and pressed by the exigencies of time, respondent made an announcement by which, in its sequels, the school became bound in a course which the school authorities could not

wisely change even if they wanted to. The memorial fund which respondent conceived became in fact, in his own mind, his fund to control and administer, and the insistence of the administration that it be limited to a scholarship fund intensified his resistance. While there is not the element of concealment which the Commissioner found reprehensible in an earlier tenure case (*In the Matter of the Tenure Hearing of Joseph Maratea,* 1966 *S.L.D.* 77, affirmed State Board of Education 106, affirmed Superior Court, Appellate Division (December 1, 1967), there was the same tenacious refusal to recognize that funds raised under the auspices of the Board of Education was subject to accurate and prudent accounting and to the control and authority of the Board. From that incident onward, it is clear that the relationship between respondent and the school administration deteriorated. On the other hand, respondent became distrustful and stubborn in his resistance to policies and procedures. On the other hand, the administration became suspicious and critical. Although the report of the hearing examiner does not find evidence to support a conclusion that respondent encouraged disruptive acts by pupils, it is clear that the administrators attributed to him the responsibility for pupil unrest and disruption of the school. (P-12) The use of the school intercom system to monitor respondent's behavior in this instance demonstrates a weakness inherent in this method of supervision, in that because it is one-sided and surreptitious, it annuls the opportunity of the supervisor to observe and assess the totality of the classroom situation. In the strength of their belief that respondent was abetting unrest, as the evidence adduced in Charge 10 reveals, their listening was biased against him. That respondent recognized the perils of his position is made clear by his conduct following the receipt of the Board's directive on March 11, 1969. (P-10)

Thus, while respondent's misconduct, as found in the charges sustained against him, cannot be excused, the context of his actions makes it evident to the Commissioner, and he so holds, that dismissal from employment would be too harsh a penalty. On the other hand, the proved misconduct warrants sufficient penalty to demonstrate that willfull disregard of the rules and authority of the Board of Education and his administrative superiors cannot be tolerated. The Commissioner holds that sufficient penalty will be effected by a reduction in respondent's salary, and, consonant with the Commissioner's authority to fix such a penalty as determined in the case, *In re Fulcomer,* 93 *N.J. Super.* 404, the Commissioner determines that such reduction shall be made in the following manner: (1) that respondent be reinstated in his employment in the Burlington City Schools with his salary reduced by loss of all pay from September 1, 1969, to February 1, 1970; (2) that respondent's salary at the time of his reinstatement be at the same rate as his salary rate for the school year 1968-69; and (3) that he be reimbursed for loss of salary from February 1, 1970, to the date of this decision at the 1968-69 rate, such reimbursement to be mitigated by all earnings which respondent received for other employment during the school year periods beginning February 1, 1970, and ending with the date of this decision. *Cf. Romanowski v. Board of Education of Jersey City,* 1966 *S.L.D.* 219.

In rendering such a judgment, the Commissioner is convinced that respondent, upon his reemployment, will scrupulously avoid a recurrence of his

past misconduct and the unpleasantness which has occurred therefrom, and cautions him that the remedy sought by the Board of Education herein remains available at all times thereafter.

COMMISSIONER OF EDUCATION

February 10, 1972

Alfred W. Freeland,

Petitioner,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Cassel R. Ruhlman, Esq.

For the Respondent, Jeremiah D. O'Dwyer, Esq.

Petitioner, an employee of the Scotch Plains-Fanwood Board of Education, hereinafter "Board," through June 30, 1971, demands judgment that at the conclusion of work on that day, he had acquired a tenure status in his position and could not subsequently be removed from it except in the manner prescribed by law. The Board avers that petitioner had been given proper and timely notice of its intent to deny tenure to him and that tenure was thus legally barred.

This matter is submitted for decision on separate Motions for summary judgment offered by each of the parties. Oral argument on the Motions was conducted by a hearing examiner appointed by the Commissioner, on December 23, 1971, at the State Department of Education, Trenton. Briefs have been filed. The report of the hearing examiner is as follows:

Petitioner served as assistant superintendent of schools in charge of business affairs in the employ of the Board for three full calendar years from July 1, 1968 through and including June 30, 1971. The terms stated in the employment were as follows:

July 1, 1968	to	June 30, 1969
July 1, 1969	to	June 30, 1970
July 1, 1970	to	June 30, 1971

By virtue of the fact that he fulfilled the full terms of service under each of these contracts, petitioner avers that as of July 1, 1971, he was a tenured employee of the Board, and could not be discharged from his employment except in the manner prescribed by the statutes (*N.J.S.A.* 18A:6-10 *et seq.*).

However, on July 1, 1971, petitioner received the following letter from the Superintendent of Schools:

> "In accordance with the action taken by the Board of Education at the May 20, 1971 Public Meeting and as shown in the minutes of said meeting which you have received, you are no longer employed by this school district. The minutes state that your contract was not renewed for the 1971-72 school year.
>
> "As of yesterday, June 30th, you were employed by the Board of Education, but as of today, July 1, 1971 you are no longer an employee of this school district and are requested to leave the building immediately, since there is no reason for you to remain on the premises."

Petitioner then left the school after filing a protest.

It is noted here that while the Superintendent and the Board admit in the pleadings that petitioner was employed up to and including the day of June 30, 1971, they jointly state that they believed a tenure status had already been denied to petitioner by virtue of an action of the Board on April 28, 1971.

On the evening of April 28, 1971, the Board met in a special meeting and had considered petitioner's status as an employee. During the course of the meeting, according to an affidavit of the Superintendent, petitioner was recommended for tenure by the Superintendent. Subsequently, a motion in support of this recommendation was presented for action, but it failed of passage by a vote of 5-4, and on the following day, April 29, 1971, the Superintendent sent the following letter to petitioner:

> "Please be advised that at the official Board meeting held last evening, April 28, 1971, the decision was made not to grant you tenure in your current position.
>
> "This letter in no way reflects my own feelings in the matter but I have been directed by the Board of Education to so inform you of its decision.
>
> "May I wish you well in your future endeavor."

The Superintendent of Schools and every member of the Board of Education now state, by affidavit, that they thought the action of the Board, referred to in the letter, *supra*, had effectively denied tenure to petitioner. Specifically, eight of the Board members aver:

> "*** As a result of the defeat of the motion which was made to grant him (Freeland) a tenure contract, it was my understanding that Mr. Freeland did not acquire tenure within the district."

The President of the Board and the Superintendent offered substantially the same opinion. Additionally, the Superintendent now states in his affidavit:

> "*** It was my further belief that if the motion to grant him tenure (Freeland) failed of passage, it was synonymous with giving him notice of termination of his contract. I felt that this was the purport of my letter to him of April 29th***." (Letter reported in full, *supra*)

Both parties to the dispute *sub judice* ground their arguments on the provisions of the pertinent statutes, *N.J.S.A.* 18A:28-5, and on prior decisions of the Courts involving tenure, particularly the decision of the Supreme Court of New Jersey in *Canfield v. Pine Hill*, 51 *N.J.* 400 (1968), which supported the dissenting opinion of Judge Gaulkins in the prior decision of the Appellate Division of Superior Court, cited at 97 *N.J. Super.* 483 (1967).

The statute under consideration (*N.J.S.A.* 18A:28-5) provides in part as follows:

> "The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents *** and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose ***."

In petitioner's view, as of the close of the work day on June 30, 1971, he had completed "employment" for the "three consecutive calendar years" as prescribed in *N.J.S.A.* 18A:28-5(a), *supra*, and was, from that time forward, entitled to continue in his position. Petitioner avers that at that juncture, no further contract was required, and that the Board's decision of May 20, 1971, to deny him a contract was superfluous, since even if one was not offered or signed, it could not alter his right to the position. To buttress this position, petitioner cites *Mateer v. Fairlawn*, 1950-51 *S.L.D.* 63; *Lange v. Board of Education of the Borough of Audubon*, 26 *N.J. Super.* 83 (1953).

The Board maintains that on April 29, 1971, petitioner was apprised of its action of the preceding evening reported, *ante*, and that the Board's intentions were so clearly enunciated that petitioner knew, or should have known, that he was to be denied tenure. In the Board's view, it had complied, on April 29, 1971, with the 60-day notice clause in petitioner's contract. The Board avers that technical deficiency or improper form should not result in a penalty imposed on it at this juncture.

In this regard, the Board maintains that the courts have traditionally looked to intent and substance rather than form, and that they have given effect to real intent unless prevented by some positive and mandatory rule of law. To buttress this position, the Board cites *Brodzinsky v. Puleck*, 75 *N.J. Super.* 40 (*App. Div.* 1940) and *Krysztofel v. Krysztofel*, *N.J. Super.* 381 (*Ch. Div.* 1949), and avers that its intent, expressed on April 29, 1971, effectively terminated petitioner's contract before passage of the required time for accrual of a tenure status.

* * * *

The Commissioner has reviewed the report of the hearing examiner, and notes a marked similarity between the facts and issues in the matter *sub judice* and those in a dispute recently adjudicated – that of *Cornelius McGlynn v. Lumberton Board of Education, Burlington County*, decided by the Commissioner on February 3, 1972. In the instant matter, as in McGlynn:

1. Petitioner had completed the time and service requirements demanded by the statutes for a specific tenure entitlement;

2. The Board demands judgment that tenure has not accrued for petitioner because the Board had, in its view, clearly expressed its intention to deny it, and had conveyed this impression to petitioner at an earlier date;

3. The Board did not take the one action which the Commissioner has held must be taken if tenure is to be denied to those who have otherwise met the precise conditions required for its accrual. It failed by the lack of affirmative action to stop petitioner's accrual of service toward a tenure right.

The Commissioner holds, therefore, that at the close of the work day on June 30, 1971, petitioner had in fact acquired tenure.

The Commissioner is constrained to opine at this juncture that a decision to the contrary by him in this matter would be an inconsistent anomaly when compared to prior decisions of the Commissioner and the courts. This is so because on the one hand, the Commissioner had been asked repeatedly by boards of education to construe the tenure statutes, to hold that no teaching staff member has a right to demand the benefits of tenure protection unless he has met all of the precise conditions that the statutes require. The Commissioner

has consistently supported such a strict interpretation since the statutes are clearly stated. On the other hand, in the case herein, the Commissioner is told in effect that a teaching staff member has met all of these precise conditions required for tenure, but that he should be, and is, denied the entitlement he had otherwise earned because the Board's intentions were apparent, even though its actions, in the Commissioner's view, were not the effective, affirmative ones which were required.

In the Commissioner's opinion, such a decision would be faulty on its face; therefore, he cannot so decide. Instead, the Commissioner has relied again for guidance on the clear expression of the courts, and he notes, in particular, the expression of the Court in *Ahrensfield v. State Board of Education*, 126 *N.J.L.* 543 (*E. & A.* 1941) that the right of tenure does not come into being until the "precise conditions" laid down in the statutes have been met. Conversely, when they are met, as herein, the Commissioner holds that it is a proper legal decision to hold that tenure has accrued.

Certainly, in the Commissioner's view, tenure could have easily been denied in this instance by the termination of petitioner's service at any time prior to June 30, 1971. As Judge Gaulkin said in *Canfield v. Pine Hill*, *supra*, at page 490:

> "***tenure is statutory and arises only by passage of time fixed by statute and the *discharge of an employee before the passage of the required time bars tenure*, even if the discharge is in breach of an employment contract which, if not breached would have extended to a date which would have given tenure. *Cf. Zimmerman v. Board of Education of City of Newark*, 38 *N.J.* 65, 73-74 (1962).***" (*Emphasis supplied.*)

Thus, in the instant matter the Board could have, on April 29, 1971, exercised the 60-day clause in its contract with petitioner, if it had chosen to do so. It could have terminated his actual service anytime subsequent to that date. Its only remaining obligation would have been to compensate petitioner at the rate specified in the contract for a period of 60 days from the time of notice.

However, the Board took no such required action to specifically stop petitioner's employment. To the contrary, petitioner continued to serve in his position until he had completed the remainder of a three-calendar-year period. Accordingly, the Commissioner holds that petitioner cannot now be estopped from claiming that entitlement, which his service earned by statutory prescription.

For the reasons stated, *supra*, the Commissioner directs that petitioner be restored to his position as assistant superintendent of schools in charge of business affairs, forthwith, and that he be given all the salary and furnished all of those benefits to which he is entitled retroactively to July 1, 1971, subject only to mitigation resulting from his earnings during that period.

COMMISSIONER OF EDUCATION

February 17, 1972

Alfred Freeland,

Petitioner-Appellee,

v.

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

Respondent-Appellant.

Decided by the Commissioner of Education, February 17, 1972

STATE BOARD OF EDUCATION
DECISION

For Petitioner-Appellee, Cassel R. Ruhlman, Esq.

For Respondent-Appellant, Jeremiah D. O'Dwyer, Esq.

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

September 13, 1972
Pending before Superior Court of New Jersey

JESSIE STEPHENS, as Mother and Natural Guardian of "B.S.",

Petitioner,

v.

Board of Education of the City of Woodbury, Gloucester County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Camden Regional Legal Services, Inc. (Fred B. Last, Esq. of Counsel)

For the Respondent, White and Simpson (John L. White, Esq., of Counsel)

Petitioner's daughter, hereinafter "B.S.," was a junior when she was suspended by the principal of Woodbury High School, hereinafter "High School," on February 25, 1971. The Board of Education of the City of Woodbury, hereinafter "Board," voted on April 27, 1971, to continue the suspension of B.S. for the remainder of the school year. Home tutoring was

provided for the entire period of her suspension from shortly after the initial suspension in February through the remainder of the regular school year which terminated in June. B.S. returned to the High School in September 1971, where she is currently a regular student in the senior class.

The report of the hearing examiner is as follows:

The matter is presented to the Commissioner of Education on the exhibits, pleadings and briefs of counsel for the determination of the following issue formalized at the conference of counsel:

> Did the Board of Education act legally and properly in the matter of the suspension of B.S. from Woodbury High School?

Petitioner contends that the suspension of B.S. was improper and illegal and alleges that the following statements show errors made by the Board:

> "a. It was illegal and improper to suspend [B.S.] from school without affording her a proper preliminary hearing;
> "b. It was illegal and improper to continue [B.S.'s] suspension from school for over 2 months without affording her a hearing;
> "c. It was error for respondent not to make specific findings of fact at the expulsion hearing;
> "d. It was error for respondent to find [B.S.] guilty of any act which is recognized as grounds for suspension in N.J.S. 18A:37-2;
> "e. It was error for respondent to suspend [B.S.] for a period in excess of 4 months for this isolated incident." (Petition of Appeal p. 4)

Petitioner, therefore, seeks a decision of the Commissioner:

> "a. Declaring the initial suspension and continued suspension to have been illegal and improper; and
> "b. Reversing the decision of respondent; and
> "c. Directing respondent to provide [B.S.] sufficient tutorial services to make up for class time lost and to provide her an opportunity to demonstrate her academic achievement and obtain such grades and standing had she not been suspended; and
> "d. Directing respondent to correct its records accordingly; and/or
> "e. Shortening the period of suspension to a reasonable and proper length, to correct its records and provide the same services and opportunities sought above; and
> "f. Granting such other relief as the Commissioner shall deem equitable and just." (Petition of Appeal, p. 4)

The reason for petitioner's initial suspension is clearly stated in the principal's letter to B.S.'s mother on February 25, 1971:

"Dear Mrs. Stephens:

"I am suspending your daughter, [B.S.], from school pending a work-up by the Child Study Team and a formal hearing before the Board of Education.

"[B.S.] was one of a small group of students which was protesting its opposition to the rules and regulations of the school. This group had the choice of going to class or leaving the building. If they chose to leave the building they were informed that this act would result in suspension.

"[B.S.] chose to leave the building. I asked her to leave if she was going to leave since she had so indicated. She became very upset and made several remarks to me, including the threat to 'punch me in the mouth.' She was in such a rage that her sister Mary, stepped between her and me, apparently to keep her from doing any violence.

"This kind of irrational, emotional rage cannot be tolerated.

"I feel that this type of study will be beneficial for her.

"I am asking that the Board of Education act on my request for her expulsion from school

Very truly yours,
Carl L. Giles"

On the following day, February 26, 1971, another letter was sent to B.S.'s parents by the assistant superintendent of schools for special services as follows:

"Dear Mr. and Mrs. Stephens:

"I should like very much to apeak with you concerning the welfare of your daughter, [B.S.], and have set up a conference for Tuesday, March 2, 1971, at 9:00 a.m. in the Special Service Office of the Woodbury Public Schools.

"If you are unable to keep this appointment, please contact me as soon as possible at 845-4200.

Sincerely yours,
Richard G. Gates"

The authority to suspend school pupils is stated in *N.J.S.A.* 18A:37-2, which reads in pertinent part as follows:

"Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.***"

The provisions of the statute, *supra*, authorizing the suspension of pupils may be invoked by the principal, pursuant to *N.J.S.A.* 18A:37-4 for failure of the pupil "to submit to the authority of the teachers and others in authority over them." *N.J.S.A.* 18A:37-1

Continuation of the suspension of pupils is authorized by *N.J.S.A.* 18A:37-5, which reads as follows:

> "No suspension of a pupil by a teacher or a principal shall be continued longer than the second regular meeting of the board of education of the district after such suspension unless the same is continued by action of the board, and the power to reinstate, continue any suspension reported to it or expel a pupil shall be vested in each board."

Although petitioner avers that B.S.'s initial suspension lasted more than two months, the Board contends in its pleadings and in its brief that B.S.'s hearing, resulting in the continuation of her suspension, was held prior to the second regular meeting of the Board following her suspension.

On April 15, 1971, the following letter was sent to Mrs. Harold Stephens by counsel for the Board:

> "Dear Mrs. Stephens:
>
> "As the Solicitor of the Woodbury Board of Education, I have been instructed to notify you that on Tuesday, April 27, 1971, at 7:30 P.M. at the offices of the Board of Education located in the High School Building a hearing will be held to determine whether your daughter, [B.S.], shall be expelled from school, suspended or otherwise disciplined.
>
> "The charges against your daughter are that on or about February 24, 1971 she threatened to strike Mr. Carl L. Giles, the High School Principal, thereby committing an assault upon him, that she had been guilty of continued and willful disobedience of the authority of a person having authority over her.
>
> "At the time of the hearing your daughter may be represented by counsel of your own choosing, she will have an opportunity to give her version of the incidents that have led to her suspension, she or her attorney will be afforded the opportunity to cross examination of any witnesses against her and any person who shall be an accuser against her will be present to testify under oath or his name will be made available to her and his testimony, in the board's discretion, will be accepted in affidavit form.
>
> Very truly yours,
> White and Simpson"

A fifty-page transcript of B.S.'s hearing before the Board was submitted for the Commissioner's examination. A careful review of that transcript shows

that B.S. had an opportunity to defend herself, to be represented by counsel and to face and cross-examine her accusers. Only after this procedure was completed did the Board vote to continue her suspension, with home tutoring for the remainder of the school year.

Portions of that transcript are reproduced here to show some of the testimony adduced by the Board.

The following testimony shows that B.S. did admit threatening to punch the principal in the nose:

"Mr. Last: (Counsel for Petitioner)
What did Mr. Giles (Principal) tell you at that time?

"B.S.: He told me I was expelled or suspended for threatening him. (Tr. 35)

"Mr. Last: Since the 25th of February or there abouts have you received instruction through the Woodbury School System?

"B.S.: Like what?

"Mr. Last: Has someone been coming to your house tutoring you?

"B.S. Yes, he has, a teacher.

"Mr. Last: How frequently?

"B.S.: Five days a week.

"Mr. Last: For how long?

"B.S.: For an hour, two hours.

"Mr. Last: And have you kept up with your work?

"B.S.: Yes, I have.

"Mr. Last: And you have admitted that back on the 24th of February you did say that you would punch Mr. Giles in the nose?

"B.S.: Yes, I did." (Tr. 37-38)

B.S. continued to say that:

"I really don't think I would have punched him in the nose." (Tr. 38)

B.S. and other students were directed to leave the building when they refused to return to class. B.S. did not leave and went through the halls where she met and conversed with a Mr. Burrell who was able to get her to leave the building.

There is no question that B.S. did in fact threaten to punch the principal in the nose. This threat was heard by others and admitted by B.S. The principal testified that B.S. tried to goad him into striking her, and his testimony was reinforced by a police officer then in the high school. (Tr. 6, 26)

* * * *

The Commissioner has read the report of the hearing examiner and has examined his findings and his review of the applicable statutes.

There can be no question of the authority of a school principal to suspend a pupil or of a board of education's authority to act further when their action is consistent with the applicable statutes.

The Commissioner finds no error in the principal's initial suspension of the student, nor does hi question the reasonableness of the Board's continuation of that suspension for the remainder of the school year because of the admitted threat of B.S. and her defiance of an order to leave the school building.

B.S. was told by the principal that she was being suspended, and she was given the reasons therefore. She and her parents were also informed in writing the next day by the principal and were invited to meet with the assistant superintendent of schools for special services that very next day to discuss the situation. B.S. was further advised of her rights at the hearing to be held by the Board, and she was represented by counsel who cross-examined the witnesses against her.

The Commissioner determines that all the essential elements of due process that are required were afforded B.S., and the Board's action in continuing her suspension with home tutoring was a reasonable exercise of its discretionary power. The Board's hearing regarding the suspension of B.S. was held within the time period prescribed by law; therefore, the Commissioner finds no procedural defect in the Board's action.

B.S. admitted keeping up with her work. She is now a regular student and senior in Woodbury High School. The Commissioner finds no legitimate claim for relief that has not already been given by the school administration or by the Board.

Therefore, for the reasons expressed herein, the petition is dismissed.

COMMISSIONER OF EDUCATION

February 17, 1972

In the Matter of the Annual School Election Held in the Township of Willingboro, Burlington County

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years each at the annual school election held February 8, 1972, in the School District of the Township of Willingboro, Burlington County, were as follows:

FOR TERMS OF THREE YEARS

	At Polls	Absentee	Total
Eva Weiss	535	4	539
Maurice S. Miller, Jr.	942	10	952
Gerald M. Tighe	868	6	874
Joseph A. Baptista	930	3	933
Donald H. Thor	679	2	681
David J. Pierson	120	2	122
Michael M. Effinger	619	4	623
Roy B. Paige	877	4	881
Judith Pierson	340	5	345

Pursuant to a request from Candidate Gerald M. Tighe and at the direction of the Commissioner of Education, a recount of the votes cast for all the candidates was conducted by an authorized representative of the Commissioner of Education on February 23, 1972, at the warehouse of the Burlington County Board of Elections, Mt. Holly. The recount of the voting machine totals confirmed the announced results above.

The Commissioner finds and determines that Maurice S. Miller, Jr., Joseph A. Baptista, and Roy B. Paige were elected to membership on the Board of Education of the Township of Willingboro for full terms of 3 years each.

COMMISSIONER OF EDUCATION

February 29, 1972

In the Matter of the Annual School Election Held in the Borough of Keansburg, Monmouth County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the annual school election held February 8, 1972, in the School District of the Borough of Keansburg, Monmouth County, on the questions of the appropriation of $1,035,582 for current expense and the appropriation of $42,000 for capital outlay for the 1972-73 school year were as follows:

CURRENT EXPENSE

	At Polls	Absentee	Total
Yes	393	6	399
No	411	0	411

CAPITAL OUTLAY

	At Polls	Absentee	Total
Yes	380	6	386
No	389	0	389

Pursuant to a request made by the President of the Keansburg Board of Education, in the name of that Board, and at the direction of the Commissioner of Education, a recount of the votes cast for current expense and capital outlay was conducted on February 23, 1972, by an authorized representative of the Commissioner at the Monmouth County Board of Elections, Freehold.

At the conclusion of the recount of the voting machine totals, no change in the results on the question of current expense was found. The correct result on the question of capital outlay was determined to be as follows:

CAPITAL OUTLAY

	At Polls	Absentee	Total
Yes	380	6	386
No	390	0	390

The Commissioner finds and determines that the authorization for the appropriation of $1,035,582 for current expense and the authorization for the appropriation of $42,000 for capital outlay for the 1972-73 school year failed of approval by the voters at the annual school election conducted in the Borough of Keansburg on February 8, 1972.

COMMISSIONER OF EDUCATION

February 29, 1972

In the Matter of the Annual School Election Held in the School District of Lower Cape May Regional, Cape May County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the voting for two members of the Lower Cape May Regional Board of Education from the constituent district of Lower Township for full terms of three years each at the annual school election held February 1, 1972, were as follows:

	At Polls	Absentee	Total
Robert A. White	488	0	488
Shull O. Rutherford	454	8	462
George L. McCahey	442	0	442
Robert R. Gosselin	394	8	402
Robert C. Matthews	159	0	159
Franklin R. Hughes, Jr.	156	0	156
John D. Sheets	104	0	104

Pursuant to a joint letter request from Candidates Robert A. White and George L. McCahey dated February 3, 1972, the Commissioner of Education directed the Assistant Commissioner in charge of the Division of Controversies and Disputes to conduct a recount of the votes cast. The recount was conducted by an authorized representative on February 14, 1972, at the office of the Cape May County Superintendent of Schools in Cape May Courthouse.

The recount disclosed several ballots which, it was agreed, could not be counted for one or more of the following reasons:

1. ballots on which no votes for any candidates were cast. (*R.S.* 19:16-4)
2. ballots with cross (x), plus (+), or check (✓), marks to the right of the names of candidates voted for, but with no marks in the squares to the left of the names. (*R.S.* 19:16-3c)
3. ballots on which votes were cast for more than two candidates. (*R.S.* 19:16-3f, 19:16-4)

Eighty-one ballots, previously voided by election officials, were reviewed. The great majority of these ballots were properly marked for two candidates, but were marked with blue ink from ball-point pens. The use of modern writing instruments such as the ball-point pen and the felt-tip pen, usually containing blue ink, has largely replaced the use of dip pens, fountain pens and quills, and the latter are unlikely to enjoy a resurgence of popularity. It has been held in previous decisions that ballots marked in blue ink or blue ball point pen with the proper symbol in the proper place on the ballot, are valid and must be counted, *R.S.* 19:16-4, *In the Matter of the School Election Held in the Penns Grove-Upper Penns Neck Regional School District, Salem County*, 1966 *S.L.D.* 69, affirmed State Board of Education 69. As the result of this determination regarding the ballots marked in blue ink, seventy-eight of the previously-voided ballots were counted. At the conclusion of the recount of the ballots, with twelve ballots referred to the Commissioner for determination, the tally stood as follows:

	At Polls	Absentee	Total
Robert A. White	508	0	508
Shull O. Rutherford	452	8	460
George L. McCahey	463	0	463
Robert R. Gosselin	396	8	404
Robert C. Matthews	160	0	160
Franklin R. Hughes, Jr.	159	0	159
John D. Sheets	100	0	100

None of the twelve ballots referred to the Commissioner for determination contains a vote cast for Candidate Shull O. Rutherford; therefore, these ballots need not be considered since they cannot affect the result.

The Commissioner finds and determines that Robert A. White and George L. McCahey were elected on February 1, 1972, to seats on the Lower Cape May Regional Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

February 29, 1972

Mr. and Mrs. Angelo Capri, and their son Sam Capri,

Petitioners,

v.

Board of Education of the City of Burlington and Roberton F. Dotti, Superintendent of Schools, Burlington County,

Respondents.

COMMISSIONER OF EDUCATION

Decision on Motion for Interim Relief

For the Petitioners, D. Ellen Stimler, Esq.

For the Respondents, John Queenan, Jr., Esq.

Petitioner, Sam Capri, hereinafter "S.C.," was a regularly-enrolled senior student in the Burlington High School, hereinafter "High School," who was suspended from school on October 25, 1971, for fighting with another senior student. S.C. has requested that the Commissioner reinstate him in his regular classes immediately and that the action of the City of Burlington Board of Education hereinafter "Board," providing him with home tutoring for the balance of the year be set aside. The matter was presented for the Commissioner's determination on the pleadings, briefs, and oral argument of counsel before a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton, New Jersey, on January 27, 1972. The report of the hearing examiner is as follows:

The Board held a hearing for S.C. on November 1, 1971, after which he was placed on home tutoring in English and Social Studies for the remainder of the year. The Board's decision to provide instruction in these two subjects, was based on an administrative determination that successful completion of these courses would make S.C. eligible to receive his high school diploma. No action has been brought before the Commissioner on behalf of the other student involved in the fight with S.C.

The essential facts in this matter are not in dispute. A tape of the Board's hearing was submitted to the hearing examiner for his review as well as an essay pleading for reinstatement written by S.C.

On October 25, S.C. and his adversary became involved in an argument in a regularly-scheduled classroom. Because the teacher was unable to keep them from insulting each other and to cause them to be seated and calm, he escorted both boys to the office of the school disciplinarian who was not in his office at the time. They were instructed by the teacher to be seated in that office and wait for the disciplinarian; however, both boys walked out into the hall where a fight between them broke out. The fight was stopped by the disciplinarian, the school principal and two other teachers. While the boys were being restrained, one broke loose from the principal and threw a punch at S.C. who ducked. The disciplinarian was struck over his eye causing an injury requiring six stitches. Again, four teachers were required to separate the boys.

No allegation has been made as to blaming one boy or the other for starting the fight. It seemed to be a spontaneous eruption that began in a classroom because one boy objected to the other's cutting his own fingernails.

S.C. avers that his suspension for two weeks until his home tutoring began is all that the statute empowers the Board to do. *N.J.S.A.* 18A:37-2 reads in part as follows:

> "Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.***"

S.C. argues, therefore, that assignment to home tutoring goes beyond the Board's power to suspend and is not authorized by State Law. Petitioner argues further that even if home tutoring could be assigned as "punishment" this would be unreasonably and excessively severe under the circumstances.

The record shows that the elements of due process were afforded to S.C. The hearing examiner listened to the tape, *supra*, and has reviewed the record and finds:

(a) that charges against S.C. were presented to him orally and in written form.
(b) that S.C. was advised of his right to be represented by counsel at the hearing.
(c) that S.C. had an opportunity to give his version of the incident that led to his suspension.

(d) that S.C. had knowledge from the charges of who his accusers were.
(e) that opportunity was afforded for cross-examination of witnesses and positive refutation of the testimony of those who testified against S.C.

* * * *

The Commissioner has reviewed the report of the hearing examiner as set forth above. There can be no question that a board of education has the statutory authority to suspend or expel a pupil for good cause. However, the Commissioner cannot agree with S.C.'s contention that the Board may not take an action that goes beyond suspension of a pupil from regular day school activities and subsequent assignment to an evening home tutoring program. Certainly, if a Board has the statutory power to expel, it can take an action against a pupil that is less than an expulsion.

The report of the hearing examiner demonstrates that S.C. was afforded a hearing which essentially comported with the statement of a pupil's right to due process as set forth in *Scher v. West Orange Board of Education*, 1968 *S.L.D.* 92, 95. In the *Scher* case, the Commissioner cited the following guidelines laid down by the Court in *State ex rel. Sherman v. Hyman*, 180 *Tenn.* 99, 171, *S.W.* 2*d* 822 (1942), *cert. den.* 319 *U.S.* 748 (1943), as an answer to the question, "What form must such hearing take?":

> "We think the student should be informed as to the nature of the charges as well as the names of at least the principal witnesses against him when requested, and given a fair opportunity to make his defense. *** The testimony against him may be oral or written, not necessarily under oath, but he should be advised as to its nature, as well as the persons who have accused him."

Also, in *Dixon v. Alabama State Board of Education*, 294 *F.* 2*d* 150 (5th *Cir.* 1961), the Court provided an elaboration of some of the guidelines as enunciated, *ante*, and said, "*** If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled."

In the instant matter the Board proceeded deliberately and without undue delay; however, the Commissioner is constrained to comment that the penalty imposed by the Board is unduly harsh for the offense committed by S.C.

The record shows that S.C. has been suspended from his regular classes since October 25, 1971, and that he has been receiving 2 hours of instruction per week in English and an additional 2 hours per week in Social Studies since November 10, 1971, after school hours.

The Commissioner determines that the four months suspension by the Board and the substitution of 4 instruction hours per week in lieu of S.C.'s regular program has been punishment enough for S.C.'s discipline infractions.

The Commissioner directs, therefore, that S.C. be reinstated in his regular academic program in the high school; however, he is not entitled to any work make-up privileges unless such privileges are extended voluntarily by the Board or by S.C.'s individual teachers.

COMMISSIONER OF EDUCATION

March 2, 1972

In the Matter of the Annual School Election Held in the School District of the Township of Clark, Union County.

COMMISSIONER OF EDUCATION

Decision

At the annual school election held on February 8, 1972, in the Township of Clark, Union County, the voters were asked to approve the amounts of $2,737,318 for current expense costs and $47,161 in capital outlay expenditures of the school district for the 1972 - 73 school year. The announced results of the balloting were as follows:

CURRENT EXPENSES

	At Polls	Absentee	Total
For	389	1	390
Against	438	2	440

CAPITAL OUTLAY

	At Polls	Absentee	Total
For	376	1	377
Against	440	2	442

Pursuant to a letter request dated February 9, 1972, from H. Ronald Smith, Business Administrator of the Clark Township Schools, the Commissioner directed that the ballots cast for and against these respective proposals be recounted. The recount was conducted on February 25, 1972, at the voting machine warehouse of the Union County Board of Elections, Scotch Plains, by a representative of the Commissioner of Education.

At the conclusion of the recount the tally stood:

CURRENT EXPENSES

	At Polls	Absentee	Total
For	360	1	361
Against	420	2	422

CAPITAL OUTLAY

	At Polls	Absentee	Total
For	345	1	346
Against	425	2	427

Accordingly, the Commissioner finds and determines that authorization for the appropriations of $2,737,318 for current expense costs and $47,161 for capital outlay costs for the 1972-73 school year failed of approval by the voters at the annual school election held February 8, 1972.

COMMISSIONER OF EDUCATION

March 3, 1972

In the Matter of the Annual School Election Held in the School District of the Township of Franklin, Somerset County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years each at the annual school election held on February 8, 1972, in the school district of the Township of Franklin, Somerset County, were as follows:

	At Polls	Absentee	Total
David Rehbein	1323	35	1358
Michael P. Ward	1553	29	1582
Renee Heflin	468	7	475
Michael Nazar	1043	20	1063
Adolph I. Katz	1361	38	1399
Raymond N. Mesiah	1617	39	1656
Terence McLaughlin	313	6	319
Henry M. Spritzer	1393	32	1425
Robert E. Lindemann	1261	26	1287

Pursuant to a letter request dated February 12, 1972, from Candidate Katz, the Commissioner directed that the ballots cast for the candidates for board membership be recounted. The recount was conducted on February 23, 1972, at the warehouse of the Somerset County Board of Elections by an authorized representative of the Commissioner of Education. The rechecking of the voting machine totals confirmed the announced results above.

The Commissioner finds and determines that Raymond N. Mesiah, Michael P. Ward and Henry M. Spritzer were elected to membership on the Board of Education of the Township of Franklin for full terms of three years each.

COMMISSIONER OF EDUCATION

March 3, 1972

In the Matter of the Annual School Election Held in the School District of the Borough of Glen Rock, Bergen County.

COMMISSIONER OF EDUCATION

Decision

At the annual school election held on February 8, 1972, in the Borough of Glen Rock, Bergen County, the voters were asked to approve the appropriation of $4,250,774 for current expense costs of the school district for the 1972-73 school year. The announced results of the balloting were as follows:

	At Polls	Absentee	Total
For	765	19	784
Against	769	11	780

Pursuant to a letter request dated February 16, 1972, from Harry H. Raber, a citizen of Glen Rock Borough, the Commissioner of Education directed that the votes cast on the voting machines for and against the current expense proposal be rechecked. The recheck was conducted on February 24, 1972, at the warehouse of the Bergen County Board of Elections, Carlstadt, by an authorized representative of the Commissioner.

The recheck of the voting machine totals confirmed the announced tally of the votes at the polls.

Accordingly, the Commissioner finds and determines that authorization for the appropriation of $4,250,774 for current expenses for the 1972-73 school year in the school district of the Borough of Glen Rock was approved by the voters at the annual school election held February 8, 1972.

COMMISSIONER OF EDUCATION

March 3, 1972

In the Matter of the Annual School Election Held in the School District of the Borough of Palisades Park, Bergen County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years each at the annual school election held on February 8, 1972, in the school district of the Borough of Palisades Park, Bergen County, were as follows:

	At Polls	Absentee	Total
Charles F. Mann	801	3	804
Stephen J. Velten	924	8	932
Vincent Grill	948	8	956
Herbert A. Minks, Jr.	713	2	715
Mathew R. DeSotto	776	2	778
Joseph J. Colaneri	1016	6	1022

Pursuant to a request dated February 11, 1972, from Candidate De Sotto, the Commissioner of Education directed that the votes cast on the voting machines for the above-named candidates be recounted. A recount was conducted on February 23, 1972, at the warehouse of the Bergen County Board of Elections, Carlstadt, by an authorized representative of the Commissioner of Education. The rechecking of the voting machine totals confirmed the announced results above.

The Commissioner finds and determines that Joseph J. Colaneri, Vincent Grill and Stephen J. Velten were elected to membership on the Board of Education of the Borough of Palisades Park for full terms of three years each.

COMMISSIONER OF EDUCATION

March 3, 1972

In the Matter of the Annual School Election Held in the Borough of Rutherford, Bergen County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for candidates for membership on the Board of Education for an unexpired term of one year at the annual school election held on February 8, 1972, in the school district of the Borough of Rutherford, Bergen County, were as follows:

	At Polls	Absentee	Total
Albert J. Monack	1584	19	1603
Theodore Brunson	1488	84	1572
Vincent P. Mariano	612	22	634

Pursuant to a letter request dated February 15, 1972, from Candidate Brunson, the Commissioner directed that the votes cast for this seat be rechecked. The recheck was conducted on February 24, 1972, at the warehouse of the Bergen County Board of Elections, Carlstadt, by an authorized representative of the Commissioner. The rechecking of the voting machine totals confirmed the announced results above.

The Commissioner finds and determines that Albert J. Monack was elected to membership on the Board of Education of the Borough of Rutherford for an unexpired term of one year.

COMMISSIONER OF EDUCATION

March 3, 1972

In the Matter of the Tenure Hearing of Roger David Lavin,
School District of the Township of Pemberton, Burlington County.

COMMISSIONER OF EDUCATION

Order

For the Complainant, Sever, Coles & Hardt (Ernest N. Sever, Esq., of Counsel)

For the Respondent, Charles W. Gross, Esq.

It appearing that the Board of Education of the Township of Pemberton, hereinafter "Board," having filed charges of incapacity, unbecoming conduct and insubordination against Roger David Lavin, hereinafter "respondent," pursuant to *N.J.S.A.* 18A:6-10 *et seq.*; and it appearing that respondent is a teacher under tenure in the Board's school system; and it appearing that such charges would be sufficient if true in fact to warrant his dismissal; and it appearing that the Board properly certified charges to the Commissioner of Education on July 27, 1970; and it appearing that the Assistant Commissioner of Education in charge of Controversies and Disputes notified respondent of the certification of said charges; and it appearing that counsel for respondent represented him at a conference at the State Department of Education, Trenton, on October 21, 1970; and it appearing that the dates of December 2, 3, and 4, 1970, were set down for a plenary hearing in the above matter; and it appearing that the Commissioner was notified on December 1, 1970, that a United States District Court Order, returnable Wednesday morning, December 2, 1970, was served temporarily restraining any hearing by the Commissioner; and it

appearing that Judge Mitchell H. Cohen indicated " *** that a hearing before the Commissioner of Education of the State of New Jersey would in no way inconvenience or cause irreparable harm to plaintiff ***;" and it appearing that Judge Cohen denied respondent's prayer for injunctive relief on December 7, 1970; and it appearing that since December 7, 1970, respondent has not attempted in any manner to defend himself *pro se* or through his counsel before the Commissioner; and it appearing that our office has tried to move the matter through respondent's counsel by letter of November 5, 1971, and by telecon on December 8, 1971, and December 10, 1971, and by letter of December 17, 1971; and it appearing that respondent no longer intends to defend himself against the charges served upon him by the Board July 27, 1970 (twenty-one months ago); and it appearing that no request for an extension of time has been made to the Commissioner; and it further appearing that respondent has expressed no reason for his lack of communication with the Commissioner relative to his intentions in this matter; now therefore, IT IS ORDERED on this 6th day of March 1972, that Roger David Lavin be hereby dismissed as a tenure teacher in the School District of Pemberton, effective on the date of his suspension by the Board of Education of the School District of Pemberton, Burlington County.

COMMISSIONER OF EDUCATION

March 6, 1972

In the Matter of the Annual School Election Held in the School District of the Township of Lumberton, Burlington County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the voting for three members of the Lumberton Township Board of Education for full terms of three years each and for one member for an unexpired term of one year at the annual school election held February 8, 1972, were as follows:

THREE-YEAR TERM

	At Polls	Absentee	Total
George A. Ball	398	13	411
William P. Barber	395	13	408
Lester C. Jones, Jr.	387	14	401
Robert J. Scott	364	8	372
Robert G. Kolbeck	346	7	353
Raymond DeBroekert	336	8	344

ONE-YEAR TERM

	At Polls	Absentee	Total
Andrew P. Forbes, Jr.	393	13	406
Frank C. Serrano	347	7	354

Pursuant to a mutual letter request dated February 10, 1972, from Candidates Scott, Kolbeck, DeBroekert and Serrano, the Commissioner of Education directed the Assistant Commissioner in charge of the Division of Controversies and Disputes to conduct a recount of the votes cast. The recount was conducted by an authorized representative on Monday, February 28, 1972, at the office of the Burlington County Superintendent of Schools in Mount Holly.

The recount disclosed several ballots which, it was agreed, could not be counted because votes were cast for more than the proper number of candidates. (*R.S.* 19:16-3f, 19:16-4)

At the conclusion of the recount of the ballots, with twenty-four ballots referred to the Commissioner for determination, the tally stood as follows:

THREE-YEAR TERM

	At Polls	Absentee	Total
George A. Ball	393	13	406
William P. Barber	392	13	405
Lester C. Jones, Jr.	383	14	397
Robert J. Scott	353	8	361
Robert G. Kolbeck	338	7	345
Raymond DeBroekert	327	8	335

ONE-YEAR TERM

	At Polls	Absentee	Total
Andrew P. Forbes, Jr.	382	13	395
Frank C. Serrano	338	7	345

The difference between the number of votes received by Candidates Jones and Scott respectively is thirty-six. Therefore, the twenty-four ballots referred to the Commissioner cannot affect the result and need not be considered. Also, the difference between the number of votes received by Candidates Forbes and Serrano respectively, for the one-year unexpired term, is fifty. The twenty-four contested ballots need not be considered in this instance, therefore, because they cannot affect the result.

The Commissioner finds and determines that George A. Ball, William P. Barber and Lester C. Jones, Jr. were elected on February 8, 1972, to seats on the Lumberton Township Board of Education for full terms of three years each and Andrew P. Forbes, Jr. was elected to a seat on the Board of Education for an unexpired term of one year.

COMMISSIONER OF EDUCATION

March 6, 1972

In the Matter of the Annual School Election Held in the School District of Northern Burlington County Regional, Burlington County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the voting for the Capital Outlay Proposal at the annual school election on February 1, 1972, in the school district of Northern Burlington County Regional was as follows:

PROPOSAL

"Resolved that there be raised for Capital Outlay for Land, Building and Equipment $32,172.00 for the ensuing school year 1972-73."

VOTES CAST

AT POLLS		ABSENTEE		TOTAL	
For	Against	For	Against	For	Against
529	534	1	0	530	534

Pursuant to a letter request from Edward B. Longmuir, Jr., Secretary of the Board of Education of Northern Burlington County Regional dated February 8, 1972, the Commissioner of Education directed the Assistant Commissioner of Education in charge of Controversies and Disputes to conduct a recount of the votes cast solely on the Capital Outlay Proposal, *supra*. The recount was conducted by an authorized representative on February 15, 1972, at the office of the Burlington County Superintendent of Schools in Mount Holly.

The Commissioner's representative found that several errors had been made in the counting of the ballots. In some cases ballots had been counted which were improperly marked. The election statutes clearly give the directions to be followed in marking a ballot. *N.J.S.A.* 18A:14-37 reads in part as follows:

> " *** If the voter makes a cross (x) or plus (+) or check (✓) mark in black ink or black pencil in the square to the left of an opposite the word "Yes," it shall be counted as a vote in favor of the proposition.
>
> If the voter makes a cross (x) or plus (+) or check (✓) mark in black ink or black pencil in the square to the left of and opposite the word "No," it shall be counted as a vote against the proposition. In case no marks are made in the square to the left of and opposite either the word "Yes" or "No," it shall not be counted as a vote either for or against the proposition. ***"

However, marks made properly and in the proper places may be in colors other than black. *In the Matter of the School Election Held in the Penns*

Grove-Upper Penns Neck Regional School District, Salem County, 1966 *S.L.D.* 69, the State Board of Education affirmed the Commissioner's decision and included language therein which is excerpted as follows:

> "*** The remaining contention of the appellants is that ballots which are marked with a proper symbol in the proper place on the ballot should nevertheless be rejected if the marking is other than ' *** in black ink or black pencil ***', *R.S.* 18:7-32 and Cf. *R.S.* 19:15-27. Although a literal reading of the statute substantiates this contention, we cannot accept it and we hereby reject it. Much ink has flowed under the bridge since 1922 when the cited section in Title 18 was last revised. We take official notice of the declining popularity of pens, fountain pens, and even pencils. The so-called ball pen has been on the scene for twenty-five years and has gradually displaced the writing instruments which were usual in 1922. More recently, the so-called soft tip or felt tip pen has enjoyed a great surge of popularity rivaling the ball pen. In any event, we do not think dip pens, fountain pens, pencils, or quills are likely to enjoy a resurgence. In addition to the popularity of the newer types of writing instruments, there is another reason why we cannot accept a literal reading of the statute as the basis for rejecting ballots marked in blue ink or blue ball pen, etc. Years ago when dip pens and fountain pens and pencils were in common use, the ink which outsold all of the other colors combined was not a true black, but a so-called blue-black which was supposed to write blue and dry black, so that even if we were considering ballots marked in pen, we would have the absurd situation that ballots would have to be rejected on the original count when they were only a day or two old, and yet the same ballots would have oxidized sufficiently by the time a recount occurred as to be acceptable in the literal terms of the statute. There being no possibility of fraud or of ambiguity, we hold that ballots marked in blue ink or blue ball pen, with the proper symbol in the proper place on the ballot, are valid and were properly counted by the Commissioner. *** "

The recount of the ballots cast gave the following results:

CAPITAL OUTLAY PROPOSAL

	For	Against
Chesterfield Township	185	144
Mansfield Township	154	150
Springfield Township	83	110
North Hanover Township	109	123
Absentee Ballot (1)	1	0
TOTALS	532	527

* * * *

The Commissioner finds and determines that the Capital Outlay Proposal was approved by a majority of the votes cast. He directs, therefore, that there be raised by *Taxation*, pursuant to the appropriate statutes, the amount set forth in the Capital Outlay Proposal as submitted to the voters.

COMMISSIONER OF EDUCATION

March 6, 1972

In the Matter of the Annual School Election Held in the School District of the City of Woodbury, Gloucester County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the voting for two seats on the Board of Education of the City of Woodbury for unexpired terms of one year each at the annual school election held February 8, 1972, were as follows:

	At Polls	Absentee	Total
John J. Turnock, Jr.	823	10	833
Thomas H. Tatham	778	6	784
Grace H. Holdcraft	739	34	773
Esther Sanders	745	27	772
Leo Ivery	444	1	445

Pursuant to a letter request dated February 10, 1972, Candidate Grace H. Holdcraft, the Commissioner of Education directed the Assistant Commissioner in charge of the Division of Controversies and Disputes to conduct a recount of the votes cast. The recount was conducted by an authorized representative on March 1, 1972, at the office of the Gloucester County Superintendent of Schools in Clayton.

The recount disclosed several ballots which, it was agreed, could not be counted for one or more of the following reasons:

1. ballots on which votes were cast for more than two candidates. (*R.S.* 19:16-3f, 19:16-4)
2. ballots on which no votes for any candidates were cast. (*R.S.* 19:16-4)
3. ballots with cross (x), plus (+), or check (✓) marks to the right of the names of candidates voted for, but with no marks in the squares to the left of the names. (*R.S.* 19:16-3c)

At the conclusion of the recount of the ballots cast for Candidates Tatham and Holdcraft, with eight ballots referred to the Commissioner for determination, the tally stood as follows:

	At Polls	Absentee	Total
John J. Turnock, Jr.	823	10	833
Thomas H. Tatham	774	6	780
Grace H. Holdcraft	740	34	774
Esther Sanders	745	27	772
Leo Ivery	444	1	445

Of the eight ballots referred to the Commissioner for determination, only two contain votes cast for Candidate Holdcraft; therefore, these ballots need not be considered since they cannot affect the result.

Accordingly, the Commissioner finds and determines that John J. Turnock, Jr. and Thomas H. Tatham were elected on February 8, 1972, to seats on the Board of Education of the City of Woodbury for unexpired terms of one year each.

COMMISSIONER OF EDUCATION

March 8, 1972

In the Matter of the Annual School Election Held in the School District of the Township of Springfield, Burlington County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for members of the Board of Education for three seats for full terms of three years each at the annual school election held on February 8, 1972, in the school district of the Township of Springfield, Burlington County, were as follows:

Albert E. Engel	74
Wayne Smith	38
Daniel Kurilla	24
Gertrude Hague	51
Robert Gaw	38
Sandra Stiles	13

Additionally, a total of nine other candidates received 1 vote each.

Pursuant to a letter request dated February 17, 1972, from Candidate Gaw, the Commissioner directed that the ballots cast for Board members be recounted. The recount was conducted on February 29, 1972, at the office of the Burlington County Superintendent of Schools, Mt. Holly, by an authorized representative of the Commissioner. The report of the Commissioner's representative is as follows:

As a result of the recount of the uncontested ballots cast, with 9 ballots referred to the Commissioner, the tally stood as follows for the five candidates with the greatest number of reported votes:

Albert E. Engel	68
Gertrude Hague	49
Robert Gaw	37
Wayne Smith	35
Daniel Kurilla	22

It is noted here that the 9 ballots reserved for determination could not affect the status of Candidates Engel, Hague or Kurilla. Accordingly, with respect to these 9 ballots, consideration will be limited to those containing marks of any kind for Candidates Gaw and Smith. These ballots are grouped in three categories as follows:

Exhibit A – There are five ballots in this exhibit, and each contains at least one name written in the spaces provided for write-in votes, but without an accompanying check or mark of any kind in the box to the left of the name. Specifically, with respect to the tally with which we are here concerned, the ballots are separately identified as follows and contain:

A-1 – The name of Wayne Smith – no check in the box.
A-2 – The name Wayne Smith – no check in the box.
A-3 – The name Wayne N. Smith – no check in the box.
A-4 – The name Wayne Smith. There is a proper check to the left of the name and in the box, which in the opinion of the hearing examiner, must be tallied. The ballot was set aside only because another name written in like manner is lacking a check of any kind.
A-5 – The name Robert Gaw – no check in the box.

Exhibit B – This exhibit contains three ballots. Each of these ballots contains a surname without an identifying first name or initial, but with a proper check in the box to the left of the name. Specifically, the ballots are described as follows:

B-1 – This ballot is not of pertinence, since it contains the name of a candidate other than that of the candidates so closely aligned, whose tallies are under consideration.
B-2 – This ballot has two names written in the proper spaces provided for write-in votes. They are:

Robert Gall
Smith

B-3 – This ballot contains one vote for Wayne N. Smith which, in the opinion of the hearing examiner, must be tallied for Wayne Smith. The name is preceded by a proper check. The ballot is set aside only because it contains the name of another candidate without an identifying prefix.

Exhibit C – This exhibit has no pertinence to the tally for Candidates Gaw and Smith, and need not be discussed or decided since such discussion or decision could not alter the result of the specific matter *sub judice*.

* * * *

The Commissioner has reviewed the report of the recount as set forth by his representative, and concurs with the two opinions expressed. He further finds as follows:

Exhibit A – With exception of the one vote for Candidate Wayne Smith, these ballots cannot be counted for either of the two men, whose tallies are examined herein, as the statutory requirement for casting a vote has not been met. The requirement in this regard is found in *R.S.* 19:16-3c, which provides in part as follows:

> "If no marks are made in the squares to the left of the names of any candidates in any column, but are made to the right of said names, a vote shall not be counted for the candidate so marked ***."

It has been consistently held by the Commissioner in numerous elections that a ballot cannot be counted when the statutory requirement that a cross (x), plus (+), or check (✓) be marked substantially within the square has not been met. The Commissioner determines, therefore, that only 1 vote may be tallied from this exhibit for Candidate Smith, since only that ballot (A-4) is properly marked for either of the candidates. *In the Matter of the Annual School Election in Union Township, Union County*, 1939-49 *S.L.D.* 92; *In the Matter of the Annual School Election in the Borough of Stratford, Camden County*, 1955-56 *S.L.D.* 119; *In the Matter of the Annual School Election in the Township of Waterford, Camden County*, 1968 *S.L.D.* 48

Exhibit B – The Commissioner notes that the only ballot requiring a determination herein is B-2, and he determines that neither of the votes cast for Candidate "Robert Gall" and "Smith" on this ballot may be properly added to the tallies for Candidate Gaw or Candidate Smith. This determination is also one which is founded on a series of prior decisions of the Commissioner. Specifically, in the decision, *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Hainesport, Burlington County*, 1951-52 *S.L.D.* 45, the Commissioner said in part:

> " *** the Commissioner cannot find any amendment of the General Election Law which would permit the counting of a write-in vote in the personal choice space with only the last name of a candidate. *** "

Similarly, the Commissioner was asked to make a determination with respect to a tally of the name "Whitney" in the decision, *In the Matter of Ballots Cast at the Annual School Election in the City of Estell Manor, Atlantic County*, 1957-58 *S.L.D.* 91, but declined to do so and said:

"The Commissioner cannot assume that the seven votes cast for "Whitney" were cast for Arthur Whitney. *** "

Neither can the Commissioner, in the instant matter, determine that a vote cast for "Robert Gall" is one cast for "Robert Gaw," or that one cast for "Smith" is for "Wayne Smith."

When the votes on the referred ballots determined to be valid are added to the tally, the final result is as follows:

	Uncontested	Exhibits A B C	Total
Robert Gaw	37	0 0 0	37
Wayne Smith	35	1 1 1	37

The Commissioner finds and determines that Albert E. Engel and Gertrude Hague were elected at the annual school election held on February 8, 1972, to seats on the Springfield Township Board of Education for full terms of 3 years each, but that there was a failure to elect a third member of the Board. The Burlington County Superintendent of Schools is, therefore, authorized under the provisions of *N.J.S.A.* 18A:12-15, and is hereby directed, to appoint from among the residents of the Township of Springfield a citizen, who holds the qualifications for membership, to a seat on the Springfield Township Board of Education, who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION

March 15, 1972

In the Matter of the Special School Election Held in the School District of the Borough of Sayreville, Middlesex County.

COMMISSIONER OF EDUCATION

Decision

A special referendum was held on March 7, 1972, in the School District of the Borough of Sayreville, Middlesex County, at which a proposal to construct a new schoolhouse at a cost not to exceed $2,500,000 and to issue bonds in the amount thereof, was submitted to the electorate. The announced results of the votes cast at this special election were as follows:

Question	At Polls	Absentee	Total
Yes	1118	2	1120
No	1093	0	1093

Pursuant to a letter request made by a resident voter of Sayreville, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to conduct a recount of the votes cast. The recount was conducted, at the direction of the Assistant Commissioner by an authorized representative of the Commissioner, at the voting machine warehouse of the Middlesex County Board of Elections, Edison Township, on March 22, 1972.

At the conclusion of the recount of the voting machine totals, the official count stood as follows:

Question	At Polls	Absentee	Total
Yes	1118	2	1120
No	1093	0	1093

The Commissioner finds and determines that the bond referendum question to construct a new schoolhouse and to issue bonds for this purpose in the amount of $2,500,000 was approved by the electorate of the School District of the Borough of Sayreville at the special school election held March 7, 1972.

COMMISSIONER OF EDUCATION

March 24, 1972

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

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years at the annual school election held February 8, 1972, in the School District of the Township of Deptford, Gloucester County, were as follows:

	At Polls	Absentee	Total
Alice Corsey	708	2	710
Robert Palese	910	2	912
Albert Boye	728	0	728
Richard Stone	622	2	624
Richard Green	732	0	732

Pursuant to a letter request dated February 9, 1972, from Alice D. Corsey, a recount of the ballots cast at the election was conducted by a hearing examiner designated by the Assistant Commissioner of Education in charge of the Division of Controversies and Disputes by the authority of the Commissioner of Education.

By unanimous consent of all parties present, the hearing examiner marked 30 ballots void. Ten other ballots were challenged and set aside for a later determination by the Commissioner of Education.

The hearing examiner reports that at the conclusion of the recount, with all but the ten ballots which were set aside for the Commissioner's determination counted, the tally stood:

	At Polls	Absentee	Total
Alice Corsey	705	2	707
Robert Palese	901	2	903
Albert Boye	727	0	727
Richard Stone	614	2	616
Richard Green	728	0	728

Although this tally, with ten ballots still undetermined, differed slightly from the announced result on the date of the election, the outcome of the election was not affected. Even if Candidate Corsey were awarded all ten of the contested ballots, she would remain in fourth place and could not be elected to a seat on the Board.

Since there is no need for any finding on the ten contested ballots, the Commissioner determines, therefore, that Robert Palese, Richard Green and Albert Boye were elected at the annual school election on February 8, 1972, to seats on the Township of Deptford Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION

March 24, 1972

Dawn Minorics,

Petitioner,

v.

Board of Education of the Town of Phillipsburg, Dr. Herbert K. England, Superintendent of Schools, J. C. Wanamaker, Principal of Phillipsburg High School, William Conwell, Assistant Administrator of the Phillipsburg High School, Warren County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Mrs. Dawn Minorics, *Pro Se*

For the Respondents, Andrew Varga, Jr., Esq.

Petitioner, the mother of children attending the Phillipsburg Public Schools, brings this action on behalf of her own children, and, in the nature of the appeal, as a class action on behalf of other children similarly situated, against the Phillipsburg Board of Education and its school administrators, hereinafter jointly identified as the "School System." Petitioner principally alleges that the grading policy of the School System, in certain instances, is used as a measure of disciplinary penalty and is thus improper. The School System avers that petitioner shows no harm to herself or anyone else from its actions, and questions the authority of the Commissioner of Education to hear the case, since there is no allegation that the actions under consideration are arbitrary, capricious or administered in an unreasonable manner.

A conference in this matter was conducted on December 20, 1971, at the office of counsel for the School System, 51 Washington Street, Phillipsburg, by a hearing examiner appointed by the Commissioner. At that time, there was an agreement by the parties to submit the principal matters in controversy herein for adjudication on a set of stipulated facts and a series of issues derived therefrom.

The report of the hearing examiner is as follows:

The principal matter in controversy herein is concerned with the ways that the School System disciplines its students. Specifically, petitioner avers that the mark "zero," when awarded to students because of their truancy or absences occasioned by suspension from school, is so weighted in the grading process as to constitute a penalty contrary to previous decisions of the Commissioner in this regard. Petitioner specifically cites *John Haddad, a minor, by his parents and Natural Guardians, Joseph L. Haddad and Regina Hadded v. Board of Education of Cranford, Union County; Charles Post, Principal of the Cranford High School; Henry Doscher, Assistant Principal of Cranford High School; and Clark W.*

McDermith, Superintendent of Schools, Township of Cranford, Union County, 1968 *S.L.D.* 98. Additionally, however, petitioner complains against the School System's policy of assigning in-school suspension as a disciplinary penalty and maintains that, as a parent, she is, or should be, entitled to receive a list of School System policies concerned with disciplinary penalties and grading practices. The stipulations, pertinent to these contentions, are listed as follows:

> "1. Use of the mark zero
>
> "(a) Students in the Phillipsburg Schools receive zero in all subjects on those days when they are truant from school and in those instances when, because of their own actions they are in suspension from the privilege of school attendance.
>
> "(b) Students may make up tests that they may have missed on such days. These test results are then averaged in with all other marks received during that quarter – including the assigned zero.
>
> "2. Parents receive letters informing them of their child's truancy or suspension. ***
>
> "3. At times the school does assign the penalty of in-school suspension.
>
> "4. The Board is presently working on a set of policies with specific pertinence to the grading of students but has nothing specifically set down as 'Board' policy in this regard at the present time. Some rules and regulations pertinent herein are set down by school administrators and are included in a teacher's handbook each year."

With respect to the second stipulation it is noted here by the hearing examiner that the School System admits in the pleadings that these letters to parents state that "*** it (truancy or suspension) will have an adverse effect on his (the student's) grades and might seriously jeopardize his chances for graduation." However, this notation by the hearing examiner does not imply a finding that the School System holds a threat of grade reduction over the heads of pupils because of their infractions of school rules. To the contrary, the hearing examiner believes the letter simply represents the statement of an obvious deduction; namely, that all absences from school are harmful to students, since a true make-up of all of the benefits that regular class attendance confers can never be truly afforded.

While the above are the four stipulations agreed to by the parties, it can also be stated, on the basis of information contained in the pleadings that students who are on suspension or who are truant are not required to make up missed classwork. Additionally, the School System avers that the principal of the High School is given authority to administer his school and is responsible for it, and it is implied that this administration and this authority embrace the practices with respect to student grades and suspension.

Finally, the hearing examiner notes that petitioner's prayer is moot with respect to the invocation of the policies, herein controverted, by the School System against her own children in the specific instance which prompted this petition. However, her children, and all others similarly situated, are, and will continue to be, controlled by these policies in the future unless they are altered in some manner. In this respect, it would appear that the petition is viable and does present a possibility for relief which the Commissioner can give.

From the stipulations listed, *ante*, the following issues have been itemized by agreement of the parties and are presented for consideration by the Commissioner:

> "(a) Is the assignment and use of the mark zero, as detailed, *ante*, a legal and proper action by the Phillipsburg school system?
>
> "(b) Is the petitioner entitled to receive a clearly defined set of Board policies with respect to the grading practices of Phillipsburg Schools?
>
> "(c) May a school properly assign students to in-school suspension as an action of punishment?"

* * * *

The Commissioner has reviewed the report of the hearing examiner and will consider the issues, as stated in his report and agreed to by the parties, in the order in which they are listed.

I.

The dispute over the School System's grading system, and the procedures and polices relative thereto, which is contained herein, is noteworthy in one respect; *i.e.*, there is no contention by either party that a student's grades should be used as a disciplinary measure against him. There is a contention by petitioner that the procedures and policies which are used produce that result and are in fact punitive in nature and thus inconsistent with previous decisions of the Commissioner in this regard. The School System denies that such is the case. In this regard, petitioner correctly cites the decision of the Commissioner in *John Haddad*, *supra*, as one that enunciates some principles of pertinence to the instant matter, and the Commissioner believes that excerpts from that decision should be cited, at this juncture, before weighing the instant circumstances.

Haddad contained a contention that the suspension of a student during the last week of the school year, and the resultant exclusion from final examinations was too severe a penalty. The Commissioner rejected the argument and stated at page 102:

> " *** In the instant matter, the Commissioner holds that a five-day *suspension in itself* does not constitute an unreasonable exercise of authority for the offenses committed *in spite of the consequential grade*

> *effect.* Although it is *preferable* for a student to be allowed to participate in examinations, the school authorities *cannot be deprived* of their discretion to assure order in school affairs and to control the pupils *even to the extent of exclusion from examinations.* *** " (*Emphasis supplied.*)

It is noted here by the Commissioner that the exclusion referred to in *Haddad* was one of permanence. The student was not to be allowed any form of subsequent and prompt examination make-up, and he received the lowest possible letter grade with a numerical equivalence of 50 in lieu of the examination.

While the Commissioner, in that instance, found it proper to exclude the student temporarily from the scheduled examination, he also found that there was a punitive effect in the action, which affected the student's grades improperly, and he said at page 103:

> " *** There appears no justifiable reason why the *grade effect* should be *superimposed* upon the suspension penalty.*** " (*Emphasis supplied.*)

And later, also at page 103, the Commissioner directed that the student be given reasonable time to prepare for and take the final examination, and directed additionally that:

> " *** The marks or grades earned in the final examinations will then be employed in determining his (the student) final grades in the same manner as if he *had taken the examinations at the usual time.*" (*Emphasis supplied.*)

In effect, the Commissioner said in *Haddad* that every suspension, even though lawful, had the inevitable effect of affecting grades to some extent because class time, as such, was lost. The absence from class attendance must, in itself, tend to reduce the grades received. Such a reduction affords no opportunity for remedy.

However, the Commissioner also said in *Haddad* that in those instances where such a remedy is possible regarding the opportunity to take objective examinations, the student should be given the chance to avail himself of it without further penalty and that his final grades should be employed " *** *as if he had taken the examination at the usual time.*" (*Emphasis supplied.*)

In the instant matter the School System is not as severe in its penalty as that in *Haddad*, but in the Commissioner's judgment, there still exists in the School System's grading policy a definite and specific penalty inherent on some occasions in the marking procedure – the zero remains, even though the opportunity to take a make-up examination is afforded, and even though the examination mark received is averaged in with others. There can be no doubt that the zero as awarded herein has the effect of a penalty that dilutes achievement, and that, in some instances where there may be few objective grades, the zero has a significant impact on the final grade that a student may earn. The zero weighs the record down.

Similarly, in the case of *Gustave M. Wermuth and Sylvia Wermuth v. Julius C. Bernstein, Principal of Livingston High School, and Board of Education of the Township of Livingston, Essex County*, 1965 *S.L.D.* 121, the Commissioner was requested to consider such a use of zero, a use that had the effect of lowering a pupil's grade when routinely assigned for disciplinary reasons. In part, the thrust of the petition in that case was; (at p. 126)

> " *** against what is characterized as a system of 'penal discipline' which counsel has called a 'mandatory zero suspension system.' ***."

Specifically, it was alleged:

> " *** that respondents imposed the 'penalty of suspension for numerous and varied breaches of the most minute detail of school discipline;' that teachers are required to give 'mandatory markings of zero' while the pupil is suspended and an arbitrary reduction in the grade for the marking period for a certain number of such zeros; that the pupil may not take any action to eradicate the said zeros or *** take examinations missed; ' ***."

It is noted here that, in the instant matter, there is no allegation that the School System arbitrarily reduced grades when a "certain number" of such zeros were received. However, similarly with the recital, *ante*, in *Wermuth*, it is clear that the mark of zero is mandatory when, on certain occasions, students enrolled in the School System are illegally absent from school or suspended from the privilege of school attendance.

It was to this latter circumstance that the Commissioner particularly addressed himself in *Wermuth*, *supra*, when he cautioned that "marks and grades should not be used to 'serve disciplinary purposes.' " Specifically, in this regard, he said, at page 128, in *Wermuth:*

> " *** The use of marks and grades as deterrents or as punishment is likewise usually ineffective in producing the desired results and is educationally not defensible. Whatever *system of marks and grades* a school may devise will have serious inherent limitations at best, and it *must not be further handicapped by attempting to serve disciplinary purposes also.* Attention is called to the statement of the Office of Secondary Education of the New Jersey State Department of Education in its publication 'Secondary School Bulletin,' Volume 20, No. 5, dated March 1964 and entitled: 'Suspension and Drop-Outs.' ***." (*Emphasis supplied.*)

Since it is clear that, in the instant matter, the use of the mark zero tends to weight the term grade received and to weigh the record down, and since such weighting occurs only when students are truant or are on suspension from the privilege of school attendance, the practice must be viewed as one of the kind the Commissioner cautioned against in *Wermuth;* a practice that serves "disciplinary purposes." As such, the Commissioner holds that the practice is improper and should be terminated at the earliest practicable time.

Finally, the Commissioner reiterates his belief that such a finding does not represent an erosion or diminution of the authority of the school, and he holds that the expressions of *Wermuth*, *supra*, in this regard, are equally appropos to the circumstances herein. Again, in that decision, the Commissioner said, at page 129:

> " *** This enunciation of a philosophy with respect to suspension and marks should not be interpreted as an erosion of either the authority of the school staff or of the desirability of maintaining good order and high standards of behavior in public schools. An effective school is an orderly one and to be so it must operate under reasonable rules and regulations for pupil conduct. Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct. Such results are attained *** by the great majority of school staffs through use of a variety of techniques adapted to the particular pupil and problem without having to resort to frequent suspensions and grade penalties. *** "

In the instant matter the Commissioner believes that the present review of the Phillipsburg Board of Education, referred to, *ante*, with respect to its grading policies and practices, is appropos and timely regarding the findings, *ante*, and that pertinent guidelines should be developed by that body prior to the beginning of the 1972-73 school year. Conscious of the fact that this decision of the Commissioner will be announced in mid-year, a time not conducive to change of policy regarding grading, and that it is the local board that must by law makes rules and regulations " *** for the government and management of the public schools ***." (*N.J.S.A.* 18A:11-1), the Commissioner refrains, at this juncture, from any direction to the Board that would change grading policies for the present school year. Such existent policies, while they may be faulty in part, are not in any sense oppressive, and there is no demanding immediate need for this revision other than as part of an overall review and coherent change. However, the Commissioner will retain jurisdiction over this phase of the dispute, pending the decision, and announcement of it, to be made by the School System. The Commissioner directs that a copy of the policies pertinent thereto be sent to him promptly following their adoption.

II.

The Commissioner observes that there is no contention herein with respect to the second issue -that the School System has refused to give petitioner a clear statement of its grading policies and of its policies with respect to discipline. Petitioner knows them. It may be presumed that the policies are traditional and a known quantity in the fabric of school affairs. Therefore, their statement in written form would gain nothing in the telling. Present practice, enunciated in a different way, would be no more acceptable to petitioner than the policy she questions and rejects.

In this regard, it is interesting to note that one of the world's great nations – Great Britain – has existed as a viable government for decades with no written constitution, but a common understanding of those principles which control the governed and the government alike. It is equally true that many policies of a school system are traditional and, in the past, the traditions have been controlling.

It is only when the tradition is challenged that the guiding principles and the understandings are the subject of scrutiny and the object of change, which change when promulgated should best be enunciated in written form.

Since in the instant matter the Phillipsburg Board is already examining these policies in detail, and since there is a presumption that they will appear in written form, the Commissioner sees no reason for his intervention in this matter. There is no statutory requirement that every facet of practice and tradition of school affairs be itemized in the form that petitioner demands, and the Commissioner will not impose one in this instance.

III.

The statute, *N.J.S.A.* 18A:37-2, makes it clear that a school system may "suspend" students from school and class attendance, but the Commissioner knows of no requirement anywhere that such suspension must, of necessity, banish the student entirely from the school environment. To the contrary, the Commissioner holds that such in-school suspension, as challenged herein, is often an advisable form of suspension, and particularly so, when notice to parents or guardian is impossible in the circumstances of the day.

Therefore, in this respect the petitioner's complaint is rejected, and relief will not be afforded.

In summary, the Commissioner remands to the Phillipsburg Board of Education the obligation to review its grading policies and to promulgate such policies anew prior to the start of the 1972-73 school year. The Commissioner expects that the policies will be consistent with the judgments expressed, *ante*, but in this respect, he retains jurisdiction in this matter until the Board's promulgation of said policies and their review by the Commissioner.

COMMISSIONER OF EDUCATION

March 24, 1972

Board of Education of the Westwood Regional School District,

Petitioner,

v.

Mayor and Council of the Borough of Westwood and Mayor and Council of the Township of Washington, Bergen County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, John J. Sullivan, Esq.

For the Respondent Washington Township Board, Leonard Adler, Esq.

For the Respondent Westwood Board, Randall, Randall and McGuire (Robert E. McGuire, Esq., of Counsel)

Petitioner, the Board of Education of the Westwood Regional School District, hereinafter "Board," appeals from the joint action of the Mayor and Council of the Borough of Westwood, hereinafter "Borough Council," and the Mayor and Council of the Township of Washington, hereinafter "Township Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Bergen County Board of Taxation an amount of appropriation for current expense purposes for the 1971-72 school year $142,670 less than the amount proposed by the Board in its school budget which was defeated by the voters.

The Board alleges that the amount certified by the Borough and Township Councils for current expense purposes is insufficient to provide a thorough and efficient system of free public schools in the Westwood Regional School District and prays for relief in the form of full restoration by the Commissioner of Education of the amount of $142,670 for current expenses for the school year 1971-72.

Both Councils reply that they consulted with the Board in accordance with *N.J.S.A.* 18A:22-37, regarding the defeated school budget. As a result of these investigations and a complete study of the Board's budget, both Councils aver that they certified to the Bergen County Board of Taxation the final amount of $4,350,208, which is $142,670 below the Board's budget for current expenses, and which they considered sufficient to provide a thorough and efficient system of education and to maintain the educational standards of the Westwood Regional Public Schools.

The facts of this matter were educed at a hearing held on January 4, 1972, at the State Department of Education, Trenton by a hearing examiner appointed by the Commissioner of Education. A large number of exhibits were received in evidence. Additional documentary evidence was received on January 24, 1972,

at the request of the hearing examiner. The parties filed briefs following the hearing. The report of the hearing examiner is as follows:

At the annual School election held February 2, 1971, the voters of the district rejected the Board's proposal to raise $4,492,878 for current expenses and $56,836 for capital outlay. On February 9, 1971, the Board delivered to each member of the respective governing bodies of the Borough of Westwood and the Township of Washington an itemization of the defeated budget, in order to secure from both Councils their determination of the amount of local tax monies required to maintain a thorough and efficient school system.

After reviewing the defeated budget and consulting with the Board on March 3, 1971, and March 9, 1971, the Mayor and Council of both the Borough of Westwood and the Township of Washington adopted similar resolutions (Exhibit P-15) on March 9, 1971, certifying to the Bergen County Board of Taxation the amounts of $4,350,208 for current expenses and $26,836 for capital outlay for the 1971-72 school year for a total reduction of $142,670 in current expenses and $30,000 in capital outlay. The reduction of the current expenses appropriation is appealed herein as the result of the resolution adopted by the Board on March 23, 1971. (Exhibit P-16)

As part of their joint determination, both Councils suggested items of the budget in which they believed economies could be effected without harm to the educational program, as follows:

ACCT.	ITEM	BUDGETED BY BOARD	PROPOSED BY COUNCILS	AMOUNT OF REDUCTION
J110B	Sal.-Bd. Secy.'s Off.	$ 48,210	$ 44,476	$ 3,734
J110F	Sal.-Supt.'s Off.	99,220	59,836	39,384
J110J	Sal.-Admin. Bldgs. & Grounds	11,500	11,196	304
J211	Sal.-Principals	201,988	160,980	41,008
J212	Sal.-Directors	58,016	51,837	6,179
J214B	Sal.-Guidance Pers.	149,765	137,765	12,000
J215A	Sal.-Princ.'s Secys.	104,204	95,590	8,614
J215C	Sal.-Instr. Staff Secys.	54,157	50,596	3,561
J410A	Sal.-Health Serv.	91,810	84,507	7,303
J510B	Sal.-Bus Drivers	13,500	12,544	956
J610A	Sal.-Custodians	244,200	233,235	10,965
J610B	Sal.-Grounds Pers.	25,515	24,686	829
J710B	Sal.-Maintenance	38,470	37,219	1,251
J730A	Instr. Equip. Repair	13,202	11,202	2,000
J730B	Repl. of Drapes	4,781	2,795	1,986
J1010	Sal.-Extra Curr. Activs.	41,475	38,879	2,596
	TOTALS	$1,200,013	$1,057,343	$142,670

On the basis of the documentary evidence and oral testimony educed at the hearing, the findings and recommendations of the hearing examiner with respect to each of the items in dispute are set forth as follows:

J110B Salaries – Board Secretary's Office *Reduction $3,734*

The Board budgeted a total amount of $48,210 for salaries for the Board Secretary – Business Administrator, four secretarial employees and a sum for

extra summer assistance and substitutes' pay. Actual contractual expenditures for 1971-72 total $46,267.56, including $455 expended for summer help and $61.56 for substitutes, as of January 4, 1972. The unencumbered balance is $1,942.44. The minutes of the regular meeting of the Board of Education held January 11, 1971, (Exhibit P-22) disclose the adoption of a salary and vacation policy for secretarial employees for the period beginning July 1, 1971, and ending June 30, 1972. (Exhibit P-20) Testimony educed from the Superintendent indicated that the 1971-72 salary policy provided a regular increment plus a 7.4 percent cost-of-living increment, for each employee in this category. Also, the total increase in this line item, including the regular increments and cost-of-living increments is approximately 14 percent of the prior year's salary total. Actual expenditures totaling $41,801.13 are listed for line item J110B in the audit report for 1970-71. (Exhibit P-28) The Board's contention here is that a reduction of $3,734 is unreasonable in that it precludes the Board from honoring salaries which are commensurate with a properly-adopted salary policy. The joint argument of both Councils is twofold; namely, that the percentage of increase granted by the Board's salary policy is excessive, and that a defeat of the proposed school budget by the voters permits the governing bodies to lawfully reduce the increases provided and prohibits the Board from implementing the adopted salary policy.

The hearing examiner will submit a recommendation in regard to this line item, and, in view of the fact that the aforestated legal argument arises concerning other Board personnel listed under additional budgetary line items, this argument of law will be referred to the Commissioner for determination at the conclusion of the report of the hearing examiner.

The hearing examiner recommends that the amount of $1,792 be restored to line item J210B to provide for the total salaries contracted for 1971-72 in accordance with the Board's salary policy, and that the balance of the original reduction, namely, $1,942, be sustained. The hearing examiner further recommends that in order to clearly differentiate between the salaries budgeted, this line item should be sub-divided with clerical personnel listed in a separate item.

J110F Salaries – Superintendent's Office *Reduction $39,384*

The Board's budgetary provisions for this line item total $99,220 for salaries of the Superintendent, the assistant superintendent, a data processing operator, a switchboard operator, three secretaries and a part-time summer switchboard operator. The actual contracted expenditures as of January 4, 1972, total $87,181.25. Salaries for the four secretarial and clerical personnel are based upon the salary policy adopted by the Board on January 11, 1971, for the 1971-72 fiscal year. (Exhibit P-20)

The reduction of $39,384 by the governing bodies includes the elimination of $28,142 for the position of assistant superintendent of schools plus all salary increments in excess of 7.4 percent increase deemed appropriate by both Councils.

The testimony educed discloses that the school district is comprised of one high school, one middle school and five elementary schools with a total enrollment of 4,944 pupils and a total staff of 367 full-time employees (Exhibit P-25), both professional and non-professional. The school district has had the position of assistant superintendent for a period of twenty years, and this position has included and now includes responsibilities in the areas of curriculum and instruction, staffing, budgeting, transportation, buildings and grounds, construction projects, summer school, adult education and special education.

Councils aver that the position of assistant superintendent can be eliminated because major construction is substantially completed. Also, Councils determined that a ceiling of $30,000 should be set on the salary for the position of Superintendent, and no salary increases for other personnel included in this line item should exceed 7.4 percent.

The hearing examiner recommends that the sum of $27,346 be restored to provide for the salary of the assistant superintendent and the salary increment for the Superintendent as well as the increments for secretarial personnel set forth in the Board's salary policy. (Exhibit P-20) The balance of the reduction, namely, $12,038, should be sustained. The hearing examiner also recommends that this line item be sub-divided to reflect the salaries of the professional employees under one line item and the secretarial and clerical employees under a separate line item in order to provide a clearer delineation of the budgetary provisions.

J110F Salaries – Admin. of Bldgs. and Grounds *Reduction $304*

This line item represents the salary for the supervisor of buildings and grounds, who has general supervisory responsibility for a total work force of thirty-nine janitorial and maintenance personnel.

The budgeted amount of $11,500 includes an increment plus a 7.4 percent cost-of-living increment totaling $1,075 above the salary of $10,425 paid the previous year. This salary is calculated by multiplying the index of 1.19 times the maximum step of $9,670 on Schedule A of the Board's salary guide policy for custodial and maintenance personnel (Exhibit P-18), which was adopted at the regular meeting of the Board of Education held January 11, 1971, (Exhibit P-22) and which is effective for the period beginning July 1, 1971, and ending June 30, 1973. A careful scrutiny of this Board policy (Exhibit P-18) discloses no provision for either this position or an index figure for calculating the salary for the position. Also, the position of supervisor of buildings and grounds does not appear in the list of administrative staff positions in the Board's policy for an administrative salary guide. (Exhibit P-19)

The hearing examiner recommends that absent any evidential policy which would fix and determine the salary increase of $1,075 for 1971-72, the reduction of $304 remain undisturbed.

J211 Salaries – Principals *Reduction $41,008*

This line item includes the salaries for ten principals and vice-principals in the elementary schools, the middle school and the high school. The amount of $20,000 was budgeted to provide for a second vice-principal for the high school for 1971-72. This new position was staffed at the actual salary of $18,144. The reduction proposed by Councils included the elimination of $20,000 for the second vice-principalship and the elimination of all salary increments in excess of 7.4 percent.

Testimony of the Board's witnesses disclosed that the high school organizational plan for 1971-72 was changed from a three-year plan of grades Ten through Twelve to a four-year plan including grades Nine through Twelve, with an enrollment of 1,539 pupils and a professional staff of ninety-nine persons.

The salaries for the administrative staff are calculated on the basis of a salary policy (Exhibit P-19) adopted by the Board at a regular meeting held January 12, 1970, for the period beginning July 1, 1970, and ending June 30, 1971. (Exhibit P-22) This policy is an index guide, which is applied to the teachers' salary guide applicable to the appropriate school year.

The parties to these proceedings agree that the amounts budgeted for the salaries of teaching staff members for 1971-72 are not in dispute.

The total amount encumbered in this line item for 1971-72 is $198,204. The salaries which comprise this total were calculated by applying the administrative index guide (Exhibit P-19) to the salary guide for teaching staff members for 1971-72 and 1972-73 (Exhibit P-21), which was adopted at a regular meeting of the Board of Education held February 8, 1971. (Exhibit P-22)

The hearing examiner recommends that the amount of $37,224 be restored to line item J211 to provide for the necessary position of vice-principal in the high school, and to permit the honoring of administrative salary obligations in accordance with the Board's salary policy for administrative personnel. The reduction balance of $3,784 should be sustained.

J212 Salaries – Directors *Reduction $6,179*

This line item includes the salaries of the three directors of guidance, special education, and curriculum and instruction, respectively. The amount budgeted for 1971-72 for these three salaries is $58,016, of which $55,102 is an encumbered contracted obligation in accordance with the Board's administrative salary guide policy. (Exhibit P-19) These salaries were calculated by applying the index quantity to the 1971-72 teachers' salary guide for 1971-72. (Exhibit P-21) The recommended reduction by Councils represents the amount in excess of a 7.4 percent increase above the prior year's salaries. The identical arguments propounded in regard to line item J211 are applied in this instance. Accordingly, the hearing examiner recommends the restoration of $3,265 to this line item and the sustaining of the balance of $2,914.

J214B Salaries – Guidance Personnel *Reduction $12,000*

The Board budgeted a total of $149,765 for nine existing guidance counselors for the high school and middle school, plus one additional counselor for the high school for 1971-72. A total of $146,922 is encumbered. (Exhibit P-26) Seven guidance counselors are assigned to the high school with an enrollment of approximately 1,549 pupils, which provides a ratio of one counselor for approximately 221 pupils. In the middle school, three counselors serve 748 pupils, providing a ratio of one counselor for 249 pupils. The average of these ratios is one counselor per 230 pupils. The average ratio for 1970-71 was one counselor per 260 pupils.

The hearing examiner can understand that the changing of the high school from a three-year grade span to a four-year grade span persuaded the Board to plan an increase in guidance services. If the additional counselor were eliminated, the high school ratio would be one to 258 pupils, because it would be unrealistic to increase the middle school ratio to one counselor per 374 pupils. The Board's plan is desirable; however, the criteria for the restoration of a proposed budget reduction following a defeat by the voters is necessity and not desirability. The reduction permits the Board to sustain the same level of guidance services for the high school as existed in 1970-71. The hearing examiner recommends that Councils' proposed reduction of $12,000 be sustained.

J215A Salaries – Principals' Secretaries *Reduction $8,614*

The Board budgeted the amount of $104,204 for fourteen existing secretarial and clerical personnel for the principals of the various schools, which included $6,000 for one additional secretary for the high school. Salary increments for the fourteen secretarial personnel were provided for by the clerical salary guide for 1971-72. (Exhibit P-20) The additional secretarial position was vacant at the time of the hearing. A total of $92,844 has been encumbered by salary contracts for 1971-72. (Exhibit P-26)

Testimony of the Board's witnesses did not substantiate the clear need for restoration of the proposed reduction of $6,000 for the additional secretarial position. The hearing examiner recommends that $2,614 be restored to this line item, and that the remaining $6,000 reduction proposed by Councils be sustained.

J215C Salaries – Instructional Staff Secretaries *Reduction $3,561*

Councils jointly reduced the Board's proposed line item of $54,157 by $3,561 for the stated reason that the total salary increments for 1971-72 exceeded 7.4 percent of the amount budgeted for the prior year. The Board's proposal to add one half-time secretary for an elementary school library was not opposed. As was previously stated, the salaries for the secretarial and clerical staff personnel for 1971-72 are based upon the Board's salary policy for these employees. (Exhibit P-20)

The hearing examiner finds the $3,561 reduction suggested by Councils is required to provide for salary increments, the one-half-time clerk for the library and for substitute pay. Accordingly, it is recommended that this reduction be restored.

J410A Salaries – Health Services *Reduction $7,303*

The reduction of $7,303 proposed by Councils consists of $4,500 for one additional half-time nurse for the high school, and $2,803 for salary increments in excess of 7.4 percent. The salary guide policy for school nurses is contained within the Board's salary policy for teaching staff personnel. (Exhibit P-21) Although Councils did not contest the Board's salary policy for classroom teachers, the guide for school nurses is attacked on the grounds that salary increments contained therein exceed the 7.4 percent cost-of-living increase. In the judgment of the hearing examiner, Council's approval of the teaching staff salary guide policy (Exhibit P-21), which was formally adopted on February 8, 1972, (Exhibit P-22) following the annual school election, precludes singling out nurses, who are also included in the policy.

The Board contends that the increased pupil enrollment in the high school resulting from the additional of the Ninth Grade in 1971-72, demonstrates the need for an additional half-time nurse. The hearing examiner finds that this testimony may indicate the desirability for this increase of health service personnel, but it does not provide a clear showing of necessity. Therefore, it is recommended that the suggested reduction of $4,500 be allowed to stand, and the balance of $2,803 for increments provided by the Board's teaching-staff salary policy for 1971-72 be restored.

J510B Salaries – Bus Drivers *Reduction $956*

The Board proposed the amount of $13,500 for three bus drivers included in this line item. Councils jointly agreed to reduce this item by $956 to $12,544 because the proposed salary increments for these positions exceeded 7.4 percent. The actual amount encumbered for 1971-72 under line-item J510B is $12,485, which presently provides a balance of only $59 to provide for substitute pay. The hearing examiner recommends that $300 of this suggested reduction of $956 be restored to provide funds for substitute pay, and that the balance of $656 be sustained.

J610A Salaries – Custodians *Reduction $10,965*

The Board's budget proposed a total amount of $244,200 for a total of thirty-two custodians. The joint reduction of $10,965 recommended by Councils includes $6,600 for an existing vacant position deemed unnecessary, and $4,365 for salary increments in excess of 7.4 percent of the amount paid for 1970-71.

Testimony provided by the Board's witnesses disclosed the fact that no vacancy existed at the time of the hearing. One additional custodian had been employed during 1970-71 when a new elementary school was opened, and one additional custodian had been employed when a new addition to the high school

was completed. The salary increments for all custodial employees for 1971-72 were provided for in a salary guide policy (Exhibit P-18) adopted at a regular meeting of the Board of Education held January 11, 1971. (Exhibit P-22)

The hearing examiner recommends that the entire amount of $10,965 be restored to this line-item account.

J610B Salaries – Grounds Personnel *Reduction $829*

This line-item account includes three custodial employees assigned to the care of the grounds. As was previously stated, the 1971-72 salaries for these custodial personnel are provided for by the Board's maintenance and custodial salary guide policy. (Exhibit P-18) Therefore, the hearing examiner recommends the restoration of the suggested reduction of $829 set by Councils as exceeding increments of 7.4 percent.

The hearing officer notices that the Board contends that an encumbrance of $26,000.04 which exceeds the originally budgeted total of $25,515, on the grounds that a large amount of overtime pay was necessitated by an emergency condition. The hearing examiner also takes notice of the fact that line-item J610C provides $10,000 for custodial overtime pay, and that overtime for the grounds custodial personnel can properly be charged to line item J610C.

J710B Salaries – Maintenance *Reduction $1,251*

This line item includes salaries for four members of the maintenance staff. Councils reduced this account on the grounds that the salary increments for 1971-72 exceeded 7.4 percent. These maintenance personnel are included in the Board's maintenance and custodial staff-salary guide policy (Exhibit P-18) adopted January 11, 1971 (Exhibit P-22). The hearing examiner recommends the restoration of the $1,251 reduction proposed by Councils.

J730A Instructional Equipment Replacement *Reduction $2,000*

The Board budgeted a net amount of $3,970 as part of this line item for the replacement of thirteen electric typewriters, which are used for instructional purposes. The suggested reduction of $2,000 is based upon the contention that these machines are being prematurely traded. Testimony of the Board's witnesses disclosed the fact that these machines are seven years old and are utilized seven periods per day for instruction in typewriting. These machines can be traded in now at the prices which prevailed prior to July 1, 1971, when general price increases were announced. The hearing examiner finds that it would be false economy to forgo trading in these machines, particularly in view of the heavy use by inexperienced pupils who are learning to typewrite.

Accordingly, it is recommended that the total reduction of $2,000 be restored.

J730B Replacement of Draperies *Reduction $1,986*

The reduction of $1,986 in this line item for non-instructional equipment replacement represents the amount budgeted for draperies for the stage in one

elementary school. No testimony was presented by the Board to prove the necessity for this item; therefore, it is recommended that the reduction be sustained.

J1010 Salaries – Extra-Curricular Activs. *Reduction $2,596*

The reduction of $2,596 proposed by Councils is based upon the contention that increments in honoraria for extra-classroom duties exceeded 7.4 for the 1971-72 school year. The Board avers, and Councils do not dispute, that the pay scales for these honoraria are set forth in the salary guide policy for teaching staff personnel (Exhibit P-21), which was adopted by the Board on February 8, 1972. (Exhibit P-22)

The hearing examiner recommends the restoration of the proposed reduction of $2,596 for these extra-classroom duty honoraria as set forth in the Board's salary-guide policy. (Exhibit P-21)

Unexpended Free Balance (1971-72) $75,000

The Board's audit report for fiscal year 1970-71 (Exhibit P-28) discloses a current expense balance of $188,985.96 as of June 30, 1971. Of this total, the amount of $75,000 was appropriated as revenue for the 1971-72 school budget, leaving an unappropriated free balance of $113,985.96.

In view of the fact that this budget was defeated by the voters and that the foreseeable needs of the school district during the next four months will not logically exceed any large portion of the unappropriated free balance, the hearing examiner recommends that $25,000 of the existing $113,985.96 be appropriated to the current 1971-72 school budget. This will leave an unappropriated free balance, for current expense purposes, totaling $88,985.96 for the period ending June 30, 1972, as follows:

Current Expense Balance - July 1, 1971	$188,985.96
Less: Amount Appropriated for 1971-72	-75,000.00
Unappropriated Free Balance July 1, 1971	113,985.96
Less: Additional Amount Appropriated	-25,000.00
Revised Unappropriated Free Balance	$ 88,985.96

The hearing examiner's recommendations are recapitulated as follows:

ACCT.	ITEM	PROPOSED REDUCTION	AMOUNT RESTORED	AMOUNT NOT RESTORED
J11B	Sal.-Board Secy.'s Off.	$ 3,734	$ 1,792	$ 1,942
J110F	Sal.-Supt.'s Off.	39,384	27,346	12,038
J110J	Sal.-Admin. Bldgs. & Grds.	304	----	304
J211	Sal.-Principals	41,008	37,224	3,784
J212	Sal.-Directors	6,179	3,265	2,914
J214B	Sal.-Guidance Pers.	12,000	----	12,000
J215A	Sal.-Princ.'s Secys.	8,614	2,614	6,000
J215C	Sal.-Instr. Staff Secys.	3,561	3,561	----
J410A	Sal.-Health Serv.	7,303	2,803	4,500
J510B	Sal.-Bus Drivers	956	300	656

J610A	Sal.-Custodians	10,965	10,965	----
J610B	Sal.-Ground Pers.	829	829	----
J710B	Sal.-Maintenance	1,251	1,251	----
J730A	Inst. Equip. Repair	2,000	2,000	----
J730B	Repl. of Drapes	1,986	----	1,986
J1010	Sal.-Extra Curr. Activs.	2,596	2,596	----
	TOTALS	$142,670	$96,546	$46,124
Less:	Balance Appropriated		25,000	
	TOTALS	$142,670	$71,546	$46,124

* * * *

The Commissioner has reviewed the report and recommendations of the hearing examiner as set forth above and the record in the instant matter. The first item, which the Commissioner must consider in the matter herein controverted, is the issue raised by Councils concerning the validity of the salary policies and salary contracts adopted by the Board of Education.

As shown above in the report of the hearing examiner, Councils have proposed reductions in the total salary accounts as reflected in various line items for administrative salaries, clerical and secretarial salaries, nurses' salaries and custodial and maintenance salaries. In each instance, Councils argue that salary increases up to 7.4 percent of the salaries paid in 1970-71 were adequate and reasonable for 1971-72, but any amounts in excess of 7.4 percent were not reasonable. Also, Councils aver that the Board cannot implement salary policies and individual salary contracts unless the current expense account of the proposed school budget is approved by the voters at the annual school election. Therefore, Councils contend that they could lawfully reduce the Board's proposed salary policies and salary contracts, which provided for salary increments in excess of 7.4 percent, and which Councils considered unreasonable.

In their Brief, respondents cite *Newark Teachers' Association v. Board of Education of the City of Newark et al.*, 108 *N.J. Super.* 34 (*Law Div.* 1969), affirmed 57 *N.J.* 100 (1970). In that case, the Newark Board of Education adopted a resolution on August 5, 1969, requesting the Board of School Estimate to certify to the City Council a sum, in the form of an emergency or supplemental appropriation, to implement a new salary policy to be effective for 1969-70 only upon receipt of the total funds necessary for implementation. The request was rejected by the Board of School Estimate on the grounds that it did not constitute a *bona fide* emergency under *N.J.S.A.* 18A:22-21 to 23. The Law Division of the Superior Court found for the defendants, and the New Jersey Supreme Court affirmed.

In the instant matter, the sum budgeted by the Board for the salaries of teachers is not in dispute. At the date of the annual school election held February 1, 1972, the Board and the local education association had concluded collective negotiations as required by *N.J.S.A.* 34:13A-1 *et seq.*, and had agreed upon a salary policy, but the Board had not adopted the salary policy, including a salary scale, as set forth in *N.J.S.A.* 18A:29-4.1, which reads as follows:

> "A board of education of any district may adopt a salary policy, including salary schedules for all *full-time teaching staff members* which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of two years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year." (*Emphasis ours.*)

The Board and Councils agree that no action was taken by Councils to reduce the amounts budgeted by the Board for teachers salaries for 1971-72. The Board subsequently adopted a 1971-72 salary policy, including a salary schedule (Exhibit P-21) at a regular meeting held February 8, 1972, (Exhibit P-22), which incorporated the negotiated salary provisions. This salary policy (Exhibit P-21) covers full-time classroom teachers, nurses and honoraria for certain extra-classroom duties, including coaching of various athletic teams.

The term "teaching staff members" which appears in *N.J.S.A.* 18A:29-4.1, *supra*, is defined by *N.J.S.A.* 18A:1-1 as follows:

> " 'Teaching staff member' means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse."

A salary policy and salary schedule for principals, vice-principals and directors (Exhibit P-19) was adopted by the Board at a regular meeting held January 12, 1970, (Exhibit P-22) for the period beginning July 1, 1970, and ending June 30, 1971, or until a subsequent successor agreement would be negotiated, which would result in the adoption of a new salary guide policy by the Board. This administrative salary guide provides for the application of an index value to the teachers' salary guide for the appropriate school year; the index guide was applied to the 1971-72 teachers salary guide for the administrative positions listed above.

In the judgment of the Commissioner, this administrative salary guide policy (Exhibit P-19) enjoys the protection afforded by *N.J.S.A.* 18A:29-4.1, *supra*, and the right of the Board to set such policies cannot be usurped by the Councils. This salary policy was adopted prior to voter action at the annual school election, and the funds necessary to implement the policy in 1971-72 were properly budgeted. Thus, the Board's action in this regard meets the

requirements of the statute, *N.J.S.A.* 18A:29-4.1, *supra*, and the interpretation set forth by the New Jersey Supreme Court in *Newark Teachers Assoc. v. Newark Board of Education et al., supra.*

In numerous previous decisions the Commissioner has held that the authority to adopt salary policies including salary schedules for all teaching staff members has been expressly conferred upon local boards of education by the Legislature (*N.J.S.A.* 18A:29-4.1 *supra*) and any attempt by Councils to substitute their judgment for that of the local Board of Education is illegal. *Ross v. Board of Education of the City of Rahway, Union County*, 1968 *S.L.D.* 29; *Board of Education of the Township of South Brunswick v. Township Committee of the Township of South Brunswick*, 1968 *S.L.D.* 168. A salary policy may also include provisions for certain "fringe benefits" such as hospitalization insurance. *Board of Education of Cliffside Park v. Mayor and Council of Cliffside Park*, 1967 *S.L.D.* 117, affirmed State Board of Education January 3, 1968, affirmed 100 *N.J.Super*, 490 (*App. Div.* 1968). See also *Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon, Passaic County*, decided by Commissioner of Education February 23, 1971.

Accordingly, the Commissioner finds and determines that Councils may not reduce the contractual salaries set by the duly-adopted salary policies and salary guides for 1971-72 for teaching staff members as defined by *N.J.S.A.* 18A:1-1, *supra.*

A salary guide policy for employees in the category of clerical and secretarial personnel (Exhibit P-20) was adopted by the Board at a regular meeting held January 11, 1971, (Exhibit P-22) for the period beginning July 1, 1971, and ending June 30, 1972.

A salary guide policy for custodial and maintenance employees (Exhibit P-18) was also adopted by the Board at the January 11, 1971, regular meeting (Exhibit P-22) effective July 1, 1971, to June 30, 1973.

The enactment of the "New Jersey Employer-Employee Relations Act," *L*, 1968, *c.* 303, now *N.J.S.A.* 34:13A-1 *et seq.*, requires public employers, including local boards of education, to conduct collective negotiations, in good faith with *bona fide* representatives of recognized units of employees regarding terms of employment such as salary policies, before the board adopts such policies. The agreements reached between the parties must be set down in writing *N.J.S.A.* 34:13A-5.3. The primary purpose of this act was doubtless to afford public employees the opportunity to organize and to conduct meaningful collective negotiations with the public employing body.

The Commissioner is constrained to notice that the authority for local boards of education to formally adopt policies, including salary guide policies, has been conferred by the Legislature through the enactment of several broad statutory provisions. *N.J.S.A.* 18A:11-1 states in pertinent part that:

"The board shall ***

c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and the public school property of the district and for the *employment, regulation of conduct and discharge of its employees* *** and

d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." (*Emphasis ours.*)

Also, *N.J.S.A.* 18A:16-1 states the following:

"Each board of education, subject to the provisions of this title and of any other law *shall employ and may dismiss a secretary* or a *school business administrator* to act as secretary and *may employ* and dismiss *a superintendent of schools, a custodian of* school monies, *** *and such principals, teachers, janitors and other officers and employees,* as it shall determine, and *fix and alter their compensation* and the length of their terms of employment." (*Emphasis ours.*)

In regard to the employment of teaching staff members, *N.J.S.A.* 18A:27-4 reads as follows:

"Each board of education *may make rules,* not inconsistent with the provisions of this title, *governing the employment, terms* and *tenure of employment, promotion* and *dismissal* and salaries and time and mode of payment thereof of *teaching staff members* for the district, and may from time to time *change, amend* or *repeal the same,* and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto." (*Emphasis ours.*)

Local boards of education are required to appoint a secretary and to fix his compensation (*N.J.S.A.* 18A:17-5). A school business administrator may also be appointed, and his salary shall be fixed by the board (*N.J.S.A.* 18A:14-14.1). The statutes provide for the appointment of a superintendent of schools (*N.J.S.A.* 18A:17-15), assistant superintendents of schools, (*N.J.S.A.* 18A:17-16) and fixing their salaries (*N.J.S.A.* 18A:17-19).

Local boards of education are required to make rules for the employment, discharge, management and control of the public school janitor, janitor engineers, custodians, or janitorial employees (*N.J.S.A.* 18A:17-41).

In *Victor Porcelli et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education,* 108 *N.J. Super.* 301 (*App. Div.* 1969), the Court stated the following at p. 309:

" *** These statutory provisions [*N.J.S.A.* 18A:16-1, *N.J.S.A.* 18A:11-1, and *N.J.S.A.* 18A:27-4] and *N.J.S.A.* 34:13A-1 *et seq.*, *supra*, are in *pari materia*, and it is axiomatic that such enactments are to be construed together 'as a unitary and harmonious whole, in order that each may be fully effective.' *Clifton v. Passaic County Board of Taxation*, *supra*, 28 *N.J.*, at 421. Accord, *Brewer v. Porch*, 53 *N.J.* 167, 174 (1969). *** "

In the judgment of the Commissioner, salary guide policies for non-teaching staff personnel, formally adopted by a local board of education, must be honored as proper exercises of the lawful discretion of the board, unless the terms of such policies are so grossly extravagant as to be unreasonable. If the attack on duly-adopted salary policies for non-teaching staff personnel, such as exist in the particular circumstances of this case, is made on the grounds of unreasonableness, the Commissioner will decide the matter on its merits. *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966)

In the instant matter, the Commissioner finds and so holds that the salary guide policies adopted by the Board for custodial and maintenance personnel and clerical and secretarial personnel are reasonable and in accord with salary increments granted to teaching staff members.

The Commissioner further concurs with the findings and recommendations as set forth herein. Accordingly, the Commissioner directs the Mayors and Councils of the Borough of Westwood and the Township of Washington respectively, to certify to the Bergen County Board of Taxation, in addition to the amounts previously certified for the 1971-72 school year, the sum of $71,546 to be raised by taxation for the current expenses of the Westwood Regional School District in the 1971-72 school year.

COMMISSIONER OF EDUCATION

March 24, 1972

In the Matter of the Annual School Election Held in the School District of the Borough of Bellmawr, Camden County.

COMMISSIONER OF EDUCATION

Decision

For the Board, Lee B. Laskin, Esq.

Pursuant to a letter request filed by Mary E. Murphy alleging irregularities in the conduct of the annual school election held on February 8, 1972, in the Borough of Bellmawr, an inquiry was conducted by a hearing examiner designated by the Commissioner of Education at the office of the Camden County Superintendent of Schools on March 14, 1972. The report of the hearing examiner is as follows:

The announced results of the balloting for the election of school board members was not challenged; however, allegations of improper conduct of the election are as follows:

(1) Mary E. Murphy, hereinafter "Complainant," avers that her appointed challengers were told to sit at a table and write down the names of the voters as they came in to cast their ballots, and that they were denied their rights as challengers. The challengers testified that they began writing down the names of the voters and that the list of names that they were compiling was not the official poll list.

The challengers testified further that they did not challenge any person's right to vote or be in the polling place, nor were they prevented from challenging anyone. They simply stated that they found no reason to challenge any voter, and they did not know of any ineligible voters who voted.

Under examination by the School Board's counsel, they testified further that they did not know what to do as challengers and did not ask anyone what they should do at the polls.

On the basis of the testimony of complainant's challengers, the hearing examiner recommends that the Commissioner determine that the challengers, *ante*, were not denied their right to challenge voters pursuant to the statutory authority of *N.J.S.A.* 18A:14-18, which reads in pertinent part as follows:

"Each challenger may in the polling district for which he is appointed:

a. Challenge the right of any person to vote in such district at any time after the person claims such right and before his ballot is deposited in the ballot box, or before the screen, hood or curtain of the voting machine is closed and ask all necessary questions to determine this right. *** "

(2) Complainant avers also that a lady who works for the Bellmawr Board of Education was loitering near the polls and had no right to be there. Complainant's challengers testified that they saw the lady in question at the polls on three separate occasions, but did not see her talk to anyone. No testimony was educed that the lady tried in any way to influence any voter in the district; however, complainant avers that the lady's very presence was sufficient to influence some voters and possibly alter the result of the election.

The lady in question does not deny appearing at the polling place several times; however, she testified that she appeared once to vote, a second time to drive a voter to the polls and a third time with her cousin, who had a baby, and that she held the baby while her cousin voted. The hearing examiner finds that complainant's mere allegation that one lady's presence influenced voters to cast ballots in a certain manner was not supported by any of the testimony. There was no finding or evidence that the lady did anything improper whatsoever, nor was there any finding that the lady "had been back and forth all day." (Complainant's letter - p.3)

The hearing examiner recommends, therefore, that this allegation, absent any corroborating evidence or testimony, be dismissed.

(3) Complainant alleges finally that the judge of the election was in error for not asking the lady to leave the polling place, and that the judge of the election improperly asked complainant to leave the polling place.

The judge of the election testified that she did not tell complainant's challengers to sit down and write names, as charged, but that the challengers had asked her what they should do. She testified that she did not know complainant was a candidate and that she did not ask complainant to leave the room. She further testified that everything was done to conduct a proper election, and that the complainant and her challengers were given every privilege allowed them by the applicable statutes.

The hearing examiner opines that the testimony of the judge of elections, supported by the testimony of one of the election workers, was rational and credible, and he concludes, therefore, that her description of the events at the polling place describe most accurately the conduct of the election on February 8, 1972.

* * * *

The Commissioner has read the report, findings and recommendations of the hearing examiner. Although *N.J.S.A.* 18A:14-73 specifically prescribes that no one shall "*** loiter, electioneer or solicit ***" votes, there has been no showing that any of these offenses occurred. The Commissioner would condemn any violations of this statute or any of the statutes governing school board elections; however, in the case herein, no evidence has been educed that any such violations occurred.

The Commissioner is constrained to comment, also, about the compilation of an additional list of voters at the polling place by complainant's challengers. The statutory power given to challengers clearly limits their function to questioning " *** the right of any person to vote *** " and to " *** Be present while the votes are being counted ***." *N.J.S.A.* 18A:14-18, *supra.* Nowhere does any statute authorize a challenger or other person to make, what is in effect, a duplicate signature copy record.

Absent, therefore, any finding by the hearing examiner that there were statutory violations that would influence or change the results of the election or that the conduct in the polling place was so improper as to invalidate the election, the Commissioner determines that the election will stand as announced and that there is no cause for any further determination.

For the reasons expressed herein, the complaint is hereby dismissed.

COMMISSIONER OF EDUCATION

March 30, 1972

In the Matter of the Tenure Hearing of Joseph N. Cortese,
School District of the Borough of Keansburg,
Monmouth County.

COMMISSIONER OF EDUCATION

Decision

For the Complainant Board of Education, Benjamin Gruber, Esq.

For the Respondent, Saling, Moore, O'Mara & Coogan (John A. Ricciardi, Esq. and Francis X. Moore, Esq., of Counsel)

Joseph N. Cortese, hereinafter "respondent," a tenured elementary school teacher employed for fourteen years by the Borough of Keansburg Board of Education, hereinafter "Board," has been charged with conduct unbecoming a teacher and five counts of using corporal punishment, in violation of *N.J.S.A.* 18A:6-1, against some of the students in his charge. The Board certified to the Commissioner of Education "that the said Joseph N. Cortese should be dismissed as a teacher in the School System.***" (Board Resolution)

A hearing in this matter was held in the Administration Building of the Board, 59 Tindall Road, Middletown on September 22, 1971, and September 23, 1971, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

CHARGE NO. 1

"On April 19, 1967, Mr. Cortese did commit an assault and battery on [D.B.], a student in the Music Class conducted by Mr. Cortese. As a result of the incident the student left the room, ran out of the building and ran home."

D.B. testified that, during the performance of a square dance in which the pupils were being instructed by respondent, he erroneously went into the center of the circle instead of outside the circle. He said the teacher, who was inside the circle, struck him with his hand in the area of the buttocks, yelled at him and directed him to his proper place in the line.

Respondent denies assaulting D.B., and comments that he has no clear recollection of this event which occurred about four and one-half years ago. Respondent does admit that instruction in square dancing does at times require the physical touching of pupils and that he has on occasion taken students by the arm to direct them into position and has also given them "a pat on the back, to help them along." (Tr. II - pp. 6, 7)

The record and the testimony indicate that respondent was questioned by the Board about the alleged assault and battery of D.B. at the time set forth in the charge, and that the Board found no cause for action against the teacher.

The hearing examiner recommends that this stale charge, now four and one-half years old, be dismissed. The matter had been dropped by the Board only to be raised at this hearing as a bare allegation without any corroborating testimony to support the charge. Also, the testimony showed that D.B. did not remember even one person who had been a classmate at that time.

CHARGE NO. 2

"On December 17, 1970, Mr. Cortese did commit an assault and battery on a student, namely [M.R.], by striking him with his knee in the left thigh, so hard that the said [M.R.] was injured and had difficulty walking, as a result of the blow."

Although this charge indicates that M.R. was kneed in the thigh, the testimony of M.R. and his mother is that he was kneed in the back of the upper leg. M.R. admits fooling around, pushing and elbowing some of his classmates while in a long line which was passing another in going from one school building to another. Portions of that testimony are reproduced here for clarification of the charge: (Tr. I - pp. 45, 46)

"Q. O.K., did you get any medical attention for your boy?

"A. No. It was a bruise from being kneed. It wasn't that serious of a case, but he was kneed, you know, and it just got black and blue. It wasn't that serious.

"Q. Did Mr. Cortese admit to you that he kneed him?

"A. Not exactly. Just said he did it, and that was it, you know.

"Q. But, he did admit to you that he kneed your boy in the back of the leg, did he, he admitted that?

"A. He said he did.

"Q. Did he admit that he kneed your boy in the back of the leg? A. Yes.

"Q. Didn't you just testify about three seconds ago that he said no, that you don't know whether he did or not?

"A. No, he did not say no. He said he did it because he misbehaved, and I said he had no right to touch my boy.

"Q. Let me ask you this again. Did he specifically say to you that he kneed him in the leg?

"A. Not in certain words, he didn't say I kneed [M.R.].

"Q. You accused him of kneeing him?

"A. Yes, because this is what he did to my son."

However, Mr. Cortese testified as follows:

"Q. Now if you would, Mr. Cortese, with relationship to – in the point of time – Mr. [M.R.]. This asserts that on December 17, 1970, you committed an assault and battery on a student named [M.R.] by striking him with your knee in the left thigh, so that [M.R.] was injured and have [sic] difficulty walking as a result of the blow; again, the second sentence apparently applies to [M.R.]. As to the first portion of that sentence, can you tell us whether or not there was any incident with [M.R.], and what, in fact, was it?

"A. On this particular day, I was bringing my class from the high school building into the annex building. I had my class behind me, and also another class, Miss Tildsley's class, was behind my class. We would take turns, both Miss Tildsley and myself, in bringing the sixty children from one building to the next. As we passed the sixth grades, there were two classes passing my class.

"Q. How many students was that? Would you tell us that, at one point, at one time?

"A. Oh, approximately a hundred, hundred and twenty.

"Q. What then happened?

"A. I heard a commotion, someone yelling to me, Mr. Cortese. I turned around, and I saw [M.R.] elbowing a group, a number of boys, rather, as he was passing them.

"Q. And how many would this involve? How many boys were elbowing – were being elbowed by [M.R.]?

"A. I think that there were five, six, possibly seven boys. I have the name of each of the boys that were elbowed at the time.

"Q. Do you remember them offhand?

"A. No.

"Q. Okay; what then happened?

"A. As soon as I saw it, I yelled to him to stop, and knock it off, but evidentally (sic) he couldn't possibly hear me because there was a group all around them.

"Q. Was there noise at the time?

"A. Yes. They were having a ball, actually. It was that time of day, they just come (sic) out of their lunch break. I tried to push my way through the group in order to get ahold of [M.R.] and stop him, because there was no other teacher there at the time.

"Q. And how many people were you supervising, students were you supervising at that time?

"A. Well actually, sixty, I imagine.

"Q. Now, this says you assaulted and battered [M.R.]. How big is [M.R.]?

"A. Well, he's quite a large boy. He was, yes, last year, I guess close to two-hundred pounds.

"Q. And did you assault and batter him, Mr. Cortese?

"A. No; I did not.

"Q. Did you kick him?

"A. No; I did not.

"Q. Did you knee him?

"A. If I kneed him, it was an accidental kneeing, by being pushed by all the others that were around me at the time, that were unsupervised by the other teachers from the other classrooms.

"Q. Did you intentionally place your body against his, other than restraining him, in quelling the disturbance?

"A. No; I did not." (Tr. II - pp. 7, 8, 9)

The hearing examiner believes that M.R. was struck or kneed in the back of the leg by the respondent. However, no determination can be made that such contact was intentional. The testimony of being kneed is also not corroborated, despite the large number of students, many of whom were friends of [M.R.'s], who were in the very location where the alleged kneeing occurred.

The hearing examiner heard testimony that approximately 120 students were moving between school buildings, and respondent had charge of sixty of those students. Apparently, the other sixty students were unsupervised according to respondent's undisputed testimony. Only after a commotion occurred between the moving classes involving pushing, shoving and elbowing, as admitted by [M.R.], did respondent move in to break up the commotion.

CHARGE NO. 3

"On December 21, 1970, Mr. Cortese struck [R.C.], in the region of the chest, causing the said [R.C.] to lose his balance and strike the wall causing minor injury to his back and head."

Irrespective of the apparent seriousness of this charge, none of the testimony adduced at the hearing indicated that there was "minor injury to his (the student's) back and head." The student testified that he and some other boys were fooling around, pushing and engaging in general horse play, when he was accidentally pushed into a girl, causing her to drop and break a bar of soap. The soap was a special sculptured and decorated piece that had been worked on for two days and was designed as a Christmas present. R.C. testified further that respondent was then called out of the classroom by the girl after she related to him what had happened and that respondent grabbed R.C. by the shirt and banged him against the wall leaving fist marks on his chest. R.C. testified also that two of the female teachers in nearby rooms came out and took him into the boys' room, raised his shirt and observed the marks on his chest.

Respondent, in answering the charge, testified as follows:

"Q. Relate the circumstances under which you were caused to go get [R.C.]?

"A. We had just completed making Christmas gifts for the mothers of the children in the classroom.

"Q. Is [R.C.] in your class?

"A. No; he is in another classroom, two doors away from mine.

"Q. Go ahead.

"A. This entailed – the work that we were doing entailed, oh, approximately two days. I had purchased small bars of soap, berries, leaves, all artificial, and we made a plaque for the mothers, for a Christmas gift, and it had taken two days to do it, and this was our final day, where we had finally glued everything together, and covered it with cellophane, and as this one girl, [L.C.], was taking it out into her locker, something happened, and she came running back into the room, crying that [R.C.] had knocked it down, and broken it. I immediately ran out. I asked [R.C.] –

"Q. How (sic), let me stop you just for a moment. When you say she had broken it, you mean she was referring to your instructional piece of material, or a property that belonged to her?

"A. Her property. This was her own property.

"Q. Go ahead. Go ahead.

"A. I ran out. I says to [R.C.] what did you do. He said nothing. I says what did you do – nothing. I grabbed him, and I shook him.

"Q. How long after the incident of her running in to you was it that you saw [R.C.] standing there?

"A. Oh, approximately thirty seconds.

"Q. Go ahead; what else happened?

"A. I then – (Tr. II - pp. 10, 11

"Q. Continue, Mr. Cortese, We were discussing the issue with relation to this [L.C.] girl crying, coming in to you, and you going out of the room.

"A. All right; I went immediately, as I said, and I had asked him what did you do. He said nothing. I might have asked him a second time, and he refused, or he didn't answer, and I shook him, and after which I might have asked him for a second time. Whether he replied, or not, I don't recall, and I shook him and then he told me what he had done. At that time, he stooped down, picked it up, because it was still on the ground, on the floor, picked it up, and he handed it to the girl. I had him ask her – or, apologize, tell her that she was sorry – that he was sorry for what he had done.

"Q. Did he apologize?

"A. Yes; as I recall he said I am sorry, and I said now say it right, so she hears you, and he apologized louder so she could hear, and I went back into the room." (Tr. II - p. 32)

The aggrieved girl, who had her project broken, testified that R.C. laughed when he made her drop and break her project and was amused by the incident.

Mrs. Tildsley, one of the teachers, who was identified by R.C. as the teacher who removed his shirt and saw the red marks on his chest, allegedly caused by respondent's fists, testified that she never entered any part of the boys' room to raise or remove R.C.'s shirt to observe any possible injury or marks on R.C.'s chest.

A pertinent portion of her testimony follows:

"Q. Miss Tildsley, yesterday, as I recall reading about this matter, [R.C.] said that you had taken him into the bathroom, and examined bruises on him. Is that true or false?

"A. That is not true. I would not take any boy into a bathroom. I'd call a man teacher.

"Q. Did you, in fact, take [R.C.] anywhere to examine bruises on [R.C.]?

"A. As far as I recollect, no." (Tr. II - p. 38)

The teacher's testimony renders R.C.'s account of the incident as unbelievable.

Respondent testified that he did shake R.C. and make him apologize for ruining the girl's project; however, there is absolutely no corroboration of his being slammed into a locker wall and punched or injured. His action at the time, he admitted, was emotional on his part because of the strain undergone by the girl caused by the recent death of her father. This tragedy in her life caused respondent to be especially protective of her and concerned for her emotional well-being.

The hearing examiner determines that respondent did in face shake R.C. as he admits he did; however, no evidence of injury or harm as charged has been proved nor did R.C. refer to any injury of his "back or head."

CHARGE NO. 4

"On November 13, 1970, Mr. Cortese did strike one [R.H.], a student, which incident was called to the attention of Mr. Cortese."

This charge was withdrawn by the Board because [R.H.] did not appear on either hearing day to testify in support of the Board's charge.

The hearing examiner recommends that this charge be dismissed.

CHARGE NO. 5

"On February 18, 1971, Mr. Cortese did inflict corporal punishment on [G.K.]."

G.K. a sixth grade pupil at the time of the incident, testified that he was improperly grabbed by the sides of his head and lifted up by respondent while on a walking class trip to a bazaar. Testimony adduced at the hearing showed that G.K. ran or walked out of line into the middle of a street while his class was going to the bazaar. His reason for doing so, he said, was to demonstrate to the entire class how big a snake he had seen on some previous occasion.

Respondent testified that he grabbed G.K. and brought him back to the shoulder of the road where he chastised him for his errant behavior. He admits yelling to G.K., warning him to stay in line and telling him to report to the office when they returned. Respondent testified also to the danger of G.K.'s breaking line and going into the road where G.K. was exposed to being struck by an automobile.

The school principal deposed twenty-five of the students who witnessed the incident, and thirteen of them said they saw a car approaching as respondent pulled G.K. to the sidewalk. The testimony was inconsistent about how and where G.K. was grabbed. Twenty-three of the students said G.K. was grabbed and pulled to the side of the road by respondent and that respondent shook him. One student said G.K. was lifted by the face, and one said only that he was pulled to the side of the road.

On the weight of the believable testimony, the hearing examiner determines that G.K. was pulled by the body or shoulders to the sidewalk where respondent shook him because of his defiance of instructions and because he possibly endangered his own life. (Tr. II - p. 15)

* * * *

The Commissioner has read the report of the hearing examiner and has examined his findings and recommendations.

With respect to Charge No. 1, the Commissioner is constrained to note that the respondent's pat on the back of the student cannot be construed as corporal punishment. The hearing examiner determined that it was administered during a square dance while directing students to their proper positions. Nor can

the Commissioner understand why such a minor incident was finally brought to his attention despite the local Board of Education's decision to drop the matter some four and one-half years ago. This charge is therefore dismissed.

As to Charge No. 2, respondent avers that his action in moving into the crowd was needed to quell a disturbance. *N.J.S.A.* 18A:6-1 reads as follows:

> "No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:
> (1) to quell a disturbance, threatening physical injury to others;
> (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
> (3) for the purpose of self-defense; and
> (4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void."

M.R. admits pushing, shoving and elbowing his classmates while in a very large group of students being moved by respondent between two school buildings.

Respondent testified that he yelled to the boys to stop the fooling around, but apparently could not be heard because of the noise they generated.

Respondent moved in quickly to break up a potentially dangerous situation as the two lines of students were passing each other. His action in this instance was completely in accord with the statutory authority granted to teachers (*N.J.S.A.* 18A; 6-1, *supra*), and no inference or determination can be made that respondent deliberately or maliciously kneed M.R. as charged. Charge No. 2 is dismissed because of lack of proof that respondent abused his discretionary authority or that his action in quelling this disturbance was inappropriate in any way.

Respondent is accused in Charge No. 3 of striking R.C. in the chest with his fists and causing injury to his back and head. There was no testimony or evidence of any injury of even the slightest degree to R.C., who testified that he had red marks on his chest, caused by respondent's fists, that were observed by two of his teachers. Only one of these teachers named by R.C. as witnessing the marks on his chest testified, and she categorically denied ever lifting R.C.'s shirt to observe his alleged injury.

Respondent, however, does not deny grabbing and shaking R.C. for breaking a project belonging to one of the girls in his class. He admits

apologizing to R.C.'s parents and admits that he was wrong in shaking R.C. Although the Commissioner cannot condone the physical punishment of students for any reason whatsoever, he can understand the cause of the depth of the emotions involved on the part of respondent in the instant matter with respect to the recent tragedy which befell the girl in his class and the resulting ruining of her project by R.C.

Charge No. 4 was withdrawn.

Respondent's action in which he admits pulling G.K. out of the middle of the road and back to the sidewalk and shaking him cannot be supported by the Commissioner as a proper disciplinary procedure. There is no doubt that the boy was wrong and possibly endangered his life by his immature and ill-advised action of darting into the middle of a road.

The Commissioner understands that the action taken by respondent was for the protection of the pupil and for his guidance for the remainder of the trip. The Commissioner finds that although the teacher did not mean to punish or harm the student, but only to force compliance with a directive for the student's personal safety, *N.J.S.A.* 18A:6-1(4), *supra*, he must determine that respondent shook the pupil as a punishment.

Charges No. 1, No. 2, and No. 4 are dismissed for the reasons stated herein.

With respect to Charges No. 3, and No. 5, the Commissioner finds that respondent did use force against R.C. and G.K. by shaking them. Although R.C. may have misbehaved or even maliciously caused the breaking of the project belonging to a girl in respondent's class, the Commissioner cannot condone the physical handling of any student as a punishment. Nor can the shaking of G.K. be condoned, even though the teacher was concerned about his safety after he darted into the street.

The Commissioner notes that corporal punishment has been prohibited in New Jersey public schools by statute since 1867. *N.J.S.A.* 18A:6-1, *supra*

With allegations of corporal punishment, the Commissioner has always been mindful that the testimony of children must be examined with great care. The Commissioner said *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 *S.L.D.* 160:

> " '***It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove

certain charges except by the testimony of children.' *Palmer v. Board of Education of Audubon*, 1939-49 *S.L.D.* 183, 188.*** " (at pp. 160, 161)

In the instant matter, with the exception of Charges No. 3 and No. 5, the Commissioner determines that respondent acted within the discretionary authority given to a teacher by statute to control his class in the particular situations herein mentioned. *N.J.S.A.* 18A:37-1 reads as follows:

"Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them."

In the Matter of the Tenure Hearing of Thomas Appleby, decided by the Commissioner of Education November 25, 1969, the Commissioner said:

"*** While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also freedom from offensive bodily touching even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 *S.L.D.* 185, 186 ***"

and:

" '***that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or punish infractions. ***' "

In examining the record herein, the Commissioner has kept in mind the penalties imposed in other cases brought before him in which teachers inflicted physical indignities upon pupils. In *Fulcomer*, *supra*, 1962 *S.L.D.* 160, remanded State Board of Education, 1963 *S.L.D.* 251, he upheld the dismissal of the teacher; however, that teacher was later reinstated without back pay. *In the Matter of the Tenure Hearing of Pauline Nickerson*, decided September 2, 1965, there was no dismissal or loss of pay. The Commissioner has ruled before about significant differences in cases involving corporal punishment of students. In *Ostergen*, *supra*, the Commissioner said:

" *** The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion each such matter must be judged in the light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.

"The Commissioner concludes after careful study of this matter that summary dismissal of the teacher for this single offense is an unnecessarily harsh penalty and not warranted in the light of all the circumstances herein. The teacher's regret of his actions, the mental anguish he has undergone over possible loss of his livelihood, the damage sustained in his professional reputation, and the efforts which he will have to exert to re-establish himself in his work are all significant aspects of the appropriate penalty for his error.***"

Although the Commissioner finds that corporal punishment of a student was committed by respondent in Charges No. 3, and No. 5, he finds that under the circumstances, respondent's action in shaking the students does not warrant his dismissal or reduction in salary.

The Commissioner directs, therefore, that respondent Joseph N. Cortese, be reinstated as a teacher in the School District of the Borough of Keansburg, and that he be reimbursed for all back pay, privileges and compensation to which he was denied during his suspension, off-set by mitigation of his earnings during the period of his suspension.

COMMISSIONER OF EDUCATION

March 30, 1972

In the Matter of the Tenure Hearing of
Joseph N. Cortese, School District of the Borough of Keansburg,
Monmouth County.

Decided by the Commissioner of Education, March 30, 1972.

STATE BOARD OF EDUCATION

Decision

For the Petitioner-Appellant, Benjamin Gruber, Esq.

For Respondent-Appellee, Saling, Moore, O'Mara & Coogan (John A. Ricciardi, Esq., and Francis X. Moore, Esq., of Counsel)

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

July 17, 1972

In the Matter of the Annual School Election in the Consolidated School District of Long Beach Island, Ocean County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for candidates for two seats on the Board of Education of the Long Beach Island Consolidated School District, Ocean County, for full terms of three years each at the annual school election held in the constituent district of the Township of Long Beach Island on February 8, 1972, were as follows:

	At Polls	Absentee	Total
Martin T. Cassidy, Jr.	184	8	192
Norman K. Bosley	195	0	195
L. R. Bud Parker	178	8	186

A letter request dated February 11, 1972, for a recount of the votes cast for candidates at the Long Beach Township polling place was received from members of the election board, who believed an error had occurred during the transcription of the final results to the Statement of Result Form at that polling place. Letters of request for a recount of the ballots cast at the same polling place were also received from Candidate Parker and the Superintendent of Schools for the Consolidated District.

Pursuant to these requests, the Commissioner directed that a recount of the votes cast at the Long Beach Township polling place be conducted. The recount was held on February 28, 1972, by an authorized representative of the Commissioner, at the office of the County Superintendent of Schools in Toms River, Ocean County.

At the conclusion of the recount, with 17 ballots reserved for the Commissioner's determination, the tally of the uncontested ballots was as follows:

	At Polls	Absentee	Total
Martin T. Cassidy, Jr.	177	8	185
Norman K. Bosley	188	0	188
L. R. Bud Parker	173	8	181

The 17 ballots reserved for the Commissioner's determination fall into five categories, as follows:

Exhibit A – consisting of five ballots having marks, in the form of crosses (x) and checks (✓), in the squares to the left of the candidates' names. On one ballot, however, the voter also encircled the name of the candidate he voted for; on another, the ballot is soiled with what appears to be a coffee stain; on two ballots, crosses (x) and checks (✓) are placed after the name of the candidates

voted for; and, on the fifth ballot, the voter placed a check (✓) before the square in addition to a cross (x) within the square to the left of the name of the candidate for whom he voted.

Exhibit B – consisting of three ballots, all of which have marks in the squares before the selected candidates' names. These ballots are referred to the Commissioner for his judgment as to whether the marks comply with *N.J.S.A.* 19:15-27, which states, in part:

> "To vote for any candidate *** the voter shall mark a cross x, plus + or check (✓) *** in the square at the left of the name of each candidate***." (See also *N.J.S.A.* 18A:14-35)

Exhibit C – consisting of four ballots. One ballot has marks in the squares before the names of two candidates; however, one of the two marks does not appear to be " *** substantially a cross x, plus + or check ✓ ***." *N.J.S.A.* 19:16-3g Another ballot, while marked with checks (✓) before the candidates' names, has one check (✓) for one candidate partially in the square, while the other check (✓) is clearly not in the square at all before the name of the candidate. The third ballot in this exhibit has marks in the squares before two candidates' names. One mark appears to be a poorly made check (✓) in the square, while the other mark appears to be a poorly made cross (x), which is outside the square. It is observed that one leg of the cross (x) in the latter mark does touch the lower right hand corner of the square. The fourth ballot has marks in the square, before two candidates' names, although one of the marks is essentially obliterated by being blacked out, while the other is a cross (x) with some added circling in the square.

Exhibit D – consisting of one ballot on which the voter indicated his choice for three candidates instead of two, as directed.

Exhibit E – consisting of four ballots, none of which have cross (x), check (✓) or plus (+) marks in the squares before the names of candidates. On two of the four ballots, one has cross (x) marks to the right of candidates' names, and the other has cross (x) marks to the left of the squares before candidates' names.

* * * *

The Commissioner, after reviewing his authorized representative's report, finds and determines each of the foregoing exhibits in the following manner:

Exhibit A – The votes on these five ballots must be counted for the candidates as cast. The only basis for rejecting these ballots would be in finding that they were so marked for purposes of identification. Title 19, Elections, to which the Commissioner looks for guidance in determining disputed election ballots, provides in *R.S.* 19:16-4:

> " *** No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by

this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board canvassing such ballots, or the *** officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot. *** "

There is no reason to suspect that these marks were made with the intent to distinguish the ballots. The additional checks (✓), and crosses (x), and the encircling of the candidate's name are methods used by the voters to emphasize their choice of candidates – although clearly unnecessary. *In the Matter of the Annual School Election Held in the Clearview Regional High School District, Gloucester County*, 1968 *S.L.D.* 34; *In the Matter of the Annual School Election Held in the Township of Stafford, Ocean County*, 1968 *S.L.D.* 59.

Exhibit B – With respect to these three ballots, the Commissioner finds that the marks in the squares to the left of the names of the candidates voted for, while poorly made, are in conformity with the statutory requirements as enunciated in *N.J.S.A.* 19:15-27, *supra*, and, more specifically, *R.S.* 19:16-3g, which, *inter alia*, states:

> "If the mark made for any candidate *** is substantially a cross x, plus +, or check ✓ ***, it shall be counted for the candidate ***."

The Commissioner finds and determines that the intent of the voter is clear on these ballots; therefore, the ballots must be counted as cast. While the marks are not perfectly made cross (x) or check (✓) marks, as in *In the Matter of the Annual School Election Held in the Township of Stafford, Ocean County, supra*, the Commissioner finds here that:

> "*** Such marks as these are not uncommon and are obviously the result of unskilled calligraphy, infirmity, poor vision or visibility, rough writing surface or some other cause rather than any attempt to distinguish a cross (x) or check (✓), is substantially within the square and clearly was not made for an improper purpose.***"

Exhibit C – On the first of the four ballots in this exhibit, the check mark to the left of the name of Candidate Cassidy, Jr., appears, at a glance, to consist of a heavy diagonal line. On closer inspection, however, it is obviously a cross (x) mark, with a lighter line actually crossing what appears to be the single diagonal line, *supra*, to form the cross (x) mark. Therefore, this mark shall be counted as one vote for Candidate Cassidy, Jr. *R.S.* 19:16-3g The mark to the left of Candidate Bosley, however, is a straight diagonal line with no other line crossing it to form a cross (x) or a plus (+). Further, there is no hook on either end of the diagonal line to form a check (✓). *R.S.* 19:15-27 and *N.J.S.A.* 18A:14-35 provide that to vote for any candidate the voter shall place a cross (x), a check (✓), or a plus (+) in the square before the candidate's name. Because the mark before Candidate Bosley's name is not a cross (x), a check (✓) or a plus (+), no vote will be allowed for him on this ballot. See *Petition of Keogh-Dwyer*, 45 *N.J.* 117 (1965).

On the second ballot in this exhibit, there are check (✓) marks to the left of the names of Candidates Bosley and Parker. Before Candidate Bosley's name, the hook of the check (✓) is inside the square, while the line attached to the hook is outside the square. The check (✓) before Candidate Parker's name is clearly outside the square in all respects. In *In the Matter of the Annual School Election Held in the School District of the Township of Voorhees, Camden County* (On Remand), the Commissioner held on page 10:

> " *** The check (✓) marks in the squares *** all extend outside the squares. These marks meet the test of substantiality ***." See *R.S.* 19:16-3g, *supra*.

In the same matter, *Voorhees, supra*, the Commissioner went on to say, also on page 10:

> " *** ballots *** have no marks whatsoever in the squares to the left of candidates' names. These ballots cannot be counted because the statutory requirements for casting a vote has not been met *** "

> *R.S.* 19:16-3c provides, *inter alia*, that:

> "If no marks are made in the squares to the left of the names of any candidates in any column ***, a vote shall not be counted for the candidates ***."

See also *N.J.S.A.* 18A:14-37 and 18A:14-55.

On this ballot, one vote for Candidate Bosley must be counted, but Candidate Parker received no vote.

For the reasons articulated in the determination of the second ballot in this exhibit, *supra*, the Commissioner finds and determines that on the third ballot Candidate Bosley received one vote and Candidate Parker received no vote.

The fourth ballot in this exhibit is marked as described, *supra*. The Commissioner finds that the mark for Candidate Cassidy does not meet the test of substantiality, as required by *R.S.* 19:16-3g, *supra*, while that test is met by the mark for Candidate Parker. Therefore, on this ballot one vote will be counted for Parker.

Exhibit D – Contains one ballot. Two Board seats from the constituent district of the Township of Long Beach Island were to be voted on at this election. The instructons on the ballot to "Vote for Two" were very clear. The voter on this one ballot selected three candidates. *R.S.* 19:16-3f provides:

> "If a voter marks more names than there are persons to be elected to an office ***, his ballot shall not be counted for that office ***."

See also *Clearview Regional, supra.*

The Commissioner, because the statutory requirements are not met, as cited, determines that this ballot cannot be counted for any candidate.

Exhibit E – This exhibit consists of four ballots, none of which have marks in the squares to the left of any candidate's name. For the reasons cited in *Voorhees Township, supra,* and the statutory requirements enunciated in *R.S.* 19:16-3c *supra,* the Commissioner determines these ballots cannot be counted for any of the candidates.

In summary, the seventeen ballots reserved for the Commissioner's determination are counted as follows:

	Exhibit A	Exhibit B	Exhibit C	Exhibit D	Exhibit E	Total
Martin T. Cassidy	3	1	1	0	0	5
Norman K. Bosley	4	1	2	0	0	7
L. R. Bud Parker	1	2	1	0	0	4

When the votes from the ballots decided by the Commissioner are added to the previous uncontested ballot totals, the final result stands as follows:

	At Polls	Absentee	Decided By Commissioner	Total
Martin T. Cassidy	177	8	5	190
Norman K. Bosley	188	0	7	195
L. R. Bud Parker	173	8	4	185

The Commissioner finds and determines that Martin T. Cassidy, Jr. and Norman K. Bosley were elected at the annual school election held on February 8, 1972, to seats on the Board of Education of the Long Beach Island Consolidated School District from the constituent district of the Township of Long Beach Island.

COMMISSIONER OF EDUCATION

March 30, 1972

In the Matter of "D.J.", by his parent,

Petitioner,

v.

The Passaic County Technical and Vocational Board of Education, and the City of Paterson Board of Education, Passaic County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Passaic County Legal Aid Society (Evan W. Zwillman, Esq., of Counsel)

For the Respondent, Passaic County Vocational and Technical Board of Education, Herman Steinberg, Esq.

For the Respondent, City of Paterson Board of Education, Robert P. Swartz, Esq.

Petitioner's son, hereinafter "D.J.," was a senior student enrolled in the Passaic County Technical and Vocational High School until October 21, 1971, when he was transferred to John F. Kennedy High School, hereinafter "JFK School," a public high school in the City of Paterson, as of October 26, 1971. D.J. was denied admittance to JFK School by the principal on the advice of counsel for the Paterson Board of Education that a unilateral transfer from the Technical and Vocational School to JFK School is improper and unacceptable. D.J. has not attended any school since October 21, 1971. His petition of appeal to the Commissioner of Education for reinstatement in the Passaic County Technical and Vocational High School was received on February 16, 1972.

Oral argument of counsel on petitioner's motion for *pendente lite* relief was heard on March 9, 1972, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner avers that D.J. has completed three full years at the Passaic County Technical and Vocational High School and that he has attended that school continuously through the date of October 21, 1971, when he was improperly transferred to JFK School. He avers that D.J. was denied admittance to JFK School and has not, therefore, attended either school since October 21, 1971. Petitioner further avers that D.J.'s transfer was without his consent, that he was not afforded an opportunity for a hearing prior to the transfer, and that he is now being denied an opportunity for an education in either school.

Therefore, petitioner prays that:

"A. The determination made by the principal of Passaic County Technical and Vocational High School to transfer D.J. be reversed.

"B. A full hearing be afforded D.J. concerning the proposed transfer and/or expulsion.

"C. A determination be made of the legality of the unilateral transfer of D.J. from the Passaic County Technical and Vocational High School to the High School within the sending district.

"D. D.J. be reinstated as a student at the Passaic County Technical and Vocational High School in order that he may continue classes for the purpose of obtaining his diploma.

"E. Pending the outcome of this litigation, D.J. immediately be reinstated as a full-time student at the Passaic County Technical and Vocational High School and be afforded the necessary extra instruction to help him catch up with his class.

"F. D.J. be afforded such further relief as may be just."

The Board of Education of the City of Paterson, hereinafter "Board," does not deny that it refused admittance to D.J. The Board avers that D.J. has attended the Technical and Vocational School for more than three years, that he is now a senior there, and that he should remain in that school to receive his high school diploma. The Board further avers that because of D.J.'s specialized program in the Technical and Vocational School, there would be little opportunity, if any, for a suitable academic program to supplement the kind of instruction he has received for the past three years.

The Board contends that D.J. was not suspended or expelled by the Technical and Vocational School, and that he was improperly transferred or released, therefore, from the Technical and Vocational School rolls.

Respondent Passaic County Technical and Vocational High School contends that it is a receiving school only, and that it has the authority not to accept, or to reject, students when it determines that they do not fit into the school's programs.

The Technical and Vocational School contends further that D.J. was extremely disruptive as a student during all of his three years at the school and that his transfer was instituted in order that the Board of Trustees of the Technical and Vocational School would not have to expel D.J.

They aver, however, that:

"1. Respondent, Passaic County Technical and Vocational High School, is a receiving district only and has the authority not to accept and/or having

accepted, to reject students who do not fit into the programs offered by the Passaic County Technical & Vocational High School.

"2. Primary responsibility for the education of residents of the City of Paterson is with the respondent, Board of Education of the City of Paterson.

"3. Petitioners were given hearings relative to the proposed transfer and agreed to the transfer following conferences with the guidance counsel team and experts provided by the Passaic County Technical & Vocational High School.

"4. The action of transferring Petitioner, [D.J.], from the Passaic County Technical & Vocational High School was based on evaluation and recommendation of the school's guidance counsellors; evaluation committee and other experts after lengthy study and evaluation.

"5. Attendance at the Passaic County Technical & Vocational High School by Petitioner, [D.J.], is disruptive to the student body and adversely affects proper operation of the school program inasmuch as the school does not offer the proper curriculum for the Petitioner.

"6. By way of alternative relief respondent, Passaic County Board of Technical and Vocational Education, seeks a determination on its right under pertinent statutes to return to the sending district any student who can not be properly educated or meet the requirements of the Passaic County Board of Technical and Vocational Education. (Respondent Technical and Vocational School Answer p. 2)

There is no dispute between the parties that D.J. has not been suspended or expelled from any school and is entitled to have his education continued. Also, apparent to the hearing examiner is the fact that the Vocational and Technical School feels that it cannot extend itself further to accommodate D.J., and that it has no further offerings in the area of technical skills in which D.J. would be interested.

The hearing examiner finds herein not only the narrow issue of which school has the legal responsibility for continuing D.J.'s education, but at this point in time, what is the most suitable educational program for D.J.

* * * *

The Commissioner has read the report and findings of the hearing examiner, and notes the apparent difficulty that D.J. has seemingly had at the Vocational and Technical School over a period of time.

There is no question that the legal responsibility to provide an education for students in each school district lies with the local board of education of that district. *N.J.S.A.* 18A:38-1 reads in part as follows:

"Public schools shall be free to the following persons over five and under 20 years of age:

(a) Any person who is domiciled within the school district ***."

The Paterson Board, acting on advice of counsel, erred in not admitting D.J. when he was sent back to JFK School and was unilaterally transferred from the Technical and Vocational School. D.J. has, in effect, suffered the loss of five months of school because he was transferred from the Technical and Vocational High School and refused admittance to JFK School.

However, there are now approximately three months of school remaining in the 1971-72 school year, and it would be impractical for D.J. to transfer to the JFK School at this point. The Commissioner directs, therefore, that D.J. be reinstated immediately in the Passaic County Technical and Vocational School. The Commissioner directs, also, that the Paterson Board of Education in keeping with its responsibilities offer a tutoring program to D.J. forthwith, in all of the academic areas in which he has been denied instruction, since his "transfer" on October 21, 1971, for the balance of this school year.

No determination is made herein that the Technical and Vocational School is responsible for all students who are initially accepted by them from public schools. The legal obligation for their education rests with the Paterson Board of Education, *N.J.S.A.* 18A:38-1, *supra*, but in the instant matter it is unrealistic to expect D.J. to go to JFK School and achieve any reasonable measure of success or have a *bona fide* opportunity to qualify for a diploma.

In the final analysis, the success or failure of D.J., subsequent to his reinstatement in school, rests with him. The Technical and Vocational School has argued that D.J. has demonstrated a pattern of behavior which was unacceptable and that that pattern was the ultimate reason for his "transfer."

It is clear to the Commissioner, and it should be clear to D.J., that any continuance of his misbehavior could result in some form of an exclusion from school, which will make it improbable that he can qualify for any diploma.

However, the Commissioner said in *John Scher v. Board of Education of West Orange, Essex County*, 1968 *S.L.D.* 92, 97:

"***It is obvious that a board of education cannot wash its hands of a problem by recourse to expulsion. While such an act may resolve an immediate problem for the school, it may likewise create a host of others involving not only the pupil but the community and society at large. The Commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem. The Commissioner urges boards of education, therefore, to recognize expulsion as a negative and defeatist

kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation.***"

The Commissioner believes that all parties concerned herein are interested in having D.J. instructed in the setting that is best for him; therefore, the Commissioner directs, in accordance with the principles enunciated herein, that D.J. be accepted in the Passaic County Technical and Vocational School immediately upon his reporting thereto.

ACTING COMMISSIONER OF EDUCATION

April 4, 1972

Adele Wildstein,

Petitioner,

v.

Board of Education of the City of Union City, Hudson County, and Fred Zuccaro, Superintendent of Schools, Bergen County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, *Pro Se*

For the Respondents, Greenwood and Weiss (Stephen G. Weiss, Esq., of Counsel)

Mrs. Adele Wildstein, petitioner, alleges that her employment as a teacher was improperly terminated by the Board of Education of the City of Union City, hereinafter "Board," and Fred Zuccaro, Superintendent of Schools. Petitioner further alleges that she was not properly compensated pursuant to the terms of her contract and that the Board did not make the proper contributions in her behalf to the New Jersey Teachers' Pension and Annuity Fund, hereinafter "TPAF." A hearing was held at the State Department of Education, Trenton, on January 11, 1972, before the Assistant Commissioner of Education in charge of Controversies and Disputes.

The narrow issues to be determined are:

(a) Was the termination of petitioner's employment proper and in accordance with the law?

(b) Were all the required contributions made to the TPAF by the Board in petitioner's behalf?

The record shows that petitioner was notified by letter from the Superintendent of Schools, dated March 10, 1971, that her employment would be terminated as of March 15, 1971, and that the Board did terminate her employment on that date. Petitioner was notified by a subsequent letter from the Superintendent, dated May 27, 1971, that she was entitled to salary at her contractual rate through May 15, 1971. Petitioner was paid, therefore, through May 15, 1971, in accordance with the 60-day termination clause in her contract. Petitioner does not deny that she has been paid as indicated, *ante*, but avers, however, that she is eligible for salary for the entire term of her contract, which was to expire on June 30, 1971. Petitioner further avers that the Board improperly withheld her additional 60 days' compensation to which she was entitled until August of 1971.

Petitioner signed a contract containing the following clause:

> "*** It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 60 days' notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term named above. ***" (R-1)

The statutes (*N.J.S.A.* 18A:27-5 and 27-7), which clearly set forth the authority for the issuance of contracts of teachers, contain no statutory proscription against the inclusion of a 60-day notice of termination clause in such contracts.

The Commissioner finds and determines, therefore, that the termination of petitioner's employment was proper, pursuant to the applicable statutes, *supra*, and that there is no defect in the Board's action of including the 60-day notice of termination clause.

Petitioner admits receiving her salary for the 60-day period from March 15, 1971, to May 15, 1971. She did not continue to perform her duties in respondent Board's school district during that 60-day period, pursuant to a determination made by the Board, in accordance with *N.J.S.A.* 18A:27-9; which reads as follows:

> "If the employment of a teaching staff member is terminated on notice, pursuant to a contract entered into with the board of education, it shall be optional with the board whether or not the member shall continue to perform his duties during the period between the giving of the notice and the date of termination of employment thereunder."

The Commissioner is constrained to comment, however, that he can find no good reason for the Board's withholding, until August 1971, payment of the remaining salary to which petitioner was entitled, in accordance with the terms of her contract. Petitioner was clearly entitled to payment of salary through May 15, 1971, and should have been so paid by the Board as soon as practicable, in accordance with its payroll procedures, after its determination to terminate her

employment. However, the Commissioner finds no unlawful action on the part of the Board. He determines, therefore, that petitioner has now received all the salary to which she is entitled by law.

The Commissioner has been informed, also, by the Teachers' Pension and Annuity Fund, that petitioner withdrew all the money to which she was entitled, because of her contributions, in February 1972, and is no longer a member of that Fund. Petitioner, therefore, has no further entitlement, nor is she eligible for any additional funds from the Teachers' Pension and Annuity Fund.

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION

April 4, 1972

In the Matter of the Annual School Election in the School District of the Township of White, Warren County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for members of the Board of Education for three seats for full terms of three years each at the annual school election held on February 8, 1972, in the school district of the Township of White, Warren County, were as follows:

	At Polls	Absentee	Total
John Romani	214	0	214
Samuel Race	243	1	244
Stewart Cramer	261	0	261
Dorris Slawik	247	1	248
Raymond Taylor	242	2	244
Frank Lukoski	189	0	189

Two other candidates received one vote each by absentee ballot.

Pursuant to a letter request dated February 9, 1972, from Mrs. Dorothy Phillips, Secretary of the White Township Board of Education, the Commissioner directed that ballots cast for Board members be recounted. The recount was conducted on February 17, 1972, at the office of the Warren County Superintendent of Schools, Belvidere, by a representative of the Commissioner. At the conclusion of the tally, with 8 ballots reserved for referral to the Commissioner, the count stood:

	At Polls	Absentee	Total
John Romani	213	0	213
Samuel Race	242	1	243
Stewart Cramer	259	0	259
Dorris Slawik	245	1	246
Raymond Taylor	240	2	242
Frank Lukoski	189	0	189

A perusal of these totals indicates that Stewart Cramer is a certain winner of one of the three seats for a term of three years on the Board of Education, since the ballots reserved for decision could not alter the result with respect to his candidacy. Similarly, the ballots reserved for decision could not affect the vote totals of John Romani and Frank Lukoski to a degree sufficient to install either of them as a clear winner of a seat on the Board. Therefore, details of the ballots reserved for decision need be reported only in those instances where the candidacies of Candidates Race, Slawik and Taylor are concerned. This report is as follows:

Five (5) of the 8 ballots reserved for decision, specifically Exhibits B, C-1, C-2, D-2 and E, are checked in a similar manner for each one of the three candidates whose totals are considered herein. Therefore, a determination with respect to the marks which these ballots contain would be rendered superfluous by the fact that such determination would apply in parallel fashion to one and all of the candidates alike. Accordingly, they need not be considered herein, since consideration of them would not alter the relative position of the candidates.

Additionally, Exhibit A need not be considered, since it contains no marks in the boxes to the left of the names of Candidates Slawik, Race, or Taylor. Such marks are required by the specific statutory prescription found in the statute, *R.S.* 19:16-3a, 16-3g. Therefore, the only ballots that remain for consideration are the two in Exhibit D-1 and F.

Exhibit D-1 contains a straight diagonal line in each of the boxes to the left of the names of Candidates Slawik and Taylor. The line contains no semblance of a bulb or a hook.

Exhibit F contains an eight-sided star in each of the boxes to the left of the names of Candidates Race and Taylor.

* * * *

The Commissioner has reviewed the report of the hearing examiner and notes that the election of a candidate to a third seat on the White Township Board of Education depends solely on an interpretation of the diagonal marks contained in the boxes to the left of the names of Candidates Slawik and Taylor on the ballots identified as Exhibit D-1.

The Commissioner finds and determines that such a mark may not be counted as a vote for either of these two candidates for the reason that the mark made in each case is not substantially a cross (x), plus (+), or check (✓) and is substantially within the square."

See also *Petition of Wade*, 39 *N.J. Super.* 520 (*App. Div.* 1956) 121 *A. 2d* 552. *In re Keogh-Dwyer*, 85 *N.J. Super.* 188 (*App. Div.* 1964); *In re Annual School Election in the Township of Union, Union County*, 1939-49 *S.L.D.* 92; *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Berkeley Heights, Union County*, 1952-53 *S.L.D.* 76; *In the Matter of the Annual School Election Held in the School District of the Borough of Bradley Beach, Monmouth County*, 1969 *S.L.D.* 44.

Having made this determination, the Commissioner observes that no discussion of Exhibit F is necessary since it contains substantially similar irregular marks to the left of the names of Race and Taylor, which would mandate parallel determinations. Such determinations could not affect the outcome of the election, since the tally now stands as follows for the following three candidates:

	Uncontested	Exhibits	Absentee	Total
Samuel Race	242	0	1	243
Dorris Slawik	245	0	1	246
Raymond Taylor	240	0	2	242

The Commissioner finds and determines that Stewart Cramer, Dorris Slawik and Samuel Race were elected to seats on the White Township Board of Education for full terms of three years each at the annual school election on February 8, 1972.

ACTING COMMISSIONER OF EDUCATION

April 5, 1972

In the Matter of the Annual School Election in the School District of the Township of Winfield Park, Union County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for members of the Board of Education for three full terms of three years each, at the annual school election held on February 8, 1972, in the School District of the Township of Winfield Park, Union County, were as follows:

	At Polls	Absentee	Total
Rose Salles	67	0	67
Charles Clementi	61	0	61
Paul DiGiano	12	0	12
Henry Bernstein	12	0	12
M. Butchko	6	0	6

Four other candidates received tallies of one or two votes each. All votes except those cast for Candidates Salles and Clementi were hand written in the space provided for such votes on the voting machines.

Pursuant to a letter request dated February 10, 1972, from Candidate Bernstein, the Commissioner directed that the votes cast for Candidates Bernstein and DiGiano be recounted. The recount was conducted on Friday, February 25, 1972, at the warehouse of the Union County Board of Elections, Scotch Plains, by an authorized representative of the Commissioner. At the conclusion of the recount, it was determined by the Commissioner's representative that a total of 33 ballots had been cast for either Henry Bernstein or Paul DiGiano or for names bearing great or little similarity. However, only eight of these ballots were written precisely with the spelling of the names as written, *ante*. The tally of these eight ballots was as follows:

Henry Bernstein – 4
Paul DiGiano – 4

The remaining 25 ballots are grouped by exhibits below for reporting purposes:

Exhibit A – There are eight ballots in this exhibit – each contains a spelling of the names differing from that indicated, *ante*, but bears specific written or phonetic similarity. Specifically, the names as written are:

Henry Ber-nstein
Henry Bernsti (two ballots)
H. Bernstien
Paul DiGiao

Paul DeGiano (two ballots)
Paul R. DiGiano

Exhibit B – Each of the six ballots, in this exhibit contains a properly spelled surname or reasonable facsimile and the correct identifying initial. The tally shows that three votes were cast for H. Bernstein, one vote for H. Berstein, and two votes for P. DiGiano.

Exhibit C – There is one ballot in this exhibit. In each of the three spaces provided for the names of write-in candidates for three seats on the Board, the voter wrote the name, H. Bernstein, one time. Thus, if counted, as written, for the one seat, which is all that one man can occupy at one time, the ballot would be afforded a triple weight.

Exhibit D – The nine ballots in this exhibit contain last names in derivations thereof, but no identifying first initial. A total of seven ballots contain the names of DiGiano, DeGiano, DiGian or Mr. DiGeono, and two contain the last names Bernstien and Bernstein.

Exhibit E – The one ballot in this exhibit contains the single name "Paul."

* * * *

The Commissioner has reviewed the report of the hearing examiner and makes the following determinations with respect to the exhibits:

Exhibit A – Four votes must be added to the tallies for both Candidates Bernstein and DiGiano. This determination is founded on a prior decision of the Commissioner in the case of *Joseph Flach, In Re Madison Borough Annual School Election*, 1938 *S.L.D.* 176. In his opinion in that case, the Commissioner was asked to determine whether votes cast for Joseph Flach, Jos. Flach, Joseph Flack, J. B. Flachs, Joe Flach, J. B. Flach, Joseph B. Flach, and Joseph F. Flach were in fact all cast by the voter for the same man – Joseph Flach. The Commissioner said in this regard, *inter alia:*

> "*** It is clearly evident that the votes cast for Mr. Flach, *with the name variously written*, were intended for Joseph Bernard Flach, and in accordance with the decision of the Commissioner of Education in *Layton v. Bedminster Township*, above cited, they should have been counted for Mr. Flach, giving him a total of 135. ***" (*Emphasis supplied.*)

The determination of the Commissioner stated in *Flach, supra*, is the same in the instant matter; four votes must be added, therefore, to the tally for Candidate Bernstein and four votes to the tally for Candidate DiGiano.

Exhibit B – Four votes must also be added to the tallies for Candidate Bernstein and two to the tally for Candidate DiGiano for the reason given with respect to the determination rendered in Exhibit A above, since six ballots each contain an identifying initial that clearly designates the choice of the voter.

Exhibit C – This ballot must be recorded as one tally for Candidate Bernstein. This determination is consistent with that rendered in *In Re Recount of Ballots Cast at the Annual School Election in the Township of Denville, Morris County*, 1958-59 *S.L.D.* 111, wherein one tally was added in similar circumstances. A decision to the contrary would represent a gross inequity in the weighting of an individual's franchise to cast one vote, since in such an event three tallies of one voter would have to be recorded for one seat.

Exhibit D – None of these ballots can be counted for Candidates Bernstein or DiGiano, since each of the ballots lacks a requisite distinguishing initial. A similar circumstance was considered by the Commissioner in *In the Matter of the Recount of Ballots Cast at the Annual School Election In the City of Estell Manor, Atlantic County*, 1957-58 *S.L.D.* 90, and also *In the Matter of the Recount of Ballots Cast In the Annual School Election in the Township of Hainesport, Burlington County*, 1951-52 *S.L.D.* 45. In this latter decision, the Commissioner said *inter alia:*

> "***the Commissioner cannot find any amendment of the General Election Law, which would permit the counting of a write-in vote in the personal choice space *with only the last name of a candidate*, and has found no subsequent decision superseding the ruling that testimony cannot be taken to prove that there is only one person with a certain name within the district. ***" (*Emphasis supplied.*)

Exhibit E – This ballot can not be added to the tally for the same reasons given with respect to the determination regarding Exhibit D above.

When the votes cast in Exhibits A-E, *supra*, are added to the eight ballots, which must definitely be tallied for Candidates Bernstein and DiGiano, the results stand as follows:

	Uncontested	A	B	C	D	E	Total
Henry Bernstein	4	4	4	1	0	0	13
Paul DiGiano	4	4	2	0	0	0	10

Accordingly, the Commissioner finds that Henry Bernstein was elected at the annual school election on February 8, 1972, to a seat on the Winfield Park Township Board of Education for a full term of three years.

ACTING COMMISSIONER OF EDUCATION

April 6, 1972

W. Blair Kennedy,

Petitioner,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Henry Bender, Esq.

For the Respondent, Asbell, Ambrose, Ergood and Asbell (Harry D. Ambrose, Esq., of Counsel)

Petitioner, a teacher employed by the Willingboro Township Board of Education, hereinafter "Board," demands judgment that he had earned a tenure status as a teacher in the Board's employ. The Board maintains that this is not the case, and that petitioner is not entitled to the benefits that the tenure laws confer.

The matter is submitted for summary judgment on the pleadings alone, and the facts of the matter are not in dispute. They may be stated succinctly as follows:

Petitioner was employed by the Board as a member of its teaching staff during the following three contract periods:

1. September 24, 1968 through June 30, 1969. It is noted here that this initial employment began after the time school had opened for "academic year" 1968-69.

2. September 1, 1969 through June 30, 1970.

3. September 1, 1970 through June 30, 1971.

Additionally, in the spring months of 1971, petitioner received, signed, and returned to the Willingboro Superintendent of Schools, a letter of intent proposing to engage his services for the school year 1971-72. This letter was subsequently updated and revised to conform to a new salary agreement negotiated between the Board and its professional staff, and on June 14, 1971, the Board officially appointed petitioner as a teaching staff member for the school year 1971-72.

One week later, on June 28, 1971, petitioner was appointed as a teacher of a class in summer school for the 1971 term, and he completed this assignment in

the summer months. However, mid-way through this employment – specifically, on July 12, 1971 – the Board voted to void the contract issued to petitioner in June to teach in its schools during the regular term scheduled to commence in September 1971. Petitioner was notified of this action in a letter from the Superintendent dated July 13, 1971. The letter stated the facts of the Board's action to terminate petitioner's contract and concluded:

> "***You are hereby notified of the said termination well in advance of the sixty days required by the terms of your contract."

It is noted here that the letter did not specifically set a termination date, and petitioner did, in fact, begin his work as a teacher in the Board's employ at the beginning of the school year in September 1971. He evidently continued this employment through September 9, 1971, but not thereafter, and so at that juncture his employment by the Board had embraced a total period of two calendar years, 11 months and 20 days (September 25, 1968 – September 9, 1971).

In petitioner's view, the total period of employment, including summer school in 1971, embracing parts of four academic years – although less than three calendar years – had resulted in a tenure accrual.

On the other hand, the Board maintains that the facts as enunciated, *ante*, do not qualify petitioner as a tenure employee. It founds its argument on a prior decision of the Commissioner with similar factual circumstances. This decision, *Jan Braverman v. Board of Education of The Township of Franklin, Somerset County*, decided by the Commissioner October 6, 1971, determined that petitioner had "not satisfied the statutory requirement for achieving tenure status."

In the instant matter, the Commissioner finds in a parallel manner. The total term of petitioner's service has not placed him in the category of a teacher protected by tenure, since the precise prescription of the statutes has not been met. Specifically, in this regard, the Commissioner refers to the statute, *N.J.S.A.* 18A:28-5, which provides:

> "The services of all teaching staff members *** excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure *** after employment in such district or by such board for:
>
> a. three consecutive calendar years ***; or
>
> 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 ***."

Since in the instant matter it is clear that the service of petitioner from September 25, 1968, through September 9, 1971, does not comprise the three "calendar" years referred to in paragraph "a" of the statutes, *ante*, petitioner's prayer can only be considered in the context of paragraphs "b" and "c." In this regard, it is equally clear that petitioner's service did embrace parts of four academic years, *i.e.* 1968-69, 1969-70, 1970-71, and 1971-72. The only question that remains is whether such service has met the precise conditions of the statutes, *supra;* however, this question is rendered *res judicata* by the decision of *Jan Braverman, supra,* on which the Board relies. In *Braverman,* the Commissioner said:

> "***The *minimum* amount of time for acquiring tenure by a teacher has always been interpreted by the Commissioner and by the courts as '*** three consecutive academic years, together with employment at the beginning of the next succeeding academic year***.' *N.J.S.A.* 18A:28-5 (b); *Clara E. Ahrensfield v. State Board of Education,* 8 *N.J.* 859 (1930); *Gladys M. Canfield v. Board of Education of the Borough of Pine Hill,* 51 *N.J.* 400, 241 *A.* 2*d* 233 (1968). (*Emphasis supplied.*)
>
> "*N.J.S.A.* 18A:1-1 defines 'academic years' as follows:
>
> > 'Academic year' means the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation ***.'
>
> "*It is not* logically *possible,* therefore, *for a person employed on an academic-year basis to serve more than three academic years in a period of time shorter than three calendar years.* To hold that petitioner served the equivalent of more than three academic years within a period of thirty-five months would suggest an anomaly. Such is not the legislative intent of the statute." (*Emphasis supplied.*)

The Commissioner then cited *Lawrence M. Davidson v. Newark State College and Eugene C. Wilkens,* 1968 *S.L.D.* 12 in support of the proposition that "a statute will not be construed to reach an 'absurd or anomalous result.' "

In the instant matter, with the facts as stated, the Commissioner, having determined that petitioner had not accrued a tenure status, holds that petitioner's employment was legally terminated by the Board in September 1971, and that the termination was a proper excercise of its discretion. As the Commissioner said in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District,* 1968 *S.L.D.* 7, dismissed State Board of Education May 1, 1968, affirmed New Jersey Superior Court, Appellate Division, March 24, 1969:

> "***The employment of teachers who have not achieved tenure status in the district is a matter lying wholly within the discretionary authority of the board. *N.J.S.A.* 18A:11-1c, 18A:16-1, 18A:27-4 See also *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962).***"

In summary, therefore, absent a finding that petitioner's service fulfilled all of the precise conditions required for the accrual of a tenure status, the Commissioner determines that the Willingboro Board of Education acted legally and within the scope of its authority when it terminated petitioner's employment in September 1971.

Accordingly, the petition is dismissed.

ACTING COMMISSIONER OF EDUCATION

April 7, 1972

In the Matter of the Annual School Election Held in the School District of the Township of Voorhees, Camden County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the voting for three candidates for full terms of three years each on the Board of Education of the Township of Voorhees, Camden County, at the annual school election held on February 8, 1972, were as follows:

	At Polls	Absentee	Total
Armand V. Ciminera	334	0	334
Albert Mann	334	0	334
Marie Holloway	376	0	376
Robert W. Anderson, Jr.	365	0	365

A letter, dated February 15, 1972, requesting a recount of the ballots cast, was received from Edward T. Hamilton, Board Secretary, on behalf of Candidates Ciminera and Mann. The Commissioner of Education directed that the recount be conducted by an authorized representative on February 29, 1972, at the office of the Camden County Superintendent of Schools, Pennsauken.

At the conclusion of the recount, with seven ballots reserved for the Commissioner's determination, the tally of the uncontested ballots was:

	At Polls	Absentee	Total
Armand V. Ciminera	330	0	330
Albert Mann	332	0	332
Marie Holloway	373	0	373
Robert W. Anderson, Jr.	361	0	361

Also, at the conclusion of the recount, the Commissioner's representative was requested to deal with a complaint by one of the candidates that the poll list from District No. 1, Osage School, had been signed twice by the same voter. This complaint was referred to the Commissioner for determination.

The Commissioner makes the following determination with respect to the seven contested ballots and the poll list complaint referred to him:

> *Exhibit A* – consists of one ballot, number 102, that had been declared void on election night by an election officer. The coupon which numerically identifies the ballot was not torn from the ballot itself. It is for this reason that the objection was raised relative to the poll list from District No. 1, Osage School. It would appear that the voter who signed the poll list on line 102 was given ballot 102, which was subsequently voided. Upon the ballot being voided, the word "VOID" was printed to the right of the voter's name on line 102, of the poll list, and in the column headed "CHECK BALLOT RETURNED" on line 102. The same signature then appears again on line 103. It must be assumed, therefore, that the voter received ballot 103 and voted – there being a check (✓) in the column headed "Check Ballot Returned."

Title 19, Elections, by which the Commissioner is guided in election disputes, states, in part, at *R.S.* 19:15-32:

> "*** the member of the election board having charge of the ballot box *** shall remove the coupon from the top of the ballot and place the ballot in the box and the coupon on a file string.***"

It is evident to the Commissioner's representative that this procedure was not followed with ballot 102. Absent any evidence to the contrary, therefore, the Commissioner views the circumstances surrounding ballot 102 to be due to human error in that the election officer, who had the responsibility of separating the coupon from the ballot, evidently placed the entire ballot, with coupon still attached, into the ballot box. Realizing what had occurred, the election officers declared the ballot void.

The Commissioner can find no basis for determining that a violation of ballot regulations took place, nor can he find that there was any attempt to cast an illegal vote. The Commissioner determines, therefore, that ballot 102 be considered void, and that the second signing on the poll list manifests no impropriety on the part of the voter.

> *Exhibit B* – contains three ballots with proper voting marks placed to the right of the candidates' names, but not in the squares to the left as provided for in *R.S.* 19:16-3g, which states, *inter alia:*
>
> > "If the mark made *** is substantially within the square, it shall be counted for the candidate ***. No vote shall be counted *** unless the mark made is substantially *** within the square."

Further, *R.S.* 19:16-6c provides:

> "If no marks are made in the squares to the left of the names of any candidates in any column, but are made to the right of said names, a vote shall not be counted for the candidates so marked ***."

It has been consistently held in numerous cases of contested elections that such ballots cannot be counted, for the reason that the statutory requirement to mark a cross (x), a plus (+), or a check (✓) *in the voting square is mandatory* and not a directory provision which can be waived. See *In the Matter of the Annual School Election Held in the Township of Clinton, Hunterdon County*, 1968 *S.L.D.* 41. For the reasons articulated, *supra*, these three ballots will not be counted.

Exhibit C – contains three ballots which shall be considered *seriatim*. The first ballot contains a cross (x) mark in one square that was essentially obliterated by being blacked out and with proper cross (x) marks placed for three other candidates within the appropriate squares.

R.S. 19: 16-4 provides that a ballot, which contains any mark, sign, or erasure, shall not be declared void unless the officer conducting the recount is satisfied that the erasure was intended to identify or distinguish the ballot. The voter who cast this ballot apparently made an error and, instead of cleanly erasing the mark, decided to indicate his intent by blocking out the entire square and placing clean marks before the names of the candidates for whom he desired to vote. The Commissioner is satisfied that there was no intention to identify the ballot, and directs that the three clean votes on this ballot be counted as cast. See *In the Matter of the Annual School Election Held in the Clearview Regional High School District, Gloucester County*, 1968 *S.L.D.* 39.

The second ballot is similar to the first in that cross (x) marks are essentially obliterated by being blacked out, but with a proper cross (x) placed for one candidate within the appropriate square. As in the case of the first ballot within this exhibit, *ante*, the Commissioner relying upon *R.S.* 19:16-4, holds that the obliteration of two marks on this ballot was not intended to identify or distinguish the ballot, and directs that the one clean vote be counted as cast.

The third ballot consists of two check (✓) marks before the names of two candidates. One mark is clearly outside the square, while the other mark has the look of the mark in the square and the line of the mark outside the square. As in Exhibit B of the referred ballots, *supra*, the mark outside the square on this ballot will not be counted as a vote for that candidate. *R.S.* 19:16-3c, *supra*. The mark which extends outside the square, however, meets the test of substantiality, pursuant to *R.S.* 19:16-3g, *supra*, and will be counted as a vote cast for that candidate. See *In the Matter of the Annual School Election Held in the School District of the Township of Voorhees, Camden County*, (on remand), decided by the Commissioner February 19, 1971.

When the votes cast in *Exhibit C, ante,* are added to the previous uncontested totals, the results stand as follows:

	At Polls	Absentee	Decided By Commissioner	Total
Armand V. Ciminera	330	0	1	331
Albert Mann	332	0	0	332
Marie Holloway	373	0	2	375
Robert W. Anderson, Jr.	361	0	2	363

The Commissioner finds and determines that Marie Halloway, Robert W. Anderson, Jr., and Albert Mann were elected at the annual school election on February 8, 1972, to full terms of three years each on the Board of Education of the Township of Voorhees, Camden County.

ACTING COMMISSIONER OF EDUCATION

April 7, 1972

In the Matter of the Tenure Hearing of Paula M. Grossman a/k/a Paul M. Grossman, School District of the Township of Bernards, Somerset County.

COMMISSIONER OF EDUCATION

Decision

For the Complainant Board of Education, Young, Rose & Millspaugh (Gordon A. Millspaugh, Jr., and Theodore Margolis, Esqs., of Counsel)

For the Respondent, Halpern, Schachter & Wohl (Richard J. Schachter, Esq., of Counsel)

Charges of conduct unbecoming a teacher, incapacity, and just causes have been made by the President of the Board of Education, Township of Bernards, against Paula a/k/a Paul M. Grossman, hereinafter referred to as "Respondent", a music teacher, under tenure, in the Bernards Township School District. These charges were certified to the Commissioner of Education by action of the Bernards Township Board of Education, hereinafter referred to as the "Board," at a special meeting held August 19, 1971, during which the seven members present unanimously determined that such charges were sufficient, if true in fact, to warrant dismissal of Respondent from the Bernards Township School System. (P-1)

Hearings on the charges were held on December 8, 9, 10, 17, 27 and 28, 1971, before the Assistant Commissioner of Education for Controversies and Disputes at 225 West State Street, Trenton, New Jersey. Testimony of Robert Laidlaw, M.D., taken as a deposition before opposing counsel, was received by the Commissioner on January 11, 1972, and is included as part of the record. The charges are to be considered individually and *seriatim* after which they will be considered as a whole.

CHARGE ONE

> "The presence of Paul Monroe Grossman as a teacher in Bernards [Township] under the present circumstances of her transsexualism and sex-reassignment has created and will continue to create a degree of sensation and notoriety within the school system and the community which will severely impair the Board's ability to properly conduct an efficient and orderly school system, thereby giving the Board just cause to dismiss Paul Monroe Grossman. Therefore, Paul Monroe Grossman should be dismissed from the system by reason of just cause."

The Board contends that Respondent has fostered, and will continue to foster, publicity in order to "show the way for other transsexuals without regard to the rights of children." It avers that if Respondent remains in the school district, the attending notoriety will be so disruptive that this in itself would constitute sufficient reason for dismissal.

The Board contends further that the Respondent's comments on the Barry Farber radio show on September 2 and 3 (P-7) are indicative of her state of mind prior to the certification of charges. The Board also avers that Respondent has encouraged the widespread publicity attending this matter and that such actions are further evidence of her state of mind prior to certification of charges.

Respondent contends that Charge One is conjectural and as such presents no just cause, for such a charge cannot be predicated upon a guess. Respondent objects to the introduction of any material indicating public reaction subsequent to the Board's dismissal decision on August 19, 1971. Respondent contends there is no evidence of her involvement in any publicity prior to August 10, 1971, the day that she first knew the Board intended to institute dismissal procedures. Respondent further asserts that she had no duty to remain silent on this issue subsequent to the Board's decision.

Paul F. Mallon, Board President, testified that a large proportion of mail and comments he has received indicated that parents intended legal action should their children be required to attend a class taught by Respondent. (Tr. I - p. 64) He further testified that in his opinion Respondent was using the school system as a "spark for her efforts to make the world safe for transsexuals." (Tr. I - p. 46)

Mr. Losey, principal of Cedar Hill Elementary School, testified that Respondent's return to that school would be highly controversial among the

teachers in the system. (Tr. I - p. 157) He further testified that he would be unable to adequately answer children's questions regarding Respondent's sex identity. (Tr. I - pp. 160-161)

Allen Kerry Kidwell, M.D., Assistant Professor, Rutgers College of Medicine and Dentistry, who in addition has practiced for eleven years in Basking Ridge, testified that he was opposed to having his fifth grade child taught by Respondent because he believed that the child should be exposed to music class to learn music and "not to be confused with the complicated issued of transsexualism." (Tr. II - p. 199)

Reverend Carl Abrahamsen, minister of a Baptist church in the community, testified that he wrote to the Board requesting that his son be excused from music class if Respondent were to return as teacher. He further testified that this was a very difficult decision for him as a parent because it would deprive his child of music instruction which he thought to be of major importance to his (son's) education. (Tr. II - p. 226)

Superintendent of Schools Headington testified that he was shocked by both the dramatic method of presentation and the information imparted to him by Respondent in late April or early May 1971 regarding the nature of her operation. He testified that five building principals expressed opposition to having Respondent assigned to their respective schools. Theodore R. Palmer and Caroline Card, faculty colleagues, testified that they were shocked when they learned of the operation in a June 24, 1971, conversation with Respondent. Both had had a close professional relationship with Respondent; however, they testified that they would avoid her presence were she to return to the school district. (Tr. III - pp. 115, 132) In addition, Mrs. Card testified that she became ill to the point of being bedridden when she first confronted Respondent in her new sex role at an August 19, 1971, Board meeting. (Tr. III - p. 132) Phyllis Johnson, a Board member, testified that she first learned of Respondent's sex-reassignment surgery on June 21, 1971, and that her impression after discussing this matter with Respondent and others was that the children of Bernards Township were being used in some manner to promote among the public at large a better understanding of transsexualism. She based this impression partly on Respondent's announced intentions to write a book about her experiences as a transsexual. (Tr. III - p. 145)

A chronology of events subsequent to the June 21, 1971, Board meeting is as follows: *July 14, 1971* – Respondent discussed the matter with the Board at which time a movie was shown and representatives from the Erickson Educational Foundation explained transsexualism. Subsequent to this, the Board had its regular public meeting, on *July 19, 1971,* at which time no member of the public spoke on this matter. The Board next met on *August 9, 1971,* in a closed session and made the following offer which was contained in a letter dated *August 10, 1971,* from Gordon A. Millspaugh, Jr., Esq., counsel for the Board, to Herbert Kestner, Esq., counsel for Respondent:

"Confirming my telephone conversation with you of this afternoon, the Bernards Township Board of Education at a special meeting held last night directed me to convey the following offer to Paula Miriam Grossman:

"Employment pursuant to a contract for a one year term covering the school year 1971 - 1972 as a new applicant teacher in its system within the scope of the teaching certificate issued to Paul Monroe Grossman on October 3, 1960 for the salary which Paul Monroe Grossman earned during the academic year 1970 - 1971 i.e. $14,300.00. It is contemplated that Mrs. Grossman will teach vocal music and such other courses as she might be properly certified to teach in the senior high school, such courses to be offered to the students on a strictly elective basis. This offer is conditioned upon Mrs. Grossman's acceptance of the following two conditions:

"1. Prior to entering into the contract referred to above, she will have resigned from the Bernards Township school system and relinquished her position therein, including expressly the relinquishment of tenure status, pursuant to N.J.S. 18A:28-8, and

"2. She obtain a proper teaching certificate from the State Board of Examiners issued in the name of Paula Miriam Grossman.

"I have been further instructed by the Board to inform Mrs. Grossman that if she does not accept the above offer, subject to the stated conditions, prior to its regularly scheduled Board meeting on Thursday evening, August 12, 1971, then there is every indication that the Board will at the meeting direct me to take the necessary steps pursuant to N.J.S. 18A: 6-10, et seq. to institute dismissal proceedings against Mrs. Grossman and at the same time it will probably suspend her without pay.

"In order to avoid any possible misunderstanding, if Mrs. Grossman should accept the above offer upon the stated conditions, she will be in the same position as any new applicant to the school system. Unless and until the status of tenure attaches to her pursuant to N.J.S. 18A:28-5, the Board will be in a position to terminate her employment at their pleasure subject only to her contract rights: In other words, the Board is willing to give Mrs. Grossman an opportunity, without any sacrifice in salary, to make the adjustment in her new role on her own merits, under the conditions stated above.

"I am also authorized to state that if Mrs. Grossman accepts the above offer upon the stated conditions, the Board will do everything reasonably possible to assist her in accomplishing a satisfactory readjustment to the school system and the community, including the sponsoring of informational seminars with the clergy and other interested groups in the community and including a possible request for assistance from the Erickson Educational Foundation and also including such other programs

and procedures which the Board and Mrs. Grossman shall jointly agree upon."

One hundred people attended the August 12, 1971, regular Board meeting; however, only two spoke when the opportunity for general discussion was presented to the public. One, the Respondent's former attorney, spoke on her behalf; the other commended the Board on its handling of the situation. (Tr. III - p. 155) (Tr. III - p. 98-99)

Respondent contends that she has no intention of using her teaching position in Bernards Township to exhort the children of that community to make the world easier for transsexuals. (Tr. V - p. 163) She claims she has been favorably received as a guest speaker to youth groups in the community. She further avers that being ignored by her faculty colleagues would not materially affect her teaching. (Tr. V - p. 186) Mrs. Ruth Grossman, Respondent's wife, testified that their family is entirely supportive of the sex-reassignment surgery. She states that their social life has not been significantly affected; their children's friends continue to visit regularly and manifest no unusual interest in Respondent's new gender identity. (Tr. IV - p. 160)

In the instant matter the Board has offered Respondent an opportunity to teach in the school district under certain narrowly-prescribed conditions. The Commissioner is constrained to comment that tenure protection is not a personal privilege subject to waiver. Consequently, condition (1) in (R-1), *supra*, may have been an *ultra vires* action of the Board. *Lange v. Board of Education of the Borough of Audubon*, 26 *N.J. Super.* 83, 88 (*App. Div.* 1953) Nevertheless, it must be assumed that if the Board believed that disruption of the entire school program would be so serious that it could not be overcome by administrative expertise and efforts, such an offer would not have been made. Also during the period this matter was under Board consideration, the Board held at least two meetings at which times public comment was invited, but only two persons availed themselves of this opportunity. Although the Board has proved intense media interest in this matter and has produced parental and faculty testimony against the return of Respondent, the evidence does not support the charge that Respondent is responsible for disruption in the school district. Therefore, the Commissioner finds that Charge One is not supported by the evidence to the degree that would constitute *just cause* for dismissal.

CHARGE TWO

"Under the circumstances of this case, including his failure to disclose to the School Board his condition and the anticipated sex-reassignment surgery as soon as he had begun active consideration of the sex-reassignment procedure, Paul Monroe Grossman has exhibited conduct unbecoming a teacher sufficient to give the Board just cause to dismiss him from the system. Therefore, Paul Monroe Grossman should be dismissed from the system by reason of conduct unbecoming a teacher."

Respondent denies this charge and contends that she was not under any obligation to inform the Board regarding the nature of surgery undergone for health reasons. She avers that sex-reassignment surgery was indicated in her case and that following the advice of her physician does not constitute conduct unbecoming a teacher.

The Board contends that Respondent through inferences and, by gratuitously providing the following letter (P-2) dated September 1, 1970, from Charles L. Ihlenfeld, M.D. to William O. Losey, principal of the Cedar Hill Elementary School, misled the principal regarding the true nature of her condition:

> "This letter certifies that Mr. Paul M. Grossman, a member of your staff, is under the professional care of this office for the treatment of an endocrine imbalance.
>
> "The monthly treatments which we administer to Mr. Grossman, and which will probably be necessary for quite some time to come, possibly years, are very essential to his continued good health and ability to carry on.
>
> "I trust that this letter will help to clarify Mr. Grossman's position with regard to his monthly visits to this office."

The Board contends, also, that the following memorandum from Respondent (J-2) further demonstrates unprofessional conduct because of the manner in which it called attention to her departure for surgery:

> "CEDAR HILL ELEMENTARY SCHOOL
>
> "TO: My colleagues and students
>
> "FROM: Paul Grossman
>
> "SUBJECT: My absence for surgery
>
> "DATE: March 3, 1971
>
> "PLEASE READ TO YOUR
> CLASSES AND THEN POST"
>
> "Dear friends,
>
> "As you are all aware, I am entering the hospital tomorrow for a rather serious major operation. In my absence, my place will be taken by Mrs. Grace Abrahamsen, a fine musician and a lovely person. She will not only teach all of my classes, but rehearse the chorus, the boys' double quartet and the girls' triple trio as well. I most kindly request that you show her

the attention and courtesy due someone who is so willing to lend a competent helping hand in this emergency.

"For about the first week, I shall be at the Wickersham Hospital, 133 East 58 Street, New York City, N.Y. 10022, and for the following week or ten days at Hotel Blackstone, 50 East 58 Street, New York City, N.Y. 10022. If you wish to drop me a note or a card to help pass the weary hours, it will be deeply appreciated.

"If all goes well, I shall see you early in April. However, the seriousness of the operation, coupled with my advancing age precludes my making any promises. It is not beyond the realm of possibility that this is my last bow. In either case, as a teacher who has served you and yours to the best of my ability for these fourteen years past, I wish to take this opportunity to wish each and all of you Godspeed, good health and all good luck, and to ask your prayers for me as sincerely as you may be assured of mine for you.

"Affectionately yours,

Paul M. Grossman"

The Board notes that staff reaction to this memorandum was one of aversion. Superintendent Headington, upon learning of the existence of the memorandum, directed the building principal (who had not been consulted by Respondent prior to its release) to collect all copies not yet distributed. (Tr. III - p. 72) Reverend Abrahamsen, husband of the substitute teacher mentioned, testified that he construed the terminology "last bow" to mean that Respondent was beset by a terminal illness. (Tr. II - p. 225) The Superintendent further testified that he was totally unaware of the true nature of Respondent's pending surgery. (Tr. III - p. 72) A faculty colleague testified that Respondent led him to believe she was going to have surgery to correct a glandular imbalance. (Tr. III - p. 108)

Respondent contends that she distributed her memorandum as a courtesy to her colleagues, to inform the children, and as a courtesy to the substitute teacher. She further said that it was her understanding that sex-reassignment surgery was a major operation and, as such, since she was over fifty years of age, she faced a real possibility of not surviving. Doctor Charles L. Ihlenfeld, Respondent's physician, corroborated her testimony regarding the risks incident to sex-reassignment surgery. (Tr. IV - p. 62) Respondent further contends that there is no regulation compelling a teacher to consult with a board of education regarding medical problems. She avers that the strong objection to her memorandum was an afterthought as no mention of this was made prior to the hearing.

The Board suggests that Respondent's actions are sufficient to invoke the concept of just cause as enunciated by the Appellate Court of Illinois, Second District, Second Division, in *Jepsen v. Board of Education of Community High School District*, No. 307, Kankakee County, 153 *N.E. 2nd*, 417 (1958), in part as follows:

> "*** In Murphy v. Houston 1298, 250 Ill. App. 385, the court defined cause to mean 'some substantial shortcoming which renders continuance in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as good cause for his not longer occupying the place.'***"

The Board contends that the manner in which Respondent set the stage for her return to the school district, as evidenced by her dramatic announcement to the Superintendent of Schools:

> "Mr. Headington, hold on to the arms of your chair because I'm about to tell you, and you will need to hold on to your chair, because I'm about to tell you that you are looking at a fifty-year-old woman."

was carefully staged by her pre-surgery farewell message to her colleagues and students.

The Commissioner observes that there can be little doubt that the administration and the Board would have been substantially aided had Respondent taken them into her confidence at the time of her decision to undergo sex-reassignment surgery. Such a standard of performance would have provided school officials with an opportunity to study this matter in greater detail and perhaps better prepare the school district for the ensuing controversy. A teacher, during the course of a career, may face some personal problems, even tragedy, which he may wish to share with his colleagues. However, the involvement of young children in these matters requires a degree of professional judgment and maturity resulting in restraint, which the public has a right to expect from its teachers. The memorandum in question was ill-advised; its distribution and its contents should have been shared by Respondent with the building principal prior to distribution. It is, however, understandable that an individual preoccupied with problems incident to such traumatic surgery would have behaved in a dramatic fashion. The evidence does not support the Board's contention that Respondent's behavior during this period may be viewed as a deliberate attempt to mislead her colleagues and the administration by euphemistically referring to her condition as "glandular" and exaggerating its danger. A major burden and responsibility of the teaching profession is to protect the students from the effects of a teacher's personal problems. With the exception of J-2, there is no evidence or testimony that Respondent did burden the children of Bernards Township with her personal problems. The Commissioner, therefore, finds that conduct unbecoming a teacher as it relates to Charge Two is not substantiated by the testimony and evidence sufficient to warrant just cause for dismissal.

CHARGE THREE

"Paul Monroe Grossman knowingly and voluntarily underwent a sex reassignment from male to female. By doing so, he underwent a fundamental and complete change in his role and identification to society, thereby rendering himself incapable of continuing to function as Paul Monroe Grossman, the person which Bernards [Township] employed in July, 1957, as a teacher and the person to whom tenure was granted in the system in 1960. Therefore, Paul Monroe Grossman should be dismissed from the system by reason of just cause for incapacity."

An analysis of the testimony and evidence presented in this matter made it readily apparent that the central issue of Charge Three relates to a matter not explicitly stated in that charge. Therefore, the Commissioner, on his own motion, amends Charge Three as follows to more accurately reflect the testimony and evidence presented:

CHARGE THREE (as amended)

"Paul Monroe Grossman knowingly and voluntarily underwent a sex-reassignment from male to female. By doing so, he underwent a fundamental and complete change in his role and identification to society, thereby rendering himself incapable to teach children in Bernards Township because of the potential her (Grossman's) presence in the classroom presents for psychological harm to the students of Bernards Township. Therefore, Paula a/k/a Paul Monroe Grossman should be dismissed from the system by reason of just cause due to incapacity."

In order that both parties be fully apprised of this action, the Commissioner directed that the following letter be sent to Counsel:

"March 13, 1972

"Gordon Millspaugh, Jr., Esq.
Young, Rose & Millspaugh
744 Broad Street
Newark, New Jersey 07102

"Richard J. Schachter, Esq.
Halpern, Schachter & Wohl
78 N. Bridge Street
Somerville, New Jersey 08876

"Gentlemen:

"IN THE MATTER OF THE TENURE HEARING OF PAULA M. GROSSMAN a/k/a PAUL M. GROSSMAN, SCHOOL DISTRICT OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY

"In reviewing the evidence in the above-entitled matter I find that both parties by consent and without objection argued as a central issue an issue not specified in the Statement of Charges. The issue of which I speak is whether or not Paula Grossman is incapable of continuing to serve as a teacher by virtue of the potential harm that her presence in the classroom may pose to the mental health of her students. Accordingly, the Commissioner, on his own motion, hereby amends Charge Three of the Board's Statement of Charges to read as follows:

[CHARGE THREE, as amended, *supra*]

"The parties in this matter are hereby advised to present a brief or statement in lieu of brief with respect to this action within ten days of receipt of this letter.

"Sincerely yours,

"William A. Shine
"Assistant Commissioner of Education

"WAS:vas"

The responses to this letter appear as Appendix A and B to this decision. Upon review of those responses, the Commissioner concludes that there is no substantial objection to the amendment of Charge Three, although counsel for the Respondent argues that a finding of just cause by reason of incapacity was not supported by the evidence.

Respondent admits undergoing sex-reassignment surgery. However, she avers that her training, education and experience have earned her tenure. She further contends that the subject she teaches can be equally well-taught by a male or a female and that the charge of incapacity, therefore, is both false and conjectural.

The Board relied heavily on the testimony of Charles W. Socarides, M.D., an expert psychiatrist in the field of sexual deviation. Dr. Socarides opined that the term "transsexual" merely describes a syndrome or the symptoms of a transvestite, homosexual, or schizophrenic personality. He contended that the presence of a teacher who has undergone sex-reassignment surgery could be psychologically disturbing to children of all ages. (Tr. II - pp. 51, 63) He testified that certain adolescent males might forsake the battle to overcome femininity when made graphically aware of a surgical alternative to their anatomical sexual identity. (Tr. II - p. 52) He maintained that problems or anxieties created by the presence of a transsexual who has been sexually reassigned would be difficult to measure and that the children themselves would not know that they were disturbed until much later in their lives. (Tr. II - p. 56) He further testified as follows regarding the role of the teacher:

> "***there's another side to this story and that is that the teachers function as objects for identification and one of the major things in teaching is that we learn through identification with the teacher and very often we learn out of love for the teacher. And, boys not only learn their lessons in school but they learn how to be men from their teachers and they learn how to be men of certain types of character or personality or aspirations or they learn in a negative fashion. That's why the teacher is, perhaps, the highest profession, well, even, perhaps, above medicine in many cases because they affect so many, so many students in so many ways and it's this process of identification to young minds which – the whole liking for learning develops out of love for the teacher and identity with the teacher." (Tr. II - p. 57)

Dr. Socarides stated that gender identity must be established by the age of three to avoid serious problems. He further stated that for many persons, even a firmly established confidence in one's gender identity may be shaken by subsequent events to which that identity is vulnerable. (Tr. II - pp. 123, 124)

Dr. Harvey M. Hammer, testifying on behalf of the Board, was the only specialist in child psychiatry to appear at this hearing. He contended that gender identity is transformational and that it may be a source of confusion until the end of adolescence. He defined gender identity as one's individual self-concept and self-esteem relative to how one feels about one's masculinity or femininity. He further opined that a person's perception of his sexual identity is an integral part of his personality. (Tr. III - p. 8) Dr. Hammer testified that every child has certain sexual or gender-identity problems and that while these vary in severity, a significant number of problems that come to the attention of child psychiatrists are directly related to this problem. (Tr. III - p. 9) His findings have been that childhood problems of gender identity vary in symptomatology from school phobias to overt psychotic breaks with reality. He indicated that children who have difficulty in relating to their peers or who engage in drug abuse quite often have sexual-identity problems. Dr. Hammer testified that a patient in his care suffered a setback "in his psychological state" upon learning of Respondent's sex-reassignment surgery. (Tr. III - p. 11) He held that a child's positive identification with a teacher undoubtedly influences the child's ability to learn. He further testified that he had advised school officials against having Respondent return to the Bernards Township faculty (Tr. III - p. 14), and he stated unequivocally that it would be disadvantageous to the mental health of the children in the Bernards Township School System to have Respondent reappear in her new gender as a teacher in that system. (Tr. III - p. 14)

Respondent calls upon the medical expertise of Charles Ihlenfeld, M.D., her physician and an associate of Dr. Harry Benjamin, a recognized pioneer of the diagnosis and treatment of transsexuals (Tr. IV - p. 19), and Robert W. Laidlaw, M.D., a psychiatrist, who in 1966 retired as chief and clinical director of the Department of Psychiatry at Roosevelt Hospital in New York City, for testimony on the probable effect on the children in Bernards Township of Respondent's resumption of teaching duties. Dr. Ihlenfeld contended that Respondent should have no problem and that if anything, her mind should be

freer to concentrate on her teaching duties. (Tr. IV - p. 51) He opined that she should function as well or better as a music teacher than she had done prior to surgery. He further stated that there should be no adverse effects on the children in her classes because their own senses of gender identity had been established long before they reached school age. (Tr. IV - p. 54) Dr. Ihlenfeld also denied that there would be any emotional effect on children over twelve, and opined that they should have no more of a problem with her than they would with any other female music teacher. Dr. Laidlaw supported Dr. Ihlenfeld's opinion. He further contended that children of the ten-twelve age group would merely snicker and gossip, and that Respondent's presence in the classroom would not adversely affect them emotionally. He held that the effect on children of a teacher who had undergone sex-reassignment surgery would be no more traumatic than if they would hear of a case of sex-reassignment surgery through the media. (Tr. IV - p. 56) Dr. Laidlaw averred that a transsexual is born, not made, and his condition is not something which life and circumstances create in an individual. (Tr. VI - p. 35) Dr. Laidlaw was questioned about Dr. Hammer's testimony regarding the effect of the knowledge of Respondent's sex-reassignment on a juvenile patient. He responded that he would have to know more details of this case in order to frame an adequate reply; however, he stoutly maintained that he could not

> "***medically conceive of the fact that a teacher in a class who prior to surgery was a male now appears as a female – dressed in appropriate female garb – will, because of this cause any essential emotional harm, as you define it, to the children in the class." (Dr. Laidlaw's sworn deposition taken December 18, 1971 - pp. 27, 28)

The Commissioner notes that he has been presented with sharply-conflicting expert testimony in this matter. He finds, however, that the testimony of all concerned is predicated on their concept of the role of the teacher. Drs. Socarides and Hammer both view the teacher as a paradigmatic person whose very presence in the classroom is instructive. Dr. Ihlenfeld believes that in an ordinary classroom situation the teacher is merely another person from the outside world, a person not invested with the same immediate personal identification as that a child invests in his or her parents. (Tr. IV - p. 55) The Commissioner believes that the role of the teacher more nearly fits the model described by Dr. Socarides, *supra*. He finds that the testimony reveals a strong possibility that potential sexual identity problems of children would be exacerbated by Respondent's presence in the classroom. Respondent contends that "No question was ever presented to [Dr. Socarides or Dr. Hammer] as to what effect there would be upon children who had not known [Respondent] as a male." (Appendix A) However, in the following testimony, Dr. Hammer clearly stated that by her presence in the school system, Respondent would provoke discussions among children at all school levels that would bear on the concerns and anxieties of these children regarding their sexual identity: (Tr. III - pp. 59, 60, 62, 64, 65)

"Q.***Are questions [verbalizing children's thoughts and feelings relating to their sexual identity] likely to come up in the classroom in Bernards Township, in the event that Mrs. Grossman is reassigned to that system?

"A. It is my opinion that they will definitely come up, without any question.

"Q. In Mrs. Grossman's classroom?

"A. In Mrs. Grossman's classroom.

"Q. In other classrooms?

"A. In other classrooms, yes.*** Mrs. Grossman's presence is going to produce undue anxiety and stress and trauma on children who are already preoccupied.***

"Q. Dr. Hammer, do you believe that there are children who can't handle Mrs. Grossman's situation in the Bernards Township school system?

"A. Yes I do feel that there are children who cannot handle her presence in the school system.

"Q. And would your answer be the same for adolescent children as for pubertal and pre-pubertal children?

"A. Yes, it would, except the symptomatology might be somewhat different."

Testimony also reveals that the "spectacular nature of the situation" (Tr. II - p. 229) has rendered the matter one of "common knowledge" among children as well as teachers in the school system. (Tr. III - pp. 110, 111) The Commissioner finds that these factors, coupled with the size of the system and the length of her service (Tr. I - pp. 14, 15, 28), demonstrate that it would be impossible for Respondent to function in her new gender identity with any degree of anonymity. Therefore, the Commissioner determines that Respondent is incapacitated to teach children in the situation described herein because of the potential her presence in the classroom presents for psychological harm to the students of Bernards Township.

The Commissioner will jointly consider Charges Four and Five because they have elements so common, that to differentiate them in this report may lead to confusion.

CHARGE FOUR

"By reason of his sex-reassignment, Paul Monroe Grossman has exhibited conduct and behavior so deviant from the acceptable standards of the community as to constitute just cause for removing him from the system. Therefore, Paul Monroe Grossman should be dismissed from the system for just cause."

CHARGE FIVE

"By reason of the fact that Paul Monroe Grossman is a transsexual and has undergone sex-reassignment surgery, he has exhibited abnormality to a degree which constitutes just cause for dismissing him from the system. Therefore, Paul Monroe Grossman should be dismissed from the system for just cause."

Respondent denies the allegations set forth in Charges Four and Five, and contends that the prime purpose of tenure is to protect the teacher from attacks not having any relation to or concerned with teaching ability and knowledge. She denies the allegations in Charge Five, and avers that she underwent sex-reassignment surgery for reasons of health. She further avers that this has nothing to do with her competence as a teacher, and that it in no way constitutes grounds of just cause for her dismissal. The Board contends that it followed the procedures outlined in *N.J.S.A.* 18A:16-2 through 18A:16-4 in obtaining psychiatric examinations. Pursuant to these statutes, the Board directed the following questions to the psychiatric examiners:

"In keeping with its statutory duty, the Board would like answers to the following three specific questions:

"1. In your opinion, will Mrs. Grossman be physically and mentally fit and able to carry on her normal teaching responsibilities?

"2. In your opinion, will Mrs. Grossman be physically and/or mentally unfit to carry on her normal teaching responsibilities?

"3. Does the result of your examination indicate mental abnormality which would affect Mrs. Grossman's capacity as a teacher?"

The recommendations contained in these requested psychiatric and psychological reports read in relevant parts as follows:

Report of William Webb, Jr., M.D. (J-4):

"***Paula Grossman appears to have had a strong yearning for feminine identification that goes back to early childhood. This has been manifest by frequent cross-dressing and a reluctant change to masculine clothes at the age of five. Except for being temperamentally unsuited for military

service, there has been no evidence of any psychopathology that has interfered with the subject's function in either her vocational or domestic life. She seems to have made the transition very well and seems adjusted to her new role. It is likely that the feminine role that she now has gives her a greater sense of mastery in her life and protects her from unwanted feelings of aggression. I would, therefore, feel that there is no physical or mental contraindication to Mrs. Grossman's returning to the classroom. There is no evidence of serious psychiatric abnormality to preclude her teaching at the present time. I think it would greatly assist her adjustment if she were placed in another school in her same district rather than returning to the same pupils she has taught in the past.***"

Psychological Report of Henry Bachrach, Ph.D. (J-5):

"***In summary, Mrs. Grossman appears in many ways a highly conventional person, cautious, careful and somewhat cynical, of superior intellect, with creative resources that enabled her to maintain goal oriented, productive attitudes and perform with only transient lapses of criticality. At present she functions within a neurotic range, and though her character shows a potential for further decompensation, she is at present 'well defended' and largely able to cope effectively with external manifestations of her intrapsychic conflicts. In my judgment she experiences mental abnormalities no greater than some effective teachers who have been previously under my care or whom I have examined. Of course, how well she may be able to continue in her work depends also upon the nature of her work circumstances, how others react to her, and the ways in which future experiences affect her self esteem and sense of security."

Report of John K. Meyer, M.D. (J-7):

"***With regard to the specific questions posed by the Board, I find no evidence of mental incapacity which in my judgment would render her incapable of pursuing her profession as a teacher. Since a physical examination or physical measurements (such as the EEG) were not performed, I am in no position to comment on these aspects of the question.***"

Affidavit Sworn to by Robert Laidlaw, M.D. on July 22, 1971 (J-12):

"***It is my further opinion that Paul M. Grossman, now Paula M. Grossman, is physically and mentally fit and able to carry on her normal teaching responsibilities and she has no mental abnormality which would affect her capacity as a teacher.***"

The Board contends that these reports are confined to the premise that mental abnormality and/or communicable disease, which affect students in one school district, will affect them similarly in all districts. Therefore, such

examinations are limited to an analysis of the individual, and not the impact that the individual may have on a school system because of a special set of circumstances. They contend, because Respondent was known as a male prior to sex-reassignment surgery in Bernards Township, that her appearance as a female makes this matter unique.

Dr. Socarides testified on behalf of the Board that all transsexuals are anatomically normal (Tr. II - p. 19), and that transsexualism is not included in the APA nomenclature as an official diagnosis. He held that the surgeons performing this operation are seriously misled: that it is merely mutilative surgery giving false hope of resolving a severe psychological disturbance that can only be resolved by getting at the problem itself. (Tr. II - p. 38) He sets forth the following arguments against performing sex-reassignment surgery on transsexuals: (Tr. II - pp. 87, 88, 89)

> "1. Transsexualism represents a wish, not a diagnosis. It is a wish present in transvestites, homosexuals and schizophrenics with severe sexual conflicts. The issues come down to whether individuals in these categories of mental illness should be treated surgically for what is basically a severe emotional or mental disorder.
>
> "2. What is unique in the situation is that a patient insists upon his own type of therapy or even exacts it fully upon himself. His insistence is also based upon medicine's great progress in surgical and plastic procedures.
>
> "3. Surgical and endocrinological treatment do not attack the cause of the patient's transvestism, homosexuality, or schizophrenia. In medicine it is well known that we do not, by choice, treat only a symptom but aim instead to treat the underlying conditions from which the symptom arises.
>
> "4. One might argue that in frontal lobotomy we as psychiatrists treat a symptom, but these operations have for the most part failed us, often leaving huge secondary problems – e.g., the individual is unable to profit by further psychiatric therapy and may have convulsive seizures or other severe personality changes, in some ways quite as severe as the original condition and creating aggressive infantilism. Also, we know that in many serious illnesses such as schizophrenia there may be periods of remission or even moderate to permanent recovery from symptomatology. We are faced therefore with the phenomenon of spontaneous recovery or remission from psychiatric illness, a development which might be seriously interfered with if a patient undergoes such major surgery affecting the very organs about which he is in great conflict.
>
> "5. There is no evidence that gender identity confusion – a gender identity contrary to the anatomical structure – is inborn. Therefore any attempt to change this through surgical means forever dooms the individual's chances of overcoming his psychosexual and psychological difficulties.

"6. In a sense, surgical intervention is a turning back of the evolutionary timeclock (sic). Our anatomy is a product of evolutionary development, and our organ symptoms are reciprocally adapted to each other – an adaptation taking millions of years of evolution.

"7. Follow-up data on individuals who have had the surgery are incomplete, especially as regards post-operative psychiatric status. Are these patients free of their former conflicts, no longer homosexual, transvestics, or schizophrenic, or do they now pursue these drives without conflict, having only altered their external anatomy? Do they lose their underlying fears of fusion with the mother, their identity confusion, and their fears of persecution, their fears of persons of the opposite sex? All these factors are still unknown – unknown and highly problematic."

Dr. Kidwell agreed with Dr. Socarides and contended that transsexualism is a psychiatric problem and should not be treated surgically. (Tr. II - p. 211) The Board contended that the report of Henry Bachrach, *supra*, contained language supportive of Charges Four and Five. A Board member commented that she was concerned because Respondent refused to see Dr. Harvey Hammer, the Bernards Township school psychiatrist. (Tr. III - p. 150) Further testimony of Board members revealed that they were not satisfied with the psychiatric reports requested by them because the reports did not contain enough "depth." The Board opined that the report of Dr. John Meyer was not completely unbiased because he heads the Gender Identity Clinic at Johns Hopkins, and has a vested interest in the treatment of transsexuals. (Tr. III - p. 152)

Respondent contends that she underwent the psychiatric examinations required by the Board and that the findings have demonstrated her fitness to teach. In addition, Dr. Laidlaw's sworn affidavit, *supra*, concurs with the independent findings of the others who have examined her.

The evidence and testimony clearly reveal that Respondent was seriously disturbed to the point of despondency, and had such deep-seated feelings regarding her gender identity that she sought a drastic surgical solution to her problem. The Commissioner recognizes that conventional standards of community behavior are seriously affected in the instant matter. He further recognizes, as testimony has revealed, that there is a serious dichotomy in medical thought regarding the course of treatment best suited to the solution of this problem. However, he does not conceive it as his duty to make a medical determination by substituting his judgment for those experts *who have examined Respondent.* He notes that in every instance these reports indicate she has no abnormality serious enough to prevent her from teaching. Therefore, the Commissioner finds and determines that Charges Four and Five have not been proved by the weight of evidence and testimony *in this hearing.*

CONCLUSION

Having found that the weight of evidence supports only Charge Three, the question remains as to whether this charge demonstrates incapacity, conduct unbecoming a teacher or other just cause warranting dismissal. Such a determination of fitness is usually required to be in accord with the principles enunciated by the New Jersey Supreme Court in *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (1943), affirmed 131 *N.J.L.* 326 (*E. & A.* 1944), in which matter the Court determined that unfitness to hold a post might be shown by one incident, if sufficiently flagrant, or by many incidents. In the instant matter, however, we are not talking about fitness in the sense that the individual teacher committed an overt act against a child or school district, but rather that she, by her presence in the classroom, manifests danger to the mental health of the pupils.

Respondent has suffered greatly, and has sought and received medical relief offered by a school of medicine which contends that psychoanalysis and other psychiatric intervention is powerless to effect a cure for her condition. This school of medical practice further asserts that surgery in the form of sex-reassignment will provide, and according to Respondent's own testimony has already proved, relief from deep depression and agony. The Commissioner recognizes that a school district has a responsibility to teachers who are plagued with illness and have medical problems including those that go beyond the layman's understanding. He further understands that psychosexual and related problems concern fields of medicine which have yet to reach a consensus on the method of treatment. In the instant matter, however, the overarching responsibility of the Commissioner and the local Board of Education is to the children of Bernards Township. Because of this, the Commissioner relies heavily on the testimony of the child psychiatrist, who states in unequivocal terms that the children of Bernards Township would be harmed by Respondent's reappearance as a teacher.

Therefore, due to the unusual nature of this matter and because there is no moral turpitude in question, the Commissioner directs the Bernards Township Board of Education to apply to the Teachers' Pension and Annuity Fund, pursuant to procedure outlined in *N.J.S.A.* 18A:66-39 *et seq.*, on behalf of Respondent, for a disability pension. The Board is further directed to make payment of Respondent's salary pursuant to L. 1971, c. 435 (amends *N.J.S.A.* 18A:6-14), which reads in part as follows:

> "Upon certification of any charge to the Commissioner *** if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.***"

The Commissioner recognizes that the Teacher's Pension and Annuity Fund is an autonomous body and must make an independent finding regarding

this matter; however, he directs the Assistant Commissioner for Controversies and Disputes to make the entire record of this proceeding available to the trustees of the Teachers' Pension and Annuity Fund, should they deem such a record useful in their deliberations.

Finally, the Commissioner orders and directs that Respondent be dismissed as a teacher in the Bernards Township School System, pursuant to 18A:6-10 *et seq.*, for reason of just cause due to incapacity. The Commissioner retains jurisdiction in this matter regarding certification by the Board of the Teachers' Pension and Annuity Fund.

COMMISSIONER OF EDUCATION

April 10, 1972

APPENDIX A

"March 21, 1972

"Department of Education
225 West State Street
P.O. Box 2019
Trenton, New Jersey 08625

"Attention: Honorable William A. Shine
Assistant Commissioner of Education

"Re: In the Matter of
the Tenure Hearing
of Paula M. Grossman
a/k/a Paul M. Grossman,
School District of the
Township of Bernards,
Somerset County
Our file #2956

"Dear Commissioner Shine:

"This statement is being submitted to you in lieu of a brief in accordance with your letter of March 13, 1972.

"To my recollection, Dr. Socarides and Dr. Hammer both rendered opinions to the effect that in their opinion there would be an adverse emotional effect on some of the children in her class if she were permitted to return to the classroom to teach children who knew her as a male. Although we denied that such would be the case (Dr. Laidlaw, on behalf of Mrs. Grossman, testified that in his opinion there would be no such harm), it is important to note that the opinions of Dr. Socarides and Dr. Hammer referred only to children who knew Mrs. Grossman as a male. No

question was ever presented to them as to what effect there would be upon children who had not known Mrs. Grossman as a male. This distinction becomes crucial since the testimony clearly indicated that there were other schools in the District to which Mrs. Grossman could have been transferred. Indeed, the Board itself offered Mrs. Grossman a one-year contract to teach in the High School but only on condition that Mrs. Grossman relinquish her tenure rights. It appears to the writer that such an offer in itself shows recognition by the Board that there was a place for Mrs. Grossman in the Bernards Township School District. Certainly, she would have been as effective a teacher without tenure as she would have been with it. The Board members who testified attempted to get around this contradiction by stating that they were willing to keep Mrs. Grossman on in a controlled situation, in that if her position in the High School did not work out to the satisfaction of the Board, she could then be discharged with a minimum of publicity and furor. This does not follow since she could have been given the opportunity without there being any request to relinquish tenure. In the event the situation worked out, she could have remained there also without any publicity or any public furor. If it did not work out, the publicity and furor would have been no greater than it actually was.

"It should also be noted that Dr. Webb's report (J4) and Dr. Myer's report (J7) do not indicate any effect on the children, and these were the Board's physicians who conducted examinations at the Board's request. These physicians answered questions that were posed to them by the Board, through its attorney (Mr. Millspaugh's letter to Dr. Webb – J3, and Mr. Millspaugh's letter to Dr. Meyer – J6), and it is a contradition for the Board now to take the position that the doctors did not answer the crucial question. An examination of those reports seems to indicate that there is no reason why Mrs. Grossman could not continue to be an effective teacher.

"Even assuming that the Commissioner finds that Mrs. Grossman's presence in a classroom before children who knew her as a male may affect some of them emotionally in an adverse manner, the question arises as to the proper manner in which Mrs. Grossman's services should be terminated. First, as set forth above, she could have been transferred to another school in the District. Even assuming that this was not feasible, it appears that discharge from office is not appropriate.

"N.J.S. 18A:6-10 provides that no one should be dismissed while under tenure of office during good behavior and efficiency except for ' . . . inefficiency, incapacity, unbecoming conduct, or other just cause . . . ' The cases seem to indicate that the thrust of the charges which may result in dismissal despite tenure relate to disobedience, criminal acts, immoral acts, or the like. It is clear from the testimony that Mrs. Grossman followed recommended medical treatment, and she should not be punished for doing so, no matter how controversial or unusual that treatment is. If that treatment renders her incapable of teaching because it

may result in an adverse emotional effect on some of the students, it would appear that the thrust of the Board's complaint is that Mrs. Grossman is disabled. Nowhere does the Board charge her with inefficiency, incapacity (in the sense of not physically being able to teach), or unbecoming conduct. Just cause has been held to refer back to the words that preceded. *School District of Wildwood vs. State Board of Education*, 116 N.J.L. 572 (1936). In effect, the position of the Board is that she should not be permitted to teach because it may adversely affect the children. This would appear to sound in disability in that N.J.S. 18A:66-39 provides for disability where ' . . . the member is physically or mentally incapacitated for the performance of duty. . . ' It would appear that although Mrs. Grossman is physically and mentally capable of teaching, the Board's position is that her effect on children would render her incapable of teaching. The statute further requires an examination by a physician and a certification by that physician that the member is physically or mentally incapacitated. There has been no such certification by any of the examining physicians involved in this case. (It should be noted that neither Dr. Socarides nor Dr. Hammer examined Mrs. Grossman.) In any event, the Board itself could have applied for a declaration of disability (N.J.S. 18A:66-39(a).) In addition, N.J.S. 18A:66-40 provides for a system of rehabilitation. Since there was no testimony that Mrs. Grossman's presence in a classroom would adversely affect children who did not know her as a male, it is clear that the mere passage of time would have resulted in her rehabilitation. It appears clear, therefore, that the Board's argument and position is in reality a contention that Mrs. Grossman is disabled.

"To vacate Mrs. Grossman's tenure and to dismiss her for 'inefficiency, incapacity, unbecoming conduct, or other just cause' would in effect amount to a declaration that one follows his physician's recommended treatment at his own peril.

"To summarize, it is our position that Paula Grossman has not committed any act which would justify her being dismissed. Further, we contend that the Board has not proved that Mrs. Grossman's presence in a classroom would adversely affect the students; but, in the event that the Commissioner finds that her presence would have an effect on the children, we contend that this would not justify her dismissal but rather that there should be a finding of disability. Such a finding is beyond the Commissioner's power and may be made only by the Board of Trustees of the Pension Fund.

"Respectfully submitted,

"HALPERN, SCHACHTER & WOHL

"By:

"RJS:slb RICHARD J. SCHACHTER

"cc: Gordon Millspaugh, Jr., Esq."

APPENDIX B

"March 22, 1972

"William A. Shine
Assistant Commissioner of Education
Department of Education
225 West State Street
P. O. Box 2019
Trenton, New Jersey 08625

"Re: In the Matter of the
Tenure Hearing of Paula M.
Grossman a/k/a Paul M.
Grossman, School District
of the Township of Bernards,
Somerset County

"Dear Dr. Shine:

"This will acknowledge receipt on March 15 of your letter of March 13 informing us of the Commissioner's *sua sponte* amendment of Charge Three of the Statement of Charges and advising us to present a brief or statement in lieu of a brief with respect to this action within ten days of receipt.

"The Board's position is that the Commissioner's 'amendment' is not an amendment of substance but rather a more articulate refinement of Charge Three as originally presented.

"Mrs. Grossman's impact on the mental health of the students in Bernards Township was clearly a concern of the Board from the outset.

"Charge Three as presented incorporated this concern within its terms and this was clearly understood by both parties.

"The Board's contention that Mrs. Grossman's return to the classroom in Bernards Township would have adverse impact on the mental health of the students was understood by both parties to be at the heart of the case from the commencement of the proceedings.

"After the Board's charges had been certified to the Commissioner, and at the initial conference of counsel held in your office at the State Department of Education on September 9, 1971 and attended by you, Herbert Kestner, Esq., then Mrs. Grossman's attorney, and me, I stated that Mrs. Grossman's potential adverse impact upon the students of Bernards Township was at issue in this case, and I informed Mr. Kestner that I intended to call as a witness the school psychiatrist, Dr. Harvey Hammer. Thereafter, upon Mr. Schachter's retention by Mrs. Grossman, he

and I conferred on more than one occasion prior to the hearing about the issues in the case and one of the issues specifically discussed was the potential adverse impact of her return upon the students. On November 19, 1971, almost three weeks prior to the first hearing date, I wrote to Mr. Schachter and informed him that I planned to call Dr. Harvey Hammer as a witness, and I identified Dr. Hammer as a specialist in child psychiatry. Mrs. Grossman had ample opportunity to prepare for this issue prior to the hearing.

"It is therefore no surprise that at the hearing both parties by consent and without objection argued as a central issue the potential harm that Mrs. Grossman's presence in a Bernards Township classroom may pose to the mental health of the students. Voluminous testimony was solicited on this subject without objection. See e.g. Testimony of Dr. Laidlaw, page 5-6 lines 17-1; Dr. Hammer, (12/10/71), page 10-11; 14; Mr. Mallon, (12/8/71), page 26, 28, 42-45, 64-65, 97, 99-103; 119; Dr. Socarides, (12/9/71), page 51-61; 180-181; Mr. Abrahamsen, (12/9/71), 230; 234. In addition, counsel for Mrs. Grossman at the hearing on December 27, 1971 requested Mrs. Grossman's opinion on the precise issue:

" 'Q. Based on your experience as a teacher, do you think your presence in a classroom before children who know that you have had this surgery would affect them emotionally, in any way?'

"See page 66, lines 4-7. Furthermore, there was no doubt in the mind of the hearing officer that the major emphasis of the hearing was directed at this very issue:

" 'It has been – the entire proceedings, to this moment, have centered around Mrs. Grossman's return to the classroom and what this might eventuate.'

"See 12/8/71, page 156, lines 15-18.

"Parenthetically, it should be noted that counsel for Mrs. Grossman did object to the School Board's contention that Exhibit J-2 (Mrs. Grossman's announcement to her colleagues and students dated March 3, 1971) constituted an element of unprofessional conduct on the ground that it was not so stated or referred to in the Certificate or Statement of Facts or Charges. See 12/8/71, page 146. Accordingly, counsel for Mrs. Grossman was clearly aware of his duty to object to matters immaterial to the issues in the case.

"We feel that the Commissioner's refinement of Charge Three is accurate, continues the meaning of that charge, comports with the evidence, and does nothing to prejudice the parties. We believe, therefore, that the hearing on the issue in question has met the standards of due process set forth in *Laba v. Newark Board of Education*, 23 N.J. 364, 381

(1957); *Handlon v. Town of Belleville*, 4 N.J. 99, 105 (1950); *In re Masiello*, 25 N.J. 590, 600, 601 (1958).

"The Commissioner, as is the case with other administrative agencies, has broad powers to determine its own procedural methods as long as due process of law is not violated. Since there is no violation of due process in this case, it is the School Board's contention that the Commissioner's 'amendment' is factually correct and legally permissible.

"Respectfully,

"Gordon A. Millspaugh, Jr.
"Attorney for the Board

"GAM:jg"

Pending before State Board of Education.

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

COMMISSIONER OF EDUCATION

Decision

The announced results of the voting for three members for full terms of three years each, and for one member for an unexpired term of two years, on the Board of Education of the Borough of Carteret, Middlesex County, at the annual school election held on February 8, 1972, were as follows:

For Three-Year Terms:

	At Polls	Absentee	Total
Alex Bobenchik, Jr.	1130	32	1162
Michael Magella	438	5	443
Harold J. Maddon	623	28	651
Louis A. Balka	532	8	540
Anthony Pusillo	387	3	390
Herman Richert, Sr.	217	4	221
Louis D. Mangieri	318	2	320
Andrew Kaskin	1146	54	1200
Julia Hila	970	35	1005
Anthony DelVacchio	293	6	299

For Two-Year Unexpired Term:

Carmine J. Ziccardi	614	4	618
Joseph P. Lamb	1422	58	1480

Pursuant to a letter request dated February 16, 1972, from Candidate Mangieri, the Commissioner of Education directed a representative to conduct an inquiry into the election. The inquiry was conducted by the representative on March 13, 1972, at the offices of the Middlesex County Board of Freeholders, New Brunswick. The report of the representative is as follows:

Petitioner asks that the Commissioner set aside the annual school election held on February 8, 1972, on the following grounds:

1. Access to the "names of the board workers" appointed to work at the election was denied to petitioner on the day prior to the election date.

2. An "employee of the school system" was appointed as an election board worker.

3. There was no "list of absentee ballots *** before the board workers ***" on the day of the election to prevent persons "coming in to vote a second time."

4. The "tally of the sixty-one absentee ballots were (sic) registered in plain view on a blackboard in the auditorium for a full three hours before the closing of the polls at nine o'clock."

In elaboration of these charges at the hearing held on March 13, 1972, petitioner supplied the name of the "employee" of the Board to whom he referred, in Charge No. 2 above, and testified that she was a teacher in some capacity working directly for the Carteret Board of Education. In this regard, in petitioner's view, the employment of the teacher as an election official was illegal and contrary to the terms of the statute, *N.J.S.A.* 18A:14-6, which provides, *inter alia*, that persons appointed by local boards of education to serve as election officers must be:

> " *** appointed from the qualified voters of the school district, who are not members *or employees* of the board of education ***." (*Emphasis supplied.*)

With respect to the other charges enumerated, *ante*, petitioner offered little oral testimony that added to his written statement of February 16, 1972. This statement avers, with respect to Charge No. One that:

> " *** Title 18A:14-6 was violated in fact, when at the time I requested of the Board Secretary the right to have access to the names of the board

> workers. (sic) I was denied this right by being told I could look at the records after the election.***"

In this regard, he further stated:

> " *** As public record this information should have been available at the January meeting. It was not.***"

Petitioner cites no statutory infringement in connection with his Charges Nos. Three and Four, *supra.* However, his letter indicates that, in his judgement, the list of absentee voters "should" have been before election workers, who were working at the polls, and that he felt that the exhibition of the absentee ballot tally was not only "unfair but also unconstitutional and can be construed as subliminal indoctrination upon the voters minds."

Testimony on all of these points was also offered by the Carteret Superintendent of Schools and Board Secretary. The Board Secretary testified that, with respect to Charge No. One, he had not given petitioner a list of election workers at 3 P.M. on the day he asked for it because the list was not complete. The Secretary indicated, however, according to his testimony, that he would have given the list to petitioner later, but that petitioner's original request was never repeated. With respect to Charges Three and Four, the Board Secretary testified he knew of no statutes pertinent thereto, but that he had turned the board around when a complaint was relayed to him about the exhibit of the tally of absentee votes.

The Superintendent of Schools testified that the person alleged to be an "employee" of the Board of Education had no official status with the Board at the time the election was held. He acknowledged, however, that the employee had been employed as a ten-week evening school instructor during the spring term of the 1970-71 school year, and that she was also so employed in the fall term of 1971. He also said she was scheduled to work again in this capacity during the spring term of the evening school in 1972.

Finally, the Board of Education submitted in evidence a document listed as P-1, which according to testimony was an exact copy of the Board's minutes of its meeting held on December 16, 1971. This document contained, *inter alia*, the following paragraph:

> " *** Mr. Cieslarczyk made a motion to authorize the Board Secretary to appoint all required clerks, janitors and tellers for the Annual School Election on February 8, 1972 at the same rate as paid for the 1971 Annual Election."

The motion passed by unanimous vote.

* * *

The Commissioner has reviewed the report of his representative and determines that the Cateret Board of Education deviated from strict statutory prescription, in the instant matter, in two instances, with respect to petitioner's Charges One and Two. These determinations are founded on the clear and precise language of the statute, *N.J.S.A.* 18A:14-6, *supra*, which provides, in its entirety:

> "Each *board of education shall*, at its regular January meeting, if paper ballots are used in elections in the district, or at its last regular meeting held *not less than 40 days prior to the date* fixed for the next annual school election, if *voting machines* are used in elections in the district, *appoint a judge of election*, an *inspector of elections*, and two clerks of elections for each polling district therein, and may appoint additional clerks for any polling district, not exceeding one for every two signature copy registers used therein, to act as election officers, and shall notify them accordingly. *They shall be appointed from the qualified voters of the school district, who are not members or employees of the board of education* and who do not intend to stand as candidates for any office of the school district during the ensuing year, and in school district in which voting machines will be used during the ensuing year they shall be chosen, as far as practicable, from the members of the district boards of election in office in the municipality or municipalities comprising the school district." (*Emphasis supplied*)

When this statute is compared, in the first instance, with the resolution of the Board of Education dated December 16, 1971, it is apparent that the Board of Education delegated a responsibility given to it, by the statute's clear terms, to "appoint" election officials, to its "Board Secretary." The Commissioner opines that if the New Jersey Legislature had thought it desirable, or necessary on occasion, for a board of education to authorize its secretary to "appoint" such election officials, it would have said so. No such authorization is contained in the provisions of the statute, *supra*, and the Commissioner holds that none can be implied. Therefore, the Commissioner determines that the delegation of authority contained in the resolution of the Board was *ultra vires*.

Similarly, the Commissioner observes that the statute bars the appointment of election officials who are "employees" of the board, but lacks a differentiation between part-time itinerant, or sporadic employment. It must be presumed, therefore, in the Commissioner's judgment, that all employees whose employment by the board has not been definitely terminated are barred by the statute from serving as election officials.

The Commissioner cannot find that the Carteret Board or its administrative officials acted incorrectly or illegally with respect to Charges Three or Four. He knows of no statutes prohibiting display of the tally of absentee votes, nor of statutes that mandate that a list of such voters be in the hands of election officials at the times when polls are open. The Commissioner does observe that the Board Secretary acted promptly to turn the tally board around, recognizing that the mere fact of its presence did have a prejudicial appearance.

Having determined that the Board or its administrators acted illegally in the two instances recited, *ante*, the Commissioner is constrained to say again that he deplores all such deviations from strict compliance with election laws. The right to vote is too sacred a right to be abused even in peripheral ways. However, the Commissioner must also reiterate that such irregularities as herein enunciated are no cause to vitiate the election. It is well established that an election will be given effect and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. *Love v. Board of Chosen Freeholders*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Petition of Clee*, 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *Application of Wene*, 26 *N.J. Super.* 363 (*Law. Div.* 1953), affirmed 13 *N.J.* 185 (1953).

In conclusion, the Commissioner admonishes the Carteret Board of Education and all boards of education in the State to fully and completely comply with all requirements of the statutes governing school elections so that there may be no taint of mistrust or doubt.

The Commissioner finds that the results of the annual school election in Carteret must stand as announced. The petition herein is accordingly dismissed.

COMMISSIONER OF EDUCATION

April 11, 1972

In the Matter of the Annual School Election Held in the School District of the Township of Winslow, Camden County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for three seats on the Board of Education of the School District of Winslow at the annual school election held February 8, 1972, were as follows:

	At Polls	Absentee	Total
Albert J. Comunale	144	2	146
Pat Casario	186	2	188
Joseph Napoliello	127	0	127
Phillip Asay	1	0	1
C. H. Thompson	16	0	16
Edward Cuneo	110	0	110
Armand Darcangelo	37	0	37
Jerald Lindsay	4	0	4

Pursuant to a letter request received on February 14, 1972, from Candidate Edward Cuneo, an authorized representative of the Commissioner of Education held a recount of the write-in ballots cast for Candidates Napoliello and Cuneo.

Although voting machines were used and there were three (3) vacancies for 3-year terms on the Board, only two candidates, Comunale and Casario, filed nominating petitions and had their names printed on the ballot.

The purpose of the recount was limited, therefore, to making a determination of a winner for the third vacant seat on the Board.

The recount confirmed the election of Candidate Napoliello.

The Commissioner finds and determines, therefore, that Joseph Napoliello, Pat Casario, and Albert J. Comunale were elected to the Board of Education of the School District of the Township of Winslow for full terms of three years each.

COMMISSIONER OF EDUCATION

April 18, 1972

In the Matter of the Application of the Board of Education of the East Windsor Regional School District, Mercer County, for the Termination of the Sending - Receiving Relationship with the School District of Monroe Township, Middlesex County.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Henry G. P. Coates, Esq.

For the Respondent, Guido J. Brigiani, Esq.

The Board of Education of the East Windsor Regional School District, Mercer County, hereinafter "East Windsor Board," has applied to the Commissioner of Education for termination of the designation of its high school as the receiving school for pupils from the Monroe Township School District, Middlesex County, hereinafter "Monroe Board."

The original petition in this matter was filed by the Monroe Township Board of Education on the grounds that the East Windsor Regional Board of Education had acted improperly and unlawfully in serving notice of termination of the sending-receiving relationship and refusing to accept approximately

thirty-three of the Monroe Board's Ninth Grade pupils for the 1971-72 school year. A decision of the Commissioner in *Board of Education of the Township of Monroe, Middlesex County v. Board of Education of East Windsor Regional School District, Mercer County and Board of Education of the Borough of Jamesburg, Middlesex County*, rendered September 10, 1971, resolved that dispute and directed the East Windsor Board to amend its Answer as an application for termination of the sending-receiving relationship with the Monroe Board.

Testimony and documentary evidence were educed at a hearing conducted on Wednesday, April 5, 1972, in the office of the Division of Controversies and Disputes, New Jersey Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The East Windsor Regional School District encompasses the municipalities of the Borough of Hightstown and the Township of East Windsor which completely surrounds the Borough. The school facilities operated by the East Windsor Board are described as follows (Exhibit P-3):

School	Functional Capacity	Maximum Capacity
W. C. Black Elementary School (Grades K-2)	875	1,010
Ethel McKnight Elementary School (Grades K-8)	300	360
Melvin H. Kreps Elementary School (Grades K-8)	1,750	2,070
Intermediate School (Grades 6-8)	640	765
Hightstown High School (Grades 9-12)	1,050	1,313
Total	**4,615**	**5,518**

The East Windsor Board receives high school pupils enrolled in Grades Nine through Twelve on a tuition basis from the school districts of Monroe, Roosevelt and Cranbury.

The Board of Education of Monroe Township operates four elementary schools for pupils enrolled in grades Kindergarten through Eight, and sends all of its pupils in Grades Nine through Twelve to East Windsor High School and Jamesburg High School on a tuition basis. (Exhibit R-4) The Monroe Board had a sending-receiving contract with the Jamesburg Board for the ten-year period beginning September 1956 and ending June 1966. (Exhibit R-1) A similar agreement existed between the Monroe Board and the East Windsor Board. (Exhibit R-2) Subsequently, the Monroe Board had a sending-receiving contract with the East Windsor Board for the five-year period beginning September 1966

and ending June 1971. *Monroe Board of Education v. East Windsor Regional Board of Education et al., supra* An agreement between the Monroe Board and the Jamesburg Board was in force between September 1966 and June 1971. (Exhibit J-1) A memorandum dated October 11, 1971, from the Superintendents of Monroe and Jamesburg to their respective Boards of Education, provided that the sending-receiving relationship would continue during the 1971-72 school year, and that Jamesburg would accept a maximum of sixty Ninth Grade pupils from Monroe for the 1972-73 school year. (Exhibit J-2)

The East Windsor statistical enrollment report for the month of February 1972, (Exhibit P-4) discloses the following number of pupils enrolled to date and on roll in Grades Nine through Twelve and in secondary special education classes:

Grade	Total Enrollment	On Roll
Nine	364	344
Ten	314	296
Eleven	292	273
Twelve	276	259
Total	1,246	1,172
Total: Ten - Twelve	882	828
Special Education	41	36

The enrollment projection compiled by East Windsor (Exhibit P-1) anticipates future enrollments in Grades Nine through Twelve as follows:

	Actual Enrollment	Projected Enrollment		
Grade	Sept. 30, 1971	1972-73	1973-74	1974-75
Nine	344	366	373	* 328
Ten	301	337	359	* 329
Eleven	284	280	314	* 298
Twelve	265	279	276	309
Total	1,194	1,262	1,322	1,264

*Minus pupils from Monroe School District

The Superintendent of the East Windsor Regional School District testified that the High School is organized on a four-year plan for Grades Nine through Twelve, but the Ninth Grade is temporarily housed in the Intermediate School with Grades Six through Eight for the 1971-72 school year. Therefore, the current enrollment status of the High School is as follows (Exhibits P-3, P-4):

Hightstown High School

Grades	Enrollment	On Roll	Functional Capacity	Maximum Capacity
Ten,Eleven,Twelve	882	828	1,050	1,313

According to the Superintendent, the present enrollment of the Intermediate School totals 659. Of this total, 344 are Ninth Grade pupils, and the remaining 315 are pupils enrolled in Grades Six, Seven and Eight. The Superintendent further testified that the East Windsor Board has a long-standing policy to maintain the ratios of professional staff per pupil of 1 to 25 for Grades Kindergarten through Five, 1 to 22 for Grades Six through Eight, and 1 to 19 for Grades Nine through Twelve. Under cross-examination, the Superintendent testified that the Board has been able to retain its desired 1 to 19 ratio of professional staff per pupil for Grades Nine through Twelve during the 1971-72 school year. The Superintendent's testimony regarding actual class size was vague and the facts are therefore obscure. He stated that the program for Grades Nine through Twelve is based upon thirteen time modules per day and a total team teaching plan. Therefore, according to the Superintendent, a class of Ninth Grade pupils could vary from one pupil to 344 pupils at a given time, depending upon the plans made by the teachers for that particular day. The Superintendent testified that the defeat of the proposed 1972-73 school budget, and the subsequent action of the two municipal governing bodies reducing the budget in the amount of $559,272 will impair the quality of education because the Board may be required to reduce the number of teachers for Grades Nine through Twelve for the 1972-73 school year. The Superintendent stated that a reduction in the teaching staff may increase the per pupil ratio by 4 or 5 additional pupils for each professional staff member. Under cross-examination, the Superintendent stated further that he had recommended that the East Windsor Board not formally appeal this budget reduction because he believes that the reduction has resulted from the operation of a democratic process.

Both the Superintendent and a former East Windsor Board member provided extensive testimony regarding the rapid growth and development of the Township of East Windsor during the past ten years, as well as the projected future growth. The Township consists of 15.6 square miles of which approximately one-third is developed. A large development of condominiums, town houses, garden apartments and single-family homes is under construction and approximately fifty percent completed. This development will increase the total population by 2,500 when the next portion is completed in December 1975. This fact has been included in the Board's enrollment projection. (Exhibit P-1) An Ad Hoc Citizens Committee has completed a study of future school building needs, and the Committee's report estimates the need for twenty additional schools, including one high school, five intermediate schools and fourteen elementary schools within the next twenty years at a cost of approximately forty-three million dollars. At the present time, the East Windsor Board is developing plans for the building of a 680-pupil school for Grades Kindergarten through Two, a 640-pupil school for Grades Six through Eight and a 396-pupil addition to the High School for Grades Nine through Twelve. The

preliminary plans for the addition to the High School were received by the Department of Education on February 28, 1972.

The Superintendent of the Monroe Township School District testified that the Monroe Board is in the final stages of planning the erection of its own high school to accommodate Grades Seven through Twelve. The final plans for this schoolhouse were received by the Department of Education on March 29, 1972. Completion of this new high school by June 1973 is anticipated by the Monroe Board for occupancy in September 1973 by its Ninth, Tenth and Eleventh Grade pupils.

The 1971-72 enrollment report of the Monroe Board (Exhibit R-3) for Grades Nine through Twelve discloses that 182 pupils are presently enrolled in Hightstown High School, and that 165 are in Jamesburg High School. Additionally, 75 pupils are attending County Vocational Schools, and 32 are in private secondary schools. For the 1972-73 school year, 123 pupils will require placement in public high school. Jamesburg High School will accept sixty of these Ninth Grade pupils, leaving the number of sixty-three pupils to be accommodated. The Superintendent testified that the Monroe Board has a total of seventy-five classrooms, including one sub-standard room, to accommodate Grades Kindergarten through Eight. (Exhibit R-4) He stated that all but one of these classrooms are utilized for regular classes. Grades Kindergarten through Three are located in leased relocatable buildings, and the Monroe Board has no facilities, professional staff or program for Ninth Grade pupils. The District's proposed 1972-73 budget was defeated by the voters, and the subsequent reduction by the Mayor and Council is being appealed to the Commissioner. For these reasons the Monroe Board is requesting that the Commissioner continue the sending-receiving relationship with the East Windsor Board until the opening of Monroe's new high school in September 1973.

The Superintendent of the Jamesburg School District testified that Jamesburg High School is an obsolete schoolhouse, erected in 1932, with a functional capacity of 340 pupils and an absolute maximum capacity of 500 pupils. This school presently accommodates 475 pupils in Grades Nine through Twelve, including resident pupils and those from the sending districts of Monroe and Helmetta. This schoolhouse contains thirteen classrooms, two science rooms, two business education rooms, one shop, one home economics room, and one gymnasium, which is combined with an auditorium. Evaluations of the High School by both the Department of Education and the Middle States Association of Secondary Schools and Colleges have resulted in recommendations for extensive building additions and regionalization studies. The Superintendent testified that since 1950, the Jamesburg Board has attempted to organize three separate regionalizations, none of which has been successful to date. According to the Superintendent, Jamesburg High School contains 128 Ninth Grade pupils at present, fifty-one of which are from Monroe. In September 1972, the Superintendent anticipates a Ninth Grade enrollment of 152, including sixty pupils from Monroe.

The Jamesburg Board also operates one elementary school for Grades Kindergarten through Five, with a functional capacity of 500 and a maximum capacity of 600 pupils. The all-purpose room in this schoolhouse is now sub-divided into three sub-standard classrooms. The District contains one intermediate school, with a functional capacity of 175 pupils and a maximum capacity of 250. Neither of these two schoolhouses contains special classrooms for music, art, industrial arts, home economics and physical education. According to the Superintendent, the current 1971-72 enrollment in Grades Kindergarten through Eight is in excess of 800 pupils.

In their summations, the East Windsor Board requested the Commissioner to terminate the sending-receiving relationship with the Monroe Board by directing that no Ninth Grade pupils be sent from Monroe to East Windsor High School in September 1972. The Monroe Board asked the Commissioner to direct the East Windsor Board to receive approximately sixty-three Ninth Grade pupils from Monroe in September 1972, with the understanding that Monroe's Ninth, Tenth and Eleventh Grade pupils will be withdrawn from East Windsor High School for the 1973-74 school year.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter. The statutes relative to the termination of sending-receiving relationships are *N.J.S.A.* 18A:38-13, 21 and 22. *N.J.S.A.* 18A:38-13 reads as follows:

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

N.J.S.A. 18A: 38-21 provides for such application to the Commissioner and *N.J.S.A.* 18A: 38-22 states in part the following:

> "*** if the commissioner finds that there are good grounds for the application, as provided in this article, he shall give his consent, and the applying board of education shall thereupon be entitled to terminate the agreement ***."

It is clear in the instant matter that the sending-receiving relationship between the East Windsor Regional Board and the Monroe Board will reach a logical point for termination when the Monroe Board's new high school is completed in September 1973. The precise question in the matter controverted

herein before the Commissioner is whether the termination of the sending-receiving relationship should begin September 1972, by the withdrawal of Monroe's Ninth Grade pupils as requested by the East Windsor Board.

The facts are clear that Jamesburg High School suffers more from overcrowding than does Hightstown High School. Jamesburg's other schools are also more crowded and are less able to accommodate additional pupils than the East Windsor schools. The Monroe Board's school facilities are also both crowded and meager in terms of appropriate facilities for a thorough and efficient educational program. Although the East Windsor Regional School District will doubtless experience more growth and a larger proportion of growth in ensuing years, the facts do not support the contention that East Windsor will suffer irreparable harm by retaining Monroe's high school pupils for the next school year. On the contrary, compared to both the Jamesburg School District and the Monroe Township School District, the East Windsor Regional School District clearly has the superior capability and would suffer fewer hardships by continuing to accommodate the Monroe high-school-age pupils. The testimony of the East Windsor Superintendent provides the fact that a ratio of one professional staff member for nineteen pupils is being maintained during the 1971-72 school year. The enrollment in Hightstown High School is presently significantly below that building's functional capacity (Exhibits P-3 and P-4), and the Intermediate School enrollment does not excessively exceed the functional capacity of that school facility. Also, the extremely flexible scheduling program described by the East Windsor Superintendent will, in the judgment of the Commissioner, easily enable that district to accommodate the East Windsor pupils. Also, there is no allegation that the East Windsor Board will be required to resort to double sessions or any other extraordinary scheduling to continue the aforestated accommodation of the Monroe pupils.

The Commissioner finds and determines, for the reasons stated, that the application of the East Windsor Regional Board of Education for the initial termination of the sending-receiving relationship with the Monroe Board of Education, beginning September 1972, must be denied. Therefore, the Commissioner hereby orders the East Windsor Board to continue to accommodate the Monroe Board of Education's pupils, including approximately sixty-three Ninth Grade pupils, for the 1972-73 school year, or until the opening of the Monroe Township High School, if such opening shall occur later than September 1973. The Commissioner further orders that the Twelfth Grade pupils from the Monroe School District shall remain situated in the Hightstown High School until their graduation in June 1974.

The petition is denied.

COMMISSIONER OF EDUCATION

April 19, 1972

Rosemary M. Michener,

Petitioner,

v.

Board of Education of the Township of Passaic, Morris County,

Respondent.

COMMISSIONER OF EDUCATIONN

Decision

For the Petitioner, Vogel, Chait & Wacks (Arnold H. Chait, Esq., of Counsel)

For Respondent, Meyner and Wiley (Donald M. Malehorn, Esq., of Counsel)

Petitioner, the Secretary of the Passaic Township Board of Education, Morris County, hereinafter "Board," avers that the Board's request to create the new position of School Business Administrator should be denied by the Commissioner and the State Board, but demands judgment that if, in the alternative, it is created, she has a tenured entitlement to fill it. The Board avers that it has moved properly to reorganize the administration of its schools by adding a new position and that petitioner has no tenure entitlement except that of Secretary to the Board.

A hearing in this matter was conducted on December 14, and 15, 1971, at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner was first appointed to the position of "Secretary-Business Manager" by the Board in 1957, and has served in this position to the present day. The job description for the position (P-2) which was in existence at that time was a limited one, however, with principal headings labeled:

I. Handle Correspondence
II. Prepare for Board Meetings
III. Attend all Board Meetings
IV. Maintain Board's Reference Files and Reference Shelf
V. Arrange for District Meetings and Elections
VI. Other
    (a) Handle legal advertisements
    (b) Carry out other responsibilities as are required by law.

In 1961, a much more comprehensive job description (P-3) was approved by the Board which established that the holder of the position of "Board Secretary" was also to be responsible for "the operation of the Business Office

of the Passaic Township Schools." According to this job description (P-3), the "Secretary" was to:

1. Prepare, in cooperation with Superintendent, advertise, and certify the annual budget;

2. Be responsible for all disbursements and financial records of the Board;

3. Complete, as required, a series of eleven financial reports;

4. Be the Board's officer responsible for collection of tuition and fees;

5. Represent the Board in preparing and supervising all advertisements for bids and letting of contracts;

6. Act as the Board's budget control officer.

Petitioner now avers that pursuant to the mandate of this job description, she performed all of these duties, as the person in charge of the "business office," and all other duties required of her as Board Secretary for the years 1961 to the present, and that, in fact, she performed many other duties additionally. Specifically, in this regard, her testimony, in part, is that she participated in work on several building alteration projects (Tr. I - 20, 21, 22) and helped with the installation of temperature controls, new lighting, and blacktopping. She also maintains that she consulted frequently over the years with architects and contractors (Tr. - 22), that she worked on the district's transportation routes in 1969 (Tr. I-155) and that she handles transportation of the handicapped at the present time. (Tr. I-152) Thus, in petitioner's view, she has earned a tenure right to continue to perform these duties as Board Secretary-Business Manager, or in any other new position with a different title, which may be created and to which these duties may be assigned.

While saying she has earned a tenure entitlement to the proposed new position of School Business Administrator if it is, in fact, created, petitioner also opposes the creation of the position in the first instance on the principal ground that the Passaic Township District is too small to warrant it and that the cost is too great in proportion. In this regard it is noted here by the hearing examiner that this school system educates approximately 1,200 school children in grades K-8 in four buildings, and now proposes to spend approximately $23,000 for the combined costs of a person to serve as Business Administrator and a secretary or clerk to assist him or her with the work (TR. I-74). Additionally, petitioner also avers that no other district the size of this one in Morris County employs a person to serve solely as School Business Administrator. (See P-11)

The Board has proposed to create just such a new position – that of School Business Administrator – and has been proceeding with an attempt to implement its proposal since 1969, pursuant to statutory authority granted to it by *N.J.S.A.* 18A:17-14.1, which provides:

> "A board or the boards of two or more districts may, under rules and regulations prescribed by the state board, appoint a school business administrator by a majority vote of all the members of the board, define his duties, which may include serving as a secretary of one of the boards, and fix salary, whenever the necessity for such appointment shall have been agreed to by the county superintendent of schools or the county superintendents of schools of the counties in which the districts are situated and approved by the commissioner and the state board. No school business administrator shall be appointed except in the manner provided in this section."

Thus, in 1969, the Board first included this new position in its budgetary planning for the 1969-70 school year, although, according to petitioner's testimony (Tr. I-30), the Board at that time was thinking of a combined Secretary-Business Administrator's position, and not of a new position that would require a second person to fill it. In any event, petitioner developed a job description in that year for the new position and presented it to the Board.

At a subsequent time, in the spring of 1970, the Board again decided to budget funds for the 1970-71 school year for the combined position, and it was evidently still petitioner's view then that she would receive the appointment to it. However, in May of 1971, petitioner's view of the likelihood of her appointment to the proposed new position changed because, according to her testimony (Tr. I-52), the statute, *N.J.S.A.* 18A:17-14.3, would confer an immediate tenure right on her if she were, in fact, appointed, and this automatic entitlement was opposed by members of the Board. This statute provides:

> "Any person who has acquired, or shall hereafter acquire tenure as a secretary or business manager under any board, and who shall be appointed a school business administrator shall have tenure as a school business administrator."

It seems clear, in retrospect, that in May of 1971, the Board finally decided to create separate, rather than combined, positions of Board Secretary and School Business Administrator, and on May 24, 1971, the Board resolved, in regular meeting assembled, to establish the new position of School Business Administrator, and subsequently publicized its action in a quest for candidates for the job. (P-8) Later, on August 3, 1971, petitioner made known her desire to be considered as such a candidate in a letter to the Board which said:

> "For the reasons set forth in my letter of July 26, 1971, I wish to be considered for the appointment as Business Administrator. However, I specifically reserve all of my rights to appeal to the Commissioner of Education and beyond, on the grounds that the creation of such a position is an attempt to deny me tenure rights as provided under Title 18A of the New Jersey Statutes."

On the following day, August 4, 1971, the Board met in special meeting (R-8) and adopted:

1. an organizational chart for the district's schools (PR-3); and

2. two separate job descriptions for the respective positions of Board Secretary (PR-2) and School Business Administrator. (PR-1)

According to the organizational chart, the Board Secretary reports directly to the Board of Education, and is not responsible for the supervision of any other employees except himself. The two former employees assigned to this office of Board Secretary in the past have been removed from this assignment on the chart and assigned to the office of the School Business Administrator. This official is listed on the chart as having direct control of his office staff, and the district's transportation staff, custodial staff and maintenance staff and reports directly to the Superintendent of Schools.

With respect to the duties of the two positions, it is apparent that the duties listed for the Board Secretary (PR-2) are closely parallel to those of the State regulations and statutes (See PR-5), while those for the new position of School Business Administrator are much more comprehensive, and do contain several of the duties and responsibilities which petitioner, as Board Secretary, has assumed over the years. These duties or responsibilities were recited in some detail, *ante*, at Page 3 and included budget control, accounting functions, purchasing, etc.

Subsequent to the Board's adoption, on August 4, 1971, of the resolutions containing the two job descriptions, there were some questions raised concerning the legality of the meeting at which the resolutions had been approved. Therefore, on September 27, 1971, the Board, in regular meeting, reaffirmed its actions of August 4 with an embracing resolution (R-1) by a vote of 8 to 1, and a record of this action was forwarded to the County Superintendent of Schools by the Superintendent of the Passaic Township Schools on September 28, 1971. (R-2) The letter that accompanied the documents also requested the County Superintendent to endorse the materials and submit them to the State Board of Education for the approval required by the statute, *N.J.S.A.* 18A:17-14.1, *supra.*

Shortly thereafter, on October 5, 1971, the County Superintendent did forward the following letter (R-3) to the Commissioner of Education:

> "The Passaic Township Board of Education has requested that the enclosed resolution reaffirming the Board's request for establishment of the position of School Business Administrator be submitted to you.
>
> "The job description and chart of organization remains unchanged. My previous endorsement of this application and recommendation for establishment of the position therefore still holds."

Subsequently, the State Board of Education, at its regular October meeting, approved the establishment of the position of School Business Administrator in Passaic Township, but rescinded the approval at its November meeting, when

apprised of the fact that litigation in the matter *sub judice* had been barred by its action.

Thus, we arrive at the present juncture and must consider the principal issues derived from a review of the contentions of the parties as embodied in the pleadings, and agreed to by counsel. They are stated as follows:

(a) Was there, and is there, a necessity to create the position of School Business Administrator within the administrative framework of the Passaic Township Schools? Was it financially feasible to do so?

(b) Has petitioner been performing substantially all of the duties that are contained in the job description for the new position?

(c) Did the Board's ratification, at a subsequent meeting, of its resolution purporting to approve the position of School Business Administrator cure the procedural defects which are alleged in the amendment to this petition?

(d) Did the Morris County Superintendent of Schools make a determination of the necessity for appointment of a person to act as School Business Administrator, pursuant to the requirement of the statute, *N.J.S.A.* 18A:17-14.1?

(e) Are petitioner's tenure rights in the position of Board Secretary violated by the proposed alteration of the job description established for the position?

(f) Does petitioner have a legal entitlement to the new position if it is in fact created?

The hearing examiner believes that the issues may be consolidated to include a consideration of:

I. The necessity for, and the feasibility of, the creation of the position of School Business Administrator in the School District of Passaic Township and the procedural manner employed to effectuate it.

II. The tenure rights and responsibilities of petitioner with respect thereto.

Therefore, the following recommendations and findings are generally grouped within these broad categories for consideration.

I.

The hearing examiner believes that the testimony at the hearing produced sufficient and positive proof that the Board and the County Superintendent jointly, did, over a long period of time, weigh and consider many alternatives in

this matter before deciding that the Passaic Township Schools needed a person to fill the position of School Business Administrator, and that the position should not be combined with that of Board Secretary. This was no cursory decision on the Board's part or a routine ratification by the County Superintendent of what the Board proposed to do.

To the contrary, according to the testimony of the County Superintendent, he had been discussing the establishment of this new position with petitioner or with Board representatives for approximately a year and a half (Tr. II - 102), and had reviewed the proposed job description for it, and the revision of the one for Board Secretary, in considerable detail. He believed that, in the form they were finally adopted, the job descriptions (PR-1,2) for the two positions were not in conflict. (Tr. II-103) Specifically, in this regard, the County Superintendent said:

> "I felt that there was no conflict between the job description finally adopted for the business administrator and the legal functions of the board secretary."

Additionally, the County Superintendent evidently felt there was a need to employ an additional person to perform some non-educational tasks in this district (Tr. II-104), and he indicated that he discussed alternative proposals in this respect. (Tr. II-105) While saying, on the one hand:

> " *** That it was a good business structure to develop a more encompassing and more defined position of business administrator." (Tr. II-104)

he also left to the " *** administrator and the Board ***" a decision as to whether or nor the positions *sub judice* should be filled by " *** one or two persons." (Tr. II-105) In the event the Board decided to fill the two positions with one person, the County Superintendent believed there was a "*** need for additional supporting personnel in specific fields." (Tr. II-105), and he specifically mentioned transportation, maintenance and custodial care as areas requiring assistance.

The Vice-President of the Board, another long-term member of the Board and the Superintendent of Schools testified as to the need for a separate position of School Business Administrator.

The Vice-President averred that the Board generally, and he in particular, believe that the schools of the district are educationally deficient, and that this deficiency is due in no small measure to the fact that the Superintendent of Schools is not able, under present conditions, to do the job he was employed to do, *i.e.* supervise the academic and educational progress of the district, because he is so burdened with other duties. In this regard, he observes that it is presently the Superintendent who must supervise the district's transportation system, and that it is the Superintendent to whom the maintenance supervisor

reports. Additionally, the Vice-President averred that the Board has need for more precise data than the Superintendent can give to assist it with budget analysis, and that there is incomplete inventory control data and deficient long-range planning in the district. In the Vice-President's judgment, the expense of employing another person for the proposed new position can be made up with savings in transportation costs, since the district will be able to purchase its own buses rather than contract for this service.

The long-term member of the Board, referred to, *ante* recited some pertinent history of the district, and observed that in the years 1964-67, the Superintendent of Schools in Passaic Township did have a person designated as the assistant to the Superintendent who assisted him with the more routine duties that the Superintendent or others have since assumed. This official also attested to the need to upgrade the educational process.

The present Superintendent of Schools was newly-employed by the Board in March 1971, and testified that when he arrived in the district, a building principal was in charge of transportation, and that there were many serious property maintenance problems, and low morale in the school custodians force. He said, additionally, that in the time since his arrival, he has been so engaged with routine items such as these that he is precluded from doing the real work for which the Board employed him – to be an educational leader.

If, in fact, a new position of School Business Administrator is established and a person hired, the Superintendent indicates that he believes that:

(a) He will be able to perform his true educational function as an educational leader;

(b) Costs will be reduced in some areas of school operation (e.g. transportation);

(c) The schools will be better maintained and will be operated more efficiently;

(d) Budget planning will be centralized;

(e) An inventory control system will be established.

He indicated, additionally, that he was surprised that petitioner was critical, at this juncture, of the proposed new position and its job description, since he had worked with her on its draft.

All three of the school officials who testified, and whose essential testimony is recited, *ante*, emphasize that they have no intention of trying to disturb petitioner's tenure as Board Secretary, but indicate, in essence, that the Board's purpose in creating the new position of School Business Administrator is to effectuate a realignment and assignment of duties in reorganizing the district. Such a purpose would seem to be in direct dichotomy with the statement

contained in petitioner's letter of August 3, 1971, reported, *ante*, which maintained that:

> " *** the creation of such a position is an attemtp to deny me tenure rights. ***"

In this regard, the hearing examiner must find unequivocally in favor of the Board. The evidence is conclusive that the Board has moved forthrightly to streamline its administrative structure to give it clear purpose and direction, and that there is no evidence at all, in the hearing examiner's opinion, that it has moved in this matter because of narrow views or in petty ways to stymie petitioner. While it is true, as previously indicated, that petitioner will lose some of her assigned duties because of the realignment, it is also true that the functions and duty assignments of others – particularly, the Superintendnet – will be affected as much if not more, and probably in a beneficial way for all concerned.

Therefore, the hearing examiner strongly recommends that the Commissioner again approve the creation of the position of School Business Administrator in the Passaic Township School District, and that he, in turn, recommend a second action of approval by the State Board of Education.

The hearing examiner believes that there is no need at this juncture to determine what procedural aspects, if any, were defective at the time of the Board's original passage of its resolutions approving the job descriptions. (PR-1 and PR-2, *ante*) Such procedural defects, if any, were clearly made whole by the Board's subsequent ratification, on September 27, 1971, of its prior action and by the County Superintendent's subsequent letter of affirmation (R-3) to the Commissioner. This second letter written by the County Superintendent, together with his clear testimony that there was a "need" (Tr. II - 104-124) for an additional employee, or employees, to properly assist with the work of the Passaic Township Schools (in the form of the position of School Business Administrator, or in an alternative titled position to be decided by the Board) is sufficient evidence, in the judgment of the hearing examiner, that "*** the necessity for such appointment***," which the statute, *N.J.S.A.* 18A:17-14.1, *supra*, requires, has been established. Therefore, at this juncture, with the principal mandate of the statute satisfied, there remains only approval "*** by the Commissioner and the state board***" before the local Board may "appoint" a new employee as School Business Administrator.

II.

The hearing examiner has found that the Board and the County Superintendent have acted properly in the matter, *sub judice*, and that a need or necessity for the new position of School Business Administrator has been established. There remains the question of whether or not petitioner has a tenured entitlement to fill it on the basis of her prior titled position of Board Secretary, or by virtue of the facts of duties performed.

It must be observed here that the hearing examiner has already stated that during the years 1957-1972, petitioner testified that she did perform many duties not strictly apportioned to the responsibility of Board Secretary by job description. (See Page 3 - *ante*) The question remaining for discussion is whether she performed, as claimed, all or substantially all, of the new duties which are listed under the job description for School Business Administrator proposed now to be applicable to a new employee.

In this regard, the hearing examiner finds that she has not, and he grounds this finding principally on the testimony of petitioner herself and on that of the Superintendent of Schools.

It is clear that the principal duties of the new person employed to fill the position of School Business Administrator in the day-to-day operation of the Passaic Township Schools – the duties which will occupy the major portion of his or her work time – have not been performed by petitioner in the past. Specifically, the reference here is to those parts of the job description which refer to:

1. Financial planning-budget preparation.
2. Operation of plant-including supervision of custodians
3. Maintenance of plant-including supervision of employees.
4. Transportation of pupils.
5. Collective negotiations

Petitioner testified as follows with respect to Nos. 2 and 3, *ante:* (Tr. I-p. 135)

"Q. So, then, you don't supervise any of the custodians?
"A. No, sir, I do not.
"Q. Or the maintenance men?"

and at p. 136:

"Q. ***I realize you're involved with their records. But in terms of their work and their supervision when they're at work?
"A. No."

With respect to No. 4, she testified: (Tr. I-p. 154)

"Q. The main transportation, do you have anything to do with working out the bus route for the ––
"A. No.
"Q. The regular children?
"A. No, I do not work out the bus routes, and ––"

and at p. 158:

"Q. So you are not handling now the daily problems with respect to transportation?

"A. No."

and also at p. 159:

"Q. You say the superintendent is now taking care of these daily busing problems?
"A. Yes."

Petitioner further testified as follows with respect to No. 5. (Tr. I-p. 140)

"A. *** and I have nothing to do with negotiations which I never did."

With respect to No. 1, *ante*, the Superintendent of Schools testified that petitioner had supplied him with so-called back-up data necessary for budget preparation but that the compilation of budget data and the decisional aspects of it had been his responsibility. (See R-4)

The important question remaining for consideration is whether or not those other duties assigned to petitioner in written prescription or by unwritten practice in the past, which are now proposed for transfer to the new position of School Business Administrator, constitute sufficient reason for petitioner to claim a tenure entitlement to continue to perform them, and other duties when, and if the proposed new position is created. On page 3 of this report, the hearing examiner listed some of the duties that petitioner claims in this regard. These claims were not refuted at the hearing. Specifically, petitioner claims that periodically or regularly, she has:

1. participated in work on several building alteration projects;
2. helped with installation of temperature controls;
3. helped in the installation of new lighting;
4. assisted with blacktopping projects;
5. consulted frequently with architects and contractors;
6. worked on the district's transportation routes in 1969;
7. worked directly with transportation of the handicapped in recent years.

Additionally, petitioner testifies that she has provided data in connection with budget preparation, been responsible for budget control and monthly reports pertinent thereto, and for:

1. internal accounts,
2. voucher and payroll work
3. receipt estimates,
4. government tax and pension accounting,
5. annual transportation report,
6. purchasing and supply orders,
7. real estate management and leases,
8. assessments and taxes etc.

In her view, therefore, a transfer of these and/or other specific duties to the new position of School Business Administrator will be a diminution of her responsibilities so severe as to infringe her tenured entitlement to perform them and thus be *ultra vires*. In this regard, the job description proposed to outline the duties of the positions of Board Secretary and Business Administrator in the future are detailed below with respect to major headings of responsibility assignment:

"204.1 Board Secretary

"204.11 Appointment of Secretary

The Board shall appoint a secretary by a majority vote of all of its members for a term of one year, beginning on July 1st, following his appointment, and until his successor is appointed and qualified.

"204.12 Salary

The salary of the Board Secretary shall be determined by mutual agreement on the basis of evaluation, training, and responsibilities assigned and shall be established in February for the ensuing year.

"204.13 Bond of Secretary

The Secretary shall, before entering upon duties of his office, give bond to the Board, not less than $2,000. in an amount and with surety being approved by the Board.

"204.14 Powers and Duties of Secretary

The Secretary shall:

a. Be custodian of all contracts, records, securities, documents, and other papers of the Board except those kept by the Custodian of School Monies, under such conditions as the Board shall prescribe;

b. Give notice of all regular and special meetings of the Board to the members thereof;

c. Record the minutes of all proceedings of the Board;

d. Post and give notice of annual and special elections to the legal voters of the District, record the results of such elections, and file reports in accord with this policy and the rules of the State Board;

e. Collect tuition fees and other monies due the board not payable directly to the Custodian of School Monies and transmit same to the Custodian of School Monies;

f. Examine and audit all accounts and demands against the Board and present same to the Board for its approval or disapproval,

and certify, with the President of the Board, the action so taken, to the Custodian of School Monies;

g. Pay on order of the Custodian of School Monies, all School Monies in accordance with 18A and the Rules of the State Board;

h. Keep and maintain a detailed account of all expenditures and other financial transactions of the District, in accordance with the Rules of the State Board;

i. Administer oaths without charge, in connection with the school matters of the District;

j. Report to the Board at each regular meeting the total appropriations-receipts for each account, and the amount for which warrants have been drawn against each account, the amount of orders or contractual obligations incurred and chargeable against each account since the date of his last report and the cash balance and free balance to the credit of each account.

k. On or before August 1st of each year, report to the Board, the County Superintendent and the Commissioner all financial transactions during the preceding year including outstanding bonds and other obligations and such othe; information as may be required by rules of the State Board.

l. Perform such other duties as directed by the Board and as may be fixed by law.

"204.2 School Business Administrator

"204.21 Qualifications

The Business Administrator shall satisfy State of New Jersey certification requirements, and shall hold a degree conferred by an accredited college or university of general recognition. He shall have a background of training and experience in management, supervision, and finance.

"204.22 Salary

The salary of the Business Administrator shall be determined by mutual agreement on the basis of evaluation, training, and responsibilities assigned, and shall be established in February for the ensuing year.

"204.23 Status

The School Business Administrator shall work under the supervision of the Superintendent of Schools.

"204.24 Responsibilities and Duties – The Functions of the Business Administrator, in cooperation with all members of the staff having related administrative responsibility are:

I. Financial Planning – Assists in the planning and preparation of the annual budget, as well as long-term planning in terms of community resources and needs.

II. Accounting – Supervises the accounting system necessary to provide the board of education and administrators with accurate financial reports in all areas except those delegated by statute to the secretary of the Board of Education.

III. Purchasing and Supply Management – Is responsible for all purchasing in accordance with the law and school board policy.

IV. School Plant Planning and Construction – Works with other administrators, architects, attorneys and financial advisors in planning construction, contracting and in acquiring suitable financing.

V. Operation of Plant – In cooperation with other administrators, assumes the responsibility for the supervision of maintenance and operation of facilities.

VI. Maintenance of Plant – Is responsible for maintaining facilities which will assure maximum educational utility.

VII. Real Estate Managment – Is responsible for site studying, site acquisition, and sale of real estate.

VIII. Personnel Management – Recruits personnel for positions in the area of school business management.

IX. Transportation of Pupils – Is responsible for the operation and maintenance of district-owned buses and handles business aspects of contracted transportation services.

X. Food Service Operation – Is responsible for the business operation of school food services and the efficient business management of the school lunch program.

XI. Insurance – Has general responsibility for the operation of the insurance program.

XII. Cost Analysis – Is responsible for obtaining the best products at the lowest possible cost.

XIII. Collective Negotiations – Assists in collective negotiations as the situation demands.

XIV. Data Processing – Introduces data processing, when desirable, to provide better and more complete accounting records.

XV. Responsible for developing and recommending Board Policies and Administrative Procedures as related to fiscal and non-instructional matters.

XVI. Serves as a member of the Administrative Council.

XVII. Perform such other duties in fulfillment of general responsibilities as may be necessary or incidental thereto, including such duties as may from time to time be prescribed by the Superintendent and in accordance with the law.

XVIII. Duties and responsibilities assigned to the Business Administrator shall in no way conflict with the legal duties of the Board Secretary, and it is not intended that any duties assigned by law to the Board Secretary shall be performed by the School Business Administrator. Nothing contained herein, however, shall prevent the appointment of the same person to serve as both School Business Administrator and Board Secretary."

Any perusal of these proposed job descriptions in the context of a comparison between what petitioner, and others, state, or admit, she has done in the past and what has evidently been left undone or done by others – particularly the Superintendent of Schools – leads, in the judgment of the hearing examiner, to the following conclusions:

1. There is a need for a new position, or realignment of some kind, to insure a more efficient operation of the district in the future.

2. Many of the duties the Board proposes as assignments for the new position, of School Business Administrator, have not been performed by petitioner – except sporadically or incidentally – in the past (i.e. transportation, maintenance, custodial supervision, budget preparation in its broad decision – making aspects, negotiations). These duties will comprise, in the opinion of the hearing examiner, a major part of the proposed new assignment.

3. Petitioner has performed many of the other tasks, as Board Secretary, that will now be assigned to the position of School Business Administrator.

The judgment that remains to be made is whether or not, in the future, petitioner has a continuing right as a tenured employee to continue to perform these duties ("c", *ante*) that were assigned to her in the past if the new position of School Business Administrator is in fact created. She argues that she does and cites previous decisions of the Courts and Commissioner to support her argument that tenured employees hold a continuing right to perform duties that have been performed in the past regardless of the job title assignment. *Viemeister v. Board of Education, Prospect Park*, 1939-49 *S.L.D.* 115; 5 *N.J. Super.* 215 (*App. Div.* 1949); *Brunner v. Board of Education of the City of Camden, Camden County*, 1960 *S.L.D.* 155; *Opeken v. Board of Education of the Township of Jefferson, Morris County*, decided by the Commissioner April 23, 1970.

The Board, on the other hand, avers that petitioner, by her own testimony has not performed many of the duties it proposes to assign to its new position of School BusinessAdministrator and that, therefore, she can not claim a tenured entitlement to perform them in the future. The Board thus maintains that the "precise conditions" necessary for a tenure accrual as mandated by the Courts, particularly, in *Ahrensfield v. State Board of Education*, 126 *N.J.L.* 543 (1941), and *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962) have not been met. The Board also cites the Commissioner's decision in *Buehler v. Board of Education of Township of Ocean, Monmouth Co.*, decided by the Commissioner July 3, 1968, affirmed State Board of Education December 17, 1970, to support its contention that an appointment, by the Board, to the new position of School Business Administrator is a necessary prerequisite for tenure accrual by a person in the Board's employ. Finally, there is no doubt that petitioner does have an entitlement, if the position of School Business Administrator is approved by the Commissioner and the State Board, to apply for it as a candidate, and to be appointed, if adjudged as the best candidate by the Board.

In summary, the hearing examiner has found that:

1. The need for the position of School Business Administrator in the School District of Passaic Township has been established, and the process that led to this determination by the Board and the County Superintendent was a long and thoughtful one.

2. Petitioner has an entitlement, as does any other person, to apply for the new position.

3. The Board's request for the establishment of this position is now, and has been, properly before the Commissioner for his approval and the approval of the State Board.

It remains for the Commissioner to determine whether or not, with the facts as related, *ante*, petitioner has a tenured right to the position of School Business Administrator in Passaic Township, if the position is indeed created, on the basis of an argument that her performance of some, or even a substantial

part, of the duties to be assigned to the new position entitles her to perform all of them.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the findings expressed therein. The Commisisoner believes that the matter, *sub judice*, is clearly one in which the discretion of the Passaic Township Board has been exercised in a commendable way to improve the educational opportunity offered to students. In such situations, he has not in the past, and will not now, attempt to impose another judgment on the Board. The Board is responsible for the wisdom of its action only to the people who elected it.

Perhaps this finding was best expressed by the decision of the Commissioner of Education in the matter of *Michael A. Fiore v. Board of Education of the City of Jersey City*, February 28, 1962, affirmed State Board of Education December 4, 1963, affirmed Superior Court, Appellate Division. In the words of the Court in 1965 *S.L.D.*, 177, 178:

> " *** The Legislature has committed the operation of local schools to district boards of education. It has provided a system of administrative appeals from such boards to the Commissioner *** and thereafter to the State Board ***. The powers of boards of education in the management and control of school districts are broad. *Downs v. Board of Education, Hoboken*, 12 *N.J. Misc.* 345, 171 *A.* 528 (*Sup. Ct.* 1934), affirmed *sub nominee Flechtner v. Board of Education of Hoboken*, 113 *N.J.* 401 (*E. & A.* 1934).
>
> "Subject to statutes relating to tenure, they are vested with wide discretion in determining the number of employees necessary to carry out the program, the services to be rendered by each and the compensation to be paid for such services. Where a board, in the exercise of its discretion, acts within the authority conferred on it by law, the courts will not interfere absent a showing of clear abuse *** *Boult v. Board of Education of Passaic*, 135 *N.J.L.* 331 (*Sup. Ct.* 1947), affirmed 136 *N.J.L.* 521 (*E. & A.* 1948).***"

The Commissioner has found no evidence of abuse of discretion by the Board herein. To the contrary, he finds that the Board has proposed a comprehensive program for the reorganization of its administrative and business functions that augurs well for increased efficiency of its total school operation. This reorganization should result in better education for children and may result in smaller dollar costs through realized savings in transportation expenditures. Therefore, the Commissioner reiterates his approval of the creation of the position of School Business Administrator in Passaic Township, and he will refer this approval again to the State Board of Education at an early date.

Having approved the creation of the new position, the Commissioner must now decide whether petitioner has a tenured entitlement to fill it. In this regard he finds that she has not.

This finding is grounded principally on the prior decision of the Commissioner in *James J. Opeken v. Board of Education of the Township of Jefferson, supra*, in which the Commissioner was confronted with a situation basically similar to the one herein. Specifically, in *Opeken*, petitioner demanded judgment that prior assignment to duties as an Assistant Superintendent of Schools had earned for him a tenured right to fill a new position of Assistant Superintendent in Charge of Business. The Commissioner, while noting that the petitioner was not properly certified for the new position, (not the case in the instant matter), also found the proposed new position to be one which was "altogether a different position" from the one petitioner formerly held. The Commissioner then stated:

> "Such duties as the new position specifies with respect to buildings and grounds are but one element of a vastly more complex business operation for which the new position requires overall supervisory, and administrative authority."

Similarly, in the instant matter the Board has moved to remove a set of responsibilities from its Superintendent of Schools, other administrators, and the Board Secretary and proposes to combine them in a new position – one both "more complex" and more embracing than the one that the Board Secretary has had over the years. Since the new position will represent a new compendium of duties, it can hardly be argued, in the Commissioner's judgment, that the performance of some of them by petition in the past must, in the future, be broadened to include an entitlement by petitioner to perform all of them. Such a finding would foreclose the possibility that other Boards, similarly situated, could ever create the new position of School Business Administrator and fill it with a new staff member since, in all districts, the duties to be assigned, as herein, would be similar and differ only in degree.

In summary, the Commissioner finds and determines that:

1. The Passaic Township Board of Education has moved in a lawful and proper manner to create the new position of School Business Administrator as authorized in statutory prescription.

2. Petitioner has no tenure entitlement to perform the duties of the new position but may apply and be elected to it at Board discretion.

3. Petitioner's tenure entitlement to the position of Board Secretary remains intact.

Accordingly, the Commissioner will refer his approval, *ante*, to the State Board of Education at an early date.

COMMISSIONER OF EDUCATION

April 25, 1972

BARRY KOTLER,

Petitioner,

v.

Board of Education of the Borough of Manville, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Diamond & Pitman (Ross R. Anzaldi, Esq., of Counsel)

For the Respondent, Trombadore & Trombadore (Raymond R. Trombadore, Esq., of Counsel)

Petitioner, a tenure teacher in the school district of Manville, Somerset County, avers that he was improperly denied a salary increment during the 1971-72 school year, and demands judgment at this juncture that he is entitled to receive it by the stated terms of a negotiated salary agreement. Respondent, the Board of Education of the Borough of Manville, hereinafter "Board," maintains that the salary increment *sub judice* could be, and was, properly withheld in this instance.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on January 31 and February 1, 1972, at the office of the Somerset County Superintendent of Schools, Somerville. Memorandums were subsequently filed by counsel. The report of the hearing examiner is as follows:

Petitioner is a teacher who, in 1970, acquired a tenure status as a teacher of social studies in Manville High School, hereinafter "High School." Up to and including the day of March 9, 1971, he had "never been reprimanded for any breach of Board policy." (R-5) However, on March 10, 1971, during the sixth period of the school day, petitioner left the High School, together with a student, for the express purpose of helping the student obtain a passport for a prospective trip to Europe. Neither petitioner nor the student remembered, prior to leaving the building, to "sign out" (R-1) as required by school rules, and the student had neglected, additionally, to present the parental permission slip, which was also a prerequisite for such an absence.

Subsequent to this absence, and the short trip to a nearby town which followed, petitioner was interviewed by the school's principal, and this official requested a written explanation of the incident. (R-3) This was furnished by petitioner in a letter dated March 11, 1971 (R-1). However, in a memorandum of that same date to the Superintendent of Schools, the principal recommended *inter alia:* (R-3)

> "*** that Mr. Kotler forfeit one-third (1/3) of one day's salary to compensate for the time he was absent to conduct private business.***"

Additionally, the principal said:

> "I further recommend that Mr. Kotler be informed that any *further incident* of similar nature could result in charges of conduct unbecoming a teacher. Such charges, if substantiated, could result in dismissal." (*Emphasis supplied.*)

Despite the recommendation of the principal, however, it is clear that the Superintendent did consider that the incident, *supra*, in itself represented a breach of school rules so serious that even on this occasion a charge of unbecoming conduct might be considered. Specifically, the Superintendent said, in a letter dated March 22, 1971, (R-2) which "required" petitioner to present himself on April 5, 1971, "to discuss" the alleged incident of March 10, 1971:

> "*** As a result of this meeting a formal charge of conduct unbecoming a teacher may be lodged against you.***"

Petitioner did present himself at the office of the Superintendent of Schools on April 5, 1971, accompanied by a representative of the teachers' association, and did have an opportunity on that occasion to present his own version of the events of March 10, 1971. However, subsequent to this meeting, the Superintendent addressed a letter (P-2) to petitioner dated April 15, 1971, stating *inter alia* that:

> "*** as a result of your actions on March 10, 1971, I will not be recommending you for an increment for the school year 1971-72. If you so desire, you may request a hearing with the Board of Education and have with you a representative of your choosing.
>
> "Will you please let me know by April 22 if you desire to have this hearing."

There is no testimony that petitioner ever "requested" such a hearing before the Board, although he did meet with the Superintendent of Schools on April 22, 1971, to consider the matter again.

Subsequent thereto, on May 12, 1971, the Board voted informally to withhold petitioner's increment for the 1971-72 school year, and petitioner was notified in a memo dated May 17, 1971, (P-3) that "official Board action" would be "taken at a regular board meeting in the near future." This memo from the Superintendent of Schools was followed by a Board action, detailed in a resolution (R-5) of June 21, 1971, which stated that petitioner's prospective salary increment should and would be "withheld" for the 1971-72 school year.

This concludes a brief recital of the basic facts pertinent to this adjudication. While petitioner contends that he was never told when the Board would meet to act on his increment for the 1971-72 school year – a contention contradicted by the Superintendent of Schools (Tr. 22) – the hearing examiner finds this specific controversy immaterial to this adjudication. Exhibit P-2 makes it clear that petitioner was offered a hearing before the Board, and there is no evidence, even by petitioner's own testimony, that he ever took any action to accept it. Additionally, petitioner had a full opportunity to express himself in person to the Superintendent of Schools on April 5, 1971, and to present his own version of events which precipitated the subsequent Board action. The hearing examiner can find no procedural due process faults in such circumstances that are worthy of consideration by the Commissioner. Accordingly, the hearing examiner recommends that consideration of the petition herein be limited to two other contentions of petitioner; namely, that:

I. The Board could not lawfully take the action it took because it had never stated, in its salary policy, that increments could or would be withheld for cause, and

II. The Board's action was an abuse of discretion and far in excess of that which reasonable men would consider fair.

These two contentions are discussed below.

I.

Petitioner founds his first contention, *ante*, on prior decisions of the Commissioner and the State Board of Education, which have held that salary guides and their attached provisions are contracts according to their precisely-stated terms, and that they may not be added to or subtracted from except in a manner detailed in writing. In petitioner's view, the Board has no policy contained in its negotiated written agreement with its teachers for the 1970-71 school year (PR-1), which reserved to itself the right to withhold salary increments for cause.

On the other hand, the Board avers that it has had, and has now, a policy in this regard which is clearly understood by all of its teaching staff members. The Board founds this argument on:

1. a written policy on withholding salary increments adopted in 1964 but not readopted since that time.

2. parol evidence that there was an agreement between the Board and the local teachers' association in 1969, effective for the school year 1969-70, which was carried over in a tacitly understood agreement for the school year 1970-71. This agreement, according to the Board, was embodied in an understanding that the Board had the authority to withhold such increments by statute, and that a written agreement to this effect was therefore superfluous.

3. clauses in the contract in effect for the 1970-71 school year between the Board and its employees.

These contentions of the Board are reported and discussed in order below:

1. The written policy adopted by the Board, according to Exhibit R-7, in May 1964, reads as follows with regard to the "Placement" of teachers on the salary guide:

"*** Increments – Rules for granting

(a) No salary increments are automatic. Increments are not granted solely on the basis of experience. Teachers (sic) increments shall be granted only on the basis of demonstrated improvement in efficiency of service.

(b) To be eligible for an increment, a teacher must have been a regularly employed teacher of the Board of Education during the previous year for at least one hundred and fifty school days, and under a contract.

(c) The Board of Education upon the receipt of an evaluation of the Superintendent, reserves the right to withhold, for inefficienty (sic) or of any other good cause, the employment increment or the adjustment increment or both of any teacher in any year by a majority vote of all the members of the board of education.***"

Other provisions, with further delineation of the paragraphs above but without pertinence herein, then appear.

2. There was parol evidence elicited, at the hearing in this matter, from the president of the local teachers' association, that in the spring of 1969, the local association and the Board jointly agreed because of their understanding of the statutes, particularly *N.J.S.A.* 18A:29-14, that the Board had the authority to withhold increments for cause. (Tr. 49) Since this was thought to be true, they then jointly agreed that no mention of this salary-increment withholding policy need be contained in the negotiated agreement between the parties in force and effect for the 1969-70 school year. Therefore, no such policy was incorporated in the agreement for that year. In the succeeding negotiations for an agreement in the school year 1970-71, the matter evidently was not even discussed.

3. The 1970-71 "Agreement" between the Board and the Manville Education Association (PR-1) contains a salary scale with steps based on years of experience and degree attainment and a page (6.1) devoted to provisions applicable to "Salaries." There is no provision to that page or on any other page specifically applicable to the issued herein; namely, the Board's right to withhold the stated salary increments contained in the salary guide. However, the Board avers that it expressly reserved this right to withhold by the language contained in paragraphs contained on page 15.1 of the exhibit and entitled "Miscellaneous Provisions." Applicable parts from this page are cited as follows:

"***D. The Board retains all of its responsibility and authority to direct and manage the public schools under applicable laws and regulations, subject only to the limitations imposed by the language of this Agreement, including the duties:

1. To direct employees of the school district and

2. To hire, promote, transfer, assign and retain employees in positions within the school district; and for just cause to suspend, demote, discharge, or take other disciplinary action against employees.

It is understood that employees shall continue to serve under the direction of the Superintendent of Schools and in accordance with the Board and administrative policies, rules and regulations, including those which may not be covered by this Agreement.***"

Finally, with respect to the legal determination to be made herein, the Board argues that a number of the Commissioner's decisions dealing with the matter of withholding salary increments "post-dated the enactment of the agreement PR-1" (Tr. 84), which the Board negotiated with its teachers in the spring of 1970 for the ensuing school year. However, the Board does aver that the agreement, even in these circumstances, does contain language reserving to the Board the right to "discipline" and "demote" teachers in its school system. In the Board's view, there is "really only one way you can discipline a tenure teacher and that is to withhold an increment." (Tr. 85)

II.

The merits of the charges against petitioner, which resulted in the Board's action to withhold the increment *sub judice*, must also be discussed. The admitted facts pertinent thereto are not in contention herein. Specifically, petitioner admits he erred and that on March 10, 1971, he violated some of the written regulations of the school (See R-8, R-1) in that:

1. he left school early without permission of the school administration;

2. he did not sign out before he left; and

3. he took a student with him who did not have the required written parental consent.

In effect, petitioner apologized for his error in his written review of the incident (R-1), but in testimony at the hearing, and in his written review, he did offer some mitigating circumstances that might be considered to temper the penalty that was later invoked against him by the Board.

Specifically, petitioner said in this regard that:

1. He had the oral permission of the student's mother to take the student to the nearby town to complete passport application. This contention was verified, in the opinion of the hearing examiner, by the testimony of the mother.

2. He had not signed out because both he, and the student, were rushed and had to hurry their departure.

3. Another teacher was asked by petitioner to cover for him in his absence. It is clear from testimony that class coverage was so provided.

4. He had spoken to his department head about his leave prior to taking it. Petitioner does not contend at this juncture that he had permission from his department head to absent himself during a regular period of the school day, but merely that he "spoke" to him about it.

Additionally, it is noted here that the Board does not question the fact that petitioner had a legitimate and commendable reason – namely, to assist a student with last-minute details preparatory to a trip to Europe, which was to be chaperoned by petitioner – for leaving school early on March 10, 1971. The objection is principally lodged in the way and manner in which he performed an otherwise commendable chore.

* * * *

The Commissioner has reviewed the report of the hearing examiner, and concurs with his opinion that in the circumstances, consideration need not be given herein to contentions that procedural due process was not afforded to petitioner. A determination in this matter could not rest on the merits of such argument.

It rests instead, in the Commissioner's judgment, solely on whether or not, in conformity with the Agreement (PR-1), which the Board made with its teachers for the 1970-71 school year, or in conformity with other policies relevant to published salary schedules, the Board even reserved to itself the right to withhold salary increments for cause during the 1971-72 school year. In this regard, it must be observed that the Commissioner's decision in *Norman A. Ross v. Board of Education of the City of Rahway, Union County*, 1968 *S.L.D.* 26, affirmed by State Board of Education October 9, 1968, has direct pertinence to the matter herein as it has had with respect to a number of other decisions in the year since its promulgation. *Doris Van Etten and Elizabeth Struble v. The Board of Education of the Township of Frankford, Sussex County*, decided by the Commissioner March 17, 1971; *Charles Brasher v. Board of Education of the Township of Bernards et al., Somerset County*, decided by the Commissioner

March 19, 1971; *Charles Lewis v. Board of Education of the Borough of Wanaque, Passaic County*, decided by the Commissioner October 21, 1971. Three of these decisions, it is noted here, were promulgated prior to the time the resolution (R-5) was adopted by the Manville Board on June 21, 1971 i.e. *Ross*, 1968; *Van Etten*, March 17, 1971; and *Brasher*, March 19, 1971. Consequently, the findings of these decisions do have pertinence to the instant adjudication and are considered below.

In the *Ross* decision, *supra*, the Commissioner dealt at some length with "salary policies" in the context of *Chapter* 236, *Laws* of 1965 and, in effect, barred such policies from the traditional past unless such policies were "precisely set forth." (Tr. 28) Specifically, he said in this regard:

> "*** The adoption by respondent in March 1966 of a 'Salary Guide' (Exhibit R-1) established for the period prescribed by the Statute, *N.J.S.* 18A:29-4.1, the precise terms and conditions 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 of increment or adjustment to which a teacher would be entitled in any one year. If respondent had wished to include such a limitation it could have done so.* The principle of limiting the amount of adjustment-to-guide is well established in the State Minimum Salary Law (*N.J.S.* 18A:29-6 *et seq.*), which provides for the payment of an annual 'adjustment increment' to teachers below their proper place on the minimum salary schedule, so as to bring them to their proper place, over a period of years if necessary. In the enactment of *Chapter* 236, *Laws* of 1965, the Legislature made it possible for school districts to establish salary policies, including salary schedules, which would give to their professional employees *a precise statement of their salary expectations* over the succeeding two years, and at the same time would make it possible for boards of education to budget meaningfully to implement such schedules. *Both of these purposes would be defeated if the board could impose other conditions not precisely set forth in the salary policy.*
>
> In the instant matter respondent relies upon a *traditional past policy*, known to petitioner, of limiting the adjustment-to-guide for any teacher to $600 per year. 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.* Only by expressly so stating its practice could all know of it and be equally bound by it.***" (*Emphasis supplied.*)

Again in *Ross*, at page 29, the Commissioner held that *Chapter* 236:

> "***clearly established the contractual nature of salary policies, including salary schedules adopted by boards under the authority of that *Chapter*.***"

Thus, stated concisely in the year 1968, the Commissioner had clearly stated that oral agreements, even though "well known" and a part of "traditional past policy" could not be considered as binding on all parties unless such agreements were included in the Board's "statement of policy."

However, in *Van Etten, supra*, another dimension was added to litigation such as the one *sub judice;* namely, *Chapter* 303, *Laws* of 1968 had been promulgated by the New Jersey Legislature. In this regard, in *Van Etten*, the Commissioner said:

> "*** Since the adoption of *Chapter* 236, the Legislature has also adopted *Chapter* 303, *Laws* of 1968, now embodied in *N.J.S.A.* 34:13A-1 *et seq.*, imposing on boards of education and other public employers the obligation to negotiate the 'terms and conditions of employment.' While there has yet been no precise definition of that mandate, as regards peripheral meanings of the phrases, there is no argument that a salary schedule for teachers, and the directly associated provisions that affect compensation, are within the purview of the legislation. Presumably, these statutes (*N.J.S.A.* 34:13A-1 *et seq., supra*) were enacted to reduce the number of disputes between public employees and governing bodies and to insure that machinery is available to process the disputes when they do arise. *However, if, following negotiations pursuant to the mandate imposed by Chapter 303, the resulting 'agreements' are not committed to writing but are left to vague 'understandings' or the habits derived from custom, the Commissioner holds that the resultant 'agreement' is no agreement at all except in so far as it is precisely stated.* In the instant matter the Commissioner believes the Board made a contract with its teaching staff for the 1970-71 school year, and that the terms of this contract are those committed to writing and contained in the terms of the salary guide (P-2). The Commissioner knows of no reason why at the time this contract was negotiated, the Board could not have attached 'additional provisions' to it, as it had for the guides adopted for the previous year and in 1955. Having failed to attach such provisions or conditions to the guide, whereby increments are conditional upon recommendations from the Superintendent or from others, the Commissioner holds that the Board and petitioners are bound only by the terms of the guide."
> (*Emphasis supplied.*)

In consideration of the instant matter, the Commissioner is asked again to render judgment that an oral agreement, a traditional past practice and a vaguely-worded group of sentences which includes the words "discipline" and "demote," should be interpreted by the Commissioner to mean that the Board had reserved for itself a right to withhold increments for teaching staff members. He is asked to do this by the Board despite the fact that a precisely-stated policy (R-7) was at one time, in 1964, a part of written Board policy, but was not subsequently found worthy of adoption. In such circumstances, having failed to readopt this precisely-stated policy in 1965 and in all the years since that time,

can the Board now claim the rights which that policy reserved? The Commissioner holds that they cannot, and that the salary guide contained in PR-1 with attached policies must stand on its own terms as stated in writing only in so far as those terms are precisely defined.

In this regard, the Commissioner notes that the Board argues that there is only one way you can "discipline" a tenure teacher and that is to withhold an increment. The Commissioner opines that if this were clearly the fact of the matter, the argument might have validity. However, it is not the fact of the matter, for there are other ways – those ways embodied in the statutes for proceeding against tenure teachers (*N.J.S.A.* 18A:6-10 *et seq.*) – and a way that in the matter, *sub judice*, was recommended by the Manville High School principal in his report. This report, the Commissioner has noted, contains the following recommendation, which must certainly be adjudged as an alternate form of discipline and one as proper under the circumstances, since petitioner, by his own admission, did infringe upon school rules and did leave the school building and his post of duty without permission:

> "I recommend that Mr. Kotler forfeit one-third (1/3) of one day's salary to compensate for the time he was absent to conduct private business."

It is noted here that the Board is not obligated to pay for service not rendered – in fact it is barred from doing so – and that during a part of the school day on March 10, 1971, petitioner did not render the service for which he had contracted.

In summary, the Commissioner holds that the salary policies which the Board adopted for the school year 1970-71 did not expressly reserve to the Board the right to withhold salary increments for cause. Such a reservation is necessary authority, and a prerequisite, to the act considered *sub judice.* Therefore, the Commissioner directs the Manville Board of Education to honor the precise terms of the salary commitment that it did make to petitioner for the 1971-72 school year, as embodied in its published salary guide, and to adjust his salary retroactively forthwith.

Finally, the Commissioner remands to the Board, for further consideration, the suggestions for appropriate disciplinary action in this matter against petitioner, which are contained in the discussion, *supra.*

COMMISSIONER OF EDUCATION

April 26, 1972

In the Matter of the Annual School Election Held in the School District of the City of Trenton, Mercer County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the voting for three members for full terms of three years each and for one member for a one-year term on the Board of Education of the City of Trenton at the annual school election held on February 8, 1972, were as follows:

For Three-Year Terms	At Polls	Absentee	Total
Frank E. Hutchinson, Jr.	2645	7	2652
Vincent L. Corso	1136	7	1143
Joseph M. Dempsey	1512	7	1519
Barbara C. Potkay	4476	14	4490
Robert E. Dansbury	201	0	201
Kathleen M. Ravenel	146	0	146
Cristino Echevarria	243	3	246
Carl J. Carter	176	2	178
Arthur E. Kaminski	1613	2	1615
James A. Taliaferro, Jr.	2281	6	2287
Maria M. Ciccarello	1385	5	1390
Gerald E. Matlock	732	1	733
John W. Brown, Jr.	224	1	225
Timothy B. Lucey	310	0	310
Francis A. Caputo	1559	3	1562
Arthur H. Anderson, III	2399	7	2406
Ernest H. Hubscher	657	6	663

For One-Year Term	At Polls	Absentee	Total
Richard P. Lloyd, Jr.	2110	7	2117
R. Chester Arsenault	965	8	973
Arthur H. Devlin	1088	2	1090
Donald D. Jones	2275	6	2281
James S. Mignone	432	1	433
Richard J. Harrison	220	1	221

Pursuant to a letter request dated February 11, 1972, from Candidate Arthur E. Kaminski, and a second letter dated February 16, 1972, from Candidate Richard P. Lloyd, Jr., the Commissioner authorized and directed a representative to conduct an inquiry into the election. The report of the Commissioner's representative is as follows:

The inquiry mentioned, *supra*, consisted of:

1. A recount of the ballots cast on the voting machines in the 87 voting districts of the City of Trenton, which was held on February 18, 1972, at the voting machine warehouse of the Mercer County Election Board.

2. An examination of the poll lists in *pari materia* with a scrutiny of the signature copy registers at the offices of the Mercer County Election Board, South Broad Street, Trenton. This examination occupied the greater part of three afternoons in late February, 1972, and was conducted by Candidates Kaminski and Lloyd, hereinafter "Candidates," and assistants procured by them. The Commissioner's representative was present on two of these occasions, and the Mercer County Superintendent of Schools was present on a third.

   Subsequent to these periods of scrutiny, the Candidates have presented a series of written allegations which are discussed herein.

The two parts of the inquiry are discussed separately as follows:

1. The Commissioner's representative finds that the recount of the ballots cast on the voting machines in the 87 election districts confirms the totals as announced and reported, supra, with the exception of five districts in the East and South Wards, i.e. District 10 in the East Ward, and Districts 7, 14, 18, and 21 of the South Ward. The variances in these districts were as follows:

			Announced Recount	
Candidate	**District**	**Result**	**Result**	**Differences**
EAST WARD				
Frank E. Hutchinson, Jr.	10	62	64	+2
SOUTH WARD				
Arthur H. Devlin	7	14	12	−2
Arthur H. Devlin	14	21	11	−10
R. Chester Arsenault	18	7	2	−5
Robert E. Dansbury	21	0	1	+1

It is noted here by the Commissioner's representative that these findings are not sufficient to disturb the relative standings of the Candidates as announced immediately subsequent to the election of February 8, 1972.

2. The written allegations of irregularities submitted by Candidates Kaminski and Lloyd followed their scrutiny of the poll lists and were filed with the Division of Controversies and Disputes, State Department of Education, on March 30, 1972, pursuant to the direction of the Commissioner's representative contained in a

memorandum addressed to the Candidates on February 29, 1972. This memorandum is notated here as follows:

"At the time of the machine recount of votes cast in the recent election for members of the Trenton Board of Education we agreed, at your request, that we would permit you to examine the poll list and compare it with the signature copy register. We did make this list available to you at an afternoon session on February 24, 1972, which lasted for a period approximating three hours and we are setting aside another period for a further spot-check perusal by you on March 1, 1972, at 1:00 p.m. This spot-check perusal is in accordance with policy of the Division of Controversies and Disputes with respect to such inquiries.

"However, before scheduling more such lengthy, time-consuming sessions in the future we will require:

"1. a written offer of proof of alleged irregularities you have found *to date* which, if proven true in fact, would warrant, in your estimation, further action by the Commissioner.

"2. a written offer of proof of other alleged specific irregularities different in kind, degree or extent from those you develop as allegations in #1 above which would warrant further scrutiny of poll lists."

The "written offer of proof" referred to in paragraph 1 of the letter, *supra*, consists of allegations that there were "79 definite instances of fraudulent voting" and 243 other "instances" classified by the Candidates as irregularities. There was no written response from the Candidates in compliance with the requirement specified in paragraph 2, *supra*.

Subsequent to receipt of the documents containing the allegations from the Candidates, the Commissioner's representative has reviewed them and submits the following report and findings pertinent thereto:

The representative believes that the allegations may be generally grouped as follows:

I. Allegations that the signature on the poll list submitted as required by law are "Not the Signature in Election Book Binder."

II. Allegations that there is no initial by an election worker as required by the statute, *N.J.S.A.* 19:31A-8.

III. Allegations that certain voters cast votes who were "not registered in the district."

The allegations will be discussed in the following order:

I. The allegations contained herein are, in the opinion of the Commissioner's representative, essentially true in fact. This opinion is based on a detailed scrutiny of approximately 60 of the signatures on the poll lists and in the signature copy registers. However, the discrepancies are of a generally minor nature and are typified by certain examples reported herein by district:

North Ward – District 2

1. The signature of Frank M. Edge appears in the signature copy register. The poll list contains the name Mr. Frank Edge. Otherwise, the signature appears to be essentially the same.

2. A voter by the name of Paul Bethea did not include the suffix "Jr." with his name on the poll list. Otherwise, the signature appears essentially the same.

North Ward – District 3

1. The name contained in one allegation herein is spelled Anna Divorak. The Commissioner's representative finds it should read Dworak. Although this voter omitted the "Mrs." prefix, which is found in the signature copy register, the signature appears essentially the same on the poll list.

2. The poll list contains the name Mr. Don L. Riehl as compared to the name Donald L. Riehl found in the signature copy register. Otherwise, the signature appears essentially the same. (The middle initial could be interpreted to be a letter other than "L.," in the opinion of the representative, in both the signature copy register and on the poll list.)

North Ward – District 7

1. The poll list contains the name, Pete Manning, while the signature copy register records the name Peter Manning. The signatures appear to be essentially the same. The address listed in the poll list differs from that in the signature copy register.

2. The signature of Gertrude Manning, as charged by the Candidates, is essentially a printed signature rather than one written in cursive form. However, there is no evidence that the person who cast this vote was not the person registered in the election book. In fact, a close similarity between the printed letter on the poll list and the written name in the signature copy register leads the representative to a conclusion that they were probably written by the same person.

North Ward – District 8

1. There was one voter in this district who signed an "x" for his name and address. The charge of the Candidates is that no questions were asked, as required by law, to determine the voter's identity in terms of the answers contained in the signature copy register. The representative notes that there is no notation, on the poll list, giving the name of the voter who signed in this manner, nor any notation that the questions were, in fact, asked. However, the election officials in this district carefully initialed each voter's poll list signature, and the initials herein are "A.M.A."

North Ward – District 10

1. The Candidates list the name of Mary Sweets as one whose signature is not the one in the election book binder. The Commissioner's representative determines that this listing is incorrect. Apparently, the Candidates meant to list Mary Morgan of 38 Sweets Avenue. Her name appears on the signature copy register as Morgan, Mrs. Mary. On the poll list it is noted as Mary Morgan. Otherwise, the signatures appear essentially the same.

2. The name of Mrs. Barbara J. Courts appears on the signature copy register. The initial is missing on the poll list. Otherwise, the signatures appear essentially the same.

3. The name of Mrs. Mary Evans appears on the signature copy register. The prefix, "Mrs.", is missing from the poll list. Otherwise, the signatures appear to be essentially the same.

North Ward – District 11

1. The name, Mrs. Vivian Virginia Paris, appears on the signature copy register. On the poll list the letter "V" is notated in place of the middle name. Otherwise, the signature appear essentially the same.

2. The name, Charles McKinzey, appears on both the poll list and in the signature copy register. The Candidates maintain the signatures are not the same. The Commissioner's representative cannot agree that they are not, although the distinctive flourish makes identification difficult to the casual observer.

North Ward – District 12

1. The signature copy register contains the signature, Rev. Isaac Ballard. The poll list has the designation Rev. I. Ballard. Otherwise, the signatures appear to be essentially the same.

2. The name, Jacqueline Holzendorf, appears in the signature copy register while the poll list contains a first name Jacqui. Otherwise, the signatures appear to be essentially the same.

North Ward – District 13

1. The Candidates list Francis Mattuzzi as one whose signature is not the same on the poll list and in the signature copy register. The representative determines that the spelling of the listed surname should be Martozzi. Otherwise, the signatures appear to be essentially the same.

North Ward – District 14

1. The names, Mattie C. Ashe and Myrtle F. Flowers, have a prefix "Mrs." in the signature copy register, but this is lacking on the poll list. Otherwise, the signatures appear to be essentially the same.

North Ward – District 15

1. The name, Cloria F. Williams, appears in the signature copy register. In the poll list the middle initial is missing. Otherwise, the signatures appear to be essentially the same.

2. The prefix "Mrs." is not contained in the poll list before the name Jessie Lee Dowling. Otherwise, the signatures appear to be essentially the same.

3. Mrs. Margaret Holloway is listed on the poll list as living at 33 Hart Avenue, but is registered in the signature copy register as living at 92 Hart Avenue. Otherwise, the signatures appear to be essentially the same.

North Ward – District 16

1. The Candidates list the name of Gloria Robison as one whose signature is not the same on both the poll list and the signature copy register. The Commissioner's representative determines that this name should be listed as Gloria Robinson and further determines that there is a conflict in address listings. Otherwise, the signatures appear to be essentially the same.

2. There is a discrepancy in the address listings on the poll list and in the signature copy register for a voter listed as Miss Audrey Oliver. Otherwise, the signatures appear to be essentially the same.

North Ward – District 17

1. Mrs. Ethel M. Purdy is listed on the poll list as residing at 547 Perry Street, while the signature copy register lists her at 549 Perry Street. Otherwise, the signatures appear to be essentially the same.

North Ward – District 18

1. The names, Dorothy J. King, Juanita M. Bowman and Anna J. Dean, appear on the poll list without the prefix – "Miss" or "Mrs.," that the signature copy register contains. Otherwise, they appear to be signatures that are essentially the same.

2. The name, Josephine L. Hence, as charged by the Candidates, is essentially a printed name as it appears on the poll list. However, the representative notes that two letters are connected in cursive form, and they bear a strong resemblance to the name on the signature copy register.

3. The Candidates charge that the name, Andrew Gentry, is printed. However, the charge is misleading, since the representative determines that it is written on the poll list and printed on the signature copy register, thus making comparison difficult, if not impossible.

North Ward – District 19

1. The name, Emory G. D. Aycock, 3rd, is listed in the signature copy register, but lacks the suffix "3rd" on the poll list. Otherwise, the signatures appear to be essentially the same.

North Ward – District 20

1. A comparison of the signatures of the name, Effie Leonard, is difficult when the poll list and signature copy register are compared. The representative cannot attest that they appear to be essentially the same. They are similar.

2. The Candidates list a name, Gladys Geter, as one whose signature is not the same on poll list and register. The representative notes that the name should be listed as Gladys Jeter. She is properly registered, and the representative determines the signatures appear to be essentially the same.

This completes this section's recital of some of the irregularities alleged by the Candidates to be reason to vitiate the election. The Commissioner's representative notes that these examples and others seem to lead to the following conclusions:

1. There was no strict requirement by election officials that the signatures on the poll list conform in every detail to those in the signature copy register.

2. Consequently, many of them did not conform strictly, as charged by the Candidates.

3. The signatures were, nonetheless, essentially similar in handwriting characteristics. This judgment by the representative is one offered admittedly as inexpert opinion, but it is founded on a detailed examination.

II. The Candidates charge that election officials failed to initial voters' signatures to attest they had compared them with the signature copy register pursuant to the requirement to this effect enunciated in *N.J.S.A.* 19:31A-8. The Commissioner's representative makes no determination that there is a statutory direction to do this for school elections, but does find that, of the sixteen districts checked in whole or in part, two poll lists were initialed completely and fourteen were not.

III. Allegations that certain voters cast fraudulent or illegal ballots in the election of February 8, 1972, are detailed by the Candidates in the documents submitted by them on March 30, 1972, and specifically a total of sixteen voters are listed as not registered within the districts. Of this total, the representative determines that in four instances, the allegations are true in fact. Specifically, the representative details this finding as follows:

1. In District 9 – North Ward, Miss Marjorie Snead is not registered at the present time, although prior to 1971 she had been. In that year her name was advertised as one who needed to re-register because of a change of address, but this has never been accomplished. Accordingly, since there was no page in the signature copy register for her, she should not have voted.

2. A voter in District 20 – North Ward listed as Richard xxx listed his address as 25 Old Rose Street. There is no such address in the files of the election board, and no registration for this man can be found. The vote was apparently fraudulent.

3. In the 10th District – North Ward, a voter named Sarah M. Holt signed a document stating that she was registered although no page bearing her name appeared in the signature copy register. The representative can find no registration for her in the records of the Election Board.

4. In District 11 – North Ward, a voter named Grace Hawk was allowed to cast a ballot, despite the fact that no entry appeared for her in the signature copy register. The representative has determined that this voter was properly registered prior to the year 1969, but

has not renewed the registration. Such renewal is necessary if no ballot is cast for a period of four consecutive years.

It is evident, from a review of the above instances, that certain election officials either ignored comparison of signature on the poll list with those in the signature copy register, or that they attempted to make the comparison, could not do so, but let the voter vote anyway. In any event, the Commissioner's representative believes such votes were clearly illegal. He does observe that in instances 1 and 4, the voters who voted were eligible except for technicalities.

The remaining allegations of the Candidates with respect to unlisted voters or unregistered voters are discussed as follows:

1. Sibbia Wise and Samuel Sullivan were permitted to sign the poll list and vote in District 9 despite the fact that they are properly registered in District 7.

2. Evelyn M. Davis, Agnes Johnson, Martha Jones and Rebecca Baten were properly registered voters in District 20. They signed a document stating they were registered, and they were permitted to vote in District 10.

3. Miss Emily Orr and Bernice Brown were permitted to vote in District 11. They are properly registered in District 12.

4. George L. Salvester, listed by the Candidates as a voter not listed, in District 8 – North Ward, *is* listed in fact, but as Gerald Silversten. The signature on the poll list is essentially the same as the one in the signature copy register for this name, and the charge herein stems from a misinterpretation of the signature.

5. Robert L. Reeves is listed on Voting Record 177054 in District 18 – North Ward, and the signatures in the poll list and the signature copy register are essentially the same.

6. A voter listed as Bernice Relnes in District 18 – North Ward should have been listed, in the representative's opinion, as Mrs. Bernice Reeves. She is listed on Voting Record 199340, and the signatures and address compare in all essential respects.

7. Lucy S. DiBiasi, District 13 – North Ward, is listed by the Candidates as an unlisted voter. However, the representative found her name on Voting Record 140791. Signatures are essentially the same.

The Commissioner's representative makes the following findings and observations independent of the charges of the Candidates:

1. In District 17 – North Ward, the Report of Proceedings is in error, but the recount of the machine tally agrees with the poll list (51).

2. In District 15 – North Ward, machine totals are reported incorrectly and not in the designated places.

3. All election workers were supplied with detailed, written instructions and a complete packet of election materials as evidenced by a check of contents of the envelopes from election officials.

4. Recent district realignment in Trenton was evidently a root cause of part of the confusion with respect to where voters should properly cast their votes.

5. In every one of the districts checked, the poll list tallied exactly with the machine tally. Election workers uniformly and in accordance with law obtained written signatures and addresses in the poll lists except for the printed signatures noted in three instances, *supra*.

In summary, the Commissioner's representative has reported, with respect to the three groupings of allegations (page 5, *supra*), as follows:

I. It is generally true that there are many minor discrepancies with respect to the signatures found on the poll lists under scrutiny and those of the signature copy register. However, there is no finding herein that the signatures as written are not, in all instances except as noted, essentially the same.

II. Two of the poll lists, which were reviewed, contained the initials of an election worker. Fourteen did not.

III. There was a total of 12 votes cast by persons who were either not resident of the district in which they cast them or were not registered at all (See pages 13 and 14, *supra*).

Additionally, the Commissioner's representative observes that the Candidates' repeated allegation – that a signature is "not the signature in Election Book Binder" – lacks the specificity necessary to determine the preciseness of the charge. In some instances, the general allegation is apparently meant to mean that the signature is not essentially the same in handwriting characteristics. In other instances, the allegation seems to be that there were minor discrepancies in the accuracy and completeness of the name or address. In any event, the Commissioner's representative feels unqualified to render a definitive judgment that handwriting characteristics are or are not the same in the samples compared. He, therefore, recommends that allegations of fraud in this respect be considered as *prima facie* evidence only when attested by a handwriting expert.

The questions that are posed for the Commissioner's decision are listed as follows:

1. Which, if any, of the evidence gathered to date and reported in part, *supra*, is so significant as to warrant a continuance of the inquiry which was initiated by the Candidates?

2. If the inquiry is to be continued, which, if any, of the evidence is of a lesser significance, and inconclusive in that the election results *sub judice* could not be affected by it and unworthy of further investigation by the Candidates or of decision by the Commissioner?

* * * *

The Commissioner has reviewed the report of his representative and concurs with the conclusions and recommendations expressed therein. He makes the following determinations, which are apropos to the facts recited, *supra*.

I. Such minor irregularities, as shown herein, are no reason to vitiate an election in the absence of widespread evidence of fraud. As the Commissioner has said on a number of occasions, it is well established that elections are to be given effect whenever possible and are not to be set aside unless it can be shown that the irregularities were of such a nature that the will of the people was thwarted, was not properly expressed, or could not be fairly determined. *In the Matter of the Annual School Election Held in the Borough of Totowa, Passaic County*, 1965 *S.L.D.* 62

In this regard, the Commissioner, quoting from 15 *Cyc.* 372, in his decision in the case of *Mundy v. Board of Education of the Borough of Metuchen*, 1938 *S.L.D.* 194:

> "***Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has been held that *gross irregularities when not amounting to fraud* do not vitiate an election.***" (*Emphasis supplied.*) See also *In the Matter of the Annual School Election in the School District of Riverside Township, Burlington County*, 1968 *S.L.D.* 73.

Some of the principal alleged "irregularities" considered herein are that the names that appear on the poll list are not identical in all respects to those on the signature copy register. The Commissioner holds, however, that such allegations constitute small cause on which to base a demand to vitiate an election. In his judgment, it does not matter that the name "Peter Flynn" notated on a poll list is not the same as "Mr. Peter Flynn, Jr." notated on the signature copy register, if the signatures are apparently the same.

In this regard, in a decision cited as *Joseph Flach v. Madison Borough* 1938 *S.L.D.* 176, the Commissioner was asked to decide whether votes cast for eight spellings of the name Joseph Flach should be counted for that candidate. He held, at page 179:

> "*** It is clearly evident that the votes cast for Mr. Flach, with the name variously written, were intended for Joseph Bernard Flach and *** they should have been counted ***."

While the issue in *Flach* was the tally for candidates, it is no more logical to hold that voters, similarly designated in a poll list by names "variously written," when compared with the names in the signature copy register should be barred from an exercise of their franchise, or that an election should be vitiated as a result.

The discussion of the section, *supra*, has been specifically directed at minor discrepancies with respect to signatures when the one noted on the poll list is compared to the one on the signature copy register. If in fact the Candidates wish to allege that signatures are not essentially the same in handwriting characteristics – thus, implying fraud – the Commissioner holds that, to be considered, such allegations must be witnessed, as suggested by the Commissioner's representative, by a testimony of record given by a handwriting expert and/or such other evidence as the Candidates may wish to bring forth. This finding takes cognizance of the fact that neither the Commissioner nor any of his representatives possesses expertise in this field.

Finally, with respect to this section the Commissioner finds that the three votes cast by voters who printed their names (pages 7 and 10, *supra*) or, in one instance, wrote it in comparison with a printed sample, are illegal votes since the requirement of the statute in this regard has not been met. This statute (*N.J.S.A.* 18A:14-51) provides that after the voter has signed the poll list:

> "*** one of the election officers shall *compare* the *signature* made in the poll list with the *signature* theretofore made by the voter in the signature copy register, and if the signature thus *written* *** is the same *** the voter shall be eligible to receive a ballot." (*Emphasis supplied.*)

Since in two of these three instances, the poll list contained a printed, rather than a written, cursive signature, the Commissioner holds that the votes that were cast were illegal votes. For similar reasons, since no written signature comparison was possible, the Commissioner holds that the vote of Andrew Gentry (page 10, *supra*) was also illegal.

II. The Commissioner knows of no requirement in the statutes that makes it mandatory for election officials to initial poll list signatures in school election. They are required to "compare" them by the prescription of *N.J.S.A.* 18A:14-51, and the Commissioner notes the conclusion of the hearing examiner that this was not always done in this election. The Commissioner deplores such

evidence as indicated herein that the clear prescription of the statute has been ignored. Failure of election officials to compare signatures as provided by statute cannot be upheld or condoned. However, it does not constitute an irregularity for which the election can be set aside, absent a showing that the omission resulted in the casting of illegal votes which could have affected the outcome. *Purdy v. Roselle Park Board of Education*, 1949-50 *S.L.D.* 34; *In re Clee*, 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *In re Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953); *Sharrock v. Keansburg*, 15 *N.J. Super.* 11 (*App. Div.* 1951)

III. The Commissioner finds that the 12 votes as itemized on pages 13 and 14, *supra*, are illegal votes which should not have been cast. Four of these voters were not registered at all. Eight others were allowed to vote in the improper districts – districts wherein the voter was not listed in the signature copy register and where he was not resident. This is clearly contrary to the statute, *N.J.S.A.* 18A:14-49, which provides:

> "Every person qualified to vote in any school election shall be at liberty, at any time while the polls are open, to enter the polling place and claim, in person, his right to vote at such election in *his proper polling district* *** giving, at the same time, his full name and address to the election officer in charge of the signature copy register. (*Emphasis supplied.*)

Therefore, since the 12 votes itemized, *supra*, were not cast in the "proper polling district," and since no signature comparison was possible, the votes so cast were not ones that may be adjudged as proper or legal.

Since it is apparent that the three votes found illegal in section I, *supra*, and the 12 judged illegal in section III, *ante*, represent serious violations of the Election Laws, the Commissioner holds that the Candidates should be furnished a further opportunity to obtain additional evidence from the poll lists of the two wards wherein scrutiny was requested to further their claim that the election of February 8, 1972, should be vitiated. Accordingly, the Commissioner directs that the poll lists be made available again for the purpose of unearthing other such serious evidence, if such evidence does indeed exist.

The Commissioner retains jurisdiction pending a further offer of proof in written form.

COMMISSIONER OF EDUCATION

May 2, 1972

In the Matter of the Annual School Election Held in the School District of the Borough of Fairview, Bergen County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for members of the Board of Education for full terms of three years each at the annual school election held on February 8, 1972, in the school district of the Borough of Fairview, Bergen County, were as follows:

	At Polls	Absentees	Total
Dennis Purcell	678	63	741
Joseph Lomuscio	658	65	723
August Centrella	652	61	713
Alexander Accomando	361	9	370
Frank Tufano	649	97	746
Henry J. O'Brien	646	91	737
John B. Pierotti	627	92	719
Benjamine DeSena	-0-	3	3

Pursuant to a letter dated February 11, 1972, from Candidates Lomuscio and Centrella the Commissioner directed that the ballots cast for Board members be recounted. Such a recount was conducted on February 23, 1972, at the machine warehouse of the Bergen County Board of Elections. The rechecking of the voting machine totals and the poll lists confirmed the announced results above. A request for further inquiry into the conduct of the elections was subsequently withdrawn.

The Commissioner finds and determines that Frank Tufano, Dennis Purcell and Henry J. O'Brien were elected to membership on the Board of Education of the Borough of Fairview for full terms of three years each.

ACTING COMMISSIONER OF EDUCATION

May 5, 1972

George L. Ulassin,

Petitioner,

v.

Board of Education of the Township of Branchburg, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, George L. Ulassin, *Pro Se*

For the Respondent, Bowlby, Woolson and Guterl (Robert E. Guterl, Esq., of Counsel)

Petitioner, a citizen of the Branchburg Township School District, requests that the Commissioner determine a controversy that has arisen regarding the sex education program of the Branchburg Board of Education, hereinafter "Board." The matter was submitted to the Commissioner on the pleadings, briefs, and exhibits of petitioner and counsel for the Board.

Petitioner alleges the following:

"*** This complaint pertains to the sex education portion of the Human Growth and Development course of instruction given to the children in the Branchburg Public School System.

"1. The program was not properly instituted by the respondent.

"Re: Minutes of respondent (sic) meeting September 8, 1969.

" 'Motion by Dr. Potter to approve delaying expansion or development of new programs in sex education pending outcome of the legislative inquiry.

"Mr. Wright objected to the motion and stated the board had never officially adopted a sex education program for the Branchburg Township schools in accordance with Title 18:A (sic) Chapter 33, Articles I and II.'

"The violation was that a new program was initiated without an official roll call vote.

"2. There are no committee reports on file showing the recommendations of the citizens of the Township of Branchburg.

"3. To the best of my knowledge a cross section of religious representatives were (sic) not consulted for recommendations.

"Wherefore, petitioner requests that the following action be initiated by the respondent;

"1. The sex education portion of instruction contained in the Human Growth and Development program offered in the Township of Branchburg School System, should be discontinued and not reinstated until the above complaints are rectified.

"2. Also bearing in mind that the present program is offensive to a large portion of the community, the new program should have a much wider acceptance and should in no way be offensive to any member in the community of the Township of Branchburg."

At a conference between petitioner and counsel for the Board conducted on November 23, 1971, the petitioner's complaints were further denied as follows:

1. Did the Branchburg Board of Education improperly or illegally adopt a sex education program in its school system?

2. Was the originating committee set up by the board of education to study the implementation of the sex education program a representative body of the total Branchburg community?

The report of the hearing examiner is as follows:

Petitioner alleges that the Board failed to adopt its sex education program pursuant to the provisions of *N.J.S.A.* 18A:33-1, which reads as follows:

"Each school district shall provide, for all children who reside in the district and are required to attend the public schools therein and those who reside therein or elsewhere and are entitled or permitted to attend the schools of the district pursuant to law, suitable educational facilities including proper school buildings and furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years, either in schools within the district convenient of access to the pupils, or as provided by article 2 of Chapter 38 of this title, (Section 18A:38-8 *et seq.*) but no course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education of the district."

Petitioner alleges further that the Board failed to follow the New Jersey State Department of Education guidelines as they existed in 1967 in:

"*** having an unending list of members from the educational fraternity, that the committee should include broad representation from the community. To be more specific, it should include representation from the Board of Education, the P.T.A., the Clergy, and other community

organizational leaders. Since no list of members was made available to the public it is hard to say with any certainty, but it has been my impression that several of the above areas were not represented. None of the political leaders in our community were on this committee, nor was anyone there representing and protecting my religious viewpoint. ***"

The Board submitted an affidavit of its President, which reads as follows:

"ALLEN G. POTTER, of full age, being dully sworn upon his oath deposes and says:

"1. I have served as a member of the Branchburg Township Board of Education during the period from 1967 through the present, and I am now the President of that Body. I am familiar with the Sex Education portion of the Human Growth and Development program which is part of the curriculum in the Branchburg Township school system.

"2. In the fall of 1967 a committee of fourteen people, comprised of teachers, administrators and parents, was organized by the Board of Education to study the concept of Sex Education with relation to the Branchburg Township school system. This committee was established in response to the recommendation of the New Jersey State Board of Education made in January of 1967 with respect to the institution of appropriate programs in Sex Education.

"3. In February of 1968, the committee submitted its report to the Board of Education and outlined a Sex Education program which it recommended be instituted in the school district during the 1968-1969 school year.

"4. During the spring of 1968 three public meetings were held informing Branchburg residents of the recommended program. One of these meetings was sponsored by the Branchburg Township Parent-Teacher Association.

"5. During the month of June in 1968 a newsletter was mailed to all parents and residents of the Township advising them that plans had been formulated to include Sex Education in the school program.

"6. On September 9, 1968 the Board of Education authorized the hiring of Dr. Gere Fulton, Professor of Health and Physical Education at Trenton State College, to conduct an in-service seminar for the purpose of assisting teachers in the initiation of the Sex Education program in the Branchburg Township school system. All members of the Board of Education were present and voted in favor of this Resolution.

"7. On January 30, 1969, the Board of Education conducted a public hearing on the budget for 1969-1970 school year. Eight members of the Board of Education were present and the budget was adopted by a roll call vote of 6 to 2. Page 13 of the budget showed a $1,000.00 appropriation for teaching supplies for the Sex Education program."

Although the Board does not deny that its initial action of September 9, 1968, in adopting the program in dispute was not in strict accordance with the provisions of *N.J.S.A.* 18A:33-1, as excerpted, *supra*, it notes that its action was unanimous in favor of adoption of the program. However, to be consistent with the precise requirements of *N.J.S.A.* 18A:33-1, *supra*, the Board adopted the following resolution:

> "WHEREAS, the Board of Education of the Township of Branchburg on September 9, 1968 by unanimous vote initiated a Sex Education Program in the Branchburg Township School System; and
>
> "WHEREAS, the Board of Education has subsequently continued that program by providing the necessary funds for the purchase of books and materials to be used in conjunction with the teaching of that subject; and
>
> "WHEREAS, the Board of Education now desires to make known its support and affirmation of this program and to demonstrate its intention that this program be continued;
>
> "NOW THEREFORE BE IT RESOLVED, by the Board of Education of the Township of Branchburg, in the County of Somerset and State of New Jersey, that the Human Growth and Development Program, more commonly referred to as the Sex Education Program, now being taught in grades 7 through 8 in the Branchburg Township School System be incorporated and continued as a permanent part of the curriculum for the said grades 7 through 8."

The foregoing resolution was adopted unanimously by the following roll call vote:

> AYES: F. Spiegel, Jr., M. Hawkins, A. Phillips, E. Roberts, J. L. Totten, Mrs. A. Wilson and A. G. Potter, Jr.
>
> NOES: None

Certainly, the Board's resolution of December 20, 1971, *supra*, satisfies all the requirements of *N.J.S.A.* 18A:33-1, *supra*, and, as such, effectively eliminates the complaint of petitioner in Point One of his appeal, thus no cause exists for relief to be granted by the Commissioner.

As to the remainder of the allegations of violations by the Board in the Petition of Appeal, the Commissioner notes the argument in the Board's brief which reads in part as follows:

> "*** *THE SEX EDUCATION PROGRAM IN THE BRANCHBURG PUBLIC SCHOOL SYSTEM WAS PROPERLY ADOPTED FOR THE SECOND TIME AT A PUBLIC MEETING OF THE BOARD OF EDUCATION ON JANUARY 30, 1969.*

"The vote of the Branchburg Board of Education on January 30, 1969, was, according to the minutes of that meeting, a recorded roll call majority vote of the full membership of the Board of Education of the District. By its terms $1,000.00 was appropriated for materials to conduct a sex education program. The Resolution should also be viewed in the light of the prior history of this program and the numerous public hearings and discussions which preceded its institution. By January 30, 1969, this program had been in effect for a period of four months. The passage of the budget, which included an appropriation of $1,000.00 for materials to conduct the sex education program, provided for the continuance of the subject part of the school curriculum. If any prior action on the part of the Board had not been sufficient to institute this program, certainly the passage of this budget and appropriation accomplished this purpose.***" (Point Two of Board's Brief)

The affidavit of the President of the Board clearly indicates an attempt by the Board to review publicly its intent to adopt the program in question and to gain a broad base of community support for its adoption. Apparently, petitioner was not satisfied with the methods employed by the Board prior to the adoption of the program, and challenges the validity of the existing program on the grounds that the Board failed to follow the "guidelines" published in 1967 by the N.J. State Department of Education, Division of Curriculum and Instruction, and to develop a representative body of interested citizens for the purpose of developing the questioned program.

The Commissioner takes official note of the content of the State Department's guidelines and directs petitioner to the section on "RESPONSIBILITY" for the development of curricula offerings which reads as follows:

"The ultimate responsibility for all curricula offerings in the school rests with the School Administrator. He implements and directs the educational program in concert with the local Board of Education. Although this responsibility cannot be delegated, the School Superintendent administers the school programs through his appointed subordinates, e.g. curriculum coordinator, principals, consultants, area chairmen, and faculty. He is the individual who must make the determination regarding the implementation of sex education as a part of the school program.

"It is time to stop being defensive about the value or legitimacy of the subject. Apology is one of the chief symptoms of insecurity and the school administrator has no need to rationalize to himself or others.

"The Superintendent will guide the planning and evolution of a realistic sex education approach and with courage and initiative, will call upon consultants and resource people in the profession and in the community to develop the curricular experience in the regular school program for all students.

"Initially, the Superintendent must be convinced in his own mind that sex education is a vital segment of the general education of all children and belongs in the school program. Finally, he must be willing to give it his full strong support in the face of opposition."

The Commissioner is constrained to comment further about the State Department "*guidelines.*" Local boards are autonomous self-governing bodies with broad discretion to run local school districts within the scope of their power granted pursuant to *N.J.S.A.* 18A:11-1, which reads as follows:

"The board shall –

a. Adopt an official seal;

b. Enforce the rules of the state board;

c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes[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."

Guidelines issued by the State Department of Education are meant to aid, where necessary, and to provide information which may be needed, but lacking, in a particular situation(s). Guidelines are often the result of detailed and expensive consultation and research by educators and professionals in related fields, who are in positions to offer their special expertise with respect to the curriculum under consideration. Such is the case herein where a panel of distinguished professionals finally published the aforementioned guidelines. It would be inefficient, expensive and wasteful to expect each community to duplicate the processes of establishing "guidelines" when they can be promulgated once at the State level and made available to all boards to be used at their discretion; however, there is no mandate for a board to follow State Department of Education guidelines. The record herein shows a deliberate and long-range attempt by the Board to properly develop and adopt its own program, which it did.

The Commissioner finds no fault with the Board's adoption of its program; therefore, there is no relief requested by petitioner which can or should be granted. For the reasons expressed herein, the petition is dismissed.

COMMISSIONER OF EDUCATION

May 9, 1972

In the Matter of the Annual School Election Held in the School District of the Borough of Watchung, Somerset County.

COMMISSIONER OF EDUCATION

Decision

For the Respondent Board, Robert J. Mooney, Esq.

Pursuant to a letter request filed by Robert J. Cornell, alleging irregularities in the conduct of the annual school election held on February 8, 1972, in the Borough of Watchung, an inquiry was conducted by a hearing examiner designated by the Commissioner of Education at the office of the Somerset County Superintendent of Schools on March 15, 1972. The announced results of the balloting for the election of school board members was not challenged; however, allegations of improper conduct of the election were made as follows:

Robert J. Cornell, hereinafter "Complainant," avers that there were several possible infractions and circumvention of the school election laws at the annual school election of February 8, 1972. He prays to the Commissioner that:

"1. [A board member] be admonished for her actions at the polls on February 8, 1972.

"2. The list and all copies [made by the board member, *supra*] inscribed at the polls should be impounded along with the official poll list.

"3. The election be set aside and a new school election be scheduled.

"4. Safeguards should be prescribed to prevent these or other possible mischief in school elections."

The report of the hearing examiner is as follows:

CHARGE NO. 1

"The presence of [board member] a member of the Watchung Board of Education, not more than 6 feet behind the election registry table in full sight of all voters may constitute an impropiety (sic) in as much as the presence of a member of the School Board in the polling place room might have unfairly influenced the outcome of the election."

With respect to Charge No. 1, the Board member admits that she is a member of the Watchung Board of Education; however, she testified that she was present at the election as an official challenger for one of the candidates for a seat on the Board. She testified, also, that she wore a ticket or badge indicating that she was a challenger. There was no further testimony with respect to this charge, nor does Complainant deny that the Board member, *ante*, was a challenger.

N.J.S.A. 18A:14-15 reads in pertinent part as follows:

"Each candidate may act as a challenger and may appoint also a legal voter of the school district to act as a challenger ***."

Finding no statutory proscription denying a member of a board of education the right to serve as a challenger in a school election, the hearing examiner recommends that Charge No. 1 be dismissed.

CHARGE NO. 2

"The second possible circumvention of the spirit and letter of our free election laws may be that [board member] as a school board member did write down the names of all those people who voted. This act and presence might be construed as a degree of intimation (sic) mitigating against free choice."

CHARGE NO. 3

"Thirdly, the list that [board member] inscribed is essentially a duplicate of the poll list which to my understanding is not public information after the polls are closed. The making of this list and its retention by any person may be judged a warping of the election laws."

Charges Nos. 2 and 3 overlap to such a degree that they will be considered as a single charge for the Commissioner's determination.

With respect to these charges, the Board member does not deny that she wrote down the names of the persons who voted, and that she did take the list she compiled out of the polling place.

The hearing examiner notes that the powers of challengers are specified in the statute, *N.J.S.A.* 18A:14-18, which reads as follows:

"Each challenger may in the polling district for which he is appointed:

a. Challenge the right of any person to vote in such district at any time after the person claims such right and before his ballot is deposited in the ballot box, or before the screen, hood or curtain of the voting machine is closed, and ask all necessary questions to determine this right; and

b. Be present while the votes are being counted, in such position that he can observe the marking on the ballots but not to interfere with the orderly counting of the votes, and challenge the counting or rejection of any ballot or part thereof."

Nowhere in the statute, *supra*, is a *challenger* given the authority or denied the authority to make what is in essence a *second* poll list. Further, *N.J.S.A.* 18A:14-48 reads as follows:

"The board of education shall provide, and one of the election officers, designated by the judge of election, and acting, as clerk of the election shall keep at each polling place, for each school election, a poll list arranged in a column or columns appropriately headed so as to indicate the election, the date thereof, and the school district and election district in which the same is used, in such manner that each voter voting in the polling place at the election may sign his name and state his address therein and the number of his official ballot may be indicated opposite the signature."

This statute indicates that the official poll list should be "sealed" in a package with other election materials and forwarded to the county superintendent of schools.

CHARGE NO. 4

"The election inspectors at this Watchung School Election can substantiate that they were instructed by the Watchung Board of Education to inscribe 'dots' in the official Watchung Voters Signature Registry next to the names of all people who voted in this election. In a phone conversation with me on or about 17 Feb. 72 you confirmed that the Watchung Voters Signature Registry was returned to the Somerset Board of Elections with marks alongside the names of certain voters."

Complainant avers that "dots" were placed in the official signature copy register next to the names of those persons who signed the poll list for the purpose of voting.

The judge of the election testified that red and/or blue dots had, in fact, been placed in the signature copy register next to the names of those who came to vote, but not at the 1972 school election. She said that this had been a practice at school elections prior to 1970 at this polling place for the purpose of

determining whether or not a voter attempted to cast more than one ballot. She testified further that she was notified after the 1970 school board election that the practice of placing dots next to voters' names in the signature copy register was improper and that the practice should stop. She testified, finally, that she had been instructed by the Secretary-Business Manager of the Watchung Board of Education that she was not to place dots in the signature copy register at the 1972 election, and that to her knowledge the practice of making dots had ceased after the annual school election in 1970.

Three other election workers testified that they had been instructed by the judge of the election that they should no longer place any dots next to a voter's name. They also testified that they had worked at the 1970 and 1971 annual school elections, and that no dots were placed in the signature copy register, to the best of their knowledge, for the annual school board elections of 1971 and 1972. Complainant introduced no evidence, testimony or proof that any such dots were used at the February 8, 1972, school election. He suggested, however, that the poll list be compared with the signature copy register to see what might be determined by such a comparison. The hearing examiner denied complainant's request on the following grounds:

1. That complainant made no offer of proof that any dots had been placed in the signature copy record this year;

2. That it has been admitted that dots exist in the signature copy register, but no one can determine when, in fact, those dots were made;

3. That, according to the unrefuted testimony of the judge of the election and the three election workers, all of whom admitted working at the polls in 1970, no dots were placed in the signature copy register for the annual school elections in 1971 and 1972.

* * * *

The Commissioner has reviewed the report and findings of the hearing examiner.

With respect to Charge No. 1, there is no law or court ruling cited by Complainant that would prevent a board member from acting as a challenger. A board member acts in his official capacity only when the board is in session. At other times board members are merely members of the citizenry-at-large. Finding, no impropriety with respect to this charge, it is hereby dismissed.

The hearing examiner noted, in Charge Nos. 2 and 3, the powers of challengers pursuant to *N.J.S.A.* 18A:14-18, *supra.* The Commissioner stated, *In the Matter of the Annual School Election Held in the Town of Newton, Sussex County*, 1967 *S.L.D.* 28, that:

"The election officials at one of the polling places admitted that they kept a list of voters as they appeared to cast their ballots. The keeping of such a list was requested by a member of the board of education. It was intended to be used as a check of voters who had not yet appeared with the apparent purpose of urging them to go to the polls to vote. Members of the election board stated that this had been a common practice in previous elections.

"It appears that the list in question was not used in this election. When the propriety of keeping such a list was questioned by one of the challengers, it was not collected by the person who had requested it and the list was evidently discarded. Petitioner makes no complaint that the list was used or that it prejudiced the results of the election. *His asserted purpose in raising the issue is to determine the propriety of the compilation of such a list by the election officials in order to quiet the question in future elections.*

"The Commissioner knows of no statute or rule on this specific point. If the purpose of such a list is to encourage as large a turnout of the voters as possible, its motivation cannot be questioned. *However, it appears to the Commissioner that the preparation of such a list is more properly the function of appointed challengers than of election officials.* The election officials have specific statutory duties to perform which require their full attention and concern. Because of the need to perform their assignments with the utmost care and attention to all the niceties of proper election procedure, the election board should not concern itself with the preparation of voter lists or other ancillary activities but should leave such chores to properly designated challengers. It is also essential that persons appointed to conduct elections avoid even the appearance of partiality or prejudice with respect to any candidate or question to be voted on. For these reasons that (sic) Commissioner suggests that election officials would be well advised to refrain from involvement in any procedures other than those required for the proper conduct of an election, however meritorious their purpose may be." (*Emphasis supplied*)

In the instant matter, the person making the list was an official challenger, and no evidence of impropriety in making such a list has been adduced.

There can be no question that the legislative intent is that after an election, the official poll list should no longer be available to the general public. That list is compiled primarily for the purpose of comparing signatures at school elections, and to be reviewed by the Commissioner or his designee on occasions when official recounts of votes cast at, or formal inquiries into such elections, are directed.

Therefore, any further use of a list of voters' names subsequent to the closing of the polls after a school election would be improper and a usurpation of the authority given to challengers pursuant to *N.J.S.A.* 18A:14-18, *supra.*

The Commissioner directs, therefore, that any such list compiled be destroyed.

In *Shanahan v. New Jersey State Board of Education*, decided January 31, 1972, the Appellate Division of Superior Court held that:

> "The Right to Know Law, *N.J.S.A.* 47:1A-1 *et seq.*, declares it to be the public policy of this State that public records shall be readily accessible for examination by citizens of this State, with certain exceptions, for the protection of the public interest. One of the exceptions is where the examination of the record is governed by another statute. *N.J.S.A.* 47:1A-2.
>
> "*N.J.S.A.* 18A:14-61 and 62, which pertain to elections of members of a board of education, provide that immediately following an election the poll lists, ballots and tally sheets shall be placed in a sealed package and delivered to the secretary of the board of education. The secretary shall, within five days after the date of the election, forward the sealed package to the county superintendent who shall preserve the records for one year.
>
> "We conclude that *N.J.S.A.* 18A:14-61 and 62 clearly fall within the meaning of 'any other statute,' one of exceptions set forth in the Right to Know Law. The legislative requirement that the poll lists shall be *sealed* and retained for one year implicitly bars a public inspection of such records, in the absence of a claim of irregularity in the election. No such claim is advanced by plaintiff. He admittedly seeks to obtain the names and addresses of persons who voted in the 1971 election to solicit their support for his candidacy in the 1972 election." (*Emphasis supplied.*)

The *Shanahan* case, *supra*, is distinguishable from the instant matter in that his request was to see the *official* poll list and solicit the support of those voters for the coming school board election. However, in the *Newton* decision, *supra*, the Commissioner found no fault with *challengers* compiling a list of voters if the purpose of such a list was to contact eligible voters, who had not yet voted, to urge them to vote, thereby encouraging as large a turnout of voters as possible. Making such compilations is common practice.

The judge of the election and the three election workers who testified all admit that red and blue dots do appear on the signature copy record, and that the marking of dots had been their practice through the 1970 school board election.

There is clearly no statutory authority for making any such mark; however, the testimony of the election workers also shows that they were informed of this error after the 1970 school board election and that no such "dots" have been marked since. Complainant made no offer of proof at all that would discredit the testimony of the judge of the election or the election workers. The Commissioner cannot say too strongly, however, that *no mark*

should be made on the signature copy record at any school board election. However, he is convinced that this practice has been discontinued according to the testimony given at the inquiry.

With respect to Complainant's prayer for relief that a new school election be scheduled, the Commissioner cites *In re Clee*, 119 *N.J.L.* 310, 327 (*Sup. Ct.* 1938) in which the Court said: "*** Irregularities on the part of election boards having no effect upon the voting *** will never vitiate an election." (at p. 329)

The Commissioner directs the Secretary-Business Manager of the Watchung School Board to instruct future judges of elections in accordance with the directives contained herein.

In all other respects, except for the specific directions given herein, the complaint is dismissed, and the results of the February 8, 1972, school board election in the school district of the Borough of Watchung will stand as announced.

COMMISSIONER OF EDUCATION

May 11, 1972

Pending before Superior Court of New Jersey

In The Matter of the Annual School Election Held in the School District of the Borough of Watchung, Somerset County.

Decided by the Commissioner of Education, May 11, 1972

STATE BOARD OF EDUCATION

DECISION

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

November 1, 1972

Pending before the Superior Court of New Jersey

Leona Smith, Mort Robin and Jan Campbell,

Petitioners,

v.

Board of Education of the Borough of Caldwell-West Caldwell, Essex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, Stickel, Kain and Stickel (Harold M. Kain, Esq., of Counsel

For the New Jersey State Federation of District Boards of Education, *Amicus Curiae*, Thomas P. Cook, Esq.

Petitioners, guidance counselors in the Caldwell-West Caldwell Junior High School, hereinafter "Junior High School," aver that their assignments as substitutes for a school nurse, when the nurse is absent from her normally-assigned post of duty, are capricious and arbitrary. They demand that the Commissioner set aside these assignments as a nullity. The Caldwell-West Caldwell Board of Education, hereinafter "Board," maintains that the assignments *sub judice* are ones that it may legally require and that the petition should, therefore, be dismissed.

A hearing in this matter was conducted on November 22 and 23 and on December 6, 1971, at the office of the Essex County Superintendent of Schools (November 22) and in a conference room made available by officials of the Caldwell-West Caldwell School District (November 23, December 6) by a hearing examiner appointed by the Commissioner. Briefs were subsequently filed by counsel to the parties and by Thomas Cook, Esq., *Amicus Curiae*. The report of the hearing examiner is as follows:

The Board employs a total of five nurses as full-time staff members responsible for the emergency and other health programs in its eight schools. One of these nurses is located and assigned full time to the Junior High School. She serves, additionally, as the coordinator of specialized equipment use for the district as a whole (i.e. audiometer, etc.)

However, for many years it has been customary for members of the guidance staff in the Junior High School to be given assignments as substitutes for the school nurse when the nurse is absent from the building, or so engaged that she cannot perform her regular duties. Specifically, in this regard, petitioners, who comprise the present guidance staff, are asked to act, on a daily

basis, in place of the nurse during all of a forty-five minute lunch period, and on three or four occasions during the school year, when the nurse is engaged for extended time periods in the administration of Tine tests, physical examination screening, dental survey work, etc. (P-5,6) Since, at the present time, there are three guidance staff members in the Junior High School, the forty-five-minute lunch assignment is divided into three segments for periods of fifteen minutes each. (R-6)

This assignment is the only one of a proctoring or extracurricular nature that petitioners have on a regularly-assigned basis. Other teaching staff members in the Junior High School normally have a half-hour period per day assigned to proctor study halls or cafeteria duty, and most of them have, additionally, a home room to supervise. (Tr. II-125) All such assignments are, according to the Superintendent of Schools, made by the building principal, and the Board's instructions in this regard are that the assignments are to be "equitably and reasonably distributed." (Tr. II-173) (R-8)

The Junior High School principal states that when he assumed his present position, he did not initiate, but continued, a long-standing policy of assigning guidance staff members to substitute for the school nurse during the nurse's absence from the building. However, he maintains that the assignments are equitable and fair. Specifically, he testified, in this regard, as follows: (Tr. II-118)

> " ***Q. And on what basis did you select the guidance counselors for this duty?***
>
> "A. The guidance counselors do not have any other assignments, such as cafeteria, or study hall, or home rooms, other than their guidance assignment.
>
> In addition it seems to me that when youngsters are injured or ill, one of the things they need is sympathy. One of the things they need is someone who has some kind of a rapport with the youngster as an individual, and in this regard, it would appear that guidance counselors have that to possibly a greater extent than other teachers ***."

Additionally, the principal indicated that the next-door location of the guidance office to the nurse's office was also a reason for the assignment, which he regarded as reasonable.

Petitioners aver that *N.J.S.A.* 18A:28-14 specifies that school nurses are required to have proper certification to perform nursing duties, and that they, petitioners, lack this prerequisite. Further, petitioners argue that they have not had first aid training to assist them in coping with the first aid duties of an emergency nature that they are called upon to assume.

In rebuttal of this argument, the Board called its school doctor as a witness. He testified that he and the Superintendent of Schools had prepared

and approved, and the Board had published, as part of a Board-approved handbook (R-3), the "Policies and Procedures" to be followed when accidents or emergencies occurred in the schools. This document discusses the immediate procedures to be followed by all teachers when emergencies occur, and it states that following an initial period of decision, "the school nurse or person so designated, should be notified with the teacher's assessment of the problem." In turn, the "person so designated" is to be guided in his or her actions by the terms of a document (R-5), entitled "Standing Orders for Secretaries and Teachers – First Aid Treatment," which is repeated in its entirety below:

"STANDING ORDERS FOR SECRETARIES AND TEACHERS
– FIRST AID TREATMENT –

"ALLERGIES
if very severe (student has difficulty breathing), keep in sitting position, use isuprel mistometer, CALL NURSE

"ANIMAL BITES
wash area with phisohex, apply ST 37 wet dressing, CALL NURSE

"BUMPS, BRUISES, BURNS
slight – apply ice
severe – apply ice, CALL NURSE

"BEE STINGS
apply ice, CALL NURSE
if hives or asthma develop after bee sting, use isuprel mistometer

"COLDS, COUGHS, not feeling well
CALL PARENT to take student home

"CONVULSIONS
DO NOT attempt to move, CALL NURSE insert tongue depressor between teeth and across tongue

"CUTS AND ABRASIONS
Minor – apply cotton moistened with phisohex, ST 37, vaseline bandaid
deep – same as above, CALL NURSE

"FRACTURE – possible
injury may be very painful – DO NOT move student if back or lower portion of body is involved, CALL NURSE
if fingers are involved, soak in cold water, CALL NURSE

"FROST BITE
place affected part in lukewarm water, gradually make water cold. CALL NURSE

"HEADACHE
slight – let student rest on cot 15-20 minutes, if feeling better may return to class.
severe – CALL PARENT

"HEAD INJURIES
CALL NURSE FOR ALL HEAD INJURIES

"EYE
CALL NURSE FOR ALL EYE PROBLEMS
foreign bodies – DO NOT attempt to remove, CALL NURSE
Chemicals in eye – put students head back, pour cups of water to thoroughly rinse eye, have someone call nurse.

"LIP INJURIES
ice to area, CALL NURSE

"MEDICATIONS
if brought to school by students, cannot be kept in classroom
must be kept in nurse's medicine cabinet – note from parent or doctor must accompany medication; in absence of nurse, may be administered by principal or secretary

"NOSEBLEEDS
mild – apply pressure to nostril, have child sit in chair, head elevated
Severe – above treatment, apply ice cap to back of head, CALL NURSE

"PENCIL PUNCTURES
soak in phisohex and warm water, CALL NURSE

"RASH
undiagnosed – CALL NURSE
due to poison ivy or allergy – let student apply calamine lotion if that is treatment followed at home

"STAPLE WOUNDS AND SPLINTERS
soak in phisohex and warm water, CALL NURSE if staple is in wound, soak in iced ST 37, CALL NURSE

"SWALLOWED OBJECTS
CALL NURSE

"TEETH
CALL NURSE

"UPSET STOMACH OR VOMITING
CALL PARENT or GUARDIAN or person on call to take student home."

It is noted here that petitioners, when acting as "the designated person" for the nurse assigned to their building, were to "call nurse" for many of the conditions listed, *ante*. This injunction is interpreted to mean that petitioners were to call one of the other four school nurses employed within the Caldwell-West Caldwell School District.

However, an argument develops from this instruction, since petitioners cite instances – i.e. to stop bleeding, wash out eye – when they thought it advisable to exceed the simple requirement of the "Orders." In the Board's view, such instances were not evidence of a requirement but of an unauthorized action, since at least one nurse is always on call within the school district and could have been called as directed.

Finally, a log of accident reports for the 1969-70 and 1970-71 school years (R-7) records the following statistics:

	1969-1970	1970-1971
Total School Accidents Reported	101	111
Number Accidents Occurring between 12:15 p.m. – 1:15 p.m. (lunch coverage for Nurse)	16	21
Number of Times Guidance Dept. Acted in Nurse's Absence	3	3

From these facts and arguments, the issues have developed and may be stated succinctly as follows:

1. May petitioners, as guidance counselors, without specialized first aid training or a nurse's certificate, be regularly assigned by school administrators to proctor or monitor the school nurse's office when the nurse is temporarily absent from her post of duty?

2. If they may not, is the Board required to employ a fully-certificated nurse in each of its schools during all the days and hours that the schools are in session, or is there some alternative arrangement which may be employed?

In arguing these issues, petitioners do not demand that the Board employ a full-time nurse in each building or maintain that there is a legal requirement to do so. They do argue that their assignment to monitor the nurse's office in her absence enlarges the extent of their responsibility – which, in their judgment, should be shared by all teaching staff members in emergency situations – to one that embraces the entire school enrollment, and that such a responsibility, imposed on petitioners alone, is an imposition. They further aver that such an assignment, unrelated to their teaching fields, takes them from their field of competence, and that practically, if not by the written prescription of R-5, *supra*, they are or may be required to render decisions which they are not competent to make. Petitioners cite *Grasso v. Board of Education of Hackensack*, 1960-61 *S.L.D.* 137 in support of this contention. Other court decisions from New York and Pennsylvania are also cited in this regard.

The Board maintains, on the other hand, and is supported by *Amicus Curiae*, that petitioners have not been substituted for the school nurse, but that, instead, the directions contained in R-5, *supra*, simply impose on them, as mature professionals, the obligation to procure proper and competent assistance when required. In the Board's view, it is more logical to give this responsibility to a guidance person, who is not charged with the supervision of a class, than to individual teachers who are so charged. Additionally, the Board argues that the assignment *sub judice* is just one of a number of extracurricular duties, which it has a legal right to require of teaching staff members to insure responsible government in its schools.

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner, and can find no evidence that the Board's actions or policies *sub judice* are repugnant or inconsistent with the school law (*N.J.S.A.* 18A, Education) or the Rules and Regulations of the State Board of Education. In this regard, the statute, *N.J.S.A.* 18A:11-1, provides, *inter alia*, that:

> "The board shall –
>
> " *** Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government *** and for the government and management of the public schools ***."

Pursuant to this statute, the Board has made "rules" with application to the assignment of its guidance personnel, and the Commissioner can find no inconsistency of the Board's rules with any other statute or with the rules of the State Board that govern "School Health Services." These latter rules now contained in the new New Jersey Administrative Code (*N.J.A.C.* 6:29-2 *et seq.*) provide in pertinent part:

> 6:29-2 "*School Health Services*
>
> "Every board of education in this state shall adopt rules to govern health services in its school district and such rules and regulations shall include as a minimum the rules and regulations of the State Board of Education which are expressed in the following sections.
>
> "Every board of education in this state shall appoint at least one medical inspector. ***"
>
> 6:29-7
>
> "The medical inspector shall direct the professional duties or activities of the school nurse and shall compile and issue regulations governing professional techniques, the conduct of inspections or tests, and the administration of treatment. ***"

6:29-15 "*School Safety Services*
"Every board of education in this state shall adopt rules to govern the supervision of pupil safety in its school district and such rules and regulations shall include as a minimum the rules and regulations of the State Board of Education ***."

6:29-16 "*Accident Prevention*
"Principals shall introduce and administer precautionary measures and practices to prevent accidents, panic, and fire. ***"

6:29-15

"The safety rules of the board of education and the preventive measures and practices applicable to local conditions shall be explained to the personnel by principals at the beginning of each school year and copies of the rules and procedures shall be posted in schools at points conveniently accessible to the personnel."

6:29-5

"Rules and practices adopted by boards of education to govern the supervision of pupil health, the hygienic management of class rooms by teachers, and the sanitary operation and maintenance of the school buildings, grounds, and equipment by custodians, matrons, and firemen shall be explained to the personnel annually by the principal, medical inspector, or nurse."

6:29-6 "*Care of Injured Pupils*
"Boards of education shall adopt rules and a program of procedures for the care of pupils injured at school and shall require that such rules and program be explained at the beginning of each school year to all employees and that copies be posted in each school at points conveniently accessible to the personnel.*** "

It is noted here, additionally, that neither the rules of the State Board, nor the statutes, require that a properly-certificated nurse be present in each school at all hours of the school day.

To the contrary, the statute, *N.J.S.A.* 18A:40-1, simply provides, *inter alia*, that each local board of education "*** shall employ *** one or more school nurses ***" and "*** adopt rules, subject to the approval of the state board, for the government of such employees." There is no provision in this statute that mandates the coverage that a nurse must give, but the clear implication, by the limited nature of the mandate, is that some schools will share nursing services, and, because of the resultant apportionment of time, that some schools at some times will be without the physical presence of a nurse in the building.

This implication receives direct substantiation from a reading of the statute, *N.J.S.A.* 18A:40-8, which provides in part:

> "The principal may, upon the recommendation of the school physician or the school nurse, *if either of them are present in the building*, exclude from school any pupil who has been exposed to a communicable disease***." (*Emphasis supplied.*)

Therefore, it must be accepted as fact that there is a recognition in the statutes that nurses are not always present in school buildings, and that at such times, some of the responsibilities for the implementation of the rules of the State Board, and the local board, must be borne by other employees of the school system.

The question then arises as to who should be delegated to act in the nurses' stead when she is absent from a given building or not assigned to it. In this regard, the Commissioner holds that the Board must decide, must make some guidelines to implement its decision, and must think through its emergency procedures in advance of the time when emergency dictates they must be employed.

The Commissioner also holds that when the Board exercises its discretion in such matters in a fair and equitable manner, he will not interpose his own judgment, even if it may differ on some occasions. As the State Board of Education said in *Kenny v. Board of Education of Montclair*, 1938 *S.L.D.* 647, affirmed State Board of Education 649, 653:

> " *** The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of duties imposed upon them is not subject to interference or reversal.*** " (*Emphasis ours.*)

See also *Boult & Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948). Again in *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (*App. Div.* 1965, affirmed 46 *N.J.* 581 (1966), the Court said:

> " *** 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.***"

In the instant matter there is no evidence that the Board's policy is arbitrary. To the contrary, it acted on advice of its school physician, who proposed emergency procedures to be followed by school personnel in the event of accidents, and there was evidence that the Board reviewed its policies thoughtfully to update and correct them in the light of experience. Neither is it "unreasonable," in the Commissioner's view, that the Board decided to assign staff members located close to the nurse's office to perform some of the nurse's referral chores, when

the nurse was absent from the building. The Board's other reasons for such assignment, in the Commissioner's judgment, have solidity and reasonableness.

The Commissioner opines that the only ultimate, eminently satisfactory provision, to properly provide for each and every emergency health situation in every one of the State's schools, would be a licensed doctor of medicine in each of the buildings at all the times they are in session. However, common sense dictates that such provision mandated by law would be one totally distorted and out of proportion to need. Even a mandated provision of a nurse for every school building on all occasions would seem to be illogical and to exceed the requirements of the statutes.

When, however, as herein, a board provides five nurses for eight schools, the Commissioner holds that the provision must be held to be one of logical provision for need.

The Commissioner believes, however, that the following recommendations for consideration by the Caldwell-West Caldwell Board of Education are appropriate at this juncture. Accordingly, he recommends:

1. that a first aid course be offered to all Caldwell-West Caldwell employees of the Board so that knowledge and skills in first aid may be generally up-dated.

2. that the Board make regular provisions to employ an additional Junior High School nurse on those few days of the year when the time of the regular school nurse is preempted by prolonged examination requirements.

3. that the Board regularly review the time schedules of nurses' assignments so that it is assured that at least one district nurse is on call at all hours of the school day.

With the exception of the recommendations, *supra*, and for the reasons enunciated, the petition herein is dismissed.

COMMISSIONER OF EDUCATION

May 15, 1972

In the Matter of the Annual School Election Held in the School District of the Borough of Lindenwold, Camden County.

COMMISSIONER OF EDUCATION

Decision

For the Respondent Board of Education, James J. Florio, Esq.

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years each at the annual school election held February 8, 1972, in the School District of the Borough of Lindenwold, Camden County, were as follows:

	At Polls	Absentee	Total
Thomas C. Garvey	247	4	251
Lorraine Ann Bott	205	5	210
Helen L. Casmer	213	4	217
James H. Madon	79	4	83
Christine Williams	71	0	71
Jane Bowman	80	4	84
Clare P. Galley	86	3	89

Pursuant to a letter request dated February 18, 1972, from A. Joseph Gagnon, a registered voter in the Lindenwold School District, hereinafter "Complainant," an authorized representative of the Commissioner of Education held an inquiry into the conduct of this election at the direction of the Assistant Commissioner of Education in charge of the Division of Controversies and Disputes and by authority of the Commissioner. The inquiry was held in the office of the Camden County Superintendent of Schools, Pennsauken, on March 7, 1972. The report of the hearing examiner is as follows:

At the beginning of the inquiry, Complainant objected to Hon. James J. Florio, Esq. representing the Board on the grounds that he is a member of the General Assembly of the New Jersey State Legislature and is, therefore, in conflict of interest by representing the Board. He charges that the following events or actions occurred in the conduct of the annual school election in Lindenwold Borough on February 8, 1972:

"1. P.T.A. meeting notices, with 'Reminder' referring to the election, were carried home by the students, the week preceding the election.

"2. P.T.A. meeting was held at 8 P.M. in school No. 5 where the election was being conducted for districts 1 & 6.

"3. Election campaign literature was distributed inside of school No. 5 where voting was taking place for districts 1 & 6.

"4. Voting machine used at school No. 5 for districts 1 & 6 could not be operated by self to make a write-in vote. I made a complaint in writing to

the judge of the election and requested my complaint be sent to Dr. Schreiber, Camden County Superintendent of Schools, along with the results of the election.

"5. Counting and tabulating the results of the election for districts 1 & 6 was closed to the public.

"6. Drawing for position of the candidates, while somewhat of a minor nature, was not done according to law.

"7. The judge of the election for districts 1 & 6 at school No. 5 did not seem to have much knowledge, if any, of the operation of a voting machine. To my knowledge, this was the first time she served on a board of election."

The charges will be considered first separately and then as a whole.

CHARGE NO. 1

"P.T.A. meeting notices, with 'Reminder' referring to the election, were carried home by the students, the week preceding the election."

Complainant alleges that a "reminder" to vote, prepared by the Parent-Teachers Association (PTA) was carried to approximately three hundred homes by the school students in the district in violation of *N.J.S.A.* 18A:42-4, which reads as follows:

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

Although *N.J.S.A.* 18A:42-4, *supra*, prohibits issuing any notice which "*** promotes, favors or opposes the candidacy of any candidate *** or the adoption of any bond issue, proposal, or any public question***," the evidence was not conclusive that the PTA was in violation of the statute.

Any citizen might logically assume that a flyer prepared by the PTA would encourage a "yes" vote on the school budget; however, the hearing examiner cannot draw that conclusion from the document submitted in evidence which did not direct a "yes" or "no" vote.

Complainant further alleges that Charge No. 1, as set forth, *supra,* shows the Board to be in violation also of *N.J.S.A.* 19:34-38.1 and *N.J.S.A.* 19:34-38.3.

School elections are held generally under the provisions of *N.J.S.A.* Title 18A, Education, and only when Title 18A is silent with respect to an election matter may the provisions of *N.J.S.A.* Title 19, Elections, be referred to. Specifically, *N.J.S.A.* 18A:14-97 and *N.J.S.A.* 19:34-38.1 are identical and read as follows:

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

R-1, *supra,* is clearly marked as a PTA document although no PTA address is printed thereon.

The hearing examiner determines that with respect to R-1, in Charge No. 1, *N.J.S.A.* 18A:42-4 and *N.J.S.A.* 18A:14-97, *supra,* clearly set forth the law with respect to Complainant's allegation; therefore, in that regard it is not necessary to look to *N.J.S.A.* 19:34-38.1 and *N.J.S.A.* 19:34-38.3 for further guidance.

CHARGE NO. 2

> "P.T.A. meeting was held at 8 P.M. in school No. 5 where the election was being conducted for districts 1 & 6."

Complainant alleges that the PTA held a meeting as indicated in the charge, *ante.* He makes no allegation that anyone was influenced to vote for or against any candidate or for or against any question as a result of the meeting; however, he avers that the meeting had the effect of encouraging local residents to come out to vote, and that such encouragement was unfair because the crowd being so encouraged consisted mainly of parents with children in the schools.

No evidence was offered as to the make-up of those in attendance at the meeting, and no charge of illegality is made here by complainant against anyone. His complaint is only that the meeting appealed to a particular interest group; namely, the parents of children in the schools, and that it was, therefore, unfair.

CHARGE NO. 3

"Election campaign literature was distributed inside of school No. 5 where voting was taking place for districts 1 & 6."

Complainant alleges that "electioneering" occurred inside School Number Five.

Counsel for the Board suggested to Complainant that such a charge, if true, may be a criminal offense, (18A:14-72) and should, therefore, be placed before the proper forum and not before the Commissioner of Education. The hearing examiner determines that no evidence of electioneering was educed at the hearing.

The hearing examiner recommends, therefore, that this charge be dismissed.

CHARGE NO. 4

"Voting machine used at school No. 5 for districts 1 & 6 could not be operated by self to make a write-in vote. I made a complaint in writing to the judge of the election and requested my complaint be sent to Dr. Schreiber, Camden County Supt. of Schools, along with the results of the election."

Complainant's major concern here is that he was not properly instructed how to cast a write-in ballot. A visit to the Camden County Board of Election's warehouse in Camden, where the voting machines are stored, did not show that the machine in question was inoperative in any way.

Complainant alleges that he was not properly instructed on the use of the voting machine and that he could not cast his ballot.

However, Complainant offers no proof of the inadequacy of the instruction to vote given by those in charge of the polling place; therefore, no determination can be made whether or not such instruction was, in fact, inadequate. The hearing examiner recommends, therefore, that this charge be dismissed.

CHARGE NO. 5

"Counting and tabulating the results of the election for districts 1 & 6 was closed to the public."

Testimony was educed by counsel for the Board from Candidate Thomas C. Garvey, who testified that eight or nine people were in the room during the counting of the ballots. He testified further that Mr. Gagnon was asked to leave because he was creating a disturbance at the polling place after the election. Mr. Gagnon denies creating a disturbance at the polling place but admits that three

to five members of the public were present at the ballot count after the election polls closed.

The hearing examiner recommends that this charge be dismissed, therefore, because Complainant admits that members of the public *were* present during the ballot count and because the counting and tabulating of the ballots was done before members of the public. (*N.J.S.A.* 18A:14-57)

CHARGE NO. 6

> "Drawing for position of the candidates while somewhat of a minor nature, was not done according to law."

This charge is a mere allegation. Complainant admits not being present at the drawing for positions on the ballot and offers no corroborating evidence whatsoever about the conduct of the drawing for ballot positions.

The hearing examiner recommends that this charge be dismissed for lack of evidence or offer of proof.

CHARGE NO. 7

> "The judge of the election for districts 1 & 6 at school No. 5 did not seem to have much knowledge, if any, of the operation of a voting machine. To my knowledge, this was the first time she served on a board of election."

This charge seems groundless on its face. Any person serving in any capacity in any job, office or position has a "first" time to serve. No proof is offered here that any statute was violated. However, Complainant alleges that the judge of election was not a qualified voter in the district and that she served on the election board in violation of *N.J.S.A.* 18A:14-6, which reads as follows:

> "Each board of education shall, at its regular meeting, if paper ballots are used in elections in the district, or at its last regular meeting held not less than 40 days prior to the date fixed for the next annual school election, if voting machines are used in elections in the district, appoint a judge of elections, an inspector of elections, and two clerks of elections for each polling district therein, and may appoint additional clerks for any polling district, not exceeding one for every two signature copy registers used therein, to act as election officers, and shall notify them accordingly. They shall be appointed from the qualified voters of the school district, who are not members or employees of the board of education and who do not intend to stand as candidates for any office of the school district during the ensuing year, and in school districts in which voting machines will be used during the ensuing year they shall be chosen, as far as practicable, from the members of the district boards of election in office in the municipality or municipalities comprising the school district."

Complainant offered no proof that the judge of the election was not a qualified voter; therefore, for lack of any offering of proof whatsoever, this bare allegation is insufficient to make any determination of fact with respect to the charge. The hearing examiner recommends that Charge No. 7 be dismissed.

* * * *

The Commissioner has read the findings and recommendations of the hearing examiner and concurs in his recommendations that Charges No. 3, 4, 5, 6, and 7 be dismissed. The Commissioner notes, also, that one ballot, which Complainant avers he could not cast, could not affect the election in any way. (Charge No. 4)

Regarding the "Reminder" portion of Charge No. 1, *ante*, the Commissioner is constrained to caution boards about permitting the distribution of any document, which interpreted as alleged, "*** promotes, favors, or opposes *** the adoption of *** any public question ***." *N.J.S.A.* 18A:42-4, *supra.*

With respect to Charge No. 2, the Commissioner determines that Complainant has not alleged that there was "electioneering" by the PTA, nor has he alleged that the meeting was held "within 100 feet" of the polling place. *N.J.S.A.* 18A:14-72 There is no statutory proscription for the holding of a PTA meeting on the day of the annual school election. The Commissioner opines, however, that the PTA meeting, held at the school on the evening of the February 8, 1972, election, was called inadvisedly unless that was the regularly scheduled date and meeting place for the PTA.

Such a meeting, as scheduled, should be avoided so as not to raise the suspicion, as herein charged, of any misconduct or collusion between the PTA and the Board.

Absent any allegation or proof of a statutory violation, however, the Commissioner determines that Charge No. 2 is also without merit or proof and is hereby dismissed.

Complainant prays that the election be voided and a new election called.

The Commissioner would vigorously condemn any procedural faults found in any school election; however, in the instant matter he finds that there is no showing of misconduct or collusion that would vitiate this election. Nor can the Commissioner find that the will of the people was thwarted and could not be fairly determined. The Commissioner stated in his decision, *In the Matter of the Annual School Election in the School District of Riverside Township, Burlington County*, 1968 *S.L.D.* 73, 77:

> "*** It is purely speculative to propose that if conditions had been different, the results would have been different. The Commissioner has

consistently declined to set aside contested elections unless it can be shown that the irregularities clearly affected the result of the election.

> '*** it has been held that gross irregularities when not amounting to fraud do not vitiate an election.' 15 *Cyc.* 372

"See also *Application of Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1958); *Sharrock v. Keansburg*, 15 *N.J. Super.* 11 (*App. Div.* 1951); *Love v. Freeholders*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *In the Matter of the Annual School Election in the Township of Jefferson, Morris County*, 1960-61 *S.L.D.* 181; *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Lumberton, Burlington County*, 1959-60 *S.L.D.* 130.***"

The Commissioner cannot comment about the alleged conflict of interest of the Board's counsel. The Commissioner has jurisdiction over all controversies and disputes arising under school law; however, no violation of any statute in *N.J.S.A.* 18A, Education, was alleged. For the reason stated, the Commissioner determines that he lacks jurisdiction with respect to Complainant's allegation that the Board's counsel, in representing the Board, is in conflict of interest.

The Commissioner finds and determines, therefore, that the announced results of the election will stand and that Candidate Thomas C. Garvey, Lorraine Ann Bott and Helen L. Casmer were elected on February 8, 1972, to membership in the Board of Education of the School District of the Borough of Lindenwold for full terms of three years each.

COMMISSIONER OF EDUCATION

May 17, 1972

Frank Hegyi,

Petitioner,

v.

Board of Education of the Borough of Fieldsboro, Burlington County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

Petitioner, a resident of the Borough of Fieldsboro, Burlington County, challenges the appointment of Mrs. Vincent Sapp to the five-member Fieldsboro Board of Education, hereinafter "Board," by alleging that Mrs. Sapp's appointment was not properly approved by a majority vote of the Board, and that, as a Board member, she is in conflict of interest. The Board denies that Mrs. Sapp was appointed improperly or unlawfully, and further denies that she is in conflict of interest as a Board member. By agreement of both parties, the matter is submitted for summary judgment on the basis of the pleadings and supplemental documents.

The latter allegation shall be considered first. Petitioner alleges that:

> "Mrs. Sapp also is the sister to Mrs. Irma Lancaster, a teacher and head of the Teachers Association at the Fieldsboro School, which *** is a *** conflict of interest inasmuch as Mrs. Sapp *** would be directly involved in salary negotiations with her sister and the Teachers Association."

Petitioner prays that the Commissioner declare null and void the appointment of Mrs. Sapp and order her "to cease and desist in taking part in any official Board function." However, a letter (Exhibit R-4) received from the Board Secretary, dated February 14, 1972, and stipulated by both parties, states that:

> " *** Mrs. Irma Lancaster was appointed president of the Teachers Association sometime in the early part of 1969, and has served as president until she regigned (sic) in October 1971.*** "

The resignation cited, *ante*, of Mrs. Sapp's sister from the presidency of the Association in October 1971 renders the issue of an alleged conflict of interest moot. Since there is no relief that could be granted in this instance because the situation from which the allegation emerged has dissolved, the Commissioner declines further consideration of the merits of this charge. See *Polskin v. Board of Education of North Plainfield*, 1968 *S.L.D.* 217.

The prior allegation relative to the propriety of Mrs. Sapp's election to the Board will now be considered. The Commissioner is informed that the specific Board seat in question herein has been filled, by a person other than Mrs. Sapp, by a vote of the electorate of Fieldsboro during the February 1972 school election which renders, therefore, that issue herein moot. He will depart from his usual practice of not adjudicating moot issues, and rules on this matter for the future guidance of boards of education and interested citizens.

The Commissioner finds that there is no issue of material fact in this matter. A vacancy existed on the Fieldsboro Board as of April 27, 1971. (Exhibit R-1) The nature of the vacancy or its length of existence is not at issue. On April 27, 1971, the regular monthly meeting of the Board was convened at 7:30 p.m., with its four remaining members present. An item on the agenda, as reflected in the Board's minutes (R-1 *supra*) was the submission of the names of three candidates, who were interested in filling the vacancy. Upon the submission of those names, one of which was Mrs. Sapp, the President of the Board announced that a vote then would be taken for election. The result of that vote was as follows:

Mr. Edward Tyler – 1 vote
Mr. Albert Blakeslee – 1 vote
Mrs. Ida Sapp – 2 votes

Petitioner asserts in his petition that Mrs. Sapp failed to receive "a majority of the required number of votes needed for appointment."

Title 18A, Education, of the New Jersey Statutes specifies precise questions on which a majority vote of the whole number of members is required for enactment. See e.g. *N.J.S.A.* 18A:27-1; 25-1; 33-1; 34-1; 29-14; 6-11; 38-6; 17-15; 17-16; 17-5; 17-13; 17-14.1; 17-25; 25-6; 15-2; 16-8; 14-39; 20-8; 20-5; 51-1; 51-11. Nowhere, however, do the statutes require such a vote for the filling of a vacancy on the Board. The relevant statute, *N.J.S.A.* 18A:12-15, states, *inter alia:*

"Vacancies in the membership of the board shall be filled as follows:

a. By the county superintendent, if the vacancy is caused by the failure to elect a member, or by the removal of a member because of lack of qualifications, or results from a recount or contested election, or is not filled within 65 days following its occurrence,

b. By the county superintendent, to a number sufficient to make up a quorum of the board if, by reason of vacancies, a quorum is lacking, or

c. By the Board in all other cases.

"Each member so appointed shall serve until the Monday following the next annual election***."

The doctrine of *expressio unius est exclusio alterius* seems to be applicable here. Nowhere does the statute, *ante*, express or imply that a majority of the whole number of members is needed to elect. It must be concluded, therefore, that where there are more than two candidates for election to fill the vacancy under the statute, a plurality of votes is sufficient. See *Polonsky et al. v. Red Bank Board of Education, et al.*, 1967 *S.L.D.* 96. By receiving more votes than the other two candidates, Mrs. Sapp had a plurality of the votes. 29 C.J.S., Elections, § 241, states, at p. 674, the following:

> " *** In the absence of a statute or constitutional provision expressly requiring more, a plurality of votes is sufficient to elect.*** "

But even had a plurality not been given to any of the candidates on the evening of April 27, 1971, the official minutes for the regular May meeting (Exhibit R-2) show that the Board, apparently believing its action at the April meeting may have been in error, took another vote on one nominee, Mrs. Sapp, to fill the vacant seat. The result of the May vote was 3-ayes, 0-nayes for Mrs. Sapp's election.

The Commissiner finds, therefore, that Mrs. Sapp was elected, by a plurality of votes cast at a legally-constituted meeting, to a seat on the Fieldsboro Board of Education.

The Commissioner, therefore, finds and determines in the first instance that Mrs. Ida Sapp was duly appointed on April 27, 1971, to fill a vacant seat on the Fieldsboro Board of Education until the organization meeting of the succeeding Board of Education in February 1972. In the second instance, the Commissioner declines jurisdiction on the grounds that the allegation of conflict of interest has been rendered moot.

Accordingly, in the first and second instance, the petition is dismissed.

COMMISSIONER OF EDUCATION

May 17, 1972

Mabel Clark,

Petitioner,

v.

Board of Education of the Borough of East Paterson, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION FOR SUMMARY JUDGMENT

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Law Offices of Charles A. Bartlett (Stanley Turitz, Esq., of Counsel)

Petitioner is a teacher under tenure in the East Paterson Borough School System. Respondent, hereinafter "Board," denied petitioner a salary increment for the school year 1971-72, whereupon petitioner filed a Motion for Summary Judgment in her favor on the following grounds:

> "1. An analysis of the Board's salary guide for 1970-71 shows that there is no implementation nor are there correlary (sic) conditions set down for advancement on the guide and that only years of service are necessary to advance from step to step.
>
> "Annexed hereto are excerpts from the 1970-71 agreement portinent to this issue." [*See footnote]
>
> "2. The Petitioner was not notified that the Superintendent proposed to submit a recommendation to the Board to deprive her of advancement on the schedule; no opportunity was afforded petitioner to speak in her own behalf before the Board; and formal action was taken by the Board before she was afforded an opportunity to be heard.
>
> "3. Petitioner was notified on June 9, 1971, of the refusal to grant an increase and advance on the guide based on lack of recommendation by the Superintendent. A copy of the letter is annexed hereto.

---

[*] Attachments were as follows:

a. Letter from Superintendent of Schools to petitioner dated June 9, 1971.
b. Article VI – Salaries – from 1970-71 "Agreement."
c. Schedule A – Teacher Salary Guide 1970-71.

"Neither the agreement between the East Paterson Education Association, of which the petitioner is a member, and the respondent Board of Education or the salary guide makes this a condition percedent to advancement on the schedule and the denial is therefore invalid and illegal.

"4. For such further relief as may be proper. (sic) We will rely upon the pleadings and documents annexed hereto as proof of the facts alleged herein in support of the motion." (Petitioner's Motion for Summary Judgment, pp. 1, 2)

Oral argument of counsel on the Motion was presented on December 15, 1971, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. Sixteen documents were submitted in evidence. The report of the hearing examiner is as follows:

Petitioner avers that the matter submitted herein for adjudication by the Commissioner is *res judicata*, and that the following decisions of the Commissioner are dispositive of the matter: *Anthony G. Pekich v. Board of Education of the City of Bridgeton, Cumberland County*, decided by the Commissioner June 8, 1971, affirmed by the State Board of Education December 1, 1971; *Doris Van Etten and Elizabeth Struble v. the Board of Education of the Township of Frankford, Sussex County*, decided by the Commissioner March 17, 1971; *Charles Brasher v. Board of Education of the Township of Bernards, et al., Somerset County*, decided by the Commissioner March 19, 1971; *Ross v. Board of Education of the City of Rahway, Union County*, 1968 *S.L.D.* 26; and *Charles Lewis v. Board of Education of the Borough of Wanaque, Passaic County*, decided by the Commissioner October 21, 1971.

Specifically, petitioner avers that her placement on the salary guide for the 1971-72 school year is governed by the terms in the East Paterson Education Association's "Agreement" with the Board, effective from September 3, 1970, to June 30, 1971. (J-1) Petitioner avers further that the Agreement, *ante*, does not include "corrollary (sic) conditions set down for advancement on the guide and that only years of service are necessary to advance from step to step." (Notice of Motion, *supra*)

The Board argues first that petitioner cannot rely on only one page of the Agreement, i.e. the Salary Guide alone, but that she must consider the Agreement as a whole, since the Education Association and its members are bound by all of the terms and conditions therein. The Board avers that ARTICLE IV A of the Agreement – *TEACHERS RIGHTS* – gives the Board the authority to withhold a teacher's increment. That portion of Article IV A reads as follows:

" *** No teacher shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause. Any such action asserted by the Board, or any agent or

representative thereof, shall be subject to the grievance procedure herein set forth ***."

Secondly, the Board argues that the Agreement between the Education Association and the Board for the 1971-72 school year was signed in February 1971, and "was in effect at the time the petitioner was denied her increment" and that the "71-72 salary guide clearly allows the Board to withhold for just cause the petitioner's increment." (Tr. 11) The Board claims that the 1971-72 Agreement includes a clause printed at the foot of the Salary Guide, which gives it the authority to withhold a teacher's increment, and that in the matter, *sub judice*, this authority is granted to the Board under the provision of Article IV A.

The hearing examiner recommends dismissal of that portion of this argument which states that the 1971-72 contract governs the matter, *sub judice*, on the basis of Exhibit J-1, the 1970-71 Agreement, which states under *ARTICLE XV, DURATION OF AGREEMENT*, that the Agreement is effective from September 3, 1970, through June 30, 1971. The 1971-72 Agreement (J-2) states that it shall be effective beginning September 1, 1971, through June 30, 1972; therefore, it could not possibly govern any action taken by the Board before its effective date of September 1, 1971.

The Board avers, also, that *N.J.S.A.* 18A:29-14 (as amended by *Ch.* 295 *L.* 1968), which reads as follows:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons 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 or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his power 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."

gives the Board the statutory authority to withhold a teacher's increment. The Board takes issue with prior decisions of the Commissioner, which have held that the provisions of *N.J.S.A.* 18A:29-14 are "applicable only to salary guides which are on or below the State Minimum Salary Guide. The Board requests that the Commissioner review his prior decisions with respect to those determinations because, in its opinion, they were "wrongfully made" decisions. (Tr. 12)

The Board argues, finally, that the 1970-71 Agreement "has sufficient language in it" to allow it the authority to withhold a teacher's increment. (Tr. 28)

The record shows that the principal filled out a "TEACHERS PERFORMANCE PROFILE" on March 22, 1971, which recommended that petitioner's increment not be granted for the 1971-72 school year. That document also provided that "Tenure Teachers are to be evaluated once each academic year." (R-1) However, the document R-5, submitted as a part of the record, is a pertinent portion of the Board's policy manual, and it provides for a "minimum" of three teacher evaluations each year followed by "a written report for each of strengths and weaknesses observed. All possible administrative guidance and supervisory help shall be given to the employee to eliminate the deficiency and to forestall this action [of withholding an increment]. R-5 states:

"Final evaluation reports shall be submitted by the building principal and the department chairman to the Superintendent of Schools by March 15 each school year ***." (R-5)

Although no classroom observation is indicated by respondent prior to March 15 as required, *supra*, (R-5), *memoranda* sent to petitioner from the building principal dated February 1 and February 4, 1971, and submitted as a part of the record (R-2), indicate that the principal was not satisfied with the total performance of petitioner, and it (R-5) became a part of the determination made by the principal in petitioner's "TEACHER PERFORMANCE PROFILE," *supra*, dated March 22, 1971, which recommended that her increment should be withheld. (*Emphasis supplied.*)

Three subsequent teacher evaluations were made on May 21, and June 14 and 15, 1971, and the Board took action at its public meeting of June 7, 1971, to withhold petitioner's increment for the 1971-72 school year, presumably based on the principal's recommendation as reported by the Superintendent of Schools.

On March 29, 1971, petitioner filed a grievance with the Board (R-4) after her unfavorable evaluation of March 22, 1971. The Superintendent rejected her grievance on May 5, 1971, stating that "The evaluation by Elementary Principal *** to remain unchanged. The grievant's request for restoration of increment is premature. No action has been taken by the Board of Education to withhold increment at the present time." (R-4) Wherein, petitioner filed a petition of appeal with the Commissioner of Education requesting that her increment for the 1971-72 school year be restored.

* * * *

The Commissioner has read the report, findings and recommendations of the hearing examiner and determines that the Board's second argument, that the 1971-72 Agreement governs the matter *sub judice* be dismissed as recommended by the hearing examiner for the reasons stated in his recommendation, *ante*.

The Commissioner determines, also, that he will not review his prior decisions, as suggested by the Board on the grounds of its contention that some of them were "wrongfully made."

However, the Commissioner will review the historical development of the applicability of *R.S.* 18:13-13.7 [now *N.J.S.A.* 18A:29-14]. *In Zelda Goldberg v. the Board of Education of the West Morris Regional High School District, Morris County,* 1964 *S.L.D.* 89, remanded to the Commissioner by the State Board of Education,1965 *S.L.D.* 174, the Commissioner held as follows:

> " *** Although counsel have stated in their pre-trial memorandum the issues posed by the conflicting contentions of petitioner and respondent, the Commissioner deems the over-riding question to be, If the salary voted to be paid to a teacher is in excess of the minimum salary to which the teacher is entitled, under the provisions of *R.S.* 18:13-13.2, [now *N.J.S.A.* 18A:29-7] do the provisions of *R.S.* 18:13-13.7 [now *N.J.S.A.* 18A:29-14] apply? Upon the answer to this question rests the answers to the other questions concerning petitioner's right to notice, to reasons, and indeed, to a salary increment.
>
> "Prior to the enactment of *Chapter* 249 of the *Laws* of 1954 (*R.S.* 18:13-13.1 *et seq.*), the statutes established a minimum salary but not a scale of minimum salaries and increments for teachers. *R.S.* 18:13-13 [now *N.J.S.A.* 18A:29-5], as adopted in the general revision of 1937, required that every teacher be paid a minimum salary of $100 per month of employment during the school year. Subsequent amendments in 1941, 1944, 1947, and 1951 raised the minimum salary to $2500. The 1954 Minimum Salary Law not only established minimum salaries for various levels of professional training, but also required that within each level of training the teacher shall be advanced by annual salary increments of $200 to a 'minimum maximum' based on the number of years of professional experience in the public schools. Provision was also made for mandatory adjustment increments to bring a teacher to his proper place on the schedule.
>
> "The language of *R.S.*18:13-13.7, *supra,* clearly sets forth the intent of the schedule: 'to prescribe a minimum salary at each step, and any increment prescribed shall also be considered a minimum.' But having met these minimum requirements, a board of education is given full latitude 'to increase for any teacher or classification of teachers included in any schedule the initial salary or the amount of any increment or the number of increments' (*R.S.* 18:13-13.7, *supra*). Section 8 of the act (R.S. 18:13-13.8) [now *N.J.S.A.* 18A:29-15] further provides:
>
> > 'Nothing contained in this act shall be construed *** to prevent the adoption of any salary schedule which shall meet its minimum requirements***.'
>
> "Thus respondent Board adopted for 1963-64 a salary guide which provided for petitioner, at step 9, a salary several hundred dollars higher than the minimum established by law for teachers on that step.

"It will be observed from the historical review of minimum salary legislation, *supra*, that legislative policy has moved from a statutory *minimum salary* (*R.S.* 18:13-13) to a statutory *minimum salary schedule* providing for a series of minimum increments (*R.S.* 18:13-13.1, *et seq.*). To such minima every properly certified teacher has such rights as are provided by law, of which the teacher cannot be deprived except in strict accordance with the procedures set forth in the statutes *Forsyth v. Board of Education of Freehold*, 1955-56 *S.L.D.* 77; *Colangelo v. Board of Education of Camden*, 1956-57 *S.L.D.* 62, affirmed State Board of Education 66. Beyond that, in accordance with the powers granted to the board by *R.S.* 18:13-13.8, *supra*, and by *R.S.* 18:13-5, to 'make rules and regulations governing the engagements and employment of teachers and principals, the terms and tenure of the employment, *** the rights and duties of the teacher with respect to his employment, shall be dependent upon and governed by the regulations in force with reference thereto.'

"It has been established that neither a state nor local salary guide has a contractual effect. *Greenway v. Board of Education of Camden*, 1939-49 *S.L.D.* 151, affirmed State Board of Education 155, affirmed 129 *N.J.L.* 46 (*Sup. Ct.* 1942), 129 *N.J.L.* 461, 462-463 (E. & A. 1943). See also *Offhouse et al. v. Board of Education of Paterson*, 1939-49 *S.L.D.* 81, affirmed State Board of Education 85, *cert. denied*, 131 *N.J.L.* 391, 396 (*Sup. Ct.* 1944). A local salary schedule has been said to be 'a rule or regulation governing the salaries of teachers which it makes for its own convenience and guidance.' *Greenway*, *supra*, 1939-49 *S.L.D.* at 159; and the Supreme Court in *Offhouse*, *supra*, at page 396, describes a regulation providing for increments as 'a mere declaration of legislative policy that is at all times subject to abrogation by a local board in the public interest. The Commissioner maintained a similar determination in *Kopera v. Board of Education of West Orange*, 1958-59 *S.L.D.* 96, 97, when he said:

> 'A salary guide, if adopted by a district board of education, and if higher than the minimum salary requirements of *N.J.L.* 18:13-13, *et seq.*, is only an announced goal or objective of the board.'

"While the Court, on appeal from the affirmance of the State Board, remanded *Kopera* for further finding of fact and conclusions by the Commissioner, it did not take exception to the Commissioner's definition, *supra*, 60 *N.J. Super* 228, 294 (*App. Div.* 1960). *In Wachter v. Board of Education of Millburn*, 1961-62 *S.L.D.* 147, in which petitioner appealed the withholding of a salary increment under the terms of a local salary guide, no claim was made that any rights accruing under the Minimum Salary Law had been violated. However, had the Commissioner found that such rights existed under the law, the proper discharge of his duty requires corrective action. *In re Masiello*, 25 *N.J.* 590, 607 (1958). But the Commissioner found that the increment was withheld within the discretion of the Board, in the exercise of which he would not intervene.

"Thus the history and past construction of the Minimum Salary Law, and prior decisions of the courts and of the Commissioner himself, lead him to the determination that petitioner herein has no rights under the terms of *R.S.* 18:13-13.7 which have been violated by respondent's decision to withhold a salary increment provided by its own salary guide for the school year 1963-64.

"There remains the question of petitioner's rights under the terms of respondent's salary guide for 1963-64. The old Supreme Court dealt directly with this question in *Fraser et al. v. State Board of Education*, 133 *N.J.L.* 15 (1945). The Court's decision, in full, reads as follows:

> 'A writ was allowed in this case for the determination of two questions. 132 *N.J.L.* 28.
>
> '1. Do teachers in a school system, who have acquired tenure, have a right to the increases provided by an existing salary schedule when the time for such increases occur? (sic) We think not. If the reasoning in *Greenway v. Board of Education of Camden*, 129 *N.J.L.* 461, is somewhat extended, as we think it should be, board action is necessary to implement every increase.
>
> '2. May the recommendation by the persons named in the schedule be arbitrarily withheld? We can find nothing in the proofs beyond inaction. There is nothing to indicate that it was arbitrary. To decide otherwise it is admitted would necessitate overruling the reasoning in the *Greenway* case, *supra*, This we cannot do.
>
> 'The judgment of the State Board of Education will be affirmed.***"

The Commissioner determines, therefore, that the Board has the authority to withhold a teacher's increment when its salary guide is above that mandated by the statutes (*N.J.S.A.* 18A:29-6 *et seq.*), and when the Board has its own rules regulating the granting and withholding of increments.

However, in 1965 the Legislature enacted *Chapter* 236, *Laws* of 1965, which enabled local school districts "to establish salary policies, including salary schedules, which would give to their professional employees a precise statement of their salary expectation over the succeeding two years and at the same time would make it possible for boards of education to budget meaningfully to implement such schedules." *Ross v. Board of Education of the City of Rahway, Union County*, 1968 *S.L.D.* 26, 28. The Commissioner stated further in *Ross* at p. 29:

> " *** the enactment of *Chapter* 236 clearly established the *contractual nature* of salary polices, including salary schedules, adopted by boards under the authority of that chapter ***." (*Emphasis ours.*)

Since the adoption of *Chapter* 236, the Legislature has also adopted *Chapter* 303, *Laws* of 1968, now embodied in *N.J.S.A.* 34-13A-1 *et seq.*, imposing on boards of education and other public employers the obligation to negotiate the "terms and conditions of employment."

In the instant matter, the Agreement provided a salary schedule and, *inter alia*, Article IV A, *supra*, which authorized the Board to withhold an increment for "just cause."

With respect to the Agreement (J-1) and the rationale herein reviewed and further developed, the Commissioner further determines that petitioner has no claim to compensation beyond that authorized by the Board for the 1971-72 school year.

With respect to the issue herein, the Commissioner determines that this matter is *res judicata* by reason of the principles enunciated in *Thomas R. Durkin et al. v. Board of Education of the City of Englewood, Bergen County*, decided by the Commissioner December 27, 1971.

The simple issue to be decided in this matter is as follows: Did the Board act properly and legally and in concert with prior decisions of the Commissioner when it withheld petitioner's salary increment for the school year 1971-72?

In previous matters having similar questions, the Commissioner has held that a salary guide is contractual in nature according to its stated terms, and that in the absence of corollary conditions, the guide itself must be implemented. *Van Etten and Struble, Brasher, and Ross, supra.* The Commissioner stated in *Durkin, supra*, that:

> " *** salary increments were not to be considered automatic, but that they were dependent upon a judgment by the Board that the teacher's 'performance' and 'professional record' met the 'standards expected by the Board.' Since *** petitioner did not meet these standards, the Commissioner holds that it [the Board] was free to withhold the increments ***.
>
> "In reaching this decision, the Commissioner holds *** that the Board had no set of clearly-labeled 'standards,' since the Agreement *** indicated that the Board was free to make a unilateral determination in this regard ***."

Such is the case herein. Article IV A of the Agreement, *supra*, authorized the Board to withhold an increment for "just cause."

The hearing examiner did not explore the merits of the Board's decision, nor does the Commissioner find such exploration necessary. Without "clear and convincing proof *** that the Board acted unreasonably *** the Commissioner

will not substitute his own judgment for the discretion of the Board in matters such as this. The salaries of petitioners have not been decreased, and the Board's decision not to increase them is one that the Commissioner holds *** [the Board] was empowered to make ***." *Durkin, supra*

The Commissioner of Education's judgment in the instant matter is the same. He finds, therefore, that the Board acted legally and within the scope of the provisions of the Agreement (J-1), and that petitioner is not entitled to the salary increment she requests. The Board's decision to withhold that increment for the school year 1970-71 is therefore sustained, and petitioner's Motion for Summary Judgment in her favor is dismissed.

COMMISSIONER OF EDUCATION

May 17, 1972

Pending before State Board of Education

In the Matter of the Tenure Hearing of Gus Holland, Jr., School District of the City of Jersey City, Hudson County.

COMMISSIONER OF EDUCATION

Order

For the Petitioner, Brown, Vogelman, Morris & Ashley (Barbara Morris, Esq., of Counsel)

For the Respondent, Philip Feintuch, Esq.

It appearing that the Board of Education of the City of Jersey City, hereinafter "the Board," having considered charges made against Mr. Gus Holland, Jr., hereinafter "respondent," by the Board's Assistant Superintendent of Schools pursuant to *N.J.S.A.* 18A:6-10 *et seq.;* and it appearing that the Board has determined that the charges would be sufficient, if true in fact, to warrant dismissal; and it appearing that the Board has properly certified said charges to the Commissioner of Education by letter dated January 29, 1971, and served a copy of said charges and certification upon respondent by certified mail; and it appearing that a copy of the charges together with a copy of the Board's resolution of certification were served by certified mail upon respondent on February 2, 1971, by the Assistant Commissioner of Education in charge of Controversies and Disputes; and it appearing that respondent filed an Answer to the charges on July 26, 1971; and it appearing that respondent did not attend

the hearing scheduled for him on October 27, 1971, in the office of the Hudson County Superintendent of Schools; and it appearing that the hearing examiner adjourned the scheduled hearing until such time as counsel could present respondent in his own defense; and it appearing that counsel for respondent was notified by letter on January 6, 1972, that the hearing should be held within the next ensuing 30 days unless good and sufficient reason was shown for the extensive delay; and it appearing that the matter has not been moved for adjudication before the Commissioner; and it further appearing that respondent has been given every opportunity to defend himself for more than 15 months; now therefore

IT IS ORDERED ON THIS 17th day of May, 1972, that Respondent Gus Holland, Jr., is dismissed from his employment with the School District of the City of Jersey City, Hudson County, as of the date of his suspension by the Board of Education of the City of Jersey City.

COMMISSIONER OF EDUCATION

May 17, 1972

In the Matter of the Annual School Election Held in the School District of the Township of Mt. Olive, Morris County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the balloting for members of the Board of Education for full terms of three years each at the annual school election held on February 8, 1972, in the school district of the Township of Mt. Olive, Morris County, were as follows:

	At Polls	Absentee	Total
Charles Digney	510	0	510
Bernice Kern	494	0	494
Arthur Magalio	478	0	478
Arthur Sirkis	278	0	278
Harold Hatton	211	0	211
Joseph Goldmann	208	0	208
Harry Ghelberg	199	0	199
Gloria Walter	174	0	174
Ann Burd	171	0	171
John Planker	118	0	118
Gerald Manning	95	0	95

Pursuant to a letter request dated February 10, 1972, from Candidate Sirkis and a group of citizens from Mt. Olive Township, the Commissioner directed that a hearing examiner conduct an inquiry with respect to the allegations that the letter contained. This inquiry was held on March 2, 1972, at the Police Training Center, Morris Plains, and, subsequently, briefs were filed by Candidate Sirkis, et al. and by counsel for Candidates Digney, Kern and Maglio. The report of the hearing examiner is as follows:

The gravamen of the allegations brought herein is that immediately prior to and during the election of February 8, 1972, certain persons residing in the Township engaged in illegal election activities. Specifically, it is alleged that certain of the Candidates and members of the professional staff of the Mt. Olive School District circulated or distributed copies of an unsigned card and that such distribution was contrary to the statute, *N.J.S.A.* 18A:14-97, which provides:

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

The card in question, introduced in two forms into evidence at the inquiry as P-1 and P-3, reads as follows:

"FOR CONTINUED QUALITY EDUCATION

IN MT. OLIVE TOWNSHIP

Vote Tuesday February 8th
***
Districts . . . 1, 2 & 3 FLANDERS SCHOOL
Districts . . . 4, 5 & 6 BUDD LAKE SCHOOL

Line 5 BERNICE KERN
Line 6 CHARLES DIGNEY
Line 8 ARTHUR MAGALIO"

It is noted here that the card, contrary to statutory prescription does not "bear upon its face a statement of the name and address of the person or persons causing the same to be printed." (*N.J.S.A.* 18A:14-97, *supra*) Neither was there

testimony elicited at the inquiry, which identified such "person or persons" who caused the card to be "published" or "printed."

However, there was direct testimony at the inquiry, which supported the allegation contained in the letter from Candidate Sirkis et al., that the cards were "widely distributed throughout the Township." Specifically, this testimony is reported in summary form as follows:

1. A resident found the card (P-1) under her door. (Tr. 12)

2. Candidate Kern offered the card to two residents. (Tr. 13)

3. A school principal, employed by the Mt. Olive Township Schools, passed the card to a school bus driver. (Tr. 23)

4. A teacher's aide asked a substitute teacher to distribute the cards. The substitute averred that she accepted a packet, but did not distribute them. (Tr. 47)

5. A citizen of the Township was given the card one evening by a young boy.

6. The Superintendent of Schools handed two of the cards to a citizen of the Township. (Tr. 52)

Other evidence of widespread distribution of the cards may be found at Transcript pages 16, 20, 24, 26, 27, 49, 55, 57. Additionally, other witnesses testified that the card was displayed, on the day of the election, on the cafeteria bulletin board, which was estimated to be a distance of 20 feet from the main corridor leading to the polling place and 200 feet from the polling place itself. This testimony would seem to indicate a possible violation of *N.J.S.A.* 18A:14-81, which provides:

> "If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question, to be voted upon at any election, within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person."

However, there was no testimony at the hearing, which would indicate that any voters were influenced affirmatively to cast their votes for any of the candidates named on the card. (P-1) One voter did testify that the card he found under the windshield of his car had a "negative" influence against the candidates whose names were imprinted thereon. (Tr. 57)

In his brief, Candidate Sirkis argues that testimony at the inquiry indicates there was an illegal political plan involving the active participation of the Superintendent of Schools, the "Teachers' Salary Negotiating Committee," the three successful candidates, and professional and non-professional employees of

the school system to elect the three Candidates whose names appear on the card. (P-1) While alleging that the activity of card distribution was contrary to the prescription of the statute, *N.J.S.A.* 18A:14-97, *supra*, he also avers that the electioneering role allegedly played by the Superintendent of Schools in the election violated the spirit of *N.J.S.A.* 18A:14-99. This statute provides, *inter alia*, that employers or "superintendents" who take direct action to influence the vote of persons in their employ "shall be guilty of a misdemeanor." Additionally, Candidate Sirkis avers that Candidate Kern, Digney and Magalio are, or should be, barred from serving on the Board of Education because they are indebted to the Superintendent and employees of the School System for their election, and that their obligation in this regard is an "inconsistent interest" prohibited by the terms of *N.J.S.A.* 18A:12-2, which reades as follows:

> "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board."

The basic prayer of Candidate Sirkis, et al., is that the election be vitiated and a new one ordered and conducted by the State Department of Education. Although the principal charges of the complaint allege infringements of law that could, if proved true in fact, result in fines or other penalty, the Commissioner of Education need consider the allegations only as to their effect on the validity of the election.

Candidates Kern, Digney and Magalio contend, in their brief, that the alleged practices *sub judice* were not improper and that, in any event, there was no testimony whatever that they influenced the outcome of the election. Further, they aver that the only tribunal competent to adjudge that the card (P-1) is proper or improper is the Mt. Olive Municipal Court, and that in the absence of a complaint before the Court that results in a finding that the card is illegal, there is no proper basis for the charges brought before the Commissioner. Additionally, it is argued that even if it were found by the Court that there was a violation of *N.J.S.A.* 18A:14-97, *supra*, resulting from the printing and distribution of the card, the fines and penalty prescribed by the statute are clear, and do not include a penalty barring the already-seated candidates from holding elective office.

The hearing examiner observes, at this juncture, that he cannot, on the basis of testimony at the inquiry alone, find that the allegations made by Candidate Sirkis, *et al.* are true in fact. Such a finding could not be reached without wide use of subpoena power and testimony from the Mt. Olive Superintendent of Schools, employees of the School System and other citizens of Mt. Olive Township. The hearing examiner would recommend use of such subpoena power if there was a *prima facie* case that the outcome of the election would have been different or changed in any material way by the distribution of the card P-1. Such a case was not established by the testimony at the hearing. Testimony at the hearing was sufficient to establish only a *prima facie* case that:

> 1. the card (P-1) was printed within the Township by a person who is unidentified at this juncture.

2. the card was widely distributed within the Township.

The hearing examiner poses, for determination by the Commissioner, the following questions resulting from this limited finding:

1. Is the card (P-1) an illegal document?

2. May the Commissioner make such a determination?

3. If it is illegal, in the judgment of the Commissioner, and if it was widely distributed by persons in Mt. Olive Township, should the election of February 8, 1972, be vitiated?

4. Should the limited inquiry of March 2, 1972, be expanded or should the limited findings reported, *supra*, be pursued in another manner?

* * * *

The Commissioner has reviewed the report of the hearing examiner, and has noted his summary of issues posed for determination. In the Commissioner's judgment, the matter *sub judice* may be properly categorized as a controversy or dispute arising under the school laws. (*N.J.S.A.* 18A:6-9) The Commissioner holds that the controversy is subject to his preliminary review and tentative determination, even though the right of a local board of education member to continue in office must ultimately be determined by a court of competent jurisdiction, in most instances, and despite the fact that only a Court can impose the penalties of fine and imprisonment, which are pertinent to the charges *sub judice. Buren v. Albertson,* 54 *N.J.L.* 72, 22*A.* 1083 (1891)

Therefore, the Commissioner will address himself to the issues raised herein; most importantly to a determination of whether the card (P-1) is an illegal document. In this regard, the Commissioner holds that the card (P-1), if circulated in the manner attested to herein, is clearly illegal in that it does not "bear upon its face:" (1) "the name and address of the person or persons causing the same to be printed, copied or published" or the name and address of a person or persons (2) "by whom the cost of the printing, copying or publishing thereof has been or is to be defrayed," and (3) the "Name and address of the person or persons by whom the same is printed, copied or published." *N.J.S.A.* 18A:14-97, *supra* Having reached this determination, the Commissioner holds that this fact, and, additionally, the *prima facie* case concerned with the distribution of the cards, reported by the hearing examiner, *supra*, should be referred to the Office of the New Jersey Attorney General for consideration and possible prosecution in a Court of law. The Commissioner believes that this Court – the one mandated by law to determine the penalty – should also adjudge the witnesses' demeanor at the time their testimony is given.

The Commissioner deplores the evidence, presented herein, that the statutes pertinent to election matters may have been violated in any manner. While recognizing the rights of all citizens to participate fully in the electoral

process, he does not recognize the right of any one to act in a manner contrary to the letter and intent of statutory prescription.

However, it is well established that an election will be given effect, and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. *Love v. Board of Chosen Freeholders*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Petition of Clee*, 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *Application of Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953), affirmed 13 *N.J.* 185 (1953) There has been no such showing herein. Therefore, the Commissioner cannot vitiate the election.

Accordingly, the Commissioner finds and determines that Candidates Digney, Kern and Magalio were elected at the annual school election on February 8, 1972, to full terms of three years each on the Board of Education of the Township of Mt. Olive. In this respect, the prayer of Candidate Sirkis, et al. will not be granted.

However, the Commissioner directs that a copy of the transcript of the inquiry of March 2, 1972, be sent to the Office of the New Jersey Attorney General for whatever review and action that office deems it proper to take.

COMMISSIONER OF EDUCATION

May 19, 1972

In the Matter of the Annual School Election Held in the School District of the Township of Mt. Olive, Morris County.

Decided by the Commissioner of Education, May 19, 1972.

STATE BOARD OF EDUCATION

Decision

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

November 1, 1972

Pending before Superior Court of New Jersey

Jack Noorigian,

Petitioner,

v.

**Board of Education of Jersey City,
Hudson County,**

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Law Offices of Thomas F. Shebell, (Thomas F. Shebell, Jr., Esq., of Counsel)

For the Respondent, Brown, Vogelman, Morris and Ashley (Irving I. Vogelman, Esq., of Counsel)

Petitioner, a teacher employed by the Jersey City Board of Education, hereinafter "Board," claims tenure and seeks back pay together with interest, costs and legal fees. The Board denies that petitioner has tenure and further denies that petitioner has entitlement to additional claims herein stated.

The facts of the matter were submitted to the Commissioner on the exhibits, pleadings and briefs of counsel.

Petitioner was employed as a teacher of Basic English on September 6, 1966, and assigned to a Manpower Development Training Program by resolution of the Board, adopted September 14, 1968. That resolution reads:

> "BE IT RESOLVED, that the following named persons be and they hereby are *assigned* to the Manpower Development Training Program as teachers of Basic English and assigned to the Manpower Skill Center, 760 Mongomery (sic) Street, at a compensation of ***$6.00 per hour, when employed*** these assignments to date from September 6, 1966, and to be subject to such further action as the Board of Education may direct: (*Emphasis in Exhibit.*)
>
> "Jack Zaven Noorigian
> 414 Worthington Avenue
> Spring Lake, New Jersey"
> (Board Resolution)

Petitioner avers that he holds an appropriate certificate to teach Basic English, awarded by the State Board of Examiners, and that he taught in his assigned position continuously from September 6, 1966, through January 19, 1970, when the program, *ante*, was closed for lack of Federal Funds. Petitioner further avers that new funding enabled the Board to resume the program on

February 20, 1970, and that he was assigned again to teach beginning in April 1970, and that his employment was terminated in August 1970. Additionally, petitioner claims that the Board enrolled him in the New Jersey Teachers' Pension and Annuity Fund.

The Board does not deny that petitioner was employed for the time he contends, *supra*, but it does deny that petitioner has tenure or has any legitimate claim for the back pay and other relief he seeks.

The Board avers that:

> "The Jersey City Manpower Training Skills Center located at rented quarters at 760 Montgomery Street, Jersey City, New Jersey, is conducted by the Jersey City Board of Education. It is sponsored by the New Jersey Department of Education – Division of Vocational Education and funded by the United States Department of Health, Education and Welfare and the United States Department of Labor, under the Manpower Development and Training Act of 1962, as amended. The program is designed to aid unemployed youths and adults to successfully raise educational levels while developing trade knowledge and vocational skills. The source of the funds for the program is the United States of America. No part of the funds comes from local municipal property taxes. It is preferable to secure teachers with certificates for the program, however, when not obtainable, persons with practical knowledge of the subject matter may be appointed. The amount of money earned by a teacher in this program is determined by the numbers [of hours] worked in a week, multiplied by $6.00 per hour. The program under which JACK NOORIGIAN was employed is not part of the academic structure of the Jersey City Public School System. It is not an accredited program. Its existence depends wholly on federal funding. *There is no requirement of tests for a teacher to be employed in this program.*" (Respondent's Brief – pp. 1-2) (*Emphasis supplied.*)

The Board avers further that petitioner was not paid on a yearly basis, but that his "assignment might consist of merely hours, and not a full day, or a full day and a fraction of it might be continued over a week or longer." (Respondent's Brief – p. 4) Therefore, the Board concludes, "Petitioner performed services for which he was entitled to be, and was paid; but that did not bring him within the classification as a teacher." *Ibid.*, p. 5 Consequently, the Board contends that petitioner does not have tenure and that his claim for payment is therefore groundless.

The Board relies also on *Schulz v. State Board of Education*, 132 *N.J.L.* 345 (*E. & A.* 1944) and *Gordon v. State Board of Education*, 132 *N.J.L.* 356 (*E. & A.* 1944) The Board avers that these decisions determine that the litigants therein were not in the purview of the term "teacher" as defined in the statutes and had therefore no claim to tenure.

However, in *Schulz*, *supra*, the Court held as follows: (at p. 353)

"*** The courts have condemned evasions of the tenure statute and refused to countenance the subterfuge of designating a teacher as a substitute where the service rendered was that of a regular teacher. 'It clearly appears that the action of the Board was the merest subterfuge to defeat the legislative purpose ***.' *Downs v. Board of Education of Hoboken*, 13 *N.J. Mis. R.* 853 (1935); 'The petitioner, like many of the other so called substitutes, was assigned to a regular position in the same manner as teachers with tenure. The device adopted cannot defeat the purpose of the act ***. Had the proofs not shown continuous employment for the statutory period, the result would have been otherwise.' *Board of Education of Jersey City v. Wall*, 119 *N.J.L.* 308, (1938). *** The offense in the cited cases was the attempt to conceal the real situation by employing in the guise of substitute teachers those who were really teachers, doing the work of teachers.***"

Such is the case, herein. By Board resolution, *supra*, petitioner was employed on a *per diem* basis, despite the fact that his assignment was made to a class that was to meet continuously and did, for four years before he was terminated by the Board.

Boards of education in New Jersey are required to provide an education, free of charge, to " *** persons over five and under 20 years of age ***." *N.J.S.A.* 18A:38-1 Boards *may* provide additional educational services if they so determine. *N.J.S.A.* 18A:11-1 reads in part as follows:

"The board shall –

"***c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11,Civil Service, of the Revised Statutes; and

"d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

In the instant matter the Board employed petitioner by the hour, notwithstanding the fact that his employment as a teacher was continuous for almost four years. The statutes include "teacher" within the definition of "teaching staff member," which is clearly set forth in *N.J.S.A.* 18A:1-1, as follows:

" 'Teaching staff member' means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment,

require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse."

The Board does not deny that it also enrolled petitioner in the Teachers' Pension and Annuity Fund, hereinafter "TPAF." *N.J.S.A.* 66-2 (p) reads as follows:

"*** 'Teacher' means any regular teacher, special teacher, helping teacher, teacher clerk, principal, vice principal, supervisor, supervising principal, director, superintendent, city superintendent, assistant city superintendent, county superintendent, state commissioner or assistant commissioner of education *and other members of the teaching or professional staff of any class*, public school, high school, normal school, *model school, training school, vocational school*, truant reformatory school, or *parental school*, and of any and all classes or schools within the state conducted under the order and superintendence, and wholly or partly at the expense of the state board of education, of a duly elected or appointed board of education, board of school directors, or board of trustees of the state or of any school district or normal school district thereof, and any such persons under contract or engagement to perform one or more of these functions. No person shall be deemed a teacher within the meaning of this article who is a substitute teacher or is a teacher not regularly engaged in performing one or more of these functions as a full-time occupation outside of vacation periods. *In all cases of doubt the board of trustees shall determine whether any person is a teacher as defined in this article.*" (*Emphasis supplied.*)

No such doubt was raised in the thinking of the Board when it enrolled petitioner in the TPAF, since one requirement for enrollment of a person is that he be a teacher.

Boards have duties and obligations to their employees who are enrolled in the TPAF. *N.J.S.A.* 18A:66-32 reads in part as follows:

"Upon the employment of a person to whom this article may apply, his employer shall inform him of his duties and obligations under this article as a condition of his employment; the employer shall notify the retirement

system of such appointment within 10 days thereafter; it shall keep such records and from time to time furnish such information as the retirement system may require; deduct the proportion of salary and extra salary deductions as certified by the retirement system, transfer each of the amounts so deducted to the retirement system; and shall transmit to the retirement system monthly or at such intervals as the system designates statement of all amounts so paid. ***"

Despite the Board's contention that local taxes were not the source of petitioner's compensation, the Commissioner finds no merit in its argument that

petitioner's position was maintained solely with Federal funds. Once funds are made available to a local school district from any source, those funds become resources of the district receiving them, and persons employed with those funds may not be separated by category from other persons employed by the Board.

The Commissioner holds, therefore, that petitioner was a teacher in the employment of the Board.

Having determined that petitioner is a teacher within the meaning of the applicable statutes, there is left the determination of his tenure status. The Board relies on the *nature* of petitioner's employment as determined by it. It did not reject or deny petitioner's allegation that he was employed continuously for the period of four years. *N.J.S.A.* 18A:28-5 reads in 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, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district 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 or more than three academic years within a period of any four consecutive academic years. ***"

The Board avers, however, that only Federal funds enabled it to employ petitioner, and that the program, *ante*, was begun with the approval of the Vocational Division of the State Department of Education. The Board contends, therefore, that it is not responsible to petitioner after those funds are exhausted. The Commissioner cannot agree. Any employment arrangement into which the Board enters, irrespective of the source of the funding, binds the Board and its employees to all the terms and conditions of employment as set forth by the Legislature in the school laws (*N.J.S.A.* 18A, Education).

The Board argued that "There is no requirement of tests for a teacher in this program." (Respondent's Brief, *supra*) The Board argued further that

petitioner had "no teaching license from the Board of Education of Jersey City, nor were any tests given by the Board." (Respondent's Brief, p. 4)

N.J.S.A. 18A:26-5 reads as follows:

> "A district board of examiners shall, under such rules as the state board shall prescribe, and under such additional rules as may be prescribed by the board of education of the district, issue certificates to teach, which shall be valid for all schools of the district."

N.J.S.A. 18A:26-2 reads as follows:

> "No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils, in such public schools and of such other certificate, if any, as may be required by law."

Although petitioner possesses an appropriate certificate issued by the State Board of Examiners and has satisfied the requirements contained in the provisions of *N.J.S.A.* 18A:28-5 (a) and (c), *supra*, there is no evidence that he possesses a valid certificate issued by the Jersey City District Board of Examiners, and the Board avers that he was not required to take the tests because of the nature of his employment. Petitioner, therefore, has not earned a tenured status with the Board of Education of Jersey City.

However, even if petitioner had acquired a tenure status, the Board would not have been placed in an untenable position. If funding for Federal programs ends, the statutes protect the Board as well as the teachers. In the event that the Board can no longer fund a program that it is not required to offer by law, the positions implementing that program may be abolished, pursuant to the terms of *N.J.S.A.* 18A:28-9, which reads as follows:

> "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number 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."

Petitioner, requests back pay for twenty days of absence because of sick leave from August 4, 1969, to August 29, 1969, to which, he avers, he is entitled. *N.J.S.A.* 18A:30-2, which reads as follows, requires that a teacher be given a minimum of ten sick days per year without loss of compensation:

> "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."

Accumulation of unused days of sick leave is provided for by *N.J.S.A.* 18A:30-3, which reads as follows:

> "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."

Having determined that petitioner was a teacher "steadily employed" by the Board (*N.J.S.A.* 18A:30-2, *supra*), he is entitled to that back pay, which was withheld during his hospitalization and recovery period, if he had accumulated a sufficient number of unused sick leave days prior to the time of his illness, a fact not contested by the Board.

The Commissioner has previously determined that there is no provision in the statutes for payment of interest, costs and legal fees. In the case of *Fred Bartlett, Jr., v. Board of Education of the Township of Wall*, decided by the Commissioner of Education April 21, 1971, affirmed by the State Board of Education November 3, 1971, the Commissioner said:

> "***Nothing in the cases cited by petitioner over-rides the principle enunciated by the Commissioner in *Romanowski v. Jersey City Board of Education*, 1966 *S.L.D.* 219, in which the Commissioner said at p. 221:
>
> > " '*** there is no statutory authority for a board of education to pay interest as damages.
> >
> > " 'It has been held that interest is payable as damages for the improper withholding of funds by a governmental agency only when provided for by statute. *Brophy v. Prudential Insurance Co. of America*, 271 *N.Y.* 644, 3 *N.E.* 2*d* 464 (*Ct. App.* 1936).' *Consolidated Police etc., Pension Fund Comm. v. Passaic*, 23 *N.J.* 645, 654 (1957) ***."

Petitioner's request for payment for interest, costs and legal fees is therefore denied.

Nor can there be found any precedent or statutory authority for awarding counsel fees as claimed by petitioner.

In *Bartlett, supra,* the Commissioner held as follows:

"*** The Commissioner has already treated this problem in *Romanowski, supra,* and in *David v. Cliffside Park Board of Education,* 1967 *S.L.D.* 192, in which the Commissioner said at pp. 194-195:

> " '*** With respect to petitioner's further claim for compensatory damages, the Commissioner has already construed the meaning of the word 'compensation' as used in *R.S.* 18:5-49.1 in the case of *Romanowski v. Jersey City Board of Education,* decided December 30, 1966, in which he said:
>
> " 'The use of the term 'compensation,' even in a broad sense, must be interpreted to mean 'earnings.'

"See also *Mastrobattista v. Essex County Park Commission, supra.* The Commissioner holds, therefore, that claims for the payment of interest, of fees and other expenses, or of damages other than lost earnings, is not within the contemplation and meaning of the statute. ***"

In summary, therefore, the Commissioner finds that:

a. Petitioner was a teacher in the employ of the Jersey City Board of Education.

b. Petitioner is entitled, pursuant to the statutes governing accumulated sick leave, *supra,* to compensation for those days on which he was absent because of illness and for which he was not paid.

c. There is no statutory authority for payment of interest, costs and legal fees.

d. Petitioner lacked tenure for failure to possess a teaching certificate awarded by the Jersey City District Board of Examiners.

The Commissioner directs, therefore, that the Jersey City Board of Education compensate petitioner, Jack Noorigian, according to the terms set forth herein.

COMMISSIONER OF EDUCATION

May 22, 1972

Pending before State Board of Education

Christine Compton,

Petitioner,

v.

Board of Education of the Township of Hanover, Morris County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Cassel R. Ruhlman, Jr., Esq.

For the Respondent, Scerbo, Glickman & Kobin, (Frank C. Scerbo, Esq., of Counsel)

Petitioner, a teacher employed by the Board of Education of Hanover Township, Morris County, hereinafter "Board," for a period of four consecutive academic years, avers that she has tenure as a teaching staff member, and that this tenure entitlement remains, although the specific positions or job categories in which she worked for the four-year period were abolished. The Board maintains that it had a legal basis for abolishing the positions or job categories, and that petitioner has no residual rights to employment in positions other than those in which she has already served.

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

1. Petitioner served as a guidance counselor or coordinator of special services in the schools of Hanover Township during the four-year period, July 1, 1967, through June 30, 1971. Specifically, her contracts and job categories were dated and noted as:

July 1, 1967 to June 30, 1968 – Guidance Counselor
July 1, 1968 to June 30, 1969 – Counselor
July 1, 1969 to June 30, 1970 – Counselor
July 1, 1970 to June 30, 1971 – Coordinator of Special Services

However, on April 24, 1969, the Secretary of the Board addressed the following letter to petitioner:

"The Board of Education, at its regular meeting on April 21, amended your contract for the current school year to show a change in title from Guidance Counselor to Coordinator of Special Services.

Your contract for the current year is further amended to provide that, effective May 15, 1969, your employment will be 4/5 as Coordinator of Special Services and 1/5 as Assistant Director of the Title VI Program."

Thus, it is clear that petitioner's actual service was two years as a guidance counselor, and two years in a position, which was one of an encompassing nature and entitled "Coordinator of Special Services."

2. During her service as an employee of the Board, petitioner possessed the following certificates:

   a. Permanent Elementary Teacher Certificate with a Kindergarten endorsement;

   b. Counselor Certificate;

   c. Elementary School Principal Certificate.

3. On the 19th day of April 1971, the Board, in regular meeting assembled, passed the following resolution to abolish the two positions petitioner had held during her four-year tenure:

"WHEREAS, the defeat of the 1971-72 budget and subsequent reduction of $85,000.00, and particularly the closing of three grades of the local parochial school whose 75-80 students will be absorbed in our schools, and the general and persistent increase in cost of education, makes it incumbent upon this Board of Education to effect certain economies; and

"WHEREAS, it is deemed necessary for economic reasons as above stated to abolish the following positions in the school system:

(a) General Elementary Supervisor
(b) Second Guidance Counselor
(c) Coordinator of Special Services

"NOW, THEREFORE, BE IT RESOLVED, that the positions of General Elementary Supervisor, Second Guidance Counselor and Coordinator of Special Services be and are hereby abolished effective as of June 30, 1971, and in consequence thereof, the contracts of employment of any and all persons presently holding the positions hereinabove abolished shall not be renewed at the end of their present term, June 30, 1971."

Petitioner maintains that her employment was that of a "teaching staff member," as defined in *N.J.S.A.* 18A:1-1, and that she has fulfilled all the requirements for tenure enunciated in the statute, *N.J.S.A.* 18A:28-5, which reads in part as follows:

"The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant

superintendents *** and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:

"(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

"(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

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

Thus, in petitioner's view, she could not be dismissed without written charges and a hearing pursuant to the tenure hearing law, *N.J.S.A.* 18A:6-10 *et seq.*, even though the particular positions in which she worked were abolished by action of the Board. Petitioner's contention is founded on the decision of the Commissioner in *Michael K. Keane v. Flemington - Raritan Regional Board of Education, Hunterdon County*, decided by the Commissioner of Education May 14, 1970. In that decision, the Commissioner held that petitioner's tenure was in the general category of "teaching staff member," and that he had an entitlement to serve as a teacher – in a position for which he was properly certificated – since his length of service met the requirement for tenure accrual, even if his service and certification had not established it specifically by job category.

In an application of *Keane*, *supra*, to the instant matter, petitioner contends that since the positions or job categories in which she had served were abolished she had an entitlement to:

1. be placed upon a preferred eligibility list for said positions;

2. a position for which she is properly certificated; i.e., as an elementary teacher, Kindergarten through Grade 8;

3. the salary that was denied her from July 1, 1971, to the present date.

The Board avers that the positions in which petitioner had served were legally abolished, and that there is no contention by petitioner in this regard. In the Board's view, petitioner's only entitlement is to be reemployed in either of the positions if and when such positions are reinstated.

The Commissioner believes that the *Keane* case, *supra*, is distinguished from the matter herein and is not analagous to it. In *Keane*, the principal issue was whether Keane had any tenure at all and, if he did, the category in which he held it. The Commissioner found that he did have tenure, but in the general category of "teaching staff member," since there was no tenure in the specific positions in which he had served – positions as assistant principal of an elementary school, for which there was no state authorized certificate, and as school principal wherein his period of service was less than that required for tenure accrual. In the instant matter, the Commissioner holds that:

1. petitioner has a tenure entitlement to the position of coordinator of special services since her more than two years of service in this position qualifies her for it under the terms of *N.J.S.A.* 18A:28-6;

2. petitioner has another tenure entitlement to a position as guidance counselor, since upon the completion of three calendar years, on June 30, 1970, the necessary service required of a teaching staff member had accrued to her original employment in guidance; (*N.J.S.A.* 18A:28-5, *supra*)

3. the Board legally abolished the two positions in which petitioner had successive tenure entitlements, pursuant to the permissive authority of the statute, *N.J.S.A.* 18A:28-9, and is now required to "determine" petitioner's seniority status and to notify her of it; (*N.J.S.A.* 18A:28-11)

4. petitioner has no additional entitlement, by virtue of certificate status, to perform duties as a teacher or as a principal, in the future, that she has not performed in the past.

These determinations are founded on a series of decisions of the Commissioner and the Courts in the years since 1951. *August Lascari v. Board of Education of the Borough of Lodi, Bergen County*, 1954 *S.L.D.* 93, affirmed State Board of Education February 4, 1955, affirmed *New Jersey Superior Court*, 1954 *S.L.D.* 89; *Charles Lautenschlager, et al. v. Board of Education of Jersey City, Hudson County*, 1961 *S.L.D.* 98; *Charles R. Lauten v. Board of Education of the City of Jersey City, Hudson County*, 1963 *S.L.D.* 119; and *William A. McDonald v. Board of Education of the City of Jersey City, Hudson County*, 1965 *S.L.D.* 119. Each of these decisions was concerned with the specific nature of tenure accrual and seniority rights, and together the decisions have established the parameters which have delineated the entitlements of tenure teachers in these respects. All of the decisions make reference to the sweeping nature of certain changes pertinent to the status of tenure and seniority, which were effectuated by amendments to the statute, *R.S.* 18:13-19, *supra*, [now *N.J.S.A.* 18A:28-9 *et seq.*] enacted by the *Laws* of 1951, *Chapter* 292, and amended by the *Laws* of 1952, *Chapter* 236. These laws in Title 18A, Education, were subsequently amended by *Chapter* 231 of the *Laws* of 1962. In their most recent promulgation, the statutes with pertinence to the matter *sub judice* are notated as follows:

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 administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article." (*Emphasis supplied.*)

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." (*Emphasis supplied.*)

18A:28-11 "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." (*Emphasis supplied.*)

18A:28-12 "If any teaching *staff member* shall be dismissed as a *result of such reduction*, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a *position for which such person shall be qualified* and he shall be re-employed by the body causing dismissal, if and when such vacancy occurs and in *determining seniority*, and in computing length of service for re-employment, full recognition shall be *given to previous years of service*, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service." (*Emphasis supplied.*)

18A:28-13 "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." (*Emphasis supplied.*)

It is noted here that pursuant to the direction contained in *N.J.S.A.* 18A:28-13, *supra*, the Commissioner did "classify" the "fields or categories" of employment and did establish guidelines to determine seniority, and that these guidelines were adopted by the State Board of Education on August 18, 1969, as the "Standards Established to Determine Seniority." Pertinent excerpts are recited below:

"*** 2. Seniority pursuant to *R.S.* 18:13-19, shall be determined according to the number of academic or calendar years of employment, or fractions thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences or leaves of absence.

"3. Employment in the district prior to the adoption of these standards shall be counted in determining seniority.

* * *

"6. 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 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.

"7. Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment.***"

The statutes, *N.J.S.A.* 18A:28-9 *et seq.*, *supra*, while representing a refinement of *R.S.* 18:13-19, are essentially the same as those of the older title in their legal effect. They clearly define the rights of tenured employees when positions in which they hold tenure are abolished.

In *Charles Lautenschlager*, *supra*, at page 101, the Commissioner observed that prior to the enactment of *R.S.* 18:13-19, in 1951, there were only four categories of employment; namely, superintendents, assistant superintendents, principals, and teachers, and that all personnel "*** who administer, direct, or supervise the teaching, instruction, or educational guidance of pupils in the public schools ***" were in the category of "teacher," except for those whose positions were mentioned specifically in the tenure statute. The Commissioner then discussed the reasons for changes in the pertinent laws in 1951, with respect to "fields or categories of service," and this discussion is of great pertinence herein. Therefore, it is quoted below:

"It is well known that teaching has become specialized over the years as evidenced by the variety of certificates issued by the State Board of Examiners. Teachers may be eligible for certification in a number of fields without having had actual experience in each of them. For example, a teacher may have had the required training to be eligible for appointment to a supervisory position but never have held such a position. Prior to the establishment of seniority standards, as required by *Chapter* 292 of the *Laws* of 1951, such a teacher in a district which found it necessary to abolish positions, might have been able to displace an experienced supervisor with less total years of experience in the district because the latter, according to previous rulings, was only a teacher. This would obviously not be efficient and in the best interests of the school pupils. For this reason, the Commissioner was given the authority to establish fields and categories within the administrative, supervisory, teaching and other educational services and to determine seniority upon the basis of service and experience *within such fields or categories of service as well as in the school system as a whole.* Thus, to return to the hypothetical case mentioned above, a supervisor with fewer years of service than a teacher who had never been a supervisor, could not be displaced as a supervisor by such a teacher. He could only be displaced by another supervisor with more years of service within the category of "supervisor." By the same token, an art teacher could not displace a general teacher, or vice versa."

The Commissioner's determination, in the instant matter, that petitioner has residual tenure entitlement to two positions or categories of employment as a guidance counselor for a second position in guidance and as a "Coordinator of Special Services" – which positions were abolished legally by action of the Board, but no additional entitlement, is directly parallel to the findings in *Lautenschlager, supra.* Any finding to the contrary, the Commissioner holds, would be a reversion to the situation existing prior to 1951, and contrary to the intent of the statute, *R.S.* 18:13-19, which was enacted in that year, and to the intent of *N.J.S.A.* 18A:28-9, which is the applicable law today.

The Commissioner notes that petitioner interprets the phraseology of the statute, *N.J.S.A.* 18A:28-12, *supra*, to mean that any teacher, "qualified" by reason of certification and otherwise possessing the requisite years of service for tenure accrual, is entitled to be employed by the Board in such position, even though she has never served in a position requiring that certification for such service before. The Commissioner holds that such an interpretation of the word "qualified" is one that is restrictively narrow for the reason advanced in *Lautenschlager, supra.* The Commissioner believes the word should be interpreted broadly to encompass not only the fact of certification, but also the element of specific service directly relevant thereto.

Accordingly, for the reasons stated, *supra*, the Commissioner directs the Board to:

1. determine the seniority of persons affected by its abolition of the two positions of guidance counselor and coordinator of special

services. (*N.J.S.A.* 18A:28-11)

2. notify all persons so affected as to his or her seniority status for the positions.

In all other respects, the petition herein is dismissed.

ACTING COMMISSIONER OF EDUCATION

May 30, 1972

In the Matter of Richard M. Nash, G. Busse, F. Brunette, R. Drake, A. Lyon, R. Valentine, E. Warga, J. Kuhlman, H. Scherman, W. Humphries, E. Philipp, A. Busse, A. Magnolia, E. Hoagland, W. Likens, C. Linaberry, and D. Kuber,

Petitioners,

v.

Board of Education of the City of Rahway, Union County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Cole, Geaney & Yamner (John J. Fox, Esq., of Counsel)

For the Respondent, Magner, Abraham, Orlando, Kahn & Pisansky (Leo Kahn, Esq., of Counsel)

Seventeen school administrators and supervisors employed by the Board of Education of the City of Rahway, Union County, hereinafter "Board," demand judgment that during the school year 1966-67 they were, as individuals and also collectively, denied salary compensation that was rightfully due them. The Board denies the claim.

A hearing in this matter was conducted on March 6, 1972, at the office of the Union County Superintendent of Schools, Westfield, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Prior to the school year 1966-67, the board had no stated, written salary schedule or program for members of its administrative and supervisory staff. However, on March 16, 1966, the Board adopted the following "Salary Guide:" (P-1)

"RAHWAY BOARD OF EDUCATION
Rahway, N. J.

"ADMINISTRATOR'S SALARY GUIDE

"Adopted March 16, 1966

"1. This salary guide is not to be considered as a contract between the administrator or supervisor and the Board of Education.

"2. With the approval of the Board of Education, increases on this salary guide will be granted to individuals upon the recommendations of the Superintendent of Schools.

"3. This salary guide may be changed, amended, revised, or abrogated by the Board of Education at any time.

"4. Administrators and supervisors may apply to the Superintendent of Schools for merit status of up to $1200.00 extra service or salary, beyond their guide maximum. Board approval will be based upon the Superintendent's recommendation and description of the nature and extent of the professional contribution of his involvement to the educational program.

Position	Maximum	Starting Salary Minimum Range	Months
Supt.	21,050.	16,400. to 17,500.	12 (1 mo. vac.)
S.H.S. Prin.	15,500.	10,800. to 11,800.	12 (1 mo. vac.)
J.H.S. Prin.	14,215.	10,065. to 11,065.	11 (1 mo. & sch. cal.)
Sch. Bus. Mgr.	14,215.	10.065. to 11,065.	12 (1 mo. vac.)
Elem. Supv.	13,650.	9,500. to 10,500.	12 (2 mo. vac.)
Elem. Prin. & Psych.	12,650.	8,500. to 9,500.	10 (Sch. Cal.)
Dir. Stud. Pers. Serv.	14,450.	10,500. to 11,500.	12 (1 mo. vac.)
2nd Curr. Coord.	12,000.	9,500. to 10,500.	12 (2 mo. vac.)
Non-Tchg. V.P. & Subj. Supv.	11,150, with M.A. & Cert or 10,400.	8,500. to 9,500.	10 (Sch. Cal.)
Guid. Dir.	12,150.	8,500. to 9,500.	11 (Sch. Cal.) (1 wk. June) (1 wk. July) (1 wk. Aug.)

Teacher with Assignment:

as Master Teacher	$200 to $500
for Supervision	$300
for Administration	$200 to $400"

[*Some abbreviations ours.*]

Subsequent to the time of the adoption of this Guide, the Board sent copies of it to each of the seventeen petitioners who bring this action. Additionally, each petitioner received an individual memo containing his own salary for the 1966-67 school year. On an individual basis, sixteen of the administrators received increments of $700 each, and the Superintendent received an increment of $1,200.

It is noted here that in 1966, there was evidently a limitation, embedded in an oral agreement, that salary increments for all administrators – except the Superintendent – were to be limited to $700, and that raises for teachers were to be limited to $600 during school year 1966-67. Subsequent to that year, however, a teacher of the district petitioned the Commissioner, in the case of *Norman A. Ross v. Board of Education of the City of Rahway, Union County*, 1968 *S.L.D.* 26, to direct the Board to pay him for his service during the school year 1966-67, according to the stated, written progressions listed in a teachers' "Salary Guide," which was also adopted by the Board on March 16, 1966. This guide (P-2) need only be reproduced here in pertinent part for purposes of comparison and is so reproduced below:

Exper.	2 yrs.	3 yrs.	"Training Bachelor's	Bachelor's + 30 credits (State Guide)	Master's	Master's + 30 Credits (State Guide)
0	4800	5000	5400	5500	5700	5800
1	5000	5200	5650	5750	6000	6100
2	5200	5400	5900	6000	6300	6400"

After considering this petition of *Ross*, and after noting that the teachers' guide, *ante*, contained no written provision or limitation as to salary increments, the Commissioner found in favor of *Ross*. Specifically, he said at page 28 of that decision:

> "*** Nothing appears in the guide, or the policy statement included therein, which would limit the amount of increment or adjustment to which a teacher would be entitled in any one year. If respondent had wished to include such a limitation it could have done so.***"

Thereafter, the Commissioner found that the salary guide (herein introduced as P-2) was "contractual" in nature, and that the "traditional" practice of "limiting the amount of salary increase for any teacher in any one year was not a part of its adopted salary policy effective for the school year 1966-67." Accordingly, the Commissioner held that petitioner Ross was entitled to be compensated for his services at the level applicable for a teacher with his training and experience, even if such amount would go beyond the limitation imposed by the oral agreement.

Now, at this juncture, petitioners in the instant matter claim a right to equal treatment with Ross – a recognition of the entitlement they allege that each of them had in 1966-67 to be compensated at the one specific level the "Administrator's Salary Guide" contained – that which is stated in the column headed a Maximum." Their specific claims range from $100 to $3,450 and are individualized as follows:

"RAHWAY BOARD OF EDUCATION
Rahway, N. J.

"1966-67 School Year

"Name	Year in Position Beginning 7-1-66		Guide Entitlement	Actual Salary	Claim
Richard M. Nash	Superintendent	1	$21,050	$17,600	$3,450
G. Busse	Elem. Prin.	4	12,650	9,865	2,785
F. Brunette	Elem. Prin.	4	12,650	9,200	3,450
R. Drake	Elem. Prin.	10	13,650	12,975	675
A. Lyon	Elem. Prin.	2	12,650	10,750	1,900
R. Valentine	Jr. H. Prin.	6	14,215	12,615	1,600
E. Warga	Elem. Prin.	10	12,650	11,775	875
J. Kuhlman	Sr. H. V.P.	8	11,150	11,015	135
H. Scherman	Jr. H. V.P.	5	11,150	10,220	930
W. Humphries	Dir. S.P.S.	2	14,450	11,500	2,950
E. Philipp	Guid. Dir.	6	12,150	11,600	550
A. Busse	Secondary C.C.	2	12,000	10,900	1,100
A. Magnolia	Lang. Sup.	1	10,400	8,650	1,750
E. Hoagland	P. Ed. Sup.	6	11,150	10,800	350
W. Likens	Elem. V.P. (tchg. V.P.)	3	11,150	9,695	1,455
C. Linaberry	I. A. Sup.	4	10,400	10,300	100
D. Kuber	Soc. St. Sup.	1	10,400	8,400	2,000"

It is noted here by the hearing examiner that the column headed "Guide Entitlement" is the one which is alleged to be the appropriate one by petitioners, but that in the "Administrator's Salary Guide" (P-1), this column is headed "Maximum."

Thus, the issues are posed:

1. Are the facts pertinent to this petition parallel to those of *Ross*, *ante?*

2. If they are, are petitioners entitled to the compensation stated by them to be due for the 1966-67 school year?

The hearing examiner has not posed laches as an issue since, while raised by the Board as a defense in its Answer, the defense was not asserted at the hearing, *supra*, and was in fact dropped.

Finally, the hearing examiner notes that two petitioners herein were treated in a different manner than fellow administrators in the school year 1966-67. In the first instance, Mr. D. Kuber's salary was $8,400, while the guide listed a starting salary of $8,500 for that position. However, in this regard, petitioner Kuber also sought a remedy as a "teacher," in a petition brought

before the Commissioner in *Sousa et al. v. Board of Education of the City of Rahway*, decided by the Commissioner April 24, 1970, and received the remedy he sought.

In a second instance, Mr. W. Likens, a vice-principal in the school year 1966-67, was entitled to the maximum salary indicated in the "Starting Salary Minimum" range column in 1966-67, i.e. $9,500, and he was compensated instead a total of $9,695. No explanation for this discrepancy has been offered; however, it is of no material significance to the adjudication herein.

* * * *

The Commissioner has reviewed the report of the hearing examiner, and notes that petitioners' prayer for relief is founded on the contention that facts pertinent to their own situation in 1966-67 were essentially ones that were parallel to the facts pertinent to the Commissioner's decision in *Ross, supra.* It is true that, in both instances, there was an understanding, not committed to writing, that salary increments would be limited to a fixed dollar amount, i.e. $600, $700, and it is true that in both *Ross* and the instant matter, there were salary programs in force and effect in 1966-67.

However, the parallels came to an abrupt end at the point where a detailed analysis of the salary programs, outlined in the documents, P-1 for administrators and supervisors and P-2 for teachers, begins. This detailed scrutiny shows that the programs are not parallel in specific prescription or inferred intent, and that, in fact, the program P-1 contains only two salary levels, which would be adjudged in any manner as representing commitments of a "contractual nature," which the Commissioner held in *Ross* must be honored. These two salary levels are:

1. those payable, within a discretionary range, for persons assuming administrative or supervisory duties for the first time, and

2. those applicable, after years of service within the district, at the point of maximum entitlement.

Since there is no evidence that any of petitioners, as administrators and supervisors, were ever denied the salaries stated by the guide to be applicable to those levels, the Commissioner holds that there is no entitlement to additional compensation. It is clear that there are no other stated agreements, as there were in *Ross,* to equate salary in terms of preparation and or experience on a year-to-year basis, but that, instead, the Board reserved to its own discretion, the salaries it would pay its administrators and supervisors in all years between the first year and the time of maximum entitlement. The mere fact of the absence of a salary guide for other "middle years" cannot reasonably lead to the conclusion that the guide P-1 is a two-year guide and that administrators should progress from the guide for beginners to the guide for experienced personnel in school administration in one year's time. In all fairness, such a conclusion would be

patently ridiculous on its face, and would substitute a two-year "guide" for what is clearly a long term "program."

For the reasons stated, *supra*, the Commissioner finds the petition herein to be without merit. Accordingly, it is hereby dismissed.

ACTING COMMISSIONER OF EDUCATION

May 30, 1972

In the Matter of the Application of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, Middlesex County.

COMMISSIONER OF EDUCATION

Decision on Remand

For the Petitioner, Karl R. Meyertons, Esq.

For the Respondent, Abraham J. Zager, Esq.

On January 14, 1969, the South River Board of Education adopted a resolution requesting the Commissioner of Education to terminate the sending-receiving relationship between it and the Board of Education of the Borough of Spotswood. Subsequent to the passage of that resolution, the matter was moved to a formal hearing, on the merits of the request, which was held on October 13 and 14, 1970, before a hearing examiner appointed by the Commissioner. Thereafter, on December 14, 1970, the Commissioner promulgated a decision, which directed that the sending-receiving relationship between the two districts "be terminated in whole or in part as of September 1, 1974."

An appeal from that decision by the Spotswood Board caused the State Board of Education, on September 8, 1971, to "remand the matter to the Commissioner for further consideration and action." The specific reason for the remand for "consideration" was that on June 25, 1971, the New Jersey Supreme Court had decided the case of *Beatrice M. Jenkins et al. v. the Township of Morris School District and Board of Education, and the Town of Morristown School District and Board of Education, et al.*, 58 *N.J.* 483 (*Sup. Ct.* 1971). This decision dealt at length with the powers of the Commissioner and caused the State Board to believe that "*** The Commissioner's determination (in the instant matter) might well have been otherwise had *Jenkins* predated his opinion."

Subsequent to receipt of the remand from the State Board of Education, the following letter was addressed to the parties herein from Dr. William A. Shine, then Assistant Commissioner of Education, Division of Controversies and Disputes:

> "A copy of the decision of the State Board of Education in response to the appeal in the above-entitled matter is enclosed, together with a copy of the decision of the New Jersey Supreme Court in the case entitled *Beatrice M. Jenkins, et al. v. The Township of Morris School District and Board of Education*, which is pertinent to the further consideration ordered by the State Board in the matter before us. At this juncture, we are requesting briefs of respondent and petitioner detailing each of your respective viewpoints on the application of *Jenkins*, if any, to the instant matter. Oral argument will be scheduled if requested.
>
> "If there are questions concerning this remand please state them in writing."

No questions were stated, but on November 2, 1971, the South River Board filed a memorandum in support of the Commissioner's determination, and advanced the view that the decision of the Court in *Jenkins, supra,* was not applicable to the instant matter.

Spotswood did not file a memorandum immediately thereafter. Consequently, in an effort to expedite the matter, and to make a decision on the remand possible, an oral argument was scheduled, and heard, on February 2, 1972, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. At that time a brief was filed by the Spotswood Board. The report of the hearing examiner is as follows:

The hearing examiner observes that the remand of the State Board of Education in the instant matter is not one that requires further hearings to determine additional facts or data, but one that mandates "further consideration and action." This requirement of the State Board of Education and the reference prior thereto to *Jenkins, supra,* carries the clear implication, in the judgment of the hearing examiner, that the word "consideration" must imply comparison – a comparison between the facts elicited in the instant matter and those present in *Jenkins.* From such a comparison of facts, the Commissioner may formulate the kind of subjective judgment that must be made – a judgment that the sending-receiving relationship in existence between South River and Spotswood should be terminated for the reasons announced by the Commissioner in his decision of December 14, 1970, or that the relationship must continue in some form because there are important facts and conditions herein, which are essentially the same as those found to be so compelling by the Court in *Jenkins.* In other words, the relationship between South River and Spotswood must now be considered in the context of *Jenkins.* For this reason, it seems apparent that *Jenkins* must first be analyzed to determine which of the broad principles it enunciated have application herein.

Of first importance, in this regard, the hearing examiner opines that *Jenkins, supra*, mandates an action by the Commissioner to set aside the statutes pertinent to the severance of sending-receiving relationships – "*** for good and sufficient reason made to and approved by the Commissioner ***" (*N.J.S.A.* 18A:38-13) – whenever an affirmative answer to a petition to sever such a relationship would result in racial imbalance. The Court, in reversing the decision of the Commissioner in *Jenkins*, founded its reversal on the principal conclusion that if the two districts of Morristown and Morris Township were allowed to sever their relationship as sending-receiving districts, there would be "*** another urban - suburban split between black and white students." (*Jenkins, supra*, at p. 505) The Court found that this split could be readily avoided through merger of the two districts, and that such merger could be ordered by the Commissioner "*** if he finds such course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools." (*Jenkins, supra*, at p. 508)

In the context of this factual situation in *Jenkins* – a situation wherein it was evident that a severance of the existing sending-receiving relationship would result in an urban-suburban split between black and white students – the facts in the instant matter may be examined. These facts are as follows, as reported in the booklet entitled "Selected Population and Housing Statistics for Middlesex County" developed by the Middlesex Planning Board, and based on the 1970 decenial census conducted by the United States Bureau of the Census:

South River Borough	15,428	14,913	515 (3.3%)
Spotswood Borough	7,891	7,855	36 (.004%)

Thus, it is evident that a severance of the existing relationship for school purposes between the two districts, whose school populations are closely parallel to the general population in racial composition as reported, *ante*, will not materially alter the existing racial balance between the districts. Practically, it is clear that the racial composition of the districts would not change at all, and there are no contentions to the contrary in this regard by Spotswood or South River.

In summary of this primary factual item, for "consideration," the petition herein bears no similarity to *Jenkins* since racial disparity of significance will not result, if severance of the relationship between the districts is granted.

Therefore, the hearing examiner finds no reason to examine other subsidiary facets of the *Jenkins* decision. Such an examination for similarities is not triggered by the recital, *ante*.

* * * *

The Commissioner has reviewed the report of the hearing examiner and has considered the facts of the instant matter in the context of *Jenkins*. It is the Commissioner's determination that his original decision of December 14, 1970, must stand since the facts, which were a component part of that decision, are

not in basic dispute, and since there is no compelling and overriding constitutional reason to bar implementation herein as there was in *Jenkins*.

Since this is so, the statutes, which govern the termination of sending-receiving relationships, control the situation *sub judice*, and the South River Board of Education is free to provide suitable educational facilities and appropriate programs of education for its own students, but is under no obligation, in view of the circumstances, to provide such facilities and programs for students of other districts as well on a permanent basis.

The Commissioner observes that the New Jersey Supreme Court's decision in *Jenkins* was one that enunciated a clear constitutional principle and related it to a precise factual and unique situation. The clash between the principle and the situation mandated the resultant decision by the Court that the statutes, which control relationships between districts, are not absolute if, as a result of the statutes' prescription, a constitutional right is abridged. However, the Commissioner believes that the Court's decision, that statutes pertinent to the severance of school district sending-receiving should be set aside in *Jenkins*, was not meant to "***permanently abridge***" existing law. To the contrary, the Court said, at page 500:

> "***It seems clear to us that, similarly, governmental subdivision of the state may readily be bridged when necessary to vindicate state constitutional rights and policies. This does *not entail any general departure from the historic home rule principles* and practices in our State in the field of education.***" (*Emphasis supplied.*)

The "home rule principles" applicable to the instant matter are that South River is, or ought to be, free, if it chooses to be so, to present "*** good and sufficient reason***" (*N.J.S.A.* 18A:38-13) why it should be allowed to terminate a relationship whereby it receives students from a sending district. Having already found such "good and sufficient reason," and having enunciated it on December 14, 1970, and having failed to find a constitutional reason herein why that determination should be altered, the Commissioner reaffirms it at this time and repeats his directive that the sending-receiving relationship between the South River and Spotswood School Districts be terminated in whole or in part as of September 1, 1974.

COMMISSIONER OF EDUCATION

June 1, 1972

In the Matter of the Application of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, Middlesex County.

Decided by the Commissioner of Education, December 14, 1970.

Remanded by the State Board of Education, September 8, 1971.

Decision on Remand by the Commissioner of Education, June 1, 1972.

STATE BOARD OF EDUCATION

Decision

For Appellant-Respondent, Abraham J. Zager, Esq.

For Respondent-Petitioner, Karl R. Meyertons, Esq.

The Decision of the Commissioner of Education is affirmed for the reasons expressed thereing.

November 1, 1972

Mary Staton, on behalf of her minor child, "L.S.", Pauline Johnson, on behalf of her minor child, "G.J." and Mary Staton, on behalf of her minor child, "C.P.",

Petitioners,

v.

Dr. Donald Beineman, Superintendent of Schools and Board of Education of the City of Woodbury, Gloucester County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Camden Regional Legal Services, Inc. (Charles Elsesser, Esq., of Counsel)

For the Respondents, White & Simpson (John L. White, Esq., of Counsel)

On December 9, 1971, a student fracas with racial overtones erupted at the Woodbury High School, Gloucester County. Thereafter, on January 10, 1972, the Woodbury Board of Education hereinafter "Board," conducted a hearing to determine the truth of the charges made against G.J., a student at the school, in connection with his involvement in it. Separate hearings were also scheduled for other students allegedly involved.

Specifically, it was alleged that during the course of the fracas, G.J. had "threatened" to strike a teacher, and that in fact he did "strike him with a wide belt and that he then pushed the teacher over a row of seats" against which the teacher was backed. (Tr. 5)

At the conclusion of the hearing, at which G.J. was represented by counsel, the Board voted to suspend him from further school attendance for the remainder of the 1971-72 school year, but ruled that he could return for the summer session of 1972. Subsequent to the Board's decision, a Motion for relief *pendente lite* was filed with the Commissioner on behalf of G.J. and other students similarly charged with disorderly conduct. An argument on the Motion was heard on January 21, 1972, by a hearing examiner appointed by the Commissioner.

Subsequent thereto, the Commissioner, in a decision promulgated on February 29, 1972, denied the Motion as it pertained to G.J., but agreed to review a transcript of the hearing subsequent to its receipt from the Board. In the same decision, the Commissioner remanded other proffered charges involving other students to the Board for hearing.

The transcript was furnished by the Board at a later date and has been reviewed. This review provides substantive reasons in support of a finding that the allegations against G.J. reported in summary form, *supra*, were true in fact. In the testimony of the teacher, Mr. Edwin Ward, before the Board, (Tr. 8) there is this recital:

> "Q. Will you give – relate to us what you know about this hearing, or case, before tonight.
>
> "A. On December 9 *** in the auditorium *** a fight broke out. At that time I saw [G.J.] standing about five yards from where the actual fight took place. He had a belt wrapped around his hand with a buckle on it and he was swinging it at a student who had been knocked down. I approached [G.J.] from the rear and I put my hands on his shoulders to restrain him from swinging the belt, at which time he swung the belt and hit me on the head with it, and at that same time I was assaulted from the rear by a number of students which caused me to leave (sic) go of [G.J.]. [G.J.] turned and swung and I regained my balance and everyone seemed to regain their balance and [G.J.] pushed me over the back row of seats in the auditorium and exited by the rear doors."

This testimony was essentially corroborated by another teacher, who was also present in the auditorium and who testified that he had seen G.J. "*** swinging a belt **" and that he saw the belt "*** come around to the side of Mr. Ward's head***." (Tr. 20) This teacher also testified that he saw "*** [G.J.] push Mr. Ward over the chairs***." (Tr. 20,21)

G.J. denied that he even had a belt in his hand (Tr. 60), and maintained that at all times during the fracas he wore a belt around his waist. (Tr. 68) One other witness, who testified in G.J.'s behalf, stated that he had not seen G.J. with a belt (Tr. 50), but another of G.J.'s witnesses apparently contradicted this testimony when he said, at Tr. 35-36:

"Q. Could you see whether he was holding a belt?

"A. Yes, he did have a belt at the time."

A review of this testimony, and the total transcript provided by the Board, provides strong evidence, in the Commissioner's judgment, that the allegations against G.J., reported in summary form, *ante*, were true in fact, that he did strike a teacher with a wide belt, and that he then pushed the teacher backwards over a row of seats. The question that remains is whether or not this finding warrants the penalty which was determined and imposed by the Board.

The Commissioner holds unequivocally that it does, that no board can tolerate violent physical attacks or actions against teachers, (See *Hymanson v. Saddle Brook Board of Education, Bergen County*, 1967 *S.L.D.* 23.), and that this Board tempered its determination that petitioner should be temporarily expelled from school by the parallel permission which it gave for him to return for the summer session of 1972.

Finally, it must be noted here that G.J. knew what the charges against him were prior to the hearing, that he was afforded an opportunity to cross-examine those who testified against him, and that he was permitted to choose witnesses who would testify in his behalf. All of the members of the Board were present for the hearing, and a majority voted for the penalty which was finally assessed.

It is clear to the Commissioner that this recital is one that attests to the fact that proper procedural due process was afforded.

Accordingly, having found that the Board had substantive reason for its finding of fact and that the punishment it imposed was improper and commensurate with the finding, and having found no procedural defects, the Commissioner will not interpose his own judgment for one that the Board was qualified to make in this instance.

The petition of G.J. is dismissed.

ACTING COMMISSIONER OF EDUCATION

June 1, 1972

Robert Tucker, a minor by his guardians ad litem, George Tucker and Ruth Tucker,

Petitioners,

v.

Richard K. Eng, Principal of Dwight Morrow High School, Englewood, New Jersey, Peter J. Dugan, Superintendent of Schools of Englewood, and the Board of Education of the City of Englewood, Bergen County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Cifelli & Behr (Omri M. Behr, Esq., of Counsel)

For the Respondents, Sidney Dincin, Esq.

Petitioner, a student registered at the Dwight Morrow High School, Englewood, moves that his suspension from school be set aside *pendente lite* until such time as the City of Englewood Board of Education, hereinafter "Board," has afforded him a full and proper hearing on charges brought against him by other students. He avers that such action is required because he was not afforded a preliminary hearing, and has not been supplied with a list of witnesses who will appear against him. The Board maintains that petitioner was afforded proper due process and opposes the Motion.

A hearing on the Motion for relief *pendente lite* was conducted by a hearing examiner appointed by the Commissioner on April 27, 1972, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

Petitioner, together with three other students, was suspended from the privilege of school attendance on April 7, 1972, as the result of complaints subsequently characterized by school administrators as complaints alleging that an extortion had been committed against a fellow student. Prior to the suspension, petitioner had been asked by the school's disciplinary officer to present his version of the incident.

Thereafter, the Board met on April 10, 1972, to consider the allegations, and voted to continue the suspension until April 25, 1972, at which time a hearing was scheduled to be held before the Board. The hearing, which lasted for a period of approximately two hours, was held on that date. At this hearing petitioner, and the three other students, were confronted by their accusers, and petitioner, who was represented by counsel, was afforded the privilege of

cross-examination. No decision of the Board was immediately announced following the conclusion of the hearing of April 25.

However, on the following day, at the hearing on the Motion *sub judice* counsel for the Board announced that the Board had decided to:

1. continue the suspension of petitioner, and the other three students, through May 7, 1972, but restore him to full school attendance on May 8.

2. provide them home instruction in the interim.

From the facts reported, *supra*, the hearing examiner concludes that the primary and important elements of procedural due process were afforded to petitioner, and that thereafter the Board lawfully made the judgment it was empowered to make since *N.J.S.A.* 18A:37-5 provides:

> "No suspension of a pupil by a teacher or a principal shall be continued longer than the second regular meeting of the board of education of the district after such suspension unless the same is continued by action of the board, and *the power to reinstate, continue any suspension* reported to it or expel a pupil shall be vested in each board." (*Emphasis supplied.*)

There is one prayer of petitioner with timely pertinence, however, and this prayer raised at the end of the hearing on the Motion – that the recordings of this incident be expunged from petitioner's record at an early date – is presented to the Commissioner for determination.

Finally, the hearing examiner notes that there is no contention by petitioner herein that a small sum of money was not, in fact, passed from one student to another at the time when it is alleged this happened. The contention of petitioner was that the money was "borrowed" and not extorted as charged, but this contention was resolved below and was not the subject of proofs herein. The Board's judgment to the contrary and the subsequent discipline it imposed must, in the opinion of the hearing examiner, be accorded a presumption of correctness.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the views expressed therein. He notes that the sole item requiring determination in this matter concerns the record of the incident *sub judice* that should be retained by the school.

In this regard, however, the Commissioner was confronted with a similar prayer in the case of *Micah Bertin, et al. v. Charles A. Boyle, et al.*, 1968 *S.L.D.* 24, and he said, at page 26:

> "*** Petitioner Micah Bertin also asks that any records reflecting his suspension be expunged. The Commissioner finds no need for such an order. School records are a report of what has happened. Any record of the instant matter must, therefore, necessarily reflect the events ***."

Similarly, the "events" of the matter herein are a matter of record as is the discipline invoked by the Board and the home instruction which conditions the suspension it imposed. Therefore, the Commissioner will not direct that the record be expunged at this juncture. However, the Commissioner said in *E. E. v. Board of Education of the Township of Ocean, Monmouth County*, decided by the Commissioner March 9, 1971:

> "*** Petitioner's juvenile indiscretion should not follow him interminably, and future doubt or suspicion should not be cast on an otherwise unblemished school record because of his misconduct in this single isolated incident. *** Youth needs guidance, help and understanding as well as punishment ***."

Thereafter, the Commissioner directed that no notation be placed on petitioner's "permanent record" and "transcript" and that "only that record of his offense that is necessary may be kept temporarily during his school career."

In the instant matter, the Commissioner directs that the same relief be afforded.

In all other respects, the Motion is denied and the petition is dismissed.

ACTING COMMISSIONER OF EDUCATION

June 1, 1972

Board of Education of the Township of Hazlet,

Petitioner,

v.

Earl B. Garrison, County Superintendent of Schools, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Crowell, Crowell & Otten (Robert H. Otten, Esq., of Counsel)

The Board of Education of the Township of Hazlet, Monmouth County, hereinafter "Board," demands judgment that its proposed policy for the transportation of some of its students to school in certain circumstances is lawful even though such transportation is denied other students similarly situated. The petition is, in effect, an appeal from the decision of the Monmouth County Superintendent of Schools, hereinafter "County Superintendent," that the proposed policy, if adopted and implemented, must be applied equally to all. The matter is submitted for summary judgment on the pleadings.

The Board's policy *sub judice* is one that would transport some of its students to public or private schools, when buses, with otherwise empty seats, pass their homes, even though these homes are a "lesser distance" from the respective schools than the distance minimums otherwise established as a necessary prerequisite for transportation entitlement. The Board admits that such a policy provides that "not all of the students living an equal distance from the respective schools are provided with transportation to the schools," but it believes no detriment arises from this fact.

However, in order to clarify the circumstances under which the policy would be implemented and to avoid confusion, the Board requested a judgment from the County Superintendent concerning the policy's legality. The County Superintendent's reply, in a letter dated November 10, 1970, was as follows:

> "Reference is made to our meeting of November 9 concerning the transportation of students to both public and private schools who live a lesser distance than that established by the Board of Education but are riding the bus to the extent that there are vacant seats.
>
> "It is the opinion of this office that to provide transportation for any student who lives a lesser distance than that established by the Board of Education mandates that the Board of Education must either provide transportation for all students living the same distance from their school or

must adhere to its original policy and exclude students who reside less than two miles from their school and who are now riding the bus.

"I would appreciate your notifying this office concerning the Board's decision."

It is noted here that the "Board's decision" in the matter was to bring the instant petition.

The issue involved herein is a simple one, i.e., whether or not the proposed policy is discriminatory and a denial of those basic rights to equal protection under the law, which must be afforded to everyone. The Commissioner holds that it is, that such a blanket, encompassing policy, dependent only on bus seats that are available, or otherwise "empty," favors certain students at the expense of others in "entirely the same circumstances," and that such favoritism is proscribed. *Howard Schrenk et al. v. Board of Education of the Village of Ridgewood, Bergen County*, 1960-61 *S.L.D.* 185 In *Schrenk, supra*, the Commissioner was concerned primarily with definitions of the term "remoteness" and "convenience of access" in a determination of eligibility requirements which may or must be established for transportation eligibility. However, at pages 187 and 188, there ensued a discussion of when, and under what circumstances, children who were similarly situated, in the context of a distance requirement from school which established a transportation entitlement, could be treated differently. The Commissioner said:

"*** In order to establish discrimination, there must be a showing that one group in entirely the same circumstances as another is given *favored treatment.*

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

In the instant matter, there is no contention that the Board evaluated "conditions in various areas," and it is clear that the policy *sub judice* is not based on "differences in the degree of traffic." To the contrary, there is no criteria at all based on a justifiable need that a given group of students may have, as opposed to another group that has no demonstrated real need at all except convenience. Instead, a policy exists which would confer its benefits by fortuitous circumstances alone on one group at the dollar expense of all residents of the community, and in a discriminatory manner with respect to

other children, who, in the circumstances, have just as valid a claim to the same transportation entitlement.

The "dollar expense" referred to, *supra*, results from the fact that State Aid payable as reimbursement for transportation costs is reduced whenever students assigned to ride school buses live at distances less than "remote" from their school of attendance. The definition of "remote" applicable to this determination is one promulgated by resolution of the State Board of Education on December 6, 1967. This resolution states *inter alia* that:

> "***A. The words 'remote from the schoolhouse' should mean 2½ miles or more for high school pupils and 2 miles or more for elementary pupils ***."

Accordingly, the Commissioner directs that the Board refrain from the implementation of its transportation policy herein controverted, in conformity with the opinion of the County Superintendent of Schools, for the reasons stated, *ante*.

COMMISSIONER OF EDUCATION

June 7, 1972

Mr. and Mrs. Frank Clifford,

Petitioners,

v.

Board of Education of the North Warren Regional School District, Warren County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, James A. Tirrell, Esq.

For the Respondent, Archie Roth, Esq.

Petitioners reside in the Township of Knowlton, Warren County, a constituent district of the North Warren Regional High School District. Because of residence, therefore, petitioners' son is entitled to attend the North Warren Regional High School. Petitioners have elected, however, to voluntarily continue their son's enrollment in the Vocational Agricultural Education course in Belvidere High School, Warren County, for the reason that the agricultural course is not offered by North Warren Regional High School. Petitioners now

appeal from the North Warren Regional Board's refusal to reimburse them for the costs of tuition and transportation resulting from the continued enrollment of their son in Belvidere High School.

The matter is submitted for adjudication by the Commissioner on an agreed statement of facts of counsel as follows:

"Petitioners Frank Clifford and Susie Clifford are the parents of Leonard Clifford and throughout the period of time hereinafter mentioned have been farming residents of the Township of Knowlton, County of Warren and State of New Jersey. Knowlton Township, together with three other municipalities, became a constituent district of the respondent, North Warren Regional Board of Education, by a majority vote of the electorate in October 1968, prior to which Knowlton Township was a sending district of Belvidere High School.

"During the 1969-70 school year petitioners' son, Leonard Clifford, was enrolled as a 9th grade student at Belvidere High School as a student in the Vocational Agricultural Educational Course. Upon commencement of the 1970-71 school term, Knowlton Township pupils, of high school age, were transferred from Belvidere High School to the newly constructed facilities of respondent.

"Leonard Clifford had satisfactorily completed his initial year of training in the Vocational Agricultural Educational course, had a definite aptitude therefor and was desirous of completing the four years course of study in this particular course to the end that he might be better equipped to pursue an agricultural major in college, which he contemplated, since respondent admittedly did not, nor does it presently, offer such a course of instruction at its Regional High School. By virtue of the foregoing, petitioners on July 31, 1970, wrote to respondent requesting that it effect payment of the tuition and provide transportation for their son to Belvidere High School to avail him the opportunity to complete the aforesaid Vocational Agricultural course through twelfth grade. Petitioners' farm upon which they reside in Knowlton Township and where Leonard has engaged in agricultural pursuits since early boyhood, is located several miles from Belvidere High School. On August 20, 1970, the respondent wrote to petitioners advising them that their aforesaid request had been denied, alleging that its school program would 'adequately provide for the instructional needs' of Leonard. Respondent has since its inception, at the expense of the Regional School District, sent students to the Warren County Vocational & Technical High School at Broadway, New Jersey to take vocational and technical courses other than agricultural.

"A list of the courses offered to Leonard in the Vocational Agricultural Program at Belvidere High School is annexed hereto, marked 'Exhibit A' and made a part hereof. In addition, Leonard engages in numerous Future Farmers of America extra curricular activities and has attended its State

and National conventions. Leonard is a better than average student, as attested from the letter of Frank C. Dragotta, Principal of Belvidere High School, annexed hereto, marked 'Exhibit B' and made a part hereof, and in addition thereto, Mr. Dragotta's letter of January 3, 1972, notifying petitioners that their son Leonard had been recently elected and was about to be inducted into the National Honor Society, a copy of which is annexed hereto as 'Exhibit C' and made a part hereof.

"Petitioners have, notwithstanding respondent's refusal to pay tuition or provide transportation for Leonard, continued to have him matriculate at Belvidere High School and have paid the tuition fee to Belvidere for the school year 1970-71 in the sume of $1,050.00 and have received a bill for tuition owing for the first half of the current school year in the amount of $575.00. Accordingly, petitioners have, by virtue of respondent's denial to provide same, made application to the Commissioner of Education of the State of New Jersey for the entry of a decision requiring respondent to reimburse petitioners for tuition fees heretofore paid by them to Belvidere High School for their son Leonard and to effect payment of such tuition and provide the transportation necessary for Leonard Clifford to complete his course of instruction, through 12th grade, in the Vocational Educational Program at Belvidere High School.

"Respondent contends the admissions catalog of Rutgers University does not require a high school agricultural program as a prerequisite to entrance into its agricultural course.

"The parties hereto, through their respective counsel, do hereby consent to submit the foregoing Agreed Statement of Facts to the Commissioner of Education upon which the Commissioner may rely in effecting resolution of the issue in controversy in the above captioned matter."

The "Agreed Statement of Facts," *supra*, sets forth the basis for the only determination to be made herein by the Commissioner; i.e. Is the North Warren Regional Board of Education required by statute to send petitioners' son to a high school of his choosing and to pay the tuition therefor?

Only an interpretation of *N.J.S.A.* 18A:38-15, which reads as follows, is required for resolution of the issue in dispute:

"Any board of education not furnishing instruction in a particular high school course of study, which any pupil resident in the district and who has completed the elementary course of study provided therein may desire to pursue, *may in its discretion, pay the tuition of such pupil for instruction in such course of study in a high school of another district.*" (*Emphasis ours.*)

The Commissioner dealt with a similar problem in *Lichtenberger v. The Board of Education of the Borough of Maywood, Bergen County*, 1966 *S.L.D.* 187, affirmed State Board of Education October 10, 1970, wherein petitioners'

parent appealed for the right to send her daughter to Hackensack High School for a special course offering. A pertinent portion of that decision reads as follows:

> "*** Petitioner contends that *R.S.* 18:14-6 [now *N.J.S.A.* 18A:38-15] establishes her daughter's right to go to another high school at public expense when the one to which she is assigned does not offer studies which she desires to pursue. The Commissioner does not construe this statute so broadly. He notes that it was enacted in 1903 as part of the whole body of school law which established the existing public school system. At that time most school systems did not maintain secondary schools and this statute authorized such districts to continue the education of pupils who had finished the elementary grades in a high school outside the district. Furthermore, even districts which operated high schools did not always maintain a comprehensive curriculum. Preparation for college was common but pre-vocational curriculums were often lacking. In order that pupils might not be restricted to a narrow choice of curriculum unsuited to their educational objectives, the Legislature authorized boards of education, even those operating high schools, to send individual pupils outside of the district to schools where their broad educational interests would be better served. Such interests have been construed to be furthered by full curriculums or broad courses of study. *The presence or absence of a single subject matter area has never been considered to be of sufficient importance to a pupil's educational welfare to require a change of school, and in the judgment of the Commissioner the statute cannot be construed to so hold.****" (*Emphasis supplied.*)

Such is the instant matter under adjudication before the Commissioner.

Petitioners argue that their son was properly enrolled in Belvidere High School prior to the formation of the North Warren Regional High School District, and that he is, therefore, eligible to continue his education in Belvidere High School and have the tuition and transportation paid for by the North Warren Regional Board.

The North Warren Regional Board is obligated under the provisions of *N.J.S.A.* 18A:38-1 to provide an education "free to *** persons over five and under 20 ***." Once it discharges its responsibility, however, pursuant to *N.J.S.A.* 18A:38-1, *supra*, it has no further educational responsibility to the students of the district. Parents and pupils may not select schools of their choice and demand payment of tuition from the Board.

Although petitioners' son has had a very successful experience in Belvidere High School, and petitioners have determined that he should remain there, no statutory provision requires that the burden of tuition payments to Belvidere High School be assumed by the North Warren Regional Board of Education.

N.J.S.A. 18A:38-15 provides the authority for boards of education to send students to schools outside their districts *in their discretion.*

The North Warren Regional Board has provided a proper educational facility and program for its students, and it is petitioners' decision not to take advantage of the Board's program.

Having determined, therefore, that petitioners have elected voluntarily to have their son remain in Belvidere High School for the special course of study he wishes to pursue, their claim for payment of tuition and transportation by the North Warren Regional Board of Education is groundless.

The petition is, therefore, dismissed.

COMMISSIONER OF EDUCATION

June 8, 1972

In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Henry Bender, Esq.

For the Respondent, Hyland, David & Reberkenny (Richard C. Schramm, Esq., of Counsel)

Respondent is a teacher, who has acquired a tenure status under the provisions of *N.J.S.A.* 18A:28-5 in the Black Horse Pike Regional School District, Camden County. The complainant Board of Education, hereinafter "Board," received six written charges of conduct unbecoming a teacher against respondent, which were made by a member of the Board. The Board determined that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary, and thereupon certified said charges to the Commissioner of Education on June 21, 1971, by a majority vote of the full membership of the Board.

Testimony and documentary evidence were educed at a hearing conducted on October 26 and 27, 1971, and November 22 and 23, 1971, at the office of the Camden County Superintendent of Schools, Pennsauken, by a hearing examiner appointed by the Commissioner. Following the conclusion of the hearing, Briefs were filed by both parties. The report of the hearing examiner is as follows:

The charges will be considered first *seriatim* and then as a whole.

CHARGE NO. 1

"During the latter part of March and early April, 1970, Mr. Sammons approached several candidates for employment as teachers in this district and attempted by false and malicious statements to discourage these candidates from accepting employment. These approaches took place at Triton High School in and around the office of the principal, where the employment interviews took place. Mr. Sammons was, at the time of these incidents, the chairman of the teachers' organization in this district. As such, he did have a limited right to present factually the status of negotiations between the Board and the teacher candidates. The presentations made by him to these candidates, however, far exceeded his rights. These conversations included flat directives not to accept employment and were characterized by malicious personal comments concerning the administration and the Board."

Respondent was called as the first employee witness by the Board. He testified that he did speak to several candidates for teaching positions in the general office of the principal of Triton High School and in the hallway adjacent to this office. (Tr. I-49-51) This witness stated that these were chance encounters, which occurred when he saw an unfamiliar person in the hallway and asked the individual his purpose in being there. (Tr. I-52) He admitted speaking to candidates both within the general office and in the hallway. (Tr. I-53) On one specific occasion, the testimony shows, he spoke to a candidate in the general office whom he recognized as a former student. (Tr. I-53) Respondent also asked candidates whether they were aware of the circumstances of the collective negotiations between the teachers and the Board. He stated that the general response he received from the candidates was "No." He also testified that he asked candidates whether the principal had explained the current posture of negotiations. The candidates generally replied that the principal had informed them that negotiations were still in process for the school year 1970-71. Respondent said that he usually spoke to the candidates after they had been interviewed by the principal. (Tr. I-53, 54) According to respondent, he had informally discussed his intention to approach candidates with other officers of the teachers' association in early March 1970. (Tr. I-58) It was stated by respondent that after he received a memorandum from the principal requesting him to stop this practice of speaking to teaching candidates, he agreed to stop. (Tr. I-60) The testimony shows that he believed that the teachers' association should know what teaching candidates were being told regarding the status of negotiations for 1970-71. (Tr. I-61) Respondent testified that he did not describe or characterize the negotiations between the teachers' association and the Board to any of the candidates for teaching positions. (Tr. I-118, 119)

One teacher, other than respondent, was called as a witness by the Board in regard to this charge. This teacher, who had been a former student at Triton High School, was approached by respondent in the general office as he was leaving the office of the principal of Triton High School following an interview for a teaching position at Highland High School. (Tr. I-155) This teacher testified that respondent asked him if he was a candidate for a teaching position,

and identified himself as the president of the teachers' association. (Tr. I-157) This witness could not recall anything, he said, about the conversation with respondent other than the fact that respondent told him the teachers were working without a contract. (Tr. I-157, 158)

Neither of these two witnesses was cross-examined on this testimony by counsel for respondent. In the pleadings, respondent admits talking to candidates in his capacity as president of the teachers' association on the grounds that he had a right to present the status of negotiations between the teachers and the Board. Respondent admits attempting to acquaint the candidates with the current status of negotiations, but denies attempting to discourage the candidates from accepting employment by false and malicious statements. The remainder of the specifics of this charge are denied by respondent in the pleadings.

CHARGE NO. 2

> "On or about April 16th, 1970, Mr. Sammons sought out the chairman of the Middle States Evaluation Team and attempted to influence the evaluation then being conducted of Highland High School unfavorably. Mr. Sammons advised the chairman that this 'is not a good place to work'. His conduct as a professional teaching staff member in attempting to adversely affect the evaluation of Highland High School cannot be excused. Even more unconscionable was the malicious and personal attack upon the Board and administration on which these attempts were based."

Respondent was called as a witness by the Board to testify regarding this charge. Respondent's version of this incident is that in April 1970, he went from Triton High School to Highland High School during his lunch hour for the purpose of serving a charge of unfair labor practice on the Secretary of the Board of Education. According to respondent, he met another teacher in the foyer of Highland High School and while they were engaged in conversation, the chairman of the Middle States Association of Secondary Schools and Colleges Evaluation Committee approached them. This witness testified that the other teacher introduced him to the chairman of the Evaluation Committee as a teacher from Triton High School and the president of the teachers' association. The chairman asked respondent why he was at Highland High School, and respondent replied that he was serving a charge of unfair labor practice upon the Board Secretary. Also, respondent testified that he informed the chairman that negotiations were currently in progress and had been since the preceding November. Respondent could not recall making a statement to the chairman that the school district is not a good place to work. (Tr. I-62-71)

The teacher, referred to by respondent as the person who introduced him to the chairman, testified that respondent entered the foyer of Triton High School while he and another individual were engaged in conversation with the chairman. This teacher stated that he greeted respondent, spoke briefly to him and then introduced him to the chairman. This teacher then left to go to his

next class, but he did hear respondent relate to the chairman that he was at Highland High School to serve papers on the Board of Education. (Tr. IV-56-60)

The principal of Highland High School testified that she observed respondent engaged in conversation with the chairman of the Evaluation Committee in the foyer of the school. (Tr. I-162-166)

The chairman testified that while he was in the foyer of Highland High School, he was approached by respondent, who identified himself as the president of the local teachers' association. According to the chairman, respondent stated that he was in the building to do something, which the chairman could not recall, and that he wanted to see the chairman at the same time. (Tr. II-3-5) The chairman stated that respondent voluntarily informed him about some of the difficulties he or the teachers' association was having with the Board of Education, and respondent wanted to know whether or not the chairman wanted to include this information in the report of the evaluation of Highland High School. (Tr. II-5-8) The chairman reported his conversation with respondent to both the principal and the Superintendent of Schools (Tr. II-8), and told them that this matter would not be included in the Committee's report because it appeared to be an internal matter, and the Committee saw no evidence of this interfering with the education of the pupils of the school. (Tr. II-9,22) Although the chairman could not recall the specifics of respondent's statements, he did recall the tone of his conversation being hostile to the Superintendent and the Board. (Tr. II-22,23,25,27,28) The chairman recalled the Superintendent's name being mentioned by respondent during this incident. (Tr. II-34)

The Superintendent of Schools testified that the chairman of the Evaluation Committee reported the incident of the conversation to him during the afternoon of April 10, 1970, the last day of the Middle States Evaluation. (Tr. II-46) According to the Superintendent, the chairman informed him that he had been approached by an individual, who introduced himself as president of the teachers' association and told the chairman that "this is not a good district to work for." The teacher indicated that he was serving unfair labor practice charges upon the Board, and he showed these papers to the chairman. The teacher berated the school district, the administration and the Board. The chairman told the Superintendent that he wanted to assure him that the incident would not influence the Middle States Evaluating Committee in its evaluation of the school. (Tr. II-125) The Superintendent received a memorandum from the principal of Highland High School under date of April 16, 1970, (Exhibit R-3) in regard to the Middle States Evaluation incident, which states, in pertinent part, the following:

> "*** On Friday, April 10, 1970 at noon, Mr. Sammons did enter the Highland building, did not report his presence to me or the general office staff, but did look up the chairman of the committee who reported that he berated the Black Horse Pike Regional School District Board of Education and administration. According to the committee chairman a dissertation was given on 'this is not a good place to work'.

"Since such action on the part of Mr. Sammons could have an adverse effect on the outcome of the Highland evaluation report, his actions in this matter are thought to be completely unethical.

"As Principal of Highland High School I request that this matter be carried through proper grievance procedure. I will be available to meet with you at your convenience to discuss the matter further."

The Superintendent discussed the principal's charge with the Board of Education. (Tr. II-64) In the judgment of the Superintendent, respondent's actions in regard to the Middle States Evaluation did not affect the outcome of the evaluation, and when taken into consideration, together with all other factors, did not warrant a recommendation by the Superintendent to terminate the employment of respondent. (Tr. II-72, 76, 79, 85, 94)

A teacher, who was a member of the negotiating committee during 1969-70, testified that teachers approached him during April 1970, and said the teachers' association should take some kind of action while the Highland High School was being evaluated by a committee from the Middle States Association of Colleges and Secondary Schools, but this recommendation was rejected. (Tr. III-7,22) This witness stated that he may have related to respondent these recommendations by teachers. (Tr. III-30)

CHARGE NO. 3

"On 45 separate occasions, commencing with the opening of the 1970-71 school year, Mr. Sammons failed and refused to follow proper sign-in procedures. The requirement that all personnel indicate on a sign-in sheet the time of arrival and departure has been a long-standing operating procedure of this district. Mr. Sammons well knew this fact and had previously experienced no difficulty in complying with the procedure. His refusal was continued after both verbal and written warnings and ceased only with the passage of a formal resolution by the Board of Education at a public meeting in November, 1970."

Respondent was the first witness called by the Board to testify regarding this charge. Respondent testified that he has been employed by the Board for a period of thirteen years, and that during this period of years, the practice within the school district regarding the sign-in procedure has been that both professional and non-professional employees sign in the time of their arrival and sign out the time of their departure each day. (Tr. I-72) He stated that during the period beginning approximately at the end of May 1970, and continuing until November 16, 1970, he signed in with his name or initials (Tr. I-72, 73), and that prior to this period, he had complied with the known practice. (Tr. I-72, 73) Respondent stated that there was a divergence between the policy and the practice. His pertinent testimony is as follows:

> "*** The policy of the Board of Education as we as teachers knew it was stated in our faculty handbooks. The years that we have signed in the time, I saw as being divergent and inconsistent with the stated policy of the Board as supplied to all teachers in the faculty handbook.***" (Tr. I-73, 74)

A compilation of the names of teachers, who did not follow the proper sign-in procedure between September 8, 1970, and November 16, 1970, was admitted into evidence. (Exhibit P-9) The dates of each violation are listed adjacent to the name of each teacher. This exhibit discloses that respondent failed to follow the proper procedure on forty-four separate days.

Respondent stated that he recalled receiving a memorandum addressed to him from the principal, which requested that he follow the proper sign-in procedure. (Tr. I-76) (Exhibit P-11) He also remembered, he said, that a bulletin from the principal to all teachers provided a similar reminder. (Tr. I-77) (Exhibit P-10) This witness stated additionally that he did not comply with either one of these directives from the principal. (Tr. I-77, 108, 109) The bulletin from the principal (Exhibit P-10) dated October 9, 1970, stated, *inter alia*, that: "*** All teachers are reminded to sign the time, in and out, personally each day.***" The memorandum under date of November 9, 1970, from the principal to respondent, reads as follows:

> "In the Principal's Bulletin of October 9, 1970, all staff was (sic) reminded of our present district procedures for signing in and out each day listing time of signing.
>
> "You have not been following this established procedure.
>
> "Beginning immediately, you are requested to sign in and out listing your arrival time and departure time each day."

The principal of Triton High School testified that during the first week of September 1970, he noticed from the payroll time sheets that a number of teachers were not following the procedure of signing in and out by indicating the time of arrival and departure. He stated that prior to October 9, 1970, respondent came to see him, and that they discussed the sign-in procedure. Respondent told the principal that the teachers had decided to take the course of action of omitting the time of arrival and departure. According to the principal, he and respondent discussed the fact that signing the time of arrival and departure was the established procedure, and respondent contended that the wording of the teachers' handbook did not require the notation of time of arrival and departure. Subsequent to this discussion with respondent, the principal included in his staff bulletin, dated October 9, 1970, (Exhibit P-10) the reminder to teachers, *supra*. On several days the principal asked teachers to sign in by recording the time of arrival, but most teachers did not comply, citing the reason that they were following the instructions of the teachers' association. (Tr. II-131-135) The principal sent on November 9, 1970, a copy of the individual

memorandum, *ante*, to each teacher, who had not signed in properly that morning. (Exhibit P-11)

The Superintendent of Schools testified that the sign-in procedure in the school district has been unchanged since the opening of the first school in 1957. (Tr. II-104) The teachers' handbook for Triton High School, used for the school years 1962-63 through 1970-71 inclusive, contains the following instruction on page 79 in regard to the sign-in procedure: "Teachers are to sign in on arrival to school and sign out when they leave for the day.***" (Exhibit R-4) The combined teachers' handbook for the 1971-72 school year includes the following statement on page 94 regarding this procedure: "Teachers are to sign in *time* on arrival to school and sign out *time* when they leave for the day.***" (Exhibit R-5) The Superintendent stated also that the principals of the two high schools decided to add this clarification to the handbook because of the problem which had arisen during the early part of the 1970-71 school year.

An examination of the sign-in sheets used by the teacher disclosed that the names of the teachers in each school are listed by the office staff, and spaces are provided for teachers to sign and note the time of arrival and departure each day. The Superintendent testified that similar forms had always been used and that all of these were available for inspection. (Tr. II-129)

At the regular meeting of the Board of Education held November 16, 1970, the Board adopted the following resolution in regard to the sign-in procedure:

> "*** WHEREAS, it has been a long standing operation procedure of the Black Horse Pike Regional High School District that all personnel, professional and non-professional, be required to indicate on a sign-in sheet the time of their arrival and departure; and
>
> "WHEREAS, the Black Horse Pike Education Association as part of its demand in the pending contract negotiations had sought the elimination of this practice for its membership; and
>
> "WHEREAS, the Board has refused this demand; and
>
> "WHEREAS, the report of the fact finder appointed by the Public Employment Relations Commission has recommended the continuance of the present sign-in practice of the Board; and
>
> "WHEREAS, it has been brought to the attention of the Board that the Association is attempting to induce its members to refuse to follow the existing policy.
>
> "NOW THEREFORE BE IT RESOLVED by the Board of Education of the Black Horse Pike Regional High School District as follows:

"1. The existing policy requiring all professional and non-professional personnel to indicate their presence by the time of arrival and departure of (sic) the provided sign-in sheet is hereby reaffirmed as the firm policy of this Board.

"2. Effective immediately any employee refusing or failing to comply with this policy shall be subject to suspension from employment without pay until such time as such employee shall comply with the Board policy.

"3. Any teacher who shall be suspended hereunder for a period longer than one day shall be reported immediately to the Board for appropriate action including in the case of tenure teachers the scheduling of a tenure hearing upon charges of insubordination pursuant to the appropriate sections of Title 18A of the Revised Statutes.

"4. The Principals, Superintendent and other Administrators are hereby directed to carry out the purposes of this resolution and to do all things necessary and proper in connection therewith.***" (Exhibit R-6)

Following this action by the Board, respondent resumed following the long-standing sign-in procedure. (Tr. I-87)

CHARGE NO. 4

"In addition to his own failure to follow proper sign-in procedures as stated in charge number 3, *supra*, Mr. Sammons also induced 46 other professional staff members from Triton High School to ignore their responsibilities with respect to proper sign-in procedure. This conduct was designed to increase tensions between the Board and its professional staff and displays the individual's arrogance and his complete disregard for the requirements of professional conduct."

Respondent testified that the representative council of the teachers' association met on May 27, 1970, and voted affirmatively to notify the general membership at a meeting scheduled for June 4, 1970, to follow the instructions in the teachers' handbook, which were to sign in on arrival and sign out on departure. (Tr. I-83) (Exhibit P-12) Respondent stated that he did not know who suggested this action, but that he was not the originator. (Tr. I-84, 85, 97) He recalled that numerous teachers questioned him regarding the sign-in procedure at the beginning of the 1970-71 school year, and that in each instance he told the teacher to follow the policy as stated in the teachers' handbook. (Tr. I-85-87) The testimony shows that respondent did telephone a teacher on the staff of Highland High School to determine the degree of compliance with the action directed by the representative council. This teacher reported to respondent that the degree of compliance at Highland High School was substantially less than at Triton High School. (Tr. I-91, 92) The staff members at Highland High School resumed signing the time of arrival and departure after being requested to do so by the Highland principal. (Tr. I-93-95)

At the June 4, 1970, meeting of the teachers' association, respondent stated that individuals asked him what they should do regarding signing in, and that he told them to follow the written Board policy as it appeared in the teachers' handbook. (Tr. I-113) (Exhibit P-13)

A careful scrutiny of the summary report of sign-in procedures for 1970-71 (Exhibit P-9) discloses that at Triton High School, twenty-nine teachers failed to follow the known procedure forty or more times, sixteen teachers failed to do so thirty or more times, four teachers did not do it twenty or more times, four teachers failed to do so ten or more times, and seventeen teachers failed to sign in properly between one and seven times. By contrast, at Highland High School, twelve teachers committed this act only one time, eleven teachers failed only twice, and three teachers failed to follow the procedure on three, five and seven days, respectively. Of the twenty-six teachers from Highland High School on this list, twenty-three failed to sign in properly on either November 11 or 12, or on both of these dates.

The teacher, who was the recording secretary for the association, testified that the teachers were aware that the instructions of the representative council made May 27, 1970, regarding the sign-in procedure, represented a change from the long-standing practice. This witness could not recall respondent's speaking at any meeting regarding this procedure, or his being present at any other discussion regarding the sign-in procedure. Neither could this witness recall speaking to any teachers regarding the sign-in procedure between the meetings held on May 27 and June 4, 1970, and she also could not recall whether the president informed the general membership on June 4 regarding the sign-in instructions. This teacher testified that she could not remember whether a vote was taken at that general meeting concerning the sign-in procedure, and also that she could not recall anyone who spoke regarding this matter at the general meeting held June 4, 1970. (Tr. II-166-191)

This witness prepared the summary minutes of the representative council meeting held May 27, 1970, (Exhibit P-12) the general membership meeting held June 4, 1970, (Exhibit P-13) the representative council meeting held June 9, 1970, (Exhibit P-15) the representative council meetings held September 14, 1970, (Exhibit R-9) and September 15, 1970, (Exhibit P-16) and the general membership meeting held September 15, 1970, (Exhibit R-7) September 18, 1970, (Exhibit P-17) November 12, 1970, (Exhibit P-18) and November 16, 1970, (Exhibit R-8).

The teacher, who was the vice-president of the association, testified that respondent did transmit the decision of the representative council to the teachers at the association meeting held June 4, 1970. (Tr. III-8) This witness recalled that respondent telephoned him shortly following the opening of school in September, and inquired regarding the sign-in procedure at Highland High School. The vice-president said that he called respondent after checking the sign-in book, and reported that approximately six to eight teachers were following the altered procedure. This witness stated also that respondent said, "Well, what do you have to do to get these people involved?" (Tr. III-11,12) The

vice-president could not recall exactly what respondent stated to the teachers on June 4, 1970, or whether the decision regarding signing in made by the representative council was a request, an order, or a mandate. (Tr. III-21,27) He stated that he was asked by the principal of Highland High School to sign the time of his arrival and departure, but he told the principal that he preferred "***'to follow the practices established by the general membership.'***" The vice-president testified further that, following this request by the principal, he "stuck to his guns," and that he continued to sign in only with initials. (Tr. III-14-16) He was shown the summary report listing the names of teachers and the dates they failed to sign in properly, (Exhibit P-9) and was informed that, according to this report, he failed to sign in on seven separate days – five consecutive days in September 1970, and November 12 and 13, 1970. The next question and answer followed:

> "Q. And are you telling us that the only days other than those on this list [Exhibit P-9] when you did not use your initials only were days when you forgot?"
>
> "A. I'll have to say that." (Tr. III-36)

According to this witness, the teachers changed their sign-in procedure as a means of indicating their solidarity and displeasure with the fact that negotiations for 1970-71 were not concluded. (Tr. III-53, 58)

The vice-president of the teachers' association testified further that the representative council recommended the change in sign-in procedure to the general membership because the practice had been in error for many years. He recalled that the members were advised to follow the written instructions in the teachers' handbook. He also stated that the matter was discussed as a means of action for teachers to take to appease their desire to do something because of the current dissatisfaction with the progress of negotiations. (Tr. III-76-81)

The teacher, who was corresponding secretary and a member of the representative council, testified that she could not recall a discussion of the sign-in procedure at the May 27, 1970, representative council meeting or how this subject was introduced at that meeting or at the general membership meeting held June 4, 1970. She said that she could not remember taking part in any discussion of this matter prior to June 4, 1970, or in any discussion of alternative actions at that meeting. She also stated that she could not remember any discussion of a possible strike at the June 4, 1970, meeting. (Tr. III-115, 116) She stated that the sign-in procedure action was a method of avoiding a strike. When reminded by counsel that this testimony was at variance with testimony given in her deposition several weeks earlier, the witness stated that she now recalled this because she had heard the testimony of the treasurer earlier in the day. (Tr. III-120-122)

A teacher, who was a member of the representative council, testified that the council discussed the sign-in procedure as a means of indicating the unity of

the teachers, but he could not recall any discussion of a possible strike or other alternative action. (Tr. III - 127, 130)

The teacher, who was formerly the president of the association but had resigned from that post in January 1970, testified that he could not recall how the proposed change in the sign-in procedure originated. (Tr. IV-14)

A teacher, who is now a building representative for the association, testified that respondent had given the teachers' handbook to a third party to read aloud the excerpt concerning the sign-in instructions, at a general meeting, and the statement of respondent to the members that they should sign in according to the instructions in the handbook. (Tr. IV-30, 31) The minutes of the general meeting held September 18, 1970, (Exhibit P-17) disclose the following exchange:

[Witness] "Do you want us to sign in with initials or time?"

[Respondent] "Sign in according to the handbook."

A teacher, who was not an officer or member of the representative council, testified that he began to sign in without marking the time of arrival and departure because this procedure was adopted by the general membership of the association at a meeting held in the fall of 1970. (Tr. IV-60, 64, 68, 72) The witness could not recall whether a general membership meeting had been held on September 8, 1970, which was the first day of school and also the first day that he began to follow the sign-in procedure decided by the association. (Tr. IV-68) (Exhibit P-9) The minutes in evidence disclose that the first general membership meeting in 1970-71 was held on September 15, 1970. (Exhibit R-7) This witness could not recall how the subject of the sign-in procedure was brought up at the general meeting, or whether a recommendation on this topic was made by the representative council. (Tr. IV-68-70)

The minutes of the various association meetings, *ante*, are rudimentary. They consist of summary statements interspersed with a few paraphrases or quotes of individual comments. The minutes of the representative council meeting held May 27, 1970, (Exhibit P-12) contain the following brief statement:

"***V. At General (sic) membership meeting of June 4, the Council agreed to indicate the following:

* * *

B. Sign in with initials.***"

The minutes of the meeting held June 4, 1970, (Exhibit P-13) contain a statement, which reads as follows:

"*** Members asked what was to be done. Representative Council directed the following:

* * *

B. Sign in with initials***."

The fact-finders report (Exhibit P-14) dated September 10, 1970, was reviewed item-by-item at the representative council meeting held September 14, 1970, (Exhibit R-9) This report recommended that no change be made in the existing Board policy in regard to the sign-in procedure. On the following day, a representative council meeting was held, and the minutes of this September 15, 1970, meeting (Exhibit P-16) contain the following notation:

"*** a. The Council reaffirmed the signing in with initials.***"

The minutes of the general meeting held September 18, 1970, (Exhibit P-17) have been quoted, *supra*, regarding the topic of the sign-in procedure. The following statement in regard to this topic appears in the minutes of the general meeting held November 12, 1970, (Exhibit P-18):

> "***1. Jacques Sammons – 'We have put on the table that we as professional people sign our names in the book. They offered a counterproposal across the table. They have made a change in this handbook without negotiating it.' Jacques further explained that the handbook had said that teachers should sign in on arrival and sign out on departure; however, in November, the handbook came out saying that teachers should indicate time.***"

The minutes of the general meeting held November 16, 1970, (Exhibit R-8) state that a motion was made, seconded and passed that teachers would indicate the time of arrival and departure when signing in and out. The minutes also indicate the displeasure of the teachers regarding the resolution adopted by the Board earlier that evening concerning this subject. (Exhibit R-6) The teachers agreed to issue a news release stating that they did not wish to see the schools closed as the result of this situation.

In the pleadings, respondent states that the action regarding the sign-in procedure was taken by the teachers' association, and he admits that he favored the action. Respondent denies the remaining specific allegations contained in Charge No. 4.

CHARGE NO. 5

> "On January 14th, 1971, Mr. Sammons filed a complaint in the Division of Small Claims of the Camden County District Court against August W. Muller, Superintendent of this district. Mr. Sammons also induced two other teachers to file similar complaints, namely Alfred Genung and Louise Mumma. The aforesaid complaint was entirely without merit, and was, in fact, withdrawn by Mr. Sammons' attorney who was retained after the filing of the complaint. The subject matter of the complaint involved withholding of pay for days Mr. Sammons claimed as personal leave. Mr. Sammons, in filing the action, by-passed and ignored the provisions of a

collective bargaining agreement which mandated the submission of the issues to binding arbitration. His action in by-passing the collective bargaining agreement and in naming the Superintendent directly as a defendant can only be regarded as further evidence of harrassment of the Board and administration and of Mr. Sammons' personal animosity toward the Board and administration.

"Mr. Sammons' disclaimer of any improper motive in taking this action is not creditable. As a former president of the teachers' organization, he was well aware of the benefits of the collective bargaining agreement which were available to him for the redress of grievances. He had, prior to the institution of the Small Claims Court action, been represented by counsel, the same counsel who later advised him to withdraw the action voluntarily. Whether taken against the advice of counsel or without bothering to consult counsel, his conduct can only be interpreted as an attempt to embarrass both the Board and administration in a malicious fashion. This was compounded by his involvement of the other individuals."

The chronology of events leading up to the action taken by respondent is set forth in the award of arbitration dated September 1, 1971. (Exhibit P-4) On September 3, 1969, and on September 24, 1969, respondent submitted a request for personal leave on December 22 and 23, 1969, which was denied on the grounds that it did not specify the reason for the request. On October 7, 1969, respondent submitted a grievance to his immediate superior for refusal to grant personal leave, and this grievance request was denied. Respondent submitted a request on December 4, 1969, for leave to visit schools in Mexico on December 22 and 23, 1969. This was denied with the suggestion that he reapply and discuss with the principal or Superintendent the conditions under which he might be given favorable consideration. Respondent absented himself from his duties on December 22 and 23, 1969, and, consequently, he was not paid for these two days. Following an arbitration decision which stated that requests for personal leave need not be accompanied by a reason, respondent requested on March 20, 1970, that the Board reimburse him for the two days of deducted pay, and this request was denied. On April 8, 1970, respondent submitted another grievance on the same grounds, (Exhibit P-8) which proceeded through the entire grievance procedure, and which was denied on June 12, 1970, on the grounds of timeliness. By letter under date of June 29, 1970, counsel for respondent requested the appointment of an arbitrator. (Exhibit P-3) On January 14, 1971, respondent filed a complaint against the Superintendent of Schools in the Small Claims Division of Camden County District Court for the two days' pay deducted for his absence. (Exhibit P-1) A stipulation of dismissal was granted without prejudice on April 8, 1971, (Exhibit P-2) with the understanding that arbitration was available under the terms of the Board's grievance procedure. (Exhibit P-19) According to the findings of the arbitrator, respondent allowed six months to elapse before submitting a required waiver of the right to submit the dispute to any other administrative or judicial tribunal, (Exhibit P-2) as set forth in the grievance procedure. (Exhibit P-19)

Respondent testified that he waited approximately five months for an answer to his letter of June 29, 1970, (Exhibit P-3) and then decided to file a complaint, after reading a newspaper article describing the function of the Small Claims Court. Respondent stated that he did not discuss the filing of this complaint with his attorney, any school administrator, any teacher or any representative of the teachers' association. (Tr. I-131, 132, 134) Respondent averred that he became aware that the treasurer of the teachers' association had filed a similar complaint against the Superintendent of Schools in the Small Claims Court after the fact, but they had discussed their similar grievances during the preceding year. (Tr. I-132-135) He also testified that he never discussed filing a complaint with a teacher from Highland High School, who had also filed a similar complaint against the Superintendent in Small Claims Court, subsequent to respondent's action. (Tr. I-135)

The minutes of the representative council meetings held May 27, 1970, (Exhibit P-12) and June 9, 1970, (Exhibit P-15) disclose the discussion of grievances. The June meeting minutes specifically refer to the grievances of respondent and the teacher who became treasurer of the association. Both of these grievances were included in the arbitration decision dated September 1, 1971. (Exhibit P-4)

The husband of the former Highland High School teacher testified that his wife was denied two days pay for personal leave, and that it was at his insistence that she signed a complaint against the Superintendent in Small Claims Court, subsequent to the action taken by respondent. (Tr. IV-148, 149) This claim was also dismissed and directed to arbitration. (Tr. IV-150)

CHARGE NO. 6

> "In the latter part of January and the early part of February, 1971, Mr. Sammons complied with an administrative directive, tardily, concerning failure to record his grades. While the initial omission was of a relatively minor nature, Mr. Sammons' response lacked candor and evidenced a degree of arrogance. This lack of professionality in written communications had been previously evidenced by Mr. Sammons in written presentations of grievances on his behalf and in particular the level two grievance procedure form dated April 9th, 1970. This arrogance and lack of professionality taken in conjunction with the other occurrences detailed in this Specification of Charges, establishes Mr. Sammons' unfitness to be a teacher in this district."

A memorandum dated February 2, 1971, was addressed to respondent by the principal regarding respondent's lateness in recording pupil grades. (Exhibit P-6) Respondent had not recorded his grades by the deadline of February 1, 1971, after being reminded to do so. This memorandum directed respondent to record his grades before leaving school on February 2, 1971, and to explain to the principal, in writing, his reasons for being late including any mitigating circumstances.

Respondent testified that some of his grade sheets were missing from his desk on the morning of February 1, 1971; therefore, he said, he could not complete the recording of pupil grades. (Exhibit P-5) On February 2, 1971, he was completing this task when he received the memorandum from the principal. (Exhibit P-6) He testified that he discussed this matter with the principal shortly after receiving the memorandum. (Tr. I-137, 138) A second memorandum was sent to respondent by the principal under date of February 5, 1971, (Exhibit P-7) which reminded respondent that he had not submitted a written explanation for his lateness in recording grades, even though he had received two requests to do this. He was directed to submit his written explanation by 12:00 noon of that day, and to further explain why he had not complied with the two previous requests. Respondent submitted the required report at 11:54 a.m. on February 5, 1971. (Exhibit P-5) In this memorandum respondent stated that since no time limit was specified for his written report, he decided to make further efforts to locate the missing grade sheets and submit these items together with his written explanation.

Three teachers testified that each had been late in recording pupil grades on some occasion, and the only penalty imposed upon each had been either an admonishment to complete this task immediately or a memorandum from the principal. (Tr. IV-8-10, 38, 63)

The second item contained in Charge No. 6 refers to the grievance procedure form submitted by respondent dated April 9, 1970, which referred to his second filing of a grievance for two days' pay. (Exhibit P-8) This grievance form reads, in pertinent part, as follows:

> "*** The board is just as wrong in withholding my salary as it was in withholding Mr. Janolfsy's. Don't discriminate – part with the bread.
>
> * * *
>
> "On the 20th of March, I handed Mr. Muller a written request for payment of money due me, (sic) as of this date I have no written answer from him. I smell another stall tactic. It won't work."

The principal testified that, in his judgment, the language employed by respondent in this grievance request was ill-advised, unprofessional and improper. (Tr. II-154, 155) This witness also testified that he considered all of the matters, which are now listed in these charges, before he favorably recommended respondent for reappointment for the 1971-72 school year. (Tr. II - 158) The Superintendent of Schools stated that he had given careful consideration to all of respondent's problems, strengths and weaknesses before he recommended that respondent be reemployed for the 1971-72 school year. (Tr. II-70-94)

This concludes the report of the hearing examiner.

* * * *

The Commissioner, having reviewed the report of the hearing examiner as set forth above and the record in the instant matter, concurs with the findings of fact set forth therein.

From his review of the record, the Commissioner finds that Charge No. 1 is partially sustained. Respondent did in fact approach candidates for teaching positions as alleged. The evidence does not support the specific allegation that respondent issued "flat directives" to candidates to decline employment, or that he made malicious personal comments concerning the administration and the Board. The testimony that respondent approached these candidates for security reasons because they were strangers is not credible. Certainly, an individual emerging from the office of a school principal is not normally suspect as a potentially-disruptive influence. The fact that one teaching candidate recalls that respondent informed him that the teachers were working without a contract provides a clear indication of the purpose of respondent's action. It would be illogical to conclude that respondent's motives were either to encourage these candidates to accept offers of teaching positions or to merely impart objective information to them. Respondent admitted that he had discussed this course of action with other officers of the association prior to his initiation of the contacts following the candidates' interviews. The only logical conclusion is that respondent was attempting to obstruct the hiring of teachers in the Black Horse Pike Regional School District. Respondent may not have issued "flat directives" as alleged, and the evidence does not sustain that specific action, but it can clearly be concluded that his actions were intended to impede, not assist, the securing of new teaching staff members.

Chief Justice Weintraub of the New Jersey Supreme Court clarified in precise detail the law of this State in regard to obstructing the function of the public schools in *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.*, 96 *N.J. Super.* 371 (*Chanc. Div.* 1967), affirmed 53 *N.J.* 29 (1968). In that case the Chief Justice stated the following at pp. 36-38:

> "***It has long been the rule in our State that public employees may not strike. We recently refused to hold that teachers are beyond that ban *** and with respect to the interference with the Board's recruitment of replacements, defendants *** say *** a refusal to accept employment is inherently different from a quit. But the subject is the public service, and the distinctions defendants advance are irrelevant to it, however arguable they may be in the context of private employment. Unlike the private employer, a public agency may not retire. *The public demand for services which makes illegal a strike against government inveighs against any other concerted action designed to deny government the necessary manpower*, whether by terminating existing employments in any mode or *by obstructing access to the labor market.* Government may not be brought to a halt. So our criminal statute, *N.J.S.* 2A: 98-1, provides in simple but pervasive terms that any two or more persons who conspire 'to commit any act' for the 'obstruction of *** the due administration of the laws' are guilty of a misdemeanor.

"Hence, although the right of an individual to resign or to refuse public employment is undeniable, yet two or more may not agree to follow a common course to the end that an agency of government shall be unable to function.***" (*Emphasis ours.*)

In regard to the scheme to prevent teachers from accepting employment in the public schools of Union Beach, the Chief Justice stated the following at p. 39:

"*** At a minimum the object is to withhold additional services a school district may need to discharge its public duty, which, as we have said, is no less illegal.***"

In regard to Charge No. 2, that respondent attempted to unfavorably influence the evaluation of Highland High School by the committee representing the Middle States Association of Secondary Schools and Colleges, the Commissioner finds that the evidence supports this specific charge. The evidence does not support the additional allegation that respondent made a malicious personal attack upon the Board of Education, while attempting to exert an improper influence on the evaluation of Highland High School. The sound judgment of the chairman of the visiting evaluation team thwarted this attempt to inject dissatisfaction with the progress of negotiations into the professional evaluation function, which is properly an objective and detailed study of the strengths and weaknesses of the school's philosophy, program of studies and broad educational plan. These evaluations, which are made once every ten years and which require an entire year of intensive self-study and evaluation by the professional staff, prior to the visit by an evaluation committee, are excellent examples of the process of improving the public schools, and they may not be lightly interfered with for whatever motive. In regard to this charge, the Commissioner finds respondent guilty of conduct unbecoming a teacher.

It is clear that Charge No. 3 is true. Respondent had complied for many years with the known procedure for indicating the time of arrival and departure on the payroll time sheets provided by the Board and its administrative officers. The record discloses that respondent seized upon an instruction to teachers contained in the handbook prepared by his principal, which omitted a reference to time, as the reason to alter the long-standing required procedure. Respondent admits that he ignored two written reminders from the principal to follow the sign-in procedure, and this in itself constituted insubordination. Apparently, respondent found strength to defy the principal's verbal and written reminders in the fact that a large number of teachers adopted a similar course of action. Respondent had participated in a series of meetings between the Board and the teachers' negotiating committee with a fact-finder during the summer months of the 1970-71 school year, and he was aware of the fact that the sign-in procedure had been submitted to the fact-finder. Respondent also knew that the report of the fact-finder was to be submitted during the first two weeks of September 1970, and that the Board of Education had agreed to accept all of the recommendations of the fact-finder sight unseen, including the item of the sign-in procedure. With knowledge of these facts and in view of the reminders

from the principal, respondent persisted in his failure to follow the sign-in procedure until the Board adopted a resolution stating that immediate disciplinary action would befall each individual, who continued his refusal to follow the proper procedure. The Commissioner finds respondent guilty of this charge of improper conduct.

Extensive testimony was educed regarding Charge No. 4. The detailed report of the hearing examiner indicates an almost total lack of recall on the part of the witnesses who testified, particularly with respect to the origination of the suggestion that teachers abandon the long-standing policy of indicating the time of arrival and departure in the payroll time sheets. The collective testimony on this specific point strains credulity. Also, much of the testimony regarding the motive for this action is contradictory. The birth of the proposed action is shrouded in mystery to the degree that no one individual can be identified as the originator. It is clear that respondent favored the action, and that he made an attempt to ascertain its effectiveness at the second High School. His comment regarding the degree of effectiveness clearly reflects his concern that faculty members of Highland High School were not supporting the sign-in action. From the record before the Commissioner, it can be concluded that respondent influenced the sign-in action, but the weight of evidence does not support the allegation that he "induced" forty-six teacher to follow the sign-in action. Accordingly, this charge is dismissed.

The facts regarding Charge No. 5 are clear and almost entirely uncontradicted. Respondent did file a complaint against the Superintendent in the Small Claims Division of the Camden County District Court without consulting the attorney, who had been representing him in this grievance before the Board. That respondent did not discuss his filing of the complaint with the two teachers who took identical action shortly afterward is not credible, particularly in view of the uncontradicted testimony that respondent and one of the other two teachers had mutually discussed their similar grievances during the school year. These two grievances had also been discussed at several meetings of the representative council.

In the judgment of the Commissioner, the fact that the complaint had been filed in the first instance is unusual in view of the fact that respondent was aware of his remedy of arbitration, which had been requested by his counsel. That the complaint was filed against the Superintendent of Schools is also unusual, since it was not within the power of that school administrator to grant respondent the two days' pay which had been withheld by an action of the Board of Education. Although this action by respondent was not illegal, and on its face would appear to have been an inadvertent error on the part of the respondent, the Commissioner cannot believe that respondent did not understand the simple requirement of the grievance procedure (Exhibit P-19) for the securing of arbitration which was initiated by letter to the Board from respondent's attorney. (Exhibit P-3) The record is barren of any logical reason for respondent's action, but, in the Commissioner's judgment, the record does support the inference that the action was an attempt to embarrass the Superintendent. This was a demonstration of unwarranted and improper

conduct, but not malicious conduct, and the Commissioner so holds. The Commissioner finds this charge to be true, in part, as stated above.

The factual incidents recited in Charge No. 6 are not contradicted. The Commissioner finds, however, that the incident concerning the respondent's failure to record pupil grades in a timely manner was not of a serious nature, and was promptly and properly dealt with by the school principal. Also, the Commissioner agrees with the judgment of the principal that the language used by respondent in this grievance form was "ill-advised." The Commissioner concludes that neither of these specific incidents is sufficient grounds for dismissal or reduction in salary; therefore, this charge is dismissed.

In view of the fact that the charges and the incidents described in the matter controverted herein all bear upon the role of a teacher who has a duty and responsibility to his professional position and a responsibility to his elected office in a teachers' association, the Commissioner is constrained to comment upon this state of affairs.

In the case of *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al., supra*, the Chief Justice of the New Jersey Supreme Court provided a delineation between the issue of freedom of speech and coercive activities designed for the sole purpose of compelling a board of education to act in accordance with the desires of the teachers' association. Justice Weintraub stated at p. 40 that:

> "*** Individuals, severally or in an association, of course have the right to denounce a public body, its officers, and its programs, in the most searing terms, and even with a wide margin of error.*** It is the right of the individual, and it serves equally the collective interest of society, thus to bring government before the bar of public opinion, thereby to alter its course.
>
> "But although citizens, individually and in association, may thus seek to 'coerce' a public body to their wish, there is no right to achieve that end by disabling the public body from acting at all. There is no right to 'compel' government to change its ways by blocking the administration of the law until it yields.***"

Further, at p. 42, the Chief Justice stated the following:

> "*** It need hardly be said that freedom of speech does not include the right to use speech as an instrument to an unlawful end.*** 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.'***"

The Court rejected the claim that the exercise of the constitutional rights of speech and association cannot be restrained unless public injury has been achieved. *Ibid.* p. 43

The Commissioner also takes notice of the words of Judge Lewis of the Appellate Division of the New Jersey Superior Court in the case of *Victor Porcelli et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert. den.* 55 *N.J.* 310 (1970), which bear directly upon the conflict evidenced in the instant matter. The Court stated at p. 307:

> "*** There can be no doubt *** that the teachers *** as public employees, had the right to organize and, through organizational representation, the right to make proposals which could be effectuated by an enforceable agreement between the school board and its organized employees. *N.J. Const.* (1947), Art. I, 'Rights and Privileges' par. 19. This right was expressly recognized in the recently adopted 'New Jersey Employer-Employee Relations Act.' *L.* 1968 *c.* 303, *N.J.S.A.* 34:13A-1 *et seq.* The enactment mandates that negotiations concerning terms and conditions of employment shall be made in good faith and that when an agreement is reached such terms and conditions shall be embodied in a signed agreement. *N.J.S.A.* 34:13A-5.3.***"

In the instant matter negotiations had reached an impasse, and in accordance with *N.J.S.A.* 34:13A-1 *et seq.*, the next stage of fact-finding was undertaken. Notwithstanding this common course of events, a series of actions was taken by respondent with the assumed purpose of obstructing the function of the public schools and thereby coercing the Board into a change of position. These actions, specifically embodied in Charges Nos. 1, 2 and 3, are repugnant to and proscribed by the public policy of this State.

Of equal concern to the Commissioner is the situation where the teacher, who should set the good example, assumes that some higher right justifies activities, which are inimical to the public interest and which are designed to impede the orderly process of public education. The Commissioner recognizes the desires on the part of public school employees to secure the greatest remuneration and the widest possible benefits in return for their services. He is constrained to remind the teachers of this State, however, that they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling. The Commissioner cautions both school employees and the elected and appointed members of boards of education to limit their sometimes intricate and endless negotiations to the confines of the

negotiation chambers, to the end that all will mutually strive for the deeply-rooted and highly-desired goal of excellence in our public schools.

The Commissioner has concluded, in the instant matter, that respondent has been found guilty of four of the six charges in whole or in part. The remaining matter is a determination of the penalty to be imposed by the Commissioner. In reviewing the record, the Commissioner takes notice that both the principal and the Superintendent of Schools balanced this teacher's classroom performance against the actions alleged in the charges, and although each of these experienced school administrators expressed the considered opinion that respondent's conduct was somewhat disappointing and less than his potential, they reached independent, objective conclusions to recommend respondent's continuing employment for the 1971-72 school year. These judgments, made by experienced administrators who had regular opportunity to observe respondent's teaching performance, weigh heavily in the Commissioner's determination of this matter.

In view of respondent's long record of above-average teaching performance, the school administrators' recommendations, and the year-long suspension suffered by respondent, the Commissioner finds that the penalty of dismissal is not warranted in this specific instance. However, the unbecoming and improper conduct of respondent does deserve a penalty lesser than dismissal. The Commissioner determines, therefore, that respondent Jacques L. Sammons shall be reinstated as of September 1, 1972, as a teacher in the Black Horse Pike Regional School District, Camden County, and further that he shall receive a reduction in salary, which shall be the equivalent to three months of his salary, during the 1971-72 school year. Respondent's salary at the time of reinstatement shall be at the same rate he would have received in uninterrupted service. All other wages which have been withheld from respondent shall be remunerated to him at the next regular date of salary payment, such remuneration to be mitigated by all earnings which respondent received for other employment during the school year periods beginning June 22, 1971, and ending with the date of this decision.

COMMISSIONER OF EDUCATION

June 12, 1972

South Plainfield Education Association and Marilyn Winston,

Petitioners,

v.

Board of Education of the Borough of South Plainfield, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Rothbard, Harris & Oxfeld (Abraham L. Friedman, Esq., of Counsel)

For the Respondent, Leroy P. Lusardi, Esq.

Petitioner, a teacher employed by the Board of Education of the Borough of South Plainfield, hereinafter "Board," alleges that her contract for the 1971-72 school year was not renewed for reasons that are statutorily proscribed. She is joined in her petition of appeal by the South Plainfield Education Association. The Board avers that petitioner, as a non-tenure teacher, had no right to continuing employment when her last contract expired by its terms, and denies any unlawful action. The Board also maintains that the South Plainfield Education Association, hereinafter "Association," has no standing in this matter, and moves that the petition in its entirety be dismissed.

A hearing on the Motion was conducted on April 21, 1972, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner was employed by the Board as a teacher in its schools for all of the three-year period 1968-69, 1969-70, 1970-71. Her contract was not renewed for the 1971-72 school year, and the fact of the non-renewal was subsequently made the subject of a lengthy grievance procedure. This procedure failed to grant petitioner the relief she sought, and the instant petition was filed with the Commissioner on February 15, 1972.

It is now alleged by petitioner that the failure to renew her contract for the 1971-72 school year was a violation of a collective bargaining agreement between the South Plainfield Education Association and the Board, and that she was denied rights that were due her under the First, Fifth and Fourteenth Amendments to the United States Constitution. Specifically, in this latter regard, petitioner recites a list of occasions when she exercised her right of freedom of speech, and then alleges that criticism by her school principal resulted.

In the first instance, petitioner states she "raised a question" with the principal, when she and other teachers were issued a directive to prepare a program in observance of Martin Luther King Day, as to why the same was not being done for the late President John F. Kennedy and Robert Kennedy.

Subsequently, she relates, she was told by the principal that he considered the question she raised to be an example of "criticizing and arguing."

On the other occasions, she states, she had differences of opinion with the school principal concerning:

1. the school's leave policy which prevented the attendance of faculty members at a funeral for a fellow teacher because the school was not closed;

2. the school's grading policy;

3. the classification and categorization of supply orders for budgeting purposes;

4. the use of substitutes for special teachers when such teachers were absent;

5. the handling of children who presented severe behavior problems during the noon lunch hour;

6. a directive assigning teachers directly to classrooms after lunch.

On one other occasion, petitioner alleges, she criticized the principal at a gathering of teachers and states that "it is probable that the criticism came to the principal's attention.

On these cited occasions, and on others, petitioner maintains she made comments or suggestions to which the principal objected, and that he then criticized her as "challenging Board policy." In this regard, she specifically cites in her Petition of Appeal, an evaluation report by the principal, which contained the following paragraph:

> "In my judgment, Mrs. Winston would be a more effective and efficient teacher if she would focus her attention on her teaching duties at Riley School rather than expend so much energy criticizing administrative policy and action. She feels that each request demands a debate on its merits. I do not feel that Mrs. Winston has demonstrated support for administrative policy on a district level or at the school level. I do not feel that Mrs. Winston will be effective in furthering progress toward improving the educational program at Riley School."

However, while citing this evaluation report, *ante*, and her differences of opinion with the principal as the "true cause and reason" for the refusal by the

Board to renew her contract for a fourth year of employment, petitioner also states that she was not furnished with any reasons and that her constitutional rights were, therefore, violated. Her prayer is that the Commissioner direct the Board to rehire her for the 1971-72 school year and to compensate her retroactively to September 1, 1972.

The Board avers that petitioner's contentions with respect to the time, cause and reason for its failure to renew her contract represent conjecture on her part, and that the Board is not required by law to give reasons for its actions, or non-actions, with regard to the employment of teachers. The Board further cites *William Myers v. Board of Education of the Borough of Glassboro*, 1966 *S.L.D.* 66-8 in support of its contention that an evaluation of a teacher's performance "is often a matter of total impression, based upon both objective evidence and subjective judgment,". In the Board's view, petitioner's contract for the 1970-71 year was honored in full, and when it expired by its terms on June 30, 1971, it was under no obligation to renew it or to give reasons for the decision that it made.

The Board also challenges the standing of the South Plainfield Education Association in this action and avers that:

> "***Nowhere is the jurisdiction of the Commissioner stated to be to hear the complaint of a bargaining agent of the employees pursuant to Chapter 303, Laws of 1968, under the guise of a 'controversy and dispute' under school law. ***"

* * * *

The Commissioner has reviewed the report of the hearing examiner. He concurs with the Board's view that the South Plainfield Education Association has no standing as a petitioner in the instant matter. While the Association may have a bargaining agreement with the Board, and while there may be a controversy over the implementation of this agreement, this controversy does not arise under the school laws, and is outside the State Education Commissioner's jurisdiction even though it pertains to school personnel. *Board of Education of East Brunswick Township v. Township Council of East Brunswick Township*, 48 *N.J.* 94, 233 *A* 2*d*. 481 (1966) Accordingly, the petition herein is retitled to read *Marilyn Winston v. Board of Education of the Borough of South Plainfield, Middlesex County.*

With respect to the allegations of petitioner, the Commissioner notes that they stand alone. Nowhere is there an offer of proof that the Board failed to renew petitioner's contract because she exercised her right of free speech. In fact, while alleging that this was the reason for the Board's action, petitioner tempers her allegation when, subsequently, she states that no reasons at all were furnished to her. The question then arises -- were reasons required?

The Commissioner holds that they were not and that the basic pleading of petitioner in the instant matter has been rendered *res judicata* by a long series of

decisions of the Commissioner and the Courts. *George A. Ruch v. Board of Education of Greater Egg Harbor Regional High School District, Atlantic County*, 1968 *S.L.D.* 7; *Taylor & Ozman v. Paterson State College*, 1966 *S.L.D.* 33; *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962); *Cullum v. North Bergen Board of Education*, 15 *N.J.* 285 (1954). While the Commissioner recognizes that a teaching staff member may not be denied employment for a statutorily or constitutionally-proscribed reason – race, religion, the exercise of free speech, etc. – it must also be recognized that such employment cannot be obtained by naked allegations that such reasons were the causative factors in a local board of education's decision. Such decisions have a presumption of correctness, *Barnes et al. v. Board of Education of Jersey City*, 85 *N.J. Super.* 42 (*App. Div.* 1964), and may not be easily abridged. Naked allegations standing alone are no cause for action by the Commissioner. In *Mitchell Klein v. Board of Education of the Township of Weehawken, Hudson County*, decided by the Commissioner of Education, June 2, 1971, the Commissioner said:

> "*** New Jersey teachers who have not attained a tenure status are not entitled to a statement of reasons when their contracts are not renewed or to a hearing before the employing board of education, since all such teachers are employed by specific contractual terms which may be exercised by either party. ***"

In the instant matter the Board clearly exercised a discretionary power with respect to the employment of one of its teaching staff members, and its discretion in the matter will not be challenged by the Commissioner, absent a substantial offer of proof that its actions were improper. The Commissioner can find no such offer herein.

As the Court said in *Zimmerman, supra,* in quoting the Court in *People v. Chicago*, 278 *Ill.* 318, 116 *N.E.* 158, 160 (1917):

> "*** A new contract must be made each year with such teachers as (the board) desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all.***"

Accordingly, for the reasons stated, the Commissioner finds no cause for his intervention in the present matter. The Motion is granted. The petition is dismissed.

COMMISSIONER OF EDUCATION

June 15, 1972

South Plainfield Education Association and Marilyn Winston,

Petitioners-Appellants,

v.

Board of Education of the Borough of South Plainfield, Middlesex County,

Respondent-Appellee.

Decided by the Commissioner of Education, June 15, 1972.

STATE BOARD OF EDUCATION

Decision

For Petitioner-Appellants, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., and Abraham L. Friedman, Esq., of Counsel)

For Respondent-Appellee, LeRoy P. Lusardi, Esq.

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

November 1, 1972
Pending before Superior Court of New Jersey.

Rose Franco,

Petitioner,

v.

Plainfield Board of Education, Union County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rothbard, Harris and Oxfeld (Abraham L. Friedman, Esq., of Counsel)

For the Respondent, King and King (Victor E. D. King, Esq., of Counsel)

Petitioner, a tenured teacher employed by the Plainfield Board of Education, hereinafter "Board," appeals from an action of the Board, which

denied her a salary increment for the school year 1970-71. Petitoner is currently on her proper step of the "guide"; therefore, only the salary increment for 1970-71 is in dispute.

The matter was heard in the office of the Union County Superintendent of Schools on May 24 and 25, 1971, and on September 27 and 28, 1971, before a hearing examiner appointed by the Commissioner. Counsel for petitioner submitted a Memorandum of Law to support his Motion for dismissal after the first day of hearing; counsel for the Board filed a Memorandum of Law opposing the Motion, and urged the Commissioner to continue with the hearings as scheduled. Counsel also filed briefs in this matter, and many documents were submitted in evidence by both parties at the hearings. The report of the hearing examiner is as follows:

The school year 1968-69 was a period of extreme racial unrest among students in Plainfield High School, hereinafter "High School." Disruption of the teaching atmosphere in the High School included the large scale cutting of classes and fights among students to such a degree that the Board closed the High School for one week. During that week when the school was closed, meetings were held with different groups in the community including parents, special interest groups, and groups of students. (Tr. I- 48, 49)

Although the High School reopened after being closed for one week, it is the hearing examiner's determination based on the testimony of several witnesses, all related in some way to the administration of the High School, that racial tensions among students, and between students and some teachers, continued throughout the 1968-69 school year and into the 1969-70 school year.

On February 20, 1970, the principal of the High School released a bulletin called, "PHS PRINCIPAL OUTLINES PARENT AND PUPIL RESPONSIBILITIES," which is reproduced in part as follows and which gives further evidence of the tense atmosphere in the school and the community:

> "Charles Bauman, Principal of Plainfield High School said today that on Monday of this week, our school administration distributed to every pupil in the High School a three-page document that included excerpts from the New Jersey State Laws, and the regulations of the Plainfield High School relating to discipline and other procedures of the school. This message, today, is for the parents of our High School students, to tell you about this, and to say additionally that on Monday these regulations were read to the entire student body. Many of these regulations are not new, but in view of the recent disruptions at the High School we should all be aware of the proper conduct we expect.
>
> "My purpose today is to impress upon the parents of the children in this community our concern for the welfare of your children, already expressed by both our Board of Education and our Superintendent of Schools, Mr. Carpenter. I also call upon you for your individual

cooperation both with your children and with the school administration to share our concern and also to impress upon the students attending not only the High School, but all public schools, the need to observe the regulations that are intended primarily for their own personal welfare.

"Mr. Carpenter, Superintendent of Schools, has already made a statement about searching the school lockers for narcotics, paraphernalia and weapons. Appropriate action will be taken by him in the event that such items are found. We have been searching the lockers in the school, and we have found nothing of this nature so far. *We really did not expect to find very much after the inspection policy was announced.* We hope that by forcing those who have been reported to have had such items with them, or secreted within the building, to take them out of the building and away from the school premises we will have a cleaner, safer environment for the majority of the students. We know perfectly well we will not have solved the basic problem, but we know equally well that we would not have had the problem to begin with if we were not sharing what is a large social problem. We are trying to instill respect for the educational process in the young people in our community, who will soon be in your positions when they become adults and will have to assume responsibilities. Respect is not a part-time thing, it is part of a basic attitude. I hope that you, as parents, will work with us when your children are home with you.***"

The hearing examiner opines that the brief history as outlined, *supra*, is necessary for a better understanding of the actions of all of the principals involved in the case *sub judice*, and will shed some light on some of the actions, testimony and documents to be discussed hereinafter in greater detail.

The Board held its regular meeting on July 21, 1970, and "*** by a roll call vote of six to zero, one member absent, did vote to accept the recommendation of the School Committee to withhold the petitioner's salary adjustment increment for the school year 1970-71 ***."

The Board "*** asserts that the withholding of petitioner's salary adjustment increment for the school year 1970-71 was a proper exercise of its discretionary authority, as set out in *N.J.S.A.* 18A:29-14 *and in accordance with its own rules* ***." (*Emphasis supplied.*) (Respondent's Answer, p.2) The Board's own rules are embodied, it contends, in Exhibit R-1, p.5, Article IV, which is part of the Agreement between the Plainfield Education Association and the Board for the school year 1970-71, and which reads in pertinent part as follows:

"ARTICLE IV – TEACHERS' RIGHTS

"No teacher shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth but not to binding arbitration.

"Prior notice to appear before the Board or any committee or member thereof concerning any matter which could adversely affect the continuation of that teacher in his office, position or employment or the salary or any increments pertaining thereto, shall be given in writing and shall include the reasons for such meeting or interview.

"A teacher shall be entitled to have a representative of the Association to advise him and represent him at any meeting or interview which might adversely affect his employment status.***"

The Board submitted a Memorandum of Law, a part of which has a bearing on the matter *sub judice* and reads as follows:

"*** Prior to its regular July meeting, respondent Board held on July 15, 1970 (Exh. R-3) a hearing at which petitioner, Rose Franco, was invited to present her side of the controversy and was assisted by representatives from the Plainfield Education Association, the primary bargaining unit for Plainfield Teachers and the New Jersey Education Association. Petitioner refused to respond to the materials in her personnel file *** and was advised to not respond by her representatives.***"

The principal said that he had recommended that petitioner's increment be withheld for the school year 1969-70, but that the Board failed to act then on his recommendation because of a "*** wholesale turnover of central office personnel which apparently resulted in the recommendation never reaching the Board of Education, to the best of my knowledge ***." (Tr. II-192)

In response to questioning, the principal testified further as follows:

"Q. Did you [principal] have the occasion, during your conference with Miss Franco, which you have stated to be 10/13/69, to discuss her relationship with the students in Plainfield High School?

"A. Yes.

"Q. Could you give us the substance of your comments to her, as you remember them?

"A. I felt this was a problem area, Miss Franco's relationship with the students in the high school, and her relationship with them was not a positive one, and that there was a need for improvement ***.

"Q. And what did you base that last statement on? What hard evidence did you base that on?

"A. There was a steady flow of complaints into my office, about Miss Franco. These came from every conceivable direction: students, other teachers, security guards, administrators, and –

"Q. Did – excuse me.

"A. Yes. It was this situation which, to me, indicated there was a need for improvement.

"Q. Any may I ask you what Miss Franco's reaction to these statements of yours, regarding improvement, what was her reaction?

"A. The conferences that I had with Miss Franco, I don't believe that at any time she really accepted the notion that there was a need for improvements in this respect. She indicated to me that she was being persecuted; that people were out after her; that we wanted to get rid of her, and again, really, did not respond to the conferences in a constructive way, in my opinion. (Tr. II-201, 202)

"Q. Mr. Bauman, in your professional opinion, based on that year, '69-'70, did you come to any conclusion with reference to Miss Franco, in relation to the racial tensions existing in the high school?

"A. I believe that the attitude of Miss Franco, in my judgment, was a contributing factor to things in the school.

"Q. And further relying on your judgment as the Building Principal, would you say that Miss Franco had difficulty relating to all students, or just a certain segment of students?

"A. I would say she had difficulty relating with both black and white students. I would say predominance of complaints about Miss Franco from students came from black students, but also from white students." (Tr. II-235)

He said also that "*** I felt that she was rigid, and inflexible, and unbending, and insensitive, and demanding, and I had hoped that this area would show improvement.***" (Tr. II-234, 235)

The principal also testified that other school administrators had submitted written reports with reference to petitioner's "poor judgment" on specific occasions. (R-4, pp. 6,9)

All of the individual items of complaint submitted into evidence by the Board against petitioner, are too numerous to consider in detail, but they do establish a definite pattern showing that the school administration was not satisfied with Miss Franco's performance, particularly with respect to her interpersonal relations with some students and, in some cases, with staff members. The principal's evaluation of petitioner (R-19) reads as follows:

"Copies of all of the materials noted above were given to you prior to the conference, and additional copies have been placed in your personnel file

where you may inspect them as well as other contents of the file at any time provided such a request is made to me beforehand.

"My conclusions subsequent to our conference are much the same as those of the previous conferences we have held. There is a continuing concern on the part of the administration about the methodology employed by you regarding interpersonal relations between yourself and students in the high school. It is my judgment that the reports discussed today substantiate this concern on the part of students, other staff members, and central office administrative personnel.

"I again suggest, as I have in former conferences, that you make a sincere effort to develop better relations between yourself and students with whom you come in contact, whether in the classroom or other areas of the school. In addition to the normal teacher-student relationship, it would be generally beneficial if you would seek what might be called a "person-to-person" relationship with some of our students as a means of lessening the sense of antagonism which has existed for some time.***"

The Board President testified that the Board convened specifically on July 15, 1970, to hear petitioner state her side of the matter under consideration because the Superintendent of Schools had recommended the withholding of her increment. At that meeting, he testified further, she was asked to respond to some specific items in her administrative file, and she refused on the basis that the persons making the charges against her were not present at the meeting. (Tr. I - 82, 83, 84, 85)

The Board President testified additionally that one of the Board members felt that the charges against petitioner were sufficiently grave that, if true, they would warrant her dismissal. However, he [the president] objected to a tenure hearing on the basis that such a "***hearing could result in a decision to terminate the employment of *** Miss Franco, or not to terminate. I was much more concerned with our taking the action which would improve her performance. If we were to take these actions, give her adequate notice of our dissatisfaction and then, had she failed to improve, *** I would support a tenure hearing. I felt that a tenure hearing was premature.***" (Tr. I-94)

The Superintendent of Schools testified that he was appointed to that position on December 16, 1970, and that he became further aware of the recommendation, made by the High School principal and assistant superintendent, to withhold petitioner's increment during the spring of 1970. (R-9) As a result of this recommendation, he testified, he asked for a historical folder on petitioner and evidence to support their recommendation. (Tr. II-157) Thereafter, he conferred with the principal, and concluded that the recommendation was just and would be carried out.

Petitioner denies that she has had poor interpersonal relations with students and staff. She testified that the principal was prejudiced against her, and that he encouraged people to write letters against her. (Tr. IV-445)

Pertinent portions of petitioner's testimony are reproduced here for the purpose of clarifying her position with respect to some of the specific charges resulting in the denial of her salary increment:

"Q. Miss Franco, in R-14 you make statements about certain troublemakers that were referred to in [J.B.'s] letter.

"A. Yes.

"Q. Were those troublemakers in your classroom?

"A. No, they were just in homeroom.

"Q. Well, maybe I don't understand the difference between classroom, and homeroom.

"A. Well, a homeroom is the place to which the students report the first thing in the morning, and that is the place from which attendance is taken. We have certain functions, supposedly to salute the flag, and in the good old days to read the Bible, and say the Lord's Prayer, and then the announcement (sic) for the day are given while we are in homeroom, and then we go to assembly, as a homeroom unit. We do not teach, necessarily, these students. We might, and we might not.

"Q. Do the students report back to homeroom during the day?

"A. Ordinarily not, but like if we have something to do like certain forms to collect, then they report back, but generally speaking, they did not.

"Q. Well now, if in your homeroom, did you have these troublemakers who wanted to wreck the homeroom's atmosphere?

"A. Yes, I think I did.

"Q. Did you have some people who did not salute the American Flag?

"A. Yes, I did –

"Q. And do you still consider this subversive, as you stated in your letter which is marked R-14 in evidence?

"A. Yes, I still do, Mr. King.

"Q. Thank you. Are you aware that those students who are not supposed to salute the American Flag by reason of religious convictions are permitted to do so?

"A. I am aware of it, now. I am also aware of the fact that the law says that they must at least stand, and be polite, and some of those students are not that.

"Q. Is it your testimony that Mr. Malt is also prejudiced against you?

"A. I can't put myself in Mr. Malt's shoes, Mr. King. I will say, if you want me to elaborate, that Mr. Malt and I have been quite good friends. I have been to Mr. Malt's house, and we have been very good friends. So, I would say that no, Mr. Malt would not be prejudiced against me. However, when Mr. Malt is Vice-Principal, and the Principal asks him to do something like write a letter against me, I think if it came to my friendship and doing what the Principal told him to do, I think he would do what that Principal told him to do, and not maybe what he felt.

"Q. Is it your testimony, then, that these letters are as a result of Mr. Bauman's telling these various people to write letters against you, and these aren't true?

"A. Mr. King –

"Q. Is that your testimony?

"A. Mr. King, I am saying – and Mr. Bauman said it under oath – that he did ask all these people to write letters –

"Q. To write letters against you?

"A. Yes, Mr. King.

"Q. You are quite sure that that is Mr. Bauman's testimony –

"A. Mr. Bauman – Mr. Bauman said he asked these people to write letters.

"Q. Oh, you changed it now. It is not against you.

"A. Well, what are these, except against me, Mr. King. If they were for me, they would never have been brought up in this case, would they? If they were for me, I would have gotten an increase in salary, rather than my salary being – increment being denied.

"Q. Is it your testimony that Mr. Snyder is against you?

"A. It is my testimony that Mr. Snyder gave what I said was just a superficial report. He did not witness what he said in that letter, and he also said that he didn't – he didn't see anybody disturbing my

class, but he says – I also said in my letter that he was so far away, he couldn't have told whether anybody was there.

"And here again, if the Principal asks him to do so, he is going to do it.

"Q. I will repeat my question. My question was, is it your testimony that Mr. Snyder is prejudiced against you? I'd like a yes or no answer.

"A. Mr. King, I cannot put myself in Mr. Snyder's shoes. (Tr. IV-443,444, 445, 446)

"Q. All right; I would like to direct your attention to a letter dated 9/4/69, on Page 6 of R-4, and the second paragraph which reads: I will expect this, this year, that in your efforts toward improvement, you attempt to develop a more flexible, positive relationship with our students; that you exert greater self-control in conferences, where constructive criticism is offered; that you evaluate your thoughts carefully before making statements of poor judgment which needlessly antagonize students, and that you freely avail yourself of advice from your Department Head, and the administrative staff. Did you receive that letter?

"A. *** I received the letter.

"Q. Did you make efforts to follow those directions?

"A. I don't believe that these are specific directions, and it says, here, to freely avail yourself of advice from your Department Head. I believe that it was evidenced from Miss Horn's statement, this morning, that I did avail myself of advice. I think that was the one thing that has been brought before this council.

"Q. Is it your testimony that those two letters that I have written – that I have read to you excerpts from are part of the harassment made against you by the school authorities?

"A. I believe it is. Yes.

"Q. Thank you. Miss Franco, I'd like to now have you turn your attention to the July 15th meeting of the Board of Education, at which you appeared. Did anyone else appear with you, at that particular meeting?

"A. From the P.E.A., Mrs. Ann Whitford, appeared, and from the N.J.E.A., Mr. Parise appeared.

"Q. Now prior to July 15th, 1970, did you, or any member of the P.E.A. who were representing you, did they make any specific requests to

the Board of Education with reference to how this meeting should be conducted?

"A. Well, I know I didn't make any specific requests. I don't know whether the other members did, either; whether the other people did. (Tr. IV – 458-459, 460)

"Q. Is it your testimony, then, that the Board has been hiding things from you, in your file?

"A. I am afraid so, Mr. King, because as I said before, I was not given a copy of R-4. I know I didn't see that document regarding Mrs. Kamp before these particular hearings started, and not in my file, that I was allowed to see, was there anything about Mrs. Kamp's alleged report about me, and I asked Mr. Malt if I might see my file, and he looked through it as well, and he said that there was nothing in my file about Mrs. Kamp; that she, herself, had written that, that Mr. Bauman saw fit to put that in, but it is in no other – it is not available any other place.

"Q. Have you had any conversations with Mrs. Kamp since May 24, 1971?

"A. Since May?

"Q. Yes.

"A. I have had conversations with Mrs. Kamp, but at that time, I didn't know that she had written this letter.

"Q. Isn't it true that you made threats against Mrs. Kamp, both in the Teachers' Room, in the High School, plus in the cafeteria, after there was a possibility of her testifying against you on the day of the first hearing?

"A. Mr. King, shall I really tell you the truth?

"Q. I have asked you a question.

"A. I'll tell you what I did, if you want, and it wasn't – it was after, that I found out what Mrs. Kamp did, and all I did, in the Teachers' Room and in the Lunch Room was to read what she had written about me.

"I made no threats. Frankly, I had wished Mrs. Kamp had testified. Why is it that she is able to write these things, or to say these things, and then be unwilling to testify; just because she is a member of my department? Well, she was a member of my department then; wasn't she?

"Q. It's also quite possible that you made threats against her, and she was reluctant to testify as a result of the threats; isn't that possible?

"A. What kind of a threat could I have made? I am not a valuable person.

"Q. You made no threats that you would get her the way they are getting you?

"A. I did not make any threats. Mrs. Kamp tells half truths; all I did – I will repeat – in the Teachers' Room, and in the Lunch Room was just to read what she had written. (Tr. IV – 463, 464)

"Q. Is it your testimony that Mr. Carpenter [Superintendent of Schools] will support Mr. Bauman [H.S. Principal] in anything he says against you?

"A. It is. That is my contention.

"Q. That is your testimony?

"A. Yes." (Tr. IV – 465)

To support her position, petitioner submitted two letters from former students who felt she was a great teacher. (P-10A, B) Petitioner also criticized the Board, claiming that all the documents introduced in evidence were not in her personnel file when she reviewed it. A witness called on petitioner's behalf, who served as petitioner's department head, testified that petitioner was a good teacher.

The demeanor of the witness, the hesitancy in some of her answers and her testimony under cross-examination, leads the hearing examiner to opine that petitioner did have more trouble with students than did other teachers in her department. (Tr. IV - 388-395)

Petitioner, citing several Commissioner's decisions alleges, not only that the Board is without authority to withhold her salary increment, but also that even considering that the Board could withhold her increment, such action was taken illegally.

Point II of petitioner's Memorandum of Law reads as follows:

"THE PARTICIPATION IN THE VOTE AT THE BOARD'S MEETING ON JULY 21, 1970 TO DEPRIVE MISS FRANCO OF THE INCREMENT, OF A BOARD MEMBER WHO HAD NOT BEEN PRESENT AT THE BOARD MEETING WHICH HAD GRANTED MISS FRANCO A HEARING ON WEDNESDAY, JULY 15, 1970 VITIATED AND NULLIFIED THE VOTE OF JULY 21, 1970."

However, the Board's Memorandum of Law, POINT ONE, reads as follows:

> "THIS BOARD OF EDUCATION HAS CLEAR AUTHORITY TO DISCIPLINE A TENURE TEACHER BY WITHHOLDING A SALARY INCREMENT BY REASON OF ITS EMPLOYMENT CONTRACT WITH THE PLAINFIELD EDUCATION ASSOCIATION."

Petitioner argues that of the six of the Board's seven members, who were present and who voted unanimously to withhold her increment on July 21, 1970, one member was not present at the hearing held for petitioner of July 15, 1970; therefore, she avers, his participation in the decision resulting in the withholding of her increment vitiated and nullified the vote of July 21, 1970. (Respondent's Memorandum of Law, pp. 6-10)

The Board does not deny that one of its members, who was not present at the July 15, 1970, hearing held for petitioner, voted at the July 20, 1970, meeting, but it avers that petitioner's record was submitted to the member in question, and that he had the advantage of the report made by the Superintendent of Schools on July 20, 1970, prior to the meeting. His recollection of the Superintendent's report of that meeting on July 15, 1970, is that nothing happened at the meeting. (Tr. III – pp. 318-327) The record indicates that petitioner, in fact, did not answer questions posed to her by the Board. (Tr. I - 81, 82, 83, 84)

Point III of petitioner's Memorandum of Law reads as follows:

> "THE AGREEMENT BETWEEN THE BOARD AND THE EDUCATION ASSOCIATION IMPOSED UPON THE BOARD THE DUTY, IF IT DID NOT ALREADY EXIST, OF GRANTING A TEACHER A QUASI-JUDICIAL HEARING."

Petitioner avers that prior to any determination by the Board to withhold her increment, she is entitled to an adversary-type hearing. Petitioner's Memorandum of Law states, at pp. 11 and 12, the following:

> "*** It is clear, we submit, that the Board was required to grant Miss Franco a quasi-judicial hearing which meant including an opportunity to confront and cross-examine any supervisor who reported that she had shortcomings in her performance, if the Board was going to rely upon such report in reaching a conclusion. It is clear from the Exhibits of the Board meetings, particularly the meeting of July 15, 1970 (Exh. R-3), that no such confrontation and no such right to cross-examine was granted Miss Franco.***"

* * * *

The Commissioner has reviewed the report, findings and determinations of the hearing examiner.

With respect to Point I of respondent's Memorandum of Law, the Commissioner determines that the authority of a board to withhold a teacher's increment is well established. *Kopera v. West Orange Board of Education*, 1958-59 *S.L.D.* 96, affirmed State Board of Education 98, remanded to Commissioner of Education, 60 *N.J.Super.* 288 (*App. Div.* 1960), decided by the Commissioner of Education, 1960-61 *S.L.D.* 57, affirmed by the New Jersey Superior Court, Appellate Division January 10, 1963; *Van Etten & Struble v. Board of Education of the Township of Frankford, Sussex County*, decided by the Commissioner March 17, 1971; *In re Fulcomer*, 93 *N.J. Super.* 404 (*App. Div.* 1967); *Durkin et al v. Board of Education of the City of Englewood*, decided by the Commissioner December 27, 1971.

Petitioner cites cases wherein the Commissioner has directed boards to reimburse teachers for improperly-withheld increments. It is axiomatic that if boards are required to pay teachers for increments, which have been withheld improperly, they also have the authority to withhold increments if lawfully and properly done. *Kopera* and *Durkin, supra.*

Point I of petitioner's Memorandum of Law, which states that the Board did not have the authority to withhold petitioner's increment, is, therefore, without merit and is dismissed.

Point II of petitioner's Memorandum of Law challenges the validity of the Board's vote on July 21, 1970, on the basis that one member who voted was not present at the "hearing" on July 15, 1970.

Petitioner does not indicate that there was any relevant evidence brought to the attention of members of the Board, which was not made available to the Board member in question prior to his voting to withhold petitioner's increment.

The hearing examiner's report demonstrates that petitioner refused to say anything with respect to the charges against her at the July 15, 1970, meeting; therefore, this Board member would have gained no further information even if he had been present, and the result would have been the same even without the one vote.

Point II of petitioner's Memorandum of Law is, therefore, dismissed.

Point III in petitioner's Memorandum of Law claims that petitioner is entitled to an adversary-type hearing prior to the withholding of an increment, and cites *Tibbs v. Board of Education, Franklin Township*, decided by the New Jersey Supreme Court December 6, 1971, affirming 114 *N.J. Super.* 287 (*App. Div.* 1971). The Commissioner notes that *Tibbs, supra*, involved the question of confrontation of student witnesses by Tibbs, another student, who was expelled from school by the Franklin Township Board of Education. It is not relevant to the case *sub judice* and the claim is, therefore, dismissed.

The evidence in the instant matter indicates that petitioner was afforded a hearing with representatives of her choosing and that she decided not to answer

questions on advice of her representative, thereby refusing to explain her position to the Board and to defend herself.

Having determined, therefore, that the Board had the authority to withhold petitioner's increment and that the "Agreement" of the Plainfield Board of Education with its teachers provided for the withholding of a teacher's increment for "just cause," the Commissioner further determines that the Board's action in withholding petitioner's increment was a proper exercise of its discretionary authority.

The petitioner is dismissed.

COMMISSIONER OF EDUCATION

June 20, 1972

Pending before State Board of Education

Joan Sherman,

Petitioner,

v.

Malcolm Conner, individually and as Acting Superintendent of the Borough of Spotswood, and the Board of Education of the Borough of Spotswood, Middlesex County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondent Borough of Spotswood Board of Education, Golden and Shore (Philip H. Shore, Esq., of Counsel)

For the Respondent Malcolm Conner, Abraham J. Zager, Esq.

Petitioner, a non-tenure Kindergarten teacher, alleges that her employment with the Board of Education of the Borough of Spotswood, hereinafter "Board," was improperly terminated under duress and coercion by the Board and the acting Superintendent of Schools, hereinafter "Superintendent." Respondents deny that petitioner was improperly terminated and aver that she resigned her position. A hearing in this matter was held on January 26, 1972, and February 9, 1972, in the office of the Middlesex County Superintendent of Schools, New Brunswick, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner was employed by the Board on "a 'call' basis as a substitute [teacher] and bedside instructor" for the period December 1967 through June 1968. (Respondent Board of Education's Answer, No. 1) No evidence was educed by either party that this employment was contractual, and the hearing examiner concludes, therefore, that petitioner was not under contract during the aforementioned period. (Tr. I-5) Petitioner avers that she was thereafter employed under contracts with the Board for the school years 1968-69, 1969-70 and 1970-71. The Board admits that petitioner was employed under contract as indicated; however, it avers that she resigned her position, effective October 20, 1970.

Petitioner avers that:

"***8. Respondents have advised Petitioner that she was and is a non-tenure school teacher under R.S. 18A:28-5, and have refused and failed to advise her of the reasons for her discharge, or to give her any explanation for same, or to provide any hearing procedure whereby the Petitioner will receive notice of the reasons for said discharge with an opportunity to answer and respond to same.

"9. Respondents base their actions described hereinabove upon their contention that since Petitioner is allegedly a non-tenure teacher, she can be discharged at will, and need not be given any reasons or explanation for same, or any procedure for hearing related thereto.

"10. Petitioner alleges, upon information and belief, that said discharge is based, at least in part, on the fact that she is of the Jewish faith and is therefore illegal and improper, and is in violation of the Fourteenth Amendment and Fifth Amendment to the U.S. Constitution; of Article I, Section 5 of the New Jersey Constitution, of the New Jersey Law against Discrimination, R.S. 10:5-1 et seq., and of 42 U.S.C.A. Section 1983. (sic)

"11. Petitioner alleges that said discharge is discriminatory, arbitrary, capricious, unreasonable and in bad faith, based on bias and personal animosity, and without foundation in fact, contrary to Federal and State Law cited herein above, and denies her procedural due process. ***" (Petition of Appeal)

Petitioner avers that on the afternoon of October 20, 1970, she reported to the office of the Superintendent of Schools, as directed by her building principal. She assumed that her pending conference with the Superintendent was related to the recent observation of her classroom teaching by him. For that reason, she took her plan book to the conference for whatever purpose it might serve. As she entered the Superintendent's office, she was told by him that his secretary would transcribe their conversation which was about to take place. The following document (P-4) is the transcription of that meeting:

"CONFERENCE – Tuesday, October 20, 1970

"MR. CONNER: I would like Mrs. Beckman to sit in here and record any conversation that takes place.

"MRS. SHERMAN: Is this the usual procedure?

"MR. CONNER: It is in cases such as this. What I have to do today is inform you that I am going to terminate your contract, under the conditions outlined in this teaching contract.

"MRS. SHERMAN: Why? What is the reason?

"MR. CONNER: According to the contract either party can terminate this contract by giving the other party thirty days notice. You can resign effective today, and it will go in to the record of your termination, so that if you go to another school, we can word it so that it will not be detrimental. Or you can have the Board of Education terminate your contract.

"MRS. SHERMAN: You don't want me to come back tomorrow?

"MR. CONNOR: No.

"MRS. SHERMAN: May I ask if Mr. Dunigan knows about this?

"MR. CONNOR: Yes, he does. I discussed it with him.

"MRS. SHERMAN: And he is in agreement?

"MR. CONNOR: I made the decision.

"MRS. SHERMAN: And you still won't give me a reason?

"MR. CONNER: I don't have to give you a reason. The courts uphold .

"MRS. SHERMAN: The courts?!!

"MR. CONNER: (Penciled in were the words, " read the statute?") [at which time the superintendent read a prepared document which was not recorded by his secretary] (Hearing examiner's note)

"MR. CONNER: Your contract terminates as of October 21st.

"MRS. SHERMAN: And my salary?

"MR. CONNER: You will be paid for the thirty days from October 20 to November 20th. Do you wish to be terminated?

"MRS. SHERMAN: I don't know what I want.

"MR. CONNER: You have the two alternatives. It is up to you to select one of them.

"MRS. SHERMAN: You mean I don't have five minutes to go out and consult with Council? (sic)

"MR. CONNER: With whom do you wish to speak?

"MRS. SHERMAN: I wish to speak with Mrs. Lennon.

"MR. CONNER: You can speak to anyone you want, but I would like you to make a decision this afternoon, whether to resign or have your contract terminated.

"MRS. SHERMAN: You can put me down at this point as a resignation.

"MR. CONNER: No. You have to put it down in writing. In this way, when somebody comes back for a reference, we can word it so that it will not be detrimental.

"MRS. SHERMAN: Suppose you give me the letter you want me to sign.

"MR. CONNER: I have no letter. I want you to write it (hands her pen and paper) No. Address the letter of resignation to me, date it and sign it. I will sign this letter accepting your resignation.

"(signed letter, gave to Mrs. Sherman, who left the room)"

The resignation letter (P-1), referred to in (P-4), *supra*, reads as follows:

"To Mr. Malcolm Conner –

October 20th, 1970

I will resign effective immediately

Joan S. Sherman"

Petitioner avers, also, that:

"***6. On or about October 20, 1970, Respondent Conner, as a result of certain acts of duress and coercion committed by him to and upon the Petitioner herein, induced and compelled the Petitioner to sign a letter of resignation.

"Said resignation, by virtue of said duress and coercion, constituted in actual fact, a discharge of the Petitioner and a termination of the contract of employment attached hereto, without the thirty-days' notice set forth therein.

"7. Respondent Board of Education has authorized and sanctioned the discharge described hereinabove.

"8. Respondents have advised Petitioner that she was and is a non-tenure school teacher under *R.S.* 18A:28-5, and have refused and failed to advise her of the reasons for her discharge, or to give her any explanation for same, or to provide any hearing procedure whereby the Petitioner will receive notice of the reasons for said discharge with an opportunity to answer and respond to same.

"9. Respondents base their actions described hereinabove upon their contention that since Petitioner is allegedly a non-tenure teacher, she can be discharged at will, and need not be given any reasons or explanation for same, or any procedure for hearing related thereto. ***" (Petition of Appeal, pp. 2-3)

At the hearing, petitioner testified that she was very upset at her meeting with the Superintendent and did not really know what to do. (Tr. I-31, 32, 36). However, she did write and sign the resignation letter (P-1) and left the Superintendent's office. She then "broke down completely" and started to cry. (Tr. I-43) She passed the room of a fellow teacher who noticed her distraught condition, and he invited her into his room to talk to her. A second teacher was already in the room. Both teachers testified that Mrs. Sherman was crying, and that she was incoherent and could hardly speak. One of the teachers testified further that after "a long time," they were able to get Mrs. Sherman to calm down and explain to them why she was so upset. (Tr. I-129-135)

The Superintendent of Schools had an acceptance letter prepared and typed, anticipating Mrs. Sherman's resignation prior to her entering his office. He testified that he also had a typewritten termination prepared in the event that she did not resign. (Tr. I-211) A pertinent portion of the Superintendent's testimony, which addresses itself to the question of "duress and coercion," is reproduced here as follows:

"A. I told her that I was going to make a transcript of the – I would like to make a transcript; that Mrs. Beckman was going to take the transcript, and I think she said, in these sort of words, Is this the normal procedure, and I said, Yes; in this case it is, and then I told her that the purpose of the conference, today, was I was going to do one of two things. I was going to give her the alternative to one, have the contract terminated, or two, permit her to resign, and we got involved in some conversation, as far as reasons, to her that I did not, at that time have to give reasons, and I had some cases, recent cases, and I quoted from the cases, and I read one area

of the statutes concerning pay, because she was concerned that if she were terminated, what would happen to her pay, and I said that the Board had the option to pick up the thirty day notice, or permit her to stay the thirty days, and I said to her – and then she said to me, may I have five minutes to speak with somebody, and I said, With whom would you liek to speak, and she said, Mrs. Lennon. I said you may speak with anyone you want, and at this point, she got up, and I thought that she was going to go talk with somebody, and to – at this point, I said to her, I am going to make a decision this afternoon, and I wanted to give her the two alternatives. Number one, the termination of contract and number two, her resignation, and then at that point, she says, I wish to resign, and this is where I got up from the desk; I went over, and I – oh, she said, may I resign; she said, I wish to resign, and she said I put you on notice that I resign. I said, No, Mrs. Sherman, you can't give me a verbal resignation; I went and got the pad and pen, and I gave them to her, and she, wrote, 'I wish to resign effective immediately' and I said No, you have to date it, address it to me, and sign it, and this she did. And at this point, I also had a letter saying that her resignation would be accepted, and I signed that, and I gave that to her, and at this point, she left." (Tr. I-169, 170, 171)

The Board denies that petitioner was forced to resign or that her resignation was caused under duress or coercion. The Superintendent's testimony and the documents submitted in evidence are the salient matters offered for adjudication by the Commissioner, and they speak for themselves. The Superintendent's testimony and Exhibit P-4, *supra*, indicate graphically the setting in which petitioner was placed on the afternoon of October 20, 1970.

The Board's defenses are that:

"1. Petitioner's petition fails to state a claim upon which relief may be granted and respondent reserves the right to move to strike for such failure at or before hearing.

"2. Petitioner voluntarily resigned from her position.

"3. Petitioner fraudulently induced the respondent, Board of Education of Borough of Spotswood to enter into a contract of employment with her." (Respondent Board's Answer, p.2)

The hearing examiner notes, however, that the petition herein includes a lengthy prayer for relief, which includes several requests which fall under the purview of the Commissioner of Education. Petitioner pleads for a Commissioner's Order:

"***c. Declaring that the alleged resignation of October 20, 1970, in actual fact constituted a discharge of Petitioner herein.

"d. Ordering and directing that Petitioner is entitled to receive the reasons for her discharge, together with access to and opportunity to see her

personnel records, together with adequate opportunity for hearing concerning same.

"e. Reinstating Petitioner to her position of employment herein.

"f. Damages for all back wages due Petitioner since the aforesaid termination.***"

The Board adduced no testimony, nor did it submit any documents for consideration, to show that "Petitioner fraudulently induced the Board *** to enter into a contract of employment with her." The hearing examiner notes that this defense is asserted as a bare allegation without any corroboration whatsoever. He recommends, therefore, that it be ignored.

Of notable interest is the testimony of petitioner that her tenure was not about to accrue at any time close to the date of her termination on October 20, 1970. (Tr. II-269) The Superintendent testified under cross-examination that there was no reason for the matter to be finalized on the afternoon of October 20, 1971. When petitioner asked the Superintendent why she was being terminated, he said "at this point, [he] was not to give reasons." (Tr. I-200)

The record shows that the entire incident took place in the Superintendent's office in 15 minutes. (Tr. I-190, 191) Although the Superintendent stated that petitioner could speak to anyone she wished after his demanding her resignation or option of being terminated, he made no genuine effort to give her any time to do so. School was over for the day and the teachers' representative was not available. (Tr. I-150) Nor was petitioner given an opportunity to go home to speak to her husband that evening. Petitioner was simply invited into the Superintendent's office at approximately 3:15 p.m. on October 20, 1970, and by 3:30 p.m. the Superintendent had her resignation and had handed her a previously-drafted and signed letter of acceptance. (Tr. I-190, 191)

The hearing examiner notes, also, that petitioner went to her school at the regular time to sign in and work on the morning of October 21, 1970, but was told by the building principal that her room was occupied by another teacher and that she could not stay and teach. (Tr. I-58, 59, 62) On the same evening, October 21, 1970, the Board had its regular meeting, and petitioner's resignation was presented to the Board for action. Apparently, without questions by any member of the Board, the resignation was accepted by a unanimous roll call vote. (R-1)

Petitioner's husband testified that he had called two Board members earlier to protest his wife's being "fired," and his testimony indicates that her termination may have been discussed with the other Board members. (Tr. I-138, 142) However, the testimony of the Board Secretary indicated that none of the Board members were told at the regular meeting on October 21, 1970, that petitioner's husband had called to protest his wife's being "fired".

A determination in her favor by the Commissioner is requested by petitioner based on "duress and coercion." Black's Law Dictionary defines "duress" as:

> "Unlawful constraint exercised upon a man whereby he is forced to do some act that he otherwise would not have done ***."
>
> "Duress consists in any illegal imprisonment, of legal imprisonment used for an illegal purpose, or threats of bodily or other harm, *or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will****." (*Emphasis supplied.*)

Coercion is defined as:

> "Compulsion; constraint ***.
>
> "It may be actual, direct or positive, as where physical force is used to compel act against one's will, or *implied, legal or constructive, as where one party is constrained by subjugation* to other to do what his free will would refuse. ***It may be actual or threatened exercise of power possessed, or supposedly possessed ***."
>
> "Duress and coercion are not synonymous though their meanings often shade into one another ***." (*Emphasis in text.*)

Reproduced here is a portion of the Superintendent's testimony, which the hearing examiner finds applicable to the definitions, *supra:*

> "Q. Now, you did tell her that she could resign effective today, meaning October 20, 1970, or it would go in to her record as a termination; so that if she went to another school, the termination would be in her record; isn't that correct?
>
> "A. Yes, sir.
>
> "Q. Now, what did you mean by if it goes in as a termination, it will be on your record when you go to another school?
>
> "A. It simply means it would go in to the personnel file.
>
> "Q. And it would go in as a discharge?
>
> "A. It would go in stating she was relieved of her – she was asked to leave.
>
> "Q. And weren't you suggesting to her that this might be to her disadvantage?
>
> "A. No.

"Q. What were you suggesting to her, then?

"A. I was suggesting nothing. I was giving the alternatives.

"Q. Weren't you suggesting to her that a discharge was more understandable than a resignation?

"A. I was not suggesting. I was giving her the courtesy of two alternatives.

"Q. Well, why did you tell her, then, that if she did not resign, it would be on her record as a termination, or as a discharge?

"A. I felt it was incumbent upon me to give her the information so that she could make a valid decision.

"Q. And you don't feel that that was suggested to her that it might be undesirable to have that on her record?

"A. I did not suggest.

"Q. Now Mr. Conner, it is true that you're telling her that (sic) she didn't resign that afternoon, that she would be terminated was the first time that you had told her this; isn't that correct?

"A. I don't understand your question.

"Q. Had you ever told her that before, this afternoon of October 20, 1970?

"A. Have I ever told her what?

"Q. That if she did not resign, she would be terminated, or discharged that afternoon?

"A. That was the first time that I called her in, and gave her those two alternatives.

"Q. And it was also the first time you had raised this with her; isn't that correct?

"A. As far as being terminated?

"Q. Yes.

"A. No.

"Q. Is this the first time you gave her this choice?

"A. The two alternatives?

"Q. Yes.

"A. Yes.

"Q. Now, you asked her if she wished to be terminated; is that correct?

"A. Yes.

"Q. And what was her answer?

"A. She said I don't know what I want." (Tr. I-195, 196, 197)

Petitioner contends that she gave her resignation under conditions which the Courts have held to be duress, and that it was therefore a nullity. She cites *Gobac v. Davis*, 62 *N.J. Super.* 148 (*Law Div.* 1960), and the cases reported therein, in support of her contention that the circumstances under which she submitted her resignation created a state of mind in which she was induced to do what she would not otherwise have done, and which she was not bound to do. She emphasizes particularly the following language of the Court in *Gobac*, at page 158, citing *Rubenstein v. Rubenstein*, 20 *N.J.* 359 (1956):

> "*** The act or conduct complained of need not be 'unlawful,' in the technical sense of the term, it suffices if it is 'wrongful in the sense that it is so oppressive under given circumstances as to constrain one to do what his free will would refuse.' ***"

Petitioner also cites *Evaul v. Camden Board of Education*, 35 *N.J.* 244 (1961), in which the Court did not find duress, but did hold that Miss Evaul's:

> "*** submission of her resignation was an impetuous act prompted by her understandably distraught condition. *** Ibid., at page 249

The Court, therefore, ordered her reinstatement in her position on "equitable principles."

The testimony of three teacher representatives convinced the hearing examiner that petitioner was distraught, nervous and upset and that she was crying after she left the Superintendent's office. (Tr. I-129, 135, 152)

Petitioner avers that the Superintendent told her that she would "be paid for the thirty days, from October 20th to November 20th." (Tr. I-120) However, no evidence was educed that petitioner was compensated for the thirty days following her termination.

Petitioner avers finally that she tried to rescind her resignation about a week after she signed it by sending a letter to the Board. (Tr. I-63)

The Board's Business Administrator wrote petitioner on November 3, 1970, as follows:

"Dear Mrs. Sherman:

"This is to advise you that we are in receipt of your certified letter dated October 28, 1970. This letter will be brought to the attention of the Board of Education at the next meeting.

"Sincerely yours,
"Margaret Uhl, Mrs.
"Business Administrator"

However, petitioner avers that she never heard anything about her request from the Board.

* * * *

The Commissioner has read the hearing examiner's report, conclusions and recommendations and is constrained to make several observations.

The matter herein under consideration is a *prima facie* case of a reprehensible action taken against a teacher by the Superintendent and the Board, which lacks any element of fair play or common decency. The Board and the Superintendent rest on their determinations that petitioner, a non-tenure teacher, has no legal right to be given reasons for her termination under the terms of her contract with the Board and that her resignation was voluntary.

Such is not the case. Her employment was involuntarily terminated under duress.

The Courts have held that non-tenure teachers may be terminated for any reason or no reason at all, and that probationary teachers are not entitled to a statement of reasons for their termination.

This principle has been enunciated by the Courts in several cases. In *Zimmerman v. Newark Board of Education*, 38 *N.J.* 65, 70 (1962), the Supreme Court quoted from *People v. Chicago*, 278 *Ill.* 318 116, *N.E.* 158, 160 (1917) to illustrate the "historically prevalent view" as follows:

> "A new contract must be made each year with such teachers as [the board] desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant *for any reason whatever or for no reason at all.****" (*Emphasis supplied.*)

The Court went on to observe that certain statutory limitations, such as illegal discrimination and tenure, have been placed upon the employment powers of boards of education, but:

> "Except as provided by the above limitations or by contract the Board has the right to employ and discharge its employees as it sees fit." *Ibid.* at page 71

However, this interpretation must not be construed so as to thrust aside all of the basic elements of fair play, human decency and respect that are rights of all individuals in our democratic society. It was a wrongful act under the present facts to demand petitioner's resignation from her public employment on such short notice. The testimony presented, *supra*, indicates that time was not an essential factor in bringing about petitioner's termination on October 20, 1970. She would not have gained tenure in a day or a week; therefore, the demand for petitioner's resignation with its option of termination, without giving petitioner a reasonable time to talk the matter over with her family and her representatives, was unreasonable and wrongful.

The significant issue here concerns the manner in which the termination was effected. Petitioner was given a choice between:

(1) resigning without adequate time to consult and become aware of her rights, and

(2) being terminated under conditions which she could only recognize as a threat to any future career in teaching.

There was adequate, unrefuted testimony by several of her fellow teachers that she was emotionally distraught. The Commissioner finds in the circumstances of this resignation such a close parallel to those under which the plantiff in *Gobac v. Davis*, *supra*, submitted his resignation and in *Carolyn R. Hom v. Board of Education of the Upper Freehold Regional School District, Monmouth County*, decided by the Commissioner July 16, 1970, as to bring the present matter clearly within the definition of duress enunciated by the Court in the *Gobac* case, as quoted by the hearing examiner, *supra*, and as adduced at the hearing.

Nor can petitioner's act be considered in any way a *voluntary* waiver of her rights, or an "impetuous act" of her own, as in *Evaul*, *supra*, so as to deny her rights to employment and compensation to which she would have been entitled under the terms of her contract.

The Commissioner finds and determines that petitioner's resignation on October 20, 1970, was given under duress and coercion and that her employment was illegally terminated by the Board on October 21, 1970.

In *Hom*, *supra*, the Commissioner determined that petitioner had resigned under duress and that the resignation did "not constitute a waiver of her contractual right to terminate her employment on 60 days' notice of her intention so to terminate." The Commissioner directed that Board "to compensate petitioner for 60 days at the rate provided in her contract of employment."

However, in the instant matter, petitioner's contract provided for a thirty-day termination clause, and petitioner is entitled to compensation by the Board for the thirty-day period subsequent to her termination on October 20, 1970.

Despite the Superintendent's callous treatment in causing petitioner to resign under duress, the Board will have met its statutory obligation under the terms of petitioner's contract when it pays her for the thirty-day period from October 20, 1970, to November 20, 1970. The Commissioner directs the Board, therefore, to pay petitioner for the thirty-day period from October 20, 1970, to November 20, 1970, if it has not already done so.

In petitioner's original appeal, she charged as follows:

> "***10. Petitioner alleges, upon information and belief, that said discharge is based, at least in part, on the fact that she is of the Jewish faith, and is therefore illegal and improper, and is in violation of the Fourteenth Amendment to the U.S. Constitution; of Article I, Section 5 of the New Jersey Constitution; of the New Jersey Law against Discrimination, R.S. 10:5-1 et seq., and of 42 U.S.C.A. Section 1983.
>
> "11. Petitioner alleges that said discharge is discriminatory, arbitrary, capricious, unreasonable and in bad faith, based on bias and personal animosity, and without foundation in fact, contrary to Federal and State Law cited hereinabove, and denies her procedural due process.***"

At the conference of counsel on October 31, 1971, counsel agreed that if the Commissioner decided in favor of the Board, all of the other issues raised in the pleadings would be rendered moot; therefore, although the charges, *supra*, were not considered or made a part of this decision, the conference agreements of October 31, 1971, specifically made them a necessary adjunct to the continuance of this matter, which now has been determined to meet condition "C" of the conference agreement which reads as follows:

> "***C. If the Commissioner decided that petitioner resigned under duress and coercion he will order depositions to be taken and interrogatories answered as requested by counsel for Petitioner in his letter to Mr. Abraham Zager dated September 16, 1971, and will retain jurisdiction in the matter.***"

However, the record shows that petitioner has made no offer of proof that the Board has discriminated against her, nor has she shown that there exists here a *prima facie* case of religious discrimination. The agreements reached between counsel and the hearing examiner go beyond the scope of this office to entertain further litigation without any offer of proof whatsoever, or the presenting of a *prima facie* case of discrimination against petitioner. Her mere allegations are insufficient to order the agreed-upon interrogatories and depositions.

The Commissioner will allow petitioner, therefore, ten days from the date of receipt of this decision in which to amend her petition of appeal and submit an offer of proof with respect to her allegations, or to show that there existed a *prima facie* case of religious discrimination.

Except for the relief as ordered, *supra*, the petition is otherwise dismissed.

COMMISSIONER OF EDUCATION

June 21, 1972

Pending before State Board of Education

Evelyn Borshadel, Edythe Holland, Carmela Lupi, Bruna Bellotti, Martha Hillel, Norma Kolbak, Lillian O'Brien, Katherine Modero, Marie Dell Colle, Mary Eichamer, Rita King, Kay McEntee, Marie Sperber, Audrey Chesis, Georgianna Cisternino, Nicolina Criscione, Anne Gratale, Theresa Jimmerson, Louise Minck, Sophie Ransier, Winifred Wunschel and Rose Green,

Petitioners,

v.

Board of Education of the Township of North Bergen, Hudson County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For Petitioners, Friedland & Friedland (David S. Solomon, Esq. of Counsel)

For Respondent, Joseph L. Freiman, Esq.

Petitioners, twenty-two members of the clerical and secretarial staff employed by the Board of Education of the School District of North Bergen, Hudson County, "hereinafter Board," allege that the Board's action in deducting the amount of one day's wages from their respective monthly salaries, as the result of their absence from duty on June 12, 1970, for reasons of personal illness was arbitrary, unreasonable and unlawful. The Board answers that its action in making the aforementioned deductions from petitioners' salaries was proper, in that petitioners' absence was for the purpose of conducting an illegal work stoppage.

Petitioners pray for relief in the form of an order of the Commissioner of Education directing the Board to reimburse them for the salary deductions made as the result of their absence on June 12, 1970.

The Board filed a Motion for Dismissal of the petition of appeal on the grounds that the issue is *res judicata*. Both parties filed Briefs in support of their arguments, and both agree that the matter will proceed to plenary hearing if not decided as *res judicata* by the Commissioner.

The genesis of this controversy actually precedes the incident which occurred on June 12, 1970, wherein twenty-four of a total of twenty-six secretarial and clerical employees reported their respective intentions to be absent from employment that day for reasons of personal illness.

Petitioners had secured, from the Board, recognition as an appropriate employee unit for the purpose of conducting collective negotiations with the Board concerning salary and other benefits, in accordance with *N.J.S.A.* 34:13A-1 *et seq.* The Board states that negotiations were initiated with this unit in the latter part of 1969 concerning certain provisions for the 1970-71 and 1971-72 school years. By June 1970, the instruments of both mediation and fact-finding had been invoked by both parties.

On June 12, 1970, twenty-four of the School District's twenty-six secretarial and clerical employees, assigned to the Board's High School, six elementary schools and administrative office telephoned notification to their various superiors that each would be absent that day for reasons of personal illness.

The Board immediately instituted suit against petitioners in the Chancery Division of the New Jersey Superior Court, Hudson County. The verified complaint, affidavit of the Superintendent of Schools and order to show cause were filed on June 12, 1970. The complaint requested injunctive relief based upon the facts stated therein. The order to show cause recited reasons for the need for preliminary injunctive relief, and such relief was granted. On the following day, June 13, 1970, petitioners returned to their duties. The final judgment was entered on July 1, 1970, and was consented to by petitioners. This final judgment states, *inter alia*, the following:

> "*** [petitioners] are hereby permanently enjoined and restrained from conducting a work stoppage or strike or from conducting, participating in, inciting, inducing or engaging in any work stoppage, strike, slowdown, boycott or impediment to work, or from ceasing work or in any manner whatsoever from interfering with the ordinary conduct of the school system conducted by the plaintiff [Board].***"

Because of the broad implications of the issue controverted herein, the Commissioner will review the applicable principles of law for the benefit of all local boards of education.

In the case of *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.*, 96 *N.J. Super.* 371 *(Chanc. Div.* 1967), Judge Lane set forth the application of the equitable remedy of injunction, applied in that case to the employees of the Board of Education, by citing 4 *Pomeroy's Equity Jurisprudence,* §1338, pp. 935-936, as follows, at pp. 390-391:

> "*** 'In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong,

there is one fundamental principle of the utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side. The general principle may be stated as follows: Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited*, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise.* This jurisdiction of equity to prevent the commission of wrong is, however, modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not interfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction.' ***"

Judge Lane concluded, at p. 391, as follows:

"*** It can, therefore, be said that the irreparable injury that must be shown means no more than an injury that is material for which pecuniary damages would not afford adequate compensation.***"

This cited case was appealed to the New Jersey Supreme Court. *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.*, 53 *N.J.* 29 (1968) Chief Justice Weintraub, writing for the Court, stated at pp. 36-38, *inter alia*, that:

"***It has long been the rule in our State that public employees may not strike.*** And we have rejected the notion that public employees may resort to strike because they think their cause is just or in the public good. *** Defendants deny there was a 'strike.' They seek to distinguish the usual concerted refusal to work from what transpired here. *** But the subject is the public service, and the distinctions defendants advance are irrelevant to it, however arguable they may be in the context of private employment. Unlike the private employer, a public agency may not retire. The public demand for services which makes illegal a strike against government inveighs against any other concerted action designed to deny government the necessary manpower, whether by terminating existing employments in any mode or by obstructing access to the labor market. Government may not be brought to a halt. So our criminal statute, *N.J.S.* 2A:98-1, provides in simple but pervasive terms that any two or more

persons who conspire 'to commit any act' for the 'obstruction of *** the due administration of the laws' are guilty of a misdemeanor."

"Hence, although the right of an individual to resign or to refuse public employment is undeniable, yet two or more may not agree to follow a common course to the end that an agency of government shall be unable to function.***"

The Chief Justice noted that the action taken by the defendants was not termed a strike. He stated, at pp. 39,40, the following:

"*** That the conventional terminology of a 'strike' nowhere appears is of no moment. The substance of a situation and not its shape must control. A doctrine designed to protect the public interest is equal to any demand upon it. It does not yield to guise or ingenuity.***"

In regard to the applicable doctrine of equity, Chief Justice Weintraub stated, at p. 43:

"*** with respect to the rule that equity will act only if the injury is irreparable, the maxim does not mean that equity will withhold its hand until a threatened harm is done. It means only that equity will leave the parties to a remedy at law if money damages will adequately compensate for the wrong.***"

In the instant matter, the precise issue before the Commissioner is whether petitioners' cause of action; namely, the deduction of the amount of one day's wages from their respective salaries, was finally adjudicated by an adverse judgment rendered by a court of competent jurisdiction, thereby precluding petitioners from an appeal to the Commissioner under *N.J.S.A.* 18A:6-9. It is conceded that the deduction of one day's compensation from petitioners by the Board did, in fact, take place at a point in time following petitioners' absence from duty on June 12, 1970.

In the instant matter, the Board avers that the final judgment of the Superior Court, Chancery Division, adjudicated the fact that petitioners had engaged in an illegal work stoppage, *ante*, and that this final judgment, therefore, bars the relitigation of the issue herein by application of the doctrine of *res judicata.*

The broad doctrine of *res judicata* embodies two main rules. The first is that a final judgment of a court of competent jurisdiction on the merits concludes the rights of the parties and privies, and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. Also, any right, fact or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a final judgment is rendered on the merits is conclusively settled and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose or subject matter of the two suits is the same. 50

C.J.S., Judgments, 592. The sum and substance of the whole doctrine is that a matter, once judicially decided, is finally decided. *Black's Law Dictionary*, p. 1470. To be applicable, it requires identity in thing sued for as well as identity of cause of action, of persons and parties to action, and of quality in persons for or against whom claim is made. *Freudenrick v. Mayor and Council of Borough of Fairview*, 114 *N.J.L.* 292, 293 (*E. & A* 1935); *Black's Law Dictionary*, p. 1470; 50 *C.J.S., Judgments*, § 598. This doctrine is grounded on the two maxims that it is in the interest of the state that there should be an end to litigation, and that no one should be vexed twice for the same cause of action. 50 *C.J.S., Judgments*, § 592

Petitioners opine that their cause of action; namely, the action of the Board in making a deduction from their respective salaries, differs substantially from that litigated and adjudicated by the final judgment, *supra*. Both parties cite *Sarson v. Maccia*, 90 *N.J. Eq.* 133 (*Ch.* 1919) wherein the Court stated the following at page 436:

> "***the record of the case exhibits beyond question all the essential elements of a plea of *res judicata* -- the identity of the parties, the cause of action, and the subject matter. The only difference between the suit in equity, decided, and the action at law, pending, is the form, the form of the remedy and the nature of the relief. *** This difference does not prevent the decree from operating in estoppel. 23 *Cyc.* 1116, 1169 *** It is enough if the matter was triable in the first suit, and that *it was actually litigated and adjudicated.* ***" (*Emphasis ours.*)

The case of *Bragg v. King*, 104 *N.J.L.* 4 (Supreme Court 1927) describes the doctrine as follows, at page 6:

> "*** The doctrine of *res judicata*, as defined by our Court of Errors and Appeals, is that the judgment of a court of competent jurisdiction on a question of law or fact, *when litigated and determined*, is, so long as it remains unreversed, conclusive upon the parties and their privies, not only in the suit in which it is pronounced, but in all future litigation between the same parties or their privies, touching upon the same subject matter. *In re Walsh's Estate*, 80 *N.J. Eq.* 565. ***" (*Emphasis ours.*)

A careful scrutiny of the verified complaint, temporary restraining order and final judgment of the Superior Court, *ante*, fails to disclose any indication whatsoever of the cause of action now pleaded by petitioners. Therefore, the Commissioner finds, and so holds, that the Board's contention that this cause of action has been adjudicated is without merit, and the Board's reliance on the defense of *res judicata* is groundless.

The next item to be considered by the Commissioner is petitioners' contention that the doctrine of collateral estoppel or estoppel by judgment or verdict does not preclude adjudication of their cause of action in the instant matter by the Commissioner.

In its brief, the Board cites *Public Service Electric and Gas Co. v. Roy M. Waldroup et al.*, 38 *N.J. Super.* 419 (*App. Div.* 1955), a case which involves both a consent judgment and collateral estoppel. The Court defined these legal principles as follows, at pp. 425, 426:

> "***It is a fundamental rule that facts and questions in issue in an action and there admitted or judicially determined are conclusively settled by a judgment entered therein, and such facts or questions become *res judicata* in all subsequent litigation between the same parties and their privies. *Hancock v. Singer Mfg. Co.*, 62 *N.J.L.* 289 (*E. & A.* 1898); *Middlesex Concrete, etc., Corp. v. Borough of Carteret*, 35 *N.J. Super.* 226 (*App. Div.* 1955) – as to a related aspect of the same case, see 36 *N.J. Super.* 400 (*App. Div.* 1955), certification denied 19 *N.J.* 383 (1955), and 19 *N.J.* 384 (1955); 30 *Am. Jur., Judgments, sec.* 178; 50 *C.J.S., Judgments,* § 686. This is known as the doctrine of collateral estoppel or estoppel by judgment and is to be distinguished from the doctrine of *res judicata*, which is that in any action on a cause previously litigated by the same parties or their privies, a general judgment in the prior action is considered a finding against the party affected on all grounds that were or could have been raised therein.***
>
> "A judgment by consent is presumed to be entered in the light of all the existing circumstances of the litigation. Although such a judgment is considered a contract of the parties acknowledged and sanctioned by the court, it is regarded as an adverse judgment and is conclusvie and effective as an estoppel to the same extent as though entered after a full trial. *Fidelity Union Trust Co. v. Union Cemetery Association*, 136 *N.J. Eq.* 15 (*Ch.* 1944), affirmed *per curiam*, 137 *N.J. Eq.* 455 (*E. & A.* 1946) and 137 *N.J. Eq.* 456 (*E. & A.* 1946); *Middlesex Concrete, etc., Corp. v. Borough of Carteret, supra;* 31 *Am. Jur., Judgments, sec.* 458; 50 *Am. Jr., Judgments, sec.* 705."
>
> "*** the authorities previously cited herein, as well as innumerable others, hold either expressly or by necessary implication that *a fact or question has been litigated if it has been put in issue by the pleadings and a judgment by consent has been entered thereon.* Such a judgment constitutes an adjudication on the merits. *Davis v. Leach*, 121 *F. Supp.* 58 (*D.C.E.D. Tex.* 1954); 15 R.C.L., *Judgments, sec.* 90." (*Emphasis ours.*)

The United States Supreme Court, in the recent case of *Arnold Maxwell Harris v. Washington et al.*, 92 *S. Ct.* 183 (1971), referred, at page 184, to its definition of collateral estoppel in *Ashe v. Surenson*, 397 *U.S.* 436, 90 *S. Ct.* 1189, 25 *L.Ed. 2d* 469, as follows:

> "*** We said that collateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' 397 *U.S.*, at 443, 90 *S.Ct.*, at 1194.***"

In accordance with the above-cited authorities, the Commissioner must determine whether the question of an illegal work stoppage was put in issue by the pleadings.

The verified complaint filed June 12, 1970, by the Board states, *inter alia*, the following:

> "*** 5. On July 11, 1970, the individual defendants [petitioners] *** decided to engage in a work stoppage against the school system of the Township of North Bergen."
>
> "*** 6. On the 12th day of June, 1970, the said defendants absented themselves from their various clerical positions and conspired to prevent the plaintiff [Board] from conducting its normal school and administrative activities. *** [petitioners] intend to continue said work stoppage and remain away from their duties indefinitely. The said work stoppage is illegal and contrary to law ***."
>
> "7. *** The said work stoppage is a work stoppage of public employees. Such work stoppage and any measures in support thereof are prohibited by law ***."
>
> "8. The actions of the defendants jointly and severally *** have disrupted and interfered with the ordinary conduct of the schools *** and have interfered with the education of the children of North Bergen ***."
>
> "9. The work stoppage by said clerical staff *** results and will continue to result in immediate, substantial and irreparable injury to the plaintiff, the North Bergen School system, pupils who attend the schools *** and the general public of the Township of North Bergen.***"

The affidavit of the Superintendent of Schools states, *inter alia*, the following:

> "*** 5. I have no doubt that the twenty-four absentees conspired among themselves to engage in a work stoppage which in effect is a strike against the Board of Education thereby disrupting the school system and the regular day to day business of the Board and making it impossible to properly conduct the public schools***."

The temporary restraining order was issued on the same day, June 12, 1970, and petitioners were directed to appear and show cause why they should not be enjoined and restrained. This Order was served on petitioners the same day, and, as was previously stated, they returned to their duties on the following day.

The final judgment, *supra*, was entered by consent on July 1, 1970.

It is clear that the pleadings did raise the issue as to whether an illegal work stoppage was engaged in by petitioners on June 12, 1970, and that a continuation of this action was threatened. It must be presumed that on these grounds the temporary restraint was obtained by the Board, since no other allegations were raised in either the verified complaint, the Superintendent's affidavit or the order to show cause. Petitioners received their opportunity to convince the court that no illegal work stoppage had occurred on June 12, 1970, or was threatened thereafter and thus to defeat the injunction. Instead, petitioners consented to a final judgment which made the restraint permanent. Such a judgment is conclusive of all matters properly belonging to the subject of the controversy and within the scope of the issues; namely, the fact of a work stoppage on that named date, so that petitioners were required to make the most of their defense, bringing forth all their facts, grounds, reasons or evidence in support of it, on pain of being barred from showing such matters in a subsequent action. 50 *C.J.S., Judgments* § 716, and cases cited.

From this evidence before the Commissioner, it must logically be concluded that the issue, whether petitioners' absence from duty on June 12, 1970, constituted an illegal work stoppage, was raised and adjudicated on the merits by the Superior Court. Therefore, the Commissioner finds and determines that the doctrine of collateral estoppel or estoppel by verdict bars petitioners from again litigating this issue. *Harris v. Washington*, 92 *S. Ct.* 183 (1971); *Public Service Electric and Gas Co. v. Waldroup, supra.*

Considering the illegal absence of petitioners on June 12, 1970, as an adjudicated fact, and the Commissioner so holds, the Board of Education had no authority of law to remunerate petitioners an amount of one day's wages for such illegal absence. *Florence P. Greenberg v. Board of Education of the City of New Brunswick, Middlesex County*, 1963 S.L.D. 59. At this point, petitioners' cause of action stated herein dissolves because the fact which required the Board of Education to deduct one day's salary from petitioners' respective wages had been adjudicated adversely to petitioners.

Accordingly, for the reasons stated, the petition of appeal is dismissed.

COMMISSIONER OF EDUCATION

June 30, 1972

Everitt F. May,

Petitioner,

v.

Board of Education of the Township of Montgomery, Somerset County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Nicholas S. Castoro, Esq.

For the Respondent, Skillman and Koerner (A. Dix Skillman, Esq., of Counsel)

Petitioner, Everitt F. May, trading as the May Agency, alleges that the Montgomery Township Board of Education, hereinafter "Board," improperly awarded contracts for the purchase of a program of insurance coverages for the school district for the 1971-72 school year, and appeals the Board's action on the grounds that the Board did not adhere to its announced intention to make such award on a competitive basis. The Board denies the allegation and answers that there is no statutory requirement that a local board of education engage in competitive bidding for insurance coverage contracts, or award such contracts to the lowest responsible bidder, if competitive bids are requested. The Board further submits that the Commissioner of Education has no jurisdiction to set aside a board of education's action of awarding a contract for insurance coverage, absent a showing of bad faith, prejudice or arbitrariness in the award thereof.

Petitioner prays for relief in the form of an Order of the Commissioner of Education, setting aside the award of the contract for insurance coverage for the 1971-72 school year and directing the Board to engage in a competitive bidding procedure with proper guidelines for the purpose of awarding such contract to the lowest responsible bidder.

Testimony and documentary evidence were educed at a hearing conducted on February 23, 1972, at the New Jersey Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Following the conclusion of the hearing, both parties filed Briefs. The report of the hearing examiner is as follows:

Petitioner has been the insurance agent of record for the Board for the past fifteen years. He testified that on or about July 1, 1971, he received a telephone call from the Superintendent of Schools requesting him to submit an insurance proposal for the 1971-72 school year on July 19, 1971. Petitioner stated that he indicated surprise because until that moment, he had no

indication that the Board intended to conduct reappraisal or bidding of the insurance program. According to petitioner, the Superintendent was discussing this matter with the representative of another insurance agency at the time, but that the Superintendent came to his office and explained that the Board intended to secure proposals for an insurance program from petitioner and two other agencies on July 19, 1971. Petitoner declared to the Superintendent that the time period was very short for the preparation of a comprehensive proposal. According to petitioner, the Superintendent agreed to ask the Board to postpone this procedure for one year because of the shortness of time, but the Board decided to proceed as planned to receive the proposals. (Tr. 10-15)

Petitioner and his son prepared a proposal for a program of insurance for the Board for the 1971-72 school year, (Exhibit P-1) based upon appraised valuations made April 2, 1971, for the Board by a company which specializes in performing such appraisals. (Exhibit R-2) (Tr. 16) According to petitioner, the Board did not specify either the amounts or types of insurance it desired, but simply informed him to prepare a proposal in the form of a recommendation of a comprehensive program of insurance. (Tr. 19)

Petitioner stated that he and his son met with the Board on July 19, 1971, and presented to each Board member a copy of his recommended proposal. (Exhibit P-1) He stated that he explained the various types of insurance and the monetary limits of coverage which he was proposing, including several supplemental types of insurance coverage. Petitioner testified that the Board members did not raise any questions regarding the specific items contained in his proposal, but stated that they would inform him of their decision after reviewing the proposals. (Tr. 23, 24) According to petitioner, he conferred with the Board at 9:30 p.m., and another insurance agency's representatives preceded him at 8:30 p.m. to present a proposal. At this July 19, 1971, meeting, petitioner asked for a copy of the other agency's proposal (Exhibit R-3), but the Board declined to give him a copy. (Tr. 26) Petitioner stated that he subsequently telephoned the office of the Board's Business Administrator and was informed that the Board had made the decision to award the contract for a program of insurance coverage for the 1971-72 school year to the only other insurance agency which had submitted a proposal. According to petitioner, the Business Administrator stated that the decision for this award was based partly on cost but also on other factors. During this telephone conversation, petitioner testified that he again requested to see a copy of his competitor's proposal, (Exhibit R-3), and he was refused a second time. (Tr. 25, 26) Some time later, petitioner averred, he was able to examine the accepted proposal in the office of the Board's attorney. (Tr. 27) From the information gleaned from this examination, petitioner concluded, he stated, that his proposal was the better of the two submitted. (Tr. 27)

Petitioner averred that he attended the next regular meeting of the Board of Education to inquire on what basis the Board had awarded the 1971-72 insurance contract (Tr. 32) The Board answered that the award was based on cost, service and other factors, and also informed petitioner that they were unhappy about their recovery on a recent fire loss. (Tr. 33) Petitioner stated that he gave each member of the Board a copy of a comparison sheet which indicated

both his and the other insurance agent's original proposals. (Exhibit P-3) According to petitioner, he reviewed this comparison of prices and coverages, item by item, for the benefit of the Board. At the conclusion of this review, he stated, the Board President informed him that the Board would discuss this matter at a later time. Petitioner testified that he heard no further word from the Board after that meeting. (Tr. 33-37) Under cross-examination, petitioner reviewed and explained his comparison study (Exhibit P-3) in some detail. (Tr. 37-41)

Petitioner's son, who is an owner of the May Agency, testified regarding various steps which he had taken during the 1970-71 school year, and in prior years, to update the Board's valuations of buildings and contents insurance. (Tr. 42-45) This witness' testimony corroborated that previously given by his father regarding the events and circumstances, which surrounded the matter of the insurance contract for the 1971-72 schol year. In the opinion of this witness, if the May Agency had presented a proposal for 1971-72 based upon the limits and types of coverage utilized by its competitor, the May Agency's proposed cost would have been $960 less than that of its competitor, who was subsequently awarded the contract by the Board. (Tr. 46-49)

The Superintendent of Schools testified that he first discussed the Board's insurance program with Mr. May, Sr. in August 1969, and again in November 1969, in an effort to determine the structure and extent of the insurance coverage. He stated that the Board made a decision, in December 1970, to have an independent appraisal company make a complete appraisal of buildings and contents under the Board's ownership. Also, the Board decided to have three insurance agencies review the Board's coverages and recommend programs of insurance on a competitive basis. (Tr. 55-59, 65, 67) According to the Superintendent, he notified the Board on July 5, 1971, that two of the three agencies would be able to meet the July 19, 1971, deadline for submitting proposals, and that the May Agency had requested a postponment of one year for this procedure because of the short period of time remaining to prepare their proposal. The Board decided to hold to the July 19, 1971, date for receiving the various proposals. The Superintendent further testified that Mr. May, Sr. and his son came to the July 12, 1971, Board meeting and attempted to dissuade the Board from proceeding with the plan to receive the insurance proposals on July 19, 1971. (Tr. 59)

The Superintendent also averred that one of the three agencies withdrew on July 19, 1971, from this planned procedure, because it was one of the insurance agencies which shared the insurance policies provided by the May Agency. According to the Superintendent, each of the three insurance agencies shared the Board's appraisal report, and no one agency possessed an advantage in submitting a recommendation to the Board. (Tr. 60, 61) Under cross-examination, the Superintendent disclosed that he came to the conclusion, after several discussions with Mr. May, that the Board could secure a better arrangement of its insurance program. (Tr. 64, 83)

According to the Superintendent, the Board provided separate hours for both petitioner and the second insurance agency to explain their respective proposals at the meeting of the Board held July 19, 1971. (Tr. 68, 69) The School Business Administrator was delegated the task of reviewing the two insurance proposals and presenting a recommendation to the Board, which was done at a special meeting held July 23, 1971. (Tr. 70) The Superintendent testified that he was generally familiar with the insurance policies, which were subsequently written by the successful vendor, the Howe Agency, but that he had not studied the policies in detail. (Tr. 72-74) He stated that he was familiar with the fact that the Howe Agency subsequently provided insurance for boiler and machinery coverage and uninsured motorists coverage, although that agency had not included these coverages in the proposal submitted by them on July 19, 1971. (Tr. 75)

The Superintendent averred that he does not believe that the Board should attempt to secure insurance coverage by means of public bidding. In the judgment of this school administrator, the best procedure for the Board's benefit was to request several insurance agencies to design and submit proposals of insurance coverage, including a description of services to be rendered and net prices for the total cost. (Tr. 78-80) The Superintendent stated that he believes that the Board has secured a better insurance program for the 1971-72 school year as compared to the 1970-71 coverage. (Tr. 79) In the Superintendent's judgment, the May Agency had provided inadequate services in prior years. (Tr. 83, 84) According to the Superintendent, the decision to award the contract for insurance coverage for 1971-72 was based upon the scope and design of the proposed plan, the amount of service the agency would provide, the possibility of the company's cancelling a policy because of a loss, and the total price of the proposed plan. (Tr. 84, 86)

The School Business Administrator testified that based upon the four criteria previously stated by the Superintendent, *ante*, and his own analysis of the proposals submitted by the two agencies, he recommended that the Board accept the proposal of the Walter B. Howe Agency. (Tr. 89) He further testified that the Board had received a notice dated June 17, 1971, stating that the Board's special multi-peril policy would be terminated effective August 6, 1971. (Tr. 90) According to this school official, petitoner informed the Board, at the June 19, 1971, meeting, that he would send a letter notifying the Board of the withdrawal of this notice of termination, but such a letter was never received by the Board. (Tr. 92) This witness stated that he was aware of the fact that some insurance coverages were added after the award of the insurance contract for 1971-72. (Tr. 92, 93) He said that he was also aware that some of the coverages written by the Howe Agency differed from their original proposal. (Tr. 94-99. The School Business Administrator had assumed his position in this school district on July 13, 1971; therefore, he had no knowledge regarding events which preceded that date. (Tr. 101)

The President of the Board of Education testified that the Board desired to have several insurance agencies propose specific programs of insurance

coverage in order that the Board could select the most favorable plan. He stated that, in his opinion, a local board of education cannot secure the best program of insurance through public bidding. Each agency, he opined, should propose a plan tailored to the needs of the Board and in accord with appropriate limits and costs. In his opinion, the Board selected the best program of coverage providing the most service at the lowest cost. The President conceded that the Board relied upon the Superintendent and School Business Administrator to provide a detailed analysis of the proposals to assist the Board in making its final determination. According to this witness, the Board expressed the desire to have the May Agency submit a proposal, but the Board did not specify the other two agencies which were also invited to do so. (Tr. 137-139, 141-145) The President stated that he was not involved with the determination of the items of insurance written by the successful vendor after the award was made by the Board on July 23, 1971, but that he was aware that changes were made from the submitted proposal. (Tr. 146)

In response to questions by the hearing officer, the President testified that the Board did not decide to have public bidding, did not specify any criteria of required services for the benefit of the agencies submitting proposals, and had never communicated in writing or otherwise its dissatisfaction with the services previously rendered by petitioner. (Tr. 149-153)

The School Business Administrator testified that petitioner and two other agencies had been selected to submit insurance proposals prior to the beginning of his duties on July 13, 1971. (Tr. 157)

Witnesses for both petitioner and the successful vendor provided detailed testimony regarding the respective proposals submitted to the Board by each agency. (Tr. 101-132, 132-136)

The minutes of the special meeting of the Board held July 23, 1971, disclose that the Board voted to discontinue the position of "Insurance Agent of Record," and dissolved its insurance committee. The Board also voted to award the contract for fire, multi-peril, workmen's compensation, and boiler-machinery insurance, as well as fidelity bonds, to Walter B. Howe, Inc., effective August 6, 1971. (Exhibit R-6)

Letters were sent by the Board, under date of July 29, 1971, to the May Agency, the Walter B. Howe, Inc. Agency and the A. H. Merritt Agency, notifying them that the Board had awarded the contract for insurance for 1971-72 to the Howe Agency. These three letters contained the statement that the Board would reconsider and reevaluate its insurance program in two and one-half years, and would be pleased to have each agency participate. (Exhibit R-7) The Board notified the May Agency by letter dated August 3, 1971, that the Board had dissolved its committee on insurance, discontinued the title "Insurance Agent of Record," and had charged the insuring agency with the responsibility of advising the Board concerning insurance matters. (Exhibit R-10)

The actual insurance policies provided for the Board of Education by the successful vendor, for the 1971-72 school year, were received in evidence. (Exhibits R-5a - R-5j) A careful scrutiny of these policies by the hearing examiner discloses the fact that there were differences between the proposal submitted by the successful vendor as compared to the exact written insurance policies.

Following the hearing, both parties filed Briefs. This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter. In its pleadings, the Board asserts that the Commissioner has no jurisdiction to set aside a local board of education's action of awarding a contract for a program of insurance. The Commissioner does not agree. This question of the Commissioner's authority to set aside an action of a local board of education has been thoroughly reviewed in several previous decisions, and the Commissioner will not, therefore, repeat the rationale covering this phase of his jurisdiction in the instant matter. See *Durling Farms v. Board of Education of the City of Elizabeth, Union County*, decided by the Commissioner January 29, 1971. Also, see *Ruth Ann Singer v. Board of Education of the Borough of Collingswood et al., Camden County* (Motion to Dismiss), decided by the Commissioner March 24, 1971; *Hudak v. Board of Education of the Township of East Brunswick, Middlesex County*, decided by the Commissioner October 26, 1971.

Two issues are raised in the instant matter. The first, a question of law, is whether the Board of Education was required to purchase a program of insurance coverage by the process of public bidding. The second issue, a factual question, is whether the Board did properly purchase a program of insurance for the 1971-72 school year.

N.J.S.A. 18A:20-25 states the following:

> "Every board of education shall keep all insurable property, real and personal, of the district insured against loss or damage by fire and, in its discretion, against other loss or damage."

Thus, it is clear that every local board of education must purchase at least a minimum of fire insurance coverage of all real and personal property within the school district.

In his Brief, petitioner argues that *N.J.S.A.* 18A:18-5, which requires the annual purchase of various types of school supplies through public advertisement and award to the lowest responsible bidder, is applicable to the purchase of insurance. The Commissioner has consistently upheld the necessity for proper public bidding in each instance where this salutory policy is applicable. Competitive bidding is an almost universally recognized practice (See *McQuillan, Municipal Corporations*, § 29.28 (1950).) and one which is rooted deep in sound principles of public policy. *Waszen v. City of Atlantic City*, 1 *N.J.* 232, 283 (1949): *Tice v. Long Branch*, 98 *N.J.L.* 214 (*E. & A.* 1922) The purpose is to secure competition and to guard against favoritism, improvidence, extravagance and corruption. Statutes directed to these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good, and they should be rigidly adhered to. *Weinacht v. Board of Chosen Freeholders of the County of Bergen*, 3 *N.J.* 330, 333 (1949); *Tice v. Long Branch*, *supra; McQuillan*, *supra*, § 29.29

In the matter controverted herein, the Commissioner cannot find that the statute upon which petitioner relies; namely, *N.J.S.A.* 18A:18-5, *supra*, requires the competitive bidding of either the mandatory fire insurance or other discretionary insurance coverages by a local board of education. A review of the education law, *N.J.S.A.* 18A, fails to disclose any statutory requirement for the competitive bidding of insurance, and the Commissioner so holds.

A review of the "Local Public Contracts Law," *P.L.* 1971, *c.* 198 (now *N.J.S.A.* 40A:11-1 *et seq.*), which pertains to counties, municipalities and school districts, discloses no specific language which would mandate competitive bidding for insurance. The Commissioner notices that the Director of the Division of Local Finance of the New Jersey Department of Community Affairs has disseminated a general memorandum under date of December 23, 1971, which states that Division's interpretation " ***that the final determination of whether to subject insurance to competitive bidding or not should rest with each local unit *** At this time, bidding for insurance is not mandatory."

The Commissioner notices that two legislative bills are presently before the Legislature as proposed amendments to *N.J.S.A.* 40A:11-1 *et seq.* and *N.J.S.A.* 18A. Senate bill No. 1005 proposes to exempt school districts from the Local Public Contracts Law, and Senate bill No. 1006 would incorporate the provisions of the Local Public Contracts Law into the education statutes (*N.J.S.A.* 18A). The statement accompanying Senate bill No. 1005 comments that " *** Further study is planned to determine if insurance should be subject to the provisions of the Local Public Contracts Law.***" This statement also points out that the Division of Local Finance "***has no conclusive evidence to require that local units [including school districts] solicit bids for insurance; however, it maintains that it is possible to draw specifications and solicit competitive bids for certain types of insurance.***" The statement concludes that, until amendatory legislation clarifies this issue, it is recommended that the interpretation of the Local Finance Division be supported.

The Commissioner concurs in this interpretation that no clear requirement exists at this time for the competitive bidding of insurance by local boards of education. Therefore, the Commissioner finds that the argument of law raised by petitioner, *ante*, has no merit.

The factual question of whether the Board did, in fact, properly award a contract for insurance coverage for the 1971-72 school year must be considered next. The record before the Commissioner discloses the Board's clear intention to invite three insurance agencies to submit individually-designed plans of insurance coverage. Apparently, the Board desired to allow each agency to offer convincing arguments for the superiority of its plan, which the Board then considered, including the items of actual price and the degree of consulting services and operational services to be rendered. At no time did the Board adopt and announce specific criteria for the services to be rendered. Also the Board did not establish precise specifications of insurance coverage to enable the agencies to compete on equal terms. The procedure employed by the Board almost guaranteed that diverse and dissimilar proposals would be forthcoming from the two participating agencies. In essence, the Board's procedure in the instant matter was a form of dual negotiation with two separate insurance agencies over two separate plans, which though similar in some respects, differed substantially in others. To further compound the problem, the Board awarded the contract to one agency, assumedly on the basis of its proposal, and then accepted insurance policies from that agency which contained some substantial differences from the proposal. (Exhibits P-3, R-3, R-5a-R-5j) As the hearing examiner has noted above, all of these events took place between June 23, 1971, when the three invited agencies were furnished the Board's appraisal of buildings and contents, and July 19, 1971, when the two submitted proposals were reviewed. The Board's School Business Administrator had only until the Board's special meeting date of July 23, 1971, to make a careful analysis of the proposals and a recommendation. This official had just begun his duties in the school district on July 13, 1971. In the judgment of the Commissioner, this hasty procedure employed by the Board to secure the 1971-72 insurance program cannot be deemed competitive, and must be construed to be a negotiation procedure.

The Commissioner is aware that some local boards of education do secure competitive bids on some types of insurance coverage. In the instant matter the Board would have been required to determine some exact specifications, possibly including alternates, of the types and total monetary values of the insurance it required, along with some definite criteria of accompanying services, in order to secure truly competitive bidding. If any local board of education decides and so announces that it is seeking competitive bids for any type of insurance, it must then include these aforementioned vital ingredients. It has consistently been held by the courts of this State that the two paramount aims of the bidding statutes are "that bidders bid upon the same thing, and that the public know clearly that a bidder must give and the municipality receive, for a consideration plainly stated." *Belousofsky v. Board of Education of the City of Linden*, 54 *N.J. Super.* 219, 223 (1959)

In the instant matter the Commissioner finds that, absent any statutory requirement to secure competitive bidding for the purchase of insurance coverage, the Board exercised its discretionary authority in awarding a negotiated contract for a program of insurance for 1971-72. The record is barren of any facts to support petitioner's contention that the Board acted illegally or improperly.

In reviewing matters which concern the discretionary authority of local boards of education, the Commissioner has consistently held that:

> "*** it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.***" *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948)

Accordingly, the Commissioner finds and determines, for the reasons stated above, that the Board of Education of the School District of Montgomery Township did lawfully exercise its discretionary authority in awarding a contract for a program of insurance for the 1971-72 school year.

The petition of appeal is dismissed.

COMMISSIONER OF EDUCATION

July 10, 1972

Board of Education of the Township of Monroe,

Petitioner,

v.

Township Council of the Township of Monroe, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Guido J. Brigiani, Esq.

For the Respondent, Huff & Moran (William C. Moran, Jr., Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for the 1972-73 school year than the amounts proposed by the Board in its budget, which was rejected by the voters. The facts of the matter were submitted in the form of written testimony, and a hearing was held on May 31, 1972, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school election on February 8, 1972, the voters of the school district rejected proposals to raise by local taxation $2,342, 639 for current expenses and $108,410 for capital outlay. The proposed budget was then delivered to Council, pursuant to statute, for the determination of the amount of appropriations for school purposes to be certified to the County Board of Taxation. On March 15, 1972, Council adopted a resolution certifying the sums of $2,213,314 for current expenses and $80,910 for capital outlay. The amounts in issue may be shown as follows:

	Proposed By Board	Certified by Council	Reduction
Current Expense	$2,342,639	$2,213,314	$129,325
Capital Outlay	$ 108,410	80,910	$ 27,500
Total	$2,451,049	$2,294,224	$156,825

The Board contends that the action of Council was arbitrary, unreasonable, capricious and without consideration of the needs of the school system. The Board further contends that the amounts certified by Council for current expenses and capital outlay are insufficient to maintain a thorough and efficient system of schools in the district as required by law. Thereafter, Council submitted to the Board a document setting forth proposed reductions in line-item accounts which are represented in the following table:

CURRENT EXPENSE

Account Number	Item	Board's Budget	Council's Proposal	Amount Reduced
J110b	Administration-Sals.	$ 34,920	$ 33,840	$ 1,080
J110f	Administration-Sals.	59,940	58,940	1,000
J130m	Administration-Other Services	3,500	1,500	2,000
J212b	Instruction-Sals. Special Services	33,600	17,600	16,000
J213.1	Instruction-Sals.	1,044,350	1,017,350	27,000
J214	Instruction-Other Instructional Staff	31,125	16,125	15,000
J215	Instruction-Secys. and Clerks	49,440	45,920	3,520
J216	Instruction-Tchr. Aides	32,350	27,125	5,225
J240	Teaching Supplies	48,545	38,545	10,000
J250	Instruction-Other	23,485	18,485	5,000
J610	Operation-Sals.	63,425	60,425	3,000
J710	Maintenance-Sals.	30,925	24,925	6,000
J720	Maintenance-Contracted Services	25,895	20,895	5,000
J730	Maintenance-Replacement of Equipment	12,560	10,060	2,500
J740	Maintenance-Other	12,665	10,665	2,000
J870	Tuition (to other districts)	510,818	496,818	14,000
	(State Aid for Cafeteria Equipment Anticipated Miscellaneous Rev.)		- 0 -	11,000
	Total Current Expense	$2,017,543	$1,899,218	$129,325

CAPITAL OUTLAY

L1230c	Buildings	$ 6,050	$ 4,050	$ 2,000
L1240c	Equipment-Instructional	41,250	36,250	5,000
L1240f	Equipment-Operation	18,030	2,030	16,000
L1240g	Equipment-Maintenance	6,590	2,090	4,500
	Total Capital Outlay	$71,920	$44,420	$27,500
	Total Reduction Current Expense and Capital Outlay			$156,825

On the basis of the evidence submitted by oral testimony and documents, the hearing examiner makes the following findings as to each of the proposed reductions, *supra:*

J110b Administration – Salaries

Council suggests a $1,080 reduction in this account, which is the amount necessary to convert a present part-time employee to a full-time basis. Council contends that the increase in school enrollment does not justify the addition of another full-time position to the three full-time personnel plus a secretary.

The Board did not present affirmative reasons for the increase in this specific line item. The hearing examiner recommends, therefore, that this cut be sustained.

J110f Administration-Salaries

Although the Board gives specific reasons for its proposed budgeted amount in this account and argues that its work load is increased, Council avers that four full-time personnel plus an additional part-time employee in this area are already employed. Council avers, also, that the increase in enrollment and the office work load do not justify the entire amount budgeted by the Board. Council suggests, therefore, that $1,000 be cut in this account.

The hearing examiner recommends that Council's cut be sustained.

J130m Administration-Other Expenses

The Board budgeted $3,500 for a newsletter, which it intends to send out monthly rather than sporadically as it has done in the past. Council argues that although this may be a desirable goal of the Board, it is not a necessary expenditure and suggests, therefore, a $2,000 cut.

The hearing examiner determines that this is not a necessary expenditure required for a thorough and efficient system of the public schools. The hearing examiner notes, however, that $1,800 was approved as the expenditure in this line item for the 1971-72 school budget, and recommends that $1,800 be approved by the Commissioner for the school year 1972-73. The hearing examiner recommends further that a cut of $1,700 be sustained, and that $300 be restored to the budget.

J212b Instruction-Salaries-Special Services

The Board proposes the hiring of a secondary curriculum coordinator, and states that the position is required for planning and coordination of programs in its new high school, which is to be opened in September 1973. Council suggests the elimination of the position and states that the functions to be served can be adequately handled by a new principal who is to be hired. Council suggests, also, that the $16,000 for the coordinator's position, *supra*, is an extravagant expenditure being made before the position is really required; however, the Board testified that advertisements have been made for bids on the new secondary school, and that the Board still intends to have the new school ready in September 1973.

The hearing examiner recommends that the $16,000 cut be restored.

J213.1 Instruction-Salaries

Council suggests a $27,000 reduction in this line-item account by eliminating three additional teachers at an average cost of $9,000 per teacher. Council contends that the Board's proposed increase of 111 students may justify the hiring of four additional teachers, but not the seven the Board has requested.

The Board testified that it needed the teachers requested and gave reasons for the hiring of all of them; however, two teachers have been projected as "supplementary teachers" to help maintain the same average pupil-teacher ratio as it had this year.

The hearing examiner recommends that a cut of $18,000 be sustained for the two supplementary teachers, *ante*, and that $9,000 be restored to the Board's budget.

J214 Instruction – Other Instruction Staff and
J215 Instruction-Secretaries and Clerks

The Board testified that its new secondary school, which will open in September 1973 with a capacity of 1,000 students serving Grades 7 through 12, requies the services of a secondary guidance coordinator at a salary of $15,000 per year. Such additional services it holds, therefore, also require additional secretarial help for which it has budgeted $7,020. Council, in reasoning for its recommended economies in these two line-item accounts, states that there is no need for the full-time employment of three professionals so far in advance of the new school's opening in September 1973. However, because of the planning, staffing and programming necessary for the opening and operation of the new school, the hearing examiner recommends that the $15,000 in item J214 and the $3,520 in item J215 be restored as budgeted by the Board.

J216 Instruction-Teacher Aides

The Board proposes an increase of four aides, one in each of its elementary schools, in addition to the twenty it already has in its employ. The Board testified that the aides are required to relieve teachers of activities such as lunchroom and playground supervision, and other related activities, which do not require the services of a professional staff member. The hearing examiner determines that this is not a necessary expenditure, although a desirable one, and recommends, therefore, that Council's cut of $5,225 be sustained.

J240 Teaching Supplies

The Board gave detailed explanations for its proposed expenditure of $48,545. Council points out, however, that the above figure represents a 65% increase in the line item with only a 6% increase in enrollment. Council suggests that the Board plan better and not try to make up for all of the school district's inadequacies in one year.

The hearing examiner notes that even with Council's $10,000 cut in this line item, the Board will have approximately $10,000 more in this account than it had last year. He recommends, therefore, that Council's cut be sustained.

J250 Instruction – Other

Council notes that the Board's budget proposes an expenditure of $23,485 in this line item and that only $8,620 was budgeted in 1971-72. It suggests an economy of $5,000 and avers that the Board already has some in-service programs.

The hearing examiner notes that this is a desirable goal, although not a necessary expenditure, and recommends, therefore, that Council's cut be sustained.

J610 Operation – Salaries

Council suggests a nominal cut of $3,000 in this account, which provides for overtime and substitute work. The Board budgeted $63,425, which it contends will be required based on past experience.

The hearing examiner notes a substantial increase in this account over the amount budgeted last year and, therefore, recommends that Council's cut be sustained.

J710 Maintenance – Salaries

The Board contends that it requires an additional "Groundsman" at a salary of $6,000 for the general maintenance and upkeep of lawns, shrubs, trees, etc. He would also help out where required during adverse weather conditions, and perform other duties such as painting and general custodial work.

Council suggests that this position is not necessary and suggests that it be cut.

The hearing examiner determines that the testimony and pictures of the grounds and buildings give adequate evidence of the need for the new position. He recommends, therefore, that the $6,000 be restored.

J720 Maintenance – Contracted Services

The Board budgeted $25,895 for maintenance services and specifically budgeted $7,335 for blacktopping. Council cut the amount set aside for blacktopping by $5,000, and contends that although desirable, it is not a necessary expenditure.

The hearing examiner notes, however, from the pictures submitted that there is a dire need for blacktopping in School No. 1 and School No. 2. He recommends, therefore, that the $5,000 cut be restored.

J730 Maintenance – Replacement of Equipment

The Board, in a detailed list of the items requested, states that all of those items are either not functioning properly or not functioning at all. Council suggests that the proposed expenditure represents a 100% increase in that line item, and that all of the expenditure does not have to be made in one school year.

The hearing examiner recommends that the suggested $2,500 cut be restored.

J740 Maintenance – Other

The Board budgeted $12,665 in this line-item account for the school year 1972-73. In 1970-71, $3,122.68 was spent for this line item, and only $3,710 was budgeted in 1971-72. Council avers that its suggested $2,000 reduction will still give the Board a sizable increase for the fertilizer, lime, seed, fungicides, insecticides, etc. that the Board says it needs.

The hearing examiner recommends that the $2,000 cut be sustained.

J870 Tuition

The amount budgeted by the Board would increase this line-item amount from $380,675 in 1971-72 to $510,818 in 1972-73, an increase of more than $130,000. Council suggests that this amount be cut by $14,000, reasoning that the Board has grossly overestimated the amount that would be required for tuition, and avers that its figures were more realistic than the Board's.

The hearing examiner notes the considerable increase in this account, and also notes that the testimony given by the Board gives reasons for the large increase for the 1972-73 school year. He recommends, however, that Council's suggested cut of $14,000 be sustained.

State Aid for Cafeteria Equipment - Anticipated Miscellaneous Revenues.

In an unnumbered line-item account, Council suggests that the Board's budget should include $11,000 in anticipated State aid for cafeteria construction.

The Board testified, however, that the recommended cut of $11,000 by Council is State aid money that only replaces the money already allocated by the Board, and that it is not a free balance. The Board testified further that the $11,000 is a refund against an appropriation.

The hearing examiner recommends, therefore, that the $11,000 expenditure be included in the budget for the 1972-73 school year.

L1230c Sites & Buildings

Council suggests a $2,000 cut in the Board's budget of $6,050. It avers that the proposed expenditure for carpeting in a Kindergarten room and an office and paneling in the secretary's office in School No. 2 total almost exactly the amount of the recommended cut of $2,000.

The hearing examiner recommends that the cut be sustained, noting that although desirable, the items are not necessary for the thorough and efficient operation of the school system.

L1240c Sites and Buildings Equipment-Instruction

The Board submitted an itemized list of expenditures for instructional equipment totaling $41,250. Only $19,165 was budgeted in this line item for the 1971-72 school year, and nothing was budgeted here for the school year of 1970-71.

Council avers that its recommended cut of $5,000, if sustained, would still give the Board more than a 100% increase in this line item, and recommends further that the Board should program its expenditures, and not attempt to make up for all its deficiencies in prior years in one budget. The hearing examiner recommends that Council's $5,000 cut be sustained.

L1240f Sites and Buildings Equipment-Operation

No expenditure was made in this line-item account in the 1970-71 school year, but $1,875 was budgeted by the Board for the 1971-72 school year. However, $18,030 has been budgeted by the Board for the coming school year 1972-73. The Board avers that the large increase was budgeted primarily for new and larger pieces of grounds equipment, specifically a tractor with attachments, a front-end loader with attachments, a small dump truck with trailer, and a prefabricated house to hold the itemized equipment, *supra.*

Council recognizes the need for better maintenance of the grounds at School No. 4; however, it avers that some of this equipment is unnecessary, and avers further that the Township itself, with many miles of roads to maintain, obtained its own front-end loader only two years ago.

The testimony at the hearing and the pictures submitted in evidence showed a need for improved maintenance of some of the school grounds. The hearing examiner is convinced of the need for better grounds maintenance at some of the schools; however, he recommends that the entire amount budgeted by the Board in this line-item account is not necessary in the coming school year. He further recommends that $8,300 of Council's recommended cut be sustained.

L1240g Equipment for Maintenance of Plant

The Board budgeted $6,590 in this account which included a pick-up truck and a plow. Council suggests a $4,500 cut in this account for the above-named items.

The hearing examiner notes that this recommended expenditure rose from nothing in the 1970-71 school year to $200 in the 1971-72 school year, and now to $6,590 in the 1972-73 school year. He recommends, therefore, that Council's suggested cut of $4,500 be sustained.

The hearing examiner's recommendations are recapitulated in the following table:

CURRENT EXPENSE

Account Number	Item	Proposed Reduction	Amount Restored	Amount not Restored
J110b	Administration-Sals.	$ 1,080	$ - 0 -	$ 1,080
J110f	Administration-Sals.	1,000	- 0 -	1,000
J130m	Administration-Other Services	2,000	300	1,700
J212b	Instruction-Sals. Special Services	16,000	16,000	- 0 -
J213.1	Instruction-Sals.	27,000	9,000	18,000
J214	Instruction-Other Instructional Staff	15,000	15,000	- 0 -
J215	Instruction-Secys. and Clerks	3,520	3,520	- 0 -
J216	Instruction-Tchr. Aides	5,225	- 0 -	5,225
J240	Teaching Supplies	10,000	- 0 -	10,000

J250	Instruction-Other	5,000	- 0 -	5,000
J610	Operation-Sals.	3,000	- 0 -	3,000
J710	Maintenance-Sals.	6,000	6,000	- 0 -
J720	Maintenance-Contracted Services	5,000	5,000	- 0 -
J730	Maintenance-Replacement of Equipment	2,500	2,500	- 0 -
J740	Maintenance-Other	2,000	- 0 -	2,000
J870	Tuition (to other districts) (State Aid for Cafeteria Equipment Anticipated Miscellaneous Rev.)	11,000	11,000	- 0 -
	Total Current Expense	$129,325	$68,320	$61,005
	CAPITAL OUTLAY			
L1230c	Buildings	$ 2,000	$ - 0 -	$ 2,000
L1240c	Equipment-Instructional	5,000	- 0 -	5,000
L1240f	Equipment-Operation	16,000	7,700	8,300
L1240g	Equipment-Maintenance	4,500	- 0 -	4,500
	Total Capital Outlay	$27,500	$7,700	$19,800

The Commissioner has reviewed the findings of the hearing examiner reported above and has considered his conclusions and recommendations. In concurring therein, the Commissioner finds and determines that an amount of $76,020 must be added to the amount previously certified by Council to the Middlesex County Board of Taxation to be raised for current expenses and capital outlay of the School District of the Township of Monroe in order to provide sufficient funds to maintain a thorough and efficient system of public schools in the district. He therefore directs the Monroe Township Council to add the amount of $76,020 to the previous certification made to the Middlesex County Board of Taxation of $2,294,224 for the current expenses and capital outlay of the school district, so that the total amount of the local tax levy for 1972-73 shall be $2,370,244.

COMMISSONER OF EDUCATION

July 11, 1972

Anne Curran Brooks,

Petitioner,

v.

Board of Education of the Township of Teaneck,
Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Paul J. Giblin, Esq.

For the Respondent, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

Petitioner, a teacher under tenure in the school system of Respondent Teaneck Board of Education, hereinafter "Board," was denied her salary increment/adjustment, hereinafter "increment," for the 1971-72 school year. Petitioner believes that she is entitled to her increment and requests that the Board be directed to award it to her.

The Board admits withholding petitioner's increment for the 1971-72 school year, but avers that it was within its right to do so.

A hearing was held in the office of the Bergen County Superintendent of Schools, Wood-Ridge, on April 24, 1971, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner filed a grievance with the Board to have her increment restored; however, that grievance was denied by letter of November 23, 1971. (P-1)

Although petitioner was present during the entire hearing, she did not testify in her own defense; instead, the president of the Teaneck Teachers' Association testified in her behalf. The main thrust of his testimony was that the evaluations made of petitioner's classroom performances were unusual in that several of them were made within a short period of time near the end of the 1970-71 school year. Ten documents were submitted in evidence. Eight of them were evaluations of petitioner made by her supervisors on September 30, October 5, December 22, 1970, and February 23, 1971. Included were two written evaluations by the principal and the assistant superintendent on May 13 and May 14, 1971.

Included also in the above evaluations, were two "annual Summary Evaluations" – one on March 1, 1971, and the last on June 2, 1971.

Petitioner's witness testified that despite the written comments on petitioner's evaluation reports that suggested improvements in some specified areas of instruction, the evaluations were in specific aspects marked as "satisfactory;" therefore, he said, the Board had no basis on which to deny her a salary increment. He testified further that petitioner was not given reasons by the Board for the withholding of her increment. He averred that it was very unusual to evaluate any teacher four times in two days, as was the case on May 13 and 14, 1971. Under cross-examination, however, petitioner's witness admitted that he had no basis for stating that four evaluations in two days was considered unusual.

The principal testified that the very *number* of evaluations made of petitioner was indicative of the administration's concern about her classroom performance. He testified further that the four evaluations, which occurred on May 13 and 14, 1971, by two different administrators, were coincidental. Neither he nor the assistant superintendent, who made the other two evaluations on May 13 and 14, he testified, were aware at the time that the other administrator had planned to evaluate petitioner's classes on those same days. The evaluations made by both administrators on May 14, 1971, were caused, he averred, by their concern over the lessons they saw on May 13, 1971. The principal testified, also, that petitioner was absent frequently, and that it was impossible at times to make a previously-scheduled evaluation of her class because of her absences.

The Board avers that the interpretation of petitioner's evaluations indicates that her performance was unsatisfactory, and that that was the sole reason for the withholding of her increments.

The "Agreement" (R-1) between the Board and the Association provides for the withholding of a teacher's increment as follows: (at p. 59)

> "***3. The granting of any salary increment and/or adjustment as set forth in the salary schedule shall not be deemed to be automatic.
>
> "The Superintendent shall have the power to recommend to the Board of Education the withholding of any salary increment and/or adjustment for ineffiency and for other good cause.
>
> "Whenever the withholding of an increment is proposed, the individual concerned shall be given written reasons for such proposed withholding and said individual shall have the right to appeal in accordance with the provisions of the Grievance Procedure applicable in such matters.***"

Recommendations for the withholding of petitioner's increment were made by the assistant superintendent of schools. (R-6, R-9)

The Board communicated with the hearing examiner by letter of May 4, 1972, and cited several court cases to support its argument, made at the hearing, that petitioner's failure to testify in her own defense may be considered as

evidence that had she testified, her testimony would have been adverse to her own case.

* * * *

The Commissioner has read the report, findings and conclusions of the hearing examiner.

A board has the authority to withhold a teacher's increment when its salary guide is above that mandated by statute (*N.J.S.A.* 18A:29-6 *et seq.*), and when it has its own rules regulating the granting and withholding of salary increments. *Van Etten & Strubel v. Board of Education of Frankford, Sussex County*, decided by the Commissioner on March 17, 1971; *Charles Brasher v. Board of Education of the Township of Bernards, et al., Somerset County*, decided by the Commissioner on March 19, 1971; *Thomas R. Durkin et al. v. Board of Education of the City of Englewood, Bergen County*, decided by the Commissioner on December 27, 1971, affirmed by the State Board of Education June 28, 1972.

In the matter *sub judice*, the Board had its own rules (R-1), *supra;* therefore, the matter is no different in principle than *Van Etten & Strubel, Brasher, Durkin, supra*, with respect to the withholding of teachers' increments.

Having determined, therefore, that the Board had its own rules for denying a salary increment, having concluded that the Board acted lawfully, on proper grounds, and pursuant to its rules in denying petitioner a salary increment for the 1971-72 school year, and having further determined that petitioner did not support her belief that she is entitled to her full salary increment for that school year, the Commissioner must find in favor of the Board and that this matter is *res judicata.*

The Commissioner further finds no need to comment on petitioner's refusal to testify in her own behalf.

The petition is dismissed.

COMMISSIONER OF EDUCATION

July 11, 1972

**In the Matter of the Tenure Hearing of June Malloy,
School District of the Borough of Runnemede, Camden County.**

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Henry Bender, Esq.

For the Respondent, Hyland, Davis & Reberkenny, (William C. Davis, Esq., of Counsel)

Charges of using physical force against a student, hereinafter "R.C.," insubordination and conduct unbecoming a teacher were filed on December 1, 1971, by the Board of Education of the Borough of Runnemede, Camden County, hereinafter "Board," against respondent, a tenured teacher. A hearing was held in the office of the Camden County Superintendent of Schools, Pennsauken, on April 26, 1972, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Board has a Teachers' Committee made up of three Board members. One function of the Teachers' Committee is to investigate staff personnel problems and report its findings and recommendations to the Board as a whole. With respect to the matter *sub judice*, the Teachers' Committee submitted the following report:

"I. The following charges are hereby filed by this committee, against Mrs. June Malloy, Seventh Grade Teacher, Bingham School.

'(a) That Mrs. Malloy used physical force on a student during her performance as a teacher, on November 16, 1971.

'(b) That Mrs. Malloy was insubordinate to her superiors on at least three separate occasions.

(1) To Mr. Herbert Lancaster, Principal, Bingham School, in her refusal to meet with this committee to determine the facts of this incident.

(2) To Mr. Robert Goodwin, Superintendent of Runnemede School District, for the same reason as above, when he requested that Mrs. Malloy meet with this committee and she refused.

(3) To this committee, acting as representatives of the Runnemede Board of Education, when Mrs. Malloy tore up written request to meet with this committee, in the presence of Mr. Herbert Lancaster, Principal Bingham School.

'(c) That Mrs. Malloy, when failing to perform her regularly assigned duty as Outside Line Supervisor, did not respond nor react to a (Duty Reminder) notification by Mr. Herbert Lancaster, Principal Bingham School.

'(d) That Mrs. Malloy failed to perform her reularly (sic) assigned duty as (Lunch Room Supervisor) and did not respond nor react to a (Duty Reminder) notification by Mr. Herbert Lancaster, Principal Bingham School.

'(e) That in a considered opinion from staff supervisors, Mrs. Malloy's general conduct and bearing have been defined as 'Difficult to communicate with'; 'Poor attitude; and Unpleasant attitude' with other members of the staff.' This opinion causes concern to this committee as to the general effect it may have on our educational program.

"II. The Teacher's Committee, therefore makes the following recommendations to the Board of Education:

'(A) That Mrs. June Malloy be charged with Conduct Unbecoming a Teacher.

'(B) That the Board of Education accept these charges and a copy be sent to Mrs. Malloy by registered mail, and that the charges be certified and forwarded to the Commissioner of Education.

'(C) That Mrs. Malloy be suspended as of this date, 12/1/71, without pay and be notified by the Superintendent, Robert D. Goodwin, pending the disposition of these charges by the Commissioner of Education."

The Board determined by recorded roll call vote on December 1, 1971, that the charges, *supra*, and the evidence in support of them, would be sufficient, if true in fact, to warrant dismissal or reduction in salary, and thereafter certified them to the Commissioner of Education. The charges will be reviewed *seriatim*.

CHARGE NO. I (a)

"That Mrs. Malloy used physical force on a student [R.C.] during her performance as a teacher, on November 16, 1971."

Specifically, respondent is accused of striking R.C. on the head, thereby causing his glasses to fall to the floor and one of the temples to break. R.C. admits that he was "messing around" prior to being struck by the teacher. (Tr. 42, 43)

Respondent does not deny striking R.C., but she does deny knocking his glasses to the floor and breaking them. She avers that his glasses fell on his desk, and that he deliberately threw them on the floor. She testified that she then picked up his glasses, inspected them, found that they were *not* broken and placed them on his desk. (Tr. 120)

The day after this occurrence, respondent met with R.C.'s mother about the incident. The school principal told respondent later that the mother would not consider any further action against her, if she would pay for the broken glasses, Respondent refused to make any such payment, because, she avers, the glasses were not broken.

CHARGE NO. I (b)

"That Mrs. Malloy was insubordinate to her superiors on at least three separate occasions.

(1) To Mr. Herbert Lancaster, Principal, Bingham School, in her refusal to meet with this committee to determine the facts of this incident.

(2) To Mr. Robert Goodwin, Superintendent of Runnemede School District, for the same reason as above, when he requested that Mrs. Malloy meet with this committee and she refused.

(3) To this committee, acting as representatives of the Runnemede Board of Education, when Mrs. Malloy tore up written request to meet with this committee, in the presence of Mr. Herbert Lancaster, Principal Bingham School."

Although Charges No. I (b), (1), (2), (3), *supra* consist of three separate counts of insubordination, they relate directly to one incident and the alleged insubordination arising therefrom. They will be treated as a single charge of insubordination.

The principal of the Bingham School testified that he personally handed a letter (P-1) to respondent, which she admitted destroying. (Tr. 127) That letter reads as follows:

"Dear Mrs. Malloy:

"I have been instructed by the Superintendent of Schools to inform you that the Teacher Committee of the Board of Education has requested your presence at a meeting on Wednesday, November 24, 1971, at 7:30 p.m. in Volz School.

"It is the purpose of this meeting to clarify the events relative to the incident involving [R.C.] on Tuesday, November 15, 1971."

"Sincerely,
"Herbert B. Lancaster
"Principal."

The principal testified further that after respondent read the letter (P-1) she told him that the matter had been resolved between R.C.'s mother and herself, and that there was no need for any further clarification of the incident before a committee of the Board. She told him, he avers, that she would not attend any meeting and be interrogated like a child.

Respondent testified that she told the principal that she would not be "blackmailed," and that R.C.'s mother had not gone to the Board to press the matter further. (Tr. 122, 124, 126, 129)

As a result of this conversation with the school principal, respondent called the Superintendent of Schools that same afternoon, and was told that the purpose of the meeting proposed in the letter (P-1) was to "clarify" the events of the incident of corporal punishment. (Tr. 51, 52)

Respondent admits calling the Superintendent and telling him that she would not attend the proposed meeting. She admits also that he advised her that it would be in her best interest to attend the meeting as requested (P-1); however, she said that she told him that she would not attend.

The record shows that the letter (P-1) was written and delivered to respondent by the school principal after he was directed to do so by the Superintendent. All of the insubordination charges arise from this incident with the principal and respondent's subsequent call to the Superintendent. Respondent had no direct contact with the Teachers' Committee of the Board.

CHARGE NO. I (c), (d)

"That Mrs. Malloy, when failing to perform her regularly assigned duty as Outside Line Supervisor, did not respond nor react to a (Duty Reminder) notification by Mr. Herbert Lancaster, Principal, Bingham School.

"That Mrs. Malloy failed to perform her reularly (sic) assigned duty as (Lunch Room Supervisor) and did not respond nor react to a (Duty Reminder) notification by Mr. Herbert Lancaster, Principal, Bingham School."

The principal testified that respondent did not perform her regularly-assigned playground duty on October 12, 13, and 14, 1971. (Tr. 76, 77, 78) He testified further that respondent did not perform her lunchroom duty on November 8, 9, 1971. (Tr. 80, 81, 82, 83)

The principal testified also that teachers were free to adjust their schedules by asking other teachers to serve as substitutes for assigned duties when they were unable to take them because of unforeseen circumstances. (Tr. 86)

Respondent admits being absent on October 12, 1971, from her assigned duty because she had a personal problem, which caused her to go home immediately. She said, however, that she arranged for coverage by one of her colleagues. Her testimony about her absence from duty on October 12 was corroborated by the teacher, who performed the duty for her. (Tr. 133, 134, 137, 138) Respondent testified that she performed her duty as scheduled on October 13 and 14, 1971, but that she was unavoidably late for duty on October 13, also, because of a personal problem.

The principal's testimony, with respect to respondent's being absent from her lunchroom supervision duty on November 8, and 9 (Tr. 81), is sketchy and cannot be supported. Although he testified that he checked and did not see respondent at her duty station, he also testified that teachers performing this duty floated between three lunchrooms (classrooms) and a teachers' lavatory. He testified further that respondent is the *only* teacher he has ever checked on to see if lunchroom supervision was being properly performed. (Tr. 105)

Although the principal testified that children should be supervised at all times, he admitted that he had called meetings of teachers during lunch periods, leaving the students unsupervised. (Tr. 97, 98, 99, 100)

The hearing examiner recommends that Charges No. I (c) and (d) be dismissed for lack of any corroborating evidence.

Charge No. I (e) was withdrawn by the Board.

* * * *

The Commissioner has reviewed the report, findings and recommendations of the hearing examiner.

Striking R.C., as charged in Charge No. I (a), and admitted by respondent, is an unlawful act of corporal punishment and constitutes conduct unbecoming a teacher.

Corporal punishment of pupils has been prohibited in New Jersey public schools by statute since 1867. *N.J.S.A.* 18A:6-1 provides in part as follows:

> "No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil***."
>
> "***While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also

freedom from offensive bodily touching even though there be no actual physical harm. See *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 *S.L.D.* 185, 186 ***."

The Commissioner said *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 *S.L.D.* 160, 162, remanded State Board of Education 1963 *S.L.D.* 251, decided by Commissioner 1964 *S.L.D.* 142, affirmed State Board of Education, 1966 *S.L.D.* 225, remanded 93 *N.J.Super.* 404 (*App. Div.* 1967), decided by the Commissioner on Remand 1967 *S.L.D.* 215, affirmed by the New Jersey Superior Court, Appellate Division, December 26, 1967, that:

"*** such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions.***"

and in *Ostergren*, *supra*, at p. 187:

"***Thus, when teachers resort to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty.***"

The Commissioner finds that respondent, as charged in Charge No. I (b), was insubordinate to her superiors by refusing to go to a meeting of a committee of the Board, when she was directed to do so by a letter given to her by the building principal, even though she assumed that the matter was settled. The Board, as her employer and as the school district's governing body, had the authority to inquire into her alleged improper conduct. Moreover, the Board has a duty to protect its students from the improprieties of teachers, and parents have a right to expect that their children's interests are being served and protected even without their direct intervention or filing of charges.

Charges No. I (c) and (d) are dismissed for lack of corroborating evidence.

There being no other charges on which to make findings and determinations, the Commissioner summarizes his findings as follows:

1. Respondent committed corporal punishment against R.C. on November 16, 1971, by striking him on the head with a book.

2. Respondent was insubordinate to her superiors on November 23, 1971, by refusing to honor a letter from the building principal and instructions from the Superintendent of Schools requesting her to attend a meeting of the Teachers' Committee of the Board.

There is left then the determination of the appropriateness of the penalty. The Commissioner notes that respondent has been suspended without pay since December 1, 1971.

The Commissioner cannot minimize the seriousness of respondent's unlawful and improper actions. However, he determines that dismissal is too harsh a penalty to impose on respondent in this matter. He further determines that the loss of compensation and benefits for the months of December 1971 and January 1972 is sufficient penalty for respondent's infractions.

Therefore, the Commissioner directs the Board of Education of the School District of Runnemede to: (1) reinstate respondent at her appropriate step on the salary guide; (2) compensate respondent according to the pay schedule in force at the time of her suspension for the period from February 1, 1972 through June 30, 1972, less mitigation of monies earned by her during her suspension; (3) award respondent all benefits for which she was eligible for the period from February 1, 1972 through June 30, 1972.

COMMISSIONER OF EDUCATION

July 13, 1972

In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, School District of the Township of Brick, Ocean County

COMMISSIONER OF EDUCATION

DECISION

For the Board of Education, Anton and Ward (Martin B. Anton, Esq., Donald H. Ward, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the New Jersey School Boards Association and the New Jersey Association of School Administrators, *Amicus Curiae*, Thomas P. Cook, Esq.

Petitioner, the Township of Brick Board of Education, hereinafter "Board," has certified a total of twenty charges against respondent, a tenure teacher in its employ. These charges, in their totality, in the judgment of the Board, constitute insubordination or conduct unbecoming a professional employee of the school system. While not denying the factual correctness of many of the principal allegations contained in the Board's complaint, respondent avers that they provide no basis for censure, and that she merely exercised rights guaranteed to her by constitutional prescription.

A hearing in this matter, conducted by a hearing examiner appointed by the Commissioner, began on January 17, 1972, at the office of the Ocean County Superintendent of Schools, Toms River, and was continued on six other days over a period of three months, concluding finally on April 12, 1972. The delay in hearing completion was in part occasioned by the illness of a principal witness, the Superintendent of the Brick Township Schools.

Briefs were submitted on May 19, 1972, by the principal parties named herein and by *Amicus Curiae* on behalf of the New Jersey School Boards Association and the New Jersey Association of School Administrators. In an intermediate decision promulgated on February 17, 1972, the Commissioner denied the application of a group of Brick Township citizens to submit a brief as intervenors. A Motion to Dismiss the charges herein, brought by respondent at the conclusion of the Board's case, was held in abeyance, and a defense was required. A decision on a second Motion, directing the Board to compensate respondent beginning on the 121st day after her suspension from her teaching duties, pursuant to statutory mandate, *N.J.S.A.* 18A:6-14, was promulgated by the Commissioner on June 14, 1972. The report of the hearing examiner is as follows:

Respondent was employed as a business education teacher in Brick Township for a period of five years prior to her suspension by the Board on September 7, 1971. The immediate, motivating factor, which prompted the Board's determination *sub judice*, was a speech, which respondent had given at an orientation day meeting of teachers, new to the Brick Township School District, on September 1, 1971. Her speech on that occasion was given on behalf of the Brick Township Education Association, which she was serving as President, and was critical of the Board and of the Superintendent of Schools, at whose invitation respondent appeared. This speech (P-1), which is reproduced in its entirety below, followed a lengthy period of difficult negotiations, which were evidently acrimonious and replete with recriminations on both sides:

> "ON behalf of the Brick Township Education Association I welcome you to the Brick Township School District. I look forward to your membership into the BTEA – for today more than ever we need the collective and organized strength of teachers in facing the many challenges here in Brick Township and indeed in the state of New Jersey.
>
> "AT THIS POINT I would like to divert for a moment to invite all of you to be guests of the BTEA Executive Board at a cocktail party – planned specifically for you – at the KNIGHTS OF COLUMBUS BUILDING . . . tomorrow . . . between 3 and 6 p.m. Our president-elect, Jim McCabe, will distribute directions at the end of this session. Please . . . attend.
>
> "As you are undoubtedly aware, we have had serious problems here in Brick this past year. Fortunately some have been resolved, regrettably others have not.

"OUR PROLONGED and often bitter contract negotiations with the Brick Township Board of Education have resulted in a contract settlement. It is a contract governing many of your terms and conditions of employment. Within the coming weeks we shall have copies available for you. It is our full intention that the contract be fully honored by Board and administration alike.

"OUR PROBLEMS as they relate to the negotiations of a contract have been resolved – at least until contract negotiations re-open 18 months from now – a word now about our unresolved problems.

"THE RECORD clearly shows that this Association has *no faith in the school's administration* – more specifically no faith in the superintendent of schools.

"FORGIVE ME if the forum of the traditional Orientation Day would appear NOT to lend itself to a discussion of these matters. But what must be said will be said.

"WHY DOES THIS Association not have faith in the Superintendent of Schools? Let me tell you a few stories.

"1. Last year two fine young teachers with excellent records were recommended for rehiring by their principals and their supervisors. They were dynamic, well-liked, personable and extremely competent men. Without warning, without explanation this man fired them. The lower courts have said that his action was legal but there is a higher court that would term the action despicable – the court of justice, reason and compassion.

"2. ANOTHER STORY – earlier last year an English teacher made a speech at Atlantic City criticizing what has throughout the State become known as the 'BRICK BOOK BURNING:' as a result this teacher was subjected to some of the most inhuman treatment ever perpetrated by a Board of Education, resulting in her suspension and the first strike in New Jersey on the issue of Academic Freedom. Through it all, the man that just spoke to you remained conspiciously silent.

"3. I WANT TO TELL YOU another story – a third story. There were two elections in Brick Township last year – one for Mayor and one for the Board of Education. Despite all good sense and good reason, this man became intimately embroiled in these political campaigns – destroying whatever distance and objectivity he might have been able to maintain as the so-called *chief teacher* in the district.

"4. ANOTHER STORY – the year before last three books were arbitrarily yanked from the English curriculum – arbitrarily by the Board of Education. Books, incidentally, all written from the black point of view: This man not only remained silent throughout the controversy, he

admits that the blame is his alone. In passing, perhaps you might ask him someday how many black teachers have been hired to work in Brick Township and if they applied would they be seriously considered.

"I could tell you stories about this man violating the confidence of the Grievance Procedures. I could tell you a story about him digging into a man's past to threaten his professional life – I could go on and on with story after story but I think you get the point. The man who just spoke to you fits Hamlet's description of his uncle – that he does smile and smile and smile and yet remain a villain.

"BRICK TOWNSHIP is a *snakepit* for young teachers and I would just give you one bit of advice – for the next three years dig a professional hole and hide under it – don't budget, don't move, say 'yes sir' to everyone and wait and watch and remember that in New Jersey there are very good tenure laws . . . your time will come. And our only defense has been and ever will be a strong professional association and I can only urge everyone of you to please, for your sake and for ours, become members of the united teaching profession. There are more teachers than there are superintendents.

"THE RECORD SHOWS that we will fight for the teachers, but until there is more enlightened legislation or more enlightened courts, our fighting will affect no fire. We can't win . . . yet we will go to the ends of the world for you but probably fall off the edge for you because you can't be saved . . . SO HIDE.

"IF YOU HAVE BEEN reading the paper or attending Board meetings you know that I have been fighting against you – some of you – those of you not fully certificated . . . but you are here now, you are brand new teachers – most of you – and you are not aware that you have become economic pawns. From my own personal experience, it takes a year or two to find yourself in this business. Two or three brand new teachers in a district can be absorbed . . . but not 70 or 80% of them, some of whom are not properly certificated. This hiring practice is eating at the core of the principle of certification, and I term this whole procedure a *callous economic* gesture.

"BUT NOW YOU ARE HERE – we're behind you . . . we will support you, but we want you to know our position. WE'RE BEING HONEST. We believe now that you are here you will blend in with the rest of the staff. We'll SUPPORT YOU ALL THE WAY –

"THE BTEA WILL PROVIDE for the involvement of teachers in educational policy, will provide for due process for its non-tenured teachers, will promote the welfare and provide for the protection of all its members, *Carmen Raciti not withstanding.*

"PLEASE JOIN WITH US IN THAT ENDEAVOR. Thank you." *(Emphasis respondent's)*

While the fact of the speech itself is not in contention – respondent agrees that she gave it as reported, *supra* – the Board contends in substance, that respondent's allegations contained in the speech are either untrue or distortions of the true facts which should have been presented. The Board's contentions in this regard, all related directly to the speech, are contained in the first nine charges made against respondent, and were forwarded to the Commissioner on September 7, 1971. They are grouped below for reporting and discussion purposes as a cohesive entity under Roman number I. Subsequent to the filing of these nine charges, the Board certified eleven "supplemental charges" on October 11, 1971. The "supplemental charges" are not founded on the speech (P-1) and are, therefore, grouped for reporting and discussion purposes under Roman number II.

I.

CHARGE NO. 1

> "On September 1, 1971, Mrs. Kathleen M. Pietrunti, in her capacity as President of the Brick Township Education Association, as well as a tenure teacher employed by the Board of Education of the Township of Brick, was invited by the Superintendent of Schools, C. Stephen Raciti, to address the new staff at the orientation program. A copy of that address is annexed hereto and made a part hereof as Exhibit 'A.' (Further charges will be addressed to said speech subsequent to the within charge.) Said teacher on page 2, paragraph 1, accused the Superintendent of Schools, C. Stephen Raciti, of a 'despicable' action inasmuch as 'this man' fired certain non-tenure teachers, all of which was purportedly 'without warning' and 'without explanation.' Such an allegation directed toward the Superintendent of Schools, in light of the true facts, is conduct unbecoming a teacher and insubordination to the office of the Superintendent of Schools inasmuch as the men referred to by the teacher were not fired by the Superintendent, but the Board of Education merely failed to renew their contracts at the expiration of the non-tenure teachers' contracts. This matter was fully litigated and was the subject of a Final Judgment, copy of which is annexed hereto and made a part hereof as Exhibit 'B,' by virtue of which, such an allegation directed toward the office of the Superintendent of Schools is a perversion of fact which is subversive of the discipline and the morale of the school system."

The Brick Township Superintendent of Schools, hereinafter "Superintendent," testified concerning the truth of this charge on January 18, 1972. He stated that the Board, by "unanimous" vote (Tr. II-236) had decided that the contracts of the two teachers of reference should not be renewed for school year 1971-72 after receipt of the Superintendent's recommendation to this effect. He also said that no reasons for the Board's decision in the matter were given to the teachers either before or after the Board's decision.

Respondent contends that there is no doubt concerning the factual allegation herein – the men were "fired" to use the verb of the vernacular – and

that, in her judgment, such an action, taken without a statement of "reasons" for the action was "despicable."

It is of note here that proceedings on behalf of the two teachers, whose contracts were not renewed, were instituted in the Superior Court of New Jersey, Chancery Division, Ocean County, but that the relief requested, reinstatement, was denied. The Court found that the teachers had not exhausted their administrative remedies or availed themselves of grievance procedures, and that there was no proof of any violation of "constitutional right," (P-2) which justified the Court's intervention.

The hearing examiner believes it is stating the obvious to say, as the Board does, that the Superintendent did not "fire" the two men – non-tenure teachers – but that their contracts were simply not renewed by the Board. However, this appears to be the fact of the matter, in the absence of any proof that the teachers were dismissed prior to the time their contracts expired at the end of the school year 1970-71. Such proof was not elicited at the hearing. Therefore, the hearing examiner holds that there was no basis for respondent's statement that the two teachers were "fired," although they may be the common understanding of the practical effect of the Board's action on persons who may not be versed in the technical ramifications of school law.

CHARGE NO. 2

> "Again, referring to the speech which is annexed hereto and made a part hereof as Exhibit 'A,' the teacher has accused the Board of Education of perpetrating 'inhuman treatment' and as a result thereof has accused the office of the Superintendent of Schools as remaining conspicously (sic) silent with respect to the suspension of Rochelle Cassie, the English teacher referred to in paragraph 2, Page 2. Similarly, this misrepresentation at the meeting of the orientation of the new staff of the schools of the Township of Brick is a perversion of fact and distortion, which is subversive of discipline and morale of the entire school system. With respect to the true facts concerning this incident, the teacher in question was not suspended for a speech given in Atlantic City, but for a classroom delivery of said speech and was in fact suspended for the use of 'poor judgment' by her own admission, and which admission is contained in a letter from Rochelle Cassie dated November 17, 1970, a copy of which is annexed hereto and made a part hereof as Exhibit 'C.' As a result of this 'poor judgment', the Board of Education did in fact pass a Resolution which is fully dispositive of this matter and sets forth the true facts, a copy of which Resolution is annexed hereto and made a part hereof as Exhibit 'D.' All of which is conduct unbecoming a teacher."

There are certain facts with regard to this charge, which are not in dispute; namely, that:

1. The teacher, Rochelle Cassie, was in fact suspended by the Board on November 13, 1970;

2. She did later admit that the reading of the speech mentioned, *supra*, in the charge, in class "***may have been poor professional judgment;

3. After this admittance, she was restored to a full teaching status on November 19, 1971, by a resolution of the Board adopted on or about November 18, 1971; and

4. The Superintendent did not take a public position in the matter.

In terms of this charge, there is only one real question of fact to determine, i.e. whether or not, as alleged by respondent in her speech of September 1, 1971 (P-1) *supra*, Rochelle Cassie was suspended from her teaching duties because "*** she made a speech in Atlantic City***" or because, as the Board maintains, she read the same speech at a later date in class.

In testimony for the Board, the Superintendent said, in this regard: (Tr. II-258)

',Q. All right; now as to the reasons for the suspension of Rochelle Cassie *** this speech that Miss Cassie gave, where and when was it given?

"A. The original speech was given at the N.J.E.A. Convention of 1970, I think.***

"Q. Now is that the only time it was given?

"A. No; then it was later read to *** at least two or three of her classes.

"Q. Now as you recall the reasons for suspension – ?

"A. That was to the point exactly; the reading of a speech to her class which was unrelated to the curriculum.***"

On the other hand, respondent maintained (Tr. VII-1009) that she was familiar with the reason the Board of Education gave, but that she did not accept that reason.

The hearing examiner notes that the incident herein was one in which the teacher, Rochelle Cassie, maintained that she had been "misquoted" in a newspaper article to the point of distortion, and sought to correct the inaccurate impressions she thought the newspaper had created by "reading excerpts" from her speech in class. When apprised of Miss Cassie's version of the incident, and her feeling that the reading of the speech in class may have been poor professional judgment, (P-3) the Board promptly rescinded its previous suspension, and restored her to teaching duties.

The hearing examiner is left to wonder why the Board did not listen to Miss Cassie's explanation prior to her suspension, which it originally imposed,

and why respondent left out of her speech of September 1, 1971, (P-1) any mention of the fact that the Board acted promptly to restore Miss Cassie to duty when apprised of her version of the incident in question. Only one fact emerges in clear perspective from this charge – the incident involving Miss Cassie's suspension had long since been terminated, and its resurrection by respondent in September 1971, in connection with her speech of that date (P-1) was inappropriate, in the opinion of the hearing examiner, as any part of a charge against the Superintendent. It must be supposed, at this juncture, that the judgment the Board made with regard to Rochelle Cassie was based on the same newspaper material, which Miss Cassie later indicated was inaccurate, and a distortion of what she had said. There was no evidence that the Superintendent knew of arguments to the contrary, which would have supported, or should have been offered in support of, Miss Cassie's position.

Finally, while the hearing examiner "belives" that the Board acted, with respect to the incidents in Charge 2, for the reason it stated in its resolution (P-4), and not because Miss Cassie had criticized the Board at Atlantic City, he cannot find that respondent was incorrect or that her charges herein were a distortion of the truth without more detailed evidence than was presented at this hearing. Neither, for the same reason, can he find that respondent's allegation – that Miss Cassie was fired because of her speech in Atlantic City unsupported by any evidence – is true in fact.

Accordingly, the finding of the hearing examiner with respect to this charge is limited to the opinion reported, *supra*, – that the incident *sub judice* was inappropriately raised by respondent. There is no specific finding of fact with respect to the core of the charge *per se* – that Rochelle Cassie was suspended from her teaching duties for a reason other than the one that respondent recited in the speech of September 1, 1971. (P-1) Testimony from Board members, subject to cross-examination, as to the motivation which impelled them to suspend Miss Cassie, was a necessary and requisite supplement to their published statement in this regard. Such testimony was not offered at the hearing, and what appears to be a precipitate act of suspension by the Board causes the hearing examiner some doubt as to the true motivation which impelled the Board to act as it did.

CHARGE NO. 3

> "With respect to the charges made against the office of the Superintendent of Schools contained in paragraph 3, page 2, of Exhibit 'A', C. Stephen Raciti, Superintendent of Schools, denies that he was 'intimately embroiled' in political campaigns, but admits that his wife, as a District Chairman, was hostess for a cocktail party for the Assistant Superintendent of Schools for his successful campaign for the Mayorship of the Township of Brick, and further admits that he attended a cocktail party given for Daniel F. Newman, a successful candidate for the last school district election for a seat on the Board of Education. However, such an allegation that such activity would 'destroy' the objectivity of the office of the Superintendent of Schools is a subjective conclusion and a

flagrant attack on the office of the Superintendent of Schools, and an attempt to deny to the Superintendent freedom of political activity, freedom of speech and adequate freedom as an individual, thereby resulting in conduct perpetrated by the teacher as being subversive of the discipline and morale of the school system."

The judgment involved with respect to the truth of this charge is whether or not the Superintendent was "intimately embroiled" in political campaigns – so enmeshed in them that his objectivity was destroyed – or whether his activity in this regard was only that which any citizen might exercise. The specific value judgment required is related to the word "intimately."

There is no doubt that the Superintendent was involved with political campaigns to some extent. The charge herein recites his own version of such involvement, and his testimony elaborates on the involvement of the recital. Specifically, he states that he:

1. had a "cocktail party" at his home for a mayoral candidate [a school administrator]. (Tr. 262)

2. attended a "cocktail party" given by one Board member "while he was running for the Board." (Tr. 262)

and that his wife had served as a block worker on one occasion. (Tr. 263) However, the Superintendent also said that he attended dinners sponsored by both major political parties, (Tr. 262) that he had not made financial contributions to the two campaigns with which he admitted some involvement (Tr. 264), and that he held no "political position or office." (Tr. 262)

Respondent's testimony offered no proof of additional political activity on the part of the Superintendent, but she maintains that the point of view she held, and expressed in her speech (P-1), that the Superintendent was "intimately embroiled in politics," was one which represented a legitimate point of view that she as a teacher could entertain and express.

The hearing examiner notes that Webster Dictionary's pertinent definition of "intimately," in the context of its use herein, is

"*** closely acquainted or associated; very familiar***"

and he opines that, judged by such a standard, the political activity of the Superintendent of Schools as reported, *supra*, could not be rightfully characterized as activity involving intimate embroilment, although there was clearly an involvement to a lesser degree. The hearing examiner leaves to the Commissioner's judgment the decision as to whether or not such involvement was deleterious to the Superintendent's role as an educational leader, or in any way proscribed, and whether respondent's inclusion of such allegations represented conduct unbecoming a teacher in the public schools.

CHARGE NO. 4

"The teacher, in the assertion set forth on pages 2 and 3, paragraph 4, has misrepresented facts at the orientation of the new staff, in denying to the Board of Education the sole right to determine the curriculum of the school district as set forth in Title 18A of the Statutes of the State of New Jersey, and in so doing has exhibited conduct unbecoming a teacher, and is subversive of the discipline and morale of the school district. The teacher, in continuing her flagrant attack on the Superintendent of Schools, assumes the prerogative to interpret the alleged silence of the Superintendent of Schools concerning the legal action taken by the Board of Education of the Township of Brick. Again, in conduct unbecoming a teacher and resulting in being subversive of discipline and morale of the school district, the teacher has by innuendo raised the question of the lack of black teachers hired in the school district of the Township of Brick, when in fact to the best of the Superintendent's knowledge, information and belief there have been no black applicants for positions in the school system in the calendar year. Again, in a flagrant attack on the Superintendent of Schools by half statements and innuendoes without factual substantiation thereof, and in derogation of the office of the Superintendent of Schools, the teacher has alleged a violation of a 'confidence of the Grievance Procedure', for which no action is pending for breach of contract, if the same were in fact believed to be true."

This charge against respondent, although obliquely stated in the opinion of the hearing examiner, is that:

1. Respondent is attempting to usurp an authority granted to the Board to determine curriculum when she charges in her speech (P-1) that the Board "arbitrarily yanked" books from the English curriculum. (In the Board's view, the responsibility to determine curriculum context – including materials – is one it must exercise, and a charge that it performed this duty was an insubstantial base for a charge by respondent.)

2. Respondent raised a charge by innuendo, i.e. no black teachers have been hired in Brick Township; therefore, the Board must have a discriminatory hiring policy.

3. Respondent violated confidences.

Thus, the charge is seen to have three component parts derived from Paragraph Four of respondent's speech.

These sub-charges and findings pertinent thereto are discussed below:

1. The hearing examiner believes that it is conjecture on the Board's part to state, as part of the charge herein, that respondent, by criticizing the Board's action in removing certain books from the library, is "denying to the Board of

Education the sole right to determine the curriculum of the school district." The hearing examiner can find no denial, or usurpation, in such criticism by respondent, and to this degree, he finds the subcharge without merit. The only question for the Commissioner's determination is whether such criticism was appropriate to the time and place of its expression.

2. The Superintendent of Schools admits that no black teachers have been employed to work in Brick Township, but denies that this fact implies that a policy based on racial discrimination exists. Specifically, he testified (Tr. II-72, 73) that there had been a dearth of black applicants for positions in the Township Schools, and that the one black candidate he had interviewed was not employed because a local candidate was properly certified and was given preference. However, the Superintendent also testified that the decision-making process relative to all such job candidates involved staff members other than himself (i.e. subject supervisors, principals, assistant superintendents). This fact was confirmed by the testimony of the assistant superintendent of schools, who evidently serves as the district's principal interviewer of new teaching candidates, and who also testified that black candidates would be "seriously considered" if they appeared for interview and were qualified. (Tr. I-94)

Respondent observes that she is charged herein with raising a question; namely, whether or not black teachers, if they applied for teaching positions, would be "seriously considered," and maintains that such a question can hardly be the basis of a charge against her.

The hearing examiner notes that this sub-charge is based on one sentence of the fourth numbered paragraph of respondent's speech (P-1) – and that all of these four paragraphs relate back directly to the phase of the speech, which states, *inter alia*, that the "Association" has "no faith in the superintendent of schools." To the extent that the question *sub judice*, which respondent posed in her speech, (P-1) is considered an inference against the Superintendent of Schools, it would appear to be a distortion of the facts as reported, *supra*, since it is clear that the Superintendent is not solely responsible in Brick Township for the recommendations, which lead to employment of teaching staff members, and it is equally clear that he does not employ them – the Board does by statutory mandate. While the fact of the Board's not employing black teachers might seem to indicate a case of racial discrimination, no evidence was presented at the hearing which confirms even an inferred premise to this effect as true in fact.

3. The Superintendent could not recall any instances wherein he had violated the confidence of the grievance procedure (Tr. 274). Later, on rebuttal, he denied he had ever "threatened" the professional life of anyone. (Tr. VII – 1120 *et seq.*) He also stated that such a charge against him personally had never been filed as a grievance pursuant to the grievance procedure. (Tr. VII-1124)

The Superintendent's testimony on rebuttal was in response to direct testimony of two teachers, who offered the opinion that they had indeed been threatened by something the Superintendent had said or done. (Tr. V-767, 780)

The hearing examiner notes that counsel for the Board moved to strike the testimony of witnesses, who appeared in respondent's behalf and offered testimony against the Superintendent, on grounds that such testimony was not relevant to any charge the Board had made. (Tr. V-767) At this juncture, however, it would appear to have some relevance to respondent's statement, contained in her speech, that she knew a "story" about the Superintendent " *** digging into a man's past to threaten his professional life.***" Those who testified against the Superintendent evidently believed his actions had constituted a threat, and in this respect, at least, there was some basis for the "story," which respondent never told, but which she said she "could tell."

However, by this finding, the hearing examiner does not imply a parallel finding that the charges made against the Superintendent were, indeed, true in fact. The Board correctly notes that they were never made the subject of a formal grievance, and the inference is clear that the alleged "threats" were evidently never viewed with much alarm prior to the time they were characterized as such herein.

The only question posed for the Commissioner's determination with respect to this sub-charge (3) is whether the pertinent part of respondent's speech considered herein was factually based in truth or in her belief and, if it was, whether or not the Orientation Day ceremony was a proper forum for its expression.

CHARGE NO. 5

> "The teacher, in a reckless attack upon the person of the Superintendent of Schools, by way of character assassination, has represented in said speech, as set forth on page 3, at the orientation of the new staff held on September 1, 1971, that the Superintendent, 'the man who just spoke to you fits Hamlet's description of his uncle . . . that he does smile and smile and smile and yet remain a villain.' As a teacher in the school district and as a teacher who represents herself to be knowledgeable in the field of Shakespearean literature, such an accusation against the Superintendent of Schools is subversive of the discipline and morale of the school system and such misrepresentation to the new staff inasmuch as Hamlet's uncle, King Claudiuss, (sic) in the eyes of Hamlet, was a 'villain' by virtue of the fact that Hamlet did in fact believe that his uncle had murdered his father and was guilty of incest and adultery. Such an agnorant accusation and classification of being a 'villain' in this shakespearean context seriously questions the fitness and value judgment of this teacher as well as being conduct unbecoming a teacher."

The hearing examiner notes that respondent's quotation from Hamlet contained in her speech (P-1) was read into the record by the Board in context with sections from the play which preceded it (Tr. II-282), and that the instant charge is based on an assumption and an inference; namely, that respondent knew the context from which the portion she used was drawn and that the word "villain," which appears in that portion has a broad connotation. The

connotation is that by comparing the Superintendent to the "villain" of Hamlet, respondent was in parallel fashion clothing the Superintendent with that villain's garb – as a murderer etc.

The hearing examiner believes, however, that the assumption and the inference are unwarranted. Respondent denies them and proofs that might counter the denial are nowhere present. Accordingly, the hearing examiner recommends that consideration of this charge be founded on the words contained in the speech alone – that the Superintendent does "*** smile and smile and yet (does) remain a villain."

CHARGE NO. 6

> "The teacher has classified the education system of the Township of Brick as being a 'snakepit' for young teachers and such a classification of her own educational system is subversive of the discipline and morale of the school system and seriously questions her fitness to teach and to make bona fide valued judgments."

The hearing examiner notes that the Superintendent alone testified concerning this charge and said he "did not" concur with the characterization of Brick Township as a " 'snakepit' for young teachers." (Tr. II-286) The hearing examiner sees no need for further discussion of the charge *per se* – the characterization was admittedly attributed to respondent, and its propriety, as a part of the totality of the speech (P-1), is a matter for the Commissioner to judge.

CHARGE NO. 7

> "The teacher, in her capacity as President of Brick Township Education Association and as a tenure teacher in the teaching district, in her address to the orientation of the new staff on September 1, 1971, again exercised lack of serious value judgments in suggesting to the new staff a code of conduct for said new staff which seriously impairs, perverts and subverts the discipline and morale of the school system by utilization of the Teachers' Tenure Act as a means for the lack of advancement of professional conduct to the end of merely gaining tenure."

This charge, like Charge 6, requires not a finding of fact but a value judgment by the Commissioner. Respondent admittedly said: (P-1)

> "*** for the next three years dig a professional hole and hide under it – don't budget, don't move, say 'yes sir' to everyone and wait and watch and remember that in New Jersey there are very good tenure laws . . . your time will come.***"

The Board's legal argument is contained in the charge and receives elaboration, by reference to respondent's personnel file (R-5), in the Brief of counsel.

Respondent did not testify concerning this charge.

CHARGE NO. 8

"The teacher has seriously interfered with the administration of the school system by classifying hiring practice of the administration as 'a callous economic gesture' and by such allegation to the new staff, who are a product of this alleged callous economic gesture, again exhibits lack of value judgment and exhibits philosophy that seriously question her fitness, and are, in fact, subversive of the discipline and morale of the school system."

This charge states that respondent has "seriously interfered with the administration of the school system", but there was little factual support for this allegation at the hearing. The Superintendent did say that, with reference to respondent's speech (P-1), "some of the teachers had approached him" and felt "quite upset" about it. (Tr. III-513) He also stated that he had recently spoken to his principals, and that two of them – he was unsure of which two – had indicated that teachers were "still upset." (Tr. III-515) However, there was no concrete evidence of any kind that the speech (P-1) ever served as an "interference" *per se* to the school administration, or that new teachers resigned their positions because of it.

CHARGE NO. 9

"The teacher in her speech (and particular attention is drawn to page 4 of the speech addressed to the new staff on September 1, 1971) again exhibits questionable fitness with respect to the fact that her primary obligation should be that of an educator. She presents mistruths; misrepresentations; and, perversions of fact as set forth in the charges hereinabove referred to, to elicit involvement of teachers to 'promote the welfare and provide for the protection of all its members' as a result of which her fitness is seriously questioned inasmuch as there is a failure to recongize the prime *raison d'etre* as a teacher is in the best interest of the children, and nowhere in her speech does she seriously address herself to that most important endeavor."

This charge is one, in reality, of summation – a legal argument that respondent's alleged "mistruths, misrepresentations and perversions of fact" should be sufficient reason for her dismissal. However, the charge lacks specificity, subject to proof. No proof was offered, and no defense was required by the hearing examiner with respect to this specific charge.

II.

The sub-charges contained within Charge 10 below are discussed separately under their designated letters, "A" through "I":

CHARGE NO. 10

"Prior to September 1, 1971, Mrs. Kathleen M. Pietrunti, in her capacity as President of the Brick Township Education Association, as well as a

tenure teacher employed by the Board of Education of the Township of Brick, by letters speeches and new (sic) releases displayed with respect to her attitude, conduct and counselling of the membership of her Association, conduct unbecoming a teacher by virtue of insubordination in fomenting disrespect to the office of the Superintendent of Schools and to the Board of Education, and the usurpation of an administrative function, all of which questions her value judgment, and by such conduct is subversive of the discipline and morale of the school district, and seriously questions her fitness to teach:

SUB-CHARGE 10 (A)

"By a letter dated April 30, 1971, a copy of which letter is annexed hereto and made a part of hereof as Exhibit 'A,' Mrs. Kathleen M. Pietrunti submitted a directive concerning 'Letters of Intent', a portion of which letter exhibited the philosophy, 'however, I would urge all tenure teachers in the district NOT TO SIGN THIS LETTER OR COMPLY WITH *ANY REQUEST* (emphasis added by writer) THAT WILL MAKE THE BOARD'S JOB (referring to the Board of Education of the Township of Brick) ANY EASIER."

It was the testimony of the Superintendent of Schools that it was customary each spring to ask staff members to relate their intentions concerning the fall semester and to state whether or not they would return to their employment in the coming term. Accordingly, the Superintendent planned to circulate the same questionnaire in May 1971.

However, on April 30, 1971, respondent, as President of the Teachers' Association, addressed the following letter (P-5) to all staff members:

"It has come to my attention that the Board of Education shortly intends to issue 'Letters of Intent' to members of the faculty, at which time we will be asked to indicate whether or not we wish to be employed next year in the district. I would advise non-tenure teachers to comply completely and immediately with this request, since there is no need for them to jeopardize their position.

"However, I would urge all tenure teachers in the district NOT TO SIGN THIS LETTER OR COMPLY WITH ANY REQUEST THAT WILL MAKE THE BOARD'S JOB ANY EASIER.

"The reason for this is simple. Under the law they must rehire you next year, and your only obligation is to give them 60 days notice if you intend to leave the district. As I see it, the purpose of these letters will be to help the Board determine who is or is not returning in September – thereby aiding them in their hiring policies.

"I would just like to remind you that the history of negotiations this year has been one of constant stalling on the part of the Board in short, they

have gotten themselves into this predicament, it hardly stands to reason that we should help them get out of it.

"Should these letters appear, the leadership will analyze the situation and inform you as to what they would like you to do. In the meantime, this might be our first opportunity to stand firm. Let us show the Board that BTEA is united in their determination to have meaningful negotiations in this district. Furthermore, should these letters come out and any of you meet with any form of coercion LET ME KNOW IMMEDIATELY. I assure you the coercion will not continue."

Respondent testified that she wrote this letter (P-5) because (Tr. VI - 936):

"*** the Board of Education, for some eighty-three days, had refused to even sit down to negotiate an agreement***."

and because (Tr. VI - 936):

"I felt it incumbent upon me to advise the membership *** of their legal rights.***"

She further stated that she had been told that "most of the members ignored my communication; and that no one had criticized her for sending it at the time." (Tr. VI - 937)

SUB-CHARGE 10(B)

"Illustrative of the intermeddling by Mrs. Kathleen M. Pietrunti in administrative affairs of the school district which are no concern of hers, either as President of the Brick Township Education Association, or as a tenure teacher, is a letter written to Mr. William Bell, President of the Board of Education, dated May 7, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'B'."

The letter (P-25) referred to herein is the sole proof, with respect to this sub-charge, that respondent was guilty of "intermeddling" in "administrative affairs." It is quoted below in its entirety for examination by the Commissioner in the context of the charge:

"It is with grave concern that I watch the approach of the end of the school year with no indication that the Board has yet chosen to fill the administrative vacancies created by the September opening of two new schools. If, indeed there is meaning in the phrase 'Education – Our Mutual Concern', I can not see how the Board of Education, in good faith, could have allowed the postponement of these appointments.

"Certainly it is no secret that there would be a need for these administrators, and the Board has permitted the situation to arise which

may cause serious setback to educational progress in the district. The opening of a new school is a major undertaking, and it would seem an unconscionable decision to allow the appointments to lapse for so long. It is not in the best interest of any of the candidates to keep them waiting; nor is it in the best interests of the district to keep these eventual appointees away from their school any longer.

"The seemingly interminable delay has long been a concern of mine as an educator, since the rationale behind it escapes me. As President of the Association, I feel that it is now my duty to request an explanation for the failure to make these administrative appointments, since I represent – in all likelihood – most of those who made application. And I feel it is within the jurisdiction of the President to seek an answer to their questions concerning the delay.

"I would earnestly request that either a member of the Board or the Superintendent of Schools forward a pertinent explanation to me as rapidly as possible, so that when I am asked to make public comment regarding the inevitable appointments I may speak not from ignorance – but from fact."

SUB-CHARGE 10 (C)

"Again illustrative of the intermeddling of Mrs. Kathleen M. Pietrunti in her capacity as President of the Brick Township Education Association and as a tenure teacher employed by the Board of Education of Brick Township is a letter dated May 10, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'C' and 'C-1' and demonstrative of interfering in the administrative rights and prerogatives of the Superintendent of Schools by her presumption to redraft a letter of intent negating the one prepared by the Superintendent of Schools."

This sub-charge is related to sub-charge (A), *ante*, and concerns the letter of intent referred to, *supra*. As evidential material offered in support of a charge that respondent intermeddled in school affairs, it is reprinted in its entirety below: (P-6)

"In place of the letter of intent which you will be asked by the Board of Education to sign, please return instead the attached letter which the Association leadership feels should be a more appropriate statement of your intentions. We urge ALL TENURE TEACHERS to co-operate, thereby demonstrating from the onset that we are united in our determination to negotiate a decent salary agreement.

"In light of the realities of the situation, as well as the nature of the present Board and Administration, we would advise that ALL NON-TENURE TEACHERS co-operate with the Board's request. Failure to do so would only jeopardize their position in the district, and it is not

our intention to endanger the positions of those of you who – under the Statutes of New Jersey – *have no rights.*" (*Emphasis respondent's.*)

The letter of intent (P-6B), which the Board had requested teachers to sign, reads as follows:

"In lieu of a standard notification of employment next year, I would like to take this opportunity to state that I will accept employment in the Brick Township School District for the year 1971-1972 at the salary guide and terms and conditions of employment that the teachers Association and the Board of Education agree to in negotiations process.

"I assume, of course, that I will be placed on the appropriate level on this guide."

SUB-CHARGE 10(D)

"On May 11, 1971 Mrs. Kathleen M. Pietrunti directed a bulletin to all members of the Intermediate School concerning the failure of the Board of Education to renew the contract of non-tenure teacher, Jack Hickman, in which she purported to quote as well as demean the Superintendent of Schools by referring to him as 'our beloved Superintendent', the sincerity of which is highly doubted, and attributed to him the following quotation 'with the labor market the way it is now we can afford to hire teachers with the *right image*', a copy of which bulletin is annexed hereto and made a part hereof as Exhibit 'D'." (*Emphasis the Board's.*)

The bulletin referred to, *supra*, was labeled in evidence as P-7, and is quoted in its entirety below:

"Jack Hickman was fired Monday afternoon. Jack Hickman who has never received a bad evaluation. Jack Hickman who had the courage as a non-tenure teacher to speak out in favor of the strike. Jack Hickman with a wife and three children – Jack Hickman was fired Monday because, in the words of our beloved Superintendent, 'with the labor market the way it is now we can afford to hire teachers with the *right image!*

"As President of your Association, I say that this (sic) nothing short of pure administrative brutality. What does Carmen Raciti care if he throws an excellent teacher out on to the streets so long as he can have his revenge on both a teacher with a board as well as the all too popular Phil Pagano.

"Jack Hickman was set up and Jack Hickman's life has now been destroyed. The answer is up to you. Because of my heavy committments (sic) this week, I can not meet with you but I promise you the support of the Association leadership in doing anything to help Jack Hickman.

"Viewed in the light of the present cancer we call our Administration, Jack Hickman is probably a terminal case, but there is no reason he should die in this district without some show that we care.

"I call on you people in the Intermediate School, people who have known Jack Hickman, to do something. Make a move, make it strong, and make it effective – and I promise you the support of all those who care.

"Yesterday I met with Mr. Raciti – along with Jim McCabe – and he must have said a half dozen times; 'trust me, trust me'. Then he called in Jack Hickman and bored the knife into his back. So much for the trust of C. Stephen Raciti – upon whose shoulders this infamy must lie. (*Emphasis respondent's.*)

"Please do something. We're with you – but do it now."

Testimony on this charge by the Superintendent was that he did not say, as respondent alleged, in P-7, *supra*, that "we can hire teachers with the right image," (Tr. III-592) but respondent maintains that the quote was relayed to her by Jack Hickman (Tr. VI-943) "*** shortly after Mr. Raciti [Superintendent] cited that to him that day." This was admittedly hearsay evidence, (Tr. VI-944) and Mr. Jack Hickman did not testify directly to refute the Superintendent's denial.

Respondent also testified with respect to the reasons why she used the phrase "our beloved superintendent." She said (Tr. VI-944) in this regard:

"***Mr. Raciti, for a time, was, in my mind, too, a beloved superintendent; a superintendent who had received premature tenure; a superintendent whose staff had stood up and applauded him when that privilege was afforded him.***"

SUB-CHARGE 10(E)

"Again illustrative of the insubordination to the office of the Superintendent of Schools and reckless accusations against C. Stephen Raciti, Superintendent of Schools, Mrs. Kathleen M. Pietrunti's letter dated May 14, 1971, referred to the administrative post of the office of Superintendent of Schools in paragraph 2 of said bulletin, a copy of which is annexed hereto and made a part hereof as Exhibit 'E', and 'an arbitrary and mindless dictatorship', and again is illustrative of the interference by Mrs. Kathleen M. Pietrunti in administrative decisions concerning the Board of Education and the administrators in the school district."

The bulletin referred to herein was admitted in evidence as P-8, and two paragraphs of that bulletin, in which the phrase *sub judice* appears, are quoted as follows:

"***Last night over 300 members of the Association met - with only one days notice – at Sea Girt Inn, and overwhelmingly voted to launch an all-out effort to save Jack Hickman.

"In a less important turn of events, they were just as strong in making a NO CONFIDENCE VOTE IN OUR SUPERINTENDENT. By doing this, they only formalized a feeling which had been sweeping through the district anyway. In effect, the teachers of Brick Township are united in their desire to end, what I feel, had been the beginnings of an arbitrary and mindless dictatorship. But the important task now is to find the means to save Jack Hickman – because we can not allow a superb teacher and dedicated family man to be destroyed because of one man's whimsy. We have many avenues open to us but our immediate need is for money. This time we will not play into the Board's hands and strike, instead teachers are pledging a days (sic) pay.***"

The Board argues that the use of the phrase "arbitrary and mindless dictatorship" is, once again, "name calling," since respondent did not know the reasons why the teacher, Jack Hickman, was not rehired, and could not properly label the decision as "arbitrary" in view of that fact. It observes that a court suit to restore the teacher had failed and that other legal avenues were available to him and were not pursued.

Respondent argues that her use of the phrase was proper, and that a denial of her right to use it would represent an interference with fair comment and free speech.

SUB-CHARGE 10(F)

"Again illustrative of the insubordination as contained in the bulletin dated May 17, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'F', Mrs. Kathleen M. Pietrunti attended a meeting at the office of the Superintendent of Schools, and in accordance with her own shorthand notes commented of the Superintendent of Schools 'this man is more to be pitied than to be scorned'."

The bulletin referred to herein is marked as P-9 in evidence, and purportedly contains a word by word recital of a meeting on May 14, 1971, in the Superintendent's office, which was attended by a teacher whose contract was not renewed, by the assistant superintendent of schools and by the Superintendent and respondent. In the course of the meeting, the Superintendent allegedly told one of the teachers that his contract would not be renewed for the coming year, and respondent then admittedly voiced the phrase attributed to her herein. However, in her view, the phrase can hardly constitute an act of insubordination, since it would apparently imply that the Superintendent should be viewed with less antipathy than with more.

The Board views the phrase as part of a total attitude, and maintains that a careful reading of all of respondent's words reveals more scorn than pity.

SUB-CHARGE 10(G)

"Again illustrative of the insubordination of Mrs. Kathleen M. Pietrunti is a letter directed to all parents in Brick Town dated May 18, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'G', in which Mrs. Kathleen M. Pietrunti scathingly denounced the Superintendent of Schools for legally conducting his office of Superintendent of Schools, and thereby attempts to incite the parents to be critical of this legal action and accuses the Superintendent of Schools of devious conduct in so conducting his office."

The heart of the charge herein is basically that respondent "scathingly denounced" the Superintendent in a letter to all parents in Brick Township dated May 18, 1971. This letter (P-10) is reported in its entirety below:

"What is happening to teachers in Brick Township stopped happening to other labor groups in the United States over 100 years ago. Only in teaching may a man who has served well for two or three years – a man whose immediate supervisors have praised him *in writing*, and who has been recommended for another contract – only in teaching may this man be fired at the whim of an executive.

"The teachers are John Hickman and Ron Heinzman; the executive is C. Stephen Raciti, Superintendent of Schools. Despite the fine record of these two men – despite the support given to them by their building principals – Mr. Raciti chooses to play God with their lives. We have asked the superintendent to tell us why; Mr. Raciti refuses to give us a reason. We think we deserve more than this from a man being paid $27,000 to bring quality education and harmony into our town.

"There is a *possibility* that LEGALLY the superintendent has the right to take this action; but the time has come for this man to stop hiding behind the law. If DECENCY, COMPASSION, and FAIRNESS still have meaning in our society, we have the duty to demand a show of humanity from those charged with managing our school district.

"So we come to you with our plea. Help save the professional lives of these two fine teachers by expressing your displeasure directly to the Superintendent and Board of Education. Write letters, make phone calls, ask questions – find out why these men who have been doing a fine job in teaching your children will soon be out of work. You are the taxpayers of this town, and you have the right to seek the answers that have been denied us.

"So we ask you to share our sorrow, and our anger; we ask you to force an answer to this break-down of humanity in high places; we ask you to act both in our behalf; and on the behalf of your children." (*Emphasis respondent's.*)

In the Board's view, the letter (P-10, *supra*) was an incitement of parents to "write letters, make phone calls, ask questions," and was not, as respondent maintains, an attempt to apprise parents of what was happening within the school system. The Board also maintains that it was a false representation to say, as respondent did, that teachers were refused reemployment because of the "whim of an executive."

Respondent maintains that she had a constitutional right to say what she did herein, and that the charge is an attempt to throttle the free speech guarantee, which is afforded to all citizens by the U.S. Constitution. She denies she was attempting, in the letter, to incite some kind of a movement against the Superintendent. (Tr. VI-950)

SUB-CHARGE 10(H)

> "As President of the Brick Township Education Association, Mrs. Kathleen M. Pietrunti either incited, organized or condoned telephone calls being made to parents of students to have them attend a rally for John Hickman and Ronald Heinzman at the Lake Riviera Club House on or about May 14, 1971, and which conduct on behalf of her Association members was objected to, and did in fact occasion one parent to write a letter to Principal Bart H. Brooks, a copy of which is annexed hereto as Exhibit 'G-1'."

On the face of it, the hearing examiner holds that this charge is faulty, that there was no testimony in support of it, and that it was dismissed by the hearing examiner with no defense required, at the conclusion of the Board's case.

SUB-CHARGE 10(I)

> "Mrs. Kathleen M. Pietrunti, as President of the Brick Township Education Association, again exhibited conduct unbecoming a teacher and usurpation of administrative functions, and a breach of contract between the Board of Education of the Township of Brick and the Brick Township Education Association in unilaterally issuing a directive, a copy of which is annexed hereto and made a part hereof as Exhibit 'H', dated June 7, 1971, concerning collection of moneys, and which directive was refuted by Principal Bart H. Brooks, when in fact any such grievance concerning the collection of moneys should have followed the proper grievance channels as referred to above, all of which is conduct unbecoming a teacher and questions her fitness to make value judgment, and is subversive of the discipline and morale of the school system."

The so-called "directive" sent to all teachers by respondent on June 7, 1971, (P-11) which is referred to, *ante*, reads in its entirety as follows:

> "As most of you know, ARTICLE X, Section A (2) of the Comprehensive Agreement provides that teachers shall not be required to collect or handle

money. Therefore, I would remind you that you are not required to collect book fines despite the page included in the close-out report.

"I brought this to Mr. Brooks' attention and he agrees. He told me that: if teachers do not wish to handle the money they should send it to the office where it will be handled by the secretary.

"I would like to take this opportunity to thank Mr. Brooks for his understanding of the contract. And in closing, I would say each teacher should follow whatever procedure suits his own needs."

However, on direct examination, the principal of the school, who is mentioned in the text of the "directive" denied he had agreed that teachers were not required to collect the money, which was the subject of the dispute. He also said (Tr. IV-201) that shortly thereafter, he published a bulletin which contained, *inter alia*, the words:

"*** the directive to teachers to collect moneys still stands***."

The question posed for the Commissioner's judgment is whether or not this activity of respondent represented an encroachment on, or a usurpation of, authority granted to school administrators to administer their schools.

CHARGE NO. 11

"Mrs. Kathleen M. Pietrunti, in her capacity as President of the Brick Township Education Association and as a tenure teacher under suspension, did in fact release to the news media a news release, a copy of which is annexed hereto and made a part hereof as Exhibit 'I', wherein she purports to misrepresent to the news media and to the public at large a legal determination by the Board of Education, which in fact the Board of Education did not so determine, and which in fact the Board of Education at the time of the filing of the within charge has no intention to submit to binding arbitration."

There was no evidence presented with reference to this charge, and it was withdrawn by the Board. (Tr. V-650)

CHARGE NO. 12

"On August 10, 1971, Mrs. Kathleen M. Pietrunti directed a letter to Mr. William Bell, President of the Board of Education, sending carbon copies to C. Stephen Raciti, as noted thereon, as Superintendent of Schools, and Joseph Jardot, a copy of which is annexed hereto and made a part hereof as Exhibit 'J', which again illustrates the insubordination of Mrs. Kathleen M. Pietrunti, the misrepresentation of the true facts as they occurred, all of which is an attempt to usurp administrative functions, is conduct unbecoming a teacher and is subversive of the discipline and morale of the school system. The actual facts as they all occurred are set forth in a letter

directed by Donald H. Ward, Esquire, attorney for the Board of Education, a copy of which is annexed hereto and made a part hereof as Exhibit 'K'."

The letter of August 10, 1971, from respondent to Mr. William Bell, President of the Board, admitted into evidence as P-12, contains the following two opening paragraphs which, in the Board's judgment, represents an attempt by respondent to usurp "administrative functions," and is an example of "conduct unbecoming a teacher":

"If the recent movement towards harmony and pride in the Brick Township Education system has any meaning at all, both sides, Association and Board, must scrupulously adhere to the provisions of the contract. This does not mean a lot of nits and lice or undue formality, but the only thing that binds us together is the master agreement.

"What has generated these remarks is an uncomfortable incident which occurred recently when Mr. James McCabe and I conferred with the superintendent regarding the grievance of Miss Carol Collett. We had already passed the superintendent's level as described in ARTICLE II, Section C of the contract, yet we were flexible enough to accede to his request that we return for consultation, since it was his feeling that the matter could be resolved without going before the Board. At this point we did not rigidly adhere to the contract but felt that it, and Miss Collett, could best be served by this meeting. Unfortunately, whatever movement towards a settlement of this rather sticky grievance was almost destroyed by the rather sudden and unexpected intrusion of Mr. William Bell, who insisted that he be permitted to become party to the conference. We view this, in retrospect, as an intrusion into the sphere of the Superintendent's influence and only served to ruin whatever good work Mr. Raciti had done up to the point of Mr. Bell's entrance.***"

The letter, *supra*, was answered by the Board's solicitor in a letter dated August 17, 1971. (P-13) This letter disputes respondent's contention that Mr. Bell had intruded on the meeting of reference and states in part:

"This is to acknowledge receipt of your letter of August 10, 1971. I have been specifically directed by President William Bell to reply to you inasmuch as the contents of the letter were factually directed toward him.

"I would like to point out to you that Mr. Bell did not intrude at the meeting at the Superintendent's office. He went there on another matter, and at your express invitation and consent was involved in the matter concerning Miss Collett. As to the reasons for this consent and express invitation, the answer lies solely within your subjective thinking. President Bell did not insist that he become a party to the conference, but was an express invitee, and participated in the conference in an aura of informality.***"

Neither Mr. Bell, nor respondent, testified concerning this charge, but the Superintendent said (Tr. III-442) that he thought Mr. Bell had entered the meeting of reference "as an observer," that he was not "disruptive," and that he was not asked to leave by anyone present.

The question of fact is whether the Board President "intruded" on a meeting where his presence was neither necessary nor wanted and where he was uninvited. In this regard the hearing examiner observes that P-13 maintains that the President was an "express invitee" to the meeting in question, but the Superintendent stated in his testimony that he had not issued such an invitation. (Tr. III-442) There was no testimony that an invitation was issued by anyone else, as P-13 alleges.

From these facts, the hearing examiner makes a deduction; namely, that the Board President knew of the meeting, attended it as an observer and was not an "invitee," as P-13 avers. Since the dictionary lists as one meaning of intrude,"*** to enter without invitation***," the hearing examiner believes that, in this one sense, the Board President was an "intruder," as respondent stated in her letter. (P-12) However, there is no evidence that such intrusion was the subject of complaint by respondent at the time, and, in effect, Mr. Bell stayed in the meeting by a kind of passive acquiescence.

The hearing examiner fails to see a misrepresentation of facts herein, or evidence of conduct unbecoming a teacher, which was "subversive of the discipline or morale of the school system." While one may question respondent's judgment in raising the issue of Mr. Bell's presence at the meeting *sub judice* at a later date, since there was no evidence that it harmed the meeting and the matter for which the meeting was called was "resolved," the hearing examiner finds little merit in the charge *per se*, and recommends that it be dismissed by the Commissioner.

CHARGE NO. 13

> "Illustrative of the insubordination and vindictive nature of Mrs. Kathleen M. Pietrunti, all of which questions her fitness as a teacher, and is subversive of the discipline and morale of the school system, is a letter from Mrs. Kathleen M. Pietrunti dated August 27, 1971, directed to Mr. C. Stephen Raciti, Superintendent of Schools, a copy of which is annexed hereto and made a part hereof as Exhibit 'L'. The meeting was requested, not by Mrs. Kathleen M. Pietrunti, but by the New Jersey Education Association through Mr. Messner, in which Mr. Messner was advised that the Board of Education did not have to hold a hearing under the contract between the Board of Education of the Township of Brick and the Brick Township Education Association inasmuch as the Board had already reached its determination within the thirty (30) day time period set by said contract, and inasmuch as John Hickman and Ronald Heinzman had been notified by certified mail, return receipt requested, and which were received by them on July 20, 1971 and July 21, 1971, respectively. Mr. Messner himself unilaterally cancelled the hearing graciously extended by

the Board of Education of the Township of Brick, and it was not cancelled because of 'receiving short notice' by the Brick Township Education Association, but was in fact cancelled by the New Jersey Education Association representative, Mr. Messner. Contained in said letter, again, are derogatory remarks inappropriately and uncalled for, directed against Mr. C. Stephen Raciti, Superintendent of Schools, alleging that he had the discourtesy to 'doze in court'."

The letter of reference herein (P-14) from respondent to the Superintendent is reprinted in its entirety below:

"Regarding your letter of August 10, 1971, I would like to make the following points:

"1. John Hickman and Ronald Heinzman were invited (in a letter signed by Mr. Ward, board attorney) to meet at the offices of Anton & Ward regarding the grievance we had initiated following their unjustified dismissal by the superintendent of schools.

"2. Apparently you did not know that this meeting was scheduled, which makes it another case of the left hand not knowing the business of the right hand. There are many of us and so few of you that it seems impossible that you would not know of a meeting of this magnitude unless there were forces afoot that wanted to keep you in the dark.

"3. Certainly you were aware of Mr. Anton's reference in Court to the fact that we cancelled this meeting because of our receiving short notice (notice given through Hickman & Heinzman that is). I am only reminding you of this since you were in the courtroom and certainly heard him make much of it, and even if you were dozing at the time you surely should remember that he mentions it in his written brief – as chief administrative official of the district you most certainly read it . . . . . !

"4. Thank you for assuring us that it is not your intention to exclude the Association from grievance meetings. I think, however, the evidence indicated otherwise."

The hearing examiner leaves to the Commissioner's judgment whether or not the letter *per se* is illustrative of "insubordination" or of the "vindictive nature" of respondent, as charged by the Board. However, the hearing examiner notes that the letter does not, as charged herein, contain an allegation that the Superintendent "***had the discourtesy to 'doze in court,'" but instead contains the words:

"***even if you were dozing at the time***."

Respondent testified (Tr. VI - 962) that the facts, as she had recited them in the letter, were true as she understood them, but the Superintendent maintains (Tr. III-443) that he was unaware of instances in which he had ever

excluded any teacher from "true" grievance meetings. The dispute herein lies in whether the "hearing" for the two teachers considered *sub judice* was a "true" grievance hearing or one of another kind.

It is the Board's representation that counsel for the Board was contacted directly by a representative of the New Jersey Education Association with a request for the hearing to consider the Board's determination with respect to the two teachers referred to in the charge (John Hickman and Ronald Heinzman). The Board also avers, through counsel, that the Superintendent was not notified of the scheduled "hearing." There was no direct testimony in this regard by anyone, however, including the representative of the New Jersey Education Association, Mr. Messner, who did testify with respect to another charge as a witness for respondent. (Tr. V-726)

CHARGE NO. 14

> "Mrs. Kathleen M. Pietrunti again exhibited a vindictive and insubordinate attitude toward the Superintendent of Schools, Mr. C. Stephen Raciti, all of which can be gleaned as an insight into her character, motivations and purposes, and which while minor is perhaps illustrative of a greater purpose involving her. This is contained in a letter dated September 15, 1971, following in rapid succession the decision of the Superior Court, Chancery Division, to uphold the Board's decision not to rehire John Hickman and Ronald Heinzman following the decision of the President of the United States to enact a wage price freeze which negated the negotiations of Mrs. Kathleen M. Pietrunti and her fellow negotiators, and following her suspension as a tenure teacher employed by the Board of Education of the Township of Brick, and the filing of the initial charges as filed herein, and which contains a copy of this letter to be sent *inter alia* to 'Carmen Raciti'. It is to be respectfully noted that in all prior correspondent she addressed the Superintendent of Schools as he has chosen to be addressed, to wit: C. Stephen Raciti. While the Superintendent of Schools does not object to the name of Carmen, the utilization of this name in this manner by Mrs. Kathleen M. Pietrunti, in concluding that in some way the use of this name may be distasteful to the Superintendent, is indicative of her choice to deviate from the politeness of her previous correspondence as set forth in the letter of September 15, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'M', and repeated in a public speech given at a meeting held on orientation on September 1, 1971."

Respondent does not deny that she directed a copy of the letter of September 15, 1971, (P-15) to "Carmen Raciti," but maintains that she did not mean by her direction to "humiliate" or "derrogate" him in any way. (Tr. VI-963) She avers that the use of the name of "Carmen" on this occasion was an outgrowth of a previous "rap" session. Specifically, she said: (Tr. VI-963)

> "***A. Mr. Raciti explained why he went from Carmen S. Raciti to C. Stephen Raciti. He told us that often times he had received

correspondence which addressed itself to Carmen, the female Carmen, when he was in guidance particularly. And so, because he had a repugnance to that, he decided to revert to C. Stephen.***"

It is also noted here that respondent used the name "Carmen," in reference to the Superintendent, in her speech of September 1, 1971. (P-1)

The hearing examiner believes the charge herein to be of such minor consequence that it need not be considered by the Commissioner as substantial evidence against respondent. It is extremely difficult, in the judgment of the hearing examiner, to find serious fault with the choice by respondent of one of two possible names – both correct "given" names – on the basis of a conclusion by the Superintendent that respondent wanted to use the name because it was distasteful. The charge is patently based on speculation; therefore, in the face of respondent's denial and because the charge lacks proof, the hearing examiner recommends that it be dismissed.

CHARGE NO. 15

"Mrs. Kathleen M. Pietrunti again demonstrated insubordination, refusal to accept administrative authority and conduct unbecoming a teacher, rendering her thereby unfit and action which is subversive of the discipline and morale of the school system, in an incident which commenced on or about September 14, 1970, and again on or about April 23, 1971.

"A. Robert Holmes, Subject Supervisor and direct superior to Mrs. Kathleen M. Pietrunti, and former Supervisor of Business Studies for the State Department of Education, has the following responsibilities as set forth in the minutes of the meeting of the Board of Education, a copy of which is annexed hereto and made a part hereof as Exhibit 'N'. Mr. Holmes directed the following suggestion in writing to Mrs. Kathleen M. Pietrunti concerning her lesson plan book, a copy of which is annexed hereto and made a part hereof as Exhibit 'O'. Mr. Holmes received from Mrs. Kathleen M. Pietrunti the following reply: 'I assumed you knew enough about the subject to know that plans are: 1. for the teacher to refer to 2. that what I have included for this week is sufficient and could be used as a guide by any one of the typing teachers on our staff. K.M.P.', which is a direct question of the administrative authority of the Subject Supervisor.

"B. On or about April 23, 1971, Mrs. Kathleen M. Pietrunti was questioned by her Subject Supervisor, Mr. Robert Holmes, concerning the fact that she was not in attendance in her classroom where she was supposed to be at 11:23 a.m. Mr. Holmes, when he passed Mrs. Pietrunti in the hall, quietly interrogated her by saying, 'Gee, you're a little late, aren't you?' Mrs. Pietrunti replied, 'Shove it.' This is set forth in a report to Mr. Bart H. Brooks, from Mr. Robert Holmes, a copy of which is annexed hereto and made a part hereof a Exhibit 'P'. Mrs. Pietrunti replied in writing in a two-fold manner. Firstly, her short note to Mr. Holmes, a copy

of which is annexed hereto and made a part hereof as Exhibit 'Q'. Then in response to a request made to Mrs. Kathleen M. Pietrunti by Mr. Bart H. Brooks, Mrs. Pietrunti in a note dated May 6, 1971, a copy of which is annexed hereto and made a part hereof as Exhibit 'R', and 'R-1' replied at length. It is to be strongly noted that Mrs. Kathleen M. Pietrunti admits that she was in fact late to class on that day and did use the most unfeminine and unladylike retort of 'Shove it', and proceeded with a rationale and explanation in vindication which gives greater insight into her total personality as a teacher, concerning her attitude toward the administration, toward personal criticism, toward authority and cites therein a purported conversation between Anthony Lucca and Bart H. Brooks which is wholly at variance with the story related by Mr. Brooks concerning the Lucca incident. It is to be noted, however, that the Elizabethan curse word used to Mr. Lucca was used by a defiant student, and not a professional member of the community, to wit: a tenure teacher."

The hearing examiner finds no question of fact in Paragraph "A" of the charge herein. Pursuant to duties as enunciated and assigned to him by the Board of Education, (P-16) Mr. Robert Holmes, subject supervisor, had made certain suggestions to respondent in written form concerning her lesson plans. (P-21) Respondent did, in fact, reply exactly as charged by written memo. (P-21B)

The hearing examiner notes no "question of the administrative authority" in respondent's reply, although there is a frank answer to the supervisor's criticism, which might be labeled curt or sarcastic, but is not so labeled in the charge.

With respect to Paragraph "B" herein, there is also no question of fact. By her own admittance, respondent was late for class on this one occasion and did direct Mr. Holmes to "shove it." (P-18) Her reason for tardiness on this occasion was that she had stopped to assist a girl in trouble. The reason is not challenged herein by the Board, and it is only respondent's reaction to criticism, as evidenced by her expression "shove it," which seems to pose the issue for the Commissioner's judgment. The question is whether or not such reactions as detailed herein are, as charged, a refusal to accept administrative authority and a representation of unbecoming conduct.

Two other facts of note are itemized with respect to this matter as follows:

1. The dialogue between respondent and Mr. Holmes was confined and limited to their hearing alone.

2. Respondent maintains she was told by the school principal that the incidents pertinent to this charge were not to be the source of a continuing dispute. (Tr. VI-970) Specifically, she stated that the principal had said:

"***as far as I am concerned this ends right here.***" (Tr. VI-970)

CHARGE NO. 16

"Mrs. Kathleen M. Pietrunti has illustrated by virtue of the speech hereinbefore referred to in charges filed with the Commissioner of Education a certain philosophy and tenor with respect to her conduct as to insubordination, unfitness to be a teacher in the school district, and has exhibited that she will continue to so conduct herself in accordance with the same tenor as contained in all the charges filed herein, and which is most clearly illustrated by the virtue of the fact that on September 7, 1971, she purported to apologize as having been too harsh on the Superintendent of Schools in her orientation speech of September 1, 1971. While the Board of Education questions the sincerity of the apology subsequent events indicated that the apology was totally insincere and not intended at any time by Mrs. Kathleen M. Pietrunti. While she was giving her 'apology' she was causing to be distributed copies of the speech of September 1, 1971, at the meeting on September 7, 1971. Sugject (sic) to her suspension, she announced in the news media that if she had to give the speech again she would."

When asked why she had apologized on September 7, 1971, for the speech (P-1) she had given on September 1, respondent stated in direct testimony, at the hearing:

"***A. Upon reflection, conversation with new teachers, it appeared as though quite possibly that could have been the wrong place, insofar as it possibly did not afford Mr. Raciti an opportunity to respond.***" (Tr. VII-997)

Later, she stated the reason why her speech (P-1) of September 1 was being distributed at the same meeting that the apology, *ante*, was offered. She said the speech was distributed:

"***A. So that all teachers in the district could readily see the reason for the apology for the September 1st speech, and to bury some of their misunderstandings about the September 1st speech, which may have been garnered from reading it in the press.***" (Tr. VII-997, 998)

The question for determination herein is whether or not the mere fact of the distribution of the speech (P-1) on September 7, 1971, was an evidence of insincerity. In the face of respondent's testimony and lacking other evidence to the contrary, the hearing examiner believes that the apology respondent gave must be accepted as an honest regret.

The hearing examiner recommends, therefore, that this charge, which, he opines, is vaguely worded and which lacks specificity, be dismissed.

No proof was offered in support of the last sentence of this charge. No defense was required.

CHARGE NO. 17

"Again illustrative of the fitness of Mrs. Kathleen M. Pietrunti with respect to insubordination and her overall purpose which is conduct unbecoming a teacher and is subversive to the morale and discipline of the school district, this teacher stated verbally to Mr. Warren H. Wolf, Assistant Superintendent of Schools, words to the effect when asked why she had made such accusations in her orientation speech on September 1, 1971, that 'We could let that go but he (referring to the Superintendent) has got to go', thereby an avowed purpose of Mrs. Kathleen M. Pietrunti to rid the school district of C. Stephen Raciti, Superintendent of Schools, and reaffirmed by a release to the news media subsequent to her suspension, 'Now I am President, but in years to come I will be a teacher and my voice will be as strong and as loud as it is now' at a public meeting of the Board of Education of the Township of Brick, at which some 400 residents, teachers and taxpayers had come to exhibit their almost unanimous support of Superintendent of Schools C. Stephen Raciti, and at which petitions containing the signature of some 1,200 residents had indicated their support of the Board of Education in its action in suspending Mrs. Kathleen M. Pietrunti."

The only facet of this charge requiring any comment is respondent's statement, "We could let that go but he has got to go," Mr. Warren H. Wolf, assistant superintendent of schools, was the only witness to testify concerning the truth of this charge, and he stated that it was his "opinion" that the words of the quote were spoken with reference to the Superintendent of Schools. (Tr. I-89)

There was no testimony from respondent concerning this aspect of the charge. However, respondent maintains that the last sentences of the charge do not constitute an indictment of any kind at all.

The hearing examiner concludes, from limited testimony, that respondent probably did say words to the effect that "The Superintendent has got to go" in private conversation with the assistant superintendent of schools. However, he recommends that all other inferences and facets of the charge be dismissed.

CHARGE NO. 18

"Mrs. Kathleen M. Pietrunti has further committed conduct unbecoming a teacher by virtue of her unfeminine and unladylike remarks made in various public places of accommodation and on school premises, all of which are subversive of discipline and morale of the school district and all of which questions her fitness to be a school teacher.

"A. At a meeting of the District Improvement Council, Mrs. Kathleen M. Pietrunti enunciated a philosophy concerning all elementary teachers as 'elementary teachers have elementary minds'

"B. On several occasions Mrs. Kathleen M. Pietrunti has called Superintendent of Schools C. Stephen Raciti 'C. Serpent Raciti' and a 'small man', or a 'little man', it not being determined whether she was referring to stature or intellect.

"C. While correcting school papers she came across a paper prepared by one of the students in the school district, and in making her professional evaluation thereof stated, 'This paper is so poor it is not good enough to wipe my ass', and which statement was made in the faculty room.

"D. At another time while being struck by a swinging door in the principal's office of the High School, and within hearing distance of two students, Mrs. Kathleen M. Pietrunti said to the teacher who had just motivated the door, 'You son-of-a-bitch, you did that on purpose'.

"E. At a place of public accommodation, Mrs. Kathleen M. Pietrunti, upon witnessing the arrival of the Board President William Bell, in an abortive attempt at humor said, 'Ding Dong Bell, Ding Dong Bell', and upon the departure of President William Bell said that Mr. Bell was a 'bald headed mental midget' and in amplification of her remarks later stated that he was 'a bald headed bastard'."

The sub-charges, *ante*, are discussed briefly *seriatim* below:

(A) A finding of "true in fact," with respect to this sub-charge, is impossible for the hearing examiner to make. All testimony concerning it was by adversary parties. While there is little doubt that respondent said something similar to the words contained in the charge, any finding that the words were spoken in a derogatory sense could only be judged authoritative if voice intonation were personally evaluated, and if the total meeting within which these or similar words were spoken was personally attended.

Respondent maintains that she "never said the words attributed to her herein, but that she said instead that "elementary teachers were elementary minded." (Tr. VI-974, 975) Her testimony was that she was not attempting to make a derogatory statement about elementary teachers as a group or about any elementary teachers, and that the total conversation within which these words were spoken was concerned with representation on a school district council.

(B) The hearing examiner finds in a parallel manner with respect to this charge. Respondent admits she characterized the Superintendent as a "little man" on one occasion, but maintains it was in a jocular exchange, (Tr. VI-977) and she admits that she told the Superintendent he was commonly referred to as sea-serpent throughout the Brick Township District on another occasion. (Tr. VI-976) She stated that she had been told she was called "big mamma," (Tr. VI-976) prior to the time she used the expression "sea-serpent," as reported.

In the circumstances, and cognizant of the fact that frequently, teachers and administrators are eventually endowed with some kind of nickname —

complimentary or otherwise – and finding it impossible to evaluate the exchanges herein from personal observation, the hearing examiner makes no finding that the attributed words, as charged, were "unfeminine," "unladylike," "subversive of discipline" or otherwise derogatory or deleterious.

(C) The statement attributed to respondent herein was purportedly made in the presence of teachers other than the one who testified that the charges were true. (Tr. I-42) Respondent herself denies it categorically, (Tr. VI-979) and other teachers called by her as witnesses in her behalf had no recollection of such a statement, although they were usually present with her during the first period of the day when the statement was allegedly made.

The testimony has not conclusively established the statement as true in fact, in the opinion of the hearing examiner; therefore, the statement should not be included as a fact to be considered by the Commissioner.

(D) The hearing examiner finds this sub-charge to be true in fact as stated. The testimony shows that respondent was struck by a swinging door during the month of February or March 1971, and in surprise or annoyance, or in an instantaneous combination of both, uttered the expression attributed to her herein. (Tr. I-46) (Tr. IV-138)

Testimony to this effect was offered against her by a fellow teacher, who activated the door, (Tr. I-46) and by a substitute secretary who was standing nearby, (Tr. IV-138) and neither testimony was changed in essence, or in the credence attached to it, by rather extensive cross-examination, in the opinion of the hearing examiner.

It is also apparent from the testimony of these two witnesses that students acting as assistants in the general office area were present when the incident *sub judice* occurred, although their testimony was not elicited at the hearing.

(E) There was extensive testimony concerning the truth of this charge, replete with a number of detailed recitals of conversations that passed between a group of teachers and representatives of the New Jersey Education Association on the one hand, and a group of Board members and administrators on the other. The place was the Red Lion Inn, Brick Township, and the time of the incident was immediately subsequent to the meeting at which respondent was suspended by the Board, in September 1971.

However, despite the extensive testimony, there is little need to treat this charge in great detail. Respondent admits, and her own witnesses attest, that she called the President of the Board of Education a "bald headed mental midget," (Tr. VI-984) but denies that she referred to him as "ding dong Bell," or that she ever called him a "bald headed bastard." While the hearing examiner believes that someone, respondent or one of her group, certainly used the expression "ding dong Bell" with reference to Mr. Bell, President of the Board of Education, he cannot find, in the testimony concerning that evening, a preponderance of evidence that it was respondent who used it. Neither is he

convinced by conflicting testimony that she used the expression "bastard" on that occasion.

The hearing examiner is convinced that both Mr. Bell and respondent were taunted in turn. Mr. Bell's response to the taunt addressed to him, as he left the Inn, was to approach respondent's table and repeat the quotation from Hamlet, which had been one reason for respondent's recent suspension. Respondent, in turn, regarded those words as a taunt and angrily replied:

"A. Leave this place, you bald headed mental midget." (Tr. VI-984)

The finding herein is limited to that portion of the charge.

CHARGE NO. 19

"Mrs. Kathleen M. Pietrunti, as President of Brick Township Education Association and as a tenure teacher employed by the Board of Education of the Township of Brick again exhibited conduct unbecoming a teacher, and subversive of the discipline and morale of the school district, in that when her authority was questioned, by another teacher in the school district, and when the teacher requested that his mailbox not be filled with what he termed 'garbage' being disseminated by the Brick Township Education Association through letters and bulletins, and himself professionally attacked by the Association which was enforced and/or condoned by Mrs. Kathleen M. Pietrunti by virtue of a proposal, a copy of which is annexed hereto and made a part hereof as Exhibit 'S' and 'S-1', and as set forth therein, concerning Mr. Frederick Felz, all of which is conduct unbecoming a teacher and subversive of the discipline and morale of the school district and questions the fitness of Mrs. Kathleen M. Pietrunti to make a value judgment."

There was no real evidence offered in support of this charge. The two documents mentioned in the charge, and identified as Exhibit "S" and "S-1," were not admitted into evidence because Mr. Felz stated that he had no "concrete proof" that respondent was responsible for them, and that the documents were not otherwise found to relevant. (Tr. I-152)

Accordingly, the hearing examiner recommends that this charge be dismissed.

CHARGE NO. 20

"On September 23, 1971, the said Mrs. Kathleen M. Pietrunti did interfere with the performance of the duties of Mr. Martin Groppe, when Mr. Groppe had occasion to speak to and confer with a teacher, namely Mrs. Bittenbinder, for not being at her post or area, at which time the said Mrs. Kathleen M. Pietrunti stated, 'Why don't you tell him to take care of it', in support of which a copy of a letter is annexed hereto and made a part hereof as Exhibit 'T' over the signature of the aforementioned Martin

Groppe. This incident occurred in the cafeteria at the Brick Township High School."

The hearing exmaminer finds this charge to be substantially true in fact. This finding is founded on the testimony of Mr. Groppe (Tr. II-295), on a memo Mr. Groppe submitted to the school principal on the day of the reported incident (P-24), and on a review of a deposition respondent herself made on January 5, 1972 , prior to the beginning of the hearing.

The document from Mr. Groppe to the school principal is reported in full as follows:

> "In the performing of my responsibility as Cafe (sic) supervisor, today I found Mrs. Bittenbinder not at her post or area upon entering the east faculty lunch room. I reminded her that she should be at her assigned area, it was at this moment that Mrs. Pietrunti said loud enough for other teachers to hear. 'Why don't you tell him to take care of it.' I feel this was very un-professional & somewhat under-mining of my role as supervisor (sic) as a person I am insulted by her remark."

Respondent herself said, in the deposition mentioned, *supra*, (at p. 52), in response to a question as to whether or not she admitted or denied saying, "Why don't you tell him to take care of it?":

> "A. I said something like that to Mrs. Bittenbinder."

This ends a recital of and discussion about the charges *per se*. However, the hearing examiner adds the following observations, which he opines have some relevance thereto:

> 1. The Superintendent was not awarded "early tenure," as respondent believed was the case, according to the testimony of the Superintendent on rebuttal. (Tr. VII-1118) This finding is related to Charge 10D.
>
> 2. There was some testimony at the hearing, which attributed a series of crude expressions to the Superintendent of Schools. If found true in fact, these charges would establish some grounds for a determination that respondent's purported or proved expressions were no cause for complaint because she used them in an atmosphere pervaded with crudity. However, the Superinendent is not charged with misconduct herein, and there is no finding that such counter charges are true in fact.
>
> 3. None of the charges herein involve students of respondent's classes or her teaching performance. Students other than those directly taught by respondent were involved only as spectators with respect to Charge 18(D).

In summary, the hearing examiner finds:

1. That Charges Nos. 2, 3, 4, 5, 6, 7, 10(A) through (G), and (I)), 13, 15,

17 as noted, and 20 must be examined by the Commissioner, as reported, for evidence that respondent encroached upon an administrative prerogative, or was otherwise guilty of conduct unbecoming a teacher in the public schools.

2. That the Superintendent did not fire the two teachers as alleged by respondent in her speech (P-1), and to this extent the charge by her, which the speech contained, was a distortion. (Charge No. 1)

3. That there is no concrete evidence that respondent's speech (P-1) "seriously interfered" with the operation or the administration of the Brick Township School System, as alleged. (Charge No. 8)

4. That respondent did call a fellow teacher a "son of a bitch" as alleged. (Charge No. 18 (D))

5. That respondent did call the Board President "a bald-headed mental midget" as alleged. (Charge No. 18(E))

6. That respondent did reply to the supervisor, as charged. (Charge No. 20)

7. That Charges Nos. 9, 10H, 12, 14, 16, 17 (except as noted), 18, (A,B,C) and 19 should be dismissed for the reasons stated.

8. That Charge No. 11 was withdrawn by the Board.

The legal arguments pertinent to the charges, *supra*, represent a diametrically opposed set of views.

On the one hand, respondent argues in the Motion to Dismiss, which was offered at the conclusion of the Board's case, and in the brief of counsel, that the charges, *sub judice*, and the proofs that were offered, present no reason at all to justify the imposition of any penalty. In this view, the disputes chronicled herein were the culmination of a long period of strained and steadily-deteriorating relations, which ensued when the Brick Township Teachers' Association, led by respondent, began to assert its rights – to press grievances, to express points of view different from those held by school administrators and the Board, and to demand that contracted privileges be afforded. In the brief of counsel, it is stated that:

"***The real culprit is the newness of a relationship involving discussion and bargaining, adjustments, concessions, compromises, acceptance, tolerance, as well as firmness, strength, principle and all the other categories, where two bodies approaching a complex of problems from different points of view suddenly find themselves in confrontation.***"

Respondent says in retrospect that at the time of "confrontation," it is perhaps true that neither side distinguished itself in tact, tolerance, forbearance and understanding, but that this truth presents no reason for her dismissal.

Respondent avers that the Board, after a review of Charges 1 thru 9, evidently was concerned that it would not accomplish its purpose, and that Charges 10 thru 20 represent a concerted effort to garner every single item, which might be of any use at all in an effort to bolster its case, despite the fact that the charges presented no cause for action at the time the incidents were alleged to have occurred. In respondent's view, however, all of the charges and the proofs, as presented, show:

(a) No evidence that morale of the Brick Township School System's staff ever suffered as a result of things respondent is alleged to have said or done.

(b) No evidence that she ever failed to carry out a single legitimate directive from the Board or school officials.

(c) No evidence that respondent ever usurped, or took unto herself, an administrative function.

To the contrary, respondent maintains that she merely occupied the position of a gadfly, annoying the Superintendent and the Board by constant reminders that they should be considering the Teachers' Association as a properly-recognized bargaining unit. She also observes that the Board never filed a grievance against her, pursuant to the bargaining agreement, and that its charges now suffer from staleness.

Further, respondent maintains that a number of court determinations uphold her rights as a citizen to speak freely on all issues, which she regards as pertinent, and that those rights are not denied to her as she enters the school house door. In this regard, she cites *Tinker v. Des Moines Independent Community School District*, 393 *U.S.* 503, 89 *S. Ct.* 733, 21 *L. Ed. 2d* 731, (1969); *Pickering v. Board of Education*, 391 *U.S.* 563, 88 *S. Ct.* 1731, 20 *L. Ed. 2d* 811 (1968); and *New York Times Co. v. Sullivan*, 376 *U.S.* 254, 11 *Ed.* 686, 84 *S. Ct.* 710 (1964). Respondent refers also to *Puenter v. Board of Education of Union Free School District of Bethpage*, 24 *N.Y. 2d* 996, 250 *N.E. 2d* 232 (1969), remanded from *U.S. Supreme Court*, 392 *U.S.* 653 (1968), in which the New York Court stated that a teacher's actions were excessive, but, since there was no evidence of actual or threatened damage to the school system, there was no reason for disciplinary action.

On the other hand, the Board maintains that the right of free speech is not an absolute right, and that respondent's references, contained in the charges herein, to the Superintendent as a "villian" and to the administration as a "cancer" and a "mindless dictatorship" go beyond the permissive limits of protected free speech and destroy the shield of constitutional protection. In support of this contention, the Board also cites a principal court decision on

which respondent relies; namely, *Pickering, supra,* and quotes extensively from *Thomas C. Knarr v. The Board of School Trustees of Griffith, Indiana et al.,* U.S. District Court, N.D. Indiana, decided September 25, 1970, 317 Federal Supplement 832, and *Bruce Jones v. Rev. Richard A. Battler, et al., Members of the Board of Education for the Town of Hartford, Defendants,* 315 *F. Supp.* 601 (1970). Additionally, the Board cites the following recent Commissioner's decisions: *In the Matter of the Tenure Hearing of Francis Bacon, School District of the Township of Monroe, Gloucester County,* decided by the Commissioner August 12, 1971; *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County,* decided by the Commissioner November 18, 1971, and *In the Matter of the Tenure Hearing of John H. Stokes, School District of the City of Rahway, Union County,* decided by the Commissioner December 20, 1971.

The Board's basic contention is that the charges leveled by respondent against the Superintendent in her speech (P-1, *supra*) were false, and that the speech *per se* was untimely, reckless, unprofessional and deserving of censure. In the judgment of the Board, *Chapter* 303, *Laws* of 1968 modified the powers and duties of a Board and its public employees, but conferred no right on employees to say or do the things attributed to respondent in the charges herein. Unbecoming conduct by a tenured teacher, in the Board's view, is still punishable under the statutes (*N.J.S.A.* 18A:6-10 *et seq.*).

Amicus Curiae supports the Board's position on all points. He argues that the employer-employee relationship imposes reciprocal rights and duties on both parties, and that the responsibilities of an employee to an employer include loyalty, respect, cooperation and dedication to the employer's best interests. In his view, these duties are not obliterated by the fact that employees have parallel rights to speak freely and negotiate collectively. *Amicus* cites *MacIntosh v. Abbot,* 231 *Mass.* 180, 120 *N.E.* 383 (1918); *Marchetto v. Central R. Co. of N.J.,* 9 *N.J.* 456, 466 (1952); *Breen v. Larson College,* 137 *Conn.* 152, 75*A.* 2*d* 39 (1950); and *Greene v. Monmouth College,* an unreported case decided by Judge Lane in the *Superior Court, Chancery Division,* on January 6, 1969, Docket No. C-1621-66. In this latter decision, Judge Lane had cited, in turn, 9 *Williston, Contracts* (3*d. ed.* 1967) and *Myers v. American Well Works,* 114 *F.* 2*d* 252 (4 *Cir.* 1940), *certiorari denied* 313 U.S. 563. From Williston, *supra,* p. 59, *Amicus* cites the following paragraph:

> "*** The relation of employer and employee requires on the part of each an observance of the elementary principles of good behavior. The extent of the duty and the consequences of a breach of it must vary necessarily with the character of the employment. Insolvent or disrespectful language or conduct on the part of a servant will justify dismissal.***"

and from *Myers, supra,* at p. 253, the following, a paragraph which he considers applicable:

> "***In addition, this first contract of employment, we think, is subject to the implied condition that the conduct of the employee towards the

employer shall at least be respectful and free from insolence, disrespect and insubordination.***"

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs that Charges Nos. 9, 10 (H), 12, 14, 16, part of 17 except as noted, 18 (A, B, and C), and 19 should be dismissed. He will, accordingly, not consider these charges in a judgment on the totality of the matter *sub judice*. He will consider the remaining evidence and findings in the two major sequences of the report *seriatim*.

I.

The Commissioner observes that the evidence herein is, for the most part, stipulated. Respondent did make the speech (P-1 *supra*), and her statements contained therein are a clear matter of record. The judgment made by the hearing examiner as to the factual nature and truth of the allegations made by respondent in the speech are also accepted by the Commissioner. Thus, the Board's charges that the speech contained untruths or distortions are found to be true in fact, and only in a limited sense, with respect to Paragraphs 1 (that the Superintendent "fired" two teachers) and 4 (that the Superintendent was "intimately" embroiled in politics).

However, the truth or falsity of these and the other charges, which respondent made on September 1, 1971, cannot be adjudged as the only points of determination at issue herein in the Commissioner's opinion, although the Board's case would certainly be stronger, if all of respondent's allegations were proved without doubt to be false. That some of them were not so proved does not obviate the necessity for a determination of the propriety of the whole speech *sub judice*. Why were such charges leveled at the Superintendent on this occasion? Were they appropriately raised? How should the charges be viewed when read in *pari materia?*

The Commissioner determines that respondent's speech (P-1), which she gave on September 1, 1971, was, in its total essence, a derogatory personal indictment of the Superintendent of Schools, was presented inappropriately to the wrong forum, and was patently unfair to the Superintendent in that it was given in complete disregard of his legal and human rights to a fair and impartial hearing on such serious complaints. The Commissioner determines, therefore, that respondent was guilty of conduct unbecoming a teacher in the public schools because the speech was made in such circumstances.

This finding is based on three principal observations:

1. The first two charges (Paragraphs 1 and 2 of P-1) leveled by respondent at the Superintendent had been adjudicated in proper forums, and decisions in both matters had been reached long before the meeting of September 1, 1971. The Superintendent was never found guilty, in either

case, of improper activity. Therefore, there was no apparent rhyme or reason for the resurrection of such disputes before the group of new teachers at the above-mentioned meeting.

2. If respondent thought the rest of her accusations were true in fact – that the Superintendent was guilty of improper political activity, of a dereliction of duty, of threatening a man's professional life, or that he was a "villain" – she had every right to process her complaints against him in the same manner as he processed those against her herein. Such charges were clearly ones, that if found true in fact, were worthy of processing and adjudication in the manner prescribed by the statutes.

3. Having no factual basis to even include the first two paragraphs of her speech as any evidence of "villainy" on the part of the Superintendent, and respondent having failed to complain in the proper forum about such serious charges as she made in Paragraphs 3 and 4 of her speech (P-1), the Commissioner holds that mention of any of them was imporper in a prelude to the characterization of the Superintendent which followed: "the man who just apoke to you fits Hamlet's description of his uncle – that he does smile and smile and smile and yet remain a villain."

II.

The Commissioner has reviewed the charges remaining, for determination of propriety in the context of charges that respondent was insubordinate and guilty of conduct unbecoming a teacher. He finds two serious evidences of such conduct and other evidences of lesser import. These serious evidences, in the Commissioner's judgment, are clearly present in the recitals relative to Charges 10 (A and C) and in Charge 18(P).

Charges 10 "A" and "C" are concerned with the letters of intent (P-5), and in this regard, the Commissioner opines that the Brick Township school administration had a responsibility, in their planning and preparation for the 1971-72 school year, to determine which staff members intended to return to their assignments in September. This has been a traditional practice.

Since this is so, it was, in the Commissioner's view, an insubordinate gesture for respondent to "***urge all tenure teachers in the district not to sign this letter***," but the most serious insubordination follows that urging, for respondent then instructed the teachers not to:

> "***comply with *any request* that will make the Board's job any easier." (*Emphasis supplied.*)

Such an instruction, by the President of the Teachers' Association, if followed by a majority of staff members, could have seriously crippled the effective operation of the Brick Township Schools. The Commissioner holds, therefore, that respondent's injunction considered herein was, on its face, an insubordinate

act. As the Supreme Court of New Jersey said in *Board of Education, Borough of Union Beach v. N.J.E.A. et al.*, 53 *N.J.* 29 (1968), at page 40:

> "***although citizens, individually and in association, may thus seek to 'coerce' a public body to their wish, there is no right to achieve that end by disabling the public body from acting at all.***"

The expression addressed by respondent to a fellow teacher – "You son of a bitch, you did that on purpose" – which is the subject and finding of Charge 18(D), is also, in the Commissioner's judgment, an evidence of conduct unbecoming a teacher in the public schools, despite the reported provocation, because by the elicited testimony, there were students present at the time. Such expressions, in the Commissioner's belief, are not covered by a Constitutional shield when uttered in such circumstances.

The remaining charges – Charges 10 (B, D, E, F, G, and I), 13, 15, 18 (A, B, C, and E) and Charge 20 – with the proofs as elicited and embracing the circumstances as recited by the hearing examiner, are, the Commissioner finds, lesser charges than the ones discussed, *supra,* in this section. Nevertheless, in the Commissioner's judgment, when taken together, the brusque expressions and terms "arbitrary and mindless dictatorship," "shove it," "bald headed mental midget," "tell him to take care of it," etc. are expressions that provide reinforcement to the principal findings relative to Sections I and II, *supra.* Even if this were adjudged not to be so, the proofs herein provide little reason to believe that respondent has, in the past, or could in the future, be seriously interested in aiding the Brick Township Board to provide the "thorough and efficient" school system required by Constitutional prescription.

In the determinations reported, *supra,* with respect to both of the principal groups of charges herein, the Commissioner has been ever mindful of the need, in our society, to balance the rights of the individual to speak his mind freely with the needs of a school system to conduct its business in an orderly reasoned manner. As the Court said in *Pickering, supra,* (at page 568):

> "***The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.***"

The determinations herein have been made in the context of this opinion.

Having determined that respondent has been guilty of unbecoming conduct and insubordination, it is necessary now to determine the penalty, which must be assessed. In this regard, the Commissioner holds that the speech (P-1), even standing alone, warrants a finding that respondent has forfeited her right to continued employment in Brick Township. This holding is grounded on the belief that local boards of education which are required by constitutional prescription to operate thorough and efficient systems of public education,

cannot be expected to carry out this mandate in an atmosphere of turmoil and conflict between school administrators and other employees. When such an atmosphere clearly exists, as herein, and when the atmosphere was created by a teacher acting in a premeditated and calculated manner (the speech, P-1) the Commissioner believes that the tenure rights of the teacher are forfeit to the needs of the district as a whole for a cooperative effort in the education of children. It is this effort of local boards of education, the representatives of the people through the electoral process, and of school administrators, entrusted by the boards with duties of school management, which, in the Commissioner's judgment, must be supported.

In addition to the finding, *ante*, with respect to respondent's speech (P-1), there are two other principal findings from the second section, *supra*, and the finding with respect to the lesser counts. The combined determinations, in the Commissioner's judgment, comprise a series of incidents to which the Court referred in *Redcay v. State Board of Education*, 130 *N.J.L.* 369, when it stated at page 371:

> "***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.***"

Accordingly, the Commissioner determines that respondent should be dismissed from her employment with the Brick Township School System, effective on the date of her suspension by the Brick Township Board of Education on September 8, 1971.

COMMISSIONER OF EDUCATION

July 19, 1972

Pending before State Board of Education

Francis A. Gana,

Petitioner,

v.

Board of Education of the Township of Quinton, Salem County,

Respondent.

COMMISSIONER OF EDUCATION

Decision on Motion

For the Petitioner, Tuso & Gruccio (Philip A. Gruccio, Esq., of Counsel)

For the Respondent, Hannold, Caulfield & Zamal (Martin F. Caulfield, Esq., of Counsel)

Petitioner, a teaching staff member employed by the Quinton Township Board of Education, hereinafter "Board," avers that he had acquired tenure in such employment and that his dismissal by the Board in April 1972, was *ultra vires.* His prayer is that he be promptly reinstated. The Board, while not denying the basic facts upon which petitioner relies, does deny that he had attained a tenure status while in its employ, and maintains that his discharge was legally correct and in the best interest of the school district.

At this juncture, petitioner moves for summary judgment on the pleadings. An oral argument on the Motion was conducted by a hearing examiner appointed by the Commissioner, on June 16, 1972, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

Petitioner was employed by the Board as a teacher during all of school year 1968-69, and reemployed under separate yearly contracts to serve as administrative principal during the 1969-70 and 1970-71 school years. His service was uninterrupted during that period of three years, and a fourth contract was given to him for service during school year 1971-72.

Under the terms of this fourth contract, petitioner resumed his employment in September 1971, and continued to serve as administrative principal until he received the following letter from the Secretary of the Board dated April 25, 1972:

> "Pursuant to action taken by the Quinton Township Board of Education at a special meeting held on April 24, 1972, your employment and services are terminated as of April 27, 1972, and you are directed to leave the Quinton school premises and perform no further services for the Quinton school system after April 27, 1972.

"The Board also voted to give you the equivalent of two month's (sic) pay."

Petitioner promptly appealed this termination of his employment, and avers that his total continuous service of three years and eight months as a teaching staff member, in an employment for which he was fully certified, bars such summary dismissal. Documents admitted into evidence as P-1 establish the fact of his proper certification during all of the period of service, and include:

1. An Elementary School Principal's Certificate dated February 1969.

2. A Principal's Certificate dated October 1969.

3. A School Administrator's Certificate dated October 1969.

4. A Supervisor's Certificate dated July 1969.

The Board, while not contesting the facts enunciated, *supra*, maintains that petitioner is not able to resume his position, even if a strictly legal interpretation of the facts is in his favor, but admits it cannot, at this time, present evidence necessary to establish such a contention as true. Specifically, the Board alleges that petitioner is suffering from mental illness and, in the Board's view, this allegation should bar the Commissioner from rendering a strictly legal judgment on the stipulated facts reported, *supra*, pending a determination of the truth of this allegation. In the Board's judgment, a denial of the Motion *sub judice* and a parallel determination of the truthfulness of its allegation would best serve the interest of the Quinton School System.

Petitioner maintains that he is ready, willing and able to continue his duties as administrative principal, that the Board's dismissal of April 25, 1972, reported, *supra*, was an arbitrary action designed to demean his professional character and performance, and that in the absence of charge against him, pursuant to the requirements of the tenure laws (*N.J.S.A.* 18A:6-10 *et seq.*), he should be promptly restored to his position.

* * * *

The Commissioner has reviewed the report of the hearing examiner and notes the contention of the parties. However, the facts are clear, and, in the Commissioner's judgment, they attest to one primary conclusion; namely, that petitioner is a tenure employee of the Board who could not legally be dismissed in the manner the Board proposed to dismiss him on April 25, 1972. This judgment is founded on a review of the precise words of the statute, *N.J.S.A.* 18A:28-5, which is reproduced in pertinent part below:

"The services of all *teaching staff members* including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any

other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, *shall be under tenure* during good behavior and efficiency and *they shall not be dismissed or reduced* in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:

(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

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

Since, by any of the standards (a), (b), or (c), petitioner had earned the protection of a tenure accrual, he could not be "dismissed" or "reduced in compensation" except "in the manner prescribed by subarticle B of article 2 of chapter 6" of Title 18A. (Tenure Employees Hearing Act) Therefore, the summary dismissal of petitioner by the Board without the preferment of "written charges" and without a "hearing," as required by the Tenure Employees Hearing Act, *supra,* was clearly an *ultra vires* act – completely unfounded and in direct violation of the rights the tenure statutes were designed by the Legislature to afford in such instances. *Board of Education of Manchester Township v. Raubinger*, 78 *N.J. Super.* 90 182*A* 2*d* 614, 620 (*App. Div.* 1963); *Viemeister v. Prospect Park Board of Education*, 5 *N.J. Super.* 215, 218 (*App. Div.* 1949) Unsupported allegations provide no reason herein for delay.

Accordingly, the Commissioner directs that petitioner be restored to his position forthwith and be awarded all of the compensation and benefits to which he is entitled retroactive to the date of his purported dismissal by the Board. Any further actions of the Board subsequent to the promulgation of this decision must be in conformity with statutory prescription.

COMMISSIONER OF EDUCATION

July 24, 1972

Edward Eugene Petrosky, Jr.,

Petitioner,

v.

Board of Education of the Borough of Freehold, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Manna & Kreizman (John C. Manna, Esq., of Counsel)

For the Respondent, DeMaio & Yacker (Vincent C. DeMaio, Esq., of Counsel)

Petitioner, a teacher employed by the Board of Education of the Borough of Freehold, hereinafter "Board," charges that he was forced to resign as a result of "pressure and undue hardship that was threatened." (Petition of Appeal) He alleges that this termination by the Board is in violation of his contractual rights. He seeks an Order requiring the Board to pay him thirty days' salary. The Board denies that petitioner was forced to resign, and asserts that petitioner voluntarily waived his claim to compensation.

A hearing was conducted on June 12, 1972, at the office of the County Superintendent of Schools in Freehold by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioner, a non-tenure teacher, was employed by the Board for the 1970-71 school year. The employment contract contained a clause allowing either party the right to terminate by giving the other party thirty days' notice in writing. This fact is not in dispute.

On Wednesday, May 26, 1971, an incident occurred in which it is alleged that petitioner struck a Fifth Grade pupil on her buttocks with a pointer. As a result of this incident and a further allegation by the Board that petitioner subsequently "shook up" another pupil on the same day, petitioner testified, he was called into the Superintendent's office on Friday morning, May 28, 1971, and told to "resign immediately or you will be suspended without pay." Petitioner telephoned the school secretary on Wednesday night (May 26) to report that he was ill and would be unable to come to work on Thursday (May 27); however, he did report for work as usual on Friday (May 28).

Petitioner's superiors testified that he was given a choice on May 28, 1971, of requesting a hearing before the Board or resigning. Petitioner testified that he

was not given reasonable time to make his decision. Petitioner said that he subsequently entered the office area, sat down at a typewriter and composed the following letter (P-1):

"May 28, 1971

"Dear Mr. Kane,

"I hereby resign effectively (sic) as of the above date.

"Sincerly yours (sic),

"Edward Petrosky"

The school principal and the Superintendent testified that petitioner was not forced to resign, but *did* so of his own free will. Therefore, the Board avers that petitioner's resignation (P-1, *supra*) was voluntary, and that the Board had no further contractual obligation to petitioner after receipt of his resignation.

Although the principal witnesses do not agree entirely on the words spoken at the conference of petitioner with the principal and the Superintendent, the essential relevant elements are that:

1. Petitioner had an incident with a Fifth Grade pupil.

2. Petitioner had a subsequent incident with another pupil.

3. Petitioner was called to the office of his superiors and was asked to resign or request a hearing before the Board.

4. Petitioner submitted a resignation (P-1).

Therefore, the salient issues presented here for determination by the Commissioner are:

1. Did petitioner resign under duress?

2. Did petitioner's resignation constitute a waiver of his contractual right to thirty days' termination pay?

The hearing examiner opines that the Board, if it so wished, could have given petitioner thirty days' notice with pay and terminated his employment. An alternative open to the Board was suspension of petitioner pending the outcome of a hearing; however, it elected to offer petitioner the option of a hearing or resigning when the result (termination) appeared to be quite obvious.

In *Carolyn R. Hom v. Board of Education of the Upper Freehold Regional School District, Monmouth County*, 1970 *S.L.D.* 207, the Commissioner wrote: (at p. 210)

"***She was not informed at the time that she could resign effective 60 days later and be entitled to pay for that period, even though her services were not used. She was advised by the teacher whom she met outside the office to consult representatives of teacher organizations***."

also, (at p. 210)

"About 15 to 20 minutes after petitioner had left the office she returned, apparently much calmer, and indicated to the Superintendent and principal that she was prepared to resign. She was given paper and wrote a resignation, effective on March 14, 1970. (P-2) Testimony as to whether the form of the resignation was suggested by the Superintendent is sharply contradictory; the hearing examiner is not convinced that the precise form was either dictated or suggested, but that petitioner clearly inferred what was expected in the resignation.***"

The controversy herein is very similar to that in the *Hom* matter. The hearing examiner finds that at the time petitioner wrote his resignation, he was not fully aware of the terms of his contract; nor did the Superintendent explain, nor feel obligated to explain, to petitioner his right to give thirty days' notice of termination. Had petitioner been so informed, it is obvious to the hearing examiner that he would have resigned effective thirty days from the date of his resignation letter. (P-1) The hearing examiner concludes that the purpose of the meeting on Friday morning, May 28, 1971, was to secure petitioner's immediate resignation, and that the alternative of petitioner's being terminated on thirty days' notice by the Board was presented to him in such terms as to make it undesirable.

Black's Law Dictionary defines "duress" as:

"Unlawful constraint exercised upon a man whereby he is forced to do some act that he otherwise would not have done***."

"Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, *or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will****." (*Emphasis supplied.*)

In *Joan Sherman v. Board of Education of the Borough of Spotswood, Middlesex County*, decided by the Commissioner on June 21, 1972, the Commissioner commented on the essential elements of duress as follows:

"***Petitioner contends that she gave her resignation under conditions which the Courts have held to be duress, and that it was therefore a nullity. She cites *Gobac v. Davis*, 62 *N.J. Super.* 149 (*Law Div.* 1960), and the cases reported therein, in support of her contention that the circumstances under which she submitted her resignation created a state of mind in which she was induced to do what she would not otherwise have

done, and which she was not bound to do. She emphasizes particularly the following language of the Court in *Gobac*, at page 158, citing *Rubenstein v. Rubenstein*, 20 *N.J.* 359 (1956):

> '***The act or conduct complained of need not be 'unlawful,' in the technical sense of the term, it suffices if it is 'wrongful in the sense that it is so oppressive under given circumstances as to constrain one to do what his free will would refuse.***'

"Petitioner also cites *Evaul v. Camden Board of Education*, 35 *N.J.* 244 (1961), in which the Court did not find duress, but did hold that Miss Evaul's:

> '***submission of her resignation was an impetuous act prompted by her understandably distraught condition.***' *Id.*, at page 249

"The Court, therefore, ordered her reinstatement in her position on 'equitable principles'.***

and,

> "***therefore, the demand for petitioner's resignation with its option of termination, without giving petitioner a resonable time to talk the matter over with her family and her representatives, was unreasonable and wrongful.
>
> "The significant issue here concerns the manner in which the termination was effected. Petitioner was given a choice between:
>
> "(1) resigning without adequate time to consult and become aware of her rights, and
>
> "(2) being terminated under conditions which she could only recognize as a threat to any future career in teaching.***"

The matter herein is similar. The hearing examiner concludes that petitioner was not fully aware of his rights and was forced "*** under [the] given circumstances as to constrain one to do what his free will would refuse." The wrongful act in the instant matter was the failure of the Board to advise petitioner correctly and fully of his rights and to give him a reasonable opportunity to consult with a representative of his choosing before he submitted his resignation.

* * * *

The Commissioner has read the report, findings, opinions and conclusions of the hearing examiner.

The Commissioner finds in the circumstances of this resignation such a close parallel to those under which the petitioners in *Hom* and *Sherman, supra,* submitted their resignations, as to bring the matter clearly within the definition of duress as enunciated by the Court in *Gobac v. Davis, supra.*

Nor can petitioner's act be considered in any way a *voluntary* waiver of his rights, or an "impetuous act" of his own, as in *Evaul, supra,* so as to deny him the right to the thirty days' compensation to which he would have been entitled for termination under the terms of his contract.

The Commissioner finds and determines that petitioner's resignation on May 28, 1971, was given under duress, and that it does not constitute a waiver of his contractual right to terminate his employment on thirty days' notice of his intention. He accordingly directs the Freehold Borough Board of Education to compensate petitioner for thirty days at the rate provided in his contract of employment.

COMMISSIONER OF EDUCATION

July 24, 1972

Jersey City Federation of Teachers, Local 752,

Petitioner,

v.

Jersey City Board of Education and Jersey City Education Association, Hudson County,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Sauer, Boyle, and Dwyer (George W. Canellis, Esq., of Counsel)

For the Respondent Board of Education, Brown, Vogelman, Morris and Ashley (Barbara A. Morris, Esq., of Counsel)

For the Respondent Jersey City Education Association, Philip Feintuch, Esq.

The Jersey City Federation of Teachers, hereinafter "Federation," alleges that the Jersey City Board of Education, hereinafter "Board," and the Jersey City Education Association, hereinafter "Association," have entered into an improper agreement, which denies the Federation specific rights to which it is

entitled under protection of the New Jersey Employer-Employee Relations Act as guaranteed by the New Jersey Constitution and the United States Constitution.

The Federation avers, also, that the denial of its right to organize and the teachers' right of free association is in violation of *N.J.S.A.* 34:13A-1 *et seq.* and especially *N.J.S.A.* 34:13A-5.3. The Federation cites the following cases to support its position: *Independent Dairy Workers Union of Hightstown v. Milk Drivers and Dairy Employees Local No. 680*, 23 *N.J.* 85 (1956); *Porcelli v. Titus*, 108 *N.J. Super.* 301 (1969), petition for certification denied 55 *N.J.* 310 (1970); *Thomas v. Collins*, 323 *U.S.* 516, 65 *Sup. Ct.* 315, 89 *L. Ed.* 430 (1945); *McLaughlin v. Tilendis*, 398 *F.* 2*d* 287 (7*th Cir.*, 1968); *Shelton v. Tucker*, 364 *U.S.* 479, 81 *Sup. Ct.* 247, *S.L. Ed.* 2*d* 231 (1960); *Keyishian v. Board of Regents*, 385 *U.S.* 589, 87 *Sup. Ct.* 675, 17*L. Ed.* 2*d* 629 (1967); *Wieman v. Updegraff*, 344 *U.S.* 183.

The Board contends that *N.J.S.A.* 34:13A-5.3 is relied upon by the Federation and that that statute gives public employees the right to organize. The Board contends further that the Federation does not argue that its right to organize has been impaired. It avers that the Federation's argument is that the actions of the Board in accordance with the contractual agreement with the Association concerning bulletin boards offends the Federation's First and Fourteenth Amendment rights and violates its public employee rights.

The Board avers further that in all of the cases cited by the Federation, the courts were dealing with the rights of association, i.e., the right to organize, and that not one of these cases is analogous to the situation before the Commissioner.

This matter is submitted to the Commissioner on the briefs and pleadings of the Federation and the Board. The Association filed an Answer to the Petition, but by telecon of March 17, 1972, notified the Commissioner that the Association would rely on the brief submitted by the Board in denying that it had entered into any improper agreement with the Board. The Federation makes the following allegations:

> "Petitioner, JERSEY CITY FEDERATION OF TEACHERS, LOCAL 752, respectfully petitions the Commissioner as follows:
>
> "1. The Jersey City Board of Education and the present bargaining agent, The Jersey City Education Association, entered into a Contract for the year 1969-1970. Article 6, Section 7, Page 9 of the Contract states, 'No other bulletin board display or mail space shall be made available to any organization representing teachers on a school system wide-base.
>
> "2. The same provision contained in paragraph one above has been carried through the 1970-1971 Contract; and if allowed to remain, the provision will be included in subsequent Contracts. The Petitioner is the representative of a minority organization of teachers in Jersey City; and, as

such, is protected by the New Jersey Employer-Employee Act in its exercise of employee organization rights and particularly those as specified in *N.J.S.A.* 34:13A-1 *et seq.* (and more particularly in *N.J.S.A.* 34:13A-5.3).

"3. The Jersey City Board of Education has acted in violation of both the laws of the State of New Jersey and the Constitutional provisions of due process and equal protection in denying the members of the minority organization their rights to free exercise of their organizational prerogative to participate in form or give assistance to an employee organization by enforcing the illegal provision referred to in paragraph one herein.

"4. The Jersey City Board of Education has also and erroneously and illegally enforced the disputed provision and has further interpreted the provision to go far beyond its scope of intention and has denied the minority organization. Petitioner herein, to (sic) distribute leaflets and fliers to utilize common mail boxes, bulletin board and any other media of written communication for all announcements offered by the minority organization; and, as a result, is in violation of the aforesaid Constitutional rights of due process and equal protection of the law and the statutes of the State of New Jersey."

Petitioner cites, also, the *New Jersey Constitution*, *Art.* I, *Par.* 19, which provides in pertinent part as follows:

"***Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

The New Jersey Legislature has indicated its intent in *N.J.S.A.* 34:13A-5.3:

"***public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization***."

Petitioner specifically asserts that the action of the Board in denying the Federation certain "rights" is in violation of the public employee rights as guaranteed by the New Jersey Constitution and the public policy mandated by the New Jersey Legislature. The Board's action, it avers, also, is violative of the Federation's rights under the First and Fourteenth Amendments of the United States Constitution. The Federation prays, therefore, that the Commissioner of Education of the State of New Jersey Order:

"a) That the Jersey City Board of Education be permitted restraint from enforcing the subject illegal provision;

"b) Declaring said provision void and of no legal effect;

"c) Allowing the Petitioner the use of the common facilities available to the majority organization; and

"d) Such other relief as may be necessary." (Amended Petition of Appeal)

The Board answered in part as follows:

"The Jersey City Board of Education is bound by an existing contract entered into on September 1, 1969, with the Jersey City Education Association, which contract provides that the Jersey City Education Association is recognized as the sole and exclusive negotiating agent for all of the employees within the bargaining unit. The contract in force and effect between the Jersey City Education Association and the Board of Education of the City of Jersey City provides, *inter alia:*

> 'No other bulletin board, display or mail space shall be made available to any other organization representing teachers on a school system-wide base.' " (First Separate Defense – Board's Answer to Petition)

The Board denies the allegations in Paragraphs three and four of the Petition, and further takes exception to the allegations in that portion of Paragraph two of the Petition, which states that "*** if allowed to remain the provision will be included in the subsequent contracts.***" (Board's Answer to Petition)

The Board's Brief explains that portion of the Agreement, now in dispute, in greater detail as follows:

" '****The Board shall provide bulletin boards to the Association for its exclusive use as sole bargaining agent. These shall be provided in schools in locations recommended by the Association and approved by the principal.*

" 'Bulletin boards shall be provided as follows: One (1) board to a school with a faculty of 35 teachers, or less. Two (2) boards to a school with a faculty of 35 to 70 teachers. Three (3) boards to a school with a faculty of 70 teachers, or more.

" 'Existing bulletin boards which are in good condition shall be accepted by the Association.

" 'No other bulletin board, display or mail space shall be made available to any other organization representing teachers on a school system-wide base.' (*Emphasis supplied*)"

The Commissioner finds, therefore, that the narrow issue to be decided is whether or not any agreement between the Board and the recognized bargaining unit for the teachers, which contains a clause denying the minority unit the right

to use bulletin boards and mailboxes, is a violation of laws of New Jersey or the Constitutions of New Jersey and the United States.

A similar issue was recently decided by the United States District Court, Denver, Colorado, on June 3, 1970, in *Local 858 of the American Federation of Teachers v. School District No. 1 in the County of Denver and the State of Colorado,* 314 *F. Supp.* 1069 D. Colo. (1970). The Denver Court commented as follows:

"FIFTH AMENDMENT ISSUE

> "*** We do not accept plaintiffs' contention, belatedly clarified at argument, that the issue here is a broad restriction on free speech. We acknowledge that the public schools are a public institution which present special opportunities for the exercise of the First Amendment right of free speech. However, this case does not present that issue. The parties are so situated and the controversy arose under such circumstances that plaintiffs seek to utilize certain facilities that are clearly distinct from pure speech rights. This case presents a problem of labor relations, and although the problem is in the context of public employment, this does not alter its essential character. Plaintiffs are a labor union and its officials and members, and they are seeking to utilize only those internal channels of school communication which are not traditionally of a public nature for the purpose of furthering the goals of their union. The privilege of dues check off which they claim is peculiarly a matter of labor relations. (sic) Thus, we do not accept plaintiffs' characterization of the issue as one of alleged impairment of broad First Amendment rights. Rather, the case presents the precise issue of whether or not the granting of the *** exclusive privileges to the DCTA impairs the right to organize and form unions of Denver teachers who are not members of the DCTA." (at pp. 1074, 1075)

and,

> "*** Our issue is freedom of association. This is a First Amendment freedom which may be impaired by state action when the state can show a compelling interest which, when balanced against the substantive right to be protected, outweighs that right. *Schneider v. State,* 308 U.S. 147, 161, 60 *S. Ct.* 146, 84 *L. Ed.* 155 (1939). The grant of exclusive privileges to one of two competing unions after that union has won a representation election serves several interests. It allows the effective exercise of the right to form and join unions in the context of public employment. It provides the duly elected representative ready means of communicating with all teachers, not just the DCTA membership. This is essential since the DCTA represents *all* teachers, not just its membership. It eliminates inter-union competition for membership within the public schools ***. This has several salutary aspects. Orderly functioning of the schools as education institutions is insured through the limiting of the time span when they may become a labor battle field. The representative union is not subjected

to competition within the schools, and thus is better able to function as a representative, its efforts not spent in constant competition with the union that lost the representation election. The fact that the representative's strength is not bled away by such constant high intensity inter-union conflict allows the public employees better representation, providing a more beneficial exercise of the right of association. Finally, all of these benefits resulting from the grant of exclusive privileges to the elected representative serve the principal policy of insuring labor peace in public schools. Labor peace means a continuity of ordered collective bargaining between school officials and representatives of the teachers. It means a lowered incidence of labor conflict and strife, thus insuring less interference with the functioning of the public schools as educational institutions.

"Against these interests we must balance the limited interference with plaintiffs' right to associate. The interference is that they are not granted equal access to internal channels of communication***.

"***The delicate task of applying the constitutional balancing test to measure the substantiality of the reasons argued in support of restriction of the First Amendment freedom of association is made easier in a case such as this, where the intersts asserted are numerous, a policy as vital as public education is the goal, and negligible impairment is proved. We find that the plaintiffs have not proved significant interference with their freedom of association, and we find that the defendant has proved that substantial state interests are served by the grant of exclusive privileges to the intervener. We find no action on the part of the defendant denying the plaintiffs' right to meet, to speak, to publish, to proselytize or to collect union dues. Plaintiffs have the right to do these things through the means employed by other organizations. We agree with the New York Court of Appeals decision, *Bauch v. City of New York*, 21 *N.Y.* 2*d* 599, 289 *N.Y.S.* 2*d* 951, 237 *N.E.* 2*d* 211 (1968), *cert. den.* 393 *U.S.* 834, 89 *S.Ct.* 108, 21 *L.Ed.* 2*d* 105, that neither the First Amendment nor any other constitutional provision entitles a public employees' union which has lost a representation election to the special aid of a public employer's collection and disbursing facilities." (at pp. 1076, 1077)

and,

"FOURTEENTH AMENDMENT ISSUE

"The essence of plaintiffs' Fourteenth Amendment claim is that giving exclusive privileges to the DCTA amounts to a giving of the privileges to certain members of the teaching profession, while arbitrarily denying them to others. This alleged arbitrary denial is claimed to constitute a denial of equal protection of the laws. Plaintiffs have at times articulated their claim as being based upon an alleged violation of due process, but we find that the only claim which can be reasonably advanced is equal protection.

"The facts show that a classification is established creating a distinction between the DCTA which won the representation election and the FTA, which lost. The facts do not show that the distinction exists among members of the teaching profession in Denver schools. All members of the profession are represented by the DCTA in dealing with the School District and none are represented by the FTA, since the FTA does not deal with the District. However, in order to fully dispose of the issue, and do so in terms which recognize to the fullest extent possible any constitutional claims that the plaintiffs do have, we will assume that there is some distinction among members of the teaching profession in Denver schools, based upon which union they belong to.

"Two tests for unconstitutional denial of equal protection exist. Where the classification allegedly violating equal protection is challenged as being irrational, is satisfies the Constitution if there exists a rational relationship between the distinction and constitutionally permissible objectives. *McGowan v. Maryland,* 366 *U.S.* 420, 426, 81 *S. Ct.* 1101, 6 *L.Ed.* 2*d* 393 (1961). However, where the classification allegedly circumscribes the exercise of a constitutional right, it is unconstitutional unless shown to be necessary to promote a compelling governmental interest. *Shapiro v. Thompson,* 394 *U.S.* 618, 634, 89 *S. Ct.* 1322, 22 *L. Ed.* 2*d* 600 (1969). We are satisfied that the grant of exclusive privileges to the duly elected bargaining representative of public school teachers by the School District promotes a compelling government interest. The interest of the state above outlined in our discussion of the First Amendment claim are compelling, for labor peace and stability in an area as vital as public education are indisputably a necessity to the attainment of that goal. Inter-union strife within the schools must be minimized. Unnecessary work stoppages and the consequent impairment of the educational process cannot be tolerated without significant injury to public education.

"Thus, we find that the grant of special privileges attacked here satisfies the strictest test for constitutional equal protection. We make this finding although we are not convinced that in fact the classification challenged impairs the exercise of a constitutional right. Therefore, plaintiffs have not proved that the action of the defendant and intervener denies them equal protection of the laws in violation of the Fourteenth Amendment. ***" (at pp. 1077, 1078)

The same issue was adjudicated by the United States District Court for the District of Delaware in *Delaware Teachers v. De La Warr Board of Education et al., U.S.D.C. Del.,* 335 *F. Supp.* 385, November 8, 1971. In that case, the Court held that the De La Warr Education Association was recognized as the school system's sole bargaining agent, and that such recognition, with the granting of special privileges to the Association, did not violate the Federation of Delaware Teachers' guarantees of freedom of speech and right to assembly. The Court held further that the question was one of labor relations, *not constitutional rights,* and that the Agreement's restricting provisions had the effect of reducing union

conflict, permitting more effective representation and assuring the peaceful functioning of the school operations. Such is the case herein.

The Commissioner finds the instant matter almost identical to the *Denver* and *Delaware* issues, *supra.* The Commissioner determines that the provisions in *N.J.S.A.* 34:13A-1 *et seq.*, which provide the right of public employees to form, join and assist any employee organization, have not been violated by the contractual Agreement with the Jersey City Education Association. Petitioner has the right to organize, and there is no State or Federal constitutional or statutory violation in the Agreement, which provides certain salutary benefits to the Jersey City Education Association.

For the reasons expressed herein, the Petition is dismissed.

COMMISSIONER OF EDUCATION

July 26, 1972

In the Matter of the Annual School Election Held in the School District of the Borough of Harrington Park, Bergen County.

COMMISSIONER OF EDUCATION

Decision

The announced results of the voting for two members of the Board of Education of the Borough of Harrington Park, Bergen County, for full terms of three years each at the annual school election on February 8, 1972, were as follows:

Frederick C. Richner	387	5	392
Sandra Mittleman	326	5	331
Erna C. Townshend	396	4	400
James B. McGiffert	380	10	390

Pursuant to a letter request, authorized on behalf of Candidate McGiffert by counsel, dated February 10, 1972, the Commissioner of Education ordered an official representative to conduct a recount of the ballots cast. The recount was conducted on February 23, 1972, at the voting machine warehouse of the Bergen County Board of Elections, Carlstadt, New Jersey.

At the conclusion of the recount the previously announced machine tally was confirmed. However, Candidate McGiffert then indicated that an effort would be made, through the Courts, to secure a judgment that "***four absentee civilian voters were not permitted to vote pursuant to law," and the decision herein was delayed in its publication, in written form, pending the result of this litigation.

At this juncture, however, and absent Notice of a Judgment from the Court to the contrary, the Commissioner finds and determines that Erna C. Townshend and Frederick C. Richner were elected in the Borough of Harrington Park to three-year terms on the Harrington Park Board of Education.

ACTING COMMISSIONER OF EDUCATION

August 7, 1972

Blanche Beisswenger, Ruth Hayford and Elizabeth Dale, individually and in behalf of others similarly situated as a class,

Petitioners,

v.

Board of Education of the City of Englewood, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION
Decision

For the Petitioners, Theodore M. Simon, Esq.

For the Respondent, Sidney Dincin, Esq.

Petitioners, all teachers in the school system of Respondent Board of Education of the City of Englewood, hereinafter "Board," appeal to the Commissioner of Education for a determination of their grievances.

A hearing was held on January 6, 1972, in the office of the Bergen County Superintendent of Schools, Wood-Ridge, before a hearing examiner appointed by the Commissioner. Counsel also filed briefs and several exhibits were offered in evidence. The report of the hearing examiner is as follows:

Petitioners allege that the Board has not paid them their proper salaries for the school year 1970-71, to which they claim they are entitled by the terms of the 1969-71 Agreement, hereinafter "Agreement," negotiated by the Board and the Englewood Teachers' Association, hereinafter "Teachers' Association." Although the amount of compensation in each case is different because of each teacher's placement on the salary guide, the problem herein is the same for each and will be treated, therefore, as an individual issue for the Commissioner's determination.

Each petitioner has been transferred from her former position in the school system to a new position of resource-center teacher. Petitioners' salaries, for the school year 1970-71, were established by the Board to be the same as those received for the school year 1969-70, and petitioners accepted their new assignments at the salaries paid to them for the school year 1969-70.

The Board stated that each of the transfers was effectuated because of poor classroom performance by the teachers. This position was corroborated by the testimony of a Board member who said that: "***[the three teachers] should not be in the classroom but that they were on tenure and that we, therefore, had to find another assignment for them or else proffer charges ***." (Tr. 51) This testimony was corroborated also by the Superintendent of Schools who stated that the "*** three ladies were not to be assigned to classroom instruction of youngsters ***." (Tr. 118)

However, petitioners aver that they were not told that their classroom performances were in any way inadequate. The petitioners aver that they only learned of this reason, advanced by the Board, at the hearing.

The Board introduced no evidence, or offer of proof, nor did it adduce testimony which indicated that petitioners were told why they would not receive their increments. Rather, the Superintendent notified each of them that they would be transferred to new positions as resource-center teachers and that their salaries would remain at the same level for the coming school year.

The Agreement then in effect (at p. 2) contained, *inter alia*, a grievance procedure, which provided a method for resolving appeals from interpretations, applications or violations of policies, agreements and administrative decisions affecting the teachers.

Reproduced here are pertinent portions of the Agreement that add to the setting of the instant dispute:

> "***B. Purpose
>
> "1. The purpose of this procedure is to secure at the lowest possible level equitable solutions to the problems which may from time to time arise affecting teachers as a result of the interpretation, application or violation of policies, agreements or administrative decisions. ***"

Time, also, is of great essence according to the terms of the Agreement. In the Agreement under "Procedure", the following paragraph is especially pertinent:

> "***C. Procedure
>
> "1. Since it is important that grievances be processed as *rapidly as possible* the number of days indicated at each level *should be considered as maximum* and every effort should be made to expedite the process. The time limits may be extended however by mutual agreements. ***" (*Emphasis supplied.*)

The varied steps of the grievance procedure provide for the possibility of informal settlement between the aggrieved teacher and her supervisors: (a) at level one; (b) three other formal levels for settlement; and (c) finally, for

advisory arbitration between the parties. The total process, exhausting the maximum time limits set for settlement at each level, should not exceed four months.

The Petition herein was received by the Commissioner on May 5, 1971. The exhibits show that petitioners were notified in May of 1970, a year earlier, of their new assignments and their salaries for the school year 1970-71. Nowhere is there any indication that petitioners took advantage of the grievance procedure as outlined in the Agreement. One of the petitioners wrote to the Superintendent of Schools informing him that she was "enthusiastic about [her] new assignment," and that she did not intend to bring the matter to "the attention of the grievance committee."

The Board alleges that petitioners are guilty of laches, and that their Amended Petition should, therefore, be dismissed.

In *Flammia v. Maller*, 66 *N.J. Super.* 440, the Court said at page 453:

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

"We had occasion to discuss the doctrine of laches in *Auciello v. Stauffer*, 58 *N.J. Super.* 522, 529 (*App. Div.* 1959), where we quoted from *Bookman v. R.J. Reynolds Tobacco Co.*, 138 *N.J. Eq.* 312 406 (*Ch.* 1946):

> " 'It is the rule that the defense of laches depends upon the circumstances of each particular case. Where it would be unfair to permit a stale claim to be asserted, the doctrine applies. ***'

"Laches can be a defense only where there is a delay, unexplained and inexcusable, in enforcing a known right and prejudice has resulted to the other party because of such delay. *Mitchell v. Alfred Hofmann, Inc.*, 48 *N.J. Super.* 396, 403, (*App. Div.* 1958), certification denied 26 *N.J.* 303 (1958). ***"

In *Dorothy L. Elowitch v. Bayonne Board of Education*, 1967 *S.L.D.* 78, affirmed by State Board of Education 86, the Commissioner in considering the question of laches wrote:

"***Justice Heher said in the case of *Marjon v. Altman*, 120 *N.J.L.* 16, at page 18:

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

The Agreement also provides as follows:

"***1. Such schedules do not guarantee an automatic salary increase but merely indicate the agreed upon value for basic services rendered by the individual whose performance and professional record meet the standards expected by the Board for the position held ***." (p. 11)

* * * *

The Commissioner has thoroughly reviewed the report and findings of the hearing examiner which is now complete after the plenary hearing. The earlier decision of the Commissioner in this matter rendered without a hearing is null and void and should not be considered.

Teachers in this State have the statutory right to negotiate the terms and conditions of their employment, pursuant to the provisions of *Chapter* 303, *Laws* of 1968. It is, therefore, the responsibility of each teacher to understand, abide by and use to his personal advantage all of the provisions of those agreements to which he is entitled. In the instant matter, petitioners accepted employment and compensation for a year without once using the grievance procedure outlined in their Agreement with the Board.

Since this is so, it would be a disservice to the fiscal planning required of the local board of education to allow for a review of these stale demands, on their merits, at this juncture. Boards must prepare for an annual audit, and they are entitled to close the books on a particular year at some reasonable time.

Therefore, to hold now that the Commissioner of Education should interfere in this matter, roll back the calendar, and entertain a hearing on alleged improper compensation to petitioners would open the floodgates for all parties, who might determine that in some past year they were not properly paid. Accordingly, in the Commissioner's judgment, this matter is out of time and petitioners are guilty of laches.

This judgment obviates any further discussion of this Petition on its merits. It is hereby dismissed.

ACTING COMMISSIONER OF EDUCATION

August 7, 1972

Blanche Beisswenger, Ruth Hayford and Elizabeth Dale, individually and in behalf of others similarly situated as a class,

Petitioners-Appellants,

v.

Board of Education of the City of Englewood, Bergen County,

Respondent-Appellee.

Decided by the Commissioner of Education, August 7, 1972

STATE BOARD OF EDUCATION

Decision

For Petitioner-Appellant, Theodore M. Simon, Esq.

For Respondent-Appellee, Sidney Dincin, Esq.

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

November 1, 1972

Anne Ida King,

Petitioner,

v.

Board of Education of the Borough of Woodcliff Lake, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Greenberg and Covitz (Morton R. Covitz, Esq., of Counsel)

For the Respondent, Sidney Dincin, Esq.

Petitioner, a teacher, who has acquired a tenure status under the provisions of *N.J.S.A.* 18A:28-5 in the School District of the Borough of Woodcliff Lake, alleges that the Board of Education, hereinafter "Board" or "respondent," has adversely affected both her rights to leave of absence for personal illness and the same rights of other similarly-situated teachers possessing a tenure status, by refusing to adopt a certain policy on leave of absence for personal illness, which was mutually negotiated between the Board and the local Education Association. The Board answers that there is no requirement of law that it must agree to a policy on leave of absence for personal illness, which it believes to be *ultra vires.*

Petitioner has filed a Motion for Declaratory Judgment by the Commissioner of Education, and the Board has answered. Both parties have submitted Memoranda of Law and have waived oral argument on the Motion.

Before considering petitioner's Motion for Declaratory Judgment, the Commissioner will set forth the uncontested material facts of the instant matter, which are admitted in the pleadings.

On or about September 27, 1967, the Board adopted a policy, which granted teachers having a tenure status ninety (90) days leave of absence for personal illness in each school year, and which provided for the accumulation of not more than fifteen (15) of such unused days in any one school year. On June 21, 1971, the Board adopted a resolution which changed the aforementioned policy as follows:

> "MOTION was made by Dr. Murray, seconded by Mr. Singer, as follows: Whereas, the Board of Education has received from Sidney M. Dincin, Board attorney, an opinion relative to the validity of a portion of the Sick Leave Policy of this District, now, therefore, be it RESOLVED that Section 3:5:2:2 of the Policies and Bylaws of the Woodcliff Lake Board of

Education is hereby revoked and deleted; and FURTHER that a new section 3:5:2:2 be substituted therefore as follows:

" 'The Board reserves the right to exercise its powers as expressed by Title 18A:30-7 NJS to grant additional Sick Leave (sic) on the basis of individual consideration when an employee has expended his accumulated Sick Leave (sic).'

"ON THE MOTION – Mr. Carlton, Seconded by Mrs. Clark, moved to amend the resolution as follows: to delete 3:5:2:2:1 and to delete 3:5:2:2:2 but include 3:5:2:2:3."

According to the Board's Answer, the roll call vote on the amendment to the resolution was five ayes and two nays, and the roll call vote on the amended resolution was five ayes and two nays.

During the latter part of the 1970-71 school year, the Board and the Woodcliff Lake Education Association, hereinafter "Association," entered into collective negotiations for the 1971-72 school year in accordance with *N.J.S.A.* 34:13A-1 *et seq.* These collective negotiations resulted in an agreement (Exhibit R-1) between the parties for the 1971-72 school year, which is dated December 8, 1971. The precise portion of policy concerning leave for personal illness upon which the dispute herein is grounded is *Article* VII, Absences and Leaves, *Section B* Sick Leave, *Part* 2. and thereunder *a.*, *b.*, and *c.*, which reads as follows:

"*** 2. A teacher with tenure shall also receive non-accumulative sick leave to cover major illness with full pay effective after fifteen (15) consecutive accumulative sick leave days of illness on the following conditions:

"a. With the first full year of tenure up to sixty (60) days of illness in any contract year, (effective June 30, 1971, this will not effect (sic) any person who will be using part of the previous 90 days at that time.)

"b. Each period of non-accumulative sick leave shall be preceded by a fifteen (15) day consecutive accumulative sick leave.

"c. A Medical Certificate must be filed with the proper school authority for such leave credit to be effective. A physician engaged and paid by the school shall be at all times permitted to consult with the hospital and medical services employed by the school teacher, and shall have the right to examine said teacher.***"

An *Addendum* to *Article* VII, *supra*, (Exhibit R-1) was appended by the following statement, which was approved by both parties to the Agreement.

"*Article* VII: paragraph B: sub-section 2a of this agreement shall not become of any force or effect until there has been a final determination of

> the validity thereof by the Administrative or Judicial Body (sic) having final authority to adjudicate the validity thereof; provided such adjudication is issued prior to June 30th, 1972; (sic) and further, if such final adjudication has not been issued on or before June 30, 1972 then no rights shall arise under this provision and claims if any, shall be rejected."

Petitioner now moves for a Declaratory Judgment by the Commissioner of Education on the grounds that the issue herein controverted arises under the school laws of this State.

N.J.S.A. 18A:6-9 provides in pertinent part as follows:

> "The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws *** or under the rules of the state board or of the commissioner."

This legislative policy originated in *Laws* 1851, *Par.* 267, *Sec.* 12, and was expanded in *Laws* 1867, *Par.* 360, *Sec.* 28. This plan for a statutory tribunal has been tested and interpreted by the courts of this State over a long period of years. In 1891 the courts decided that controversies regarding the election of school trustees came within the meaning of the statute, *ante. Buren v. Albertson*, 54 *N.J.L.* 72 (*Sup. Ct.* 1891), 22 *A.* 1083 A dispute regarding the placement of pupils in the public schools was remanded for exhaustion of remedies to the Commissioner's jurisdiction in *Stockton v. Board of Education of the City of Burlington*, 72 *N.J.L.* 80 (*Sup. Ct.* 1905), 59 *A.* 1061. A complaint against the governing body for failing to approximate tax funds fixed and determined by a board of school estimate for the erection of a schoolhouse was found to be within the purview of the Commissioner in *Town Council of Montclair v. Charles J. Baxter, State Superintendent*, 76 *N.J.L.* 68 (*Sup. Ct.* 1908), 68 *A.* 794. The removal of an officer by a local board of education was determined to be a matter for the Commissioner to decide in *Schwarzrock v. Board of Education of Bayonne*, 90 *N.J.L.* 370 (*Sup. Ct.* 1917), 101 *A.* 394. The refusal of a local board of education to call a special meeting of voters of the school district when requested by petition was found cognizable by the Commissioner in *Ridgway et al. v. Board of Education of Township of Upper Freehold*, 88 *N.J.L.* 530 (*Sup. Ct.* 1916), 96 *A.* 390.

The Supreme Court of New Jersey stated in the more recent case of *Estelle Laba et al. v. Board of Education of Newark*, 23 *N.J.* 364 (1957) at pp. 381, 382 that:

> "*** While the statutory language leaves much to be desired it sufficiently evidences the legislative purpose to set up a comprehensive system of internal appeals with broad powers vested in the administrative tribunals to insure that controversies are justly disposed of in accordance with the School Laws. ***"

For an extensive review of the jurisdiction exercised by the Commissioner of Education to decide controversies and disputes under the school laws, see *Ruth Ann Singer v. Board of Education of the Borough of Collingswood*, decision of the Commissioner on Motion to Dismiss, March 24, 1971, and cases cited therein.

It is clear that the Commissioner will decide controversies growing out of the statutory provisions regarding sick leave set forth in *N.J.S.A.* 18A:30-1 *et seq. Mabel Marriott v. Board of Education of the Township of Hamilton, Mercer County*, 1949-50 *S.L.D.* 69, affirmed by State Board of Education 1950-51 *S.L.D.* 69. See, also, *Marjorie B. Hutchenson v. Board of Education of the Borough of Totowa, Passaic County*, decided by the Commissioner of Education November 9, 1971.

The procedural question of whether the Commissioner may issue a declaratory judgment is raised in the instant matter. In previous instances, the courts of this State have remanded cases involving declaratory judgment relief to the Commissioner of Education. *Schults et al. v. Board of Education of the Township of Teaneck, Bergen County*, 86 *N.J. Super.* 29 (*App. Div.* 1964), aff. 45 *N.J.* 2 (1965). See, also, *Woodbridge Township Education Association, Inc. v. Board of Education of the Township of Woodbridge*, 91 *N.J. Super.* 54 (*Ch. Div.* 1966), 219 *A.* 2*d* 187. For cases involving declaratory judgment relief remanded to the Commissioner by the Federal Courts, see *Shepard et al. v. Board of Education of the City of Englewood et al.*, 207 *F. Supp.* 341 (*U.S.D.C. N.J.* 1962). Also, see *Morean et al. v. Board of Education of the Town of Montclair*, Civil No. 461-62 (*U.S.D.C. N.J.* July 9, 1962) unreported, 1963 *S.L.D.* 154, aff. 160 *S.L.D.* 160, aff. 42 *N.J.* 237 (1964).

In this precise instance, the Commissioner must determine whether a declaratory judgment is the appropriate remedy. One specific limitation on a declaratory judgment is that an actual controversy must exist between the parties. *New Jersey Turnpike Authority v. Parsons*, 3 *N.J.* 235 (1949); *Hildebrandt v. Bailey*, 65 *N.J. Super.* 274 (*App. Div.* 1961) A declaratory judgment may not amount to an advisory opinion upon some state of facts which may arise in the future but does not presently exist. *Borough of Rockleigh, Bergen County v. Astrol Industries*, 29 *N.J. Super.* 154 (*App. Div.* 1953) It is essential that a declaratory judgment terminate the controversy or remove the uncertainty. *Elizabethtown Water Co. Consol. v. Bontempo*, 67 *N.J. Super.* 8 (*App. Div.* 1961); *N.J.S.A.* 2A:16-52. All persons having an interest in the subject litigated, and whose rights will be affected, must be made parties if they are to be bound by the judgment. *Abelson's, Inc. v. New Jersey State Board of Optometrists*, 5 *N.J.* 412 (1950), 75 *A.* 2*d* 867, 22 *A.L.R.* 2*d* 929; *Gerhardt v. Continental Insurance Companies*, 48 *N.J.* 291 (1966), 255 *A.* 2*d* 328.

The Commissioner notices that if he were to decline to hear and decide the matter controverted herein, petitioner would be required to seek relief in the courts. There petitioner would face the doctrine of exhaustion of remedies which is set forth in *R.* 4:69-5 as follows:

"Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted."

Having considered all of the foregoing facts and applicable law, the Commissioner finds that the instant matter meets the prescribed criteria and is ripe for judgment.

The school laws which are pertinent to this dispute are found in *N.J.S.A.* 18A:30-1 *et seq.*

N.J.S.A. 18A:30-2 provides the following minimum sick leave protection:

"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 *** 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 requires the accumulation of unused sick leave as follows:

"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."

N.J.S.A. 18A:30-4 bestows the right upon local boards of education to require proof of illness to obtain sick leave as follows:

"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."

If absence for sickness is prolonged and exceeds both the minimum annual sick leave required by *N.J.S.A.* 18A:30-2, *supra*, and any unused sick leave days accumulated as required by *N.J.S.A.* 18A:30-3, *supra*, then the provisions of *N.J.S.A.* 18A:30-6 provide the following:

"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. ***"

The Legislature has also made provision for the granting of sick leave above the annual minimum of ten days specified by *N.J.S.A.* 18A:30-2, *supra*, either by blanket rule or by individual consideration. This authority is granted to local boards of education by *N.J.S.A.* 18A:30-7, which states that:

> "Nothing in this chapter shall affect the right of the board of education *to fix either by rule or by individual consideration*, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year." (*Emphasis ours.*)

These statutory provisions are in *pari materia*, and it is axiomatic that such enactments are to be construed together "as a unitary and harmonious whole, in order that each may be fully effective." *Clifton v. Passaic County Board of Taxation*, 28 *N.J.* 411, 421 (1958). Accord, *Brewer v. Porch* 53 *N.J.* 167, 174 (1969) *Porcelli et al. v. Titus et al.*, 108 *N.J. Super.* 301, 309 (*App. Div.* 1969).

From the statutes, considered as a whole, it is logical to assume that a local board of education may increase the minimum annual sick leave days for all employees from ten to fifteen as is the case in the instant matter. A board could also allow these additional annual days to accumulate for all employees. But the statute, *N.J.S.A.* 18A:30-7, *supra*, clearly prohibits the accumulation of more than fifteen such days in any one year. For example, if a local board of education increased the annual allowable sick leave for all employees from ten to twenty days, and many employees did not use any of these twenty days, only fifteen days could be accumulated from that one school year for use in a subsequent school year. It is also logical to assume that, given additional sick leave days as described above, if any employee used all of the annual sick leave days and, additionally, all accumualted sick leave days as the result of illness in any one school year, the board could invoke its authority under *N.J.S.A.* 18A:30-6, *supra*, to grant additional sick leave less substitute's pay. *Hutchenson v. Board of Education of Totowa, Passaic County*, decision of Commissioner of Education, November 9, 1971.

In the instant matter, the policy adopted by the Board on December 8, 1971, but stayed by the Addendum, *supra*, is limited in application to teachers with a tenure status. Although neither party has raised nor argued this point, in the judgment of the Commissioner a policy which bestows a sick leave benefit only upon teachers with a tenure status is improper. A review of the legislative history of this act is illuminating in regard to this point. The original enactment of *P.L.* 1942, *c.* 1942 granted certain provisions of sick leave to "*** teachers, principals and supervising principals ***." The title of this act was changed by *P.L.* 1952, *c.* 237 to provide sick leave benefits for "*** teachers, principals, assistant superintendents and superintendents ***." A general revision of this law was accomplished by the enactment of *P.L.* 1954, *c.* 188, which extended the scope of these sick leave benefits to "*** certain persons in the public

schools of this State." The *statement* attached to this legislation enunciated two purposes of this bill, the second being "*** to extend the coverage of the law to include all persons steadily employed by boards of education." The language of the specific 1954 statute, *N.J.S.A.* 18:13-23.8 [now 18A:30-2] clearly provides that the act applies to "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 ***."

Further amendments and additions were made to this basic act by *P.L.* 1956, *c.* 58, permitting the granting of sick leave above the minimum of ten days; *P.L.* 1958, *c.* 150, allowing additional sick leave days above the minimum of ten to accumulate, but limiting the annual accumulation of such unused days to fifteen; *P.L.* 1959, *c.* 175, providing for leave with pay for injury arising out and in the course of the performance of duties, for up to one calendar year; *P.L.* 1960, *c.* 53, protecting the accumulated sick leave of employees who continue employment after a regional school district is created; *P.L.* 1960, *c.* 54, providing similar protection for employees of public schools which consolidated; *P.L.* 1961, *c.* 34, permitting local school boards to hire teachers with accumulated sick leave from other school districts within the same county and transfer such leave; and *P.L.* 1967, *c.* 177, broadening the transfer of accumulated sick days for new employees from any other school district within the State.

Thus the thirty-year history of this legislation discloses a consistent legislative purpose to broaden the scope of beneficiaries, and no instance of restrictive language to permit any limitation of the designated beneficiaries at the discretion of local boards of education. Therefore, the Commissioner finds no authority in the controlling statutes of *N.J.S.A.* 18A:30-1 *et seq.* to permit such a limitation. Sick leave provisions adopted by a local board of education pursuant to the statutes, *ante*, must apply to all persons as defined by *N.J.S.A.* 18A:30-2, *supra.*

As was previously stated, *N.J.S.A.* 18A:30-72 prohibits the accumulation of more than fifteen days of sick leave in any one year. The annual granting of sixty days of non-accumulative sick leave in addition to fifteen days of accumulative sick leave constitutes an evasion of that statutory limitation, and the Commissioner so holds. A statute should not be construed to permit its purpose to be defeated by evasion. *Grogan v. DeSapio*, 11 *N.J.* 308, 322 (1953)

This policy also provides that the use of any portion of the sixty days of non-accumulative sick leave must be preceded by the use of fifteen days of accumulative sick leave days. Since the Board is annually granting fifteen cumulative days of sick leave, a teacher could use non-accumulative sick leave each year in lieu of accumulative sick leave days acquired from previous years. In the judgment of the Commissioner, it is not the intendment of the legislation, *supra*, that non-accumulative sick leave days should be used prior to the exhaustion of all accumulative sick leave days. A careful reading of *N.J.S.A.*

18A:30-6, 7, *supra*, leads to the logical conclusion that any additional sick leave benefit could become available only upon the complete utilization of uniformly acquired, accumulative sick leave. The Commissioner is constrained to notice that the adoption of a sick leave policy, which grants annually fifteen days of accumulative sick leave and in addition sixty days of non-accumulative sick leave, is an improvident action which constitutes an abuse of discretion by the Board of Education. The Commissioner agrees with the action of the Board and the Association in mutually agreeing to stay the effectiveness of this policy pending a determination of the issue controverted herein.

The Commissioner finds and determines, for the reasons stated, that *Article* VII, Absences and Leaves, *Section B.* Sick Leave, *Part* 2, 2*a* and 2*b*, *supra*, of the policies of the Woodcliff Lake Board of Education, is *ultra vires* and is accordingly set aside.

ACTING COMMISSIONER OF EDUCATION

August 10, 1972

Dr. Constant J. De Cotiis,

Petitioner,

v.

Board of Education of the Borough of Woodcliff Lake, Bergen County, and Board of Trustees of the Teachers' Pension and Annuity Fund of the State of New Jersey,

Respondents.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent Board of Education, Sidney Dincin, Esq.

*For the Respondent Board of Trustees of the Teachers' Pension and Annuity Fund, George F. Kugler, Jr., Attorney General (Prudence H. Bisbee, Esq., Deputy Attorney General)

Petitioner, formerly the Superintendent of Schools employed by the Board of Education of the Borough of Woodcliff Lake, Bergen County, hereinafter "Board," alleges that the Board has illegally and improperly deprived

*The Teachers' Pension and Annuity Fund is a party only to the extent that the Board of Trustees moved for a Stay of the Commissioner's decision pending TPAF action on the involuntary disability retirement application for petitioner which was filed by the Board of Education. Immediately following TPAF action on the application, this State agency ceased to be a party to these proceedings.

him of the use of accumulated unused sick leave and unused vacation leave with pay by the expedient of compelling his retirement on grounds of physical disability. Petitioner further alleges that the Board has improperly withheld accumulated sick leave from him in the amount of fifty-two weeks or 183 days which he is entitled to receive as the result of a Workmen's Compensation award. The Board denies these allegations and counterclaims that petitioner owes a sum to the Board for using sick leave in excess of the total number of days permitted by *N.J.S.A.* 18A:30-1 *et seq.*, and for moneys earned by petitioner from other sources between June 2, 1969 and June 30, 1971, in addition to the full salary paid to petitioner by the Board during that period of time. Petitioner prays for relief in the form of an Order by the Commissioner of Education directing the Board to reimburse him for all unused accumulated sick leave days and for six months of unused vacation.

This matter is submitted to the Commissioner of Education on Motion for Summary Judgment. All parties filed Briefs and waived oral argument and plenary hearing.

A brief recitation of the relevant material facts is essential for an understanding of the matter controverted herein.

Petitioner held the position of Superintendent of the Woodcliff Lake School District at the time of the filing of his Petition of Appeal on August 17, 1971. The genesis of his dispute with the Board lies in an incident which occurred on July 8, 1966, when he sustained an accidental injury to his back, allegedly arising out of and in the course of his employment. As a result of this injury, the Superintendent was absent from his duties for a period of fifty-two weeks or 183 days. This absence was charged to the Superintendent's accumulated sick leave days. The Superintendent instituted a suit in the Division of Workmen's Compensation, as the result of his accidental injury and temporary disability, and a hearing was held in the matter before a Judge of Compensation on January 12, 1971. At that hearing the Superintendent was represented by counsel, and the Board was represented by counsel furnished by the Royal Globe Insurance Company, the Board's Workmen's Compensation insurance carrier. The award to the Superintendent included, *inter alia*, "Temporary Disability, June 2, 1969 to June 1, 1970 inclusive, 52 weeks at $45 a week – $2,340.00 ***." The tribunal directed that this sum of $2,340 be paid directly to the Woodcliff Lake Board of Education as reimbursement, since the Board had paid the Superintendent full salary during the period of temporary disability, and had deducted the days of absence from his sick leave.

As a result of this Workmen's Compensation award, the Superintendent recouped the sick leave days, which had been used for his absence due to accidental injury, and these sick leave days were added to his credit of unused leave for personal illness. A communication was addressed to the Superintendent by the Secretary of the Board under date of April 21, 1971 (Exhibit P-1), which clarified his available unused sick leave as follows:

"Referring to my letter dated February 23, 1971, wherein I listed the balance of your accumulated sick leave days, it has been called to my attention that in giving you credit for the Compensation Award I included the 12 days you were out in June 1970. The award was to June 1st, 1970 thus the total days remaining as of the end of February 1971 should be 231 instead of 243.

"The breakdown is as follows:

Total leave accumulated June 30, 1969	230 days
Plus: accumulated days 1969-70	15 days
Plus: extra days per Board Policy	90
	335 days
Less: number of sick days June 70 (sic)	12
	323
Plus: accumulated days 1970-71	15
	338
Less: number of sick days to end of Feb. 1971	107
Balance of Sick (sic) days remaining as of end of February, 1971	231 "

At a regular meeting of the Board held April 24, 1968, the Board unanimously adopted the following resolution by roll call vote:

"BE IT RESOLVED that the Board of Education of Woodcliff Lake recognize that the Superintendent of Schools, Dr. C. J. DeCotiis, has accumulated 6 months of vacation leave; and

"FURTHER, that the Board Secretary advise Dr. DeCotiis of this and that he forward a statement of appreciation to Dr. DeCotiis."

As a result of this formal Board action, a letter was sent to the Superintendent by the Board Secretary under date of May 6, 1968 (Exhibit P-2), which reads as follows:

"I have been directed by the Board of Education to advise you that at its regular meeting held on April 24, 1968, by motion duly made, seconded, and unanimously passed, the Board recognized and approved an accumulation of six months' vacation leave for you.

"The Board wishes you to know that it is fully aware of your professional dedication to the Woodcliff Lake School System and realizes that in your years of service you have not taken a proper vacation because of this dedication.

"The Board unanimously extends its most sincere appreciation to you for your work so far."

From June 2, 1969 through June 30, 1970, the Superintendent was absent from his duties as the result of personal illness diagnosed as heart disease. This absence continued from the opening of school in September, 1970 to June 30, 1971, encompassing the entire school year of 1970-71. Assuming the correctness of the Board Secretary's calculations as set forth in the letter of April 21, 1971 (Exhibit P-1), *ante*, which stated that the Superintendent possessed a total of 231 days of unused sick leave as of February 28, 1971, and deducting the Superintendent's absence of seventy-two school days through June 30, 1971, the remaining unused sick leave days as of that date total 159.

At a special meeting held June 8, 1971, the Board adopted a resolution by roll call majority vote authorizing the Secretary to file an application on behalf of the Board with the Teachers' Pension and Annuity Fund, Division of Pensions, Department of Treasury, hereinafter "TPAF," for the involuntary, ordinary disability retirement of the Superintendent, pursuant to *N.J.S.A.* 18A:66-39 (b). This application was filed on June 14, 1971, and the Superintendent was examined on July 9, 1971, by a physician appointed by the Board of Trustees of TPAF. Thereafter, the Medical Board of the Division of Pensions submitted its written report to the Board of Trustees of TPAF pursuant to *N.J.S.A.* 18A:66-56.

The Secretary of the TPAF notified petitioner by letter dated September 28, 1971 (Exhibit P-4) of the action of the Board of Trustees of TPAF as follows:

> "This is to advise that based upon the medical testimony obtained in connection with the June 8, 1971 application filed by the Woodcliff Lake Board of Education, the Board of Trustees, Teachers' Pension and Annuity Fund, approved ordinary disability retirement for Dr. Constant J. DeCotiis effective July 1, 1971 at its regular meeting on September 16, 1971. ***"

This letter also informed petitioner that he could appeal the action taken by the Board of Trustees of TPAF by filing a written Notice of Appeal within forty-five days of the September 28, 1971, date.

At this juncture, petitioner claims that the Board has no legal right to deprive him of the benefit of accumulated sick leave and unused vacation leave with pay by the simple expedient of securing his involuntary retirement for ordinary disability.

The Board's counterclaim is that the Superintendent was paid full salary for 105 days' absence in excess of his available sick leave. The Board's calculations are based on the assumption that it need not accept the findings of fact and award made by the Division of Workmen's Compensation because it was not represented by its own counsel in that proceeding and because it disagrees with the judgment rendered. The Board also alleges that part of its policy for sick leave was *ultra vires* at the time of the award. It further declares that its action awarding the Superintendent six months' vacation leave with pay was also *ultra vires*. The Board also claims that it is entitled to reimbursement for any

sum of moneys earned by petitioner during the period when he was receiving full salary for sick leave.

The statute which is applicable to the incident of petitioner's accidental injury is *N.J.S.A.* 18A:30-2.1, which reads as follows:

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

In the instant matter the Board disagreed that the 1966 absence of petitioner was the result of a service-connected accident. This fact, however, was decided by the appropriate statutory tribunal in favor of petitioner, as stated in the award, *supra.* In the judgment of the Commissioner, that fact stands unless and until reversed on appeal by the Appellate Division of the New Jersey Superior Court. *R.* 2:2-3 (a). The allegation that a portion of the Board's policy on sick leave was *ultra vires* at the time is not supported in the Board's Brief nor by any argument nor proofs. No evidence was presented that petitioner had any other employment and earnings during the time he was absent on sick leave. Accordingly, the Commissioner finds and determines that the Board's allegations are wholly without merit and that the counterclaim is groundless.

The Commissioner must next determine whether petitioner is entitled to any benefit from the 159 days of unused accumulated sick leave which he possessed as of July 1, 1971, the effective date of his disability retirement. This total of 159 days of sick leave does not include the 183 days petitioner received as a result of the Workmen's Compensation award, *supra.* After petitioner recouped 183 days of sick leave, he was absent for personal illness a total of 182 days during the 1969-70 school year, and 182 days during the 1970-71 school year, thereby utilizing the restored days. It is clear from the Board Secretary's letter (Exhibit P-1), *ante,* that petitioner did not possess 364 days of sick leave at the time of the 1966 accident, since his total accumulated leave as of June 1969, after he had recouped the 183 days, was only 323 days. The balance of 159 sick leave days possessed by petitioner as of July 1, 1971, result from the accumulation of additional sick leave days since his absence as the result of the accidental injury in 1966.

The precise question before the Commissioner is: may this Board or any board of education pay a retiring employee wages or salary in lieu of unused accumulated sick leave days? In the judgment of the Commissioner, no authority can be found in the statutes for the payment of such compensation. Sick leave is a protection afforded employees under particular circumstances of illness defined in the law by *N.J.S.A.* 18A:30-1. There is no indication and no inference can be drawn that sick leave is a personal privilege which, if not required to be

utilized in entirety, may be transformed to a claim for wages or salary. A local board of education cannot expend public moneys without specific authorization. Statutory authority exists under which a board may increase an employee's salary, but no such authority is found for the expenditure of public funds in order to compensate an employee for accumulated unused sick leave. A cardinal maxim of financial management of public schools is that local boards of education must at all times protect the public interest and guard the public purse. The exercise of a practice such as described above would be a gross violation of this deep-rooted principle of law. *Hudak et al. v. Board of Education of the Township of East Brunswick*, decided by the Commissioner of Education October 26, 1971.

In the instant matter petitioner was involuntarily retired for total and permanent disability, which did not arise out of and in the course of his duties. The Legislature has provided that, in such instances, either the employee or the employer can institute retirement proceedings under *N.J.S.A.* 18A:66-39. It can logically be assumed, therefore, that the accumulated unused sick leave is not intended to be used for the prolongation of employment because of extensive sick leave, and thus thwart the intendment of the statute, *N.J.S.A.* 18A:66-39, *supra.*

In their Briefs, both petitioner and the Board rely on *Flynn v. City of Union City*, 32 *N.J. Super.* 518 (*App. Div.* 1954) and *Ziegler v. State of New Jersey*, 95 *N.J. Super.* 273 (*App. Div.* 1967). Both of these cases concern claims for Workmen's Compensation benefits after retirement, and are, therefore, clearly distinguishable from the issues controverted herein.

The final question before the Commissioner is whether the Board has an affirmative obligation to pay petitioner for six months of unused vacation with pay, as the result of the formal adoption of a resolution by the Board on April 24, 1968, *supra*, and the notification to petitioner by letter dated May 6, 1968 (Exhibit P-2), *supra.*

It is clear that the statutes make no provision for a superintendent of school's vacation as a matter of right. In a previous decision, the Commissioner stated that local boards of education are authorized by *N.J.S.A.* 18A:11-1 to adopt rules, regulations and policies governing the employment of superintendents, principals and teachers, which encompass the determination of vacation leave with pay. *Ralph W. Herold v. Board of Education of the Borough of Mount Arlington, Morris County*, 255 *S.L.D.* 1967. In that case, the Commissioner determined that petitioner was entitled to the agreed-upon vacation, if the terms of employment were met, but that he was not entitled to a prorated portion of the vacation, absent a specific provision for such prorating. In the instant matter the Board clearly intended that the Superintendent should avail himself of the six months of vacation with pay stated in its resolution, *supra.* It is to be noted that at the time the Board adopted the aforementioned resolution, there was no indication that petitioner would later suffer a disabling illness. From this fact it can logically be assumed that petitioner intended to avail himself of this benefit, although perhaps not for one vacation of six

months' duration. The onset of his disabling illness within one year's time obviously precluded the utilization of the accumulated vacation leave by petitioner.

In the judgment of the Commissioner, under the particular circumstances of the instant matter, petitioner's claim for six months of vacation leave with pay rises to the status of a legally-enforceable right by virtue of the Board's clear action, as stated in its resolution of April 24, 1968, *supra.* The fact that petitioner was involuntarily retired for ordinary disability as of July 1, 1971, cannot deprive him of this rightful benefit derived from his years of service.

Accordingly, for the reasons stated, the Commissioner directs the Woodcliff Lake Board of Education to pay to petitioner at the next regular pay period the sum equal to six months of his salary for the 1970-71 school year.

ACTING COMMISSIONER OF EDUCATION

August 11, 1972

Charles Gersie,

Petitioner,

v.

**Board of Education of the City of Clifton,
Passaic County,**

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Greenburg, Wilensky & Feinberg (Oscar R. Wilensky, Esq., of Counsel)

Petitioner, an employee with a tenure status in the Clifton Public School System, alleges an improper and illegal reduction in his salary by the Board of Education of the City of Clifton, hereinafter "Board," and requests that the reduction be declared *ultra vires* and his salary for the 1971-1972 school year as vice-principal be upwardly adjusted to comport with the amount specified in the Board's officially-adopted salary schedule for that year. The Board avers that its actions were proper and legal, and it moves for dismissal of the Petition.

A hearing in the matter was held on May 11, 1972, at the Passaic County Administration Building, Paterson, New Jersey, before a hearing examiner appointed by the Commissioner of Education.

The report of the hearing examiner is as follows:

The uncontested facts of the matter, as elicited from the testimony of the witnesses and the documentary evidence, are these:

Petitioner was employed as a vice-principal of the Clifton High School, hereinafter "High School," during the 1970-1971 school year at the annual salary of $19,020. For the 1971-1972 school year, petitioner was "reassigned" to the vice-principalship of School Number 6, a [pupil] discipline school, at his prior year's salary. Although the reassignment was effective September 1971, the official action of the Board was taken on November 10, 1971, by the adoption of the following resolution by a roll-call majority vote of its membership:

> "RESOLVED that the Clifton Board of Education does hereby affirm the action taken at a prior executive session regarding payment to Mr. Charles Gersie, vice-principal, on the senior high school level. BE IT FURTHER RESOLVED that Mr. Gersie's salary be maintained at the 1970-71 salary level due to circumstances as set forth at the meeting."

The Board avers that its action was taken only after petitioner was informed by the school administrators of several areas of dissatisfaction with his performance throughout the 1970-71 school year. Reflected in unrefuted testimony is the fact that commencing with the school year 1970-71, the principal of the High School informed petitioner that he was expected to improve his performance in the areas of teacher supervision and pupil discipline. Subsequently, at least nine memoranda were sent by the principal to petitioner regarding his unsatisfactory services. (Tr. 64) Finally, by letter dated July 2, 1971 (R-2), to the Superintendent of Schools, the principal recommended petitioner's transfer "*** prior to the beginning of the 1971-1972 academic year." The Superintendent, by letter dated July 14, 1971 (P-4), informed petitioner of the principal's recommendation and advised him that the situation "*** also affects your salary increase for [the] 1971-72 period," and that "*** both matters will be held in abeyance until adjudication can be made***." The Superintendent discussed the matter with petitioner on August 26, 1971, and again on September 1, 1971, with petitioner and his representative.

Although petitioner does not deny participating in the conferences nor receiving the memoranda, *ante*, regarding his performance as vice-principal, he asserts that his salary for 1971-72 was "fixed" at $21,111 by virtue of a memo sent to him by the Board Secretary (P-3) dated March 22, 1971. Petitioner argues that said memo (P-3) had the effect of establishing his salary, and short of formal charges being preferred, the Board may not act later to rescind its initial action. Further, petitioner contends that while the Superintendent had knowledge that the Board Secretary had sent the memo, *ante*, he took no action to countermand it.

The Board maintains that while a memo is customarily submitted to its personnel yearly, its sole purpose is to indicate "*** to the Board Secretary and the Board *** who will be back for a position on July 1." (Tr. 101)

Additionally, the Board avers, it had not yet adopted a salary schedule for 1971-72 and regardless of petitioner's contentions, only the Board has the authority to establish salaries.

The hearing examiner notices that at the time of the memo (March 22, 1971), the Board had not yet adopted a salary guide for 1971-72, and the Secretary had no specific authority to inform any employees of the Board regarding salaries for the ensuing year.

On July 21, 1971, the Board, by unanimous vote, adopted the "Clifton Public Schools Salary Guide and Schedule 1971-1972," hereinafter "Guide," (P-2) with an effective date of July 1, 1971, which provides salary guides for all categories of the Board's employees.

In the instant matter, the dispute centers on the amount of money specified in the Guide (Page 4 – Supervisory Personnel) for a person who is a "Senior High School Vice-President at the 6th-year level, calling for a maximum salary for 1971-72 of $21,111 – the figure stated in the Secretary's memo (P-3, *ante*). There is no disagreement that, absent the existing dispute, petitioner's background and experience would qualify him for the maximum step at the 6th-year level. (Tr. 19-20)

Petitioner's anchor point for his salary claim is founded on the adoption of the Guide, *supra*, effective July 1, 1971. Even if the claim that his 1971-72 salary was established by the Board Secretary's memo (P-3, *supra*) is found to be without merit, petitioner argues, the adoption of the Guide (P-2, *supra*) which set a salary of $21,111 for a person with his background and experience in the position he held *at that time*, absent affirmative Board action to the contrary prior to July 1, 1971, entitles him to that amount of salary for the 1971-72 school year.

The Board asserts, to the contrary, that it acted within its authority to retain petitioner's salary at the same level as in 1970-71; that the basis for its action was petitioner's unsatisfactory performance of which he was duly informed; that the Guide, *supra*, contained sufficient authority to allow the Board to withhold increments; that it is nothing more than a guide and a goal; that the Superintendent, in his letter of July 14, 1971, *supra*, informed petitioner that final action on his transfer and salary increment would be held in abeyance; and that the granting of increments is discretionary with the Board. To support the foregoing arguments, the Board relies upon *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288. (*App. Div.* 1960)

In summary, the hearing examiner finds that:

1. The Clifton Board of Education, through its supervisory personnel, properly informed petitioner of its dissatisfaction with his services.

2. Petitioner had ample opportunity to present his case all through the 1970-71 school year and during the succeeding summer on at least two

occasions, at one of which he was accompanied by his chosen representative.

3. Petitioner does not contest his reassignment; he contests his salary under the reassignment.

4. The Board did officially adopt its Guide, *supra*, during July, with an effective date of July 1, 1971.

5. The Board first acted officially on November 10, 1971, to retain petitioner's salary for 1971-72 at the same level that he received during 1970-71.

The hearing examiner concludes that the issues to be decided by the Commissioner are the following:

1. Did the memo dated March 22, 1971, from the Board Secretary, in fact, establish petitioner's salary for 1971-72 at $21,111?

2. Is the salary guide adopted by the Board, in fact, a goal to be achieved and not contractual in nature?

3. Did the Board act properly and within its authority in determining petitioner's salary for 1971-72?

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the findings of fact set forth therein. A recitation of the statutes which are pertinent to the instant matter is appropriate.

N.J.S.A. 18A:16-1 provides, in part:

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

N.J.S.A. 18A:29-4.1 provides, *inter alia*, that:

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

Further, authority is given to local boards of education by *N.J.S.A.* 18A:11-1 to:

"*** Make, amend and repeal rules *** for its own government and the transaction of its business and for the government and management of the

> public schools *** *and for the employment, regulation of conduct and discharge of its employees****." (*Emphasis supplied.*)

The Commissioner observes from the statutes cited, *supra*, that the sole authority and responsibility for "fixing" or "establishing" a salary for an employee of a local board of education rests solely with that board. Although it is recognized that a board may delegate authority to carry out a board-mandated policy or directive, it may never delegate its statutory responsibility. As the Courts observed in *La Polla v. Freeholders of Union County*, 71 *N.J. Super.* 264 (*Law. Div.* 1961) at p. 278:

> "***legislative powers cannot be delegated, although mere ministerial powers may. A purely ministerial act is one to which nothing is left to discretion, while legislative acts involve the exercise of discretion and judgment."

At 78 *C.J.S.* § 122, the following is stated:

> "*** a board of education *** cannot lawfully delegate to others, whether to one or more of its members, or to any school officer, or to any other board, the exercise of any discretionary power conferred on it by law."

The Commissioner relied upon the court's doctrine of delegation of authority, *supra*, in *Vandenbree v. Board of Education of the School District of Wanaque*, 1967 *S.L.D.* 4, affirmed State Board of Education January 3, 1968. In that case there was an alleged contract executed by the President and Secretary of the Wanaque Board with Superintendent Vandenbree without formal Board action. The Commissioner stated the following at p. 6:

> "As to the purported contract executed by the President and the Secretary of the Board with Petitioner *** there is no evidence of the requisite action as set forth in *R.S.* 18:7-70 [now *N.J.S.A.* 18A:16-1; 17-15; 17-17; 17-19; 17-20] *** to authorize the execution of the contract. Action of the President and the Secretary of the Board in this case cannot be held to satisfy the statutory requirement***. Absent such an authorization the contract must be held to be void and of no effect."

Therefore, in the instant matter, absent affirmative action by the Board in the form of a duly-passed resolution, the allegation that the Board Secretary's memorandum (P-3, *supra*) "fixed" petitioner's salary for the 1971-72 school year is without merit.

The second and third issues presented for the Commissioner's determination will be considered jointly.

Prior to 1965, the Commissioner and the Courts held that salary guides of local boards of education were only an announced goal or objective, were not contractual in nature, and that the Board, at its discretion, could withhold

increments. See: *Greenway v. Board of Education of Camden*, 1939-49 *S.L.D.* 151, affirmed State Board of Education 155, affirmed 129 *N.J.L.* 46 (*Sup. Ct.* 1942), 129 *N.J.L.* 461, 462-463, (*E. & A.* 1943); *Offhouse et al. v. Board of Education of Paterson*, 1939-49 *S.L.D.* 81, affirmed State Board of Education 85, *cert. denied*, 131 *N.J.L.* 391, 396 (*Sup. Ct.* 1944); *Kopera, supra; Wachter v. Board of Education of Millburn*, 1961-62 *S.L.D.* 147.

However, in 1965 the Legislature enacted *Chapter* 236, *Laws* of 1965 (*N.J.S.A.* 18A:29-4.1), which enabled local school districts "to establish salary polices, including salary schedules, which would give to their professional employees a precise statement of their salary expectation over the succeeding two years and at the same time would make it possible for boards of education to budget meaningfully to implement such schedules." *Ross v. Board of Education of the City of Rahway, Union County*, 1968 *S.L.D.* 26, 28. The Commissioner also stated the following at p. 29 in *Ross, supra:*

> "***the enactment of *Chapter* 236 clearly established the contractual nature of salary policies, including salary schedules, adopted by boards under the authority of that *Chapter.****" (*Emphasis supplied.*)

In *Brasher v. Board of Education of Bernards Township*, decided March 19, 1971, the Commissioner held that:

> "*** The Board has the authority to withhold a teacher's increment when its salary guide is above that mandated by statute (*N.J.S.A.* 18A:29-6 *et seq.*) and the board has its own rules which regulate the granting and withholding of salary increments.***"

From this review of previous decisions, the evolution of the following principles stated by the Commissioner may be seen:

> 1. Salary policies, including salary schedules, as adopted by a board of education, *are contractual in nature*, and
>
> 2. A board of education does have the authority to withhold increments when its guide is above that mandated by the State minimum salary guide (*N.J.S.A.* 18A:29-7), and when *the salary policy contains written provisions pertaining to the granting and withholding of increments.*

The Board has not advanced any convincing argument in support of its differing views regarding these principles, *supra*, which would alter the Commissioner's judgment.

The next question to be answered is whether the Guide, adopted by the Board on July 21, 1971, contained provisions for the withholding of increments.

A careful review of the Guide, *supra*, discloses the following on p. 15, entitled *Increments, Sec.* a, *Subsec.* 4:

> "*** All increments are to be considered to be earned by employees as the result of satisfactory service. No increment is to be considered as an automatic or mandatory payment."

The criteria for the acquisition of an increment from year to year is, thus, spelled out as "satisfactory service." From the testimony and evidence now before the Commissioner, there is little doubt that, in the Board's judgment, petitioner's performance during the school year 1970-71 was less than "satisfactory." It is clear that the Board's 1971-72 salary policy contained provisions to withhold increments and that petitioner failed to meet such criteria. However, the resolution implementing the salary policy includes fourteen qualifying provisions. *Provision* 7, *Sec.* (b), at p. 18, states:

> "***The schedule mentioned as a guide and goal provide for all increments and increases contemplated under this resolution and *in the event, after this resolution takes effect, that no action to the contrary is taken by the Board,* the annual increments, as the same become due under the applicable schedules, will become a part of the salary, subject, however, to the provisions and limitations set forth in this resolution and the accompanying schedules." (*Emphasis supplied.*)

Further, *Provision* 9 at p. 19, states:

> "The salary schedule hereto attached *** have been formulated after taking into consideration *the 1970-71 salary of all employees,* and the records of the Secretary of the Board of Education on file in his office *** Such records, as of June 30, 1971, will disclose the annual salary of each employee, which together with the increase and the increments, if any, granted under this resolution, *will be the salary for the school year 1971-72.*" (*Emphasis supplied.*)

The Board, through its Superintendent of Schools and the principal of its High School, determined that petitioner's performance was not of a satisfactory nature, informed him of his alleged inefficiencies, and allowed him an entire school year to correct them. However, the fact that the Board took *no official action* until November 10, 1971, *supra,* notwithstanding the Superintendent's letter to petitioner dated July 14, 1971, *supra,* is of fatal consequence. By its own terms, the Guide became effective July 1, 1971, and "no action to the contrary [was] taken by the Board" (*Provision* 7, *supra*) until November 10, 1971. This lack of timely action by the Board established petitioner's salary for 1971-72 at the level of $21,111, as specified in the Guide, *supra.* Furthermore, *Provision* 9, *supra,* incorporates the Board's affirmation of that salary for petitioner for 1971-72 by stating "*** as of June 30, 1971 *** the annual salary of each employee, which together with the increase and the increments, if any, granted under this resolution, will be the salary for the school year 1971-72."

The Board's argument, that the resolution adopted November 10, 1971, ratified its action taken at a previous executive session, is without merit. Once

the Board fixed the salary of this tenured employee, in the instant matter, by the formal adoption of the Guide and its qualifying provisions, *supra*, such salary cannot be rescinded or reduced at a subsequent meeting. See *Docherty v. Board of Education of West Paterson*, 1967 *S.L.D.* 297.

The Commissioner finds and determines, therefore, that the Board's adoption of the 1971-72 salary policy, *supra*, effective July 1, 1971, established petitioner's 1971-72 salary as $21,111. The untimely action taken by the Board on November 10, 1971, setting petitioner's salary at less than $21,111 was *ultra vires* and is accordingly set aside.

The Commissioner directs the Board of Education of the City of Clifton to pay to petitioner the difference between the salary which he actually received during the 1971-72 school year and sum of $21,111 at the next regularly scheduled pay period.

ACTING COMMISSIONER OF EDUCATION

August 11, 1972

D. Diana Ramo,

Petitioner,

v.

Board of Education of the Borough of Hopatcong, Sussex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision on Motion

For the Petitioner, John Cervase, Esq.

For the Respondent, Trapasso, Dolan & Hollander (Sanford Lloyd Hollander, Esq., of Counsel)

Petitioner, a nontenure school principal employed by the Hopatcong Board of Education, hereinafter "Board," until suspended from such employment on November 3, 1971, avers that her suspension and a later termination of her employment by the Board was improper and *ultra vires*. The Board maintains that petitioner's contract was terminated according to its stated terms, and denies that any illegality was present in, or resulted from, its actions.

At this juncture, the Board moves for an Order dismissing the Petition on the grounds that it fails to state a claim on which relief can be granted. An oral argument on the Motion was conducted on May 2, 1972, at the State

Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. Memoranda were subsequently filed by counsel for the parties. The report of the hearing examiner is as follows:

Petitioner was employed as a guidance counselor under contract with the Board and served in this capacity during the year July 1, 1969 through June 30, 1970. Subsequently, two other contracts, for her employment as a school principal, were executed for the years July 1, 1970 through June 30, 1971, and July 1, 1971 through June 30, 1972.

However, on November 2, 1971, the President of the Board received a letter from the president of the Hopatcong Education Association, detailing a list of ten charges against petitioner, and subsequent to the receipt of this letter, the President of the Board and the Superintendent of Schools addressed the following letter to petitioner:

> "In accordance with Title 18A:25-6, the Board President, Mr. Brukardt, and myself, wish to notify you of your suspension as Principal of the Hudson Maxim School effective Wednesday, November 3rd until a hearing can be arranged before the Superintendent of Schools. I recommend that this hearing be held on Monday, November 8th at 3:30 P.M. in the office of the Superintendent of Schools. I shall appreciate your confirming the date and time of this hearing."

It is noted here that, at the request of petitioner's counsel, the "hearing" mentioned in the letter, *ante*, was postponed until November 10, 1971, and petitioner, accompanied by counsel, was in attendance.

At that time, petitioner was confronted by members of the local Education Association, in the presence of the Superintendent of Schools, and a discussion of the charges ensued. Petitioner maintains that, the discussion ended in a debate between her counsel and the president of the Education Association, and that the conference or meeting could not be considered as a hearing.

On November 12, 1972, the Secretary of the Board sent counsel for petitioner the following telegram: (Exhibit E)

> "Board of Education hearing Re Mrs. Ramo 8:00 P.M. Monday Nov. 15th HOPTACONG (sic) HS Cafeteria"

and on the appointed day, petitioner again appeared with counsel and met in a conference meeting with the Board. There is no transcript of the conference available, but petitioner maintains that it was not a "hearing" as such.

In any event, at the conclusion of the meeting or conference of November 15, 1971, between petitioner and the Board, the Board evidently went into an executive session lasting approximately one hour. Following this session, the Board resumed its public meeting and approved a resolution, which purportedly "terminated" petitioner's contract, effective at the end of a sixty-day period

thereafter, pursuant to a sixty-day notice clause, which the contract contained. On the following day, November 16, 1971, the Secretary of the Board sent petitioner the following letter: (Exhibit B)

> "Please be advised (sic) at a special meeting of the Board of Education held November 15, 1971, the following action was taken and approved by unanimous vote of the Board:
>
> > " ' The Contract of D. Diana Ramo be terminated subject to sixty (60) day clause from November 15, 1971. '
> >
> > " ' Mrs. Ramo is not to perform any duties during the sixty (60) day period. '
>
> "In reference to the deductions from your salary, I will be taking a full month of Pension Fund Contributions, Hospitalization, H. E. A. Dues and Washington National on January 15, 1971. This will mean you will be covered by hospitalization until February 29, 1971.
>
> "If you have any objections to these deductions please let me know as I can stop all deductions at the end of December."

Petitioner alleges that the facts enunciated, *supra*, are evidence that the Board acted unfairly and in a precipitous and arbitrary manner at the time of her suspension on November 3, 1971. She further contends that the termination of her contract by the Board on November 15, 1971, with 60 days' notice, was illegal since, in her view, proper procedural due process was denied her prior to the time the action was taken. Therefore, at this juncture, petitioner demands:

1. Reinstatement in her position.
2. Full pay to the end of the school year on June 30, 1972.
3. An apology for damage to her reputation.
4. Such other relief as is fair and equitable.

Additionally, petitioner further states that she was not properly compensated for services rendered under her contract's terms, and pursuant to an oral agreement for the period July 1, 1969 to August 15, 1969. In support of this contention, she now submits: (1) a letter the Superintendent wrote on her behalf (P-1) to the chairman of the graduate division of Newark State College on May 9, 1969, requesting that petitioner be allowed "to register" for summer school in 1969; and (2) documents the Board forwarded to the Teachers' Pension and Annuity Fund, which contained, *inter alia*, the statement that all deductions "*** begin 07-01-69" and the notation "contributory insurance effective 07-01-69" and (3) a subscriber's identification card stating that petitioner was covered by Blue Shield insurance on October 1, 1969 – three months (the requisite waiting period) after her contract's effective date of July

1, 1969. However, petitioner makes no claim now that she worked in Hopatcong Schools during the summer of that year. She claims only that she had permission to attend summer school in that year and understood that she would be paid during the six-week period of her attendance. There is no evidence that this claim for compensation was advanced in any form prior to the date of the instant Petition.

Finally, the hearing examiner notes that counsel for petitioner alleges in his brief that the treatment afforded petitioner herein was discriminatory. However, counsel failed to include such a charge in the Petition of Appeal and does not buttress the charge in his brief with an offer of proof of the existence of a proscribed practice. In similar manner, the brief contains a charge that petitioner's dismissal resulted from a "conspiracy" to "get rid of her" which was instigated by teachers employed in petitioner's school, the local Education Association, and the Superintendent; but, the Petition itself contains no such allegation.

The principal questions posed herein for the Commissioner's determination are stated succinctly by the hearing examiner as follows:

> 1. Is petitioner entitled, at this juncture, to compensation she now avers is due her for the period July 1, 1969 to August 15, 1969, or is such claim barred by laches?
>
> 2. Were the actions of the Superintendent and the Board, which resulted in the termination of petitioner's contract, effective 60 days from November 15, 1971, legally correct and proper actions? If they were not, is petitioner eligible now for additional compensation?

With respect to this latter question, it is noted here that petitioner advances no claim that she was not compensated for the total period which began with her suspension from service by the Superintendent, and continued through January 15, 1972. She was in fact paid at the contracted rate for that period. Instead, her claim in this Petition is that the manner of her termination of employment by the Board entitles her to compensation for the additional period January 15, 1972 through June 30, 1972.

* * * *

The Commissioner has reviewed the report of the hearing examiner and notes the issues posed for adjudication. He determines that:

> 1. Petitioner is barred by laches from a consideration of her belated appeal for compensation with respect to the summer of 1969.
>
> 2. The termination of petitioner's contract according to one of its clearly-stated terms, in the circumstances as related herein, provides no basis for intervention by the Commissioner.

These determinations are discussed below:

Petitioner's claim for compensation allegedly due her for the period July 1, 1969 to August 15, 1969, was belatedly advanced two and one-half years later at the time of the instant Petition. Such a delay, in the Commissioner's judgment, is unreasonable and a bar, by reason of the doctrine of laches, from consideration of her complaint on its merits at this juncture. As the State Board of Education stated in *Dorothy L. Elowitch v. Bayonne Board of Education, Hudson County*, 1967 *S.L.D.* 78, in affirming the decision of the Commissioner, at page 88:

> "Implicity in the doctrine of laches is the *inaction* of a party with respect to a known right for an *unreasonable* period of time coupled with detriment to the opposing party. *Pomeroy, Equity Jurisprudence*, V. II, *Sec.* 419, *p.* 171-2; 27 *Am. Jur. 2nd, Sec.* 162, *p.* 701; *Atlantic City v. Civil Service Commission*, 3 *N.J. Super.* 57 (*App. Div.*, 1949); *Park Ridge v. Salimone*, 36 *N.J. Super.* 485 (*App. Div.*, 1955) aff'd 21 *N.J.* 28 (*Sup. Ct.*, 1956) (*Emphasis supplied.*)

The bar herein is thus the "inaction" for a period adjudged as "unreasonable" by the Commissioner, *supra.*

The second determination of the Commissioner, *supra* – that petitioner's contract was legally terminated according to one of its stated terms – is also grounded on previous decisions of the Commissioner and the courts. *Sue S. Branin v. Board of Education of the Township of Middletown, Monmouth County*, and *Paul F. Lefever, Superintendent*, 1967 *S.L.D.* 9; *Gager v. Board of Education of Lower Camden County Regional High School District No. 1*, 1964 *S.L.D.* 81, *Amorosa v. Board of Education of Jersey City*, 1964 *S.L.D.* 126. These decisions distinguish and define the terms "dismissal" and "termination" with specific pertinence to the employment and contractual rights of teaching staff members who have not acquired the protection of tenure.

Thus, in *Sue S. Branin, supra*, the Commissioner held that a teacher may not be "*** summarily *dismissed* without notice and good cause ***" (at page 10) (*Emphasis supplied.*) but that contracts may be terminated according to their stated terms "*** for any reason or no reason.***" (at page 11) Specifically, the Commissioner quoted from *Gager, supra*, as follows:

> "*** In *Gager v. Board of Education of Lower Camden County Regional High School District*, decided May 11, 1964, for example, the Commissioner held that when a board determines that a teacher's work is unsatisfactory to the degree that it does not wish to continue his employment, it may terminate such employment only under the conditions of the contract. Such a course was open to respondent in the instant matter; it could have, *for any reason or no reason*, given petitioner 60 days' notice in writing of its intention to terminate his contract, and pursuant to *R.S.* 18:13-11.1, elected not to have him teach during the period of notice. The Commissioner recognizes the possibility of

> circumstances constituting good cause within the contemplation of *R.S.* 18:13-11, *supra*, under which the summary dismissal of a teacher could be upheld." (*Emphasis supplied.*)

and, then summarized the distinctions between "dismissal" of teaching staff members and "termination" of their contractual employment in the synopsis that followed:

> "Thus 'dismissal' as used in *R.S.* 18:13-11 contemplates that 'good cause' must exist therefor. Termination – which is equally available to both employee and employer – may be for any reason or no reason."

In the instant matter, petitioner was clearly not "dismissed" in violation of a contractual clause on November 15, 1971. Instead, on that date the Board chose to invoke a clause of a contract "available to both employee and employer," and terminated her employment with compensation according to the contract's terms payable for a 60-day period thereafter. At the time of this action the Board was under no legal compulsion to provide a hearing, although it did meet with petitioner, or to advance stated reasons for the action it took.

Nor can the Commissioner find the Superintendent in error for his suspension of petitioner when faced with such serious divisions in his staff as those confronting him, and the Board, on November 2, 1971. Statute *N.J.S.A.* 18A:25-6 clearly confers the power to "suspend" teaching staff members on the Superintendent of Schools in local districts and provides:

> "The superintendent of schools may, with the approval of the president or presidents of the board or boards employing him, suspend any assistant superintendent, principal or teacher, and shall report such a suspension to the board or boards forthwith. The board or boards, each by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper, subject to the provisions of chapter 6 and chapter 28 of this title."

Since the letter of the Superintendent to petitioner dated September 2, 1971, *supra*, clearly implies that such suspension was one he imposed with the "approval" of the President of the Board – there is no contention to the contrary – it cannot be construed as a unilateral act on the part of the Superintendent, but one taken in conformity with the statute's provisions. The "action" of the Board which followed, and which resulted in petitioner's "removal," followed by less than two weeks thereafter.

Finally, the Commissioner notes that petitioner now alleges that the termination of her contract was "discriminatory," but fails to buttress this allegation with offers of proof that any proscribed practice motivated the Board to act as it did, and that the termination resulted from a "conspiracy" between the teachers, their Association and the Superintendent to "get rid of her." (Petitioner) However, these charges *per se* are not included in the Petition of

Appeal and, in the Commissioner's judgment, do not demand a determination with respect to the Motion *sub judice*.

For the reasons stated, *supra*, the Commissioner finds no cause for his intervention in this matter. Accordingly, the Motion is granted. The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION

August 4, 1972

"E.H.,"

Petitioner,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Michael S. Bokar, Esq.

For the Respondent, McLaughlin, Dawes & Abbotts (James J. McLaughlin, Esq., of Counsel)

Petitioner, a pupil enrolled in the Tenth Grade at Trenton Central High School, was suspended from school attendance by school administrators on October 8, 1971, and was subsequently expelled by action of the Trenton Board of Education, hereinafter "Board." He demands judgment at this juncture that the act of expulsion was *ultra vires*. The Board avers that its actions in the matter *sub judice* were correctly founded and pursuant to statutory authority granted to it by the New Jersey Legislature.

The matter is submitted for Summary Judgment on the pleadings and memoranda of counsel, and for purposes of this adjudication, there is no dispute about the facts. The factual chronicle is as follows:

On October 8, 1971 in the cafeteria of Trenton Central High School, hereinafter "High School," petitioner approached another pupil and asked him for a small sum of money. Petitioner was given the sum of five cents, and he then returned to his table in the cafeteria. Subsequently, while in an area adjacent thereto, petitioner approached the same pupil again and "hit" him "on the side of the face." (From petitioner's testimony at a hearing before two members of the Board (Tr. 1-26)) There was no blow in return.

The assault was witnessed by a High School administrator who suspended petitioner the same day, pending referral of the report of the incident to the Board. Ultimately, after a series of inadvertent delays, petitioner, represented by counsel, appeared before two Board members who were part of a five-member "Legal Committee" of the Board. These two members heard testimony, subject to cross-examination of witnesses, including pupil witnesses, who appeared for and against petitioner. Petitioner also appeared in his own behalf.

Petitioner admits that he did "hit" the pupil who gave him the money as reported, *supra;* however, petitioner and a pupil witness who appeared in his behalf indicated that there was a motive for the act – namely, that the pupil who was struck had said, after giving petitioner a "nickel," (Tr. II-4)

"What's the matter, your father too cheap to give you lunch money?"

Following the hearing before two members of the Board – held January 6 and 10, 1972 – the two Board members referred the matter to the whole Board as part of a total report concerning several pupils, which included recommendations regarding disciplinary action. Specifically, their written report to the whole Board on the matter *sub judice* contained these words: (Exhibit A)

> "F. [E.H.] – Striking a student. It is recommended that he be expelled."

The whole Board had no written report other than this one from two of its members, and there is no evidence that they ever reviewed or saw a transcript of the hearing which was afforded petitioner. Nevertheless, the Board subsequently voted to expel petitioner from the privileges of further school attendance.

At this juncture, petitioner avers that such an action by the whole Board was illegal, since all members of the Board who voted on petitioner's expulsion were not present at the hearing afforded him and no alternative transcript review was provided as a substitute. In support of this viewpoint, petitioner quotes *Orange v. De Stefano*, 48 *N.J. Super.* 407, 413 (*App. Div.* 1958) to the effect that it has become "axiomatic in the area of administrative law that the one who decides must hear." Petitioner also cites *Eisberg v. Mayor and Council of the Borough of Cliffside Park and Joseph J. Cohn*, 92 *N.J.L.* 321, 322 (1919) and *McAlpine v. Garfield Water Commission*, 135 *N.J.L.* 497, 500 (1947) in support of this position, and lists additionally a recent decision of the Superior Court of New Jersey, *In the Matter of Shelton College*, 109 *N.J. Super.* 489 (*App. Div.* 1970). In this decision the Court found that the Board of Higher Education could lawfully meet and decide matters affecting Shelton College, in instances wherein the whole Board had not been present at the hearing afforded the College, if transcripts of the hearing and exhibits were provided every member. Specifically, the Court said (at p. 493):

> "*** that the requisites of administrative fair hearing are satisfied so long as one who participates in the ultimate decision reads and considers all the evidence presented."

In the matter *sub judice*, the Board agrees essentially with petitioner's statement of facts and avers that the findings and conclusions of the two members, who acted on behalf of the Board's Legal Committee, were reported to the whole Board (Exhibit A, *supra*) and considered by it, prior to the official action which expelled petitioner. The Board contends that there is no requirement that local boards of education provide stenographic transcripts of hearings afforded students, and that time necessary to prepare such transcripts would preclude expeditious action in such matters. Further, the Board argues, that petitioner was afforded all rights that were due him – including the right to counsel of his choice, an opportunity to hear witnesses who testified against him, and the rights of cross-examination and testimony in his own defense. The Board cites *"T.T." v. Board of Education of the Township of Franklin*, 114, *N.J. Super.* 287 (*App. Div.* 1971) affirmed 59 *N.J.* 506 (1971), as implied support of the position that a local board may appoint hearing examiners to take testimony, find facts and make conclusions of law on behalf of the board as a whole.

A review of the pleadings in this matter *produces* no additional substantive issues. Petitioner does not contend that the degree of severity of punishment is an issue herein, although this would seem inherent in the factual recital, *supra*. The narrow issue before the Commissioner is whether or not the Board acted properly when it voted to expel petitioner on the recommendation of the two Board members who were present at petitioner's hearing, in the absence of both a transcript of the hearing and of a detailed written report.

In the judgment of the Commissioner, the hearing afforded petitioner, notwithstanding the fact that it was conducted by two members of the Board's Legal Committee, did provide him with procedural due process as measured by the standards enunciated in the law. *John Scher v. Board of Education of the Borough of West Orange*, 1968 *S.L.D.* 92, affirmed State Board of Education 1968 *S.L.D.* 97; *R.R. v. Board of Education of Shore Regional High School District*, 109 *N.J. Super. 337 (Chan. Div.* 1970); *"T.T." v. Board of Education of the Township of Franklin, supra;* and *Dixon v. Alabama State Board of Education*, 294 *F. 2d* (5*th* Cir. 1961)

Such delegation by a board of the responsibility to conduct a hearing of the kind considered herein received tacit, implied, or specific approval in both *"T.T." v. Board of Education of the Township of Franklin, supra*, and *Dixon v. Alabama, supra.*

In *"T.T." v. Board of Education of the Township of Franklin, supra,* the Court stated (at p. 296), with regard to proper procedural due process in the "school" context, that:

> "*** Cross-examination of school children witnesses in proceedings like these should, however, be carefully controlled by the *hearing officer* or body ***" (*Emphasis supplied.*)

In *Dixon v. Alabama*, *supra*, the Court said (at p. 159), in the discussion pertinent to such hearings and in reference to a pupil petitioner, that:

> "*** He should also be given the opportunity to present to the Board, or at least to an *administrative official of the college*, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.***" (*Emphasis supplied.*)

The Commissioner is constrained to notice that local boards of education must of necessity delegate some procedural matters to a committee or to school administrators for the purpose of determining facts and developing recommendations. However, the Commissioner emphasizes that, following the conclusion of a hearing on pupil discipline as described in the instant matter, the Board as a whole must receive and consider either the transcript or a detailed, written report of the hearing, prior to taking any final action. In the instant matter, the report (Exhibit A, *supra*) of the Legal Committee of the Board is obviously deficient, since it contains merely petitioner's name and a recommendation that he be expelled from school. The record is barren of any evidence that the Board, apart from the two members who conducted the hearing, had any detailed knowledge of petitioner's testimony or that of the witnesses who testified in petitioner's behalf or against him. In that vacuum of knowledge, the decision made by vote of the whole Board can only be judged to be arbitrary.

Accordingly, and in consideration of the fact that petitioner has already been suspended from school attendance for a period comprising almost one year, the Commissioner directs that petitioner be readmitted to the same academic program in which he was enrolled at the time of his suspension. This direction is given conditionally and is grounded on the supposition that petitioner will conform to the rules of his school and exhibit acceptable patterns of conduct. If he does not, the Board is free to proceed in the manner discussed, *supra*, to exercise those powers of suspension or expulsion granted to it by statutory prescription.

COMMISSIONER OF EDUCATION

August 29, 1972

Case Box Lunch, Inc.,

Petitioner,

v.

**Board of Education of the City of Trenton,
Mercer County,**

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Sidney H. Grad, Esq.

For the Respondent, McLaughlin, Dawes & Abbotts (James J. McLaughlin, Esq., of Counsel)

Petitioner, a New Jersey corporation, alleges that respondent Board of Education, hereinafter "Board," improperly awared a contract for furnishing and delivering cold lunches to its elementary schools, on the grounds that petitioner submitted the lowest bid, but was denied the award of said contract.

The Board answers that the contract in question was awarded to the lowest possible bidder, which was not petitioner.

Petitioner prays for relief in the form of an Order by the Commissioner of Education to: (1) restrain the Board, its agents and servants, from entering into a contract with the only bidder other than petitioner, (2) direct the Board to accept the lowest bid submitted by petitioner, and (3) execute a proper contract with petitioner for furnishing and delivering the cold lunches to the various schools within the Trenton School District.

Testimony and documentary evidence were educed at a hearing conducted by a hearing examiner appointed by the Commissioner on Thursday, August 24, 1972, at the State Department of Education, Trenton.

The report of the hearing examiner is as follows:

The Board's "Specifications for a Cold Lunch Program for Elementary Schools, 1972-73," (Exhibit R-1) hereinafter "specifications," describe the method for preparation and submission of the bid, the scope of the bid and length of contract period, the type of service and the quality of product to be furnished, and the basis for the awarding of the contract. Essentially, the specifications provide for the furnishing and delivering of refrigerated Type A cold lunches (exclusive of milk) and extra sandwiches (one sandwich for every ten (10) complete lunches ordered) to the various elementary schools within the district for a six-months' period beginning September 1, 1972 to February 28, 1973, in accordance with the included sample menu and instructions. The Board

reserves the right to extend, at its option, the ending date of the contract with the successful vendor, at the award price, for an additional period of time not to exceed four months.

The request for these competitive bids was properly advertised, and the bids were received accordingly and opened publicly and read on Wednesday, June 28, 1972, at 10:00 a.m. At that time, only two bids were received, the Case bid of $.415 per lunch (Exhibit P-1) and the second from Dobbs Houses, Inc. at $.468 per lunch. (Exhibit R-2) Both bids conformed to the specifications with respect to the submission of sample lunches, sample menus, and proper surety.

At the regular meeting of the Board held July 11, 1972, the Board's Director of Food Services read a detailed statement (Exhibit R-7) to the Board, recommending the award of the contract for furnishing and delivering the Type A cold lunches to the higher of the two bidders, Dobbs Houses, Inc., at the unit price of $.468. (Exhibit R-2, *supra*) The minutes of the meeting of July 11, 1972, disclose the following action by the Board (Exhibit R-3):

> "*** **COLD LUNCH PROGRAM**
>
> "Mr. Lawrence requested the Board reconsider the Cold Lunch Program.
>
> "Considerable discussion surrounded the awarding of this bid. Mrs. Gibson, Director of Cafeterias, read a report on her visits, accompanied by Mr. Pete Mullaney, to the two lowest bidders. She expressed grave reservations that Case Box Lunch, the lowest bidder, could not supply the daily order of over 6,000 cold lunches due to lack of sufficient refrigeration space and equipment. Upon direct questioning by Board counsel, she stated in her professional opinion that Case Box Lunch did not comply with Board specifications. Dr. Watson urged the Board to accept the professional expertise of Mrs. Gibson. Mr. Tesauro deferred to Mrs. Gibson's professional opinion. Mrs. Potkay expressed concern that the Board could end up being sued by Case Box Lunch Co.
>
> "Mr. Lawrence MOVED the contract be awarded to Dobbs Houses at .468 as the lowest bidder complying with specifications.
>
> "This motion, seconded by Mr. Anderson, was ADOPTED by the following roll call vote:
>
> "Yes: Mr. Anderson, Mr. Jones, Mr. Kiser, Mr. Lawrence, Mr. Thomas, Mr. Tesauro.
>
> "No: Mr. Hutchinson, Mrs. Potkay.***"

A transcript of the portion of the July 11, 1972, meeting of the Board, pertaining to the award of the cold lunch contract, was received and marked in evidence. (Exhibit R-4)

The Director of Food Services for the Board testified that after the aforementioned two bids were received, she visited the Trenton plant of Case Box Lunch, Inc. together with her associate from the Board's purchasing department. On this occasion, she testified further that they inspected the plant and questioned the assistant manager concerning the procedures the Case company would follow to meet the requirements of the specifications if awarded the contract. At a later date, but prior to the July 11, 1972, meeting of the Board, the manager of the Trenton plant of the Case company came to the office of the Director of Food Services and, in this discussion, the Director asked the manager many questions regarding the manner in which the Case company would meet the specification requirements if awarded the contract for the cold lunch program. The Director testified that the manager did not have adequate answers to all of her questions on that occasion, but that he came to meet with her again on July 11, 1972, at 10:00 a.m., the date of the Board of Education meeting. Following this third discussion with a representative of the Case company, the Director of Food Services wrote her summary recommendation (Exhibit R-7), which she read aloud to the members of the Board assembled in regular meeting during the evening of the same day; namely, July 11, 1972.

From the handwritten summary recommendation (Exhibit R-7, *supra*), the transcript of the tape recording of that portion of the meeting which pertained to the cold lunch program contract awarded (Exhibit R-4), and the oral testimony of the Director of Food Services, the essence of her recommendations are set forth as follows:

The Director stated to the Board that the Case company: (1) had a very unsophisticated operation with very little modern automatic equipment; (2) had very limited refrigeration and freezer storage space; (3) had no temperature-controlled areas for food preparation and packaging; (4) had inadequate cooking facilities; and (5) owned no refrigerated delivery trucks. In addition, the Director judged the Case company's methods of preparation inadequate, specifically: (a) the planned purchase of all juices in individual containers; (b) the excessive handling necessitated by the repackaging of bulk salads into individual containers, within the plant and by a manual process; and the uncertainty whether jello and jellied salads would be prepared in the plant or purchased in pre-packaged form. The Director stated, also, that the award of this contract for 6,100 cold lunches per day would more than double the present operation of the Case company. In conclusion, the Director stated that the Case company does not have adequate facilities to meet the basic sanitation standards required for the daily preparation and storage of 6,100 cold lunches. The Director did not, therefore, recommend awarding the contract for the cold lunch program to the lowest bidder, Case Box Lunch, Inc.

The Director further testified that she also inspected the plant of the only other bidder and asked the officials of that company questions regarding their ability to perform the contract in accordance with the specifications. In every respect, she averred, the Dobbs company provided satisfactory evidence to her of its ability to perform the requirements of the specifications.

The manager of the Trenton plant of the Case company testified that his assistant did discuss the specification requirements with the Board's Director, and did conduct her and her associate on a tour of the Case plant. Also, the manager corroborated the fact that he personally conferred with the Director on two subsequent occasions regarding the specification requirements.

In response to the Director's specific criticisms, *ante*, the manager testified that: (1) the Case company had tried using automatic wrapping machines in the past, but had found manual wrapping more satisfactory and reliable; (2) the Case company has completed arrangements to rent a refrigerated tractor-trailer truck for overnight storage of cold lunch components and assembled cold lunches; (3) the Case company does have temperature-controlled areas for the preparation and packaging of food, but this had not been adequately explained to the Board's Food Services Director; (4) the company's cooking facilities are very limited but would not be utilized to meet the specification requirements; and (5) arrangements have been made by the Case company to lease four refrigerated van-type trucks for both storage and daily delivery, from a company located immediately adjacent to the Case plant.

The manager and the owner of the Case company testified that arrangements had been or could be made for: (a) the daily purchase and delivery of juices in individual serving containers acceptable to the Board; (b) the daily purchase and delivery of all salads in pre-packaged, individual serving containers to eliminate hazardous repackaging; and (c) the Case company has arranged for the daily purchase of individually-packaged jello and jellied salad products from a reputable dairy.

Both the manager and the owner of the Case company denied that the Trenton plant lacked proper sanitation, citing regular inspections and approvals by the Health Departments of the City of Trenton and the State of New Jersey. These two witnesses averred that the addition of the required 6,100 daily cold lunches would not more than double the operational volume of their Trenton plant, but would actually increase the daily volume by approximately thirty-three percent. These witnesses further stated that, on any given day, the Case company has processed and delivered quantities of items far larger than 6,100, but has not done this on a regular daily basis. Petitioner's witnesses also provided detailed testimony regarding the number of years that the company has been in the food service business and the kinds of food items supplied. They expressed the judgment that the Case company could easily and satisfactorily meet the specification requirements for the Board's cold lunch program.

Under cross-examination, the manager and owner both testified that the specific criticisms related by the Board's Food Services Director, *ante*, had for the most part been remedied since July 11, 1972, the date of the Board meeting when the contract award was made.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

The dispositive question in the matter controverted herein is whether the Board of Education's determination that the Case Box Lunch, Inc. was not the lowest responsible bidder is justified, notwithstanding that the Case company was in fact the lowest bidder.

New Jersey law (*N.J.S.A.* 18A:18-20) requires that boards of education shall award contracts for supplies to the lowest responsible bidder.

The philosophy and purposes of the statutes respecting public bidding have been enunciated in decisions of the courts upon numerous occasions. Contracts are to be awarded upon competitive bidding solicited through public advertisement. *Hillside Township v. Sternin*, 25 *N.J.* 317, 322 (1957)

It is an almost universally-recognized practice (See *McQuillin, Municipal Corporations* Sec. 29, 28 (1950), and one which is deeply rooted in sound principles of public policy. *Wazen v. City of Atlantic City*, 1 *N.J.* 272, 283 (1949); *Tice v. Long Branch*, 98 *N.J.L.* 214 (*E. & A.* 1922) The purpose is to secure competition and to guard against favoritism, improvidence, extravagance and corruption. Statutes directed toward these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good, and they should be rigidly adhered to. *Weinacht v. Board of Chosen Freeholders of County of Bergen*, 3 *N.J.* 330, 333 (1949); *Tice v. Long Branch, supra; McQuillin, supra,, Sec. 29.29*

It is settled in this State that, in the absence of a question as to the responsibility of a bidder, the low bidder is entitled to an award of the contract as a matter of right. *Sellitto v. Cedar Grove Township*, 133 *N.J.L.* 41, 42 (*Sup. Ct.* 1945); *Frank P. Farrell, Inc. v. Board of Education of Newark*, 137 *N.J.L.* 408, 409 (*Sup. Ct.* 1948) The status of the lowest bidder on a public contract is not one of grace, but one of right, and may not be lightly disturbed for it is based upon competition, a State policy. *Sellitto v. Cedar Grove Township, supra*

The Supreme Court of this State in *Arthur Venneri Co. v. Patterson Housing Authority*, 29 *N.J.* 392 (1959) stated at p. 402 that:

> "*** It is settled doctrine that *** the low bidder for a municipal contract be afforded a hearing on the issue of responsibility prior to an award of the contract to a higher bidder. *Automatic Laundries, Inc. v. Bayonne Housing Authority*, 45 *N.J. Super.* 266, 270 (*Law Div.* 1957); *Sellitto v. Cedar Grove Tp.*, 132 *N.J.L.* 29, 32 (*Sup. Ct.* 1944); *American Water Corp. v. Mayor and Council of Borough of Florham Park*, 5 *N.J. Misc.* 969, 972 (*Sup. Ct.* 1927); *Kelly v. Board of Chosen Freeholders of Essex*, 90 *N.J.L.* 411, 412-413 (*Sup. Ct.* 1917); *Armitage v. City of Newark*, 86 *N.J.L.* 5, 8-9 (*Sup. Ct.* 1914); *Harrington's Sons Co. v. Jersey City* 78 *N.J.L.* 610, 614 (*E.&A.* 1909); *Faist v. City of Hoboken*, 72 *N.J.L.* 361, 363 (*Sup. Ct.* 1905) ***."

To reject the lowest bid there must be evidence of such character concerning the responsibility of the bidder as would cause fair-minded and reasonable men to believe it was not in the best interest of the municipality or the school district to award the contract to the lowest bidder. *Venneri Co. v. Paterson Housing Authority, supra; Automatic Laundries v. Bayonne Housing Authority, supra; Sellitto v. Cedar Grove Tp., supra*

The question of responsibility may involve experience, financial ability, machinery and facilities necessary to perform the contract. *Venneri Co. & Paterson Housing Authority, supra*, 29 *N.J.* at p. 403; *Hillside Township v. Sternin, supra* 25 *N.J.* at pp. 317, 323; *Sandfort v. Atlantic City*, 134 *N.J.L.* 311, 312 (*Sup. Ct.* 1946); *Sellitto v. Cedar Grove Township*, 133 *N.J.L.* 41, 43-44 (*Sup. Ct.* 1945); *Sellitto v. Cedar Grove Tp., supra*, 132 *N.J.L.* at p. 31; *Paterson Contracting Co. v. City of Hackensack*, 99 *N.J.L.* 260, 263-264 (*E. & A.* 1923); *Peluso v. Commissioner of City of Hoboken*, 98 *N.J.L.* 706, 708 (*Sup. Ct.* 1923); *Bailey Fuel Co. v. Board of Education of the Township of Commercial* 1962 *S.L.D.* 114, 115.

In the instant case, the Board defends its action solely on the allegation that petitioner does not possess the proper facilities to perform the contract, and this conclusion was reached after hearing a detailed verbal report and recommendation from the Board's Director of Food Services. The fatal flaw in the Board's procedure is that no opportunity to be heard on that vital question was afforded to the lowest bidder. Consequently, no distinct finding was made against him, upon proper facts, to justify the Board's action. If petitioner was present at all at the Board's meeting held July 11, 1972, he was there as a spectator, and not upon notice of hearing to determine petitioner's responsibility as a bidder. See *Sellitto v. Cedar Grove Tp., supra*, 132 *N.J.L.* at p. 32.

It would be possible at this juncture to remand this matter to the Board of Education for hearing to determine petitioner's responsibility as a bidder. In the interest of justice to both parties, however, and upon agreement of both parties that the pivotal issue was that of responsibility, the hearing held herein included extensive testimony bearing upon petitioner's responsibility as a bidder. The Commissioner finds authority for this in the Supreme Court's decision in the case of *In re Masiello*, 25 *N.J.* 590 (1958) in which the Court stated the following at p. 600:

> "It has long been the law of this State that the requirements of due process are satisfied in situations of this kind if at any time before the order becomes effective, a fair hearing is granted by administrative or judicial action."

The Court stated the following concerning a hearing before the Commissioner at p. 606:

> "On the other hand, if, as in this case, the hearing demanded by principles of fair play is had before him for the first time, then the obligation to

'decide' signifies a complete *de novo* and independent decision on the facts."

In determining whether petitioner is a responsible bidder, the Commissioner has critically examined the testimony of the witnesses for both parties. In the judgment of the Commissioner, the deficiencies detailed in the testimony of the Board's witness did exist prior to the meeting of the Board on July 11, 1972, when the contract was awarded. It is clear, however, that subsequent to that date, but prior to the date of this hearing, petitioner did remedy the reported defects and deficiencies which influenced the Board to select the higher bidder. The Commissioner determines therefore, that petitioner has the experience, financial ability, machinery and facilities necessary to perform the contract to furnish and deliver 6,100 cold, Type A lunches to the various schools within the Trenton School District for the 1972-73 school year.

In the Commissioner's judgment, the Board of Education can provide adequate safeguards to assure performance under a properly-drawn contract.

The Commissioner finds and determines, for the reasons stated, that the Case Box Lunch Co., Inc. was the lowest responsible bidder to supply cold, Type A lunches to the Board of Education of the City of Trenton for the 1972-73 school year, and that the Board failed to award petitioner the contract as required by law. Accordingly, the Commissioner declares the award to the second lowest bidder a nullity and orders that the contract be awarded to Case Box Lunch Co., Inc.

COMMISSIONER OF EDUCATION

September 1, 1972

**In the Matter of the Tenure Hearing of Wardlaw Hall,
School District of the Township of Cinnaminson,
Burlington County.**

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Brown, Connery, Kulp, Wille, Purnell & Greene (George Purnell, Esq., of Counsel)

For the Respondent, Plone, Tomar, Parks & Seliger (Howard S. Simonoff, Esq., of Counsel)

Charges of conduct unbecoming a teacher and gross insubordination were filed with the Commissioner of Education against Wardlaw Hall, hereinafter "respondent," by the Cinnaminson Township Board of Education, hereinafter "Board." Respondent, a teacher with a tenure status, was suspended without pay on March 20, 1972, after certification of the Commissioner by the Board

that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary.

A hearing in this matter was held at the Burlington County Court House, Mount Holly, on May 24, 1970, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The gravamen of the charges in the instant matter is that respondent, even though denied permission to take a leave of absence, did absent himself from his teaching duties without permission. During his absence, the Superintendent of Schools prepared and filed with the Board the specific charges enunciated, *supra.* Said charges were certified to the Commissioner by the Board on March 20, 1972. (P-6)

The events leading up to the present controversy are these:

Respondent is a fifth-grade teacher in his twelfth year of employment with the Board and is currently a grade-level chairman at his school. He has long been a minister in the Jehovah's Witness religious group. On January 3, 1972, he submitted a request to his principal for a "*** leave of absence between the dates of February 28, 1972 to March 10, 1972 for the purpose of bettering my education.***." (P-1) The next day, January 4, 1972, he received the following memo (P-2) from the principal:

January 4, 1972

"[To] Mr. Hall

"[From] Mr. McGrath

"Your request for a leave of absence from February 25th to March 10th cannot be granted. The Board of Education clarified its position in their policy book (4156). This is available for you to read, if you so desire.

"I have no authority to grant any leave other than personal leave. (Policy #4153)"

Upon receipt of the memo, *supra*, respondent then asked his principal what steps of appeal should be taken in order to obtain an affirmative response. (Tr. 63) Respondent stated that he required the leave to attend a two-week seminar conducted by the Watch Tower Society of Jehovah's Witness for its ministers. (Tr. 61) Attendance at this seminar, respondent testified, is by invitation only, and then only after an individual has been observed for a period of time in the performance of his ministerial duties as a Witness. (Tr. 61) Respondent stated that the invitation had been extended to him in August 1971, and that if he did not attend, he would not be eligible for the next three or four years because the classes would be full. (Tr. 61)

In his efforts to gain approval for the requested leave, *supra*, respondent then appealed to the assistant superintendent of schools who also denied the request. (Tr. 20) Respondent then requested and was granted a meeting with the Superintendent of Schools, which was held on January 10, 1972. Respondent verbally explained his reasons for wanting the leave to attend the seminar, *ante*, in order to "*** better my education ***" so that he could then "*** instruct Jehovah's Witnesses on how to instruct people in their home [s] ***." (Tr. 65) According to respondent, the Superintendent determined that the reason was not sufficient to warrant approval of the leave. (Tr. 65)

On February 22, 1972, the Superintendent was informed by the principal that respondent had affirmed his intention to absent himself from duty during the period beginning February 28 and ending March 10, 1972, even though his request for leave had been denied three times. The following memo (P-3) was then sent to respondent by the Superintendent:

"TO: MR. WARDLAW HALL
FROM: DR. RAY T. BLANK, SUPERINTENDENT OF SCHOOLS
DATE: FEBRUARY 22, 1972
SUBJECT: UNATHORIZED (sic) ABSENCE FROM YOUR POSITION

"On January 10, at our personal conference, I denied approval of your request for a leave of absence for the period of February 28 through March 10. That evening, in Executive Session, the Board of Education discussed your request and concurred with my decision. We found the requested leave was not in accord with Board policy and your extended absence would not be in the best interests of the children in your class.

"Mr. McGrath advised me today that you have informed him of your intention to absent yourself from your position and responsibilities regardless of the fact that formal approval permitting you to do so has been denied. It must be made absolutely clear to you, therefore, to do so will be considered an act of insubordination, the consequences of which can be most serious.

"cc: Mr. McGrath
Board of Education Members"

Respondent replied in writing (P-4) to the Superintendent that he denied any intention of being insubordinate and reaffirmed his position that he must attend the seminar because "*** my religion is calling me at this time, and in harmony with Acts 5:29 in the Holy Bible, and being obedient to, I must go.***"

Finally, the Superintendent reiterated his denial of the request, *ante*, in the following memo (P-5) to respondent:

"TO: MR. WARDLAW HALL
FROM: DR. RAY T. BLANK, SUPERINTENDENT OF SCHOOLS
DATE: FEBRUARY 24, 1972
SUBJECT: LEAVE OF ABSENCE

"This will acknowledge your memo of February 23, 1972. It will be sent to the Board of Education, per your request, along with a copy of this reply.

"You must be corrected in your statements relative to the question of insubordination so there can be no claims of confusion or lack of clarity and understanding. The leave of absence, in and of itself, is not the act of insubordination, as you imply has been stated. The act of taking the leave, knowing full well and in contradiction and opposition to the fact that it has been denied by the Board of Education and Superintendent of Schools, is the act of insubordination. What you intend, also has no relationship to the question at hand. It is what you do in this case that will determine whether or not you have committed an act of insubordination.

"In your memo, you present nothing new or different to alter the decision to deny your request for a leave of absence from February 28 to March 10, 1972. The decision to deny your requested leave, therefore, stands, and you are advised for the third and last time that you may not absent yourself from your position and responsibilities for the period and purpose stated.

"cc: Board of Education members
Mr. McGrath"

Respondent admits that he was, in fact, absent from his teaching duties for the period of February 28, 1972 through March 10, 1972. He further admits that he did attend the seminar at the Watch Tower building in Brooklyn, New York.

In oral summation at the hearing, counsel for the Board relied on the record to prove the charges against respondent. He points to the following in arriving at the conclusion that the dismissal of respondent as requested by the Board should be ordered by the Commissioner (Tr. 76): (a) respondent did absent himself from his post; (b) respondent was warned that such absence might have serious consequences; (c) the Board acted upon the charges as filed by the Superintendent; (d) the evidence presented constitutes serious insubordination.

Respondent denies any insubordination or conduct unbecoming a teacher. He argues that he did not flaunt administrative authority willfully and maliciously, and that he did not intend the degradation of that authority. On the

contrary, respondent asserts that his religious life required him to participate in the seminar, *ante*, and that he did not go off on a lark, a business trip or to do something frivolous. Respondent points to: (a) his outstanding record during his employment by the Board; (b) his appointment as a grade-level chairman; (c) lack of any other disciplinary action against him in twelve years; (d) his accumulation of sick leave time and his refusal to be dishonest about the reason for his requested leave. These things, he avers, indicate that he is conscientious and dedicated and that he should not have his employment as a teacher terminated as a result of the incident which resulted in the charges, *supra*.

Notwithstanding the relative merits of his reasons for taking the denied leave, respondent asserts that the Board's own rules on excessive absence merely provide that a first offender receive written reprimand and warning. Respondent argues that any disciplinary action by the Board should be less devastating than dismissal. (Tr. 81)

The Board's policies on absence and leave (P-8) provide, *inter alia:*

"***5. Personal Leave 4155

"Employees may be granted two days off with pay each year for personal business. These are not to be accumulative. Written application, except in cases of emergency, must be made 24 hours in advance to, and approved by, the immediate administrative superior before such absence. Examples of such personal leave are: illness in family, death not in immediate family, personal emergency, religious holidays, court summons, etc.

"Revised November 17, 1969

"6. Excessive Absences 4156

" 'All absences in excess of those described in parts 1 [absences for personal illness], 2 [absences for personal injuries] and 5 above or for any other reason shall be without pay. Deduction shall be made at the rate of 1/200 or 1/240 of the annual salary as appropriate for each day of absence.' In addition, the following conditions shall be attached:

"First Offense: The employee shall receive a written reprimand with a copy to be placed in his permanent personnel file.

"Second Offense: The non-tenured employee shall not be rehired. The tenured employee shall have his salary increment withheld. If the employee is at the top of the salary scale and not entitled to an increment, his adjustment to any new scale shall be withheld for the school year following that in which the offense took place.

"Prior approval for any exception to the above shall be for emergency reasons only. All requests for emergency leave must be referred to the Superintendent of Schools.

Revised February 1, 1971"

Because of his past unblemished record, *supra*, the purpose of the leave, *supra*, and the policies of the Board regarding absence and leave, *supra*, respondent prays that the Commissioner reinstate him to the position he held prior to his suspension with all the rights and privileges pertaining thereto, and order the Board to reimburse him for his lost earnings during his period of suspension.

The issues may be simply stated as follows:

1. Are the Board's policies regarding absence and leave, *supra*, dispositive of the instant controversy?

2. Is respondent guilty of insubordination and conduct unbecoming a teacher as charged?

3. If respondent is guilty as charged, is the charge sufficient in scope to warrant dismissal or reduction in salary?

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the report of the hearing examiner and the issues posed for consideration.

In regard to the Board's absence and leave policies, *supra*, the Commissioner observes that *N.J.S.A.* 18A:11-1 authorizes boards of education, *inter alia*, to:

"***c. Make, amend and repeal rules, not inconsistant 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."

Subsequently, at *N.J.S.A.* 18A:30-7, boards of education are provided authority, *inter alia:*

> "*** to fix either by rule or by individual consideration, the payment of salary in *cases of absence not constituting sick leave* ***" (*Emphasis supplied.*)

Thus, legislative authority for boards of education to effectuate policies regarding the "*** management of the public schools ***" and, in this instance, policies on absence and leave, is embodied within the corpus of school law.

The first question is whether the Board's policies on absence and leave are dispositive of the instant matter. Respondent argues that policy 4156 controls the matter herein, that he is therefore deserving of only a written reprimand for his action. The Commissioner does not agree. 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; Grogan v. DeSapio*, 11 *N.J.* 308 (1953) This clear maxim applies equally to local board of education policies as well as to those ordinances adopted by municipalities.

Policy 4155, *supra*, provides for a maximum of two days per year of leave for personal business, which may be secured by written application only and with approval in advance by an immediate administrative superior.

Policy 4156, *supra*, cannot be construed to mean that any employee or group of employees may at any time simply absent themselves from their duties as teachers, without prior approval, and as a result receive only a written reprimand from the Board. It is the Commissioner's view that this could result in depriving numerous pupils of their regular teachers, which would be wholly inconsistent with the State policy requiring the operation of a thorough and efficient system of free public schools. *New Jersey Constitution, Art.* VIII, *Sec.* IV, *Par.* 1.

While the Commissioner holds that the Board's policies, *supra*, are not dispositive of the issues contained herein, and do not invalidate the charges, he does find that they are applicable to the extent that the Board may and should prepare a written reprimand to respondent and place a copy in his permanent record.

The second issue to be considered is whether respondent is guilty of insubordination and conduct unbecoming a teacher. As defined in *Black's Law Dictionary*, *supra*, (at p. 942), "insubordination" is a:

> "State of being insubordinate; disobedience to constituted authority *** Refusal to obey some order which a superior office is entitled to give and have obeyed ***"

In the instant matter, respondent requested permission on at least three separate occasions to take a leave of absence from his assigned duties. Not only was permission denied verbally, but written memoranda were sent to respondent

in which the request was denied. (P-2, P-3, P-5) The Superintendent, was most emphatic in his denial when he said, *inter alia* (P-5), the following:

> "*** you are advised for the third and last time that you may not absent yourself from your position and responsibilities for the period and purpose stated."

N.J.S.A. 18A:17-20 states, *inter alia*, that:

> "The superintendent of schools shall have general supervision over the schools of the district *** under rules and regulations prescribed by the state board *** and *** shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him ***"

In the judgment of the Superintendent, the reason advanced by respondent for the requested leave was "*** not in the best interests of the children in your class ***"; therefore, he denied the request. (P-3) Respondent, with full knowledge of the denial of his request by the Superintendent, and by the Board (P-5), took the leave anyway. In the judgment of the Commissioner, this was, in fact, an act of insubordination, to the authority of the Board, *N.J.S.A.* 18A:11-1, *supra*, and to the authority of the Superintendent, *N.J.S.A.* 18A:17-20, *supra*. Respondent's argument that the leave was not spent in a frivolous manner nor on a lark is not germane to the issues herein. The Commissioner finds no necessity to address the merits of the purpose for which the leave was taken.

Finally, the last issue posed for consideration is whether the charge of insubordination is sufficient in scope to warrant dismissal from respondent's tenured position with the Board. In that regard, testimony educed at the hearing is convincing that respondent has had no previous blemishes on his record; that his performance as a teacher was such that he was appointed fifth-grade-level chairman, a post he held prior to his suspension; that no other disciplinary action had been taken against respondent in his twelve years of service with the Board; and that his teaching ability is not questioned.

With these factors as part of the total consideration, the Commissioner looks to other decisions of the Courts where penalties were assessed or evaluated and takes particular cognizance of the decision of the Court, *In re Fulcomer*, 93 *N.J. Super.* 404. Judge Carlon, delivering the opinion of the Court, said (at p. 421):

> "*** Although such conduct [the use of physical force to maintain discipline or to punish infractions] certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances.***"

Although *Fulcomer, supra,* dealt with a charge of corporal punishment and the matter *sub judice* is insubordination, the Commissioner holds that the same reasoning is applicable herein.

The Commissioner, therefore, finds that the dismissal of respondent for this act of insubordination would be too harsh a penalty. Nevertheless, the Commissioner is constrained to repeat his statement in a case recently decided. *In the Matter of the Tenure Hearing of Jacque L. Sammons,* 1972 *S.L.D.* 302:

> "*** that they [the teachers of this State] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children *** This heavy duty requires a degree of self-restraint and controlled behavior *** Those who teach do so by choice ***."

The Commissioner notes with dismay that, in the instant matter, respondent lacked "self-restraint and controlled behavior" by being insubordinate. For future guidance, respondent is cautioned to fulfill his responsibilities to the Board and to the students that have been entrusted to his "care and custody."

The Commissioner determines that respondent Wardlaw Hall shall be reinstated as of September 1, 1972, as a teacher in the Cinnaminson Township School District, Burlington County, and, further, that no remuneration for the period of suspension shall be forthcoming to respondent.

COMMISSIONER OF EDUCATION

September 1, 1972

Pending before State Board of Education

**In the Matter of the Tenure Hearing of Florence M. Sahner,
School District of the Borough of Keyport,
Monmouth County.**

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Norton and Kalac (Peter P. Kalac, Esq., of Counsel)

For the Respondent, Peter B. Shaw, Esq.

Charges of insubordination and conduct unbecoming a teacher were filed with the Commissioner against Florence M. Sahner, hereinafter "respondent," by the Board of Education of the Borough of Keyport, hereinafter "Board." Respondent, a teacher with eight years of service was suspended, on March 7, 1972, without pay, after certification by the Board that such charges, if proven to be true in fact, would warrant dismissal from her tenured position.

Hearings were held in this matter on May 25, and June 27, 1972, in the office of the Monmouth County Superintendent of Schools, Freehold, and the Freehold Court House by a hearing examiner appointed by the Commissioner. A written Summation and Memorandum of Law were subsequently filed by respondent and the Board, respectively. The report of the hearing examiner is as follows:

The Board alleges, on the basis of charges filed by the Superintendent and made part of the pleadings, that respondent is guilty of insubordination and conduct unbecoming a teacher because she absented herself from her teaching duties for three days, with full knowledge that her request for permission for three days of leave was denied. Respondent admits taking three days of unauthorized leave, but asserts that the "*** immediacy of her activity [i.e. the purpose for which the leave was taken] *** justified [her absence] ***." (Respondent's Memorandum, at p. 7)

The facts of the matter as elicited from the testimony and evidence submitted are these:

The Board's policy for leaves of absence (P-1) provides the following, *inter alia* (at p. 17):

"*** As of the beginning of the school year, teachers shall be entitled to the following temporary nonaccumulative leaves of absence with full pay each school year:

1. Two (2) days leave of absence for personal *** matters ***. *** the applicant *** shall not be required to state the reason for taking such leave***."

Uncontradicted testimony discloses that in implementing the personal leave segment of the policy, *ante*, a "blue slip" procedure is used by the Board's administrators. (Tr. 18, 30)

On the morning of February 22, 1972, respondent requested and received permission from the principal of Keyport High School to use February 25, 1972, as the second (Tr. 27) of two days of personal leave allowed by the policy, *supra*. Respondent submitted the following request (R-3) to the principal:

"Office of the Superintendent "Keyport Public Schools
"Keyport Public Schools

"REQUEST FOR LEAVE OF ABSENCE

"Name Florence M. Sahner
"Dates Requested 2/25/72
"Dates Submitted 2/22/72
"Reasons for Request:

"I must take my husband to doctor for removal of sist (sic).

" ____ Denied
" ____ Excused Without Salary
" ____ Excused Minus Substitute
" ✓ Excused Full Salary Pers'l Day
" ____ Educational Leave

"Principal/Supervisor Jerome L. Zampelle

"[*unclear initials contained herein*]
"Signature of Superintendent"

At the same time that respondent submitted the request (R-3), *ante*, she informed the principal that her husband had to take a trip following his scheduled minor surgery, *ante*, and that she planned to accompany him. Therefore, she requested additional personal leave for March 2, 3, and 6, 1972. Conflicting testimony was presented as to whether here husband's trip after the minor surgery was (1) post-recuperative, (2) therapeutic or (3) a vacation. The principal testified that he advised respondent that her two days of personal leave as provided by the terms of the policy, *supra*, would have been used; therefore, he did not have the authority to approve her request for three additional days.

According to the principal, he suggested that respondent reduce her request to writing, submit it to his office, and that he, in turn, would forward her request to the Superintendent for a decision. Respondent then submitted the following handwritten memo (P-3) to the principal:

"2/23/72

"TO: Mr. Frederick (sic)
Mr. Zanpelle (sic)

"Gentlemen:

"For personal reasons, it will be necessary for me to be absent from school on 3/2, 3/3 and 3/6.

"Sincerely,
"Florence M. Sahner"

Upon receipt of respondent's request (P-3), *supra*, the principal forwarded it to the Superintendent with the recommendation that it be denied (Tr. 27) because respondent would have used all of her personal days. It is not clear whether the Superintendent concurred with the recommendation of the principal regarding respondent's request. (P-3), *supra*. It is clear, however, that the administrators decided to suggest to respondent that the "blue slip" procedure, *ante*, be followed. In compliance, respondent submitted the following document on February 28, 1972: (R-4)

"Office of the Superintendent
"Keyport Public Schools

"REQUEST FOR LEAVE OF ABSENCE

"Name Florence M. Sahner
"Dates Requested 3/2 3/3 3/6
"Dates Submitted 2/28/72
"Reasons for Request:

"Personal

"✓ Denied
" Excused Without Salary
" Excused Minus Substitute

"_____ Excused Full Salary
"_____ Educational Leave

_____

_____

"Principal/Supervisor _____

"D. W. Fredericks
"Signature of Superintendent"

Late in the morning of the day that the request (R-4), *ante*, was submitted, respondent was asked to report to the principal's office where she conferred with the principal and the Superintendent. The Superintendent informed respondent that her request for leave on March 2, 3 and 6, 1972, was denied. In that regard, testimony of these three persons is as follows:

Superintendent on direct examination (Tr. 113):

"Q. ***after you had the blue sheet [R-4] in hand *** what did you do?

"A. I advised Mr. Zampelle [the principal] that I conferred (sic) [concurred] with his recommendations; that the request for personal absence be denied *** I also advised him that inasmuch as we were denying the request, that as a professional courtesy, that (sic) I would meet personally with Mrs. Sahner *** and apprise her as to the reasons that I was denying it."

The principal on cross-examination (Tr. 68):

"Q. And did Mr. Fredericks indicate why, at that time, that (sic) he was denying her request?

"A. Yes *** He felt that looking over her record, (sic) that she had been absent quite a bit, and that the students were the ones that would suffer from this, [leave] and he thought that it was necessary for her to be there."

Respondent on direct examination (Tr. 221):

"Q. Now, what happened after ? [after the submission of R-4, *ante*]

"A. At eleven o'clock – that is my professional period – I was called to Mr. Zampelle's office, [the principal] and Mr. Fredericks was there [Superintendnet]. He gave me the blue slip, and he said I am denying these three days, and I said I have to have them, and I was pleading with him, and he said if you take these three days I will bring you up on charges. I was shocked at his antagonism, and his

anger, and I said, I wouldn't be here those three days. I have to take them."

Respondent on cross-examination (Tr. 264):

"Q. That morning [February 28th] you were demanding those three days; is that correct?

"A. Right."

Prior to the close of school that day, the Superintendent had the following memorandum (P-8) delivered to respondent:

"February 28, 1972

"TO: Florence M. Sahner

"FROM: Douglas W. Fredericks, Superintendent of Schools

"SUBJECT: Request for additional personal days

"This is to confirm our discussion of Monday, February 28, 1972. At this meeting we discussed your request for personal days on March 2, 3 and 6. You were told, in view of the fact that you had used the personal days you were entitled to, your request was denied.

"You had indicated at this meeting that despite your request being denied you intended to be absent on March 2, 3 and 6. This is to inform you that in the event that you are absent on the days in question I shall consider your actions as insubordination and conduct unbecoming a teacher.

"Furthermore, in the event you are absent, I shall immediately report this matter to the Board of Education with a recommendation that appropriate disciplinary action be taken against you. This is to again inform you that I shall expect you to be present in class on March 2, 3 and 6.

"Very truly yours,

***

"Douglas W. Fredericks
"Superintendent of Schools

"DWF: hjb
"cc: Mr. J. Zampelle
Mr. Donald Hill"

Respondent testified that upon receipt of the memorandum (P-8), *ante*, and after conferring with her husband, she consulted a New Jersey Education Association representative. On the next day, February 29, 1972, respondent submitted the following letter (J-1) to the principal and Superintendent:

"February 29, 1972

"TO: Douglas W. Fredericks, Superintendent of Schools

"FROM: Florence M. Sahner

"SUBJECT: Request for leave for illness of teacher's spouse

"My first reaction to our discussion and your letter regarding my 'request for additional personal days' was that of shock and dismay. I took it as a personal slur against my integrity. As a professional, I expect to be treated with a certain amount of respect and dignity, especially from another professional in the same field.

"After having had a chance to reflect a little, I began to think that perhaps we were suffering from a lack of communication. I had told Mr. Zampelle last week that I had to accompany my husband to the doctor's office for surgery in a rather delicate and sensative (sic) area. Of course, there was no problem in getting off Friday, Feb. 25th for this purpose. I also told him at the same time that the surgeon had told my husband to go away for several days for recuperative purposes and that he must be accompanied by someone. The dates I asked for are the dates my husband determined since it was the first available arrangement he could make subsequent to the surgeon's first post-operative examination on Feb. 29th. He arranged to return on March 6th because he will be due for another check up at that time.

"As I stated before, apparently there must have been some misunderstanding. I may have unduly assumed that you would discuss this with Mr. Zampelle before making your decision. That is why I did not put all the details in my request and I merely requested the three days as personal days without any expectation of getting paid for them.

"Since you put your refusal in writing with copies to the school principal and the secretary of the board, I am submitting this request with copies to the same interested parties. I am requesting three days leave on March 2, 3 and 6 under the provision in our contract which states that a teacher is entitled to: 'Up to a maximum of 3 days during the school year for serious illness of a teacher's spouse, child, parent, or any other member of the teacher's family living in the teacher's household. At the request of the principal, the teacher shall present a physician's certificate of connection with request for time off under this section.'

"If a physicians (sic) certificate will be required I would like to have this request in writing today. Since my husband is being examined by the surgeon tonight he can obtain this certificate. I would like to add that my husband feels that it is degrading and embarrasing for for (sic) a prominent and respected member of this community to have to go to a doctor like a child for a medical excuse.

"Thank you for your prompt attention to this matter.

"Very Truly Yours,
***
"Florence M. Sahner

"cc: Mr. J. Zampelle
Mr. Donald Hill"

That portion of the policy, *supra*, to which respondent refers in her letter (J-1), *supra*, reads as follows:

"*** Up to a maximum of three (3) days [will be allowed] during the school year for serious illness of a teacher's spouse***."

In response to respondent's letter (J-1), *supra*, the Superintendent addressed the following reply (J-2):

"February 29, 1972

"TO: Florence M. Sahner

"FROM: Douglas W. Fredericks, Superintendent of Schools

"SUBJECT: Your request for leave for illness of spouse

"This will acknowledge receipt of your letter dated February 29, 1972. Your absenting yourself from your instructional responsibilities to be with your husband while he is on vacation rehabilitating from minor surgery does not qualify as an acceptable absence under the 'serious illness of a teacher's spouse' clause of the Master Contract. Your request for absence under this clause of the contract is denied.

"Be advised that I expect you to be present in class on March 2, 3 and 6. In the event that you are absent the steps as outlined in the 2nd and 3rd paragraphs of my correspondence to you dated February 28, 1972 will be implemented.

"Very truly yours,

"Douglas W. Fredericks
"Superintendent of Schools

"DWF: hjb
"cc: Mr. J. Zampelle
Mr. D. Hill"

Respondent testified that on March 1, 1972, the day after the aforementioned exchange of correspondence (P-8, J-1), *ante*, she informed the principal "*** that I wouldn't be there [in school] those three days, and to make sure that he [the principal] had a substitute***." (Tr. 227) The principal's recollection of this conversation is expressed in his report to the Superintendent (P-5) as follows:

"March 1, 1972

"TO: Mr. Douglas Fredericks, Superintendent of Schools

"FROM: Mr. Jerome L. Zampelle, Principal, Keyport High School

"RE: Leave of Absence requested by Florence Sahner

"On Wednesday, March 1st, Mrs. Sahner stated to me that she was still going through with her request for leave of absence for Thursday, March 2nd, Friday, March 3rd and Monday, March 6th. Mrs. Sahner also stated that she realized that it was not with Mr. Fredericks (sic) approval but stated 'what's the worst thing they can do, slap my wrist, deduct these days from my pay or suspend me.' Mrs. Sahner also stated that her husband and family were more important than her job and this is why she was taking the time off.

"I told Mrs. Sahner that if this was her decision that I would arrange for a substitute to take her classes."

Respondent denies the quote attributed to her in the principal's report (P-5), *ante*, but does admit that she was, in fact, absent from her duties as a teacher on March 2, 3 and 6, 1972. She further admits that she accompanied her husband to the island of St. Martin in the Caribbean following his minor surgery.

When respondent returned to school on March 7, 1972, she was notified of her suspension by the Superintendent, who had discussed the matter with the Board the prior evening. (Tr. 176) That evening, the Board passed its resolution certifying the charges, *supra*, to the Commissioner.

Respondent asserts that her unauthorized absence was justified because of marital problems. Testimony was presented by both respondent and her husband in regard to their marital problems, over strenuous objection by the Board and at

the insistence of respondent. This testimony revealed that the minor surgery referred to as the "removal of a sist (sic)" in respondent's request for leave of absence (R-3), *supra*, was not true, and respondent's husband had actually undergone a vasectomy. Respondent asserts that the trip to St. Maarten on March 2, 3 and 6, 1972, was taken on advice of her husband's physician. However, respondent did not call the physician to testify in corroboration of that assertion.

The Board argues that the only issue to be decided herein is whether the insubordination of which respondent is charged is sufficient to warrant her dismissal as a tenured teacher. The Board avers that it does. Reciting a brief history of recent application of the tenure statutes in New Jersey, the Board maintains that "*** tenure teachers are now enjoying a pampered status in New Jersey." (Board's Memorandum, *supra*, at p. 3) The Board cites *In the Matter of the Tenure Hearing of Mary Worrell*, 1970 *S.L.D.* 378 and *In the Matter of the Tenure Hearing of Joseph N. Cortese*, 1972 *S.L.D.* 109 affirmed State Board of Education 1972 *S.L.D.* 120, as instances in which there were findings of statutory violations, but the teachers were reinstated. The Board asserts that the matter *sub judice* does not encompass statutory violation, and maintains that the issue of insubordination herein is potentially more dangerous. Accordingly, it argues that the principle upon which the instant controversy should be decided is that found in *Smith et al. v. Board of Education of the Borough of Paramus et al.*, 1968 *S.L.D.* 62, which is stated as follows (at p. 67):

> "***'The public schools were not created, nor are they supported, for the benefit of the teachers therein *** but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.'***"

The Board in furthering its argument for dismissal of respondent, looks to *In the Matter of the Tenure Hearing of John H. Stokes*, 1971 *S.L.D.* 623, in which the Commissioner stated, *inter alia*, the following (at p. 45):

> "***' Dismissal from a tenured post cannot cure the wrong, but it can prevent the exhibition of a subsequent repeat performance, and it must be adjudged to be a proper and positive step.'***"

Against a possible argument that the requested penalty of dismissal is too harsh, the Board relies on *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (1943), affirmed 131 *N.J.L.* 326 (*E. & A.* 1944); *In the Matter of the Tenure Hearing of Emma Matecki*, 1971 *S.L.D.* 566; and *In the Matter of the Tenure Hearing of Francis Bacon*, 1971 *S.L.D.* 387, as support for its position that insubordination is sufficient, though it be only one incident, to demonstrate a teacher's unfitness. The Board maintains that the premeditation of respondent's insubordination certainly justifies her dismissal.

Finally, the Board points to the fact that the school calendar (P-6) provided for an Easter vacation commencing March 29, 1972, and ending April 5, 1972. The Board avers that this time could have been properly used by respondent to accompany her husband instead of March 2, 3 and 6, 1972.

Respondent advances essentially five basic arguments in support of her request for reinstatement by the Commissioner:

1. That the purpose for time taken on March 2, 3 and 6, 1972, *ante*, was on the advice of a physician; it was not a vacation but a post-recuperative and therapeutic trip for her and her husband in regard to their marital problems, *ante;*

2. That the Superintendent and the principal were acting unreasonably in their denial of her request for leave of absence, *supra*, by not having the courtesy to ask her why the leave was necessary;

3. That she should not have been expected to proffer the reason because of its intimate and personal nature;

4. That her suspension by the Superintendent, later affirmed by the Board, was procedurally defective. She asserts that the Board did not have sufficient information to affirm her suspension, and that the Board, before acting, should have at least listened to her. She points to minor technical aspects of the Superintendent's report of charges, *ante*, as being in error to support this argument.

5. That the burden is on the Board to prove by a preponderance of credible evidence that the charges *sub judice* are true, in fact, and if so, are sufficient in scope to warrant dismissal. She asserts that this the Board failed to accomplish and cites *Schroeder v. Board of Education of the Township of Lakewood*, 1960-61 *S.L.D.* 37; and *In re Masiello*, 25 *N.J.* 590 as support.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

It is clear that the Board recognized that its employees may require time away from their school responsibilities during the school year, and, therefore, adopted a policy which allows teachers two paid days of personal leave each school year. In the instant matter, respondent had taken advantage of that policy by utilizing February 25, 1972, as the second of her two days of personal leave, for the alleged purpose of accompanying her husband during the removal of a cyst (R-3), *supra.* Respondent then requested three more days, for "personal reasons" (P-3, R-4) to accompany her husband on a trip following his minor surgery, allegedly on a physician's recommendation.

The Commissioner observes that at the time of respondent's submission of her request for leave of absence (R-4), *ante*, the Superintendent had before him: (1) the knowledge that respondent had utilized her second and last personal day; (2) her request for the three additional days of March 2, 3 and 6, 1972, with "personal" stated as her reason; and (3) the information from respondent that she intended to accompany her husband on a trip following his minor surgery. The Superintendent concluded from this information before him that the minor surgery consisted of the removal of a cyst. In the Commissioner's view, this conclusion was reasonable. Based upon this conclusion, the Superintendent determined that the requested leave should be denied, and he conveyed his determination to respondent on the morning of February 28, 1972. The Commissioner can find nothing in the record in support of respondent's contention that the Superintendent was antagonistic, angry, or treated the respondent in any manner other than with "*** respect and dignity***" (J-1), *supra.*

The Commissioner lends credibility to the principal's version (P-5) of what occurred during the meeting of March 1, 1972, when respondent informed the principal of her intended absence. The testimony shows that on February 25, 1972, when respondent used her second personal day (R-3), *supra*, she was determined to absent herself on March 2, 3 and 6, 1972, and she was angry and annoyed because the Superintendent refused her request. Therefore, absent evidence to the contrary, the Commissioner accepts the quote attributed to respondent (P-5), *supra*, as the verbal expression of her dissatisfaction with the Superintendent's denial.

In the Commissioner' judgment, respondent's argument that the requested leave falls within the ambit of that portion of the policy, *supra*, regarding "*** serious illness of a teacher's spouse***" is not convincing. If respondent truly believed in the merits of that claim, she could have produced expert medical testimony to prove the seriousness of the minor surgery.

Respondent asserts that the onus of responsibility is on the Superintendent to determine the underlying reason for the requested personal leave. The Commissioner cannot agree. Respondent gave her reasons for the request as "personal" (P-3, R-4), *ante*, and to accompany her husband on a trip. On that basis the Superintendent made his decision. In the Commissioner's view, the burden was on respondent to provide arguments of extenuating circumstances in order to convince the Superintendent to approve the requested leave.

The Commissioner finds it unnecessary to consider the testimony and the arguments advanced by the parties to determine whether the purpose of the trip was post-recuperative, therapeutic, or a vacation.

The first issue to be decided is whether respondent's behavior and activity support the charges of insubordination and conduct unbecoming a teacher. As defined in *Black's Law Dictionary* (at p. 942), "insubordination" is a:

"State of being insubordinate; disobedience to constituted authority. *** Refusal to obey some order which a superior officer is entitled to give and have obeyed.***"

In the instant matter respondent requested personal leave for three days. The request was denied by the Superintendent, with reasons given (P-8), *supra.* Quite pointedly, the Superintendent advised respondent on February 29, 1972 (J-1), that should she absent herself on those days, he would prefer charges of insubordination and conduct unbecoming a teacher against her. Respondent did absent herself from her duties without permission; but now finds it appropriate to present the alleged facts supporting her urgent need for the leave and argues that, under the aforementioned circumstances, she should not be found guilty of insubordination. The Commissioner does not agree. Respondent had ample opportunity to persuade the Superintendent of her alleged urgent need for the leave. Respondent chose to indicate that the minor surgery was for the removal of a cyst (R-3), *supra.* Next, she indicated that the purpose of the leave was "personal" (R-4), *supra.* Being denied the request, respondent then turned to the Board's policy on sick leave and renewed her request under "*** serious illness of a teacher's spouse***" (Board's Policy, *supra*). The Superintendent again denied her request *on the basis of the information he had before him* (J-2), *supra.* Finally, respondent absented herself from her duties on March 2, 3 and 6, 1972, without permission and with full knowledge of the Superintendent's warning of the consequences.

Having made these findings of facts, the Commissioner determines that respondent is guilty of insubordination and conduct unbecoming a teacher. There is no evidence in the record before the Commissioner that the Superintendent acted in any way unreasonably in making his decision to deny respondent's requested leave. In the Commissioner's judgment, respondent must be held fully responsible for the charges *sub judice*, and reminds respondent that the Superintendent of Schools, as the chief executive officer of the Board, is given statutory authority by *N.J.S.A.* 18A:17-20, for, *inter alia*,

"*** general supervision over the schools of the district***."

The lack of candor on respondent's part while in the privacy of the school office, regarding the purpose of her requested leave, *supra*, which she fully described during the public hearing, has played a large role, in the Commissioner's view, in the instant controversy.

Next, respondent asserts that procedural aspects of the Board's action on her suspension were in error. In reviewing the record, the Commissioner observes that prior to the Superintendent's giving notice to respondent of her suspension, he discussed the matter with the Board. (Tr. 176) After the Superintendent notified respondent regarding her suspension, he reported his action to the Board which then certified the charges to the Commissioner. (Tr. 175) The Commissioner notes that statutory authority is given superintendents and boards of education to suspend teachers by *N.J.S.A.* 18A:25-6, which reads in pertinent part as follows:

> "The superintendent of schools may, with the approval of the president *** of the board *** employing him, suspend any *** teaching staff member and shall report such a suspension to the board *** forthwith***"

and, by *N.J.S.A.* 18A:6-14, which provides in part as follows:

> "Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made *** pending final determination of the same ***."

In the instant matter the Commissioner finds that the Superintendent did suspend respondent with the knowledge of the Board, and that the Board, on the evening of March 7, 1972, duly certified charges against respondent to the Commissioner and continued her suspension. The Commissioner determines that there was no procedural defect in these actions.

Finally, the last issue to be decided herein is whether the charges *sub judice* are sufficient in scope to warrant dismissal of respondent from her tenured position.

In this regard, the Commissioner has reviewed the evidence and the arguments of both parties and notes the cases each cites in support of their contentions. The Commissioner finds and determines that the dismissal of respondent for this act of insubordination would be too harsh a penalty to impose. However, the Commissioner cannot condone respondent's actions in the matter *sub judice* in light of the responsibility of the State, through local boards of education, to provide for a thorough and efficient system of public schools. *New Jersey Constitution, Art.* VIII, *Sec. IV*, Par. 1 The Commissioner, therefore, orders that respondent, Florence M. Sahner, be reinstated as a teacher in the Keyport Public Schools as of the date of this decision, with no remuneration of salary for her period of suspension. He further determines that respondent's salary for the 1972-73 school year shall be the same as her salary for the 1971-72 school year.

COMMISSIONER OF EDUCATION

September 12, 1972

**In the Matter of the Tenure Hearing of Eleanor Turner,
School District of the Township of Wall,
Monmouth County.**

COMMISSIONER OF EDUCATION

Order

For the Petitioner, *Pro Se.*

For the Respondent, Mirne, Nowels, Tumen, Fundler, Magee & Kirshner (William C. Nowels, Esq., of Counsel)

It appearing that the Board of Education of the School District of the Township of Wall, hereinafter "Board," having considered charges made against Eleanor Turner, hereinafter "respondent," by the Superintendent of Schools pursuant to *N.J.S.A.* 18A:6-10 *et seq.*; and it appearing that the Board has determined that the charges would be sufficient if true, in fact, to warrant dismissal or reduction of salary; and it appearing that the Board has properly certified said charges to the Commissioner of Education on April 6, 1972, and served a copy of said charges and certification upon respondent by certified mail; and it appearing that a copy of the charges together with a copy of the Board's resolution of certification were served by certified mail upon respondent on April 19, 1972, by the Assistant Commissioner of Education in charge of Controversies and Disputes; and it appearing that respondent has not filed an Answer as of today's date; and it appearing that service of the charges and request for an Answer was attempted by the Monmouth County Superintendent of Schools; and it appearing that respondent has been evicted from her apartment and neither the superintendent of the apartment building nor the police know her whereabouts; and it further appearing that respondent has been given every opportunity to defend herself for more than four months; now therefore,

IT IS ORDERED ON THIS 13th DAY OF SEPTEMBER 1972, that Respondent Eleanor Turner, is dismissed from her employment with the School District of the Township of Wall, Monmouth County, as of the date of her suspension by the Board of Education of the School District of the Township of Wall.

COMMISSIONER OF EDUCATION

September 13, 1972

Robert G. Enslin,

Petitioner,

v.

Board of Education of Egg Harbor Township School District, Atlantic County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Henry Bender, Esq.

For the Respondent, A. Ralph Perone, Esq.

Petitioner alleges that he has tenure both as a teacher and as a principal in the Egg Harbor Township School District, and that he has been improperly transferred to the position of teacher in violation of his tenure rights and contrary to the provisions of *N.J.S.A.* 18A: 6-10 *et seq.* This matter is submitted to the Commissioner for adjudication on the pleadings and Briefs of counsel.

Petitioner has been in the employ of the Board of Education of Egg Harbor Township, hereinafter "Board," since 1957, as evidenced by fourteen signed contracts for the school years beginning September 1, 1957 through June 30, 1971. The terms of the first seven contracts stipulated that petitioner "teach" in the public schools of the district. The contracts issued for the school years 1965-66, 1966-67, 1967-68, and 1970-71, however, employed petitioner as a "teaching principal." The remaining contracts which became effective on September 1, 1968, September 1, 1969 and September 1, 1971, stipulated that petitioner "teach" in the public schools. No contract was submitted in evidence for the school year 1964-65; however, the Commissioner takes notice that petitioner was issued a contract that year to teach.

Petitioner alleges that he was promoted to the position of teaching principal in 1963, but the Board first recognized him as having that title in the signed contract for 1965-66. The Board's minutes (Respondent's Brief, Exhibit 15) clearly indicate that petitioner was appointed to the position of teaching principal on August 26, 1963, by a resolution of the Board. The record indicates, thereafter, that petitioner served continuously as a teaching principal for the school years 1963-64, through 1970-71, a period of eight years, and that he was awarded an elementary principal's certificate by the State Board of Examiners, State Department of Education, Trenton, in June 1970. By letter of August 30, 1971, petitioner was notified by the Superintendent of Schools as follows:

Dear Mr. Enslin:

The Board of Education has instructed me to inform you that a motion naming you as Principal of the Bargaintown School was defeated.

"This action was taken during a special meeting of the Board held on Thursday, August 26, 1971.

"Until a successor can be named, Miss Nickles will assume the responsibilities of the Principalship for the Bargaintown School.***"

In September 1971, the Board posted a bulletin advertising that there were positions available in the school district and that one of them was the

"*** Principalship (Part-Time) of the Bargaintown School. Salary: $50.00 per classroom other than your own. $50.00 for the cafeteria.***"

Petitioner argues that he has served in the position of principal and that he has an appropriate principal's certificate issued by the State Board of Examiners as required by statute; therefore, he avers, he has tenure both as a teacher and as a principal, pursuant to the provisions of *N.J.S.A.* 18A:28-5 which reads in part as follows:

"The services of all teaching staff members including all *teachers, principals,* assistant principals, vice principals, superintendents, assistant superintendents, *** *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 ***." (*Emphasis supplied.*)

The Board does not deny that petitioner has served in the district for the past fifteen school years, nor does it deny that petitioner served as a teaching principal for the last eight years. The Board avers, however, that petitioner has tenure in the District as a teacher only and not as a principal. The Board further asserts that it never passed a resolution appointing petitioner a principal in the District and that the position he held was exactly the same as that held by six of his colleagues in other elementary schools of the District, to wit "teaching principal." Since petitioner was never appointed a principal in the District, argues the Board, his elementary principal's certificate awarded by the State Board of Examiners in June 1970 does not of itself confer that title nor the benefit of a tenure status upon petitioner.

In the *New Jersey Administrative Code, Title* 6: 11-4.1 (b) the position of teaching principal is permitted under a teacher's certificate as follows:

"*** (b) The holder of a standard teacher's certificate with three years of appropriate teaching experience may serve as a teaching principal or teaching supervisor, within the scope of the certificate, in charge of not more than 12 teachers. The holder of a standard teacher's certificate who has not had three years of teaching experience may not be assigned to supervisory duties."

Petitioner admits:

"*** the lack of tenure in a 'teaching-principalship' which, as a subclassification, is definitely not included in the categories mentioned in *NJS* 18A;28-5. The only pertinent classifications there mentioned are the titles, 'teachers' and 'principals' (*Cf Lascari v. Board of Education of Lodi* 36 *N.J. Super.* 426 (*App. Div.* 1955) (sic)

"However, we contend that precisely as a principal and precisely as a teacher there are separate tenures earned and held by the petitioner.

"We respectfully submit that the disposition of the dispute here mentioned is controlled by the decision of *Viemeister vs. Board of Education of the Boro of Prospect Park, Passaic County*, 1949 - page 115; 5 *N.J. Super.* 215 (*App. Div.* 1949)." (sic) (Petitioner's Brief, at p. 1)

In the judgment of the Commissioner, the only issue to be determined is: Has petitioner acquired a tenure status as a principal in the School District? There is no question about the fact that he possesses a tenure status as a teacher.

The Commissioner takes notice that the Board has seven elementary schools which are listed and staffed as follows;

"*** *FARMINGTON SCHOOL*', 1st, 2nd and 3rd grades, 6 rooms, 6 teachers.

"*CARDIFF SCHOOL*, 1st, 2nd and 3rd grades, 5 rooms, 5 teachers.

"*MCKEE CITY SCHOOL*, 1st, 2nd and 3rd grades, 5 rooms, 5 teachers.

"*BARGAINTOWN SCHOOL*, 1st, 2nd and 3rd grades, 4 rooms, 4 teachers.

"*SCULLVILLE SCHOOL*, 1st, 2nd and 3rd grades, 4 rooms, 4 teachers.

"*STEELMANVILLE SCHOOL*, Kindergarten, 2 rooms, 2 teachers.

"*WEST ATLANTIC CITY SCHOOL*, Kindergarten, 2 rooms, 2 teachers.

"There is one elementary supervisor for these seven schools, and one teacher in each of these seven schools who is given the additional authority

to oversee the orderly conduct of the school's operation. Petitioner was designated to such a position in the Bargaintown School, which was described as a teaching principal in four of his employment contracts executed with the respondent.***" (Respondent's Brief, at pp. 1,2)

The Board argues that petitioner was the chairman of the Professional Committee of the Egg Harbor Township Education Association in late 1970 and early 1971, and that a paragraph in the 1971 Teachers' Contract excludes non-teaching principals, "*** nevertheless, it is Mr. Enslin's contention that at this time he was in fact a principal.***" (Respondent's Brief, at p. 3)

The Board argues further that his association with the Professional Committee clearly shows that he was not a non-teaching principal, but a member of the teaching staff only, with supplemental duties for which he was compensated.

ARTICLE 1 - RECOGNITION

"A. The Egg Harbor Township Board of Education hereby recognizes the Egg Harbor Township Education Association as the exclusive and sole representative for collective negotiation concerning grievances and terms and conditions of employment for all regularly employed certificated personnel whether under contract or on leave, but excluding the Superintendant, (sic) Elementary Supervisor, and non-teaching principals.

"B. Unless otherwise indicated, the term 'teachers', when used hereinafter in this Agreement, shall refer to all certificated professional employees represented by the Association in the negotiating unit as above defined, and references to male teachers shall include female teachers.***" (Petitioner's Brief, Exhibit 17)

The Board argues further that the petitioner has always been paid in accordance with the provisions of the Teachers' Salary Guide, on a school-year basis, that petitioner was never paid according to the Principal's Guide which is on an annual basis, and that *non-teaching principals* were excluded in the 1971 Teachers' Contract executed by the Board and the Education Association.

The Board disagrees with petitioner's legal argument in which:

"*** The petitioner attempts to substantiate his position by citing the case of *Viemeister vs. Board of Education of the Boro of Prospect Park*. (sic) However, the facts in the Viemeister case are substantially different than those set forth in this petition, for example:

"1. Viemeister was employed as a *non-teaching principal*, a position Mr. Enslin has never held.

"2. Viemeister was *certificated as a principal* at the time of his initial appointment, petitioner was certificated in June of 1970, some 5 years after his first alleged employment as a teaching-principal. (sic)

"3. There were 17 teachers immediately under the *supervision, direction* and *control* of Viemeister, while the school in which petitioner presided had a maximum of 3 teachers, none of whom were under his supervision, direction and control.

"4. Most important, it was undisputed that Viemeister had acquired *tenure* as a non-teaching principal wheras the petitioner's tenure status in any position other than that of a teacher is the precise issue to be resolved.***" (Respondent's Brief, at p. 8)

The record is replete with evidence that during the school year 1970-71, petitioner served as chairman of the Professional Committee which negotiated an agreement for the teachers with the Board. Therefore, there can be no question that petitioner was a teacher.

The Commissioner does not find here any similarity with *Viemeister, supra*, as argued in petitioner's Brief. However, in *Lange v. Board of Education of the Borough of Audubon*, 26 *N.J. Super.* 83 (*App. Div.* 1953), the Court held (at p. 86) as follows:

> "*** The position of 'Supervisor to Supervise Grade Schools' is not recognized by the school laws of this State as extending to the holder thereof *tenure* other than as a *teacher*. In the case of Werlock, *supra*, the Commissioner of Education in a similar situation held that the position of 'Supervisior of Elementary Educaation,' not being mentioned specifically in the tenure statute, *did not give to the holder of that position tenure of supervising principal or principal, but that the tenure protection enjoyed by the petitioner was only that of a 'teacher,'* ***. " (*Emphasis added.*)

The Board has seen fit to establish the psoition of teaching principal in each of its seven small elementary schools pursuant to the authority granted in *N.J.S.A.* 18A: 11-1 which states that:

> "*** the board shall--
>
> "C. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools ***."

N.J.A.C. 6-11:4.1 (b), *supra*, clearly permits the establishing of a teaching principalship. The eligibility requirements for this position are a standard teacher's certificate and three years of successful teaching experience; however, no time served as a teaching principal may be counted toward the accrual of tenure in a certificated non-teaching principalship.

In *Lascari v. Board of Education of the Borough of Lodi*, 36 *N.J. Super.* 426 (*App. Div.* 1955), the Court held (at p. 430) that:

> "*** [Lascari] would have us treat this case as though both co-ordinator and vice-principal were tenure categories. He is not entitled to this concession.***"

Such is the case herein. No rights other than those afforded to a teacher can legitimately be claimed by petitioner. A teaching principalship has no tenure status and any time served in that position may not accrue toward tenure as a principal.

In *Mildred W. Potter v. the Board of Education of the Township of Berkeley, Ocean County*, 1961 *S.L.D.* 167, the Commissioner held that petitioner had no right to continue receiving salary as a teaching principal subsequent to her transfer back to the classroom. In *Potter, supra*, petitioner held the position of teaching principal only until the teaching staff increased beyond the number which she was authorized to supervise under the terms of her certificate and, thereafter, a non-teaching principalship was established for which she could not qualify.

In the instant matter, however, no evidence was submitted giving any reason for a change in the title of the vacancy in petitioner's school. Assuming, however, that the Board does change the title to *principal*, petitioner may apply for the new position along with all others who may be interested and eligible.

Finding no statutory violation nor violation of the rights of petitioner, the Commissioner holds that petitioner has tenure as a teacher in the Egg Harbor Township School District, and that absent any affirmative appointment as a principal, petitioner has no legitimate claim to the position of either principal or teaching principal.

The Petition of Appeal is accordingly dismissed.

COMMISSIONER OF EDUCATION

September 15, 1972

Pending before State Board of Education

Board of Education of the Borough of Sayreville,

Petitioner,

v.

Borough Council of the Borough of Sayreville, Middlesex County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

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

For the Respondent, Blanda & Blanda (Robert A. Blanda, Esq., of Counsel)

Petitioner, the Board of Education of the Borough of Sayreville, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," pursuant to *N.J.S.A.* 18A:22-37, certifying to the Middlesex County Board of Taxation, a lesser amount of appropriation for the 1972-73 school year than the amount proposed by the Board in its budget which was rejected by the voters.

A hearing was held in the instant matter on June 9, 1972, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. Supplemental documents were filed by the Board, including a study report of the Sayreville school facilities developed by several staff members of Rutgers, The State University. Correspondence exchanged between the parties, relating to the merits of the dispute, was also received in evidence. The report of the hearing examiner is as follows:

At the annual school election held on February 8, 1972, the Board submitted proposals for the following amounts to be raised by local taxation for 1972-73:

Current Expense	$5,832,838
Capital Outlay	121,200

After these proposals were defeated by the voters, the proposed budget was submitted to Council, as provided by law. Council certified the following amounts to the Middlesex County Board of Taxation to be raised by local taxation:

Current Expense	$5,649,838
Capital Outlay	78,200

As set forth in the Board's budget and in Council's Answer, the line-item appropriations, Council's recommendations and the proposed amounts of reductions are shown in the following table:

Account Number	Item	Board's Budget	Council's Proposal	Amount Reduced
J120C	Architect's Fee	$ 20,000.00	$ - 0 -	$ 20,000.00
J211	Sals. of Prins.-New Prin.	238,675.00	223,675.00	15,000.00
J230C	Audiovisual Mat.	21,275.00	16,275.00	5,000.00
J240	Teaching Supplies	140,000.00	130,000.00	10,000.00
J250A	Misc. Supls.-Instr.	23,000.00	18,000.00	5,000.00
J250B	Travel Exps.-Instr.	5,000.00	4,000.00	1,000.00
J250C	Misc. Exps.-Instr.	44,000.00	24,000.00	20,000.00
J520C	Field Trips	18,000.00	13,000.00	5,000.00
J720A	Contr. Servs.-Upkeep of Grounds	5,000.00	- 0 -	5,000.00
J720B	Repair of Bldgs.	91,300.00	33,300.00	58,000.00
J730B	Repl.-Noninstr. Equip.	12,000.00	8,000.00	4,000.00
J930	Food Serv. Deficits	10,000.00	5,000.00	5,000.00
J1020	Other Exps.-Student Body Activ.	46,200.00	36,200.00	10,000.00
L1220C	Improvement to Sites	52,000.00	32,000.00	20,000.00
L1230C	Remodeling	5,000.00	- 0 -	5,000.00
L1240C	Equipment-Instr.	50,200.00	40,200.00	10,000.00
L1240F	Equip.-Operation of Plant	3,000.00	- 0 -	3,000.00
	Unappropriated Bal.-Current Surplus	20,382.69	382.69	20,000.00
	Unappropriated Bal.-Capital Surplus	6,141.29	1,141.29	5,000.00
	Totals	$811,173.98	$585,173.98	$226,000.00

The findings, conclusions and recommendations of the hearing examiner as to each of the listed items are as follows:

J120C—Architect's Fee.

Council proposed complete elimination of this item, thereby effecting a saving of $20,000. Council argues that the Board had $7,500 in this line item for the fiscal year 1971-72, and had used none of these funds as of December 31, 1971. The Board argues that the proposed amount of $20,000 is necessary to employ an architect to develop preliminary plans for expanding and renovating its physical plant. The Board anchors its position for building expansion and renovation on the Rutger's report, *supra*, on a 1964 Middle States Evaluation report, and on projected housing and garden apartment construction in its community. Council, without elaborating on its "underlying determinations and supporting reasons" (*Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94, 105 (1966)), disagrees with the Board on the need for building renovations, and further asserts that the Board should not incur the cost at this time.

The hearing examiner finds that the Board did establish the need for preliminary plans on building expansion and renovation although it is difficult to ascertain how the $20,000 estimate was made. It is recommended that the $20,000 be restored to this line item for judicious use by the Board.

J211–Salaries of Principals

The Board's budget proposed $15,000 in this line item, which represents the salary of an additional school principal to be employed in September 1972, for a new K-6 school in the President Park section of Sayreville. The school is scheduled to open in September 1973. The Board explained that this School is designed for open classroom instruction, a relatively new concept to be used in the structure of the Sayreville schools. The Board determined that it is necessary for the new principal to take part in planning processes regarding the selection of furniture and materials and curriculum development. Also, it avers, the principal should work with the faculty to be assigned to the school and direct all other activities required in opening a new school. Council argues that it is unreasonable and arbitrary to employ a principal for fifteen months prior to the opening of the new school.

The hearing examiner finds that the Board has established the need for the additional position of principal as of September 1972, and accordingly recommends that the $15,000 required for this purpose be restored to this account.

J230C – Audiovisual Materials.

The Board's proposed budget for this item is $21,275. Council argues that this amount is double the total expended in the two preceding years and is, therefore, unreasonable. Allowing for a general increase in costs, Council proposes to reduce the amount to $16,275 thereby saving $5,000. The Board argues that, of the requested amount, $6,204 is earmarked for the purchase of a new social studies program to be instituted in September 1972. The remaining sum is to be used by all schools in the district for new materials pertinent to their courses of study.

The hearing examiner finds that a total of $13,707 was expended for this line item in 1970-71, and in 1971-72 a total of $11,500 was appropriated. He further finds that the need for the sum of $21,275, requested by the Board for 1972-73, is not sufficiently demonstrated. Accordingly, it is recommended that the reduction of $5,000 as made by Council be sustained.

J240 – Teaching Supplies.

The Board proposed $140,000 in this line item, which provides for all teaching supplies actually consumed in the learning process. Council, proposed a reduction of $10,000 from the $140,000 request. It points to the 40% increase in this figure from the 1971-72 appropriation of $100,000 as being unreasonably high and arbitrary. The Board, however, cites a deficit of $31,813 for the 1971-72 school year in this account. The $140,000 request, the Board asserts, is due to expanded programs at all schools, particularly junior and senior high schools, as well as generally rising costs.

The hearing examiner, after reviewing the record, finds that the need for $140,000 in this line item has been established by the Board; he accordingly recommends the restoration of $10,000.

J250A – Miscellaneous Supplies – Instruction.

The Board requested $23,000 for this line item to be used to strengthen the reading program through the purchase of individualized nonconsumable reading kits, and to support the testing program of the guidance department. Council proposed a $5,000 reduction in this line-item amount because of "proposed in-service training" to be supported by this money.

The hearing examiner can find no mention of in-service training being supported by this line item. On the contrary, he finds that the Board has demonstrated its need for $23,000 to support its reading and guidance programs, and accordingly recommends restoration of the $5,000.

J250B – Travel Expenses – Instruction.

The Board stipulates that the amount in this line item be reduced to $4,000. Therefore, the hearing examiner recommends that Council's proposed reduction of $1,000 be sustained.

J250C – Miscellaneous Expenses – Instruction.

The Board proposed $44,000 for this line item for 1972-73, as compared to $16,000 in 1971-72, and $14,123 in 1970-71. Council proposed a reduction of $20,000. The Board, in its written testimony, avers that the estimated high cost of in-service instruction by qualified people knowledgeable in the open-space concept, as well as the estimated high cost of on-campus university programs, necessitate the amount requested. Also offered by the Board as evidence of further need for the amount requested are six "suggested in-service programs for 1972-73," plus the increased number of teachers requesting compensation for attending in-service programs held after school hours. Council argues the following: it did not receive sufficient explanation of the in-service programs; it is not aware whether the teacher will receive credit for courses taken; and its proposed reduction does not jeopardize the thorough and efficient operation of the Board's schools.

While not commenting on the merits of Council's arguments, the hearing examiner can find no justification in the Board's testimony for an increase of $28,000 in this account. Accordingly, it is recommended that the $20,000 reduction suggested by Council be sustained. The amount of $24,000 will remain for in-service programs.

J520C – Field Trips.

As of September 1971, the enrollment in the Sayreville schools totaled 6,817. The Board proposed $18,000 for field trips away from school premises as an integral part of the approved course of study. Testimony reveals that the Board believes such trips, with class follow-up, provide valuable learning experiences. Council argues that $5,000 should be cut from this line item because "It is felt *** that 25% of all field trips are local and *** It is felt also that better planning can be made***."

The hearing examiner finds that the $18,000 budgeted by the Board for field trips amounts to somewhat less than $3.00 per pupil, and that the Board

did, in fact, prove the need for the proposed sum. Accordingly, it is recommended that the $5,000 reduction by Council be restored.

J720A – Contracted Service – Upkeep of Grounds.

The Board requested $5,000 for this line item to relocate the curbing at the junior high school exit and for spreading lime and other services which may be needed during the school year, such as repairing and replacing walks, fences, playground surfaces, lawn sprinkling systems, flagpoles, and regrading sites. Council argues that it would be foolhardy to relocate the curbing at the junior high school exit because the fronting road belongs to the County which has plans to widen it soon. Council also points to an appropriation of $11,000 in this line item for 1971-72, of which only $7,250 was expended by December 31, 1971.

The hearing examiner finds no evidence that the amount requested in this line item is absolutely essential to a thorough and efficient public school system. The Board's testimony is that, with the exception of the curbing relocation, the other services "may be needed" during the school year. There is no proof that such services are, in fact, essential to the proper upkeep of the grounds, or that the services are part of a yearly upkeep program. Neither is there any proof that the curbing of the junior high school exit is essential at this time.

Accordingly, the hearing examiner recommends that Council's proposed reduction of $5,000 be sustained.

J720B – Repair of Buildings.

The Board proposed $91,300 in this line item for 1972-73 increased from $46,400 in 1971-72. A major portion of these moneys, $58,000, is proposed for the replacement of 69 window units plus five special auditorium windows. This replacement cost includes a 15% increase from the original estimate of $57,000 received by an architect in 1970. The remaining portion of these moneys is to be used for the following purposes: carpeting to be installed in one classroom; the conversion of an auditorium to two classrooms because of increased enrollments; roof re-coating and repair for two schools for $16,500; and an estimate of $6,000 for other contracted services.

Council proposed a reduction of $58,000 from the requested sum. It points to the estimate received and used by the Board for its projection of window replacement cost, *supra*, and the "arbitrary" 15% increase it [the Board] attached to the original $51,000 estimate received two years ago. Council asserts that it had a contractor inspect the windows, and he concluded that not all windows need replacement as planned by the Board.

The Board President's testimony (Tr. 30) demonstrates that not all the windows are being replaced, as charged by Council; only those windows needing immediate attention are to be replaced.

Accordingly, the hearing examiner recommends that the $58,000 reduction proposed by Council be restored.

J730B – Replacement – Noninstructional Equipment.

The Board proposed $12,000 for this line item which was to be used for the replacement of noninstructional equipment "throughout the entire school system and administration building." The Board offered examples of the kinds of equipment being referred to such as: janitorial equipment, grounds equipment, maintenance equipment, cafeteria equipment, air conditioning units, etc. Council argues that a review of past records will indicate that an amount of $8,000 is sufficient to maintain this line item and its services.

The hearing examiner finds that the Board did not demonstrate sufficient need to have Council's proposed reduction restored. No evidence was offered that the Board has any short or long-range plans for equipment replacement. To offer general categories in which equipment replacement may or may not be needed is not sufficient to demonstrate need for a thorough and efficient school system. Accordingly, the hearing examiner recommends sustaining of Council's proposed reduction of $4,000 from this line item.

J930 – Food Service Deficits.

The Board requested $10,000 in this line item to cover the possibility of any unforeseen operating loss from its cafeteria program. Council argues that the Board's records for this account do not demonstrate the need for a 100% increase from last year's budgeted amount. The Board testified that the year ending June 30, 1971, reflected a *profit* of $234.57 from the cafeteria operation. However, the Board asserts that with rising food costs, moneys requested *might be needed* to cover a possible deficit.

The hearing examiner finds that the need for an amount of $10,000 has not been demonstrated by the Board, and accordingly, recommends that Council's proposed reduction of $5,000 be sustained.

J1020– Other Expenses – Student Body Activities.

The Board proposed $46,200 for this line item, increased from $29,779 in 1971-72. In 1970-71 the appropriation for this line item was $33,222 which was overspent by $12,000 for a total expenditure of $45,222. The Board argues that $46,200 is necessary during 1971-72 for "supplies and equipment for the total sports program, school newspaper printing, athletic insurance, award jackets, etc." In addition, the Board asserts that it plans to create a drill team for the school as well as purchase new band uniforms. Council argues that an amount of $46,200 for extra-curricular activities – the lack of which, Council asserts, does not deprive any child of a better education – is more than sufficient and therefore proposes a $10,000 reduction.

The hearing examiner, in reviewing the argument of the Board for the total request, has no way of determining the meaning of "etc.," *ante*. No finding can be made that the Board demonstrates need for the $10,000 reduction made by Council and accordingly, the hearing examiner recommends that Council's proposed reduction be sustained.

L1220C – Improvement to Sites.

The Board proposed $52,000 in this line item for three major activities: (1) A joint project between the Board and Council for installation of a new traffic light near one of the Board's schools. This requires, according to the Board's testimony, the removal and relocation of a driveway, curbing, sidewalk and drainage at the school. An estimate of $25,000 for this work was received by the Board from Council's engineer; (2) A cooperative project between the Board and Council to correct a drainage problem in the fields between the junior and senior high schools – this work to consist of grading, installation of catch basins and concrete drainage pipe and landscaping. The amount estimated for this project is $25,000; (3) The third project is for additional landscaping of the senior high school site at an estimated cost of $2,000. Council argues that the cost estimate is exceedingly high for installing a new traffic light and can be cut by $10,000; that the drainage problem between the junior and senior high schools may be corrected by hooking into the drainage system of the Borough Library which is adjacent to the high school; and that $2,000 for additional landscaping is for purely aesthetic purposes.

The hearing examiner finds that the Board has demonstrated need for projects (1) and (2), but can find no establishment of the need for project (3). Accordingly, the hearing examiner recommends that $18,000 of the $20,000 reduction be restored and the remaining $2,000 reduction be sustained.

L1230C – Remodeling.

The Board proposed $5,000 for this line item for the redistribution of electric power in order to accommodate ten driver education simulators, as well as to accommodate a computer for the mathematics department. Council recommended eliminating $5,000 from this account on the grounds that Council is not certain whether the electrical work for the driver education simulators is reasonable and necessary at this time.

The hearing examiner observes that the driver education simulators, provided *gratis* from the Division of Public Safety, are designed to assist students in learning the fundamentals of safe automobile driving. The argument that Council is not sure whether the expenditure to hook up the simulators for student use is reasonable and necessary at this time is, in the judgment of the hearing examiner, without merit. The Board has demonstrated need for these moneys as part of its total program. Accordingly, the hearing examiner recommends the restoration of $5,000 to this account.

L1240C – Equipment – Instruction.

The Board proposed $50,200 for this line item for the acquisitions of equipment needed in the instructional process. Council proposed a $10,000 reduction on the grounds that the amount proposed by the Board is an excessive increase from the 1971-72 amount, which was $34,800. Council contends that even with its proposed reduction, the sum of $40,200 is almost $6,000 higher than last year's total, which should be sufficient. The Board asserts that the funds, as requested, are to provide equipment for the junior and senior high school libraries, and shelving for the high school at an estimated cost of $5,025.

The Board provided lists of equipment it deemed essential. While the Board states that $35,398 is budgeted for the junior and senior high schools, the submitted lists, which also included items for the library, total $34,035. Adding $5,025 to that figure, the sum demonstrated as needed by the Board is $39,060. Council's recommended reduction of $10,000 leaves $40,200, an amount sufficient to cover the Board's demonstrated need. Accordingly, the hearing examiner recommends that the proposed $10,000 reduction be sustained.

L1240F – Equipment – Operation of Plant.

The Board proposed $3,000 for this line item to purchase metal garbage containers for all schools so that Borough garbage trucks could make garbage pickups at the schools. Nothing in the record indicates the present method of garbage pickup. Council contends that the proposed total amount in this line item is unnecessary because the metal garbage containers cannot be used with the Borough's trucks.

Absent a showing that the proposed metal garbage containers can be used with the Borough's garbage trucks, and because the Board advanced that reason as its rationale for the proposed $3,000 expenditure, the hearing examiner finds that the Board has not sufficiently demonstrated a need for the garbage containers. It is recommended, therefore, that Council's proposed reduction of $3,000 be sustained.

Unappropriated Balance – Current Expense.

The Board, in compiling the total amount of the current expense portion of its proposed budget allocated $150,000 of the unappropriated free balance to arrive at an amount of $5,832,838 to be raised by local taxation. This left an unappropriated free balance of $20,382.69. Council determined that an additional $20,000 should be applied to the 1972-73 school budget to reduce the tax levy. The Board, however, points out that should such a determination be upheld, a balance of only $382.69 would remain for meeting unforeseen contingencies – in a total current expense budget in excess of $7,000,000. During the hearing, the Board's Secretary testified he expected an estimated $35,000 to $50,000 unexpended balance from the 1971-72 school budget. Assuming that this estimate holds true, and that the $20,000 application is not upheld, the resultant current expense unappropriated free balance would range from $55,000 to $75,000, plus, of course, the $382.69. Such an amount would approximate 1% of the total current expense budget, which, in the hearing examiner's view, is not unreasonable. Accordingly, it is recommended that $20,000 of unappropriated free balance, proposed by Council to be applied towards current expense for 1972-73, be restored.

Unappropriated Balance – Capital Outlay.

The Board, with a proposed $121,200 proposed capital outlay budget, reported an unappropriated free balance of $6,141.29. Council determined that $5,000 of that balance should be appropriated for 1972-73. Council has provided no underlying reasons for its determinations regarding this proposal as mandated by the Supreme Court in *Board of Education of East Brunswick,*

supra. The Board avers that the total balance of $6,141.29 is necessary in the event that proposed projects for this account are received in excess of the estimates made. Accordingly, the hearing examiner recommends that the $5,000 of unappropriated free balance in the capital outlay account be restored.

The following table reflects the recommendations of the hearing examiner with respect to each of Council's suggested reductions:

Account Number	Item	Amount Reduced	Amount Restored	Amount Not Restored
CURRENT EXPENSE:				
J120C	Architect's Fee	20,000	20,000	- 0 -
J211	Sals. of Prins.-New Prin.	15,000	15,000	- 0 -
J230C	Audiovisual Materials	5,000	- 0 -	5,000
J240	Teaching Supplies	10,000	10,000	- 0 -
J250A	Misc. Supls.-Instr.	5,000	5,000	- 0 -
J250B	Travel Exps.-Instr.	1,000	- 0 -	1,000
J250C	Misc. Exps.-Instr.	20,000	- 0 -	20,000
J520C	Field Trips	5,000	5,000	- 0 -
J720A	Contr. Serv.-Upkeep of Grnds.	5,000	- 0 -	5,000
J720B	Contr. Serv.-Repair of Bldgs.	58,000	58,000	- 0 -
J730B	Repl. - Noninstr. Equip.	4,000	- 0 -	4,000
J930	Food Serv. Deficits	5,000	- 0 -	5,000
J1020	Other Exps.-Student Body Activ.	10,000	- 0 -	10,000
CAPITAL OUTLAY:				
L1220C	Improvement to Sites	20,000	18,000	2,000
L1230C	Remodeling	5,000	5,000	- 0 -
L1240C	Equipment-Instr.	10,000	- 0 -	10,000
L1240F	Equip.-Operation of Plant	3,000	- 0 -	3,000
	Subtotal	201,000	136,000	65,000
	Unappropriated Bal.-Current Expense	20,000	20,000	- 0 -
	Unappropriated Bal.-Capital Outlay	5,000	5,000	- 0 -
	Total	226,000	161,000	65,000

* * * *

The Commissioner has reviewed and considered the findings, conclusions, and recommendations of the hearing examiner as set forth above. The Commissioner notices the testimony of the Board (account J930, *supra*) regarding a *profit* made from the cafeteria operation and the proposed use of such profit to cover a possible deficit in the operation in the future. The word *profit*, as used in the testimony is, at best, an unsatisfactory choice of words to describe the balance of funds available from the cafeteria activity. *N.J.S.A.* 18A:33-3 states, *inter alia*, that:

> "A board of education of any district may *** operate cafeterias *** for *** public school pupils without profit***."

The Commissioner is convinced that, more properly, the testimony should have utilized the term balance, instead of profit, in view of the subsequent testimony that the moneys were to be returned to the cafeteria to cover a possible deficit.

The Commissioner is cognizant of the responsible attitude adopted by both the Board and Council regarding their respective duties in the instant matter. As much as the Commissioner encourages energetic and innovative approaches for increasing the qualitative levels of education, he is constrained to determine, in disputes of this nature, those sums which are necessary for the operation of a thorough and efficient system of public schools. *Board of Education of East Brunswick, supra.*

Accordingly, the Commissioner directs that the Borough Council of the Borough of Sayreville certify to the Middlesex County Board of Taxation the following additional amounts:

For Current Expenses	$133,000
For Capital Outlay	$ 28,000

to be raised by local taxation for the school year 1972-73.

COMMISSIONER OF EDUCATION

September 20, 1972

Board of Education of the Eastern Camden County Regional School District,

Petitioner,

v.

Boroughs of Berlin and Gibbsboro and The Township of Voorhees, Camden County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Hyland, Davis & Reberkenny (William C. Davis, Esq., of Counsel)

For the Respondent, Kmiec & Palumbo (Ralph J. Kmiec, Esq., of Counsel)

Petitioner, the Board of Education of the Eastern Camden County Regional School District, hereinafter "Board," appeals from an action of the municipal governing bodies of its constituent districts, the Boroughs of Berlin and Gibbsboro and the Township of Voorhees, hereinafter "Councils," certifying to the Camden County Board of Taxation a lesser amount of appropriations for the 1972-73 school year than the amount proposed by the Board and rejected by the voters in the annual school district election.

The facts of this matter were presented at a hearing conducted on July 28, 1972, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school district election held February 2, 1972, the Board submitted to the electorate the following proposals for amounts to be raised by local taxation for the 1972-73 school year:

Current Expense	$855,556
Capital Outlay	41,515

Both proposals were defeated. Thereafter, the Board and Councils consulted and Councils adopted separate resolutions determining that lesser amounts were necessary to be raised by local taxation as follows:

	Board's Proposal	Councils' Resolutions	Reduction
Current Expense	$855,556	$836,556	$19,000
Capital Outlay	41,515	40,015	1,500
Total Reduction			20,500

In support of the resolutions adopted by Councils, pursuant to *N.J.S.A.* 18A:22-37, Councils set forth a list of the specific reductions which they determined were appropriate in four accounts. These reductions were for amounts budgeted by the Board as Current Expense and are the following: an additional administrative secretary ($5,000); an additional guidance counselor ($9,725); and, an additional secretary to assist guidance personnel and the child study team. Additionally, Councils proposed to reduce the amount the Board had budgeted in Capital Outlay expenditures for the remodeling of its guidance suite ($1,500).

At the hearing, *supra*, and in written testimony, the Board has documented its need for each of the respective four sums of money which comprise the total reduction of Councils. Councils have offered no testimony in either written or oral form in support of the reductions.

The hearing examiner has reviewed the Board's testimony and finds adequate support for its position that the proposed expenditures *sub judice* are necessary for the operation of a thorough and efficient school system. Even in the absence of other reasons, the documentation provided by the Board with respect to the increase in the student population of the district – from 910 students enrolled in June 1971, to 1,161 estimated to be enrolled in September 1972 – lends support for such a finding.

However, while the finding herein favors the Board on the merits of the disputed expenditures, the hearing examiner also determines that sufficient funds are available, at this juncture, for the Board to fully implement its

proposals if it chooses to do so. This determination is grounded on the Board's certification that a total sum in excess of $90,000 is available to it in unappropriated balances in the Current Expense account at the present time. Such funds have accrued to the Board from unexpended appropriations in prior years ($59,953.32), from unanticipated revenue in the 1971-72 school year ($28,299.17), and from savings resulting from the replacement of teachers, who have recently resigned, with other staff members at lower cost ($3,000). Additionally, a total sum of $6,148.76 is available as a free appropriation balance for Capital Outlay expenditures.

Accordingly, and in summation, the hearing examiner finds and determines that:

1. The Board has adequately documented its need for the positions it proposed to establish and for the renovating it planned to accomplish during school year 1972-73.

2. The Board has sufficient funds in the Current Expense and Capital Outlay accounts to employ the personnel necessary to fill such positions and accomplish such renovating.

Further, the hearing examiner believes that, in the context of the budget defeat and the determination of Councils, such unappropriated balances should be employed herein to accomplish the Board's purposes.

Such findings and conclusions lead to the recommendation that the certification of the Councils to the Camden County Board of Taxation be allowed to stand unaltered.

* * * *

The Commissioner has reviewed the findings of the hearing examiner and has carefully considered the recommendation expressed herein. In concurring with the recommendation, the Commissioner notes that sums in excess of $70,000 in Current Expense and $4,500 in Capital Outlay will remain at the Board's disposal even in the event that all of the Board's proposals *sub judice* are fully implemented. The Commissioner can detect no interference with the operation of a thorough and efficient school system in such circumstances, and, accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

September 22, 1972

John Mountain,

Petitioner,

v.

Board of Education of the Township of Fairview, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Weintraub, Urato and Schulman (Robert S. Schulman, Esq., of Counsel)

Petitioner taught for a two-year period as an employee of the Fairview Township Board of Education, hereinafter "Board," and immediately thereafter he was granted two successive one-year leaves of absence by the Board. At this juncture petitioner demands judgment that he has attained a tenure status as a teacher in the Fairview Township School District. The Board denies that petitioner has attained a tenure status and has refused to employ him for the succeeding school year.

This matter is submitted on an agreed set of stipulated facts and on Briefs of counsel for Summary Judgment.

Petitioner was employed as a teacher by the Board for the 1967-68 and 1968-69 school years, during which time he held a provisional teaching certificate. On August 14, 1969, he was granted "*** a one year's leave of absence *** by the Board. Thereafter, in a letter dated August 16, 1970, addressed to the Superintendent of Schools, petitioner made the following request, *inter alia:*

> "***Please accept my resignation and give my regards to all connected with the Fairview Schools System. I will miss not being there this Fall But (sic) hopefully I will return to teach once again in my home town.
>
> "Again let me thank you for your time and consideration and (sic) would appreciate any effort you can make for *another years* (sic) *leave of absence* on my behalf.***" (*Emphasis supplied.*)

In responce to this request, the Board did approve the following Motion at a regular meeting on August 20, 1970 (PR-4):

> "***Motion was made by Mr. Laura, seconded by Mr. Stigliano to approve one additional year's leave of absence for Mr. John Mountain.***"

However, when petitioner sought to resume his employment for the succeeding 1971-72 school year, the Board addressed a letter to him dated September 9, 1971 (PR-2), which stated *inter alia:*

> "***At the August Board of Education meeting it was stated that you would not be re-employed at this time as you had not been able to present full certification as required by Fairview Board of Education policy.***"

The reason given, *ante*, for this decision not to reemploy petitioner – because he had not presented "full certification" – was contrary to the opinion of the Bergen County Superintendent of Schools, who, by letter dated September 1, 1971 (PR-1), stated that petitioner had, during his service in Fairview, possessed a "valid teaching license." In any event petitioner engaged in additional academic study during the summer of 1971 and any question about his certification status during that period has now been resolved. The Board does not now contend, for purposes of this adjudication, that petitioner could not have produced "full-certification" if given an opportunity to do so by the opening of school in September 1971.

Instead, in a letter signed by the respective counsel in this matter and dated March 13, 1972, it is stated:

> "***The parties hereby stipulate that the sole issue for the determining of the Department of Education is whether the leaves of absence granted unto the Petitioner herein are to be included as time spent by the Petitioner in the employment of the Respondent, for purposes of determining whether the petitioner has tenure. It is further stipulated that an affirmative finding will constitute a finding of tenure and that a denial constitutes a rejection of Petitioner's claim."

It is also of note that petitioner does not now demand that he be compensated retroactively to September 1971, if the decision herein is in his favor, since he has been otherwise employed in the interim.

Petitioner, in his argument of law, maintains that prior decisions of the Commissioner have held that periods during which properly certified teaching staff members are on leaves of absence must be considered as continued employment for tenure purposes. Specifically, he cites *Mateer v. Fairlawn Board of Education*, 1950-51 *S.L.D.* 63, affirmed by the State Board of Education, 1951-52 *S.L.D.* 62.

Respondent, on the other hand, argues that the decision in *Mateer, supra,* is not precisely at point to the matter herein but, in any event, has been overruled *sub silentio* by *Canfield v. Board of Education of Pine Hill Borough* 51 *N.J.* 400 (1968) and by *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962). Specifically, the Board argues that two successive leaves of absence cannot constitute the "employment" required for the precise period defined in *N.J.S.A.* 18A:28-5 and that "employment" must mean "to teach" or "to work." The statute, *ante*, provides, *inter alia:*

"The services of all teaching staff members *** shall be under tenure *** after employment *** for

"(a) three consecutive calendar years *** 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 academic years ***."

The Commissioner notices with interest the Stipulation of the parties concerning this matter. However, the Commissioner cannot agree, in the context of a review of the cited cases, that this matter is as simple and uncomplicated as the Stipulation would make it appear.

It is clear that the Board's grant of two successive years of absence to petitioner entitled him to return as a teacher in the Board's employ in September 1971 and the Commissioner so holds. A "leave of absence" as defined by *Black's Law Dictionary*, Revised Fourth Edition, is:

"Temporary absence from duty with intention to return during which time remuneration is suspended ***."

Accordingly, when petitioner reiterated his continuing intention to "return" to "duty" in the fall of 1971, the Board had an obligation, that it assumed voluntarily, to return him to such duty forthwith, absent proof that he was improperly certified or otherwise unfit to resume active employment. There is no such contention raised herein.

In the Commissioner's judgment, petitioner is in error when he argues that his two years of active service as a teacher in the Board's employ, plus his two years of "leave," constituted "employment" as mandated by the statute, *N.J.S.A.* 18A:28-5, *supra*, and thus constituted reason why he could demand return to active duty in September 1971, as an employee "under tenure." This judgment is founded on a review of the cases cited by the parties.

Petitioner correctly cites *Mateer v. Fairlawn*, *supra*, as a case at point in the instant matter, but he fails to note the modifications of its conclusions and findings by later court decisions which clarify the word "employment" in its pertinence to the tenure statutes. The Commissioner particularly refers, in this regard, to the *Zimmerman* and *Canfield* decisions, *supra*, which are cited by the Board.

The decision of the Commissioner in *Mateer v. Fairlawn*, *supra*, held that:

"*** A board of education is not required to continue the *employment* of a non-tenure teacher on leave of absence after the expiration of her contractual period of employment, but if it does continue her

> employment, and her leave of absence, she holds *employment* with the board, despite her leave, and this period of *employment counts toward tenure*. ***" (*Emphasis supplied.*) (at p. 66)

However, the decision of the Supreme Court of New Jersey in *Zimmerman, supra*, interpreted the word "employment" in a more narrow and demanding sense and equated it, in effect, with work during a period of "preliminary scrutiny" while "on the job." Specifically, the Court cited *Cammarata v. Essex County Park Commission*, 26 *N.J.* 404 (1958) in an effort to define the "qualifying trial period" which the tenure statute establishes as a prerequisite for tenure acquisition as follows:

> "*** It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge and intelligence do not alone *** [suffice]. The crucial test of his fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the *** [employer] is entitled to a *period of preliminary scrutiny, during which the protection of tenure does not apply*, in order that it may make pragmatically informed and unrestricted decisions as to an applicant's suitability. ***" (at p. 412)

The Court then held that petitioner Zimmerman's three-year contractual status did not qualify him as a tenured employee since it was clear he had not been actively engaged "on the job," in "teaching" for all of the contracted period. Thus, service of an active, "on the job," kind was deemed by the Court to be a prerequisite for tenure acquisition.

This concept received further amplification in *Canfield v. Board of Education of Pine Hill, supra*, wherein the Supreme Court gave credence to the dissenting opinion of Judge Gaulkin of the Superior Court. (97 *N.J. Super.* 483 (*App. Div.* 1967)) Judge Gaulkin, in discussion of the status of plaintiff Canfield – a teacher who was dismissed from active teaching prior to the date of her contract's termination, which would have conferred a tenure status – said:

> "***It seems to me that the dismissal immediately stopped the running of the time to tenure. The burden of proving the right of tenure is upon plaintiff and ordinarily that right must be clearly proved. I do not think a municipality should be trapped into tenure by the construction of words which neither party expected to have that meaning.***" (at p. 493)

Thus, in practical terms, Judge Gaulkin's opinion that "dismissal" of the plaintiff barred the "running of the time to tenure," again required "on the job" work experience as a necessary prerequisite to tenure acquisition.

An examination of the instant matter, in the context of the two Supreme Court decisions discussed, *ante*, discloses that petitioner has a total of only two years "on the job" experience or service in the employ of the Board. Such experience, or service, in the Commissioner's judgment, must be credited toward the acquisition of a tenure status for petitioner, beginning at the time he actively resumes "on the job" employment as a teacher in the Board's employ, but there is no parallel entitlement for petitioner to count his "leave of absence" from his on-the-job experience or service in similar fashion. In this latter respect, in the Commissioner's judgment, *Mateer*, *supra*, has been overruled.

Accordingly, having found that petitioner was improperly denied the right to resume active employment as a teacher in the Board's employ in September 1971, the Commissioner directs that the Board grant petitioner such right, upon his request; within a period of sixty days from the date of this decision. for the 1972-73 school year. The Commissioner further directs that such employment shall be pursuant to a new contract similar in all respects to the one under which petitioner was last employed by the Board, and that service under the new contract shall be added to petitioner's previous accrual of two years of service toward a tenure status.

COMMISSIONER OF EDUCATION

September 27, 1972

Pending before State Board of Education

Board of Education of the Township of Hillside,

Petitioner,

v.

Township Committee of the Township of Hillside, Union County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Chamberlin & Hobbie (Gilbert D. Chamberlin, Esq., of Counsel)

For the Respondent, Harold Wovsaniker, Esq.

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Union County Board of Taxation a lesser amount of appropriations for school purposes for the 1972-73 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted by a hearing examiner, appointed by the

Commissioner, on July 18, 1972, at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

At the annual school election held February 8, 1972, the voters rejected the Board's proposals to raise $3,750,338 for current expenses and $51,026 for capital expenditures. The budget was then sent to the Committee pursuant to *N.J.S.A.* 18A:22-37 for its determination of the amount of local tax funds required to maintain a thorough and efficient school system.

After consultation with the Board and a review of the budget, the Committee made its determination and certified to the Union County Board of Taxation an amount which reduced the appropriations for current expenses by $90,000 and for capital outlay by $40,000 for a total reduction of $130,000. The respective determinations of the parties may be shown by the following table:

	Board's Proposal	Committee's Determination	Amount of Reduction
Current Expense	$3,740,338	$3,660,338	$ 90,000
Capital Outlay	51,026	11,026	40,000
Totals	$3,801,364	$3,671,364	$130,000

While the Committee did not immediately submit complete line-item data in support of its contention that $130,000 could be taken from appropriations proposed by the Board, such data was subsequently supplied by the Committee to the Division of Controversies and Disputes, State Department of Education, Trenton, on July 5, 1972, and the Board provided a document in reply thereto on July 14, 1972. The Committee's data, the Board's reply, and the hearing of July 18, 1972, make it possible, at this juncture, to produce the following table which shows the amounts budgeted by the Board for various items in contention, and reductions recommended by the Committee. (The hearing examiner does not have an itemized reduction schedule which identifies reduced accounts by "J" number and name. Thus the account numbers, account names and budgeted amounts cannot be stated with authority to be correct in each instance.)

Account Number	Item	Board Budget	Committee's Determination	Amt. of Reduction
J213	Sals.-Tchrs.	$2,493,870	$2,443,870	$50,000
J240	Teaching Supls.	54,000	52,000	2,000
J520c	Misc. Exps.	21,000	16,000	5,000
J720, 730, 740	Building Maint.	73,700	66,700	7,000
J720b	Contracted Servs. - Buildings	115,615	90,615	25,000
J810a,b,c	Fixed Charges	75,758	74,758	1,000
	Total – Current Expense Reduction			$90,000
1200	Remodeling	53,000	13,000	40,000
	Total – Capital Outlay Reduction			$ 40,000
	Grand Total – Reduction	$130,000		$130,000

The hearing examiner has carefully reviewed the testimony of the parties herein and determines that reductions thought by the Committee to be appropriate should be examined in some detail with respect to three accounts; namely those involving salaries of teachers (J213), contracted services (J720b) and remodeling (1200). Recommendations of the hearing examiner with regard to the other accounts will be reported in a succeeding summary statement.

J213 Salaries of Teachers

The Board avers that its staff of teachers and other professionals for the 1972-73 school year should be increased by eight and one-half. Specifically, the Board proposes to add one new position in each of the following areas:

1. Art – elementary
2. Music – elementary
3. Physical Education – elementary
4. Home Economics – elementary (7-8)
5. Industrial Arts – high school
6. Industrial Arts – elementary (7-8)
7. Guidance – elementary

Additionally, the Board proposes to hire a remedial reading teacher and to employ a psychologist on a half-time basis. The testimony of the Superintendent of Schools, in summary, is that the new positions are necessary because pupil population has increased "substantially" in recent years and because there is a need to equalize instruction "*** as between students in large and small schools." He also avers that such positions will enable the Board to "extend coverage" in art and music to "*** the first and second grades," and "*** implement a continuous program of physical education and health from kindergarten through the twelth grade***." A new teacher in each of the other areas, will, in his judgment, also be desirable to reduce excessive class loads and increase educational opportunity for pupils in the school system.

The Committee finds a "*** justified need ***" for a guidance counselor, remedial reading teacher and a teacher of industrial arts in the elementary schools, but disputes the need for the remainder of the eight proposed additional full-time positions. Specifically, the Committee avers that there is no proven increase in the demand for vocational courses at the high school level, and, if there were, such additional vocational students could be accommodated in County facilities. The Committee further maintains that proposed staff increases for art, music, home economics and physical education would represent a "***desirable goal***" but that such positions cannot be deemed essential to the operation of a thorough and efficient system of education.

The hearing examiner has reviewed all of the testimony in conflict and recommends that sufficient funds be restored to the account to provide for a total of five full-time positions, including the three positions on which there is common agreement. This recommendation is grounded on the belief that the proposed expenditures for teachers of art, music and physical education are basically an effort to improve and expand these programs. Such an improvement

and expansion cannot be sustained in view of the vote of the people against the Board's budget proposals and Council's determination, although it is evident that the Board has made a commendable effort to upgrade its program offerings in these fields.

Summary:	Amount of Reduction	$50,000
	Amount Restored	20,000
	Amount Not Restored	30,000

J720b Contracted Services-Buildings

The Committee has attached to its written testimony a list of the Board's proposed expenditures from this account and avers that the sum of $25,000 for these expenditures is for items that are not "*** immediate necessities***." Specifically, the Committee determined that the reduction was appropriate from a total sum of $82,265 designated for electrical wiring and receptacles, a new intercom system, curtains and drapes, plaster and ceiling renovations, modernization of lighting, interior and exterior painting, window replacement and floor refurnishing.

The Board argues that there is no specific, itemized deduction herein and that the Committee has cited only "generalities" in support of its argument. Therefore, there is no specific defense by the Board since in its view the reduction is "illegal."

The hearing examiner agrees that the Committee's argument herein is not completely detailed with itemized dollar reductions against specific expenditures. However, the Committee did designate the appropriate line item, and did detail the proposals wherein it thought savings could be effectuated in an aggregate sum. Accordingly, the hearing examiner believes that he cannot simply ignore the Committee's determination but must make a judgment, in the absence of Board testimony, on the *prima facie* evidence that is presented.

In this regard, a review of the Board's budget statement showed that the sum of $108,795 was actually expended from this account in 1970-71, that $135,865 was budgeted for 1971-72, and that the Board proposed to expend $115,615 in 1972-73. Thus the account statistics do not indicate an expansion of great magnitude in the context of the last two budget years. Neither does the sketched list of the Board's proposals indicate expenditures other than for rather routine housekeeping expenses except, specifically, that money is budgeted for an intercom system, and for new curtains and drapes. The hearing examiner recommends that these expenditures be deferred during the 1972-73 school year, but that other reductions of the Committee herein be restored.

Summary:	Amount of Reduction	$25,000
	Amount Restored	19,700
	Amount Not Restored	5,300

1200 Capital Outlay

The Committee's reduction of $40,000 from the amount proposed by the

Board for building renovation represents the specific elimination of the Board's scheduled project for converting an auditorium into a resource center. The Board avers the new facility is a necessary complement to its decision to continue a program of modular scheduling at the high school level.

The Committee argues that the conversion will deny girls' gym facilities at the high school, that the expenditure is for a temporary purpose, and that the money should properly be raised through a bond issue.

The hearing examiner is satisfied, after eliciting written and oral testimony, that other facilities within the school in question may be substituted for the gymnasium scheduled for renovation, with no real harm, but perhaps some inconvenience. The hearing examiner believes the Board properly and conscientiously evaluated its program of instruction in its entirety before proceeding on the given course it finally chose herein. The decision which the Board finally made was certainly a fundamental one pursuant to powers given to it by statute *N.J.S.A.* 18A:11-1 which provides *inter alia* that:

> "The Board shall *** c. Make, amend and repeal rules *** for the *government* and management of the public schools and *public school property of the district****." (*Emphasis supplied.*)

Accordingly, the hearing examiner recommends that the current estimated costs of this project be restored to the Board. These costs are now budgeted at $36,573.

Summary:	Amount of Reduction	$40,000
	Amount Restored	36,573
	Amount Not Restored	3,427

The remaining reductions proposed by the Committee total $15,000 and the hearing examiner recommends that they shall be allowed to stand as determined by the Committee without a decision on their merits. This recommendation is founded on the fact that the Board has accrued approximately $15,000 from savings in teacher turnover costs and has a sum in excess of $60,000 which remains as an unappropriated balance.

In summary, the hearing examiner recommends restoration of the total sum of $76,273 as reflected in the chart below, as necessary for the operation of Hillside Schools during the 1972-73 school year.

Account Number	Amount of Reduction	Amount Restored	Amount Not Restored
J213	$ 50,000	$20,000	$30,000
J720b	25,000	19,700	5,300
All Others	15,000	- 0 -	15,000
Totals – Current Expense	$ 90,000	$39,700	$50,300
1200	40,000	36,573	3,427
Totals – Capital Outlay	$ 40,000	$36,573	$ 3,427
Grand Total	$130,000	$76,273	$53,727

* * * *

The Commissioner has reviewed the findings and recommendations as set forth by the hearing examiner and concurs therein. He therefore directs the Hillside Township Committee to certify to the Union County Board of Taxation, in addition to the amounts previously certified for the 1972-73 school year, the amount of $76,273 to be raised by taxation for the current expense and capital outlay accounts of the Hillside School District in the 1972-73 school year.

COMMISSIONER OF EDUCATION

September 27, 1972

**In the Matter of the Tenure Hearing of William H. Kittell,
School District of the Borough of Little Silver,
Monmouth County.**

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Edward Stokes, Esq.

For the Respondent, Raymond B. DeRidder, Esq.

Respondent is a teacher, who has acquired a tenure status under the provisions of *N.J.S.A.* 18A:28-5 in the School District of the Borough of Little Silver, Monmouth County. The complainant Board of Education, hereinafter "Board," received a single written charge against respondent of assault and battery upon a pupil, hereinafter "C.J.," brought by the parent of C.J. The Board determined that the charge would be sufficient, if true in fact, to warrant dismissal or reduction in salary, and thereupon, certified said charge to the Commissioner of Education by means of a formal resolution, adopted by a majority vote of the full membership of the Board, at an adjourned meeting held December 15, 1971.

A stipulation of certain essential facts was filed jointly by the parties, and testimony and additional documentary evidence were educed at a hearing conducted on June 22, 1972, at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner.

The report of the hearing examiner is as follows:

The single charge filed against respondent is cited below:

CHARGE

"*** on or about October 8th, 1970, he pulled *** [C.J.] from his seat by the hair and pushed him against the wall causing him to hit his head and that as a result of this action, the said William H. Kittell was convicted on October 22, 1971, of being a disorderly person***."

The two pupil witnesses called to testify by the parties were members of the Seventh Grade class which was receiving art instruction from respondent at the date and time of the alleged incident. The first witness called by the Board was C.J. C.J. testified that he was in respondent's art classroom during the morning of October 8, 1970, sitting at a table with five other pupils. C.J. stated that while respondent was distributing drawing paper to the pupils, C.J. was playing with his paper and possibly creased it. According to C.J., respondent saw him engaged in this manner, walked over, seized him by the hair, and pulled him up to a standing position. C.J. also testified that respondent then stated, "*** I have had enough of you***," (Tr. 6) and instructed him to sit down and begin working. While respondent proceeded to distribute charcoal drawing sticks to the class, C.J. testified that he continued to play with his paper, and respondent walked over and again seized his hair and pulled him to a standing position. C.J. could not recall what respondent said at that moment, but he recalled that something was said by respondent. According, to C.J. respondent then pushed him against a nearby wall, causing him to strike his head against the wall. Also, C.J. stated that respondent squeezed his cheeks together and said, "*** I am not going to stand for any more of this ***." (Tr. 7) C.J. testified further that he then hit respondent's hand away, and that respondent took his arm and led him to the table, handed him a piece of paper and a piece of charcoal, and told him to go out into the cafeteria. C.J. testified that as he took one step away, respondent seized him by the back of his shirt, causing the bottom shirt button to tear off, and accused him of grabbing the charcoal, which C.J. denied. C.J. stated that he then walked through the doorway into the cafeteria and sat down. He asserted that when he brushed his hair back into place, an unspecified amount of his hair fell out of his head. He also asserted that he had a slight headache as the result of the aforementioned incident in the art classroom, but that he did complete two drawings as he had been instructed. When art class was dismissed, according to C.J., he was called into the art classroom by respondent. C.J. testified that they both sat down, and respondent asked him several times, "*** what is wrong with you?***" (Tr. 8) C.J. testified that he answered "Nothing," and at one point respondent became angry and said, "*** God damn you***." (Tr. 8) C.J. then testified that he then went home to have lunch and related these incidents to his mother. (Tr. 5-8)

The second pupil witness, hereinafter "A.R.," testified that he was present in the art classroom during the art period on the morning of October 8, 1970, and that he witnessed the incident between C.J. and respondent. A.R.'s version of the incident differs in some particulars from that of C.J.'s. A.R. testified that he was sitting at the same table with C.J., and, while respondent was distributing drawing paper, C.J. was wrinkling the paper belonging to a pupil seated next to him, hereinafter "M.S." A.R. testified that he overhead M.S. say to C.J. "***why don't you wrinkle your own paper***?" (Tr. 64, 65) A.R. then observed C.J. starting to wrinkle his own sheet of drawing paper. A.R. stated that respondent came over to their table and lifted C.J. out of his chair by pulling up on his hair. A.R. testified further that respondent told C.J. to get out of the room, and that as C.J. was walking to the doorway, respondent stopped C.J. by seizing the back of his shirt, handed him a piece of charcoal and drawing paper, and told him to get out. (Tr. 68, 69, 71-73)

Respondent, testifying in his own behalf, related his version of the incident of October 8, 1970. Respondent testified that, because he had planned a lesson dealing with the design of perspective drawings, he took his pupils into the cafeteria, which is directly adjacent to his art classroom, to demonstrate the conversion of lines to a vanishing point. At the end of the lesson, he directed the pupils to return to the art classroom, but C.J. remained standing by a water fountain. Respondent said that he told C.J. to come into the classroom and that C.J. answered that he was taking a drink of water. Respondent said that he stood by the door, holding it open, until C.J. entered the classroom (Tr. 90-96), and that he then began to distribute charcoal and paper to the puils, who were seated six or seven to a table. Respondent testified that C.J. was seated at the first table of pupils to receive these art materials. He further related that during the previous week's art class, he had noticed that C.J. did not perform the lesson of drawing a nonobjective design, but instead had merely scratched up his paper. Respondent stated that he had told C.J. to come to the art classroom after school, but that C.J. had not come. (Tr. 94) Respondent said that on October 8, 1970, he asked C.J. why he had not come to the art classroom after school, and that C.J. replied that "***I forgot.***" (Tr. 98) According to respondent, C.J. made a facial expression of disgust when respondent instructed him to "*** come in again today.***" (Tr. 98) Respondent testified that as he continued to distribute the art materials, he noticed C.J. crumpling his art paper. According to respondent, he said to C.J., "*** I've had enough of you,*** get out. ***" (Tr. 99) Respondent also stated, "***I assisted him out of his chair by his hair. ***" (Tr. 29, 99, 101, 121) According to respondent, as C.J. was walking away he "snatched" the piece of paper and charcoal. (Tr. 103) Respondent testified that "*** I grabbed him by the back of his shirt *** I wanted to stop him. *** I wanted to give him a second piece of paper***." (Tr. 103, 104) Instead of performing the two assigned lessons, respondent asserted, C.J. drew an American flag with the charcoal and paper. (Tr. 104) According to respondent, he did call C.J. back into the classroom after the class was dismissed, and he talked to him for several minutes. (Tr. 108, 109) Respondent flatly denied having used any profanity while talking to C.J. (Tr. 117-119) He also denied hitting C.J.'s head against the wall as was alleged (Tr. 119) and grabbing C.J. by the cheeks. (Tr. 121)

The Superintendent testified that he was visited by C.J. and his mother on the afternoon of October 8, 1970, and that C.J.'s mother reported the incident which allegedly had taken place in the art classroom between her son and respondent. (Tr. 28) After C.J. and his mother left, the Superintendent said he called respondent to his office and asked him if the specific charge regarding pulling C.J.'s hair and ripping his shirt were true. The Superintendent testified that respondent "*** admitted that he had done this.***" (Tr. 29) According to the Superintendent, he then reminded respondent that he had spoken to him on two previous occasions about using his hands to discipline pupils, and respondent admitted having been previously reminded. (Tr. 29) (Exhibits P-5, P-6).

The Superintendent testified that after reporting this incident to the Board he addressed a formal reprimand to respondent under date of October 16, 1970. (Exhibit P-3) In this formal reprimand, the Superintendent related the specific

charge made by C.J.'s mother, and reminded respondent that he had admitted the truth of the charge on October 8, 1970. The Superintendent also stated that he had spoken to respondent on two previous occasions about corporal punishment, and pointed out that neither he nor the Board would condone nor tolerate this type of conduct on the part of a teacher. The Superintendent requested a letter from respondent indicating his intentions "*** as to your future in Little Silver.***" (Exhibit P-3)

Respondent replied by letter addressed to the Superintendent under date of October 26, 1970, wherein he stated, "*** please be advised my intention to remain in my current teaching position***" and, "It is further my intent to continue to abide by rules and regulations of the Board and the State of New Jersey ***." (Exhibit R-1)

The Superintendent and the principal testified that, in their judgment, respondent is a good teacher of art. (Tr. 42, 53, 59) The Superintendent did, however, recommend to the members of the Board of Education that they certify this charge against respondent to the Commissioner. (Tr. 154)

A formal complaint of assault and battery on C.J. was filed in Red Bank Municipal Court against respondent, by C.J.'s mother on March 19, 1971. (Exhibit P-1) A trial was held in the Municipal Court on June 7, 1971, and the opinion of the Court was delivered on October 22, 1971. (Exhibit P-2) The finding of the Court stated, *inter alia*, that:

> "*** the defendant, William Kittell, did pull the said [C.J.] up from his seat by his hair.***"
>
> "Based on the above the Court finds and determines that the defendant, William Kittell, acted unreasonably in pulling up [C.J.] by his hair under the circumstances and exceeded any and all authority he had in so doing."
>
> "In conclusion the Court finds the defendant, William Kittell, guity of assault and battery (2A:170-26) and imposes a fine of $25.00 without costs." (Exhibit P-2)

As a result of respondent's conviction on the charge of assault and battery on C.J., *supra*, the Board adopted a resolution at a special meeting held November 23, 1971, setting respondent's salary for the school year 1971-72 at the same amount he was paid for the 1970-71 school year; namely, $11,450. (Exhibit P-4) According to respondent's uncontradicted testimony, by this action the Board withheld his increment and a negotiated salary increase which totaled $1,050. (Tr. 115)

The Superintendent testified that a letter was received from C.J.'s mother under date of November 19, 1971, following respondent's conviction in Municipal Court. (Tr. 50) This letter is attached to the Board's certification of charges and is marked in evidence as Exhibit P-7. The letter reads as follows:

> "Based on the recent conviction of Mr. William Kittell in the Red Bank Municipal Count (sic) *** for Assault and Battery on my son, [C.J.], during school hours, I hereby request the Little Silver Board of Education to proceed with a formal hearing before the State Commissioner of Education for Mr. Kittell's dismissal."

The Superintendent testified that the Board adopted its resolution of December 15, 1971, certifying the charge against respondent, as a result of this letter from C.J.'s mother. (Tr. 50) A member of the Board testified that the Board adopted the resolution, *supra*, by a vote of four ayes and three nays. (Tr. 136) The Board did not suspend respondent from his duties; it permitted him to continue the performance of his teaching duties pending the adjudication of the certified charge.

A memorandum written by the Superintendent on an unspecified date (Exhibit P-6) and testimony by the Superintendent, related that two previous allegations had been made of respondent's using corporal punishment. (Tr. 40-44) The first allegation was made in 1967 by C.J.'s mother wherein she charged that respondent had struck her older son, a former pupil of respondent's. (Tr. 40, 150, 151) According to the Superintendent's memorandum (Exhibit P-6), respondent had admitted pushing C.J.'s older brother, but that there was doubt that he had struck him. (Tr. 40) C.J.'s older brother testified that, "*** I can recall of no incident when Mr. Kittell hit me, or pushed me, or anything.***" (Tr. 61) He also testified that he had never made a complaint to the principal about Mr. Kittell. (Tr. 61)

The second alleged incident described in the Superintendent memorandum (Exhibit P-6) occurred in 1969 when respondent was accused of hitting a pupil. The Superintendent's testimony regarding this incident is as follows:

> "*** I believe it was decided that he [respondent] had not actually hit the child, but perhaps pushed him, and the degree of how hard he had pushed him was questionable, and the family was satisfied that proper measures had been taken.***" (Tr. 41)

Respondent's testimony regarding the 1969 incident was, "*** I think I stepped on his toe. I think that was what it was.***" (Tr. 106) Respondent denied pushing the pupil, and stated that he did not step on his toe on purpose. (Tr. 106)

According to the Superintendent's memorandum (Exhibit P-6), the parents involved in the incident of 1969 "were satisfied that the matter had been well taken care of."

Respondent testified that he has never struck a child and he will not strike a child. (Tr. 123) He admitted that, in the past, he had taken pupils by the arm to assist them out of the classroom, or to sit pupils down in their seats, or perhaps had shaken a pupil's arm in an up and down motion. He stated that he has never pushed a pupil, but that he had placed his hand on a pupil's back to assist him from the classroom. (Tr. 124, 125) In this respect respondent

admitted using his hands to discipline children. (Tr. 129) According to respondent's uncontradicted testimony, he has never received an unfavorable evaluation of his teaching performance while employed in the Little Silver School District. (Tr. 133) Respondent also stated that since the incident of October 8, 1970, he has not had physical contact of any kind with a pupil. (Tr. 128, 129)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter, and concurs with the findings of fact set forth therein.

It is clearly established, both by respondent's admission (Tr. 29, 99, 101, 121), and by his conviction in a court of competent jurisdiction (Exhibit P-2), that respondent is guilty of assault and battery upon a pupil on October 8, 1970, by pulling the pupil's hair. In the judgment of the Commissioner, the evidence does not support the remaining allegations specified in the single charge, *supra.*

Corporal punishment of pupils has been prohibitied in New Jersey schools by statute since 1967. *N.J.S.A.* 18A:6-1 provides in part as follows:

> "No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution***."

By enactment of this statute over one hundred years ago, the New Jersey Legislature subscribed to the philosophy that:

> " '***an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another although no actual physical harm be done.' (*Teacher Liability for Pupil Injuries*, National Education Association of the United States, p. 8)"

See also *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 *S.L.D.* 185; *In the Matter of the Tenure Hearing of Pauline Nickerson*, 1965 *S.L.D.* 138.

The Commissioner further stated *In re Fulcomer*, 1962 *S.L.D.* 160; remanded State Board of Education, 1963 *S.L.D.* 251, decision on remand, 1964 *S.L.D.* 142; affirmed State Board of Education, 1966 *S.L.D.* 225; remanded 93 *N.J. Super.* 404 (*App. Div.* 1967); decision on remand, 1967 *S.L.D.* 215; affirmed Appellate Division, Superior Court, December 13, 1967 (unpublished) the following at p. 162:

> "*** that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If

> all other means fail, there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. *** While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.***"

It is the Commissioner's judgment that parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers and that teachers who resort to unnecessary and inappropriate physical contact with pupils in their charge must expect to face dismissal or other severe penalty. *In the Matter of the Tenure Hearing of Pauline Nickerson, supra.*

In the instant matter, the Commissioner finds that respondent is guilty of the use of corporal punishment.

The Commissioner's practice in previous cases of corporal punishment controverted before him has been to assess a proper penalty after taking into account the nature and gravity of the offense under all of the circumstances involved, any evidence as to provocation, extenuation or aggravation, and any harm or injurious effect, which the teacher's conduct may have had on the maintainance of discipline and the proper administration of the school system. Also to be considered are the teacher's record of performance and the prognosis for his continued effective performance and usefulness in the school system. In each case previously decided by the Commissioner, all of these factors have varied materially. In the Commissioner's opinion each such matter must be judged in the light of its particular circumstances. The kind and degree of penalty will necessarily vary according to the specific problem.

The Commissioner notices in the instant matter that respondent has a good record of teaching performance during the past twelve years in the School District of the Borough of Little Silver. Although some testimony was offered of two relatively minor incidents in which respondent was alleged to have laid hands on pupils, the Commissioner considers the proofs of these occurrences to be insufficient and inconclusive. The single incident of this charge is the only clear instance of proven improper conduct by respondent. It must also be noted that there is no evidence that respondent's act was premediated, cruel or vicious, nor done with intent to inflict physical harm.

There is no evidence that respondent's actions had any pervasive effect on the proper operation of the school, either by influencing pupil discipline or by impeding the school's administration. It is significant that the Board did not keep respondent from his duties when the charge was certified, but instead permitted him to continue teaching until adjudication of the matter. Respondent's action appears to have been a mistaken and misguided effort to discipline the pupil in an overly forceful and totally improper manner; namely, lifting the pupil from his chair by seizing and pulling his hair.

The Commissioner notices that respondent has suffered the mental anguish of a trial and conviction in Municipal Court, a fine imposed by the Court, the loss of salary in the amount of $1,050, and a hearing which could result in the loss of his livelihood. In addition, respondent's professional reputation has been damaged, and he will be required to exert himself to reestablish his reputation and standing because of his error.

The Commissioner concludes, after careful scrutiny, that summary dismissal of respondent for this single incident is an unnecessarily harsh penalty, and is not warranted. A reduction in salary, in addition to his previous loss of increment and the negotiated salary increase for the 1971-72 school year, is the maximum penalty that is appropriate under all the circumstances of this case.

The Commissioner finds and determines that William H. Kittell inflicted corporal punishment upon a pupil in his charge, in violation of the law. He finds further that the total circumstances of this case do not dictate respondent's dismissal. The Commissioner orders, therefore, that respondent be continued in his tenure status as an employee of the Board of Education of the Borough of Little Silver, that he be denied the salary adjustment of $1,975 for the 1972-73 school year, and that his salary for the 1972-73 school year remain the same as the salary he received during the 1971-72 school year.

September 29, 1972 COMMISSIONER OF EDUCATION

Board of Education of the Township of Wayne,

Petitioner,

v.

Municipal Council of the Township of Wayne, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Sylvan G. Rothenberg, Esq.

For the Respondent, G. Thomas Breur, Esq.

Petitioner, hereinafter "Board," appeals from the action of the Wayne Township Council hereinafter, "Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Passaic County Board of Taxation a lesser amount of appropriations for school purposes for the 1972-73 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were educed at a hearing conducted July 19, 1972, at

the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school election on February 8, 1972, the voters rejected the Board's proposal to raise $11,968,661 by local taxes for current expenses and $68,600 for capital expenditures in the 1972-73 school year. The budget was then sent to Council pursuant to *N.J.S.A.* 18A:22-37 for its determination of the amount of tax funds required to maintain a thorough and efficient school system.

After consultation with the Board and a review of the budget, Council made its determination and certified to the Passaic County Board of Taxation an amount of $11,468,661 for current expenses and $68,600 for capital outlay. The pertinent amounts may be shown as follows:

Board's Proposal	$11,968,661	$68,600
Council's Certification	11,468,661	68,600
Reduction	500,000	- 0 -

The Board contends that the reduction by Council will leave an amount of money insufficient to provide a thorough and efficient system of education for the pupils of the district and appeals to the Commissioner for restoration of these funds.

As part of its determination Council suggested items of the budget in which it believed economies could be effected without harm to the educational program, as follows:

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
CURRENT EXPENSE:				
J110-f	Sals.-Supt. Off.	$117,500	$ 99,500	$ 18,000
J110-i	Sals.-Bus Adm.	112,300	102,300	10,000
J130-f-1	Other Exp.-Supt. Off.	2,500	1,500	1,000
J130-f-3	Other Exp. - Supt. Off. Supls.	7,000	4,500	2,500
J130-i-2	Other Exp.- Bus. Adm.	7,000	6,000	1,000
J130-n-3	Misc. Exp.-Adm.	22,000	18,500	3,500
J212	Sals.-Supervisors	321,500	301,500	20,000
J213.1-a	Sals.-Tchrs.	6,483,900	6,366,900	117,000
J213.1-c	Sals.-Tchrs.-Spec. Ed.	326,500	299,370	27,130
J214-a	Sals.-Librarians	213,600	203,451	10,149
J216-a	Sals.-Tchr. Aides	51,400	26,400	25,000
J230-c-1	Audiovisual Mats.	43,500	9,707	33,793
J240	Teaching Supplies	251,000	233,108	17,892
J250-c-5	Misc. Exp.-Data Proc.	27,200	23,900	3,300
J500	Transportation	503,400	347,400	156,000
J600	Plant Operation	341,000	321,000	20,000
J710	Plant Maintenance	192,300	179,800	12,500
J800	Insurance	69,600	50,600	19,000
J1000	Student Activities	201,500	195,022	6,478
Total Current Expense		$9,294,700	$8,790,458	$504,242

It is noted here that Council's reductions, proposed in the chart, *supra*, total $504,242, while its certification to the County Board of Taxation was for a sum only $500,000 less than the Board's proposal. At this juncture, Council avers, however, that its cuts in the Board's budget are modest, when viewed in the context of the budget as a whole, and will not endanger the operation of a school system that must, by Constitutional mandate, be one that is both thorough and efficient.

In the Board's view, Council's action is "inappropriate and detrimental to the welfare of approximately 12,500 students and a plant valued in excess of $33,000,000." It requests full restoration of all items marked for reduction.

The views of both parties are expressed in written testimony, buttressed with supporting documents, and supplemented by oral testimony at the hearing.

The hearing examiner has reviewed all of the documentation and will discuss the respective views of the parties in regard to all principal items. However, as a preface to this discussion it is noted here that the Board has shown a deficit in each of its last two years of operation; a deficit in excess of $300,000 in the year which ended June 30, 1971, and a much reduced deficit estimated at approximately $28,000 on June 30, 1972. An overall view of the budget *sub judice* produces the strong impression that a full implementation of all of the Board's proposed programs would result again in funding obligations approximately equal to or in excess of the budgeted amounts.

The hearing examiner does find a relatively small amount of approximately $30,000 in the teachers' salary account – a result of resignation – replacement comparisons, and he recommends that this sum be maintained as a small reserve to guard against the kind of deficit financing which has been necessary in the past.

For discussion purposes some line accounts listed, *supra*, have been consolidated, although Council detailed a more specific breakdown. In particular, this reference includes the accounts J500 (Transportation), J600 (Plant Operation) and J1000 (Student Activities).

The specific findings and recommendations of the hearing examiner are detailed as follows:

J110-f Salaries-Superintendent's Office

Council maintains that three clerks or secretaries can be eliminated from the staff of the school district office at a saving of $18,000. The Board avers that all of the eight positions itemized in this account – including three "pool" secretaries, a "pool" coordinator, secretary to secure substitutes, public relations consultant, and two secretaries of administrators – comprise a staff that has operated effectively for some three years, and that the entity is essential to the operation of the school system.

The hearing examiner regards the Board's testimony in this matter as adequate support for its position and he believes that there is a need for all of the personnel employed by the Board as listed within this account. However, the hearing examiner does not find that the whole budgeted sum of $117,500 is necessary for these positions. Salary increments included herein and detailed in part in the Board's proposed "Budget Review" document, and elsewhere in testimony, establish that a total of approximately $8,500 in salary increments are necessary over and above last year's budgeted account itemization. In the hearing examiner's opinion, the total documentation establishes a need for only $113,500 and not the $117,500 budgeted by the Board.

Accordingly, he recommends restoration of $14,000 of the reduction made by Council.

Summary:	Proposed Reduction	$18,000
	Amount Restored	14,000
	Amount Not Restored	4,000

J110-j Salaries-Office of Business Administrator

Council avers that the sum of $10,000 included herein for the services of a manager to be newly employed to supervise data processing work in the district is unnecessary and without "justification." It proposes to reduce the account and eliminate the new position. The Board maintains that it must move to the use of computers to "insure more accurate and less expensive records" and proposes to employ a "manager" to supervise the program in midyear.

The hearing examiner believes that the vote of the people against the Board's budget as advertised and the decision of Council reported, *supra*, must be sustained in this instance. There is no concrete evidence that the Board cannot operate its schools efficiently without computers, nor a manager to supervise their use, during the 1972-73 school year. The envisioned program, while evidently desirable, cannot otherwise be sustained as "necessary," in the hearing examiner's opinion.

Summary:	Proposed Reduction	$10,000
	Amount Restored	- 0 -
	Amount Not Restored	10,000

J212 Salaries-Supervisors

The hearing examiner has examined the documentation herein and can find no evidence that, as Council maintains, there are, at present, two "vacant positions" within this account which, in Council's judgment, need not be filled. However, it is apparent that the Board had originally planned to add positions of "Coordinator of pupil personnel" and "Student teacher's coordinator" at a total cost of $33,520, but deleted such costs prior to the time of the budget referendum.

The total account budget of $321,500 reflects the following costs:

Full-Time Staff	$235,815
Part-Time Staff	12,285
Transfers	70,130
Athletic Director	3,250
	$321,480

and it is noted that the transfer items from other budgeted accounts play a major role in the budgeted increase of almost 50% which is planned for the 1972-73 school year.

Having found no evidence in support of Council's position that $20,000 could be excised from this account without harm to the present educational program of the district, the hearing examiner recommends that all of this sum be restored.

Summary:	Proposed Reduction	$20,000
	Amount Restored	20,000
	Amount Not Restored	- 0 -

J213.1-a Salaries-Teachers

Council had originally reduced this account by $94,000 but also proposed a reduction of $23,000 in the amount expended for a foreign language program at the seventh and eighth grade levels. This latter reduction is combined for discussion purposes herein and the total amount for consideration is thus $117,000 as shown in the chart, *supra.*

Council avers that a projected 1972 redistricting of the schools in Wayne and a student enrollment decrease indicate that a total of $94,000 (the estimated salary costs of approximately 10 teachers) can be "eliminated from this account" as unnecessary. Additionally, Council maintains that the program of foreign language instruction it characterizes as "experimental" should be eliminated as "not helpful to (sic) educational program."

The Board maintains that the planned hiring of 15 new teachers for the 1972-73 school year, at the high school level, is warranted by a: (1) population increase; (2) new requirements of the contract with the local teachers' association; (3) need to staff new facilities. The Board also argues that its language program cannot be labeled correctly as "experimental" although it gives children at the seventh and eighth grade levels an opportunity to explore different languages before a final choice is made to pursue one in depth.

Testimony at the hearing was that the total enrollment in Wayne Schools is now projected to increase by 206 students in September 1972. New staffing costs to accommodate this increase, and to meet the other requirements listed, *ante*, are estimated by the Board to total $116,467.

The hearing examiner recommends that a total of 12 new teachers be programmed herein and budgeted at a cost of $8,900 per teacher. He further

recommends that all of the amount of the reduction proposed for the foreign language program be restored.

Thus, the recommendation herein may be charted as follows:

New Teachers	$116,487	$ 94,000	$ 84,500	$9,500
Foreign Languages	23,000	23,000	23,000	- 0 -
	$139,487	$117,000	$107,500	$9,500

Summary:	Amount of Reduction	$117,000
	Amount Restored	107,500
	Amount Not Restored	9,500

J213.1-c Salaries-Teachers-Special Education

Council proposes herein to eliminate $13,130 – the salary of a speech teacher – and $14,000 for the salary of a teacher of the neurologically impaired. The latter reduction is pertinent to a new position.

The Board argues that the speech teacher performs a required service that is vitally necessary and documents its need for an additional, required class for the neurologically impaired.

The hearing examiner has examined the documentation herein and must find for the Board. The positions in contention herein are necessary and the special education which is proposed is only that which the Board is required to furnish. (*N.J.S.A.* 18A:46)

Summary:	Amount of Reduction	$27,130
	Amount Restored	27,130
	Amount Not Restored	- 0 -

J214-a Salaries-Librarians

Council does not dispute the need for personnel employed from expenditures within this account but avers that the total budgeted amount of $213,600 is in excess of that required. Its argument is based on the fact that 1971-72 expenditures are listed as $192,993 and salary increments listed for 1972-73 total $10,458, for a grand total of $203,451.

The hearing examiner has examined an itemized list of salary expenditures as documented and submitted by the Board, and determines that $205,034 was actually expended by the Board from this account in 1971-72 and that increments necessary for addition herein in 1972-73 will again overexpend it. Thus, the listed $20,000 increase in the account which was earmarked for salary increments and in compensation for a prior deficit is inadequate as it stands.

Accordingly, the hearing examiner recommends full restoration.

Summary:	Amount of Reduction	$10,149
	Amount Restored	10,149
	Amount Not Restored	- 0 -

J216-a Salaries-Teacher Aides

The Board originally proposed to employ teacher aides to relieve teachers of the responsibility of monitoring playground activities and argues that expenditures to insure such relief can be justified by: (1) the assurance that, if aides are hired, teachers will have more time to spend in the instruction of students; and (2) the benefits to be expected as a result of the fact that continuous responsibility will be assigned to the same aides each day.

Council argues that the quality of education will not be affected if this budget item of $25,000 is eliminated and avers that, in its judgment, the expenditure would represent an "extreme luxury."

The hearing examiner notes that while it is true the Board budgeted this money for teacher aides, there is no commitment on the Board's part, at this juncture, to spend money for such a purpose even if it were restored. Just the contrary seems to be true as evidenced by a letter written by the President of the Board to the President of the Wayne Education Association, July 11, 1972, and reproduced in its entirety below:

> "*** At last night's Board of Education meeting, Mr. Rothenberg and I discussed with the Board the results of the several meetings held with you and the negotiating team here since the close of the school year. The intent of these meetings was to finalize the contract of the Board's agreement with the W.E.A. for 1972-73.
>
> "Among the several points still in question was the insistence on the part of the W.E.A. that a guarantee of playground aides at the elementary level be included in this document. The feeling of the Board is as I indicated that no such agreement had ever been reached between the Board of Education and the Association. It is true, of course, that this was discussed during negotiations. However, a review of the minutes of the sessions and discussions with Mr. Rose, the P.E.R.C. mediator, and a review of the factfinder's report support the position of the Board that this was never agreed to by the Board of Education.
>
> "The Board and the administration continue to recognize the potential assistance which could be rendered by playground aides but cannot agree to include the item in the agreement after the completion of negotiations and the acceptance of the factfinder's report. You are aware that as early as October the administration suggested this item for inclusion in the budget for 1972-73 and $25,000 was estimated as the cost to cover the aides for the coming year.

This item never had final approval of the Board and was one of the items specifically listed by the township council for deletion in their $500,000 cut of the defeated budget.

"The Board of Education sympathizes with your request to insure an inclusion of aides, even in a watered down form as you had suggested, but at the same time there is no basis in fact to allow this to be included in the final agreement.***"

Since the Board has, of this date, not committed itself to this expenditure as part of a negotiated agreement pursuant to the mandate of *Chapter* 303, *Laws* of 1968, to negotiate the "terms and conditions of employment," and because of the actions of Wayne Township voters and the expressed judgment of Council reported, *supra*, the hearing examiner finds no necessity to restore the sum of money under consideration *sub judice*.

Summary:	Amount of Reduction	$25,000
	Amount Restored	- 0 -
	Amount Not Restored	25,000

J230-c-1 Audiovisual Materials

The Board proposes an increased expenditure of $33,793 for audiovisual aids in 1972-73. The grand total of this account is $43,500 as compared to $9,707 budgeted for school year 1971-72 and $22,620 for school year 1970-71. In part the increase is necessary, in the Board's view, because of a basic policy decision to break away from reliance on the Passaic County Audiovisual Aids Library for any part of its necessary audiovisual materials in future years. The budget total herein is in addition to $10,000 budgeted for the County Library in 1972-73.

Council argues that the increase of over 300% in one year is "unreasonable and unwarranted" and in view of the defeat of the Board's budget and the Council's subsequent action the hearing examiner must agree with Council.

The total sum of $20,000 for audiovisual aids purchased locally and as part of the County project still remains as a significant sum available to the Board.

Summary:	Amount of Reduction	$33,793
	Amount Restored	- 0 -
	Amount Not Restored	33,793

J240 Teaching Supplies

The Board's expenditures for supplies in past year and budgeted amounts for supplies in 1971 and 1972 are itemized as follows:

1969-79	$156,567.93
1970-71	$192,501.54

1971-72 (Budget)	$229,387.00
1972-73 (Budget)	$251,000.00

While the budgeted increases amount, in the aggregate, to approximately $95,000 in a three-year period, Council does not base its reduction on the lack of need for the increase, *per se*, but on a misapplication of a "supply-purchase formula" employed by the Board.

The Board submits enrollment projections on which its supply budget is based and argues that approximately 5% of the increase is due to increased costs attributable to inflation.

The hearing examiner recommends a supply budget increase of $15,000 to reflect an amount for increased costs of operation, and another sum for increased enrollment, so that the budget figure for 1972-73 will total $244,387. Such a budget will require restoration of $11,279 of the reduction of $17,892 determined as sufficient by Council.

Summary:	Amount of Reduction	$17,892
	Amount Restored	11,279
	Amount Not Restored	6,613

J500 Transportation

Council's total reduction of $156,000 from the amounts of money budgeted by the Board for pupil transportation during the 1972-73 school year is an aggregate sum comprised of reductions in three subaccounts; namely,

J510	Salaries for Pupil Transportation — Reduction of $11,000
J520-a-1	Contracted Services — Reduction of $67,000
J520-c	Trips Other Than To and From School — Reduction of $8,000

and, additionally, the sum of $70,000 which Council labels for reduction as "Safety Transportation" in its itemization of J520-c. The subaccounts will be discussed in some detail below:

The amount of $11,000 in dispute in account J510 was designated by the Board for the salary of a mechanic to service its fleet of buses. According to the Board's testimony, there is no mechanic for such service at the present time and repair work is contracted. In the Board's view a mechanic is necessary to keep the transportation fleet in safe operating condition.

Council avers that the new position is unncessary at the present time.

The hearing examiner recommends that the reduction itemized herein be restored in full. The recommendation is founded on the evident need, in a system of this size and with many district-owned buses, for such a person to

insure regular mechanical maintenance. The alternative, contracted maintenance, presents difficulties in scheduling service as needed and represents no guaranteed savings in dollar costs.

The reduction of $67,000 determined by Council to be appropriate in budgeting for Contracted Services (J520a) is specifically applicable to a proposed elimination of all "double routes." The Board had proposed, for the 1972-73 school year, to eliminate such "double routes" as a "convenience" to pupils of the district.

In the context of a budget defeat, and Council's determination, the hearing examiner finds no compelling necessity to restore funds to provide such additional transportation services. The duplicate routes planned by the Board herein cannot be listed as "essential" to the operation of the Wayne Township Schools and therefore the hearing examiner recommends that Council's determination be allowed to stand.

Council avers that $70,000 could be eliminated for safety transportation and maintains that the projected sum is undisputed. The Board, at the hearing, *supra*, agreed that this was the sum expended for "*safety*" (non-remote) transportation in the 1971-72 school year.

However, the hearing examiner has examined the Board's own reports for the most recent year of record, 1970-71, which are on file in the Office of Transportation, State Department of Education, and determines that the total deduction for non-remote, or "safety," transportation for that year was only $35,729.06. Accordingly, the hearing examiner opines that this sum is the maximum amount that may be deducted in this instance.

Such a reduction has been found to be a proper one in the past. As one instance, the hearing examiner cites *Board of Education of Caldwell-West Caldwell v. Mayor and Council of the Borough of Caldwell and Mayor and Council of the Borough of West Caldwell*, 1970 *S.L.D.* 245 wherein a similar reduction was under consideration and it was said:

> "*** Part of the transportation expense for the district has, for many years, been for transportation of children who do not live remote from the school.*** This expenditure, in the absence of voter approval of the school appropriations, cannot be held to be essential and subject to reinstatement in the appropriations. Therefore, it is recommended that the cut of Council's be sustained***." (at p. 251)

Similarly, in the instant matter the hearing examiner recommends that funds designated for this non-remote transportation, in the maximum amount of $35,700, and marked for reduction by Council be deleted from the Board's transportation account, but that the difference between this sum and $70,000 (Council's reduction) be restored to the Board.

For similar reasons the hearing examiner recommends that Council's determination that $18,000 may be reduced from the expenditures proposed for "Trips Other Than to and from School J520-c" be sustained.

Summary:	Amount of Reduction	$156,000
	Amounts Restored	
	J510	11,000
	J520a-1	- 0 -
	J520c	- 0 -
	Amount Designated "Safety Transportation"	34,300
	Total Amounts Restored	$ 45,300
	Amounts Not Restored	
	J510	$ - 0 -
	J520-a-1	67,000
	J520-c	8,000
	Safety Transportation	35,700
	Total Amounts Not Restored	$110,700

J600 Plant Operation

Council argues that $20,000 may be excised from the Board's budget for utilities (i.e. heat, gas, and electric). It characterizes the 25-30% increases for these basic services as speculative and excessive. The Board counters with figures that purport to show the increases average approximately 7% and are justified by new building additions containing 223,000 square feet of additional area.

A review of the budgeted items herein causes the hearing examiner to believe the Board may have underestimated the J600 account if increases in utility costs are taken into account. Accordingly he recommends full restoration of these reductions.

Summary:	Amount of Reduction	$20,000
	Amount Restored	20,000
	Amount Not Restored	- 0 -

J710 Plant Maintenance

Council maintains that $12,500 can be reduced from the Board's maintenance budget and avers that an increase it calculates as 72% is "unreasonable and without foundation unless facts are presented to support such an increase." The Board counters with its own version of the "facts" to which Council refers; namely, that $13,320 of the total of increased expenditures programmed herein represents the costs of negotiated salary increases, and that $12,480 is for 1½ maintenance men "required to compliment the present staff needed to cover the additional 223,000 square feet of building facilities***."

The hearing examiner has examined the budget data pertinent herein and finds justification for the Board's position. The provision of additional maintenance services for the large additional area appears minimal and salary obligations are well-documented.

Accordingly, the hearing examiner recommends full restoration of the amounts budgeted by the Board in th subaccount.

Summary:	Amount Reduction	$12,500
	Amount Restored	12,500
	Amount Not Restored	- 0 -

J800 Insurance

The Council avers that an increase of approximately 40% for property and liability insurance is speculative and unwarranted and proposes to reduce the amount budgeted herein to approximately the same amount ($50,587) budgeted by the Board for expenditure in 1971-72. The Board testified that all of its calculations are based on recommendations of its Insurance Committee and lists these costs as totaling $69,513. (The budget proposed by the Board herein totals $69,600.)

The hearing examiner finds that Board's testimony in error since the costs listed total $65,913 and not the $69,513 listed by the Board. However, the various policies have an affixed estimated cost which is variable and the small surplus contained herein is probably more speculative than real.

In this context the hearing examiner recommends that $17,000 of the reduction imposed by Council be restored to allow sufficient funds, plus a small contingency amount, to cover the itemized expenditures.

Summary:	Amount of Reduction	$19,000
	Amount Restored	17,000
	Amount Not Restored	2,000

The remaining budget items in contention between the parties in the matter *sub judice* are for smaller sums than those discussed, *supra*. However, the testimony of the parties has been examined in detail by the hearing examiner and his recommendations are contained in the chart below. Recommendations with respect to subaccounts J130-n-3 and J250-c-5 (accounts wherein money is allocated by the Board for a move to computerization) are consistent with the recommendations with respect to subaccount J101-i as discussed by the hearing examiner, *ante*.

J130-f-1	$ 1,000	$ - 0 -	$1,000
J130-f-3	2,500	2,000	500
J130-i-2	1,000	300	700
J130-n-3	3,500	- 0 -	3,500

J250-c-5	3,300	- 0 -	3,300
J1000	6,478	6,478	- 0 -
	$17,778	$8,778	$9,000

The summarized recommendations of the hearing examiner for restoring or sustaining part or all of Council's proposed reductions are shown as follows:

J110-f	Sals-Supt. Off.	$ 18,000	$ 14,000	$ 4.000
J110-i	Sals.-Bus. Adm.	10,000	- 0 -	10.000
J212	Sals.-Supervisors	20,000	20,000	- 0 -
J213.1	Sals.-Teachers	117,000	107,500	9,500
J213.1-c	Sals.-Tchrs. Spec. Ed.	27,130	27,130	- 0 -
J214-a	Sals.-Librarians	10,149	10,149	- 0 -
J216-a	Sals.-Tchr. Aides	25,000	- 0 -	25.000
J230-c-1	Audiovisual	33,793	- 0 -	33,793
J240	Teaching Supplies	17,892	11,279	6.613
J500	Transportation	156,000	45,300	110,700
J600	Plant Operation	20,000	20,000	- 0 -
J710	Plant Maintenance	12,500	12,500	- 0 -
J800	Insurance	19,000	17,000	2.000
Misc.	Chart *Supra*	17,778	8,778	9,000
	Total Current Expense	$504,242	$293,636	$210,606
	* *	* *		

The Commissioner has reviewed and considered the findings, conclusions, and recommendations of the hearing examiner, as set forth above. He finds and determines that the amounts certified by Council to the Passaic County Board of Taxation for the current expenses of the Wayne Township School District are insufficient for the maintenance and operation of a thorough and efficient system of public schools in Wayne Township for the 1972-73 school year. He therefore directs Council to certify to said Board of Taxation the additional sum of $293,636 for current expenses of the School District to be raised by local taxation for the support of the School District in the school year 1972-73.

COMMISSIONER OF EDUCATION

October 2, 1972

"S.T.," a minor by "B.T.," his mother and next friend,

Petitioners,

v.

Board of Education of the Township of Neptune, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Stafford W. Thompson, Esq.

For the Respondent, Laird & Wilson (Andrew J. Wilson, Esq., of Counsel)

The parents of S.T., hereinafter "petitioners," maintain that their son's exclusion from school for a six-month period by reason of action taken by the Board of Education of the Township of Neptune, hereinafter "Board," was a punishment both excessive and *ultra vires*. Specifically, petitioners aver that S.T. was subjected to two trials for the same offense and that, after the first trial, a court trial, which resulted in a court's finding of innocent, the Board was barred from an administrative action on the same matter. At this juncture, petitioners demand his reinstatement. The Board denies any impropriety in its actions, and defends its decision in this matter as reasonable and necessary under the circumstances.

By mutual agreement, the matter is submitted for Summary Judgment on the pleadings and Briefs of counsel, and is limited in scope to the two principal contentions of petitioners; namely, that the action of the Board, as outlined, *supra*, violated the double jeopardy provisions of the United States and New Jersey Constitutions, and that the "severe" penalty which resulted from the Board's action was unwarranted. Previous demands of petitioners for an Order of the Commissioner restraining the Board from acting at all, and for S.T.'s reinstatement in school, *pendente lite*, have been rendered moot.

There is no dispute about certain facts pertinent to this adjudication, and a chronicle of events will serve as the context for a decision with respect to the principal contentions at issue.

Following the close of school on June 14, 1972 – which was also the close of the academic year – an incident occurred on school grounds in which it is alleged a student was attacked and beaten severely by fellow students. The incident was rooted in a climate of racial animosity, and S.T. has not denied that he was a member of the group of students present at the time the incident occurred. He maintains that he did not participate personally in the attack.

However, on the basis of an investigation conducted by school officials, S.T. was subsequently placed on a "technical" suspension from further school attendance – although such suspension had no practical immediate effect during the summer vacation period, and charges were proffered against him by local police in the Juvenile and Domestic Relations Court of the County of Monmouth. The charges against S.T. were that on June 14, 1972, he did:

> "*** commit an atrocious assault and battery on one [C.P.] by kicking, punching and stomping him on the face and body, causing him to be admitted to Jersey Shore Medical Center, Neptune, New Jersey, with injuries."

Subsequent to a hearing conducted on the charges, *supra*, August 8, 1972, before Judge Burton L. Fundler, S.T. was found to be not guilty.

Thereafter, on August 29, 1972, the principal of Neptune Senior High School notified petitioners that S.T. would be continued "on suspenseon." This notification was contained in a letter of that date which read:

> "***On June 19, 1972 your son [S.T.], was placed under suspension for involvement in an incident which occurred on June 14, 1972 and which resulted in serious injury to a student of the Neptune Junior High School.
>
> "The investigation of the incident has been completed and it has been determined that [S.T.] is to be continued on suspension pending further action.
>
> "You will be notified by the Neptune Township Board of Education within a few days of the further action.***"

The "further action" to which the letter referred was the scheduling of a hearing by the Board for September 13, 1972. On that date S.T. appeared with counsel before the Board, witnesses were called to testify, and he testified in his own behalf. The charge against him, which had been stated in a letter addressed to petitioner on July 28, 1972, by the Secretary of the Board was "Assault on a student." It is noted here that there is no contention by the Board that this was not the same basic charge which had been considered previously by the Court as "atrocious assault," and it is clear that the evidence educed was essentially parallel in both hearings.

At the conclusion of the hearing, the following summary statement and resolution were approved by the Board:

> "[S.T.], Age 16, Student, Grade 11, Senior High School
>
> "At an official hearing of the Board of Education, conducted on September 13, 1972, charges were heard with regard to [S.T.], age 16, a student at the Neptune Senior High School. Having heard all pertinent testimony to be offered and having thoroughly evaluated said testimony in

conjunction with the recommendation of the Superintendent of Schools and all other facets of this case, the Board of Education finds that [S.T.] is guilty of:

"1. Assault on a pupil;

"RESOLUTION:

"Therefore, be it resolved that [S.T.] be excluded from the Neptune Senior High School by official action of the Neptune Township Board of Education. Be it further resolved that Mr. [T.] be: (1) administered a full and complete psychological battery, (2) considered by the Child Study Team for placement in either the Program for Optional Learning or the In-School Adjustment Program, (3) considered for re-evaluation in February of 1973, and considered for reinstatement by the Board of Education. Be it further resolved that to insure that there be no loss of formal education that [S.T.] be placed on home instruction until such time as the psychological battery has been completed and proper placement has been determined."

The present adjudication is dependent on the facts, *supra*, and petitioners aver that these facts lead to only one conclusion; namely, that S.T. having been found "not guilty" as charged in a court of law, on a charge of atrocious assault, could not, at a later date be found guilty and punished on the same basic charge by the Board. Indeed, petitioners aver that the Court's judgment in this matter acted as an estoppel that barred a contrary finding by the Board and, that there were, therefore, no grounds for the conduct of the hearing by the Board on September 13, 1972.

Petitioners buttress this argument with the following citations having relevance to the doctrine of double jeopardy: *Benton v. Maryland*, 395 *U.S.* 784 (1969); *Green v. United States*, 355 *U.S.* 184 (1957); *Richard M. v. Superior Court*, 4 *Cal.* 3*d* 370 (1971); *Ashe v. Swenson*, 377 *U.S.* 436, (1963). Petitioners aver that the principal of collateral estoppel is embodied in the Fifth Amendment guarantees contained in the U.S. Constitution. They further aver that it is "***fully applicable to the states through the Fourteenth Amendment.***" Further, petitioners argue that the Board's action herein was further barred by the doctrine of *res judicata* – a doctrine which, in petitioners' view, should act to prevent multiple court proceedings based on the same violations of law, and, specifically in this matter, the proceeding before the Board on September 13, 1972.

The Board agrees that all citizens, including juveniles, are protected by the U.S. and New Jersey Constitutions against double jeopardy, but avers that both federal and state courts have recognized the power of the State Legislature to impose both a criminal and a civil sanction with respect to the same offense. In support of this contention the Board cites *U.S. ex rel. Marcus v. Hess*, 317 *U.S.* 537; *Helvering v. Mitchell*, 303 *U.S.* 391; *Stone v. U.S.*, 167 *U.S.* 178 *Atkinson v. Parsekian*, 37 *N.J.* 143 (*Sup. Ct.* 1962); *In re Pennica*, 36 *N.J.* 401 (*Sup. Ct.*

1962). In essence, the Board argues that an expulsion or exclusion action, by a board of education, is an administrative procedure pursuant to statutory authority – "Not to punish for a criminal act, but to impose sanctions which are found to be reasonable and necessary in order for it to propoerly conduct its school program." (Board's Brief, at p. 7) Additionally, in the Board's view, the exclusion of petitioner from the regular school program, with a provision for psychological testing and home instruction, is a reasonable and necessary action at this juncture.

* * * *

The Commissioner has reviewed the contentions of the parties reported, *supra*, and determines that the doctrine of double jeopardy is not applicable herein and that the Board was not barred by this doctrine from conducting a hearing on a charge made against S.T. by members of the Board's staff who are entrusted with responsibility for the supervision of pupil conduct and behavior while such pupils are in the schools or immediately adjacent thereto. It has been held by the Supreme Court of New Jersey that acquittal in a criminal matter does not prevent a departmental trial. *In Borough of Park Ridge v. Salimone*, 36 *N.J. Super.* 485, affd. 21 *N.J.* 28, the Court said:

> "***The second charge arises from substantially the same factual matter as the indictment. But the *acquittal in the criminal case does not stand in the way of the departmental trial.* The proceedings are entirely *independent of each other.*" (at p. 498) (*Emphasis ours.*)

Such proceedings as the Board conducted in the matter *sub judice* are disciplinary, or civil in nature and not criminal. *Kravis v. Hock*, 137 *N.J.L.* 252; *Schwarzrock v. Board of Education of Bayonne*, 90 *N.J.L.* 370. And, the quantum of proof necessary to obtain conviction is a different one. In this regard, the Supreme Court said in *Kravis v. Hock, supra:*

> "*** Under the disciplinary proceedings instituted against petitioner, to justify her conviction, respondent was only required to establish the truth of said charges by a preponderance of the believable evidence and not to prove her guilt beyond a reasonable doubt.***" (at p. 254)

Since the quantum of proof in the Board's hearing differed from the Court's hearings and since there was no possibility that imprisonment could result from the Board's hearing, there was, in the Commissioner's judgment, no estoppel from the conduct of the Board's hearing by the doctrine of double jeopardy. See also *Victor De Bellis v. Board of Education of the City of Orange, Essex County*, 1960-61 *S.L.D.* 148.

Accordingly, the Commissioner finds no reason to reverse the Board's action on such grounds.

However, on the evidence contained in the file of this case, there is a question that must be raised as to the severity of the punishment which the Board adjudged as proper in this instance. The punishment of "exclusion" from

school for a period of five full months, half of a school year, is mitigated somewhat by a provision for home instruction; but, it remains as a serious penalty to be assessed in the context of the facts, *supra.*

Faced with a similar question in *Jeffrey Pasko v. Board of Education of the Borough of Dunellen,* 1961-62 *S.L.D.* 188, the Commissioner was constrained to refer again to a fundamental proposition by Sir William Blackstone in his *Commentaries on the Laws of England* (Edition by George Chase) to the effect that offenses against one's fellow man are best prevented "*** by the certainty rather than the severity of punishment.***"

While the Board has mitigated S.T.'s punishment of "exclusion" by providing an alternate form of instruction, it appears to the Commissioner that a reexamination is now in order. The finding of not guilty by the Court, *supra,* viewed in *pari materia* with S.T.'s prior record, which, to the Commissioner's knowledge, contains no incidents of a serious nature, are reasons which should cause the Board to expedite the administration of examinations it proposes, and to hear and consider the report of its child study team at an early date. Accordingly, the Commissioner directs that the Board order such examinations as its child study team deems appropriate forthwith and that a report be rendered to the Board within a period of thirty days from the date of this decision. (See *John Scher v. Board of Education of the Borough of West Orange,* 1968 *S.L.D.* 92, 96)

The Commissioner further directs that the judgment of the child study team be considered, at that juncture, by the Board, and that the present "exclusion" of S.T. be tempered, if not clearly inimical to the welfare of other students in the schools of Neptune Township, in ways that the team recommends, or ended if, in the team's judgment, such termination would be desirable.

Accordingly, the Commissioner remands this matter to the Board for consideration, and he will maintain jurisdiction pending notice of the outcome of the Board's determination.

COMMISSIONER OF EDUCATION

October 6, 1972

Thomas Cluff, John James Angier, Nancy Graham Vona, Donna Gaver Massey, Dorothy Elwell Sheehan, Diane Lafferty Goldren, Karen Sheppard Douglass, Joan Church Burkhardt, Linda Maurer Gordon, Helen Tyree Richardson, Alex Oxendine, Carol Van Fossen Ortman, Carol Parker Boyd, Florence Dubin Nash, David Souder, Carolyn Chase Souder, Robert Roth, David Brown and Linda De Hart Hickman,

Petitioners,

v.

Lower Cape May Regional High School Board of Education,

Respondent.

COMMISSONER OF EDUCATION

DECISION

For the Petitioners, Nathan W. Davis, Jr., Esq.

For the Respondent, Hayman & Gorelick (Maurice M. Hayman, Esq., of Counsel)

Petitioners, members of the 1962 graduating class of Lower Cape May Regional High School, hereinafter "class," allege that the Lower Cape May Regional High School Board of Education, hereinafter "Board," has withheld certain moneys deposited with it, in trust, for a specified use by the class. Petitioners pray that the Commissioner order the Board to release said moneys, plus interest and costs. The Board, however, denies that these moneys are deposited in trust and requests dismissal of the Petition.

A hearing was conducted in this matter at the office of the Cape May County Superintendent of Schools, July 10, 1972, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioners called four witnesses to testify in support of their allegations: the president of the class; the faculty advisor; and two members of the class. The hearing examiner observes that with the exception of the faculty advisor, the other three witnesses are petitioners in the action *sub judice*. Collectively, their testimony reflects the following:

Since enrollment in the Ninth Grade of high school, the class had undertaken various Board-sponsored (Tr. 12), fund-raising activities such as dances, cake sales, and car washes, the proceeds of which constituted a class fund, hereinafter "fund." These moneys, in addition to class dues, were turned over to the principal who then deposited them in a pupil-activity fund for the purpose of financing the senior class trip to Washington, D.C. Testimony was educed that during the course of the class' four years at the High School, withdrawals were made from the fund upon requests approved by the principal

or Superintendent, both of whom, in addition to the principal's secretary, were authorized to sign checks on the fund account. (Tr. 7, 77, 103)

During 1961-62, the senior year of the class, the fund became sufficiently solvent to finance the senior class trip to Washington, D.C., and to purchase a class gift for the school. After the expenditure of moneys for those two ventures, a balance of $608.27 remained. Testimony of the former class president alleges that the class, at one of their meetings, determined by recorded vote, to use the balance of $608.27 to finance a reunion five or ten years hence. (Tr. 8, 16) Prior to that determination, the class president testified that "approval" to use the balance in that fashion, *ante*, was first obtained from the principal's secretary. (Tr. 9) In support of that assertion, petitioners submitted an affidavit from the class secretary (P-1) which attests to the holding of that class meeting, the vote taken, and the recording of minutes, which were subsequently, it is averred, "*** presented in the office in the second week of June, 1962***." (P-1) The Superintendent and the principal, both of whom have held their respective offices with the Board since 1960, deny any knowledge or administrative approval of the alleged request, *ante*, by the class. (Tr. 79, 101)

The hearing examiner observes that the alleged minutes of the class meeting, *supra*, were not produced at the hearing; no supporting testimony from the principal's secretary regarding her alleged approval was heard; neither the principal, the Superintendent, nor the Board was ever consulted regarding the use of the balance of class funds; and no evidence nor testimony of current or prior Board policy regarding the use of funds realized from pupil activities heretofore mentioned, was produced.

The Board submitted a statement (P-2) enumerating the disposition of class funds from the class *sub judice* to the class of 1971. With the exceptions of the classes of 1962, 1963, and 1970 – the altter class having no fund balance – all other class balances were used to purchase some item *for the school.* The Board avers that neither the class *sub judice*, nor the class of 1963, indicated their desire for the disposition of their class fund balances.

Upon graduation, no communication regarding the balance of funds in dispute, took place between petitioners and the Board, nor its representatives, until January, 1972. (Tr. 53) At that time, a representative of petitioners conferred with the principal and informed him that the time for the class reunion had arrived and requested the sum allegedly being held in trust. The principal, after reviewing the 1962 student activity accounts, confirmed that a balance of $608.27 had existed in the class fund, but disclaimed any knowledge of these moneys being held in trust for the purpose alleged by petitioners. The principal further testified that the balance was subsequently transferred to a "Reserve Account" (Tr. 90, P-2) on the advice of the Board's auditor and was used for various pupil activities of a general nature. (Tr. 90) Petitioners then attended three Board meetings in an unsuccessful attempt to secure the disputed funds for their reunion. Finally, the Board informed petitioners that, on advice of counsel, it had no legal authority to turn over the sum requested. (Tr. 61)

This concludes the factual findings of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the findings contained therein.

A major issue to be determined in the matter *sub judice* is: Does a specific class of pupils that engages in school fund-raising activities under the aegis of a board of education have the authority to dedicate those funds, upon graduation, for use at a future date, without the approval or agreement of that board?

In that regard, the Commissioner observes that *N.J.S.A.* 18A:10-1 provides, *inter alia:*

> "The schools of each school district shall be conducted, by and under the supervision of the board of education***."

With the responsibility of boards to conduct and supervise their schools established by *N.J.S.A.* 18A:10-1, *supra*, the authority for boards to carry out that mandate is provided by *N.J.S.A.* 18A:11-1 which states, *inter alia:*

> "The board shall –
>
> ***
>
> "c. Make, amend and repeal rules, not inconsistent with this title [18A] or with the rules of the state board, for its own government and the transaction of its business***
>
> "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 *** of the public schools of the district."

In addition to a Board's general rule-making authority provided by *N.J.S.A.* 18A:11-1, *supra*, specific statutory responsibility and authority is provided by *N.J.S.A.* 18A:16-1, which states, *inter alia:*

> "Each board of education *** shall employ *** a secretary or a school business administrator to act as secretary***."

The statutory mandate given to secretaries of boards of education is found in *N.J.S.A.* 18A:17-8 which provides, *inter alia:*

> "The secretary shall be the general accountant of the board and he shall:
>
> "a. Collect *** moneys due to the board not payable directly to the custodian of school moneys ***

"b. Examine and audit all accounts and demands against the board and present the same to the board for its approval in open meeting ***

"c. Keep and maintain such accounts of the financial transactions of the district as shall be prescribed by the state board in accordance with the uniform system of bookkeeping presented by the state board ***."

N.J.S.A. 18A:17-10 provides that the secretary of the board of education, in addition to the responsibilities enunciated in *N.J.S.A.* 18A:17-8, *supra*, present to the board at the close of each fiscal year a detailed report of the board's financial transactions during that year.

The Legislature, in its wisdom, saw fit to provide boards of education with a system of 'checks and balances' regarding moneys for which it is responsible and accountable. See *N.J.S.A.* 18A:17-8, *supra*. *N.J.S.A.* 18A:23-1 requires that boards of education secure an annual audit of accounts and financial transactions by a public school accountant. The scope of such an audit is described by *N.J.S.A.* 18A:23-2:

"Each annual audit shall include an audit of the books, accounts, and moneys *** of the board and of any officer or employee thereof *and of moneys derived from athletic events or the activities of any organization of public school pupils conducted under the auspices of the board ***.*" (*Emphasis supplied.*)

In the Commissioner's view, a perusal of the statutes, in *para materia*, *supra*, discloses the Legislature's intention that boards of education be held accountable for and have authority over those funds raised by pupils through various fundraising activities conducted under the "*** auspices of the board." See *N.J.S.A.* 18A:23-2, *ante*. Such a holding is reinforced when *N.J.S.A.* 18A:19-14 is considered concomitantly with *N.J.A.C.* 6:20-2.3:

N.J.S.A. 18A:19-14 provides:

"All funds derived from athletic events *or other activities of pupil organizations* shall be administered, expended and accounted for pursuant to the rules of the state board." (*Emphasis supplied.*)

while *N.J.A.C.* 6:20-2.3 provides:

"*** (b) The budget and cost distribution records [of local school boards] shall include but not be limited to the following ***

"8. Sundry accounts:
- i. Food Services;
- ii. *Student-body activities;*
- iii. Community services;
- iv. Special projects; ***

(*Emphasis supplied.*)

The Legislature, through *N.J.S.A.* 18A:19-14, *ante*, acknowledged that pupil organizations do conduct various fund-raising activities and, further, provided that all funds so raised "*** shall be administered, expended and accounted for pursuant to the rules of the state board."

It is the Commissioner's judgment, therefore, that funds raised by pupils through activities sponsored under the aegis of a board are the ultimate responsibility of that board, including their administration, expenditure and accounting. The Commissioner notices, however, that boards of education are given discretionary rule-making authority by *N.J.S.A.* 18A:11-1, *supra.* Equitable principles require that boards of education develop and periodically review a written statement of policy regarding the use of funds raised by pupils through various activities approved by the Board.

The Commissioner is constrained to observe that no authority can be found, nor was any cited by petitioners, for a high school graduating class to hold a continuing claim, after leaving school, to any balance of class funds allegedly to be used at some future time. In the instant matter, the Commissioner notes that the Board's graduating classes, excepting 1962, 1963, and 1970 had used their class fund balances to purchase some item for the school. This generally accepted practice, however, does not constitute a written statement of policy regarding the use of class or pupil funds.

The Commissioner finds and determines that petitioners have not demonstrated a valid claim against the Lower Cape May Regional Board of Education regarding the balance of 1962 class funds, and further that the Board acted properly and within its discretion by using these moneys for general pupil activities.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

October 12, 1972

**In the Matter of the Tenure Hearing of David Brody,
School District of the Borough of East Paterson,
Bergen County.**

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Charles H. Barlett, Esq.

For the Respondent, Saul R. Alexander, Esq.

Respondent is a teacher who has acquired a tenure status under the provisions of *N.J.S.A.* 18A:28-5 in the School District of the Borough of East Paterson, Bergen County. The complainant Board of Education, hereinafter "Board," received five charges of conduct unbecoming a teacher, made against respondent by the Superintendent of Schools, hereinafter "Superintendent." The Board determined that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary, and thereupon certified said charges to the Commissioner of Education on December 21, 1971, by a majority vote of the full membership of the Board. Respondent was served a copy of the Board's certification, and he was suspended without pay from his duties as a teacher, effective December 22, 1971.

Testimony and documentary evidence were educed at a hearing conducted on June 19, 1972, at the office of the Bergen County Superintendent of Schools, Wood Ridge, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The charges will be considered first *seriatim* and then as a whole.

A brief explanation is necessary for a clear understanding of the charges. Each of the separate allegations of unbecoming conduct by respondent relate to separate individual contacts of respondent with four pupils on November 30, 1971. These individual contacts took place sequentially, following an incident in a narcotics education classroom on the same date of November 30, 1971. The charges and pertinent testimony are arranged in chronological order by their occurrence, in order to provide the clearest presentation of the proofs.

CHARGE NO. 1

"That on November 30, 1971, Mr. Brody entered the Narcotics Education class of Mr. Rowe, eating an ice cream cone, to make an announcement about intramurals. Mr. Brody's eating an ice cream cone while walking through the corridor and entering a classroom is not normal procedure. His entering the Narcotics Education class to make an announcement about intramurals is not normal procedure, and his action in doing so was not professional."

Respondent admits Charge No. 1, *supra.* (Tr. 113) According to respondent, he was finishing his lunch in the cafeteria when the basketball coach entered and joined him at the table. As a result of the conversation which ensued, respondent decided to go immediately to Mr. Rowe's classroom to make an announcement that the intramural games scheduled for that afternoon would be canceled. At this time, respondent was holding an ice cream cone which he had purchased just prior to conversation with the basketball coach. Rather than throw it away, he carried it with him when he walked to Mr. Rowe's classroom. Respondent testified that he knocked on the classroom door and Mr. Rowe signaled him to enter. Respondent stated that he entered the room, stood by the doorway, and asked Mr. Rowe whether he could make an announcement regarding intramural basketball games. Mr. Rowe replied affirmatively and respondent then walked to the front of the classroom and made an announcement that the intramural games scheduled for that afternoon were canceled because the gymnasium would be used by the basketball team. Respondent testified that he held the ice cream cone in his hand during this sequence of events. (Tr. 111-113)

According to respondent, as he was leaving the classroom, he heard one of the Seventh Grade boys, R.F., say "so long, Brod." (Tr. 115) From the area where M.D. and G.B., two other Seventh Grade boys were sitting, he heard G.B. and possibly M.D., say, "so long, Brod" or "Coach Brod." Respondent also heard another one of these Seventh Grade pupils refer to him as "Dave." (Tr. 115, 142) Respondent testified that as he walked out of the classroom, he told R.F. that he would speak to him later about this incident. Respondent stated that he did not want to disrupt the class, therefore he did not say any more, even though he was perturbed by these comments by the pupils. (Tr. 115, 142)

Respondent asserted that in the gymnasium, during physical education classes and sometimes during intramural games, pupils might call him "Coach Brod" and he did not always correct them because of the atmosphere of athletics. In the school building proper, however, respondent stated that pupils do not usually refer to him in that fashion. (Tr. 116) According to respondent, he had on occasion remonstrated some of the Seventh Grade boys because of their use of such a casual form of address to him within the school building. (Tr. 117)

Mr. Rowe testified that respondent was given permission and entered his classroom at 11:50 a.m., and before respondent made the announcement, some pupil or pupils made comments such as "here comes Brod or Brody." Mr. Rowe did not know which pupils made the remarks. (Tr. 81) According to Mr. Rowe, respondent made a statement to the effect of "*** [R.F.] I will talk to you later about that remark ***," and to G.B., respondent said, "you too,***. I will see you later." Mr. Rowe further testified that respondent then made the intramural announcement and left the classroom. (Tr. 82)

One of these Seventh Grade pupils, R.F., testified that when respondent entered the classroom to make the intramural announcement, he said "*** how

you doing, Dave." This pupil also testified that respondent replied, "*** [R.F.] I am going to talk to you later." (Tr. 54)

Another pupil, M.D., testified that he did not say anything to respondent when he entered Mr. Rowe's classroom, but that he heard other boys make remarks such as, "Hi Coach, and Brody, and Dave. ***" (Tr. 5)

A third pupil, G.B., testified that when respondent entered Mr. Rowe's classroom, "*** I called him by his first name. *** I just said bye, with his name." (Tr. 31, 32)

The fourth pupil mentioned in the charges, W.S., testified that he did not address any remark to respondent when he entered Mr. Rowe's classroom, but that he heard one pupil call respondent "Dave." (Tr. 68)

The hearing examiner reserved decision on a Motion for Dismissal of Charge No. 1, *supra*, made by counsel for respondent. Counsel moved for dismissal on the grounds that the incident of carrying the ice cream cone was a trivial incident.

CHARGE NO. 2

"That on November 30, 1971, *** W.S., Grade 7, claims Mr. Brody pushed or shoved him prior to the start of period 5-3 Reading in Miss Szal's room. As a result, he fell over the desk and to the floor."

The pupil, W.S., testified that he left Mr. Rowe's classroom at the end of the class period, went to his locker, and was then going to his next class in Miss Szal's room, when respondent called W.S. to come over to him. When questioned as to what transpired next, W.S. testified as follows:

"***A He [respondent] said come here, and I was afraid, and I started running back, and I tripped over the desk, and he told me not to run in the hall.

"Q. Did Mr. Brody touch you at all that day?

"A. No. ***" (Tr. 62)

Counsel for the Board questioned W.S. as to whether he remembered speaking to the vice-principal on the afternoon of November 30, 1971, and W.S. answered as follows:

"***A. I told him [vice-principal] that when he [respondent] came in the class [Mr. Rowe's classroom] to tell us about the intramurals, that a kid, *** [P.S.], he was calling him [respondent] by his first name, and that when I went to my locker, I was running in the hall, and I went into to (sic) Miss Szal's room, and he [respondent] called me over, and I was running backwards, and I tripped over the desk.***" (Tr. 63, 65)

Counsel for the Board then questioned whether this Seventh Grade pupil was positive that the testimony, *ante*, was what he had related to the vice-principal on November 30, 1971, and to the Board's counsel during the latter part of January 1972. The pupil witness affirmed that he had related the incident in the same manner. At this juncture, counsel for the Board pleaded surprise on the grounds that the testimony of W.S., *ante*, was in conflict with his previous statements to counsel. (Tr. 63, 64)

The vice-principal testified that W.S. came to his office at approximately 2:50 p.m. on November 30, 1971. He further testified that W.S. accused respondent of pushing him in Miss Szal's room, causing him to fall over a desk. (Tr. 71, 74, 75) According to the vice-principal, W.S. was quite excited at the time, but when asked whether he was injured in any way, he replied negatively, and said that he was all right. (Tr. 71) The vice-principal testified that other pupils had come into his office at approximately the same time to report some incident with respondent. (Tr. 73) The vice-principal also testified that, at the time of the incident in Miss Szal's room, W.S. told him that the teacher who was in the classroom, other than respondent, was a student teacher. (Tr. 76)

The principal testified that he became aware of the complaint made by W.S. on December 1, 1971, when he received a report from the vice-principal. The principal testified that W.S. stated to him and the Superintendent that he had been pushed by respondent in the classroom and that he did fall. (Tr. 78, 79)

A pupil witness, G.L., testified that he was standing outside of Mr. Rowe's classroom talking with respondent, after respondent had made the intramural announcement. The period had ended, and W.S. ran past and yelled, "*** Hey Dave, Hey Brod, how is it going.***" (Tr. 172, 175) According to this Eighth Grade pupil, respondent walking quickly, followed W.S. into Miss Szal's classroom. G.L. testified that he saw W.S. running or jogging backwards, and then tripping over a desk and chair. He stated that he observed respondent helping W.S. to his feet, and he heard respndent say, "*** I don't want you to call me these names. ***" (Tr. 173, 175)

A second Eighth Grade pupil, P.C., testified regarding this incident and generally corroborated the testimony of G.L. (Tr. 167-171)

Respondent, testifying in his own behalf regarding Charge No. 2, *supra*, stated his version of the incident as follows: He saw W.S. in the corridor and told him to come over because he wanted to speak to him. W.S. turned and ran down the hall into Miss Szal's classroom. Respondent ran after W.S. and, as W.S. entered the classroom, he reversed himself, ran backwards and fell down. (Tr. 120, 121) Respondent tetstified that he walked over to W.S., helped him to his feet, and told W.S. that he should not refer to him by his first name or any nickname. Respondent stated that he asked W.S. whether he was all right and the pupil replied affirmatively. (Tr. 122) According to respondent, a student teacher was present in the classroom during this incident. Respondent denied having any physical contact with W.S. during this incident. (Tr. 122)

The hearing examiner recommends that Charge No. 2, *supra*, be dismissed for lack of proof.

CHARGE NO. 3

"That on November 30, 1971, *** [G.B.], Grade 7, claims that Mr. Brody grabbed him by the neck and shoved him up against a locker."

Respondent testified that, immediately following the incident regarding W.S. in Miss Szal's classroom, he turned around and observed G.B. and M.D. sitting behind him and laughing. According to respondent, he asked these two pupils to step outside the classroom into the hallway, because he wanted to speak to both of them. Before speaking to G.B., respondent averred, he asked M.D. to stand by the boys' room, directly across the hallway, so that M.D. would not overhear his conversation with G.B. (Tr. 125) Respondent testified that he stepped into the hallway while G.B. was opening his locker near the classroom doorway. Respondent stated that he placed his hand on G.B.'s shoulder and told him that he wished to talk to him. G.B. turned around, according to respondent, and respondent told him that he had been rude in Mr. Rowe's classroom when he called respondent "Dave, or Coach Brod," and he did not want to hear anything like that from G.B. again. Respondent testified that the pupil told him he was sorry and said it would not happen again. (Tr. 126, 127) Respondent then described the physical contact with G.B. as follows:

> "***A. While I was speaking with *** [G.B.], he was moving around. He was a little nervous, and embarrassed from what he did, and he was moving around, and while he was moving, in order to stand him still, I kind of grabbed him by the shirt, up around – right around here, and just making him stand still.***" (Tr. 127, 128)

The hearing examiner observed respondent demonstrate this physical contact by placing his hand on his shirtfront at the base of the neck. When respondent was asked by counsel whether his hand had come in contact with the flesh of G.B.'s neck, respondent testified it had not. (Tr. 128)

The pupil, G.B., testified that respondent placed his hand on the front of his (G.B.'s shirt below the base of the neck. (Tr. 34) The hearing examiner observed this deomonstration, and noticed that G.B. placed his hand below the front of the shirt collar. G.B. testified that respondent told him not to call him by his first name again. G.B. testified further, that later in that same school day, respondent approached him and apologized for being "so mad and rough." (Tr. 34)

Respondent testified that he did speak to G.B., not to apologize, but to assure him that he held no grudge as the result of having to admonish him. According to respondent, the pupil responded by smiling and thanking him. (Tr. 128)

A teacher of English for Grades Seven and Eight testified that she was supervising at the door to her classroom at approximately 12:36 p.m., just prior

to the beginning of the class period, when she witnessed the incident involved in Charge No. 3, *supra*, This teacher testified as follows:

> "***A. *** The time was approximately twelve-thirty-six, twelve-thirty-seven. It was before the beginning of period five-three.
>
> "I was supervising the area by my door, and I just unlocked the door, and I witnessed Mr. Brody grab *** [G.B.] by the neck, and push him against the lockers.***" (Tr. 39, 40)

This teacher witness testified that respondent did not place his hand on G.B.'s shoulder. She demonstrated the physical contact by placing her hand on the front of her throat above the collar area. (Tr. 40, 44) According to this teacher, G.B. was then released by respondent and walked back into Miss Szal's room, while respondent crossed the hallway and entered the boys' lavatory room. (Tr. 44)

CHARGE NO. 4

> "That on November 30, 1971, *** [M.D.], Grade 7, claims that said Mr. Brody, Physical Education Teacher, grabbed him by the neck in the boys' room."

This pupil testified that, following the incident in Mr. Rowe's classroom, he was walking to his next class in Miss Szal's room, when respondent saw him in the hallway and told him to go into the boys' room. (Tr. 6) Under cross-examination, M.D. responded as follows to this question:

> "***Q. And did Mr. Brody say to you to wait for him in front of the boy's (sic) room? Isn't that what he said to you?"
>
> "A. No. No. He said to get in the boy's (sic) room, and wait for me in there. ***" (Tr. 9)

The same question was then repeated and M.D. repeated his negative answer. When asked to describe what transpired in the boys' room, M.D. testified as follows:

> "***A. He grabbed me right, you know, around here, on the shoulder, and he started yelling, like what did I call him, and so I said nothing. There must have been a few kids around where I was sitting. [in Mr. Rowe's classroom] So he asked me again, and I kept on saying nothing.
>
> "Q. What did he ask you?
>
> "A. It was what did I call him, and so like I was, you know, trying to back away, you know, and so while I was, I like hit the wall, and so then he let me go, and a few nights later he called my house and he apologized.***" (Tr. 7)

This pupil testified that respondent then told him that he could leave the boys' room, so he went immediately to his next class in Miss Szal's room. (Tr. 8) When questioned under cross-examination as to whether he was hurt in any way by respondent, M.D. replied, "No. I was scared." (Tr. 11) M.D. testified that he reported this incident to the vice-principal at the end of the school day. (Tr. 12)

The teacher of English who previously testified to witnessing the incident between G.B. and respondent, stated that she observed resondent cross the hallway and enter the boys' room. (Tr. 44) This teacher testified that she also observed M.D. coming out of the boys' room approximately thirty seconds after respondent entered. (Tr. 44) When asked to describe M.D.'s condition at that specific instant, the teacher replied:

> "***A. Well, *** [M.D.] came outside of the boy's (sic) room. He appeared to be very upset. His face was very red, and it appeared to me as though he was going to cry – ***" (Tr. 45)

This witness stated that respondent walked out of the boys' room immediately behind M.D. and M.D. then walked into Miss Szal's classroom. (Tr. 45, 46)

The hearing examiner asked M.D. to demonstrate the physical contact with respondent, and the pupil took hold of counsel's shoulder by way of demonstration. (Tr. 13)

A pupil witness, G.L., testified that he entered the boy's room after respondent, and he observed respondent touching M.D. and M.D. backing away. (Tr. 14) G.L. overheard respondent telling M.D., "*** I don't want you to call me this name ***." (Tr. 15) When asked to demonstrate how respondent touched M.D., this pupil witness placed his hand on the shoulder of counsel and stated:

> "***A. He [respondent] grabbed him, you could say grabbed, like right around here, and he said that I don't want you calling me, and then I heard Brod' David like that. ***" (Tr. 16)

A second pupil witness, B.R., testified that he was inside the boys' room prior to the entrance of M.D. and respondent. (Tr. 20) B.R. testified as follows regarding this incident:

> "***A. Mr. Brody was holding him [M.D.] by the arm, and he was like telling him not to call him by his first name, or hey Brod', nothing like that anymore. (Tr. 21)
>
> "Q. Did *** [M.D.] try to get away from Mr. Brody?
>
> "A. Yes; he walked away, and Mr. Brody pulled him back. ***" (Tr. 21)

This pupil witness demonstrated how he observed respondent holding M.D. by the arm, by taking hold of counsel's upper arm above the bicep area.

B.R. also demonstrated how respondent pulled M.D. He held counsel's upper arm and exerted a pulling motion. The witness stated:

> "*** By the arms; he pulled *** [M.D.]. *** [M.D.] was walking away from him, and he pulled him back, like this. [demonstrating] (Tr. 22)

Respondent testified that he told M.D. to stand by the boys' room and he denied instructing M.D. to go inside of the boys' room. (Tr. 125) Two pupil witnesses, G.L. and C.D., corroborated this by testifying that they overheard respondent instructing M.D. to meet him by the boys' room. (Tr. 108, 109) Respondent's version of the incident is as follows:

> "***A. Well, I turned and walked toward the boy's (sic) room door to speak with *** [M.D.]. He wasn't there. So I opened the door to the boy's (sic) room and he was walking toward the back of the boy's (sic) room. So I called him and he went on walking. So I walked over to him, and I put my hand on his shoulder, and in a very similar manner as I had done to *** [G.B.], he turned around, and I started to talk to him. However – and told him the same thing, that I don't want to be called by my nicknames, Coach Brod', or Dave, and I didn't care to be referred to in that manner, and as I was talking to*** [M.D.] he started to walk away, a little bit from me, and as I remember, to the best of my knowledge, I might have held him by the arm, as he started to walk away from me, and he apologized, and he walked out of the boy's (sic) room. ***" (Tr. 129)

CHARGE NO. 5

"That on November 30, 1971, *** [R.F.], Grade 7, claims that he was grabbed by the neck and picked up off his feet by Mr. Brody. *** [R.F.] stated that he called Mr. Brody 'Brod.' *** [R.F.] also stated that he has been 'elbowed' by Mr. Brody during study period."

As was previously stated under Charge No. 1, *supra*, R.F. testified that when respondent entered the classroom to make the announcement regarding intramural games, R.F. said to respondent, "*** how you doing, Dave." R.F. also testified that respondent replied, "*** [R.F.] I am going to talk to you later." (Tr. 54)

R.F. stated that he met respondent at approximately 1:55 p.m. when he left Miss Szal's classroom at the end of that class period. R.F. described the next incident as follows:

> "*** A. He said I couldn't play intramurals anymore, and first like he took me by the arm, and brang (sic) me into one of the other teacher's classes, where some kids were in, and like I was against the wall, and he put his hand on my chest, and just shoved me there, and say (sic) I couldn't play intramurals anymore, basketball, because (sic) calling him by his first name. ***" (Tr. 56)

R.F. demonstrated how respondent grabbed him by the arm, and held him. The pupil placed one hand on his upper arm, above the bicep, to demonstrate how respondent had seized him. He then placed his opened hand on his upper chest, below the collar, to demonstrate how respondent held him against the wall.

When questioned, R.F. admitted that he also had called respondent "Brod." (Tr. 58) R.F. testified that he was not angry because respondent had physically seized him, but he resented being told he could not participate anymore in intramural basketball. (Tr. 59) Several days after this incident, R.F. stated, he related the matter to his parents. (Tr. 60)

Respondent testified that he saw R.F. walking down the hallway approximately two and one-half hours after the incident which occurred in Mr. Rowe's classroom. (Tr. 157) Respondent's version of what transpired is as follows:

> "***A. *** when I saw him [R.F.] my memory came back to the fact that he was also in that classroom [Mr. Rowe's], and being that he was the most vociferous, and the one that I remember the most in calling me Dave, or Coach Brod', I thought that when I saw him at that time it would be a good time to square him away as far as using my name like that, and I thought I had talked to the other boys, I might as well talk to him, which is what I did.***" (Tr. 131)

Counsel for respondent next asked him whether, after hearing the testimony of R.F., he generally admitted or denied the assertion made by R.F. that respondent had grabbed him by the arm and placed his hand on R.F.'s chest. Respondent replied, "Generally I admit them." (Tr. 132)

Respondent testified that he held R.F. in a friendly manner, because he is fond of R.F. (Tr. 158) He further explained that he has this type of friendly rapport with many boys in the school.

The hearing examiner reserves decision on a Motion for Dismissal of Charge No. 5, *supra*, made by counsel for respondent. In view of the fact that no testimony was offered by way of proof of the second sentence of this charge, *supra*, the hearing examiner strikes this portion of charge No. 5, *supra;* namely, that R.F. has been "elbowed by respondent during a study period.

This concludes the report of the hearing examiner.

* * * *

The Commissioner, having reviewed the report of the hearing examiner as set forth above and the record in the instant matter, concurs with the findings of fact set forth therein.

From his review of the record, the Commissioner finds that Charge No. 1 is sustained. Respondent did, in fact, enter another teacher's classroom carrying an ice cream cone, for the purpose of making an announcement concerning an intramural basketball contest. The Commissioner agrees that both actions were improper. A thoughtful teacher would not interrupt another teacher's classroom instruction for such a purpose, but would instead utilize one of several more orderly means of conveying the message.

The Commissioner notices that all of the additional charges against respondent evolve from this single episode. It is logical to conclude that the sight of respondent entering a classroom while a class was in session and carrying an ice cream cone, a practice uniformly forbidden to pupils, encouraged and inspired these Seventh Grade pupils to greet respondent by using most informal appellations.

In regard to Charge No. 2, the Commissioner agrees with the recommendation of the hearing examiner and hereby dismisses this Charge for lack of proof.

It is clear that Charge No. 3 is true. Although there are variations in the details of the testimony produced by respondent and the involved pupil, respondent admits the physical contact with G.B. The impartial testimony of the English teacher who witnessed the incident verifies the truth of this charge of improper conduct.

Respondent admits to physical contact with M.D. in regard to Charge No. 4. The testimony is contradictory whether respondent instructed M.D. to wait for him outside of the door to the boys' room or inside the boys' room. The evidence is conclusive that respondent did seize M.D., first by the shoulder and then by his upper arm. The Commissioner finds respondent guilty of unwarranted and improper conduct in regard to Charge No. 4.

The allegation of the first part of Charge No. 5, and the supporting testimony of the pupil, R.F., are generally not denied by respondent. The allegation set forth in the second part of this Charge is unsupported by any evidence, and was properly dismissed by the hearing examiner. The Commissioner finds the first part of this Charge to be true.

All of the individual incidents which comprise the five charges against respondent occurred on the same day, namely November 30, 1971. The incidents between respondent and four Seventh Grade pupils were a direct outgrowth of the classroom episode; wherein respondent entered carrying an ice cream cone and interrpupted class instruction in order to announce the cancellation of intramural basketball contests scheduled for that afternoon. In the judgment of the Commissioner, it was respondent's own conduct that inspired these thirteen-year-old pupils to greet him by using informal nicknames. By his own testimony respondent admits that pupils had addressed him with the same terminology on previous occasions, particularly in the school gymnasium. In the narcotics class incident, the pupils were obviously teasing respondent, as

thirteen-year-old pupils are sometimes wont to do. Respondent's immediate response of stating that he would talk to some of these pupils later, played into the hands of the pupils, and proved that they had aroused him. The subsequent spectacle of respondent, a young physical education teacher, chasing a pupil down the corridor into a classroom, and laying hands on three other pupils, at first amused the pupils, but finally resulted in each of them reporting to the school administrators that respondent had physically abused them.

Respondent states in the pleadings and in his testimony that the admitted incidents resulted from the actions of the pupils who addressed him in an "insulting and demeaning fashion." (Respondent's Answer, p. 1) The Commissioner does not agree. On the contrary, respondent's actions, considered as a whole, were totally improper and constitute conduct unbecoming a teacher.

The Commissioner is aware that teachers differ in their abilities to secure and maintain the obedience and respect of their pupils, but it is essential that every teacher conduct himself with dignity at all times. In this specific case, respondent's actions and reactions were wrong and improper in every instance, and constituted irresponsible professional behavior and cannot be condoned.

In a previous decision, *In the Matter of the Tenure Hearing of Jacque Sammons, School District of Black Horse Pike Regional, Camden County*, decided June 12, 1972, the Commissioner issued the following caveat:

> "*** He is constrained to remind the teachers of this State *** that they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. *This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.* As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. ***" (at p. 41) (*Emphasis added.*)

The use of corporal punishment and physical force in the public schools has been prohibited by statute since 1867 in this State. (*N.J.S.A.* 18A:6-1)

In the previous decision of *In re Fulcomer*, 1962 *S.L.D.* 160, remanded State Board of Education, 1963 *S.L.D.* 251, decided 1964 *S.L.D.* 142, affirmed State Board of Education 1966 *S.L.D.* 225, remanded 93 *N.J. Super.* 404 (*App. Div.* 1967), decision on remand 1967 *S.L.D.* 215, the Commissioner held that by the enactment of this statute over one hundred years ago, the New Jersey Legislature subscribed to the philosophy that:

> " '*** an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another although no actual physical

harm be done.' (*Teacher Liability for Pupil Injuries*, National Education Association of the United States, p. 8)***" (at p. 162)

See also, *In the Matter of the Tenure Hearing of Pauline Nickerson*, 1965 *S.L.D.* 130; *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 *S.L.D.* 185; *In the Matter of the Tenure Hearing of Thomas Appleby*, 1969 *S.L.D.* 159; *In the Matter of the Tenure Hearing of Victor Lomakin*, decided by the Commissioner of Education July 29, 1971.

The Commissioner further stated in *Fulcomer*, *supra:*

"*** that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail, there is always a resort to removal from the classroom or school through suspension or expulsion. *** While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control. ***" (at p. 162)

The Commissioner clearly stated his judgment in *Nickerson*, *supra*, that:

"*** Parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers, and teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty. ***" (at p. 132)

The Commissioner has concluded, in the instant matter, that respondent has been found guilty of four of the five charges in whole or in part. The remaining matter is a determination of the penalty to be imposed. In reviewing the record, the Commissioner notices that the Board had reemployed respondent for the 1971-72 school year, thus granting him a tenure status. Also, no charges are brought against respondent other than those surrounding the incident of November 30, 1971. It is logical to conclude that respondent's reemployment for 1971-72 and subsequent attainment of a tenure status resulted from favorable recommendations by the school administrators to the Board of Education. After weighing all of the factors in this case, the Commissioner finds that the penalty of dismissal is not warranted in this specific instance. However, the unbecoming conduct of respondent does deserve a penalty lesser than dismissal.

The Commissioner determines, therefore, that respondent David Brody shall be reinstated as a teacher in the School District of the Borough of East Paterson, Bergen County, and further that he shall receive a reduction in salary, which shall be equivalent to four months of his salary, during the 1971-72 school year. Respondent's salary at the time of reinstatement shall be at the same rate he would have received in uninterrupted service. All other wages which have been withheld from respondent shall be remunerated to him at the next

regular date of salary payment, such remuneration to be mitigated by all earnings which respondent received for other employment during the school year periods beginning December 22, 1971, and ending with the date of this decision.

COMMISSIONER OF EDUCATION

October 16, 1972

Evelyn Lenahan,

Petitioner,

v.

Board of Education of the Lakeland Regional High School District, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION ON MOTION FOR SUMMARY JUDGMENT

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Slingland, Bernstein & Van Hartogh (Nathan Bernstein, Esq., of Counsel)

Petitioner, a school nurse with tenure, employed for fourteen years by the Lakeland Regional Board of Education, hereinafter "Board," filed a Petition of Appeal before the Commissioner of Education on June 1, 1972. Petitioner who holds a master's degree, alleges that the Board acted improperly in the determination of her salary for the 1972-73 school year. She alleges that the Board failed to place her on the proper level and step of the 1972-73 teachers' salary guidy in accordance with her training and experience. The Board answers that, in good faith and with good reason, it properly placed petitioner on a salary guide other than the guide for teachers. The Board denies each of petitioner's allegations, and requests dismissal of the Petition of Appeal.

On June 9, 1972, Assembly Bill No. 623, *Chapter* 29, *Laws* of 1972, supplementing *Title* 18A, *N.J.S.A.*, was signed into law. The full text of that law, hereinafter referred to as the "Act," is herewith reported:

"AN ACT concerning compensation of school nurses and supplementing chapter 29 of Title 18A of the New Jersey Statutes.

"BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

"1. Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experiences steps and training levels that apply to teachers.

"2. This act shall take effect July 1 next following its enactment."

Subsequent to the passage of the Act, petitioner filed Notice of Motion for Summary Judgment in her favor. The Board thereafter filed its Answer in opposition to that Motion. Oral argument was heard at the State Department of Education, Trenton, on August 16, 1972, by a hearing examiner appointed by the Commissioner.

Petitioner argues that Summary Judgment should be granted on the grounds that the controversy contained within the original Petition is controlled by the Act which now mandates boards of education to compensate school nurses on the same salary guide as teachers are compensated, according to individual training levels and experience. Petitioner points out that the effective date of the Act is July 1, 1972, and argues that the legislative intent is clearly to "*** Pay the nurse according to the provisions of the teachers' salary guide in effect in that school district at that particular time.***" (Tr. 9)

The Board denies petitioner's assertion in that regard and argues that the Act applies only to those school nurses whose salaries are to be fixed by a board after July 1, 1972. In the matter *sub judice*, the Board asserts that since petitioner's salary had already been established prior to July 1, 1972, the provisions of the Act are not applicable to the 1972-73 school year. The Board recites the chronology of activities required for budgets and appropriations by *N.J.S.A.* 18A:22, *et seq.*; namely, a board must prepare its yearly school budget, arrange the public hearing at which it is presented, publicly advertise the proposed budget, and, finally, submit the budget to the vote of the electorate. The Board avers that because the Legislature, in its wisdom, did not see fit to include a provision for additional funds, which would be necessary had it intended the Act to be interpreted as petitioner argues, the only interpretation the Legislature intended is:

"*** This statute is prospective and it means that after *July 1, 1972 every board of education in its next salary guide* when adopted must provide that a nurse shall receive, assuming that she qualifies, the same amount of money as the teacher***." (*Emphasis supplied.*) (Tr. 13)

Should the Act be interpreted in any other way, the Board asserts, chaos would result in every school board's budget in New Jersey – simply because boards of education have already determined their budgets for the 1972-73 school year.

Petitioner argues that the Legislature was in fact, aware that the Act would require additional moneys and that that was the reason the Act received

legislative approval; "*** to [place school nurses] on the same salary scale as teachers. ***" (Tr. 24)

The Board relies on *N.J.S.A.* 18A:29-5 and 18A:29-15 regarding minimum teacher salaries and teacher salaries in force in *pari materia* to support its position that the Act is propsective and not applicable to the 1972-73 school year. Finally, the Board asserts that petitioner is no longer in the employ of the Board because "*** She was offered a contract and refused it because of the amount involved.***" (Tr. 15)

Petitioner objects to the Board's argument, *ante*, that she is not employed by the Board because of her refusal to sign a "*** so-called contract offer ***." (Tr. 15) The only way to eliminate an employee with a tenure status, petitioner argues, is according to the provisions of the law. (*N.J.S.A.* 18A:25-6, *et seq.*) (Tr. 16) This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the findings contained herein.

Initially, the Commissioner opines that the Board's allegation that petitioner is no longer in its employ, because of her failure to sign a proffered contract, is totally without merit. The tenure status that petitioner holds is authorized by law, *N.J.S.A.* 18A:28-5, and such status can only be terminated according to the provisions of law. There is no requirement in the law, that a teaching staff member who has acquired tenure, must sign a contract each year. *De Simone v. Board of Education of the Borough of Fairview*, 1966 *S.L.D.* 43, 46

The central issue to be determined, therefore, in the matter herein, is the legislative intent with respect to the manner and time of the Act's application.

Petitioner avers that the application of the Act should provide her with immediate relief by placing her on the proper level and step of the Board's salary guide. Such determination, petitioner asserts, should be made for the 1972-73 school year. The Board argues that the Act was intended by the Legislature to be effective for the 1973-74 school year.

Prior to a determination on the legislative intent of the Act, the Commissioner believes it important to point out that a school nurse, by statute, is considered a teaching staff member. *N.J.S.A.* 18A:1-1 provides *inter alia*, that:

> "*** 'Teaching staff member' means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school *** *and includes a school nurse.*" (Emphasis supplied.)

The Commissioner discerns no distinction between a school nurse who, in fact, teaches and one who does not. While it is recognized that a school nurse who has received a "school nurse certificate" pursuant to *N.J.A.C.* 6:11-6.51 is authorized to teach first aid, home-nursing and areas related to health, such assignment is wholly within the authority of local boards of education. See *N.J.S.A.* 18A:40-1 and *N.J.A.C.* 6:29-3.2. In the Commissioner's view, therefore, a school nurse with an appropriate certificate is a teaching staff member as defined in *N.J.S.A.* 18A:1-1, *supra*, whether or not the school nurse does, in fact, teach.

Finding that a school nurse is, *de jure*, a teaching staff member, the legislative intent of the Act becomes more lucid. It provides, *inter alia*, that a school nurse who holds a standard school nurse certificate shall be paid "*** according to *** the same experience steps and *training levels that apply to teachers* ***" in that district. (*Emphasis supplied.*) In that regard, the Commissioner observes that a school nurse may obtain a "standard school nurse certificate" with or without having a minimum bachelor's degree. See *N.J.A.C.* 6:11-6.52 It is pointed out that effective July 1, 1975, an applicant for the school nurse certificate will be required to possess a bachelor's degree based upon a four-year curriculum in an accredited college. *N.J.A.C.* 6:11-12.9 At this juncture, the Commissioner also takes note that at one time a graduate of a two-year, and then later a three-year, "normal school" program was eligible for a teacher's certificate. (See *New Jersey School Laws and Rules and Regulations Prescribed by the State Board of Education*, 1925 edition, at p. 392; *New Jersey School Report*, 1930, at p. 215) Furthermore, in certain instances today, a minimum bachelor's degree is not a requirement for a teacher's certificate. See *N.J.A.C.* 6:11-8.5 and 6:11-12.3 It is evident, therefore, that a "teaching staff member" may obtain a certificate with or without a bachelor's degree.

In 1963, the New Jersey Legislature, through its enactment of *Laws* 1963, *Chapter* 164, *Sections* 2, 3, addressed the issue of payment of teachers' salaries, recognizing that teachers holding certification, also held various "experience steps and training levels." That law, now *N.J.S.A.* 18A:29-7, provides:

> "Except as hereinafter provided, the salary schedule for an academic year in this state:
>
> "1. For a member who does not hold a bachelor's degree or its equivalent and who is employed as a school nurse shall be as provided in column A below;
>
> "2. For a member who does not hold a bachelor's degree or its equivalent and is not employed as a school nurse shall be as provided in column B below;
>
> "3. For a member who holds a bachelor's degree or its equivalent shall be provided in column C below;

"4. For a member who holds a master's degree or its equivalent shall be as provided in column D below; and

"5. For a member who has six years of training or who holds a doctor's degree shall be as provided in column E below:

SALARY

"Years of Employment	A	B	C	D	E	Empl*** Incr***
1	$4,400.00	$4,400.00	$4,700.00	$5,000.00	$5,300.00	*
*	*	*	*	*	*	*
11	6,900.00	6,900.00	*	*	*	
12	*	*	7,450.00	*	*	*
13	*	*	*	8,000.00	*	*
14	*	*	*	*	8,550.00	250.00"

In the Commissioner's view, such enactment, *ante*, is demonstrative of the legislative awareness of the variance in *formal training* of teachers holding certificates. Accordingly, Schedule B, *ante*, was created for those teachers who, although certified (through normal school training), lacked a bachelor's degree; while Schedule C, *ante*, was provided for those teachers who were certified and who held a bachelor's degree.

There is little question that all of New Jersey's operating school districts compensate teachers at rates higher than those mandated by *N.J.S.A.* 18A:28-7, *supra.* Still, it is recognized that each of the districts, *ante*, has individual guides which provide for several basic training levels, with each level having its own salary experience increments. Generally, each guide has four, five and six-year training levels with a bachelor's degree usually required for the fourth-year level and, with additional training required for fifth and sixth-year levels. Over 200 boards of education still include, however, a non-degree guide for "teaching staff members" without a degree in their employ. Other boards allow teachers with an "equivalency" in lieu of an actual bachelor's degree to be compensated at the four-year level. (Source: New Jersey School Boards Association)

In arriving at an adjudication of the issues presented herein, the Commissioner is mindful of the Court's admonition regarding statutory construction and interpretation articulated in *Capute v. Best Foods, Inc.* 17 *N.J.* 259:

"*** We are concerned here not with what the Legislature meant to say, but the meaning of what it did say.***" (at p. 263)

In the matter *sub judice*, the Legislature said that a school nurse holding a standard school nurse certificate shall be paid according to the experience steps and training levels that apply to teachers in each respective district.

Accordingly, the Commissioner determines that the legislative intent of the Act is as follows: a school nurse holding a standard school nurse certificate

and a bachelor's degree, or an academic degree higher than a bachelor's, shall be compensated in the same manner as any other teaching staff member holding a parallel degree or parallel level of training. Placement on the proper step of the salary guide shall be determined in the same manner as placement is determined for any other teaching staff member. A school nurse who holds a standard school nurse certificate, but who does not hold a bachelor's degree, is to be compensated according to the non-degree teachers' salary guide in effect in each respective district. If a non-degree teachers' salary guide does not exist in a district, such a category must be created and its compensation rates determined according to proper negotiating procedures, or the Board may alternatively compensate all school nurses holding the appropriate certificate at the level set for a teaching staff member with a bachelor's degree.

Having thus determined the application of the Act, it remains for the Commissioner to address and resolve the date the Act shall take effect. The Board asserts that the Legislature intended the Act to become effective for the 1973-74 school year, not for the current school year. With this view the Commissioner cannot agree. Section 2 of the Act states:

> "*** This act shall take effect July 1 *next following its enactment.*" (*Emphasis supplied.*)

The Act was signed into law on June 9, 1972. Section 2, *ante*, is an explicit statement of legislative intent, that as of July 1, 1972, the Act shall go into operation. The choice of July 1 as an effective date indicates a desire that the ensuing school year should be included within the coverage of this statute. By specifying an "effective date," the Legislature has declared that school nurses shall be compensated according to the rate established by the statute. If this had not been the intention of the Legislature, Section 2 of the statute would have been worded so that presently existing contracts would be exempt for the 1972-73 school year. *Capute,supra* The Legislature of New Jersey has the power to alter contracted obligations of local school boards with private parties, so long as the change is assented to by the private parties. *City of Worcester v. Worcester Consolidated R.R. Co.*, 196 *U.S.* 539, 551-52 (1905); *City of Trenton v. State of New Jersey*, 262, *U.S.* 182 (1923). In the instant matter, the Commissioner finds it reasonable to assume that school nurses assent to modifications of their contractual rights. Therefore, the Commissioner determines that school nurses who possess standard school nurse certificates, and who are presently working under contracts executed prior to the effective date of this Act, shall be paid "according to the provisions of the teachers' salary guide" in the manner expressed herein.

Accordingly, absent evidence of issues of genuine material fact in the instant matter, Summary Judgment is granted petitioner, and the Board is ordered to place petitioner on the proper level and step of the teachers' salary guide in accordance with her training and experience for the 1972-73 school year. This order is effective as of the effective date of petitioner's duties for the 1972-73 school year, and, furthermore, such order is wholly dependent upon such action being consonant with the Federal Economic Stabilization Program

Regulations. Guidance in that regard should be secured by the Board from the District Director, Internal Revenue Service, Newark, New Jersey.

COMMISSIONER OF EDUCATION

November 15, 1972

Blanche Beisswenger, Ruth Hayford, and Elizabeth Dale, Individually and in Behalf of Others Similarly Situated as a Class (Englewood Teachers Association),

Petitioners,

v.

Board of Education of the City of Englewood, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioners, Theodore M. Simon, Esq.

For the Respondent, Sidney Dincin, Esq.

Petitioners, teachers employed in the Englewood School District, appeal an action of the Board of Education of the City of Englewood, hereinafter "Board," in which the Board withheld a $400 increment from all teachers on the top step of the salary guide for the school year 1970-71. A hearing was held in the office of the Bergen County Superintendent of Schools on November 30, 1971. In addition, Briefs were filed and a deposition was submitted by counsel. Rebuttal testimony to that of a deposed witness was given at the State Department of Education, Trenton, on March 30, 1972, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Petitioners and the Board negotiated an agreement on terms of employment effective July 1, 1969, and terminating June 30, 1971. The salary policy adopted by the Board (P-1) closes with a sentence which is the only issue of disagreement here considered between the parties, and is shown below: (P-1, at p. 25)

"TEACHER SALARY GUIDE

"1969-1970

"Step	Bachelor	Masters	Sixth Year	Doctorate
1	$ 8,000	$ 9,000	$10,000	$11,000
2	8,000	9,000	10,000	11,000
3	8,200	9,200	10,200	11,200
4	8,500	9,500	10,500	11,500
5	9,000	10,000	11,000	12,000
6	9,300	10,300	11,300	12,300
7	9,600	10,600	11,600	12,600
8	9,900	10,900	11,900	12,900
9	10,200	11,200	12,200	13,200
10	10,500	11,500	12,400	13,400
11	10,800	11,750	12,700	13,600
12	11,050	12,000	12,950	13,800
13	11,300	12,250	13,200	14,000

"1970-71

1	8,300	9,300	10,300	11,300
2	8,300	9,300	10,300	11,300
3	8,400	9,400	10,400	11,400
4	8,800	9,800	10,800	11,800
5	9,200	10,200	11,200	12,200
6	9,600	10,600	11,600	12,600
7	10,000	11,000	12,000	13,000
8	10,500	11,500	12,500	13,500
9	11,000	12,000	13,000	14,000
10	11,500	12,500	13,500	14,500
11	12,000	13,000	14,000	15,000
12	12,500	13,500	14,500	15,500
13	13,000	14,000	15,000	16,000

"All on present top step who do not go up a salary step to receive a longevity increase of $400.00 ***."

Petitioners argue that the sentence at the end of the salary guide, *supra*, applies to both the 1969-70 school year and the 1970-71 school year. The Board argues, however, that the word "present" does not mean future and that the $400 increment was intended only for the school year 1969-70. The Board avers that its intent is clearly stated by the word "present" in the salary guide it adopted subsequent to signing the agreement with petitioners.

Petitioners aver that their negotiators discussed with the Board's officers whether or not the $400 increment would be granted for both school years, and they testified that the answers from the Board's officers were affirmative.

The Board denies that an affirmative response was given to any such query and asserts that the $400 increment was discussed only in terms of how it applied to the "present top step."

The Board avers that this $400 longevity increment was a necessary concession during negotiations because the teachers at the top of the salary guide during 1968-69 would otherwise have received only a very small increase in salary for the 1969-70 school year.

Counsel deposed a witness, now retired, who served as coordinator for school community relations during the time of negotiations for the salary policy now in dispute. The coordinator was employed by the Board from 1946 through June 30, 1971.

The testimony of the coordinator was adduced to clarify a statement made in two issues of a pamphlet entitled *Focus on the Englewood Schools*, hereinafter "*Focus.*" The pamphlet is published periodically by the Board and mailed to teachers and other members of the school community. The statement as published in the March and July issues of *Focus* is: (Exhibits B, C)

> "*** A person who does not move at the top step will receive an additional $400 *each year* in longevity." (*Emphasis supplied.*)

The words "each year" in the published articles are quite different, therefore, from the salary guide language which states that the increment is for "all on present top step." (P-1, *supra*)

The coordinator testified that she prepared the *Focus* articles from materials given to her by the Superintendent's office (P-7). The Superintendent does not deny that she obtained materials from his office for *Focus*, but does deny any familiarity with page 2 of P-7, a stapled document, containing the language "each year," and he testifies further that the language is not and never was a part of the salary policy.

It can clearly be seen, therefore, that the testimony of the witnesses is diametrically opposed with respect to the factual issue in dispute.

Petitioners also argue that the salary policy contains ambiguous language in its statement granting a $400 raise to "all on the present top step." Therefore, argue petitioners, whenever any ambiguity arises in a written policy or agreement, the widest interpretation of the language should be used, and the increment should be granted for both years.

The Board disagrees and cites *Naumberg v. Young*, 44 *N.J.L.* 331 (*Supreme Court*, 1882):

> "*** The only safe criterion of the completeness of a written contract as a full expression of the terms of the parties' agreement, is the contract itself. When parties have deliberately put their mutual engagements into writing

in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance; and, consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before or after, or at the time of the completion of the contract, will be rejected. 2 *Taylor on Ev.*, § 1035. If the written contracts purport to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissable. *Hei, Adn'r, v. Heller*, 53 *Wis.* 415. 'If the instrument,' says Chief Justice Erle in Lindley v. Lacey, 'shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence shall be admitted to introduce a term which does not appear there.'***" (at pp. 339, 340)

The Board also cites *Casriel v. King*, 2 *N.J.* 45 (1949). In that decision the Court stated as follows: (at pp. 50, 51)

"*** Even when the contract on its face is free from ambiguity, evidence of the situation of the parties and the surrounding circumstances and conditions is admissable in aid of interpretation. The inquiry is the meaning of the words when assayed by the standard adopted by the law. On the theory that all language will bear some different meanings, evidence of the circumstances is always admissable in the construction of integrated agreements, but not for the purpose of giving effect to an intent at variance with any meaning that can be attached to the words. This is a primary rule of interpretation which has special application where the meaning of the instrument is not clearly apparent. The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing – not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. And the general design of the agreement is to be kept in view in ascertaining the sense of particular terms.***"

And, the Board cites *Newark Publishers' Assn. v. Newark Typographical Union*, 22 *N.J.* 419 (Supreme Court, 1956) as follows:

"*** Evidence of the circumstances is always admissable in aid of the interpretation of an integrated agreement, even where the contract is free from ambiguity, not for the purpose of changing the writing, but to secure light by which its actual significance may be measured. Such evidence is adducible simply as a means of interpreting the writing, – not for the purpose of modifying its terms, but to assist in determining the meaning of what has been said. So far as the evidence tends to show, not the sense of

the writing, but an intention wholly unexpressed, it is irrelevant. *Atlantic Northern Airlines v. Schwimmer*, 12 *N.J.* 293 (1953). 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. Corn Exchange National Bank & Trust Co. v. Taubel*, 113 *N.J.L.* 605 (*E. & A.* 1934). And the construction of the integration is the exclusive province of the judge, unless an issue of fact be raised by evidence *aliunde*. *New York Sash & Door Co., Inc. v. National House & Farms Association*, 131 *N.J.L.* 466 (*E. & A.* 1944).***" (at p. 427) (*Emphasis supplied.*)

The Board also quotes from the case of *Journeymen Barbers, etc., Local 687 v. Pollino*, 22 *N.J.* 389 (1956). In that case the Court stated as follows:

"*** In the *Berland Realty* case Judge Speakman aptly remarked that where the meaning of contractual language is doubtful the best guide is furnished by the parties' construction as manifested by their conduct. ***" (at p. 395)

Since the Board made no budgetary provisions for a $400 increment for the school year 1970-71, it argues that its conduct, therefore, is further proof that there was no agreement nor understanding by the Board that the salary guide language causing this dispute applied to both years.

The hearing examiner has considered the sharply conflicting testimony of the litigants regarding the intent of the parties in reaching an agreement for the school years 1969-70 and 1970-71, and the legal arguments presented by the parties. He concludes that a determination herein must be rendered not only on the basis of the written language contained in the salary policy but also on the implied intent of the parties which is now in dispute.

* * * *

The Commissioner, having carefully reviewed the report of the hearing examiner and the record in the instant matter, concurs with the findings contained therein.

The Board's award of $400 to teachers at the "present top step" of the salary guide had the effect of placing teachers who had been on the top or thirteenth step during 1968-69 on a new, longevity step for the 1969-70 school year. Thus, for the 1969-70 school year, some teachers had moved to the top or thirteenth step of the bachelor's scale and were receiving $11,300, while those teachers who had been on the thirteenth step during 1968-69 were receiving $11,700, which was a longevity step, by virtue of the $400 longevity increment for 1969-70.

According to the Board's reasoning, for the 1970-71 school year, teachers who would be at the top or thirteenth step of the new salary guide would receive $13,000 on the bachelor's scale. Both the teachers who received $11,300 at the thirteenth step during 1969-70 and those who received $11,700, which included the longevity increment of $400, would automatically be placed at the thirteenth step of $13,000 on the bachelor's scale for 1970-71.

Assuming, *arguendo*, that the $400 longevity increment was to be applied for both 1969-70 and 1970-71, as petitioners contend, an entirely different set of circumstances would result. Under this interpretation, the teachers who were on the twelfth step of the bachelor's guide during 1969-70 would move to the thirteenth step in 1970-71 and receive $13,000. Teachers who were on the top or thirteenth step during 1969-70 would receive $13,000 plus the $400 longevity increment for a total of $13,400. Teachers who were on the longevity step during 1969-70 would supposedly receive another $400 longevity increment and would be paid $13,400.

This illogical situation would be difficult to adjust, could not be continued, and could not have been the intention of the Board. If the Board intended to award a $400 longevity increment to the teachers on the top step of the salary guide for both 1969-70 and 1970-71, the simple solution would have been to add another step to both salary guides. However, the determination of this issue is not to be made solely on the argued intent of the parties, but also on the written language in the salary policy.

In the written language of the salary policy the Board included the adjective "present" in delineating the top step, thus giving the policy a definite construction.

Black's Law Dictionary (Revised Fourth Edition) defines "present" as follows: (at p. 1347)

> "PRESENT, *adj.* Now existing; at hand; relating to the present time; considered with reference to the present time, ***"

and, *Webster's Third New International Dictionary* (Unabridged, c1966) gives the following excerpted definitions: (at p. 1793)

> "*** [4] present *** *adj* ***
> 1: now existing or in progress *** now being in view *** being at this time: not past or future ***" (*Emphasis supplied.*)

It is the Commissioner's judgment that the Board meant to differentiate between the two separate salary guides and actually did so by awarding $400 to all of its teachers on the *present*, or 1969-70 top step of the salary guide. There would be no need to use that adjective if the Board meant otherwise.

The Commissioner determines that the language "all on the present top step" applies only to the school year 1969-70. Having made this determination, the Commissioner finds that there is no relief to which petitioners are entitled.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

November 20, 1972

Pending before State Board of Education

"S.J.," By His Parent and Guardian *ad litem*, Bernice Jacobs,

Petitioner,

v.

Passaic County Technical and Vocational Board of Education and Passaic County Technical and Vocational School, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

Decision on Motion for Interim Relief

For the Petitioner, Passaic County Legal Aid Society (Ann Marie Boylan, Esq., of Counsel)

For the Respondent, Herman W. Steinberg, Esq.

Petitioner, hereinafter "S.J.," is a seventeen-year-old pupil formerly enrolled in the Passaic County Technical and Vocational School, hereinafter "Vocational School," from September 1970 until January 3, 1972, at which time he was suspended and subsequently, it is alleged, transferred to the Paterson School District. S.J. appealed to the Commissioner of Education on August 7, 1972, to set aside the Vocational School's action, *ante*. S.J. simultaneously moved for immediate reinstatement to the Vocational School.

Oral argument on the Motion was heard at the State Department of Education, Trenton, on August 29, 1972, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

S.J. initially began his enrollment at the Vocational School during September 1970. It is alleged by the Vocational School that within three months of enrollment, S.J. demonstrated that he could not adjust to their program. (Tr. 43) It is further alleged by the Vocational School that S.J. "*** was given two or three different types of programs; every effort was made to fit him into the school programs [sic]. He just did not fit ***." (Tr. 44) On January 3, 1972, S.J. was suspended from the Vocational School and, during that suspension,

S.J.'s mother was notified by letter dated January 12, 1972, that S.J. was to be transferred back to the Paterson School District. Attached thereto was a chronology of eight separate incidents regarding S.J.'s behavior. S.J. avers that he did attempt to gain admittance to the Paterson School District, but that Paterson denied him such admittance. It is stipulated by counsel, however, that subsequent to the Commissioner's decision in *D.J. v. The Passaic County Technical and Vocational Board of Education and the City of Paterson Board of Education, Passaic County*, decided April 4, 1972, the Paterson School District was willing to accept S.J. for enrollment. (Tr. 58) However, S.J. chose not to enroll in the Paterson School District because "*** that [his enrollment in a school which has an academic orientation as opposed to a vocational orientation] may discourage him [S.J.] so much that he will never come back to education. Right now he has a very firm desire to go back to the technical school [Vocational School] ***." (Tr. 36)

Counsel for the Vocational School avers that the transfer, *ante*, was recommended by the Child Study Team of the Vocational School "*** only after they had a lengthy hearing, and only after they considered all of his [S.J.'s] activities, and the series of events that sort of tied everything off [sic] the first half of this year, when week after week he would be in constant problems.***" (Tr. 44)

The hearing examiner observes that the "lengthy hearing," *ante*, was not a due process hearing as addressed in *R.R. v. The Board of Education of the Shore Regional High School District*, 109 *N.J. Super.* 337 (*Ch. Div.* 1970); rather, as counsel for the Vocational School asserted at the hearing, *ante*, the hearing was conducted by, for, and among the Child Study Team and school administrators:

> "*** Nor, was there ever any hearing [afforded S.J.]. There was [sic] studies by administrators, and experts as to the child's ability, the child's progress, and I don't think the child is entitled – a student is entitled to a hearing when directors get together to discuss it; the psychologists get together to discuss it. They are not deciding a case. They are analyzing a child's condition.***" (Tr. 53)

S.J. asserts that the reason why the Vocational School transferred him was his alleged misbavior. (Tr. 37) In fact, he maintains the alleged transfer, *ante*, is not really a transfer at all; rather, the label "transfer" was chosen by the Vocational School as a self-serving instrument to avoid its responsibility of affording due process in an expulsion proceeding. (Tr. 24, 30, 33) In this regard, the hearing examiner observes that counsel for the Vocational School argues that:

> "*** since it was the end of the school year, the Board concluded that it would only harm the child [S.J.], and his record to have an *expulsion* hearing *** irrespective of the fact that expulsion was ordered, or not. Because, at this point, with the termination of the school year *** the Board abandoned any expulsion hearings.***" (Tr. 48) (*Emphasis supplied.*)

Citing the *New Jersey Administrative Code*, S.J. argues that as an allegedly handicapped person he needs vocational education, a factor which the Vocational School has not considered. (Tr. 31, 51) The hearing examiner points out that no proofs were offered that S.J. was, in fact, classified as a handicapped pupil pursuant to the provisions of *N.J.S.A.* 18A:46-6, *et seq.*, and *N.J.A.C.* 6:28-2.1, *et seq.* Furthermore, the Vocational School asserts that the classification of handicapped has never been made in regard to S.J. (Tr. 53)

Citing numerous federal court decisions in which due process is alleged to have been required for pupil suspension or expulsion, counsel for S.J. grounds her argument for *pendente lite* relief on the allegation that petitioner was, in fact, expelled from the Vocational School without due process; therefore, immediate reinstatement ought to be provided forthwith. Counsel also relies heavily upon New Jersey judicial holdings in *R.R. v. Shore Regional Board of Education, supra; Tibbs v. Board of Education of Franklin Township*, 114 *N.J. Super.* 287, affirmed 59 *N.J.* 506; and the Commissioner's decision in *Scher v. Board of Education of the Borough of West Orange*, 1968 *S.L.D.* 97 to support the claimed right of due process, *supra.*

Counsel for the Vocational School asserts that the Vocational School holds a "receiving" relationship with the Paterson School District and "*** as such all it does is receive students from other districts, and by statute has a right to send back those students to those districts.***" (Tr. 42) Counsel further argues that the Paterson School District is willing to accept S.J. as a pupil, but by his own choice he [S.J.] refuses to take advantage of such education. Therefore, counsel concludes, S.J. is denying himself the opportunity for an education and the Vocational School should not be expected, nor ordered by the Commissioner, to take S.J. back.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the findings contained therein.

The Commissioner views with concern the Vocational School's argument that their action *sub judice* regarding S.J. constitutes a "transfer," and not an expulsion. It is recognized that *N.J.S.A.* 18A:54-20 provides county vocational boards of education with broad powers, one of which is the authority to suspend and expel pupils from their schools. However, the Commissioner finds no authority for county vocational school boards of education nor its administrators to unilaterally "transfer" pupils. Had the Vocational Board, in the instant matter, determined that S.J.'s behavior was such as to warrant suspension or expulsion from its schools pursuant to *N.J.S.A.* 18A:37-2, it could have invoked its authority found at *N.J.S.A.* 18A:54-20, *supra*, by providing procedural due process of law as articulated by the Court in *R.R. v. Board of Education of Shore Regional High School, supra.*

The Commissioner finds and determines that S.J. was, in fact, expelled from the Passaic County Technical and Vocational School without being afforded a fair hearing regarding alleged charges against him and such action is, accordingly, set aside. Therefore, the Passaic County Technical and Vocational Board of Education is ordered to readmit S.J. as a pupil, and to provide him with a program appropriate to his interests and abilities. Nothing contained herein shall preclude the Board from invoking its statutory authority, *supra*, to suspend and/or expel pupils for just cause according to the principle articulated in *R.R. v. Board of Education of Shore Regional High School, supra.* S.J., on the other hand, is cautioned that his future behavior will be demonstative of his asserted desire to successfully complete his studies at the Vocational School, and must in large measure determine his continued attendance therein.

COMMISSIONER OF EDUCATION

November 20, 1972

Board of Education of the City of Passaic,

Petitioner,

v.

Municipal Council of the City of Passaic, Passaic County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Louis Marton, Jr., Esq.

For the Respondent, Otto F. Blazsek, Esq.

Petitioner, hereinafter "Board," apppeals from an action of respondent, hereinafter "Council," certifying to the Passaic County Board of Taxation a lesser amount of money to be raised by local taxation for the current expenses of the school district for the 1972-73 school year, than the amount proposed by the Board and rejected by the voters at the annual school district election. The Board alleges that Council's reduction was arbitrary and unlawful. Council denies the allegation and avers that the Board will have adequate funds to provide a thorough and efficient system of education in Passaic during the 1972-73 school year.

A hearing in this matter was conducted on August 31, 1972, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The instant matter was delayed in reaching a hearing by the failure of Council to provide an Answer to the Board's Petition of Appeal. This failure resulted in a Motion by the Board for Summary Judgment in its favor. An oral argument on the Motion was conducted by the hearing examiner on June 22, 1972. A written decision on the Motion by the Commissioner followed on July 26, 1972. This decision denied the Motion, but established a timetable for the submission of testimony in written form and the hearing of August 31, 1972, ensued. Thus, at this juncture, we are able to consider the dispute on its merits.

At the annual school election held on February 8, 1972, the Board proposed to raise $6,825,446.08 by local taxation for current expenses and capital outlay expenditures of the school district during school year 1972-73. The voters rejected the Board's proposal, and the budget was then submitted to Council pursuant to *N.J.S.A.* 18A:22-37 for its determination of the amount of funds required to maintain a thorough and efficient school system.

Thereafter, on March 9, 1972, Council met, and by resolution number 597-72, certified to the Passaic County Board of Taxation an amount of $6,112,446.08 for the operation of Passaic schools during school year 1972-73. This sum represented a reduction of $713,000 from the Board's proposal and was, specifically, a reduction from the Board's proposal for current expense costs. The comparable proposals as set forth in the Board's budget and in Council's determination are shown in the following table:

	Current Expenses	Capital Outlay	Totals
Board's Proposals	$6,801.623.18	$23,822.90	$6,825,446.08
Council's Certification	$6,088,623.18	$23,822.90	$6,112,446.08
Amount of Reduction	$ 713,000.00	- 0 -	$ 713,000.00

While Council's original reduction amounted to $713,000, it now avers that the total of approximately $813,000 could be taken from the Board's budget without harm to the school system. Specifically, Council avers that the following amounts could be deleted. (The accounts are listed, generally, in the order set by Council and not by the usual sequential practice.)

Account Number	Item	Board's Budget	Council's Proposal	Amount Reduced
Not specified	Salaries	$ - 0 -	$ - 0 -	$482,376.53
J3-213-1	Sal.-Tchrs. (Eve.Sch.)	21,840.00	18,840.00	3,000.00
J212	Sal.-Tchrs. (Directors)	171,918.00	146,361.50	25,556.50
J310a	Sal.-Dir. (Pupil Pers.)	117,456.59	74,361.59	43,095.00
J130a	Admn.-Other Expenses	27,732.50	12,232.50	15,000.00
J213	Sal.-Tchrs. (New Pos.)	4,967,110.51	4,897,110.51	70,000.00
J110f	Administration (Aides)	126,608.96	109,608.96	17,000.00
Not specified	"Payroll Turnover Savings"	- 0 -	- 0 -	57,000.00
Misc.	List	- 0 -	- 0 -	100,000.00
	Total Reduction Itemized			$813,028.03

In support of its position Council offers some arguments that are general in nature and some that are specific. These arguments, and a summation of testimony by the Board, with respect to major items in contention, will be discussed by the hearing examiner below.

Salaries – Amount of Reduction $482,376.53.

Council's testimony, in written form, with regard to this reduction is as follows:

> "***The City Council of the City of Passaic after consideration of the president's (sic) guideline decided that 5.5% increase in salary *including increments* was a fair increase and decided not to pay the teachers both the increment which is actually payment in lieu of a (sic) increase in salary and an additional increase in salary and an additional increase in salary to the extent of the maximun (sic) permitted by the presidential guidelines. The fact that such a payment is legally permissible does not detract from the fact that the City Council is not obligated to pay as much as it could possibly be permitted to pay.***" (*Emphasis supplied.*) (Respondent's Brief, unp)

On the other hand the Board avers that:

> "***The allegation of Respondent that Petitioner 'included salary increments and increases 'far' in excess of the 5.5% allowed under Presidential Order' is, in general, both inaccurate and untrue. The new salary schedule adopted by Petitioner for 1972-73 for the various employee groups, specifically incorporated a salary improvement across the board for all of not more than 5.5% *plus normal increment* as allowed by the I.R.S. pursuant to a ruling from the Newark office of the I.R.S. a copy of which is attached hereto for reference.***" (*Emphasis supplied.*) (Board's Brief, at p. 2)

The letter from the Internal Revenue Service to the Board which was attached to the Board's testimony reads, in part, as follows:

> "***Longevity increases and automatic progression within a rate range are allowed to go into effect after 11/13/71, according to the terms of agreements or established practices in existence prior to *11/14/71, without* regard, to the 5.5% general wage standard. In other words, teachers may *receive their increments plus 5.5% wage* increases.***" (*Emphasis supplied.*) (Board's Brief, unp)

The hearing examiner notes that part of the dispute herein is founded on an interpretation of the federal wage price guidelines. On the one hand, the Council, at the time of its original determination in this matter, did say, as the Board now avers, that the Board's budget included salary increments and increases "*** far in excess***" of the 5.5% guidelines which were allowable,

but in its testimony, *supra*, this contention is modified. Council now maintains that it is not "obligated" to pay as much as the maximum amount permitted by the federal wage price guidelines.

In the modification of Council's position, there is a significant difference, since Council at first based its reduction on a federal restriction but now assumes, in effect, that it is the employer and states in its testimony, *supra*, that it "*** decided not to pay ***." (The increment plus a percentage increase.)

However, the hearing examiner finds no basis for Council's action on such an assumption since it is the Board which may adopt a "*** salary policy ***" according to *N.J.S.A.* 18A:29-4.1 which provides, *inter alia*, that:

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

and since it is the Board which negotiated and adopted the terms of the salary policy herein controverted pursuant to the requirements of law.

Accordingly, and in the absence of evidence that any account is inflated beyond the requirements of the salary policy, the hearing examiner recommends that all of the reductions herein be restored.

Summary:	Amount of Reduction	$482,376.53
	Amount Restored	482,376.53
	Amount Not Restored	– 0 –

J212 Salaries-Teachers (Directors) Amount of Reduction $25,556.50.

Council proposes herein to effect a reduction by abolishing two positions; namely, Director of Continuing Education and Athletic Director. It argues that the staffing of schools "*** cannot be done in such a ridgid (sic) manner so as to prevent the governing body of a municipality to abolish or merge positions where reason or sound judgment indicates that they are not required but only a waste of the taxpayer's money.***" (From Council's written testimony.)

The Board charges that Council was "*** actually usurping and interfering with the internal administrative operations of the petitioner, and in effect was proposing to dictate the table of organization to be followed by the Board of Education.***" (Board's Brief, unp)

The hearing examiner notes that the positions controverted herein are not new, but established positions, which the Board has determined as necessary for the proper "government" or "management" of two phases of its operation. Such determinations are pursuant to powers granted to the Board by *N.J.S.A.* 18A:11-1 which provides *inter alia* that:

"The Board shall *** (c.) Make, amend and repeal rules *** for the government and mangement of the public schools *** and for the employment *** of its employees ***"

and, in the judgment of the hearing examiner, the proposals of Council herein would, as charged, usurp such powers as are specifically conferred on the Board above.

Accordingly, the hearing examiner recommends that all of the reductions herein be restored.

Summary:	Amount of Reduction	$25,556.50
	Amount Restored	$25,556.50
	Amount Not Restored	– 0 –

J310a Salaries-Directors-Amount of Reduction $43,095.

The arguments herein are similar to the arguments pertinent to J212, *supra*, and the recommendation is the same.

Summary:	Amount of Reduction	$43,095
	Amount Restored	43,095
	Amount Not Restored	– 0 –

J130 Administration-Other Expense – Amount of Reduction $15,000

Council has not itemized the reductions it believes are possible herein without harm to the school system, but the Board has provided testimony in support of its position that all of the budgeted funds are necessary. The hearing examiner has reviewed the account and notes that there are ten subaccounts which comprise the total of account J130 and of these, seven have the same budgeted figure for the 1972-73 school year as for the 1971-72 school year. In such budgeting there is no evidence of extravagance or new programs.

The hearing examiner recommends that $2,000 of Council's reduction imposed herein be sustained (from J130a) but that the balance of the reduction be restored.

Summary:	Amount of Reduction	$15,000
	Amount Restored	13,000
	Amount Not Restored	2,000

J213 Salaries-Teachers-Amount of Reduction $70,000.

The dispute herein is partly concerned with the number of new teaching positions which the Board proposed to add. Council avers that the Board budgeted for the addition of fifteen new positions, while the Board maintains that a total of only ten new teaching positions were added.

Testimony in oral form by the Board at the hearing, *supra*, was that the Board proposed to hire the following new personnel for the 1972-73 school year to accommodate an estimated enrollment increase of 300 students:

10	teachers
1	secretary to the Superintendent
1	psychologist
1	secretary for supervisory personnel
1	secretary for shared services
14	

While it is noted that some of the proposed new positions would not be budgeted from this account, all of the fourteen positions are covered within line accounts of the 100 or 200 series. It is the Board's testimony that six of the ten teaching positions are not new, but represent an assumption by the Board of costs formerly borne by federal programs. There was no refutation of this testimony by Council.

The hearing examiner believes the proposals of the Board to employ the designated "new" teachers are reasonable and necessary in view of the increased enrollment, and other educational factors in Passaic, but he recommends that two of the three secretarial positions (one of which is presently unfilled) be eliminated from budget planning, as determined by Council ($10,000).

Summary:	Amount of Reduction	$70,000
	Amount Restored	60,000
	Amount Not Restored	10,000

J110f Administration-Aides-Reduction $17,000.

The sum of money in contention herein was programmed by the Board for the in-service education of two school administrators, and according to the Board's testimony, similar expenditures have been programmed sporadically, since 1959. It is the Board's belief that staff morale will suffer unless most of its school administrators are employed from among its present employees and it regards this in-service program a necessary prerequisite to such employment.

The hearing examiner believes the Board is to be commended for its planning herein, but he believes an alternative program can be developed at greatly reduced cost to accomplish the Board's objective, *supra*, and that such cost can be funded from the total sum of money available in the J110 account. Further, in the context of the budget defeat at the annual referendum, and Council's determination, the hearing examiner believes that such an economy should be effected by the Board at this juncture.

Accordingly, the hearing examiner recommends that this reduction be permitted to stand unaltered.

Summary:	Amount of Reduction	$17,000
	Amount Restored	– 0 –
	Amount Not Restored	17,000

Payroll Savings-Amount of Reduction $57,000.

Council's proposal herein is founded on the assumption that the Board has accrued large savings in programmed expenditures because of the difference between the salaries of staff members who have resigned and those who were recently employed to replace them during the 1972-73 school year. However, the Board testified that it had already deleted $40,000 from its budget in anticipation of such savings and that the actual savings at the time of the hearing, *supra*, were $58,000.

Accordingly, the hearing examiner recommends that $18,000 of Council's reduction herein be allowed to stand, but that the balance be restored for use by the Board.

Summary:	Amount of Reduction	$57,000
	Amount Restored	39,000
	Amount Not Restored	18,000

Miscellaneous-List-Amount of Reduction $100,000.

The Board contends that the reductions of Council herein are "after-thought" or "post-mortem" items and that as a matter of law, Council is barred from making such additional reductions in the Board's budget after the time of Council's original determination and certification. Council agrees that no reduction in excess of $713,000 need be considered, but avers that specific reductions totaling $100,000 may be considered as part of that total. The hearing examiner agrees with the latter view.

The hearing examiner has reviewed the conflicting testimony with respect to fifteen specific reductions that Council determined were appropriate herein and notes, in the first instance, that there is duplication between sums of money in contention between the parties and other reductions (intern program, additional secretarial personnel, and certain other staff personnel) which have already been considered by the hearing examiner, *supra*. These duplications total $67,000. The disputed items that remain for consideration are generally smaller sums of money, and the hearing examiner finds that the Board has properly buttressed its position that all items are necessary for the operation of a thorough and efficient school system with the exception of proposed expenditures from account J130a. In this regard the hearing examiner recommends that Council's reduction of $2,000 be allowed to stand.

Summary:	Amount of Reduction	$100,000
	Amount Restored	98,000
	Amount Not Restored	2,000

Other recommendations concerning the remaining sums of money in dispute and a summary of the recommendations made by the hearing examiner, *supra*, are contained in the chart below:

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
Not specified	Salaries	$482,376.53	$482,376.53	$ -0-

J3-213-1	Salaries-Tchrs. (Evening School)	3,000.00	3,000.00	- 0 -
J212	Salaries-Tchrs. (Director)	25,556.50	25,556.50	- 0 -
J310a	Salaries-Dir. Pupil Personnel	43,095.00	43,095.00	- 0 -
J130a	Administration-Other Exp.	15,000.00	13,000.00	2,000.00
J213	Salaries-Tchrs. (New Positions)	70,000.00	60,000.00	10,000.00
J110f	Administration (Aides)	17,000.00	- 0 -	17,000.00
Not specified	"Payroll Turnover Savings"	57,000.00	39,000.00	18,000.00
Misc.	List	100,000.00	98,000.00	2,000.00
	Totals	$813,028.03	$764,028.03	$49,000.00
*Council's Certification to County Tax Board		$713,000.00	$664,000.00	$49,000.00

Finally, it is noted here for emphasis, that while the hearing examiner has considered all of Council's proposed reductions from the amounts proposed by the Board for the thorough and efficient operation of its schools during school year 1972-73, such reductions were considered in the context of Council's original certification to the Passaic County Board of Taxation. This reduction was $713,000. Thus at this juncture, the hearing examiner recommends that a total of $49,000 of the reduction determined by Council as appropriate, be permitted to stand, but that $664,000 be restored for use by the Board as necessary for the thorough and efficient operation of Passaic schools during the school year 1972-73.

* * * *

The Commissioner has reviewed the findings and recommendations reported by the hearing examiner. In concurring therein, the Commissioner finds and determines that an amount of $664,000 must be added to the amount previously certified by Council to be raised for the current expenses of the City of Passaic schools in order to provide a thorough and efficient school system in Passaic during the school year 1972-73. He therefore directs the Mayor and Council of the City of Passaic to add to the previous certification to the Passaic County Board of Taxation of $6,112,446.08 for the current expenses of the school district, the amount of $664,000, so that the total amount of the local tax levy for current expenses shall be $6,776,446.08.

COMMISSIONER OF EDUCATION

November 20, 1972

Pending before Superior Court of New Jersey

Concerned Parents of Howell Township School Children,

Petitioners,

v.

Board of Education of the Township of Howell, Monmouth County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Morgan & Falvo (Peter S. Falvo, Jr., Esq., of Counsel)

For the Respondent, Bathgate & Wegener (Peter H. Wegener, Esq.. of Counsel)

This appeal is brought by a group of parents contesting an action of the Board of Education of the Township of Howell, hereinafter "Board," in which the Board discontinued certain transportation routes which existed during the 1971-72 school year. Petitioners contend that the termination of this service, in favor of a revised transportation plan for 1972-73, endangered the welfare and safety of pupils residing in a number of geographical areas, and was arbitrary, capricious, unreasonable and inequitable. Petitioners pray that the Commissioner of Education order the Board to conduct public hearings on the matter and establish an equitable and safe transportation plan.

The Board denies that its action was arbitrary, capricious, unreasonable or inequitable. It argues that its decision to alter the transportation plan for the 1972-73 school year complies with the statutes and the rules of the State Board of Education, and that it was a determination within its discretionary authority, arrived at after due deliberation.

Testimony was educed at a hearing in the office of the Monmouth County Superintendent of Schools, Freehold, on September 19 and 21, 1972, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner relates the series of events, culminating in this Petition of Appeal, as set forth in the Board's Brief and reproduced below:

> "***1. Prior to September of 1972 and from approximately 1964, respondent Board of Education has provided transportation to a majority of the children in Howell Township. The only exceptions being usually where the school existed in a particular student's development or immediate area.
>
> "2. The respondent Board has jurisdiction over Howell Township Schools, which comprise grades kindergarten to eight with the high school students being accommodated through the regional system.

"3. On or about May or June, 1972, the budget of the Board of Education was established by the Board. This was the same budget voted down by the voters, and approved by the Township Committee less $180,000. This was and is also the same budget in which the transportation line item was not effected. (sic)

"4. Some time subsequent to June, 1972 andprior (sic) to August 28, 1972, the defendant Board undertook a unilateral course of action without public notice and without a public hearing, the result of which was to discontinue transportation for students within a certain prescribed radius from each school. The exact area is unknown.

"5. On or about August 28, 1972, the affected parents received their first notice that their children would not be transported by bus to their individual schools.

"6. As of August 28, 1972, the respondent Board of Education had not requested the Township Committee of the Township of Howell to provide additional school crossing guards.

"7. The Township Committee as of August 31, 1972 had only allowed for two more crossing guards and this was at the parents' insistence.***" (Board's Brief, unp)

On September 7, 1972, petitioners were granted a temporary restraining order by the Honorable M. Raymond McGowan, presiding Judge of the Chancery Division of the New Jersey Superior Court, Monmouth County, directing the Board to transport all children in grades Kindergarten, One and Two, and remanding the matter to the Commissioner for his determination on the merits.

Petitioners testified to the existence of certain hazards which, they allege, were not considered by the Board. Petitioners also testified that the Board's failure to involve the citizens in the formulation of its transportation plan led to this dispute. Petitioners allege that a number of pupils have preferable school commuting circumstances, because of short travel distances over less hazardous roadways located within housing developments.

There is no allegation by petitioners that a number of pupils live remote from the schoolhouse. Rather, petitioners argue that a number of pupils lack "convenience of access" as required by *N.J.S.A.* 18A:33-1:

"Each school district shall provide, for all children who reside in the district and are required to attend the public schools therein and those who reside therein or elsewhere and are entitled or permitted to attend the schools of the district pursuant to law, suitable educational facilities including proper school buildings and furniture and equipment, *convenience of access* thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years, either in

schools within the district *convenient of access* to the pupils, or as provided by article 2 of chapter 38 of this title,[1] but no course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education of the district." (*Emphasis supplied.*)

Petitioners' prayer to the Commissioner for relief, therefore, reads as follows:

"*** (a) Requests that the transportation program used during the 1971-72 school year be immediately reinstated;

"(b) Requests that the proposed 1972-73 school year transportation schedule be suspended; and

"(c) Requests that public hearings be conducted before any future transportation policy is adopted; and

"(d) That adequate standards be established in order to guide the Board in the future exercise of its discretion.***" (Board's Brief, unp)

Witnesses for the Board testified that long-range school district organization plans for the past four and one-half years provided for neighborhood schools, thereby eliminating certain transportation routes and changing others for the 1972-73 school year. Having provided all of the necessary school facilities for the implementation of the neighborhood school concept, the Board notified parents on or about August 28, 1972, that a revised pupil transportation plan would be in effect for the 1972-73 school year.

The Board avers that hazardous conditions had either been remedied or properly referred to municipal authorities prior to the beginning of the 1972-73 school year. The Board's transportation plan (P-2) was finalized during June 1972, and reads as follows:

"*** *Eligibility*

"1. All students who reside on a rural area roadway without paved walkways will be transported to and from school when the walking distance to school or to a continuous paved walkway to school, exceeds 500 feet.

"2. All students who reside on a residential area roadway without paved walkways will be transported to and from school when the walking distance to school through the residential area and on paved walkways through a rural area exceeds the following:

Kindergarten	1 mile
Grades 1 and 2	1½ miles
Grades 3 thru 8	2 miles

"3. All students who reside on any roadway with paved walkways which are continuous to the school will be transported to and from school when the walking distance to school exceeds the following:

Kindergarten	1 mile
Grades 1 and 2	1½ miles
Grades 3 thru 8	2 miles.***"

The hearing examiner concludes that the essential issues presented in this matter are not different from those of transportation disputes previously decided by the Commissioner.

* * * *

The Commissioner has reviewed and considered the findings of the hearing examiner as set forth above. None of the findings disclose that any child lives remote from a schoolhouse nor is denied convenience of access thereto.

In *Schrenk et al. v. Board of Education of the Village of Ridgewood*, 1960-61 *S.L.D.* 185, the Commissioner said:

"*** There have been numerous appeals arising out of the interpretation of remoteness by local boards of education. In a series of decisions extending over a long period of time, a board of education has never been reversed for refusing transportation to an unhandicapped pupil residing within two miles of a schoolhouse in the case of elementary pupils and within two and one-half miles where high school pupils are concerned. These distances have become so well established that county superintendents have for many years based their approval of transportation for State aid on these limits. The State Board of Education has adopted these distances as a guide for the approval of State aid for transportation.***" (at p. 186)

The Commissioner quoted from the State Board of Education's resolution, section A of the guidelines for approval of State transportation aid in *Trossman v. Board of Education of the Borough of Highland Park*, 1969 *S.L.D.* 61, as follows:

"*** 'The words 'remote from the schoolhouse' should mean 2½ miles or more for high school pupils and 2 miles or more for elementary pupils, except for pupils suffering from physical or organic defects. State aid for shorter distances for the sole reasons of traffic hazards should not be given, inasmuch as traffic hazards are a local responsibility.'***" (at p. 64)

This statement is applicable to the issue controverted herein.

In *Read et al. v. Board of Education of the Township of Roxbury*, 1927 *S.L.D.* 763, the Commissioner said:

"***Boards of education are not authorized by law to provide for the safety of children in reaching school. While a board should be concerned as

> to the safety of children and should report to the State Police or local officers reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highways and street dangers demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation.***" (at p. 765)

Also, in *Trossman, supra,* the Commissioner said:

> "*** This position has been reaffirmed in numerous subsequent decisions. See, for example, *Iden v. Board of Education of West Orange*, 1959-60, *S.L.D.* 96; *Schrenk v. Board of Education of Ridgewood, supra; Frank v. Board of Education of Englewood Cliffs*, 1963, *S.L.D.* 229; *Livingston v. Bernards Township Board of Education*, 1965 *S.L.D.* 29; *Peters v. Washington Township Board of Education*, Commissioner of Education, March 8, 1968 [1968 *S.L.D.* 42]; *Friedman v. Board of Education of South Orange and Maplewood*, Commissioner of Education, March 19, 1968 [1968 *S.L.D.* 53], affirmed State Board of Education, February 5, 1969.***" (at p. 65)

See also *Locker et al. v. Board of Education of the Township of Monroe*, 1969 *S.L.D.* 178; *Rosenman v. Board of Education of the Township of Howell*, 1969 *S.L.D.* 124; *Frieman et al. v. Board of Education of the Borough of Haworth*, 1970 *S.L.D.* 113; *Tolliver et al. v. Board of Education of the Borough of Metuchen*, 1970 *S.L.D.* 415; *Bocco v. Board of Education of the City of Camden*, decided by the Commissioner February 23, 1971.

The Commissioner finds no evidence in the record before him that any group of pupils or pupils of any geographic area were favored, or that the Board's transportation plan is inequitable, unreasonable or arbitrary. It has been shown that the transportation plan evolved over a considerable period of time and that the Board considered availability of additional school facilities prior to its implementation. Under these circumstances, the Commissioner finds no evidence of discrimination or favoritism and determines that the Board acted within its discretionary authority. This principle was enunciated in *Boult and Harris vs. Passaic*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948) as follows:

> "*** it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.***" (at p. 13)

In *Schrenk, supra*, the Commissioner said:

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

The Commissioner does find, however, that the Board's notice to parents dated August 28, 1972, informing them of the change in the transportation plan, was unduly late. Such late notice could create extreme hardships for parents who wish to make their own arrangements for transporting their children to school. As transportation routes change in the future, the Board would be well advised to provide more timely notification to the parents of the change.

Having found no proof that the Board's action was unreasonable, inequitable, arbitrary or capricious, the Commissioner determines that the Board's pupil transportation plan, *supra*, does not violate State Board of Education transportation guidelines, nor any applicable statute.

The Board may proceed with its transportation plan as developed and adopted.

The Petitioner is dismissed.

COMMISSIONER OF EDUCATION

November 20, 1972

Joseph McKay,

Petitioner,

v.

Board of Education of the Borough of Red Bank, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Galvin and McLaughlin (Maurice B. McLaughlin, Esq., of Counsel)

For the Respondent, Reussille, Cornwell, Mausner & Carotenuto (Samuel Carotenuto, Esq., of Counsel)

Petitioner, a vice-principal employed by the Board of Education of the School District of the Borough of Red Bank, Monmouth County, hereinafter "Board," alleges that the action taken by the Board in abolishing his position was an improper and unlawful violation of his tenure rights. The Board denies that its action was improper or unlawful, and answers that petitioner's position as a vice-principal was abolished in good faith, in the interest of efficiency and for reasons of economy.

This matter is submitted on a Stipulation of Facts and documentary evidence for Summary Judgment by the Commissioner of Education. Both parties presented arguments of law in the form of Briefs. There is no dispute regarding the relevant material facts.

The minutes of the regular meeting of the Board held August 8, 1961, disclose that petitioner was originally appointed vice-principal of the River Street School for the 1961-62 school year. (Exhibit R-2) Although the minutes fail to show the roll call majority vote of the full membership of the Board, as required by *N.J.S.A.* 18A:27-1, it is stipulated that petitioner was appointed by a majority vote of the full membership of the Board. (Exhibit R-2)

The Commissioner cautions this Board and all other local boards of education to comply strictly with the legislative mandate to record the roll call majority votes of the full membership of the board in each instance required by statute. The Commissioner also recommends that all matters put to a vote be recorded in the same manner, in order better to inform the citizens of the community regarding the positions taken by their representatives on the board.

Petitioner was issued a limited elementary teacher's certificate on October 18, 1953 (Exhibit P-1), and a permanent elementary teacher's certificate on April 18, 1957. (Exhibit P-2) Petitioner received his limited elementary

principal's certificate on May 21, 1957. On June 21, 1962, he was issued a second limited elementary principal's certificate. (Exhibit P-3) On June 22, 1964, petitioner was issued a permanent elementary school principal's certificate. (Exhibit P-4)

Petitioner served as vice-principal of the River Street School continuously from September 1961 until January 1, 1969, a period of seven and one-half school years. The minutes of the regular meeting of the Board held January 14, 1969 (Exhibit R-3), disclose the appointment of petitioner as acting principal of the River Street School effective January 1, 1969. At this same meeting the Board appointed a special education teacher as acting vice-principal of the River Street School effective January 1, 1969. (Exhibit R-3)

It is stipulated that petitioner resumed his position as vice-principal for the 1969-70 school year when a permanent principal was appointed by the Board at a special meeting held July 9, 1969. The new principal assumed his duties on August 18, 1969.

The minutes of the special meeting held August 12, 1969 (Exhibit R-4), disclose that the former acting vice-principal was appointed as a second vice-principal for the River Street School for the 1969-70 academic year. As a result of the appointments, *ante,* the River Street School was staffed by a principal and two vice-principals, one of whom was petitioner, for the 1969-70 academic year.

The Board, meeting in regular session on July 28, 1970, adopted the following resolution which abolished petitioner's position as vice-principal and reassigned him as a classroom teacher for the 1970-71 academic year. (Exhibit R-5):

> "WHEREAS, the Board of Education, having examined the report and recommendations of Prof. Thurston A. Atkins that one of the vice principalships in the River Street School be eliminated at once; and
>
> "WHEREAS, the Board of Education, upon consultation with the administration, has determined that the vice principalship to which is assigned the duties of attendance of students, including maintaining central register; supervision of to and from school transportation program; supervision of buildings and grounds program and buildings and grounds staff; sharing in the supervision of the lunch program; sharing in the program of classroom supervision; sharing in the supervision of extra-curricular activities program, is the least important to the system of education and one which should be eliminated,
>
> "THEREFORE, BE IT RESOLVED that the position of vice principal having the aforesaid duties is hereby eliminated, and the incumbent, Joseph McKay, is relieved of any further responsibilities in the office of vice principal in the school system and that he be employed by the Red

Bank Board of Education for the school year 1970-71 as a classroom teacher at the appropriate step in the guide."

This resolution was adopted by a vote of four ayes and three nays with the two remaining members absent. (Exhibit R-5)

Petitioner voluntarily decided not to perform the duties of a classroom teacher for the 1970-71 academic year, and instead filed his Petition of Appeal. During the course of the litigation petitioner has not performed any duties for the Board.

The second vice-principal had originally been employed by the Board as a teacher of handicapped pupils beginning with the 1956-57 school year. (Exhibit R-1) He received both his permanent elementary teacher's certificate and permanent teacher of the handicapped certificate on June 6, 1960. (Exhibit R-6) This vice-principal was issued an elementary school principal's certificate in August 1969. (Exhibit R-7)

Several statutory provisions are applicable to this controversy. *N.J.S.A.* 18A:28-5 reads in pertinent part, as follows:

> "The services of all teaching staff members including all teachers, principals, assistant principals, *vice principals* *** and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years;
>
> provided that the time in which such teaching staff member has been employed as such in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district or under that board but *no such teaching staff member shall obtain tenure prior to July 1, 1964* in any position in any district or under any board of

education other than as a teacher, principal, assistant superintendent or superintendent or as a school nurse***." (*Emphasis ours.*)

By the enactment of *L.* 1962, *c.* 231, *Sec.* 1, the Legislature amended *N.J.S.A.* 18:13-16 [now 18A:28-5] adding, *inter alia*, the positions of assistant principals and vice-principals to the list of teaching staff members who could acquire a tenure status. A qualification of *N.J.S.A.* 18A:28-5, *supra*, provided that the academic year 1961-62 was to be counted in determining "*** such period or periods of employment ***" but no assistant principal nor vice-principal could obtain tenure prior to July 1, 1964.

From this review of *N.J.S.A.* 18A:28-5, *supra*, it is clear that petitioner acquired a tenure status as a vice-principal at the beginning of his employment during the 1964-65 academic year.

The second vice-principal, who was appointed by the Board on August 12, 1969 (Exhibit R-4), and served during the 1969-70 academic year, had not acquired a tenure status in that position at the time the Board formally abolished one of the vice-principal positions in the River Street School on July 28, 1970 (Exhibit R-5) for the 1970-71 academic year.

It is clear that the Legislature has empowered local boards of education to reduce the number of teaching staff members they employ by abolishing positions. *N.J.S.A.* 18A:28-9 provides the following:

> "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."

See *Downs et al. v. Board of Education of the District of Hoboken*, 12 *N.J. Misc.* 345 (*Sup. Ct.* 1934) 171 *A.* 528, affirmed *Flechtner et al. v. Board of Education of the District of Hoboken*, 113 *N.J.L.* 401 (*E. & A.* 1934), 174 *A.* 529. *Seidel v. Board of Education of Ventnor City*, 110 *N.J.L.* 31 (*Sup. Ct.* 1933), 164 *A.* 901, affirmed 111 *N.J.L.* 240 (*E. & A.* 1933), 168 *A.* 297. All that is necessary is that the action of the Board was in good faith. There is no evidence nor Stipulation of Fact presented by the record before the Commissioner to indicate that there was any bad faith in the action by the Board, or that the Board was unwarranted in its conclusion that the position was unnecessary. *Werlock v. Board of Education of the Township of Woodbridge*, 5 *N.J. Super.* 140, 144 (*App. Div.* 1949), 68 *A.* 2*d* 547. Under these circumstances the Board was within its right in abolishing the position of vice-principal.

The precise issue which is dispositive of the matter controverted herein before the Commissioner is whether or not petitioner is entitled to the single

remaining position of vice-principal as the result of the Board's action of abolishing one vice-principalship in the River Street School.

In *Lascari vs.Board of Education of the Borough of Lodi, Bergen County*, 1954-55 *S.L.D.* 83, affirmed State Board of Education, 1954-55 *S.L.D.* 89, affirmed 36 *N.J. Super.* 426 (*App. Div.* 1955), 116 *A. 2d* 209, the Commissioner adjudicated the question of which of two employees was entitled to a position of vice-principal. At that time, prior to the 1962 amendment, *supra*, of *N.J.S.A.* 18:13-16 [now *N.J.S.A.* 18A:28-5] tenure could not be obtained in the position of vice-principal, therefore the determination in that case was made upon the basis of seniority. *N.J.S.A.* 18A:28-10 See, also, *Lange v. Board of Education of Audubon*, 26 *N.J. Super.* 83 *(App. Div.* 1953), and *Moresh et al. v. Board of Education of the City of Bayonne*, 52 *N.J. Super.* 105 (*App. Div.* 1958).

In the instant matter, seniority would apply only if petitioner and the second vice-principal both possessed a tenure status. As has been shown hereinbefore, petitioner had acquired a tenure status in the position of vice-principal, whereas the second vice-principal only possessed tenure as a teacher by virtue of having served only during the 1969-70 academic year as a vice-principal prior to the Board's action, *ante*.

It is well established in this State that a teaching staff member with a tenure status cannot be transferred or dismissed upon the abolition of his position for statutorily permitted reasons, while another teaching staff member not entitled to a tenure status in the same category of position, whose assignment the former is competent to fill, is retained in employment in that same category of position. *Downs et al. v. Board of Education of the District of Hoboken*, *supra*, affirmed *Flechtner et al. v. Board of Education of the District of Hoboken*, *supra; Seidel v. Board of Education of Ventnor City*, *supra; Board of Education of the Town of Kearny v. Horan et al.*, 11 *N.J. Misc.* 751 (*Sup. Ct.* 1933), 168 *A.* 132; *Downs et al. v. Board of Education of the District of Hoboken*, 13 *N.J. Misc.* 853 (*Sup. Ct.* 1935); *Board of Education of the City of Garfield v. State Board of Education et al.*, 130 *N.J.L.* 388 (*Sup. Ct.* 1943), 33 *A. 2d* 689.

This long-standing principle of school law, enunciated in numerous decisions by the courts of this State, is precisely applicable to the instant matter, and the Commissioner so holds. If this were not so, petitioner's tenue would indeed rest upon frail reeds.

In the judgment of the Commissioner, petitioner was entitled by virtue of his tenure status, to continued employment as the remaining vice-principal when the Board abolished one of the two positions and consolidated the duties of both positions. The Board erred in transferring petitioner to a classroom teaching assignment and permitting the other vice-principal, who did not possess tenure, to continue in that position.

Accordingly, for the reasons stated, the Commissioner finds and determines that Joseph McKay was improperly removed from his position as vice-principal of the River Street School in violation of his tenure status.

The Commissioner hereby orders the Board of Education of the School District of the Borough of Red Bank to reinstate petitioner in his former position as vice-principal at the same salary he would have received for the 1972-73 academic year in uninterrupted service.

Petitioner is not entitled to reimbursement of salary for the 1970-71 and 1971-72 academic years, or for that portion of the 1972-73 academic year prior to this decision, by virtue of the fact that he was not suspended, but voluntarily refrained from rendering any service during the course of this litigation (*N.J.S.A.* 18A:6-30). Any such payment would constitute a gift of public funds for services not rendered, which is clearly prohibited by the law of this State. *New Jersey Constitution, Art.* VIII, *Sec.* III, *Pars.* 2, 3.

COMMISSIONER OF EDUCATION

November 20, 1972

In the Matter of the Tenure Hearing of Louis A. Garibaldi, Jr., School District of Toms River, Ocean County.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Hiering, Grasso, Gelzer & Kelaher (Milton H. Gelzer, Esq., of Counsel)

For the Respondent, Wilbert J. Martin, Jr., Esq.

The Toms River Board of Education, Ocean County, hereinafter "Board," has certified two charges against respondent, a tenure teacher in its employ. These charges are specific in nature; namely, that respondent did, in two instances over a four-year period, commit acts involving corporal punishment against pupils assigned to his supervisory control. Respondent does not deny the altercations involved herein, but avers that there was strong mitigating reason for his action in each instance.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on September 1, 1972 in the office of the Ocean County Superintendent of Schools, Toms River. Memoranda were subsequently filed by counsel. The report of the hearing examiner is as follows:

Respondent is a tenure teacher in the Board's employ who, according to testimony of the Superintendent of Schools, was a good teacher with

"favorable" ratings during all of the period of his employment by the Board. (Tr. 65) The Board's Memorandum, filed subsequent to the hearing, also states that:

> "*** with the exception of these two instances, Mr. Garibaldi was indeed an acceptable teacher with a good record and evaluation.***" (Board's Memorandum, at p. 1)

However, on one occasion in 1968, and again on an occasion in 1972, the Board alleges that there was evidence that respondent apparently "blew his top." (Board's Memorandum, at p. 1) On both of these occasions, respondent was engaged in duties as a track coach after regular school hours. In both instances respondent was involved with one student. In each case, the involvement was occasioned in part by the fact that respondent was attempting to police the school locker room to prevent vandalism and thievery.

The incidents in question were the specific cause for the Board's charges herein. Testimony concerning each of them was offered at the hearing, *ante*, by pupils involved, by eye-witnesses to the incidents, by school administrators and by respondent who testified in his own defense. The two charges and the findings of the hearing examiner with pertinence thereto are detailed below.

It is noted here that the first charge is offered by the Board at this late juncture "*** merely *** for the purpose of giving *** background necessary to make a complete evaluation of the 1972 charge." (Board's Memorandum, at p. 1)

CHARGE NO. 1

> "*** On October 8, 1968, Louis A. Garibaldi, Jr., an employee of the Board of Education of the Toms River Schools, employed for one year by said Board of Education, did, in violation of N.J.S. (sic) 18A:6-1, commit an assault and battery on David Orens, a student at the Toms River High School. The said Mr. Garibaldi threw David Orens against the locker, grabbed him by the throat and threw him on the ground in the boys (sic) locker room at the gymnasium at the Toms River High School, causing injury to the said David Orens.***"

Details of this alleged assault were contained in a report to the Superintendent of Schools by the high school principal, dated October 11, 1968. (P-2) These details were educed by the principal following discussions with eyewitnesses to the event and with respondent, and were recited as follows:

> "***1. Both the Orens boy and the Beatty boy were in the boys' locker room just prior to a regularly scheduled soccer game. Both boys are members of our varsity soccer team with impeccable reputations as school citizens.

"2. Mr. Garibaldi had been keeping the locker room under surveillance for several days, on his own initiative, in an attempt to resolve some recent locker room thievery.

"3. Mr. Garibaldi heard the Orens boy and the Beatty boy discussing an unusual padlock on a locker. Mr. Garibaldi assumed that the boys had a devious motive (this assumption was later proved incorrect).

"4. Mr. Garibaldi reprimanded the boys (Orens and Beatty) and implied that the soccer players were creating too much confusion in the locker room.

"5. Mr. Garibaldi then turned to leave the locker room, when he overheard the Orens boy comment to the Beatty boy on the unfairness of a wholesale indictment of the soccer team when athletes from other teams were also in the locker room at the time.

"6. Mr. Garibaldi then turned and in a complete burst of emotionalism grabbed the Orens boy with such force as to cause lacerations and bleeding on the chest. He threw the Orens boy against a locker and in so doing, caused the Beatty boy a minor hand injury. The Orens boy fell to the floor and Mr. Garibaldi grabbed him by the throat, while the boy was on the floor, and demanded that the Orens boy repeat what he had said.

"7. At this moment, Daniel Teymant, captain of our soccer team, entered the locker room. He indicates that he saw Mr. Garibaldi holding the Orens boy down with one hand on his throat and the other hand clenched menacingly.

"8. Mr. Garibaldi, in seeing the Teymant boy, began shouting at the Teymant boy. The Teymant boy left the locker room, hurried to the field and got Mr. Konyhas.

"9. When Mr. Konyhas reached the locker room, calm had been restored. Mr. Konyhas discussed the problem with Mr. Garibaldi, who seemed quite upset.***"

Respondent avers that he does not "recall" making the statements, *ante*, about the incident herein to the school principal and he cannot testify as to their truth or accuracy. (Tr. 136) However, he does say that:

"*** before this incident happened we had been continually told about cutting down on the amount of thievery, ripping open baskets, and also the amount of damage that was being done in the locker room. And I proceeded to run out from this locker room, outside, and I had grabbed David Orens, who at the time was taking off this lock, and I spun him around and Ronald Beatty, who was next to him, he said, 'Look out.' I can't remember. I can't recall that incident that much, but I remember

going after David. And the next thing I knew, I was on the ground with him.***" (Tr. 128)

Respondent contends now that, at the time of this incident, "*** he was not using corporal punishment but instead the necessary force that the statute permits in controlling a student. And, also, to exercise his rights in self-defense.***" (Tr. 4) Specifically, in this regard, respondent now contends that the student involved on this occasion had confronted him with a "pry bar;" (Answer to Statement of Charges, at p. 1) although on cross-examination at the hearing, *ante*, a pry bar was defined by respondent as "*** Any type of screwdriver.***" (Tr. 132)

The hearing examiner sees no reason to examine Charge No. 1 in greater detail since the charge is not offered at this juncture for purposes of possible penalty, but only as background to the charge that follows. In any event, respondent was suspended by action of the Board, because of events detailed herein, on October 15, 1968, and suffered the loss of five-days' salary (P-3,4) at that time.

There is no record that respondent appealed this action of the Board. In fact, the summation of a subsequent meeting respondent had with the Superintendent (P-3) in which he was charged with using "excessive force," and admonished against using such force in the future, was signed by both respondent and the Superintendent.

Despite this incident of alleged "excessive force," however, respondent achieved a tenure status in the Board's employ and evidently continued coaching until the time of the second charge which is detailed below.

CHARGE NO. 2

"*** On April 21, 1972, Louis A. Garibaldi, Jr., a tenured high school teacher employed for 5 years by the Board of Education of the Toms River Schools, did, in violation of N.J.S. (sic) 18A:6-1, commit an assault and battery on Kevin Dowd, a student in the Toms River High School South. The said Mr. Garibaldi grabbed the said Kevin Dowd by the hair and threw him down on the floor of the hallway in the vicinity of the locker room at the gymnasium at said school, causing injury to the said Kevin Dowd.***"

The hearing examiner has reviewed all of the testimony herein and finds the charge to be essentially true in fact, although there is some question with regard to the position of the charge that states respondent "*** grabbed the said Kevin Dowd by the hair ***." Testimony by one student witness who was present at the time of the incident was that respondent grabbed Kevin "*** by the shirt, you know, up by the collar.***" (Tr. 96) Respondent himself acknowledged on direct examination:

> "*** I grabbed him about the hair and around the collar, and he just went down.***" (Tr. 120)

However, such a finding with respect to this charge must be set in its proper context, if it is to be properly assessed. There were mitigating factors involved which prompted respondent's action. A review of these factors is now in order.

In the first place, respondent had been ill on the day immediately preceding the day on which the incident occurred. Nevertheless, on the evening of that day he received a phone call from a fellow coach requesting that respondent act as an official for a girls' track meet that was to be held on April 21, 1972, and respondent agreed to serve in this capacity.

On April 21, 1972, respondent reported to school at 7 a.m. and was engaged in work there until approximately 5 or 5:15 p.m. – as a teacher with a regular teaching assignment, as a track coach, and in a substitute capacity as official for the girls' track meet. Immediately following the regular school day he had evidently fulfilled his responsibility as a track coach and dismissed track team members for whom he was directly responsible at approximately 3:15 p.m. Thereafter, he assumed the duty of "working" the track meet. (Tr. 117)

While respondent had already dismissed members of the track team for whom he was directly responsible, other members of the team evidently remained in and about the school during the girls' track meet. These students, numbering some sixty to sixty-five, were under control of a student teacher and one other faculty member. (Tr. 119) (The usual number of coaches was not present because of other commitments out of town). As the afternoon waned, certain members of the track team were told repeatedly to pack their equipment and leave by both the student teacher and the regular coach who remained responsible for them.

However, some of them continued to be in and about the school. Among this group was the student Kevin Dowd who admits he had been told to go home (Tr. 108) but had remained. The girls' track meet evidently terminated at approximately 5:00 p.m. and respondent left the scene of the meet and returned to the boys' locker room. Upon arriving there he was told by a fellow coach that the student, Kevin Dowd, was still present in the locker room despite instructions to leave. Respondent then proceeded to question Kevin about his track practice and admits that as the result of one of Kevin's answers, he, respondent, had used an obscenity.

Thereafter, Kevin evidently left the room (Tr. 119) but returned again. According to respondent (Tr. 120),

> "*** I saw Kevin come back. I asked, 'What are you doing here?' And that's when he said to me, 'F--- you.' And that's when I grabbed him.***"

Respondent denies he threw the boy down.

According to the report of the other regular coach who was present, the immediate incident developed as follows: (P-5)

> "*** Mr. Garibaldi came downstairs and we started to close up. At this time Kevin was still there. Mr. Garibaldi mentioned to me that he had spoken to Kevin earlier in the day and then he proceeded to lecture Kevin on the topic of 'If he did not want to practice, he should not take the coaches (sic) time.' Kevin, at this time was standing near the door leading from the weight room to the hall. After Mr. Garibaldi stopped talking, Kevin said 'F--- you' so that everyone heard what he had said.
>
> "Mr. Garibaldi then rushed at Kevin, grabbed his hair and pulled him to the floor. I also rushed over and grabbed Mr. Garibaldi's arm and told him something like 'Lou, stop it! It's not worth it.'
>
> "Upon leaving the locker room, Kevin met us at the door and apologized to Mr. Garibaldi.***"

There is general agreement that the obscenity, *ante*, was the immediate cause of the action that followed. The student Kevin Dowd admits the obscenity, but denies that it was directed at respondent. (Tr. 107) Shortly thereafter, however, Kevin apologized to respondent.

The result of the altercation was that Kevin Dowd was suspended from the track team and respondent was suspended from his teaching duties for three weeks without pay. Thereafter, he was continued on suspension with pay by action of the Board pending a decision by the Commissioner on the ultimate disposition of the case. (P-11) This suspension with pay continues to the present day.

In summary, the hearing examiner finds that respondent is guilty of the charge herein, but that there are mitigating circumstances of great consequence; namely:

1. It is clear that the activity schedule for the afternoon of April 21, 1972, was under-staffed and under-supervised; and that respondent carried a heavy responsibility;

2. The pupil involved in the altercation of that date had remained in the school in direct defiance of specific teacher direction for an extended period of time;

3. Respondent was serving voluntarily, without extra compensation, in the work of a track-meet official, on the afternoon of April 21, 1972, immediately prior to thy incident in question;

4. Respondent was provoked with obscenity by the pupil Kevin Dowd at the conclusion of a ten-hour work day;

5. Respondent promptly desisted from physical retribution when a fellow teacher remonstrated with him.

The hearing examiner further reiterates that respondent's record as a teacher during the regular school day is without flaw. His only difficulties in five years of teaching have emerged as a result of his own efforts to discipline pupils in activities after regular school hours and to assist school authorities in solving incidents involving locker room theft and vandalism.

* * * *

The Commissioner has reviewed the report of the hearing examiner and determines that even with the provocation recited, *ante*, there is no rational justification for respondent's response detailed herein. Corporal punishment cannot be condoned and is specifically prohibited by law. (*N.J.S.A.* 18A:6-1, *supra*)

As the Commissioner recently said *In the Matter of the Tenure Hearing of Jacque L. Sammons*, decided by the Commissioner June 12, 1972 (at p. 41):

> "***they (the teachers of this State) are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children *** This heavy duty requires a degree of self-restraint and controlled behavior *** Those who teach do so by choice***."

and *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, Bergen County*, decided by the Commissioner June 22, 1971, the Commissioner said:

> "A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions*** must accept the consequences of his actions.***" (at p. 23)

In the instant matter it is clear that respondent's actions on two occasions demonstrated a lack of self-restraint that cannot be justified because of the burden of responsibility, no matter how onerous that responsibility may have been. Accordingly, the Commissioner determines that respondent exhibited conduct unbecoming a teacher in the public schools and that such conduct must not go unpunished.

It remains to assess the penalty that must be invoked. In this regard the Commissioner believes there is no parallel between the matter *sub judice* and the case *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County*, decided by the Commissioner November 18, 1971, wherein the Commissioner held that:

> "*** the conduct of the teacher in the matter heretofore detailed as a demonstration of unprofessional conduct so gross, and so fraught with

> peril to the continued safety and well-being of both the teacher and the pupils, as to warrant the forfeiture of tenure rights." (at p. 20)

In the instant matter, there is no evidence at all that during the course of his regular teaching duties respondent has ever acted irresponsibly, or angrily, or that he was ever unprofessional in his conduct. To the contrary, the evidence shows him to be a good teacher and one who, by the evidence herein, is willing to exert extra measure of effort in the service of his school.

When such factors are considered in *pari materia* with the specific facts and provocations noted by the hearing examiner, the Commissioner believes the matter herein controverted is similar to *In re Fulcomer* 93 *N.J. Super.* 404. In that decision, Judge Carton delivering the opinion of the Court said (at p. 421):

> "*** Although such conduct (the use of physical force to maintain discipline or to punish infractions) certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances.***"

Accordingly, having considered the instant finding of conduct unbecoming a teacher in the context of prior decisions of the Commissioner and the courts, the Commissioner directs that respondent be restored to his regular teaching position.

The Commissioner further directs that respondent's salary for the 1972-73 school year shall be the same contractual salary appropriate to a teacher with his training and experience during the 1971-72 school year, minus the costs of a substitute needed to serve as his replacement during the period of his suspension on May 17, 1972 to the date of this decision. The suspension without pay prior to that date is allowed to stand.

COMMISSIONER OF EDUCATION

November 27, 1972

S. J. Marcewicz, I. Cohen, J. Ceva and I. L. Adler,

Petitioners,

v.

Board of Education of the Pascack Valley Regional High School District, Bergen County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Bouregy & Gallahue (Zane Bouregy, Esq., of Counsel)

For the Respondent, Parisi, Evers, & Greenfield (Irving C. Evers, Esq., of Counsel)

Petitioners are citizens residing in the Pascack Valley Regional High School District who allege that the Board of Education, hereinafter "Board," acted illegally and in an arbitrary manner in redistricting its schools for the 1972-73 school year. They further aver that the Board's plan for redistricting is inequitable and should be rescinded and a new plan adopted. The Board maintains that it acted properly within the parameters of discretion conferred upon it by statutory prescription and that the redistricting plan now in force and effect is equitable for all concerned.

A hearing in this matter was conducted on August 22, 1972, and continued on September 6 and 13, 1972, by a hearing examiner appointed by the Commissioner at the office of the Bergen County Superintendent of Schools, Wood-Ridge. The report of the hearing examiner is as follows:

The Petition has two principal contentions; namely,

1. That the Board illegally adopted a redistricting plan with respect to the enrollment apportionment of pupils assigned to its two high schools, and

2. That the plan the Board adopted is discriminatory and lacks a logical rationale.

These contentions will be discussed *seriatim* at the conclusion of a factual recital of conditions and events which precipitated the dispute *sub judice.*

The Pascack Valley Regional High School District provides education for approximately 2955 pupils enrolled in grades nine through twelve, who attend school in two buildings; namely, the Pascack Hills High School and the Pascack Valley High School, hereinafter referred to as the "Hills School" and the "Valley School." The Valley School was built and opened in 1955 and the Hills School

opened in 1964. In the years that have intervened since those respective openings, both schoolhouses have been enlarged and the attendance patterns adjusted accordingly on several occasions. (Tr. II-27, 28) According to the testimony of the Board's President, such adjustments in attendance patterns were never preceded on those occasions by a public hearing devoted to the merits of the proposed adjustments. (Tr. II-29) In the President's opinion such hearings were not and are not mandated by the Board's policy on the conduct of meetings (P-11) which provides:

> "*** Official meetings of the Board of Education are to be held in public for the benefit of the public. Committee meetings are in general considered to be work sessions set aside for Board members to prepare agenda for the regular, special or adjourned meetings. Closed sessions for the benefit of any group are not permitted. The Board of Education, as a public body, elected by all the citizens of the District, and responsible to all members of the community for the democratic education of its youth, at all official meetings invites honest discussion and comment from individuals and groups residing in the District. These discussions about the school shall be held at times and places made known to the community and open to all members of the District, and not in secret. Executive or closed sessions may be called by the Board when, in the opinion of any member, or the chairmen, such a session is deemed necessary or desirable."

There is one other general Board policy of interest in the matter. This policy was adopted in 1965 and provides that:

> "*** once a student has started in one school, that that pupil would not be forced to attend the other school, even if the lines were changed, and that the change would only affect the incoming freshmen. ***" (From testimony of the Board's President. Tr. II-27, 28)

The Board was cognizant of this policy and the one, *ante*, concerned with the conduct of Board meetings, when it considered the matter of again redistricting the enrollment area of its two high schools in the Winter and Spring months of 1972.

The redistricting on this occasion was preceded by a study of enrollment statistics, including projections, which was made by a former math teacher in the Board's employ at the request of the Superintendent of Schools. (Tr. II-126) The study involved the preparation of punch-card data for every pupil enrolled or expected to be enrolled in the district's schools in the period through the school year 1979-80. (This included a projection for the number of parochial school pupils expected to attend the Pascack Valley Regional High School District.) Additionally, the study incorporated projections for population. (R-1,2) The punch-card data were then employed as the basis for the development of alternative arrangements of pupils and a total of approximately fifteen arrangements, or plans, for redistricting were presented to the Superintendent of Schools. (Tr. II-180)

The Superintendent evidently reviewed these statistics and selected five which he thought were feasible. (Tr. II-131) He then submitted these plans to the Board in February 1972 for study and decision. His submission was in bound booklet form (PR-1) and contains this "Foreword."

> "*** The present patterns of enrollment in our two schools, coupled with school capacities and projected construction, dictate that the Board of Education make a decision on rezoning of enrollment patterns well before the end of the present school term, and hopefully by March 31, 1972.
>
> "Frankly, we are a year behind schedule – the decision should have been made last year. The Hills is over capacity now, and since we do not require students already enrolled in one school to transfer to the other to achieve enrollment balance, it takes three (3) years to effect a plan of action. (Example: the large Freshman class which we introduced to the Hills last year will remain there for the next 3 years and will have considerable impact on that school's total enrollment).
>
> "Statistics presented for the existing enrollment plan indicate a situation at the Hills which is intolerable; therefore, change is mandatory.
>
> "The Superintendent presents herewith five alternatives to the present arrangement. Some of these are not worthy of serious consideration – they were developed to show that the central problem has a rather narrow definition – that is, several critical zones carry the elements of the solution.
>
> "In developing the new data we used, (a) official enrollment figures for each sending elementary district as of September 30, 1971; and (b) 60% of the class enrollment at each of the two major elementary parochial schools – St. John's of Hillsdale and Our Lady of Mercy in Park Ridge; and our own experience tables for other private/parochial schools.
>
> "Plans I and II offer the best possibilities – Plans IV and V are within the realm of consideration. Other considerations which transcend the raw statistics will be presented by the Superintendent when the Board of Education discusses the report."

The Board considered the submission of its Superintendent of Schools and evidently discussed redistricting at some length in the weeks that followed. According to the Board's President, the Board:

> "*** met on I believe three different occasions after the receipt of the plans, and I would just have to estimate that we spent perhaps seven or eight hours total, prior to our public meeting, on March 13. ***" (Tr. II-25)

Another member of the Board confirmed that the plans (PR-1) were discussed by the Board on two or three occasions, but this member differed with the

Board President on the amount of time devoted to such discussion. His estimate was a half-hour.

The Board's final discussion of the plans (PR-1) was held on March 8, 1972, in an executive work session, and according to the Board President, the discussion was a "frank" one (Tr. II-62). Following the discussion, the Board evidently voted by a "show of hands" (Tr. II-62) not to open up a subsequently scheduled public meeting on March 13, 1972, to broad general discussion of the various five alternative plans which the Superintendent had submitted to the Board (PR-1). These alternative plans (PR-1) were not presented to the public generally, prior to the Board's action of March 13, 1972, nor at the meeting during which final action was approved.

It is clear that many voters of the district knew of the five plans (PR-1) and knew that the Board was considering the adoption of a plan numbered as "four" at the time of the meeting of March 13, 1972. During the course of this meeting one Board member opposed to plan four spoke against its adoption and other persons from the audience also expressed themselves concerning it when comments were invited by the President of the Board. (Tr. II-33)

Following the discussion, or comment, part of the meeting, the Board adopted plan four by a vote of "7 ayes and 1 nay."

The minutes of that meeting state:

> "*** On Motion by Mr. Singer, seconded by Mr. Jensen, and carried by a majority roll call vote of 7 ayes and 1 nay (Mr. Craffey voting negatively), Board accepted the redistricting of student population attending PVHS and PHHS in accordance with Plan IV as submitted in the Pascack Valley Regional District School Zoning Study dated February 1972, to become effective September, 1972, and in accordance with established board policy. (Plan IV would assign all future students from River Vale and all future students from Hillsdale, including on and east of Pascack Road to PVHS; all other students to attend PHHS) ***" (Minutes of Board Meeting, March 13, 1972, at p. 13)

At this juncture it is noted that the Board's decision to redistrict its schools for the 1972-73 school year was a necessary decision mandated by existing enrollment imbalance, imminent construction at the Valley School, and projected new capacities of the respective buildings following construction. While not questioning the necessity for redistricting, petitioners question the plan that was chosen. Their contentions are founded in part on the Board's own enrollment projections, which are contained as an integral part of plan four, adopted by the Board (PR-1) and reproduced below.

"School Year	P.H. (Hills School) (1600)*	P.V. (Valley School) (1800)**	District
72-3	1718	1325	3043
73-4	1666	1532	3198
74-5	1628	1738	3366
75-6	1508	1868	3376

76-7	1493	1861	3354
77-8	1450	1833	3283
78-9	1415	1739	3154
79-80	1342	1704	3046"

*Maximum Capacity
**Maximum Capacity After Addition

It is observed that plan four fails to note that the present capacity of the Valley School is only 1100 pupils. Thus, in 1972 – the year of construction of a major school addition – a total of 225 pupils will be enrolled beyond the school's maximum capacity. (At the Hills School this over-enrollment figure is seen to be 118 pupils.) Further, petitioners question the assertion that the existing construction will be completed prior to the start of the 1973-74 school year. They aver that if such construction is not completed the Valley School will enroll 432 pupils beyond maximum capacity in that year, while the Hills School's over-enrollment will approximate only 66. (See P-3) Petitioners project other disparities in the years 1974-80 and aver that the Board has underestimated the growth of the general population from which children will be assigned to the Valley School. (P-4, 5, 8, 16)

Further, petitioners argue, in their answers to interrogatories, that:

> "The 1100 pupil capacity [Valley School] applies for normal operation – with construction taking place in 6 or more places of the building a capacity degradation of 150 students is an estimated possibility considering five and normal construction hazards, storage access areas, construction traffic flow, power and heat connections, wall cuts and hook-ups, noise from power equipment (drills and jackhammers) ***."

On the other hand the Board argues that, prior to the time it adopted a redistricting plan, the matter of construction was considered (Tr. II-78). However, the Board evidently concluded that its school administrators had handled such problems in the past without undue adversity and that the problems envisioned herein were not greater. (Tr. II-81) Additionally, the Board maintains that construction work will not significantly alter the number of present facilities available for use and that the large area under construction for work in "speech-drama" might be available for use in December 1972. (Tr. II-121)

The Board's appointee or "Clerk of the Works" for the new construction now underway believes there is little doubt the new building addition will be ready for occupancy in September 1973. He testified:

> "*** I see no problem at all of occupying in September of 1973; absolutely no problem." (Tr. II-96)

He does admit there is always a possibility that construction delay will occur. (Tr. II-103) The Clerk of the Works also said that the construction has

been planned to avoid as much conflict with school operation as possible. (Tr. II-98)

The following items of information also have pertinence to the issues herein:

1. In February 1972 the Board predicted an enrollment of 1325 pupils in the Valley School in September 1972. According to the Valley School's principal there were 1308 pupils enrolled as of August 22, 1972. (Tr. II-192)

2. The two schools of the Pascack Valley Regional High School District have almost identical curriculum offerings.

3. The Valley School's principal does not believe the present overcrowded conditions are such as to impair the educational program to a significant degree (Tr. II-195). If the new school addition is not completed as scheduled by September 1973, he believes some alternate scheduling plans can be employed to minimize the impact of additional pupils.

The issues involved in the matter were ones which were stated prior to the hearing, *ante;* namely, whether or not the Board properly and lawfully adopted a redistricting plan in March 1972 and/or whether, in fact, the plan which was adopted was discriminatory in its net effect, inequitable, arbitrary or capricious. The finding of the hearing examiner is limited, in its procedural aspects, to the reporting of the evidence, *ante,* concerning the Board's adoption on March 13, 1972, of redistricting plan Four.

With respect to the merits of the plan, its equity, and fairness – the hearing examiner makes the following observations:

1. There is some inequity in comparative enrollments at the present time, but both schools are over their rated capacity and the situation could not be basically altered without new facilities. There is some merit in petitioners' argument that, in a year of major construction in one school, the higher of two enrollment overloads should have been assigned to the other. (Hills School)

2. However, in the long view, if conflicting claims on expected population growth are put aside, the hearing examiner believes that the Board's adoption of plan four may prove to be the correct one. If so the present inconveniences are justified by the broader good.

3. Events, and time alone, will prove whether or not the new addition to the Valley School will be ready for occupancy in September 1973. If it is, the Board's action controverted herein is vindicated at least in part. If it is not, major adjustments in program and scheduling will undoubtedly be necessary. However, the hearing examiner believes that the Board's reliance on its clerk of the works, an experienced general contractor, and

> its architect are well founded and that the Board has proceeded properly on their advice that the building will be completed by September 1973. Petitioners' opinion to the contrary would appear to be speculative and offers no basis for a contrary action by the Board at this juncture.

Finally, the hearing examiner is constrained to reiterate the fact that the basic need in the Valley School is a new school addition. The voters have commendably approved such a project and building is in progress. Until such time as that addition is finished any apportionment of pupils within the Pascack Valley Regional High School District could be attacked as inequitable in part. After it is finished inequities can be dealt with in a realistic manner with the hope of solution. Certainly, the present plan bears all the attributes of former plans of redistricting adopted by the Board -- most importantly that it is subject to change.

* * * *

The Commissioner has reviewed the report of the hearing examiner and noted the two principal issues for determination; one concerned with the procedures the Board employed prior to the adoption of a plan to redistrict its schools, and the other with the merits of the plan. The Commissioner determines, however, that petitioners' proof with respect to these issues provide no grounds for intervention by the Commissioner at this juncture.

This determination is grounded on the judgment, with respect to the first issue, *ante*, that the Board acted in a reasonable, deliberate and thorough manner to examine the enrollment projections (PR-1) over a period of weeks prior to the time of its final action of March 13, 1972. Such final action was not barred by the fact that there had previously been a frank exchange of views in a caucus meeting, *Schultz v. Teaneck*, 86 *N.J.* 29, nor can the action be rendered a nullity by any claim that a full adversary type hearing was a prerequisite to the decision. It is the Board alone which is empowered by *N.J.S.A.* 18A:11-1 to make rules for its own "government" and the "government" of the public schools entrusted to its supervision, and the Commissioner determines that the Board's decision controverted herein was not contrary to its own rules in this regard. In any event the Board did invite public discussion or comment on the issue before it and received such comments prior to the final action. A deliberative body, such as the Board herein, has a right, as the Court stated it in *State ex rel. George B. Whitney, v. Hiram Van Buskirk*, 40 *N.J.L.* 463 to vote and reconsider its vote at its own pleasure until such time as a final determination is reached. According to the Court:

> "*** Such final determination may be evinced by a public promulgation of the result, or by subsequent action inconsistent with the purpose of further review.***" (at p. 467)

See also *Bove v. Board of Adjust. of Emerson Borough*, 100 *N.J.S.* 95.

As the Court stated in *Thomas v. Board of Education of Morris Township*, 89 *N.J.S.* 329, at page 332:

> "*** We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be used 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. *Quinlan v. Board of Education of North Bergen Township*, 73 *N.J. Super.* 40 (*App. Div.* 1962); *Schinck v. Board of Education of Westwood Consol. School District*, 60 *N.J. Super.* 448 (*App. Div.* 1960). ***"

The charge of petitioners that the Board's redistricting plan is inequitable, lacking in rationale, and discriminatory is also without merit in the Commissioner's judgment. While it is true that some inequity may exist at the present time, the question may also be posed – Is there ever an enrollment assignment plan that is perfectly balanced, a plan where no iota of inequity exists? While it is clear that the answer to such a question is a negative one, it is equally clear that every situation which involves the assignment of pupils to one school or another requires careful and constant scrutiny to avoid the possibility of an imbalance which is clearly detrimental to the interests of all.

In the instant matter such a possibility exists, in the Commissioner's judgment, for the 1973-74 school year. Although the Commissioner believes the Board has properly discounted this possibility, he is also of the opinion that the Board would be well advised to develop contingency plans for that year at an early date.

For the reasons stated, the Commissioner finds no grounds for his intervention in this matter nor for the interposition of an alternate judgment to that made by the Board for the districting of its schools. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

November 28, 1972

In the Matter of the Application of the Upper Freehold Regional Board of Education for the Termination of the Sending-Receiving Relationship with the Board of Education of the Township of Washington, Mercer County.

COMMISSIONER OF EDUCATION

DECISION

For Upper Freehold, Barclay P. Malsbury, Esq.

For Washington Township, Henry F. Satterthwaite, Esq.

The Upper Freehold Regional Board of Education, hereinafter "Regional Board," requests the permission of the Commissioner to terminate the sending-receiving relationship existing between it and the Board of Education of the Township of Washington, hereinafter "Township Board," effective June 30, 1974, the expiration date of their present ten-year sending-receiving agreement. The Township Board opposes the request for such termination.

A hearing in this matter was conducted on June 12 and 13, 1972, at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The sending-receiving relationship between the Regional Board and the Township Board for the education of pupils in grades nine through twelve, is one that has existed for approximately 45 years (Tr. 5), although the first formal contract in this regard was executed in 1964. Even though the relationship has been an amicable one, recent events at the senior high school level have caused the Regional Board to reexamine its responsibility to educate pupils from sending districts, and has led it to the conclusion that the relationship between it and the Township Board should be terminated. This conclusion appears to be one which is motivated by present overcrowding at the senior high level, an overcrowding which is alleged to be a factor in several incidents of pupil unrest in recent years. More importantly, the conclusion is founded on a projective scrutiny of future enrollments which, in the Regional Board's judgment, indicate that present problems will be continued unless the geographical area from which the Regional Board draws its pupils is contracted in some manner.

After a survey of the situation, it is now the Regional Board's opinion that the present geographical school attendance area may best be tailored to fit into the educational facilities which the Regional Board can provide both now, and in the future, if pupils of Washington Township are required to attend school elsewhere. This opinion is founded on certain basic enrollment projections which represent a dichotomy of view and on other projections and assumptions which do not. These basic enrollment projections, and certain basic data not in contention herein, will be discussed below, and the diversity of opinion will then be explored.

I.

The Upper Freehold Regional School District, hereinafter "regional district," is located in the center of the State of New Jersey, approximately ten to fifteen miles from the State's Capital City of Trenton, and is composed of the Borough of Allentown and the Township of Upper Freehold, Monmouth County. The regional district also serves as the receiving district for three sending districts; namely, Millstone, Monmouth County; Plumstead, Ocean County; and Washington Township, Mercer County.

Of these component and sending districts, the Borough of Allentown is the one most completely built-up, with little land area (only two square miles) to sustain future population growth. For comparison purposes, the Township of Upper Freehold contains approximately 47 square miles and Washington Township, according to testimony, contains in excess of 20 square miles (Tr. 86). Both of these latter districts are largely rural in character although a new interstate highway through the area is expected to alter this situation in the future through an increased construction schedule involving both industrial and residential building projects.

As one example of this growth, the Upper Freehold Regional Superintendent, hereinafter "Regional Superintendent" testified that a total of 89 dwelling units are now under construction, or approved for construction, within the Borough of Allentown and that 80 apartments have also been approved. (Tr. 47) Additionally, he testified that a "planned unit [housing] development" involving 4000 units "is being proposed and is under consideration by the town fathers in the Township of Upper Freehold." (Tr. 48)

These and similar projected developments within the regional district are expected, by the Regional Superintendent, to add significantly to the pupil population of the regional district in future years. Specifically, the Regional Superintendent estimates that:

> "*** an average of a little over two hundred, two hundred and thirty students per grade, from kindergarten on to twelfth grade, during the next eight years will be added to our school enrollment.***" (Tr. 48)

To this figure, the Regional Superintendent projects a growth in the number of pupils from Washington Township, since according to his testimony, which is founded on a study of the Mercer County Planning Board (P-6),

> "*** Washington Township will expect to double their population by 1980, and in 1990 would double again, and by the year 2000 would triple. ***" (Tr. 22)

Such projections of growth within the regional district, and in Washington Township, are cause for serious concern in the Regional Superintendent's opinion, since the schools of the regional district are already crowded and

additional building programs are necessary now, or will shortly be necessary, at both the elementary and high school levels.

For purposes of this report, we are primarily concerned with the high school level, since Washington Township educates its own pupils enrolled in grades kindergarten through eight in schools situated within Washington Township. Therefore, it is necessary to examine only present and projected enrollments at the high school level in the context of the projected population growth within the regional district reported, *supra.*

The present high school of the regional district opened in 1964 and has not been enlarged during the past eight-year period. According to the Regional Superintendent, it has a present, rated capacity of 786 pupils, at 80% of full utilization, and a maximum capacity, at full utilization, of 983 pupils. (Tr. 27) During the school year 1971-72, the high school building was utilized at its approximate maximum rated capacity with an enrollment of 969 pupils, and the Regional Board planned to inaugurate a double session schedule for the 1972-73 school year. This planning was prompted by a straight-line enrollment projection of 1053 pupils for that year.

Enrollment and other projections, in the absence of any provision for general or pupil population growth, are listed in chart form (P-7, 8, 11) by the Regional Superintendent as follows:

YEAR	WITH WASHINGTON TOWNSHIP PUPILS*	WITHOUT WASHINGTON TOWNSHIP PUPILS
1971-72	969 (195)	774
1972-73	1053 (206)	847
1973-74	1110 (216)	894
1974-75	1163 ,(235)	928
1975-76	1120 (223)	897
1976-77	1128 (230)	898
1977-78	1164 (232)	932
1978-79	1163 (229)	934
1979-80	1213 (229)	984
1980-81	1186 (233)	953

*Rated Capacities = 786 (at 80% utilization)
983 (at full utilization)

These enrollment projections by the Regional Board are not disputed by the Township Board. The dispute herein is what they portend for the future; what action is required.

II.

The Regional Board argues that it needs new facilities at the high school level even if pupils from Washington Township are required to attend elsewhere; but, with such a requirement, "more time" would make it possible for the

Regional Board to construct its own facilities. Specifically in this regard, the Regional Superintendent testified on cross-examination at the hearing, *supra:*

> "*** Well the primary advantage that we will gain from Washington leaving is the fact that this give (sic) us more time to construct facilities. We will know definitely what students we will house in our schools, so we can plan construction. At the present time it is up in the air. It will show the rates of the enrollment increase. Your community (Washington Township) is the fastest growing community. It will slow down the rate of growth, and ——***" (Tr. 93)

Additionally, the Regional Superintendent testified, in this regard:

> "*** we feel we need a building regardless of whether Washington stays or leaves.***" (Tr. 124)

and, further,

> "*** in all good conscience the building that we are planning would not be a lot larger than we need in the very near future if we do not have Washington Township, and on the other hand, if we still have them, we are going to be crowded very soon again, I feel ***." (Tr. 128)

While conceding that the regional district needs a building program to enlarge its high school capacity, regardless of whether or not Washington Township remains as a sending district, or is terminated, the Regional Superintendent apparently believes that the voters of the district will not approve a building program unless the Regional Board reduces its obligation to educate the pupils of districts other than those which constitute the regional district. (Tr. 106) Nevertheless, according to the Regional Board President, the regional district is proceeding with a building addition proposal and he testified that "*** very shortly we will have something to present to the public." (Tr. 119)

The hearing examiner finds that it is evident from the testimony of the Regional Superintendent and from the Regional Board President that the Regional Board has recognized in the past, and recognizes today, the need for a building program. It is apparent that such a building program will not be tailored to the Commissioner's decision in the matter *sub judice,* but instead will be based upon the Regional Board's pragmatic assessment of what the public generally will approve. (See Tr. 125, 128)

The Township Board avers that it has explored alternative placements for its pupils with districts other than the regional district, but states that none are available at the present time. One such district, the West Windsor-Plainsboro School District, according to the testimony of its Board President, resolved in November 1971, to discontinue discussion of regionalization with the Washington Township Board. (Tr. 78) It was also educed from the testimony of the Mercer County and Monmouth County Superintendents of Schools that no alternative placement possibilities for Washington Township pupils are known to

them at the present time.

However, the Township Board is not adamantly opposed to termination of the present sending-receiving relationship with the Regional Board at a future date. To the contrary, even at this juncture -- with only 200 high school pupils enrolled in grades nine through twelve -- it has been considering the possibility of erecting its own high school in the future, if such a school proves to be economically and educationally feasible. (Tr. 162) Pursuant to this consideration, the Township Board's vice president testified that the Township Board has options on a site consisting of 49.5 acres (Tr. 162), but that it needs "*** additional time in order to see what is actually going to develop in our own Township.***" (Tr. 163)

Although there are no known alternatives to the existing sending-receiving relationship, it is the testimony of the Township Superintendent that the Township Board is discussing regionalization proposals informally with a "number of districts." (Tr. 175) The Mercer County Superintendent also has suggested the possibility of a regional study group involving the Township Board and two other boards of districts now sending pupils to the regional district. However, he also avers that severance of the sending-receiving relationship would pose a "dilemma" for him at this juncture or in 1974.

The Monmouth County Superintendent also testified at the hearing, *supra*, with respect to the existing sending-receiving relationship. In response to the question,

> "*** do you feel it is in the best interest of all children attending this high school that this termination take place?***" (Tr. 16)

he said:

> "*** I would think there ought to be some attempt to continue the same arrangement with these districts. I am not convinced, at this moment, that there aren't some solutions other than the termination of the sending-receiving relationship.***" (Tr. 16)

The "solutions" to which he referred in tentative fashion included a building addition program by the Regional Board, and in this regard, he stated that it was his recollection that the present regional district high school was originally designed to provide for an expansion of the pupil population to 1200 pupils. (Tr. 17)

Finally, the hearing examiner finds that it is necessary to recite some factual data for consideration that could not be made a part of the narrative, *supra*. This recital is comprised of six items as follows:

> 1. In 1970 the Regional Board was granted permission to proceed with plans for a new building addition, to be added to its high school, at an

extension of credit hearing before the Commissioner. It later decided not to proceed because of a belief that the time was not propitious.

2. The proposed cost of the Regional Board's building addition program, now under consideration, is not known at the present time.

3. The bonded indebtedness of the regional district for the present high school building in Allentown matures in 1983. (Tr. 144)

4. The regional district will have to absorb, and apportion, approximately $200,000 in tuition costs now paid by Washington Township if the existing sending-receiving relationship is severed. This sum will be offset by resultant savings estimated imprecisely at from $30,000 to $70,000. (Tr. 146, 157)

5. The evidence shows that the racial configuration of the regional district will change by approximately 1% if the existing sending-receiving relationship is severed. (P-9)

6. As reported, *supra*, the Regional Board did inaugurate a double session schedule in September 1972 which it had planned in school year 1971-72. The immediate necessity for this was the overcrowded condition which occasioned a greatly diminished academic program (P-13), and pupil agitation and unrest.

This last item, *ante*, poses the primary issue for the Commissioner; namely, whether or not the present overcrowded conditions in the regional district high school, which are not disputed, may best be cured, for the advantage of all concerned, by a severance of the sending-receiving relationship between the regional district and Washington Township.

While the Regional Board has adopted a position which advocates such severance, its point of view is opposed by the Township Board at this juncture.

* * * *

The Commissioner has carefully reviewed the report and findings of the hearing examiner and notices the statement of the principal issue; namely, whether or not the present crowded conditions in the Upper Freehold Regional School District may best be cured by a severance of the existing sending-receiving relationship.

The Commissioner fails to see that a cure will result from the proposed severance. The pupil population projections which the Regional Board advances, clearly show that even if Washington Township is compelled to send its pupils elsewhere in 1974, the regional district high school will still be filled to almost maximum capacity (estimated enrollment of 928, capacity of 983). Further, the Commissioner notices that even a small projection for population growth, when

added to the straight-line projections, will result in an enrollment not significantly different from the one about which the Regional Board now justly complains.

The Commissioner also observes that the Regional Board itself has recognized in the past and still recognizes this fact, since preparations for a building program have already begun, and will proceed, regardless of whether or not Washington Township continues as a sending district to the regional district. The Commissioner commends the Board for this recognition of the problem.

However, the principal question remains, since there is no doubt that projected overcrowding in the regional district high school will be relieved if the Regional Board's request herein is granted. This question is, has the Regional Board proven that there are "good grounds," or "good and sufficient" reasons, which proof is required by the statutes, for the termination of the present sending-receiving relationship with Washington Township? In considering this question, and the issue posed by the hearing examiner in *pari materia*, the Commissioner is constrained to review the pertinent statutes and to refer to previous decisions of the Commissioner in similar cases in order that this dispute may be considered in the proper context of law.

The Regional Board's application in the instant matter is grounded in the terms of *N.J.S.A.* 18A:38-8, *et seq.*, which governs the relationships that exist among school districts in New Jersey. These statutes provide for stability and order in sending-receiving relationships between districts, while at the same time providing the flexibility which is needed to meet situations which constantly change.

Thus, *N.J.S.A.* 18A:38-13 provides that once a sending-receiving relationship has been established it shall not be "changed or withdrawn" except for "good and sufficient" reason. The complete text of this statute is as follows:

> "*** No such designation of a high school or high schools and no such allocation or apportionment or 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." (*Emphasis ours.*)

N.J.S.A. 18A:38-21, which is particularly applicable to districts with written contracts provides that:

> "Any board of education which shall have entered into such an agreement may apply to the commissioner for consent to terminate the same, and to cease providing education to the pupils of the other contracting district on the ground that *it is no longer able to provide facilities* for the pupils of the other district ***." (*Emphasis ours.*)

It is noted here that all such applications require a hearing before the Commissioner, or a representative designated by him, and *N.J.S.A.* 18A:38-22 states that:

> "*** if the commissioner finds that there are *good grounds* for the application, as provided in this article, he *shall give his consent*, and the applying board of education shall thereupon be entitled to terminate the agreement***." (*Emphasis supplied.*)

The judgment required of the Commissioner is whether "good and sufficient" reason exists to warrant the termination of an existing sending-receiving relationship and if so, whether or not there are "good grounds" for such termination.

In interpreting the words of these statutes, and similar statutes which have preceded them, the Commissioner has often been required to elucidate the specifics which underlie such judgments.

Thus, *In the Matter of the Application of the Board of Education of the Township of Green Brook, Somerset County, to Terminate the Sending-Receiving Contract with the Board of Education of the Borough of Dunellen*, 1967 *S.L.D.* 329, the Commissioner refused an application to terminate a sending-receiving relationship initiated by Green Brook, the sending district, on the principal grounds that the:

> "***termination of the sending-receiving contract in 1968 will seriously affect Dunellen both financially and educationally, and he so holds.***" (at p. 334)

As another case example, the Commissioner found that a sending-receiving relationship should be severed because a receiving district was unable to meet the demands upon it. He stated in this case, *In the Matter of the Termination of the Sending-Receiving Relationship Between the Boards of Education of the Township of Lakewood and the Township of Manchester, Ocean County*, 1966 *S.L.D.* 12, that:

> "*** continuation of the present sending-receiving relationship can be expected to impose such serious demands upon the high school facilities in Lakewood Board of Education will be unable to provide suitable school facilities for its pupils and to maintain a thorough and efficient system of secondary education.***" (at p. 14)

A similar request *In the Matter of the Application of the Board of Education of Caldwell-West Caldwell to Terminate Sending-Receiving Relationship With the Board of Education of the Township of Montville Beginning With the Ninth Grade for the School Year 1958-59*, 1957-58 *S.L.D.* 43 was also approved by the Commissioner and he stated that the:

"*** High School is overcrowded, that to continue to increase this overcrowding would impair the educational program of the district and that the pupils from Montville could receive an adequate educational program in any one of four high schools within a reasonable distance from Montville.***" (P-45)

Perhaps the most complete rationale for decision-making involving sending-receiving relationships is found in *Board of Education of the Borough of Haworth v. Board of Education of the Borough of Dumont*, 1950-51 *S.L.D.* 42 wherein the Commissioner stated the following:

"*** 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 by 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 (sic). It is the opinion of the Commissioner that the petitioner has not sustained this burden of proof.***" (at pp. 42-43)

For other decisions in this regard see *Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park*, 1959-60 *S.L.D.* 163; *Board of Education of the Borough of Allenhurst, Monmouth County v. Board of Education of the City of Asbury Park, Monmouth County*, 1963 *S.L.D.* 168; *In the Matter of the Application of the Board of Education of the City of Vineland, Cumberland County, for the Termination of the Sending-Receiving Relationship with the School Districts of Newfield, Pittsgrove, Weymouth and Buena Regional*, decided by the Commissioner April 15, 1971.

A consideration of the instant matter in the context of the statutes and case decisions cited and excerpted, *supra*, now requires some reiteration of factual matter from which some conclusions may be drawn and determinations made. The principal facts herein are not in dispute and may be listed as follows:

1. There is no known alternative placement for pupils from Washington Township at the present time. (Unlike the situation in the application of Caldwell-West Caldwell, *supra.*)

2. There is no evidence that the Regional Board herein (unlike Lakewood, *supra*), is faced with "serious" demands for new facilities occasioned by Washington Township's present school enrollment or its future projected growth. To the contrary, the Regional Board clearly needs a school addition regardless of whether or not Washington Township leaves or stays as a sending district.

3. It is clear that a school addition program in the regional district might meet the needs with advantage to all concerned for some years to come.

4. A decision by the Commissioner to terminate the existing relationship between the Township Board and the Regional Board at this juncture might be purely academic; a delusion without practical effect. This is so because the pupils of Washington Township have an entitlement to a "thorough and efficient" education; an entitlement which might mandate their placement in the regional district high school by the exigencies of the situation, even if the Commissioner were to formally agree that the Regional Board had sustained the burden of proof to which the Commissioner referred in the decision involving the Borough of Haworth, *supra.*

Having reviewed these facts, the Commissioner is constrained to state that he believes the instant Petition is premature and that it is based in part on conjecture. On the one hand the Regional Board avers that Washington

Township is or will be a fast-growing district. On the other hand, its enrollment chart (P-7) indicates an increase in high school enrollment of 227 pupils in the period 1971-72 through 1980-81 with only 38 pupils of this increase projected from Washington Township. On a percentage basis, pupils from Washington Township form a smaller proportionate group of the pupil population in the projection for 1980 than they do today. Indeed, if the planned unit housing development materializes in Upper Freehold, the percentage of Washington Township pupils attendant in the regional district high school may be expected to shrink even more.

Having examined the facts of the instant matter and having reviewed the contentions of the parties, the Commissioner finds and determines that the Regional Board has not provided the "good and sufficient" reason which the statute *N.J.S.A.* 18A:38-13, *supra*, requires for the severance of the sending-receiving relationship between it and the Township Board at this juncture. The Petition herein is, accordingly, denied.

However, the Commissioner believes that the physical size of the present Upper Freehold Regional School District and its sending districts has such a potential for population growth that future developments in the area may well require periodic scrutiny. The instant denial may well be rendered obsolete by future events within a rather short period of time.

Accordingly, the Commissioner urges all districts within the sending area of Upper Freehold Regional School District to develop short-term and long-term plans to accommodate such possible growth of the general and pupil population. In this regard, he recommends that the Board of Education of the Township of Washington continue and expand its recent planning efforts and that, in conjunction with the Mercer County Superintendent of Schools, it explore in depth the alternatives to the present sending-receiving relationship.

While the instant Petition is denied, the Commissioner will retain jurisdiction in this matter through June of 1974. At a time to be set, immediately subsequent to that date, the Commissioner will direct the parties herein to present an up-dated review of the relationship existing between them at that time.

COMMISSIONER OF EDUCATION

November 28, 1972

Robert Anson, Norman Shimp, and John L. Henderson,

Petitioners,

v.

Board of Education of the City of Bridgeton, Cumberland County,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Henry Bender, Esq.

For the Respondent, Kleiner, Moore & Fisher (Steven Z. Kleiner, Esq., of Counsel)

Petitioners, teachers employed by the Board of Education of the City of Bridgeton, hereinafter "Board," allege that their salaries were improperly and unlawfully reduced by the Board during the 1970-71 school year. Respondent Board denies that petitioners' salary rights have been violated, and asserts that they do not possess the necessary qualifications for the salaries to which they lay claim. Although individual petitions were filed originally, they were consolidated as a single petition by agreement of counsel.

This matter is submitted to the Commissioner of Education for his determination on the pleadings and Briefs of counsel.

Each of the litigants has served in the district for a different length of time, and it is stipulated that Robert Anson and Norman Shimp possess a tenure status. John L. Henderson alleges that he, too, has tenure by virtue of his employment and service in the district for more than "*** three consecutive academic years ***," as set forth in *N.J.S.A.* 18A:28-5(b). The Board neither admits nor denies that Petitioner Henderson has a tenure status. The Commissioner determines that Henderson is entitled to a tenure status if he holds an "*** appropriate certificate *** issued by the board of examiners ***." (*N.J.S.A.* 18A:28-5) The holder of a provisional teaching certificate accepts a conditional requirement of earning four academic credits per year, and the validity of a provisional certificate cannot be questioned as it relates to tenure, so long as this requirement is met. The State Board of Examiners' rule, setting forth qualifications for the issuance of provisional certificates, is excerpted as follows:

> "***A provisional certificate is a one-year certificate issued under certain circumstances to applicants whose preparation does not meet completely the New Jersey requirements for the regular certificate. The provisional certificate is issued only upon request by local school authorities stating that the applicant is being offered a position for which the certificate is

required. ***Applications for provisional certificates are not accepted from individuals in search of teaching positions. *Renewal of these certificates for an additional year is dependent upon the satisfactory completion of four semester-hour credits of additional study toward meeting the requirements.****" (*N.J.A.C.* 6:11-4.2) (*Emphasis supplied.*)

The Commissioner concludes, therefore, that Petitioner Henderson has tenure in the district because he holds an appropriate provisional certificate issued by the State Board of Examiners, State Department of Education, Trenton.

Having determined that each of the petitioners has a tenure status, the issue to be decided is: Were petitioners improperly compensated for the balance of the 1970-71 school year?

The Bridgeton Education Association negotiated an agreement with the Board, upon which the Board adopted the salary policy for the 1970-71 school year. Petitioners were compensated at the beginning of the 1970-71 school year pursuant to the terms of the Board's salary policy, in accordance with the negotiated agreement.

The Board asserts that its [the Board's] information about the qualifications of petitioners as to training and years of service was incorrect, and it should "have been known" that it was incorrect, since petitioners had received copies of the 1970-71 salary guide which indicated their proper compensation according to training and years of experience. (Board's Brief, at p. 4)

The Board avers, also, that each petitioner was paid on a higher level of the salary guide than that for which he was eligible and that the Board, therefore, issued adjusted salary statements to each of them.

However, the Board "*** does not claim that the parties acted *improperly*, inefficiently, or lacked capacity in any nature whatsoever.***" (Board's Brief, at p. 5)

The Board asserts that the new statements of salary were issued solely to correct the "administrative error" which came to light upon an objective examination of personnel files. (Board's Answer, at p. 2)

Petitioners do not deny that they were paid salaries at higher levels of the salary guide than they were eligible to receive, by virtue of their training and years of experience. However, petitioners argue that their individually-signed contracts established their levels of compensation for the 1970-71 school year. Therefore, they aver, pursuant to the terms of *N.J.S.A.* 18A:6-10 *et seq.*, they cannot be reduced in compensation"*** except for inefficiency, incapacity, unbecoming conduct or other just cause***."

This issue was addressed in *Docherty v. Board of Education of the Borough of West Paterson, Passaic County*, 1967 *S.L.D.* 297 which reads as follows:

> "***The Commissioner has previously considered the question of a tenure teacher's right to a voted salary in the case of *Harris v. Board of Education of Pemberton Township*, 1939-49 *S.L.D.* 164. In that case, Mrs. Harris, a tenure teacher, was voted a salary of $1,800 for the ensuing year. Some three months later, the Board of Education adopted a new salary schedule, and adopted a resolution rescinding the salary previously voted for Mrs. Harris and fixing a new salary of $1,600. In ruling upon Mrs. Harris' petition that the action reducing her salary be set aside, the Commissioner said:
>
> " 'A board of education may rescind at any meeting a resolution which it passed during the course of the meeting and, accordingly, persons do not acquire rights until the final action has been taken on such resolution prior to adjournment. The resolution of May 5th, above set forth, was the final action at the meeting on that date in relation to the appointment of teachers***.
>
> " 'If a teacher is under tenure, a board of education is authorized to increase her pay, but cannot reduce it except under the procedure set forth in the tenure statute, to which procedure the board has not reverted.***' "
>
> "And elsewhere:
>
> " '***An acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting.' " (at pp. 299, 300)

The matter herein is similar. Petitioners acquired vested rights to the salaries established for them by the Board's adoption of their salary placement. The Board notified each petitioner of his salary for the 1970-71 school year. If there had been a mistake in the placement of petitioners on the salary guide, it was not of their making and they cannot, as teachers under tenure, be deprived of a right they had acquired by the action of the Board in fixing their salaries for the 1970-71 school year.

The Commissioner finds and determines, therefore, that the Board only computed and offered salaries to petitioners for the school year 1970-71, which petitioners had accepted and were receiving. The Board's unilateral action, which resulted in petitioners being paid at lower salaries, is in violation of petitioners' vested rights as protected by the provisions of the Teachers' Tenure Act.

Therefore, since petitioners' salaries were improperly reduced, the Board of Education of the City of Bridgeton is accordingly directed to pay to petitioners the amounts of the differences in earnings to which they are entitled in accordance with the determination of the Commissioner herein.

COMMISSIONER OF EDUCATION

December 5, 1972

Michael O'Lexy and Elizabeth O'Lexy,

Petitioners,

v.

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

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, M. Bruce MacNaul, Esq.

For the Respondent, Samuel H. Bullock, Esq.

Petitioners are parents of a child formerly enrolled in the Township of Deptford Schools. They allege that their son, hereinafter "M.O.," is prevented from attending a "general public school" within the Township of Deptford, by reason of his classification as handicapped, and they request an Order compelling the Board of Education of the Township of Deptford, hereinafter "Board," to admit him forthwith to such a school. The Board avers that the placement it has offered M.O. is suitable to his needs, and that placement in a "general public school" would be detrimental to his interests.

A hearing in this matter was conducted in the office of the Gloucester County Superintendent of Schools on September 14, 1972, by a hearing examiner appointed by the Commissioner. A total of twenty documents were received in evidence at that time and counsel subsequently filed Briefs. The report of the hearing examiner is as follows:

M.O. is a twelve-year-old boy, who, in the year 1969, was classified as "Multiply Handicapped" (PR-9, 16), with a primary neurological impairment and some emotional disturbance, by the child study team, hereinafter "team," employed by the Board. The particular disability resulting from the handicaps was said by the team to be in the area of developmental language arts skills. This classification by the team (PR-16) resulted from a broad study and evaluative program which included psychological reports (PR-5), an examination by a

psychiatrist (PR–7) a neurological report (PR-6), a general physical exam (PR-1), an evaluation by a learning disabilities specialist (PR-4), a report by a social worker (PR-10), and reports by classroom teachers (PR-14, 15).

At the time the team made the classification, M.O. was enrolled in a regular fifth-grade classroom in the Deptford Township Schools; but, subsequent thereto, and after investigation proved no suitable "public" school placement in a class for children with M.O.'s handicaps was possible, he was enrolled on February 8, 1971, in an appropriate class in the "private" Bancroft School, Haddonfield, at Board expense. His enrollment in Bancroft continued through the balance of the 1971-72 school year and by June 8, 1971, it was possible for a social worker to report, in a conference of teams members, that M.O. had "made very good progress" (PR-11) in the five-month period which had elapsed since his enrollment in Bancroft.

In June 1971, the Board decided to establish a class of its own for neurologically impaired children during the school year 1971-72 and to locate this class in a school in a district immediately contiguous to the Township of Deptford. The Board subsequently assigned M.O. to this class, and it is primarily this assignment which is in dispute herein.

In petitioners' view, a placement in this nearby school would have stigmatized M.O., and they aver that he would not accept it. Therefore, petitioners refused such placement for him during all of the 1971-72 school year and contest it at this juncture. However, the Board stands firm on the correctness of the classification of M.O. by its team, and on its decision to place him in its own small class for handicapped children with problems similar to those of M.O.

In the context of petitioners' refusal, and as an attempt to provide M.O. with an alternative educational program, the Board did arrange for a home instructor to work with M.O. during the school year 1971-72, but the attempt evidently was not successful and was abandoned. Since there is no evidence that petitioners provided an equivalent educational program of their own, in lieu of the program offered by the Board, it is clear that the dispute herein resulted in M.O.'s failing to receive a formal education of any kind since that time.

At the hearing, *ante*, petitioners did not appear, nor did they produce witnesses of their own, to counter or challenge the classification and placement of M.O. by the Board's team. Instead, petitioners buttress their contention that M.O. should be returned to a regular classroom assignment, with special help in reading, by referring to excerpts from the many reports of the team's members and by questions directed to the team's coordinator, its psychologist and to the Township of Deptford Superintendent of Schools. Additionally, petitioners aver in their Brief of counsel that:

> (a) M.O. was never diagnosed as having a "Specific and definable central nervous disorder" prior to his classification as multiply handicapped with a primary neurological impairment; (Petitioners' Brief, at p.2)

(b) His assignment to a special class will tend to lower his self esteem – as a stigma against him – and that such assignment is contrary to the letter and spirit of State regulations; (Petitioners' Brief, at p. 5)

(c) The team never considered the stigma attached to special placement prior to the time that such placement was made; (Petitioners' Brief, at p. 7)

(d) The placement was arbitrary in the absence of such consideration prior to the team's action;

(e) There was no evidence that the assignment of M.O. to a regular school classroom would be a disruptive influence on other children.

In support of their principal contentions with regard to the kind of education appropriate for a pupil with M.O.'s problems, petitioners cite *N.J.A.C.* 6:28-3.1 (b) which provides:

"*** Whenever possible, handicapped pupils shall be grouped and/or participate with nonhandicapped children in activities that are part of their educational program.***"

The Board rests its case on the testimony of witnesses from its team called by petitioners and on nineteen documents submitted as joint exhibits. The testimony restates and reiterates the findings and classification of the team – that M.O. is a multiply handicapped boy, and that the most suitable placement for him is in a class established primarily for children whose principal handicap is neurological impairment. In the team's judgment, the placement it made was a proper one for the 1971-72 school year and is similarly appropriate for the school year 1972-73.

The hearing examiner has examined the documents PR-1 through PR-19, *supra*, wherein is found the chronology of the Board's efforts to classify and place M.O. in an appropriate educational program, and finds no evidence of superficial or arbitrary action by the Board's team. To the contrary, the record as an entity provides convincing and clear evidence that the team acted in a conscientious and thorough manner to classify M.O. properly, and to provide him with an appropriate educational program to meet his needs. The neurological report (P-6) does find:

"*** 'soft' motor signs such as moderate motor clumsiness, choreiform movements of the hands, mild perceptual motor difficulties, plus a moderate dyslexia.***"

Other reports (PR-4, 9, 16) attest in well-documented fashion to the fact that the final judgment of the team, embodied in PR-16 was one which was grounded on an exhaustive consideration of all factors gleaned from batteries of tests, expert examinations, and responsible professional opinion.

Faced with a similar set of circumstances *In the Matter of "D" v. Board of Education of the Borough of Scotch Plains-Fanwood and Fred La Berge, Superintendent of Schools, Union County*, decided by the Commissioner November 4, 1971, it was said:

> "*** Against the weight of this combined testimony, there is only petitioner's judgment that the school's proposed placement is not a suitable one for 'D,'and this judgment, with respect to 'D's' placement for the school year 1971-72, is made without even a trial to determine the merits of the school's proposed program.***"

The recommendation that ensued in that instance was that the Petition be dismissed by the Commissioner.

The same recommendation is made in the instant matter. And in sustaining the Board's position and the team's judgment, the hearing examiner recommends that petitioners be directed to comply forthwith with the Board's placement of M.O., or provide an alternative equivalent education at their own expense, so that the compulsory education statute, *N.J.S.A.* 18:38-25, is not flouted for another year.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the recommendations expressed therein. It is clear in this matter that the Board has proceeded to classify M.O. in accordance with the prescription of the statutes, *N.J.S.A.* 18A:46-6 *et seq.*, and has provided him with an appropriate program of education that its qualified team believes to be adapted to his needs and requirements. In any event, there is no evidence to support the counterclaim of petitioners that the classification of M.O. is incorrect. It cannot be factually argued that the team's educational program is not effective, since petitioners' refusal to have M.O. attend school during all of the 1971-72 school year, except on their own terms, precludes any judgment in this regard at the present juncture.

What evidence there is, concerning the correctness of the classification of M.O., and the efficiency of the program which the team believes is necessary to effectively help him, was gained from the Bancroft School, where he made good progress. It must be presumed that a similar placement in a class administered directly by the Board would not be less effective. The judgment made by the team was one it was empowered to make and, absent a showing of an arbitrary or procedurally faulty decision, it will be sustained as correct by the Commissioner. As the Commissioner said *In the Matter of "D," supra:*

> "*** Personnel of such child study teams are specifically empowered to make just such judgments as that made herein. Admittedly, it is a difficult task, but as the Commissioner observed in *The Parents of K.K. v. Board of Education of the Town of Westfield, Union County*, decided by the Commissioner June 1, 1971:

> " '*** the State Board of Education has required each district to employ highly-qualified personnel representing many disciplines. The certification standards for these team members are high. When, as in this instance, such a team makes a judgment it is qualified and mandated to make *** *that judgment will not be determined to be faulty* or incorrect by the Commissioner; *absent* a clear showing of procedural fault or an arbitrary exercise of discretion without proper diagnostic information.***' " (*Emphasis supplied.*)

Since there is no finding of "procedural fault" herein and no evidence of arbitrary action, the Commissioner determines the instant Petition without merit. It is, therefore, dismissed, and petitioners are directed to enroll M.O. in the program of education prescribed for him by the Board or in an equivalent program at their own expense.

In the event that such enrollment is not made, nor an equivalent program provided by the parents, the Commissioner expects that the Board will take all appropriate measures to insure compliance with the statutes of the State of New Jersey which compel school attendance by all children between the ages of six and sixteen.

COMMISSIONER OF EDUCATION

December 20, 1972

Board of Education of the City of Long Branch,

Petitioner,

v.

City Council of the City of Long Branch, Monmouth County,

Respondent.

COMMISSIONER OF EDUCATION

Decision

For the Petitioner, Giordano, Giordano & Halleran (Richard D. McOmber, Esq., of Counsel)

For the Respondent, Robert L. Mauro, Esq.

Petitioner, the Board of Education of the City of Long Branch, hereinafter "Board," appeals from an action of the City Council of the City of Long Branch, hereinafter "Council," certifying to the County Board of Taxation a lesser amount of appropriations for the 1972-73 school year than the amount proposed by the Board. The facts of the matter were presented at a hearing

conducted on October 5, 1972, at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

On February 16, 1972, the Board adopted a budget for the operation of its school system during the 1972-73 school year. This budget provided that a total of $5,030,880 was to be raised by local taxation.

Thereafter, the budget was submitted to the Board of School Estimate as required by statute (*N.J.S.A.* 18A:22-14), and the Board of School Estimate reduced the total budgeted expenditures of the Board by $75,000, and at the same time reduced the scheduled appropriation from unappropriated free balances by the same amount. The net effect of this action was that the Board of School Estimate had agreed with the Board that a total of $5,030,880 was required from local taxes for use in the operations of the Long Branch School District during the 1972-73 school year. A resolution to this effect was duly passed by the Board of School Estimate and certified to the Board and to Council.

Thereafter, however, Council acted independently on the basis of powers expressly conferred on it by *N.J.S.A.* 18A:22-17 and by a resolution of March 14, 1972, reduced the amount of money to be raised by local taxation to $4,930,880. This was a reduction of $100,000 from the amount proposed by the Board and approved by the Board of School Estimate. The Council's action herein was founded on the statute cited, *N.J.S.A.* 18A:22-17, *supra*, *inter alia*, that a governing body is not required to appropriate funds for school district operation "*** in excess of 1½% of the assessed valuation of the ratables of the municipality ***." Council maintains that such is the case herein and is not disputed in this regard by the Board. *N.J.S.A.* 18A:22-17, *supra*, reads in its entirety as follows:

> "The governing body of the municipality shall include the amount so appropriated in its tax ordinance, and the same shall be assessed, levied and collected in the same manner as other moneys appropriated are assessed, levied and collected, but the *governing body shall not be required so to appropriate any amount in excess of 1½% of the assessed valuation of the ratables of the municipality, but may do so if it so determines by resolution.*" (*Emphasis ours.*)

It is this reduction of $100,00 by Council which the Board now appeals. The chart below is a representation which summarizes the actions of the Board, the Board of School Estimate, and the Council, with respect to the amounts of money deemed necessary by each of these respective bodies to be raised from local taxation or appropriated from available balances in the school year 1972-73.

REVENUE

	From Local Taxes	From the Board's Unappropriated Free Balances
Board's Budget	$5,030,880	$500,000
Board of School Estimate	5,030,880	425,000
Council's Certification	4,930,880	425,000
(Reduction)	100,000	

The Board avers that the reduction of $100,000 in the amount of revenue to be raised from local taxation is excessive and unwarranted and that the total revenue which remains:

> "*** will not provide to the Board of Education sufficient monies necessary to fulfill the standard of providing a thorough and efficient system of schools in the City of Long Branch ***." (Board's Resolution, March 24, 1972, at p. 3)

In support of this position, the Board has provided extensive written testimony. The Board further avers that:

> "*** There are insufficient monies in the Surplus Account of the Board to allow the funding of the $100,000.00 reduction from said Surplus Account. ***" (Petition of Appeal, at p. 3)

Council argues to the contrary and avers that reduction can and should be made in the Board's budget to accommodate the amount of reduction which Council thought appropriate. However, this contention was not detailed by Council for a period of approximately four months from the date of the Board's appeal, *sub judice*, filed with the Division of Controversies and Disputes, State Department of Education, Trenton, on April 6, 1972.

The hearing examiner has reviewed the testimony of the parties in detail and determines that if a decision in the matter were dependent on the merits of the respective testimonies, he would be compelled to recommend a finding for the Board. Indeed, some of the Board's budgeted figures – *i.e.* those documented for general supplies, library books, text books and audiovisual aid supplies (P-4) – appear to be below minimal adequacy.

However, the hearing examiner finds no reason at all to review either the Board's or Council's testimony, although in the hearing examiner's judgment the testimony of Council lacks preciseness and clarity, and is not relevant to the merit of the Board's need for additional funds to provide the thorough and efficient school system which must be afforded all children in New Jersey by

Constitutional prescription. The fact of the matter is that such an adjudication is unnecessary; the Board has the money it needs in unappropriated free balances at the present juncture. This is apparent from a review of the documentation and the testimony which was given at the hearing, *ante*.

This documentation and testimony, with respect to unappropriated free balances, shows that on June 30, 1971, the Board had balances of:

(a) $866,554.48 in current expense, and
(b) $55,740.52 in capital outlay.

However, in anticipation that some additional balances would accrue in school year 1971-72, the Board, in February 1972, appropriated an additional $500,000 from its current expense balances for school year 1972-73 (this was later reduced to $425,000 by action of the Board of School Estimate) and applied $32,000 of the balances in capital outlay toward expenditures for capital outlay in school year 1972-73. It must be emphasized here that the Board's action in February 1972 with respect to balances in current expense was an action to appropriate money which it had, as a balance of record, only in part.

Nevertheless, as anticipated, the Board did accrue sufficient additional funds during school year 1971-72 to validate its decision. Specifically, according to testimony at the hearing, a total of $340,423.88 was accrued by the Board in its free current expense balances during that year and on June 30, 1972, the Board had the total sum of $706,978.36 remaining as a current expense balance, of which $425,000 had been appropriated for school year 1972-73. Thus a total of $281,978.38 remains as a free appropriation balance in current expense at this juncture, and additionally there is a small amount in capital outlay. It is in the context of this balance approximating $282,000 that Council's reduction of $100,000 must be viewed.

It seems evident to the hearing examiner that:

(a) the Board's statement contained in its Petition that:

> "*** There are insufficient monies in the Surplus Account of the Board to allow the funding of the $100,000 reduction from said Surplus Account. ***" (Petition of Appeal, at p. 3)

was true to the Board's best belief at the time the statement was made;

(b) the funds now known as available to the Board are sufficient to fund the reduction of $100,000 imposed by Council in the amount of money required from local taxation in school year 1972-73;

(c) the net effect of Council's action is to render it probable that the Board will be unable to continue to appropriate such large sums from balances in the future.

In this latter regard, the hearing examiner believes that caution would seem to indicate that no future appropriation by the Board from balances should exceed the free balance of record in the audit report of the Board's prior budget year.

Accordingly, the hearing examiner finds no need to discuss the dispute *sub judice* on its merits with respect to expenditures proposed by the Board, since the Board has the authority, and the revenue necessary to fully implement its budget proposals for the 1972-73 school year. He, therefore, recommends that the reduction of $100,000 imposed by Council be allowed to stand. A recommendation to the contrary, it must be observed, would mean the addition of $100,000 to the Board's free balance in the absence of any real proof, or even argument, that a sum in excess of $182,000 (which will still be available to the Board after a substitution of $100,000 from free balances for tax revenue) is needed and necessary for the support of a program of thorough and efficient education in the City of Long Branch during the school year 1972-73.

* * * *

The Commissioner has reviewed the report of the hearing examiner and concurs with the findings and recommendations contained herein. This decision is founded on a review of the decision of the Supreme Court of New Jersey in *East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) and the criteria for such judgments which the Court established. Specifically, the Commissioner notices the Court's direction as follows:

> "*** the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also *whether the State's educational policies are being properly fulfilled.* Thus, if he *finds* that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or *is insufficient to meet minimum educational standards* for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action ***." (at p. 107) *(Emphasis supplied.)*

In the application of such criteria to the instant matter, the Commissioner finds no evidence that there must be a restoration of funds to the Board to insure that the "*** State's educational policies are being properly fulfilled ***" or that the funds available to the Board are "*** insufficient to meet minimum educational standards ***."

Finally, the Commissioner notices that the Board of School Estimate has a limited duty to perform by statutory prescription; namely, to

> "*** fix and determine *** the amount of money necessary to be appropriated *** for the ensuing school year ***." (*N.J.S.A.* 18A:22-14)

It is observed that such a duty does not carry with it the corollary privilege of preparing or altering a budget. This obligation is imposed on boards of education

alone by the statutory prescription of *N.J.S.A.* 18A:22-7 and it is only when the budget becomes an appealable controversy that the Board of School Estimate must come forth with the supporting reasons for its action.

Having found no grounds herein to interpose a judgment other than that rendered by Council, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 20, 1972

In the Matter of the Tenure Hearing of Robert M. Wagner,
School District of the Township of Millburn
Essex County.

COMMISSIONER OF EDUCATION

Decision on Motion to Dismiss

For the Petitioner, McCarter and English (Andrew J. Berry, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Abraham L. Friedman, Esq., of Counsel)

Charges pursuant to the Tenure Employees Hearing Act have been certified to the Commissioner by the complainant Board of Education, hereinafter "Board," against respondent, a teacher with a tenure status in the School District of the Township of Millburn.

A hearing was held on December 5, 1972, in the office of the Essex County Superintendent of S hools, East Orange, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Nine written charges of inefficiency were mailed to the respondent teacher on March 28, 1972, pursuant to *N.J.S.A.* 18A:6-12 which reads as follows:

> "The board shall not forward any charge of inefficiency to the commissioner, unless at least 90 days prior thereto and within the current or preceding school year, the board or the superintendent of schools of the district has given to the employee, against whom such charge is made, written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same."

One charge dealt with respondent's absence from a staff meeting without permission. Another criticized his procedure in making appointments for

parental conferences. The rest of the charges dealt with respondent's inefficiency as a classroom teacher in the performance of his duties, with respect to the instruction of pupils and other classroom activities related to instruction.

A Motion for Dismissal of the charges certified by the Board was made on the premises that respondent did not have ninety days after receipt of the written charges in which to eliminate the inefficiencies as alleged.

The Board admits mailing the written charges to respondent on March 28, 1972, and counsel avers that certification of the charges was forwarded to the Commissioner of Education on June 30, 1972, subsequent to a special meeting of the Board on June 29, 1972, at which time the Board approved that certification.

Respondent alleges, however, that despite a series of evaluations which took place after March 28, 1972, the last evaluation of his teaching performance was on June 16, 1972, with the exception that the Supervisor of Instruction visited his classroom on June 21, 1972, and observed pupils in the process of cleaning their desks prior to the dismissal of school for the summer on June 22, 1972. Therefore, argues respondent, only eighty days were allowed between March 28, 1972, and June 16, 1972, in which to correct the alleged inefficiencies wherein *N.J.S.A.* 18A:6-12, *supra*, specifically provides for ninety days.

The Board argues that although written notice was not mailed to respondent until March 28, 1972, he knew of his inefficiencies long before that date and in fact had the specific letter alleging the inefficiences read to him "verbatim" on March 22, 1972. That was the same letter mailed later to respondent on March 28, 1972. The Board argues further that a series of conferences throughout the earlier part of the school year were held between respondent and his supervisors because of their concern about his poor classroom performance.

The Board argued finally that certification of the charges to the Commissioner was made only after a period of ninety days had elapsed since it delivered the written charges to petitioner pursuant to *N.J.S.A.* 18A:6-12, *supra;* however, petitioner knew of the specific charges on March 22, 1972.

The hearing examiner concludes his report to the Commissioner with the aforementioned recitation of the dates in contention and the applicable statute *N.J.S.A.* 18A:6-12, *supra*, as argued by the parties.

* * * *

The Commissioner has read the report of the hearing examiner, and finds that a careful review of *N.J.S.A.* 18A:6-12, *supra*, and its intent is required herein, prior to a determination of respondent's Motion to Dismiss.

It is necessary to point out that the tenure statutes were designed by the Legislature to protect teachers from the arbitrary and capricious whims occasionally demonstrated by some local boards of education.

The specific statute in question (*N.J.S A.* 18A:6-12, *supra*) anticipated that teachers who, at one time served well enough to gain tenure might, in later years, be less than efficient and boards were, therefore, provided a statutory procedure to correct inefficiency, when exhibited, for the protection of the pupils in the school districts.

N.J.S.A. 18A:6-12, *supra*, is quite specific on how this is to be accomplished. The Board can only certify charges of inefficiency to the Commissioner after "*** written notice of the alleged inefficiency***" has been served on the employee in question *and then only after a period of ninety days has elapsed in which the employee has had an opportunity to correct the alleged inefficiencies.*

It is clear to the Commissioner that the Legislature thus gave the employee ninety days as the minimum time in which to improve his performance. It is illogical to hold that a teacher could be evaluated a day, or a week, or a month after being served with written notice and still found inefficient, and then have a board wait until ninety days elapsed before certifying the charges to the Commissioner. Such is not the intent of the statute. Rather, a period of ninety days is required during which time the employee can be evaluated and counselled. Subsequent to this period of ninety days, a board must make its determination*** within 45 days after the expiration of the time for correction of the inefficiency ***." *N.J.S.A.* 18A:6-13 These two statutes *N.J.S.A.* 18A:6-12 and *N.J.S.A.* 18A:6-13 must be read together for a proper determination of the legislative intent, after the service of charges of inefficiency.

In the instant matter, the record shows that respondent was evaluated after the charges of inefficiency were *mailed* to him on March 28, 1972. It has not been determined when he received them. The record shows also that the last observation of his teaching performance was on June 16, 1972. Even if the observation of June 21, 1972, of the cleaning of desks for the summer vacation was unsatisfactory, this once-a-year activity could not be a basis for a determination on any of the original charges as filed.

The Commissioner finds, therefore, that respondent had a maximum of eighty days in which to correct the charges of inefficiency, and that the mere expiration of time to June 29, 1972, prior to the certification of these charges to the Commissioner, does not comply with the spirit and intent of the statute. *N.J.S.A.* 18A:6-12.

The Motion to Dismiss the charges is granted, but without prejudice to the Board's subsequent right to proceed, consistent with the provisions of *N.J.S.A.* 18A:6-12, *supra*, and in conformance with the principles enunciated in this decision.

Therefore, the Commissioner directs the Board of Education of the Township of Millburn to: (1) reinstate respondent at his appropriate step on the salary guide; (2) compensate respondent for all lost back salary from September 1, 1972, according to the pay schedule in force for the 1972-73 school year, less mitigation of monies earned by him during his suspension; (3) award respondent all benefits for which he was eligible from September 1, 1972.

COMMISSIONER OF EDUCATION

December 22, 1972

Board of Education of the East Windsor Regional School District,

Petitioner,

v.

Common Council of the Borough of Hightstown and Council of the Township of East Windsor, Mercer County,

Respondents.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondents, Satterthwaite & Satterthwaite (Henry F. Satterthwaite, Esq., of Counsel) and Mason, Griffin, Moore & Pierson (Hervey S. Moore, Jr., Esq., of Counsel)

At the annual school election on February 1, 1972, the voters of the East Windsor Regional School District rejected proposals of the Board of Education, hereinafter "Board," to raise by local taxation a sum of $4,209,550 for current expenses and $71,970 for capital outlay for the 1972-73 school year. The proposed budget was then submitted to the Common Council of the Borough of Hightstown and the Borough of East Windsor Council, hereinafter "Councils," purusant to *N.J.S.A.* 18A:22-37, for determination of the amount of appropriations for school purposes to be certified to the County Board of Taxation. On March 1, 1972, Councils adopted a resolution certifying the sum of $3,650,278 for current expenses and $71,970 for capital outlay. The amounts at issue may be shown as follows:

Current Expense	$4,209,550	$3,650,278	$559,272
Capital Outlay	71,970	71,970	– 0 –
Totals	$4,281,520	$3,722,248	$559,272

A hearing was held at the State Department of Education, Trenton, on October 3, 1972, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The Board contends that the action of Councils was arbitrary, capricious and unreasonable and the amount certified for current expenses is insufficient to maintain a thorough and efficient school system as required by law.

The record shows that Councils met with the Board in efforts to resolve the budget dispute, and when those efforts failed, filed an Answer to the Board's budget appeal which contained a Statement of Determination and Reasons for the suggested economies.

The preparation of a breakdown of the budget and a statement about the budget came about as a result of the Court's requirement in the case of *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966), which reads in part as follows:

> "*** Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. This is particularly important since, on the board of education's appeal under *R.S.* 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found.***"

Councils presented a list as specified at the time it communicated its reduction to the Board. Therefore the hearing examiner concludes that Councils' cut was not arbitrary, capricious and unreasonable, and he recommends that this charge be dismissed.

Councils, in keeping with the guiding principles laid down by the Court in *Board of Education of East Brunswick v. Township Council of East Brunswick*, *supra*, set out certain items which it suggested could be reduced. The sum of the suggested reductions is as follows:

Current Expenses and "Programs"

Account No.	Line Item	Board	Councils	Reduction
J213a & J216	Elimination of Two new "Units" of Houses	$2,791,086	$2,532,646	$258,440
J213	Inst. Sal. & Fringe Ben.	**	**	39,319
J110 & J214b	Admin. Sal. & Fringe Ben.	**	**	6,822
	*Sabbatical Leave	**	**	32,537
	*Part-time Sum. Wk.	**	**	1,408
	*Plant Operation	482,728	469,641	13,087
	*Plant Main.	187,517	184,270	3,247

		"Programs"		
No. 6	Business Office	$ 16,550	$ 16,000	$ 550
No. 7	Central Admin.	16,660	14,800	1,860
No. 16	Library	65,486	62,506	2,980
No. 17	Maintenance	76,650	72,600	4,050
No. 31	General School Servs.	61,907	27,600	34,307
No. 32	Dist. Wide Supls.	69,000	52,500	16,500
No. 3	Board of Ed.	42,400	30,500	11,900
No. 4	Building Admin.	33,356	31,300	2,056
No. 8	Plant Operation	241,294	214,300	26,994
No. 9	English, Math,	93,888	51,586	42,302
18, 21, 22, 24	Phys. Ed., Rdg. Social Studies			
No. 26	Attendance Office	3,875	– 0 –	3,875
No. 27	New Vehicles	73,700	57,700	16,000
No. 29	Comm. & Sum. School	93,334	52,000	41,334
	Total	$---------	$---------	$559,568

*Not listed as a line item number
**Not given as a total dollar amount by specific line item number

Although there were no funds in the Board's capital outlay account which were set aside for reduction, Councils did make reductions in the Board's "Programs," many of which contained capital outlay line items.

A breakdown of the proposed reduction by capital outlay account reveals the following:

Capital Outlay in "Programs"

Program	Line Item	Reduction
No. 4	1240c – New Instructional Equipment	$ 1,205
No. 8	1240f – New Equipment	3,000
No. 16	1240c – New Inst. Equip.	3,500
No. 17	1230c – Remodeling Classrooms	5,000
No. 17	1240c – Equip. Maint. of Plant	2,500
No. 18	1240c – New Inst. Equip.	400
No. 21	1240 – New Inst. Equip.	2,208
No. 22	1240c – New Inst. Equip.	300
No. 24	1240c – New Inst. Equip.	1,340
No. 31	1220e – Improvement to Sites	4,037
No. 31	1230c – Building Remodeling	31,312
No. 31	1240c – New Inst. Equip.	4,532
		$59,334

Councils' total proposed reduction included, therefore, $59,334 of capital outlay items which were listed together with current expense items under the Board's "Programs."

The hearing examiner notes, also, that Councils' recommended reduction is $559,272; however, the actual amount reduced by line item and program amounts to $559,568 (see table, *supra*), a difference in the stated amount of $296.

Through testimony and exhibits the following facts are found with respect to each of the proposed reductions:

1. *Line Items Nos. J213a and J216*

Councils aver that the Board has established a teaching system which calls for "teaching units" each made up, in this instance, of nine to eleven staff members and two teacher aides. Professional support for these units is given by other teaching staff specialists such as: program analysts, special education teachers, library staff and guidance counsellors. Councils aver that the Board proposed to increase its "teaching units" from thirteen to sixteen because of the addition of 281 students in its September 1972 enrollment. This proposed increase allegedly necessitated an increase in salary and fringe benefits for the proposed unit personnel.

Councils recommend a $258,440 cut for two of the Board's proposed three additional "teaching units." Councils also suggested that one additional unit, which would bring the school system's "unit" number to fourteen, would be sufficient to handle the additional school enrollment.

The Board testified that Councils' proposed staff cuts, if sustained, would be harmful to the educational program.

The Superintendent testified that the Board proposed to increase the number of teaching "units" as described, *ante*, from thirteen for the 1971-72 school year, to sixteen for the 1972-73 school year. He testified further that the "units" were in fact increased from thirteen to sixteen, but that they were made up of fewer professional staff and larger numbers of pupils because of Councils' cut of $258,440 from the total amount of $2,791,086 which was allocated for the teaching "units" and the fringe benefits in accounts J213a and J216. His testimony was that the Board decreased its professional staff from 244 teachers to 220. The record shows that this reduction in staff was offset by hiring thirty-two additional teaching assistants and sixteen additional teacher aides.

The Superintendent testified that classes are larger than they were last year; however, nothing in the record shows that acceptable class sizes are not being maintained. Nor is there any proof that a sound educational experience is not being offered to the pupils. Indeed, the decision to reduce the professional staff must have been reached only after the proper educational considerations were made that this reduction would not adversely affect the pupils. Therefore, the Board saw fit to reduce the professional staff, hire more nonprofessional aides, increase its "units" to sixteen and increase the number of students in those "units."

In account J216, Councils recommended a cut of $13,495 for salaries and fringe benefits for the "other than Instruction" category. The hearing examiner finds that this amount is required and recommends that it be restored because the Board hired additional nonprofessional personnel.

The hearing examiner recommends, also, that Councils' cut of $244,945 in account J213a be sustained. The testimony shows that professional staff size was not increased but was in fact reduced by twenty-four staff members. Accordingly, the hearing examiner can find no justification for recommending restoration of the money. The reduction in professional staff size should offset most if not all of the cost of the new aides.

2. *Limits Salary and Fringe Increases to Federal Guidelines*

Councils recommended a cut of $39,319 for Instructional Salary and Fringe Benefits and an additional cut of $6,822 in Administrative Salary and Fringe Benefits. It computed these amounts by applying percentage decreases to salaries of personnel remaining after deletion of the two "units" referred to in (1), *ante*, and using the Federal Wage Guidelines as a base.

There is no proof, however, that the Board's proposed salary and fringe benefits are excessive or that they exceed the Federal Wage Guidelines. The hearing examiner recommends, therefore, that the amounts of $39,319 and $6,822 be restored.

3. *J213a Sabbatical Leave*

Councils testified that sabbatical leaves are a luxury in view of the current economic situation and recommended a cut of $32,537.

The hearing examiner notes that sabbatical leaves are commonplace statewide and that the Board has the statutory authority under its general rule-making powers to include such an item in its budget for its own educational reasons. The hearing examiner recommends that this $32,537 be restored.

4. *J710 Part-time Summer Work*

Councils recommended a cut of $1,408 reasoning that part-time pay for summer school students at $3.00 per hour for cutting grass and similar maintenance was excessive and that $2.00 per hour was adequate compensation for the work to be done.

The hearing examiner recommends that this cut be sustained.

5. *J610 and J710 Plant Operation and Maintenance*

Council testified that audit reports for the past several years show that surpluses have resulted in both these accounts. Council recommends cuts, therefore, of $13,087 and $3,247. This testimony was rebutted by the Board's auditor who testified that only a transfer of money from the free balance prevented over-expenditures in these accounts for the 1971-72 school year.

The Board asserts that both of these accounts include funds for salaries of employees which are part of a negotiated agreement between the Board and the Custodial and Maintenance Associations.

The hearing examiner recommends, therefore, that these amounts of $13,087 and $3,247 are necessary in the budget and that they be restored.

5. *Programs*

Program No. 16

Program No. 16 is for the operation of the Library. The documents submitted in evidence indicate a recommended cut in this account of $2,980.

The hearing examiner finds that this amount is necessary for instructional use and that it should be restored.

Program Nos. 6, 7, 17, 31

Program Nos. 6, 7, 17, and 31 are not directly related to the instruction of pupils. The hearing examiner concludes that they are not essential for the operation of a thorough and efficient system of schools and recommends, therefore, that Councils' cuts be sustained.

A summary of the cuts to be sustained are as follows:

Program	Item	Reduction
No. 6	Business Office	$ 550
No. 7	Central Administration	1,860
No. 17	Maintenance	4,050
No. 31	General School Services	34,307
	Total	$40,767

Program No. 32

Program No. 32 includes teaching supplies of which Councils recommended a reduction of $16,500.

The hearing examiner recommends that this amount be restored as a necessary expenditure.

Program No. 3

Program No. 3, which is noninstructional, increased by $30,501 over the amount allocated for the 1971-72 school year. All of the specific items included are desirable but not necessary to operate a thorough and efficient system of schools.

The hearing examiner notes that the recommended cut by Councils of $11,900 will still give the Board an increase in this account of more than an $18,000. He recommends, therefore that Councils' cut be sustained.

Program No. 4

Most of Program No. 4 is allocated for teaching materials and supplies.

The hearing examiner recommends that the $2,056 cut by Councils be restored.

Program No. 8

Program No. 8 is for Plant Operation. In this account the Board's budget

increased from $169,450 in 1971-72 to $241,294 for the school year 1972-73, primarily because of new construction. Councils' recommended cut of $26,994 still allows for a considerable increase in this account.

This allowance appears more realistic to the hearing examiner after examination of Program No. 8 and the written documentation supporting it. The hearing examiner recommends, therefore, that Councils' cut of $26,994 be sustained.

Program Nos. 9, 18, 21, 22, 24

Program Nos. 9, 18, 21, 22 and 24 are instructional programs for Reading, Mathematics, Physical Education, English and Social Studies, respectively.

The hearing examiner recommends that Councils' respective recommended cuts of $12,963, $14,206, $3,713, $3,413 and $8,007 be restored. This will allow the increase in the aforementioned five educational programs which the hearing examiner concludes is necessary because of increased enrollment.

Program No. 26

Councils' recommended cut of $3,875 in Program No. 26 would eliminate the attendance officer who is already a Board employee. This is not a new position.

The hearing examiner recommends that the $3,875 be restored.

Program No. 27

Program No. 27 is for transportation. Councils recommended a cut of $16,000 in this account for two new buses and testified that the Board's present buses are in working order and can be maintained for another year. This recommended economy still allows for an increase in this account

The hearing examiner recommends that this cut be sustained.

Program No. 29

Program No. 29 is the Board's Community and Summer School which Councils determined should be self-supporting by assessing tuition costs and pupil fees. Councils recommend therefore, that $41,334 be cut from this account.

The Board has the statutory authority to establish those program it deems necessary for its school system.

The hearing examiner recommends, therefore, that the $41,334 cut by Council be restored.

A summary of the amounts recommended to be reduced and restored is shown in the following table:

Account No.	Line Item	Amount Cut	Amount Restored	Amount Reduced
J213a & J216	Elimination of Two new "Units" of Houses	$258,440	$ 13,495	$244,945
J213	Inst. Sal. & fringe Ben.	39,319	39,319	– 0 –
J110 & J214b	Admin. Sal. & Fringe Ben.	6,822	6,822	– 0 –
	*Sabbatical Leave	32,537	32,537	– 0 –
	*Part-Time Sum. Wr.	1,408	– 0 –	1,408
	*Plant Operation	13,087	13,087	– 0 –
	*Plant Main.	3,247	3,247	– 0 –
	PROGRAMS			
No. 6	Business Office	$ 550	$ – 0 –	$ 550
No. 7	Central Admin.	1,860	– 0 –	1,860
No. 16	Library	2,980	2,980	– 0 –
No. 17	Maintenance	4,050	– 0 –	4,050
No. 31	General Sch. Servs.	34,307	– 0 –	34,307
No. 32	Dist. Wide Supls.	16,500	16,500	– 0 –
No. 3	Board of Ed.	11,900	– 0 –	11,900
No. 4	Building Admin.	2,056	2,056	– 0 –
No. 8	Plant Operation	26,994	– 0 –	26,994
Nos. 9, 18, 21, 22, 24	English, Math, Phys. Ed., Reading, Social Studies	42,302	42,302	– 0 –
No. 26	Attendance Office	3,875	3,875	– 0 –
No. 27	New Vehicles	16,000	– 0 –	16,000
No. 29	Community & Summer Sch.	41,334	41,334	– 0 –
	Totals	$559,568	$217,554	$342,014

Councils' certification to the County Board of Taxation was technically inaccurate in that its certification did not include any reduction in capital outlay items; however, Councils' documentary evidence did in fact recommend specific reductions in capital outlay items through the Board's "Programs" which the hearing examner determines have been properly recommended and supported. He therefore recommends that the capital outlay cuts be sustained as follows:

Program No.	Account No.	Item	Reduction Sustained
31	1220c	Improvement to Sites	$ 2,037
31	1230c	Building Remodeling	29,312
31	1240c	New Inst. Equip.	1,000
			$32,349

It must also be noted that the Board's audit report of June 30, 1972, reveals a free appropriation balance of $301,938.55 as follows:

Current Expense	Capital outlay	Debt Service	Special Schools or Projects	Total
$211,880.48	$15,409.99	$70,163.11	$4,484.97	$301,938.55

After eliminating from consideration the amount of $70,163.11 which is set aside for Debt Service, the Board's free appropriation balance is $231,775.44.

The hearing examiner concludes that this free balance is adequate, if needed, to offset many of Councils' cuts which the hearing examiner recommends should be sustained.

With respect to the $32,349 in capital outlay which is recommended to be cut from the Board's "Programs," the hearing examiner recommends that it be included as shown by Councils in the reductions to be made in current expenses and the Board's "Programs." Deficits in the "Programs," if any, may be offset by using the free appropriation balance.

* * * *

The Commissioner has read the report, findings, conclusions and recommendations of the hearing examiner and concurs therein. The Commissioner is aware that the budget originally proposed by the Board contains appropriations designed to improve the educational program of the schools or to correct deficiences in supplies and equipment. However, the Commissioner is constrained, in an appeal of this nature, to provide only that which he feels is necessary for the maintenance and operation of a thorough and efficient school system. He finds in the hearing examiner's recommendations a compliance with that limitation. The Commissioner, therefore, finds and determines that in addition to the amounts previously certified to the Mercer County Board of Taxation, the additional amount of $217,554 for current expenses is required for the 1972-73 school year. The Commissioner, therefore, directs the Common Council of the Borough of Highstown and the Council of the Township of East Windsor to certify this additional amount to the Board of education of the East Windsor Regional School District which shall in turn certify the additional monies to the Mercer County Board of Taxation to be raised by local taxation for the support of the East Windsor Regional School District for the school year 1972-73.

COMMISSIONER OF EDUCATION

December 28, 1972

In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County,

Plaintiff-Respondent,

v.

Thomas Appleby,

Defendant-Appellant.

Decided by the Commissioner of Education, November 25, 1969

Decided by the State Board of Education, October 7, 1970

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Submitted March 7, 1972 – Decided before Judges Lewis, Halpern and Lora.

On appeal from Judgment of Commissioner of Education of New Jersey and State Board of Education of New Jersey.

Mr. Harold A. Horwitz, attorney for appellant.

Mr. Frank J. Testa, attorney for respondent.

Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney for Commissioner of Education and State Board of Education of New Jersey (Mr. Gordon J. Golum, Deputy Attorney General, of counsel).

PER CURIAM.

Defendant Thomas Appleby was afforded a hearing in accordance with the Tenure Employees Hearing Act *R.S.* 18:3-23 *et seq.*, now *N.J.S.A.* 18A:6-10 *et seq.* The State Board of Education affirmed the decision of the Commissioner of Education dismissing defendant as a tenured teacher effective the date of his suspension by the Vineland Board of Education.

The Commissioner and State Board of Education found that a series of incidents charged against defendant were true in fact and that they constituted a pattern of behavior demonstrating conduct unbecoming a teacher of such a serious nature as to warrant his dismissal.

The grounds for appeal asserted by defendant are that the refusal to compel production of statements and school records of student witnesses was prejudicial, ceritificate of charges was improperly made, the charges were not valid under school laws, there was undue influence by representatives of the Board of Education, and the decision under review was against the weight of the testimony.

We have reviewed the lengthy record before us, including 33 volumes of transcript of testimony (in excess of 4,000 pages) and the comprehensive briefs of counsel, and we are satisfied that defendant had a fair hearing and that there is substantial credible evidence to support the findings and conclusions of the Commissioner as adopted by the State Board of Education.

Affirmed.

In the Matter of the Tenure Hearing of Francis Bacon,
School District of the Township of Monroe,
Gloucester County.

STATE BOARD OF EDUCATION

DECISION

For the Petitioner-Appellee, Martin Frank Caulfield, Esq.

For the Respondent-Appellant, Fred Ball, Jr., Esq.

The decision of the Commissioner of Education of the State of New Jersey, dated August 12, 1971, is affirmed for the reasons set forth therein.

January 5, 1972

Herbert H. Buehler,

Petitioner-Appellant,

v.

Board of Education of the Township of Ocean, Monmouth County,

Respondent-Appellee.

Decided by the Commissioner of Education, December 17, 1970
Decided by the State Board of Education, June 2, 1971

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Argued October 2, 1972; Decided November 2, 1972

Before Judges Lewis, Carton and Mintz.

On appeal from a decision of the New Jersey State Board of Education.

Mr. Peter B. Shaw argued the cause for appellant (Mr. Charles Frankel, attorney).

Mr. Daniel J. O'Hern argued the cause for respondent.

Mr. Gordon J. Golum, Deputy Attorney General, argued the cause for the New Jersey State Board of Education (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney; Ms. Virginia Long Annich, Deputy Attorney General, of counsel).

PER CURIAM

Petitioner, a tenure teacher, appeals from the whole of the decision of State Board of Education which affirmed the decision of the Commissioner of Education in dismissing his petition in which he claimed to have tenure of employment as "Chairman and/or Supervisor" of the Department of Social Studies in Ocean Township.

We have reviewed the record and find that the factual findings of the State Board of Education are supported by substantial evidence.

We affirm substantially for the reasons expressed in the decision of the State Board of Education.

Deborah Jean Capen,
a minor by her parent and guardian ad litem, James Capen, et al.,

Petitioner-Appellant,

v.

Board of Education of the Town of Montclair,
Essex County,

Respondent-Appellee.

Decided by the Commissioner of Education, July 1, 1971 (Motion) and September 8, 1971 (Motion)

STATE BOARD OF EDUCATION

DECISION

For the Petitioner-Appellant, Connell & Connell (Raymond R. Connell, Esq., of Counsel)

For the Respondent-Appellee, Charles R.L. Hemmersley, Esq.

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

April 12, 1972

Victor Catano,

Petitioner-Appellant

v.

Board of Education of the Township of Woodbridge,

Respondent-Appellee

Decided by the Commissioner of Education, September 27, 1971

STATE BOARD OF EDUCATION

DECISION

For the Petitioner-Appellant, Coleman, Lichtenstein, Levy & Segal (Stephen Lichtenstein, Esq., of Counsel)

For the Respondent-Appellee, Hutt & Berkow (Stewart M. Hutt, Esq., of Counsel)

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

April 12, 1972

Citizens for Better Education, Marilyn Whitham, Jerrothia Riggs, Barbara Brown, Dr. John W. Robinson, Joyce Carter, Sandra Armstrong, Vera Benjamin, Jacqueline Harper, Edith Curly, Alma G. Peterson, and Deloris Moye,

Petitioners-Appellants,

v.

Board of Education of the City of Camden and Dr. Charles Smerin, Superintendent of Schools, Camden County,

Respondents-Appellees.

Decided by the Commissioner of Education, December 20, 1971

STATE BOARD OF EDUCATION

DECISION

For Petitioners-Appellants – Carl S. Bisgaier, Esq.

For Respondents-Appellees – Leonard A. Spector, Esq.

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

June 7, 1972

Samuel Crisafulli,

Petitioner-Appellant,

v.

Board of Education of the Township of Florence, Burlington County,

Respondent-Appellee.

Decided by the Commissioner of Education, December 2, 1971

STATE BOARD OF EDUCATION

DECISION

For the Petitioner-Appellant, Pellettieri & Rabstein (J. Stewart Grad, Esq., of Counsel)

For the Respondent-Appellee, Powell, Davis, Dietz & Colsey (John A. Sweeney, Esq., of Counsel)

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

April 12, 1972

Samuel Crisafulli,

Petitioner-Appellant

v.

**Florence Township Board of Education,
Burlington County,**

Respondent-Appellee

Decided by the Commissioner of Education, December 2, 1971

Affirmed by the State Board of Education, April 12, 1972

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued June 20, 1972 – Decided July 5, 1972

Before Judges Lewis, Halpern and Lora

On appeal from the New Jersey State Board of Education

Mr. George L. Pellettieri argued the cause for appellant (Messrs. Pellettieri andRabstein, attorneys)

Mr. Gordon J. Golum, Deputy Attorney General, argued the cause for the State Board of Education (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney).

Mr. John A. Sweeney argued the cause for appellee (Messrs. Powell, Davis, Dietz, Colsey and Radcliffe, attorneys).

PER CURIAM

We are in accord with the conclusion of the Commissioner of Education which was affirmed by the State Board of Education that petitioner has not attained tenure under *N.J.S.A.* 18A:28-5 or *N.J.S.A.* 18A:28-6.

The motion purporting to grant petitioner early tenure is invalid due to its failure to apply to a general category of staff employee as required by *N.J.S.A.* 18A:28-5(a). *Rall v. Board of Education of the City of Bayonne*, 54 *N.J.* 373 (1969).

Nor is petitioner tenured under *N.J.S.A.* 18A:28-6(a). Mr. Crisafulli served under contract as assistant principal from September 1, 1968 to June 30, 1969. He was promoted to and served as principal from July 1, 1969 to June 30, 1970 and again from July 1, 1970 to June 30, 1971. On June 25, 1971 a letter was sent to petitioner giving notice that his contract would not be renewed nor would a new contract be issued to him for the academic year commencing July 1, 1971 and ending June 30, 1972. This was done in accordance with a sixty-day notice of intention-to-terminate provision contained in petitioner's employment contract. Such notice having been sent five days prior to the expiration of the

two consecutive calendar years required by *N.J.S.A.* 18A:28-6(a), tenure was barred. *Canfield v. Board of Ed. of Pine Hill Borough*, 51 *N.J.* 400 (1968), rev'g 97 *N.J. Super.* 483 (App. Div. 1967) for the reaons expressed in the dissent at 97 *N.J. Super.* 490.

Affirmed.

Custodians-Maintenance-Matrons Service Association,

Petitioner-Appellant,

v.

Bridgewater-Raritan Regional Board of Education, Somerset County,

Respondent.

Decided by the Commissioner of Education, April 1, 1971

Decided by the State Board of Education, September 8, 1971

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Submitted September 19, 1972 – Decided September 25, 1972

Before Judges Gaulkin, Lora and Allcorn.

On appeal from State Board of Education.

Mr. John T. Lynch, attorney for appellant.

Messrs. Blumberg, Rosenberg, Mullen & Blackman, attorneys for respondent.

Mr. George F. Kugler, Jr., Attorney General, attorney for New Jersey State Board of Education (Mr. Gordon J. Golum, Deputy Attorney General, of counsel).

PER CURIAM

Since the plaintiff's members wery hired under annual fixed term contracts, they have no tenure. *N.J.S.A.* 18A:17-3. We affirm, substantially for the reasons stated in the opinion of the Commissioner of Education, adopted by the Board of Education.

Mary Dawson,

Petitioner-Appellant,

v.

Boards of Education of the Townships of Ocean and Berkeley,

Respondents-Appellees.

Decided by the Commissioner of Education, November 17, 1971

STATE BOARD OF EDUCATION

DECISION

For the Petitioner-Appellant, Parsons, Canzona, Blair and Warren (Edmund J. Canzona, Esq., of Counsel)

For the Respondent-Appellee Ocean Township Board, Peter Shebell, Esq.

For the Respondent-Appellee Berkeley Township Board, Wilbert J. Martin, Esq.

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

May 3, 1972

Thomas R. Durkin,

Petitioner-Appellant,

v.

Board of Education of the City of Englewood, Bergen County,

Respondent-Appellee.

Decided by the Commissioner of Education, December 27, 1971

STATE BOARD OF EDUCATION

DECISION

For Petitioner-Appellant, Saul R. Alexander, Esq.

For Respondent-Appellee, Sidney Dincin, Esq.

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

July 7, 1972

William R. Gibson,

Plaintiff-Appellant,

v.

Collingswood Board of Education; Walter C. Ande, Superintendent of Collingswood School System; Astor T. Ritter, Principal, Collingswood Junior High School; Frank Law, President, Collingswood Board of Education,

Defendants-Respondents.

Decided by the Commissioner of Education, March 26, 1970

Decided by the State Board of Education, October 7, 1970

DECISION OF THE SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Argued October 12, 1971 – Decided January 10, 1972

Before Judges Goldmann, Collester and Mintz.
On appeal from Decision of State Board of Education.

Mr. Carl D. Poplar argued the cause for appellant (Messrs. Stransky and Poplar, attorneys).

Mr. George Purnell argued the cause for respondents (Messrs. Brown, Connery, Kulp, Wille, Purnell & Greene, attorneys).

Mr. Gordon J. Golum, Deputy Attorney General, filed a statement in lieu of brief on behalf of State Board of Education (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney).

The opinion of the court was delivered by Collester, J. A. D.

This is an appeal from a decision of the State Board of Education affirming the Commissioner of Education's dismissal of plaintiff's petition demanding that the Collingswood Board of Education issue to him a teacher's employment contract for the school year 1969-1970.

Plaintiff was employed by the board of education as a teacher in the Collingswood Junior High School under a contract for the period from September 1, 1968 to June 30, 1969. The board of education made no offer to renew the contract beyond that period.

On April 7, 1969 plaintiff filed a petition with the Commissioner of Education alleging that for reasons of conscience he had refused to salute or pledge allegiance to the American flag during the daily exercise required in public schools under *N.J.S.A.* 18A:36-3(c); that his refusal resulted in a re-evaluation and down-grading of his teaching abilities and a recommendation by the school principal that he should not be rehired. Plaintiff charged that the

refusal of the board of education to offer him an employment contract for the school year 1969-1970 was an infringement of his constitutionally protected rights under the First Amendment. He sought an order requiring the board to issue a new contract, to expunge from the school records the re-evaluation based on his exercise of such rights, and to prohibit the school authorities from in any way referring to his personal and protected views.

Defendants moved to dismiss the petition on the ground that plaintiff was a nontenured teacher and the Board was under no legal obligation to offer him an employment contract for any period subsequent to June 30, 1969.

The Commissioner granted the motion to dismiss holding that employment of a nontenured teacher was a matter vested solely in the discretionary authority of the Board; that the Board was under no legal obligation to reemploy a nontenured teacher, and that while the Board may choose to announce reasons for its decision not to rehire it was under no compulsion to do so.

At oral argument counsel for plaintiff admitted that the relief initially sought, namely, a contract for the 1969-70 school year, was a moot issue. He explained that plaintiff had obtained a position with another board of education for that school year, and, indeed, for the year 1970-71. He further admitted that plaintiff had suffered no financial disadvantage because the new position carried a salary substantially higher than that paid by defendant board.

The only relief presently sought, therefore, is plaintiff's claim that the reasons for defendant board's failure to renew his contract should be expunged from its records. The basis for this claim is that the continued existence of the board's records would prejudice plaintiff's future progress in the educational field. The immediate answer is that there has been no such prejudice visited upon plaintiff; he had no difficulty in immediately obtaining a new position, and at a higher salary.

Plaintiff claims that the reason his contract was not renewed by defendant board was his failure to participate in the classroom pledge of allegiance to the American flag. This is only one of the matters mentioned in the preliminary "Descriptive Report and Recommendation for Non-tenure Teachers" relating to plaintiff, as well as a follow-up report of a similar nature filed with the board early in 1969. Copies of these evaluations were given plaintiff at his request. There is nothing in the record, however, indicating the reasons which moved the board in refusing to renew plaintiff's contract for the school year 1969-70. Like the Commissioner of Education, we find that plaintiff's allegations as to the motivations underlying the board's decision are speculative and conjectural.

The decision of the State Board of Education is affirmed essentially for the reasons expressed in the opinion filed by the Commissioner of Education. *Cf. Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962), *cert.* den. 137 *U.S.* 956 (1963), and see *Parker v. Board of Education of Prince George's County, Maryland*, 237 *F. Supp.* 222 (D. Md. 1965), aff'd 348 *F.* 2d 464 (4 Cir. 1965), *cert.* den. 382 *U.S.* 1030 (1966).

Petition for certification denied, Supreme Court, March 14, 1972.

Marjorie B. Hutchenson,

Petitioner-Appellant,

v.

Board of Education of the Borough of Totowa, Passaic County,

Respondent-Appellee.

Decided by the Commissioner of Education, November 9, 1971

STATE BOARD OF EDUCATION

DECISION

For Petitioner-Appellant, Saul R. Alexander, Esq.

For Respondent-Appellee, Corrado & Corcoran (Robert E. Corrado, Esq., of Counsel)

For the New Jersey State Federation of District Boards of Education, *Amicus Curiae*, Thomas P. Cook, Esq.

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

May 3, 1972

Patricia Meyer,

Petitioner-Appellant,

v.

Board of Education of the Borough of Sayreville, Middlesex County,

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

For Petitioner-Appellant, Sauer, Boyle & Dwyer (George W.Canellis, Esq., of Counsel)

For Respondent-Appellee, Hayden & Gillen (Eugene F. Hayden, Esq., of Counsel)

This controversy arises under a claim by petitioner that because of her union activities, she was refused a re-employment by respondent district that would have given her tenure.

Her original petition to the Commissioner of Education of the State of New Jersey resulted in a determination by him on July 16, 1970, that was adverse to her, based on the holding of *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (*Sup. Ct.* 1962), *cert. den.* 371 *U.S.* 956, 83 *S. Ct.* 508, 9 *L. Ed. 2nd* 502 (1963) that a board of education has the right to refuse employment or re-employment to any applicant "for any reason whatever or for no reason at all" subject to constitutional, statutory and contractual limitations. She thereafter appealed that determination to the State Board of Education. On December 2, 1970, we remanded the matter to the Commissioner for "a factual inquiry into the nature and extent of petitioner's union activity" and its effect on respondent's decision to refuse re-employment.[1] That action was based on

[1] As noted in that decision, no testimony had been taken before the Commissioner, but the parties submitted affidavits which, in view of the stipulations between the parties and the agreement between respondent and the Sayreville Education Association of which petitioner was an admitted beneficiary, we found to be inadequate in form and content as a basis for a determination. We remanded the matter to the Commissioner.

> "***for a hearing at which the parties should introduce full proofs through testimonial and documentary evidence. Certain matters, however, have been agreed upon by the parties and are already settled. These are:
>
> (a) The existence and validity of the agreement between the Board and the Association, and petitioner's status as a beneficiary of that agreement;
>
> (b) That petitioner, throughout her service as an employee of the Board, received 'consistently good reviews with respect to her classroom and related duties;' and
>
> (c) That the Board gave no notice of intention not to rehire petitioner until March 28, 1969."

the record then before us which, among other things, indicated (1) that notwithstanding the terms of Sec. V, 3 of the agreement then in force,[2] petitioner received no written notice of unsatisfactory performance but received "consistently good reviews with respect to her classroom and related duties," (2) that petitioner received no notice of non-rehiring until March 28, 1969, and (3) that the parties conceded that petitioner was engaged in extensive union activity.

Consonant with our understanding of *Zimmerman*, we held that a refusal of re-employment based on petitioner's union activities would be violative of her constitutional rights under the *New Jersey Constitution of 1947, Art.* 1, *Par.* 19.[3] On remand, extensive testimony was presented by the district Superintendent, 5 members of the local Board and administrative personnel. The Commissioner, on April 7, 1971, found that petitioner had failed to prove that the local Board's action in refusing re-employment was based on her union activities.

Sayreville Education Association (SEA) was the bargaining unit of teachers in the district. The evidence was overwhelming, and not disputed, that petitioner was active and vocal during most of the period of her employment (1966-67, 1967-68 and 1968-69) in trying to establish as the bargaining unit the American Federation of Teachers (AFT), and that her actions were known by school personnel and Board members. SEA's membership was several times that of AFT.

The testimony of non-Board member witnesses (including that of the district Superintendent) clearly established that petitioner's competence and qualifications as a teacher were undoubted. Three of the five Board members called as witnesses stated that at the time she was considered for non-rehiring there was no discussion whatever of the quality of her teaching. Indeed, the record contains numerous assertions by respondent's counsel that she was a good teacher and that it advanced no contention to the contrary.

---

[2] I. This guide will become effective September, 1968 and will supercede all other local salary guides.

* * * *

"V. Contracts:

1. Contracts will be issued as soon as practical after the April meeting of the Board of Education.

2. Teachers who are not to be rehired will be notified by March 1.

3. A teacher whose work is deemed unsatisfactory by his principal or the Superintendent shall be notified in writing by January 31, so that he may have an opportunity to improve. His shortcomings shall be specifically outlined, and he shall receive constructive help from his superiors."

[3] "***Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

Petitioner called as witnesses five of the local Board members who had voted not to rehire her. The procedure in dealing with the hiring and non-rehiring of teachers, as given by the Superintendent and generally corroborated by Board members, was to have a caucus meeting at which he would present the names of teachers to be rehired or hired, after which a vote would be taken; and that he would indicate, without disclosing names, teachers not to be rehired and the reasons therefor, followed by a vote. At the time petitioner's matter came up, it was not clear whether hers was the only one considered for non-hiring. The Superintendent gave the reason as "excessive absenteeism." After voting no to rehire, an inquiry was raised by the Board President as to who the teacher was, at which time petitioner's name was mentioned. According to the Superintendent, the Board President stated that he ". . . thought it was, as best as I can explain it, it was – it was a good idea because she was a union member." He stated further that with respect to activities concerning formation of an AFT unit, the Board's reaction in general was "negative to AFT," although he could not say that this was the unanimous feeling of the individual Board members. Apparently at least one Board member objected to the injection of this topic into the discussion.

All Board-member witnesses testified that the decision not to rehire petitioner was based solely on the Superintendent's recommendation without any independent records being presented and without any independent findings being made on the part of the Board.[4] All agreed that in virtually every instance the recommendation of the Superintendent was followed with question. Three stated that an actual vote was taken with respect to petitioner; the remaining two did not indicate one way or the other whether such was the case. All agree that the reason given by the Superintendent was absenteeism. Two of the Board members testified that there was no discussion as to petitioner's competence and ability as a teacher; two could not say one way or the other; and one Board member and the Superintendent stated there was such discussion.[5] Two Board members testified that they knew of union activities of SEA and AFT and of petitioner's involvement therein; two stated they did not know of her union activities. Three members stated that her union activities were mentioned at the time of the meeting at which her non-rehiring was considered, while two denied it, one of the two contending that the only discussion of union activities concerned petitioner's husband. One Board member indicated that there was a second meeting at which the question of petitioner's rehiring was discussed in

---

[4] As Board member Piatek stated it, ". . . I said to Hank/Henry Counsman, superintendent/, 'Your recommendation is to fire her?' And he said, 'Yeah'. I said, 'I'm with you'. I said, 'Is she on tenure?' He said, 'No.' I said, 'We don't have to give an excuse for non-tenured teachers. If you want her gone, go.' "

[5] Piatek stated, ". . . one of the Board members asked what's her teaching qualifications besides absenteeism, after the vote was already taken. And Mr. Counsman said, 'I have no qualms, in fact, as far as her teaching evaluations go, she's a good teacher, but I can never count on her because she is absent quite a bit, and over and above what the, you know, allows.' And, in fact, that was – one of the reasons why she didn't get her notice on time was because we had asked him to go back and look into her and come back with a report into her actual teaching capabilities; ***"

some fashion, and Board member Piatek tended to corroborate this. The testimony of the remaining Board members shed no light on this.

No documentary evidence was submitted as to what went on in the meeting or meetings at which petitioner's rehiring was considered, and we are left with the credibility of the witnesses and that of their testimony. The record reflects that all of the Board members who testified apparently had occasion to discuss the case together prior to being called as witnesses, and that after some of them had testified they discussed their testimony with at least some of the remaining ones who had not yet testified.

The Superintendent, who was the first witness to testify in the proceedings, while basing his recommendation not to rehire petitioner on absenteeism, stated that petitioner's absences over her 3-year employment period were all legitimate and not in excess of those permitted by the agreement between the Board and SEA. He stated that no mention was ever made to petitioner about her absences at any time during her employment. When he was recalled for further testimony after Board members had testified, he stated that in considering his recommendation he did not take into consideration the admitted improvement in petitioner's attendance over the second and third years of her employment.[6] As to whether he examined petitioner's file when he made his recommendation, his answers varied indicating that he did not examine her file because of lack of time (and therefore had to rely on telephone calls to subordinates for opinions), that he did examine her file, and ultimately that he could not recall whether he did or not.

With respect to petitioner's union activities, when initially called to testify, he stated that he had no knowledge of petitioner's union activities, except that he had heard "through hearsay" that she was a member of AFT, although he had no knowledge "of who belongs to the SEA or who belongs to the AFT;" that prior to the Board's consideration of his recommendation he had not discussed with it "the question of the union; and that in the Board's discussions of union activity he had no feelings one way or the other, "AFT, SEA, what's the difference?" On recall, however, after the testimony of the Board members and administrative-employee witnesses, he stated that he did in fact discuss petitioner's union activities with James A. Moran, the assistant superintendent, during the period of petitioner's employment (Moran had testified that his discussions with the Superintendent concerned the "explosive quality" of the union activity); that he was still a member of SEA; that he was concerned about the "coming" of a second organization because it would make his job more difficult; that his wife was a teacher in the district who attended union meetings and that she informed him of union activities and petitioner's part in them; that his wife knew of his concern as to what was going on in the union and discussed it with him after each meeting she attended; and that these events took place

[6] On January 18, 1968, petitioner's then principal submitted a report to the Superintendent calling attention to petitioner's attendance record, among other things, but nevertheless recommended re-employment of petitioner (Exhibit R-1).

prior to the recommendation he made to the Board. He further testified that he "could" well have spoken directly with petitioner condemning the tactics of her union in publishing a contract-type document; that he could have referred to petitioner, in discussions with one of the principals concerning rehiring, as a "rabble rouser" and that this was "probably" because of her union activities; and that Mr. DiPaolo, the Board President, was the source of some of the information as well as Mr. Moran and petitioner's principal, Dr. Parnell. He also testified on recall that petitioner (and her union activities) was discussed by name in the meeting held in January, 1969 with the Board, and that a decision was not made concerning petitioner's re-employment until "sometime late in March" of 1969 after her records were made available by the Board.

It seems clear from the record that petitioner's union activity was well known to Board members, the Superintendent and others in the system, and that she was active and vocal. While absenteeism, according to Board members and the Superintendent, was the only basis on which non-hiring was premised, that evidence is far from persuasive. All Board members who testified, with one exception, stated that there was but one meeting in January, 1969 and that they approved the recommendation of the Superintendent not knowing at the time the identity of the person involved, and knowing only that the Superintendent's assigned reason was "excessive absenteeism." However, the Superintendent's testimony on recall contradicts this "rubber stamp" approach, and it appears that the Board, if there was a second meeting late in March at which the Board voted not to rehire petitioner, considered the rehiring of petitioner with full knowledge of her union activities and of her identity.

In view of the contract provisions relating to notice to teachers of deficiencies by January 31, the fact that petitioner was never notified, verbally or in writing, at any time of her absences as being an area where improvement was needed, the fact that her absences were legitimate and not in excess of the number permitted by the agreement, the acknowledged improvement in her attendance record, and the fact that her attendance was not, after her first year, the subject of critical comment in subsequent evaluations, lead to the conclusion that absenteeism was not the basis of the Superintendent's recommendation nor the Board's decision. This finding alone, however, is no basis for setting aside the Board's determination not to rehire.

To the extent that the testimony of the Board members calls for credence, they must be deemed to have relied solely on the judgment of the Superintendent. The contradictions between his initial testimony and his testimony on recall are significant, not only with respect to what knowledge the Board members had of union activities, petitioner's involvement therein and the Board members' attitudes, but as to whether the Superintendent himself based his recommendation on petitioner's extensive union activity. From his testimony on recall concerning his knowledge of petitioner's union activity, his own identification with SEA, his direct conversations with petitioner as to her union activities and information he received from other sources, and his admitted concern over anticipated problems associated therewith, it must be concluded, aside from questions of credibility on the absenteeism issue, that petitioner's

union activities were of prime concern to him, and her record of attendance inconsequential.

The Board members and the Superintendent were subpoenaed by petitioner to testify and were called upon to defend the propriety of the very action taken by them which was under attack. Due regard must be given to this fact in weighing their evidence. If the Board members, as they testified, merely followed the Superintendent's recommendation without any inquiry or other independent judgment, then an examination of the Superintendent's reasons for his recommendation is clearly proper in these circumstances. We cannot conceive that there is any less an unconstitutional deprivation of re-employment where a Superintendent, for an unconstitutional reason, makes a recommendation that is automatically approved, for all practical purposes, than a determination made by a Board itself for an unconstitutional reason. The constitutional protection to petitioner, in either case, is destroyed. The fear of administrative difficulty concomitant with the struggle of two union organizations for bargaining power does not stand tall against the constitutional rights of persons in public employment to organize. *New Jersey Constitution of 1947, Art. 1, Par.* 19; *Zimmerman v. Board of Newark, supra; Burlington Co. Evergreen Park Mental Hosp. v. Cooper*, 56 *N.J.* 579 (*Sup. Ct.* 1970)

The decision of the Commissioner of April 7, 1971, is reversed and petitioner ordered reinstated.

April 12, 1972

Morris School District,
Morris County,

Petitioner,

v.

Board of Education of the Township of Harding and
Board of Education of the Township of Madison,
Morris County,

Respondents.

STATE BOARD OF EDUCATION

DECISION

For the Petitioner, Meyner & Wiley (Stephen B. Wiley, Esq., of Counsel)

For the Respondent Board of Education of the Township of Harding, Mills, Doyle, Hock & Murphy (John M. Mills, Esq., of Counsel)

For the Respondent Board of Education of the Borough of Madison, Cook & Knipe (Peter R. Knipe, Esq., of Counsel)

The appeal from the action of the Commissioner of Education of the State of New Jersey, designating Morris School District as the receiving district for Township of Harding high school students on an annually-decreasing schedule terminating June 30, 1975, and designating the Borough of Madison School District as the successive receiving district, is denied.

September 13, 1972
Pending before Superior Court of New Jersey

Township Committee of the Township of Morris, et al.,

Plaintiffs-Appellants,

v.

Board of Education of the Township of Morris, et al.,

Defendants-Respondents.

Decided by the Commissioner, July 28, 1971

SUPREME COURT OF NEW JERSEY

Argued January 24, 1972. Decided Feb. 22 1972

On certification to the Appellate Division.

Mr. John M. Mills argued the cause for the plaintiff Township Committee of the Township of Morris (*Messrs. Mills, Doyle, Hock & Murphy*, attorneys).

Mr. Arthur B. Hanson of the Washington, D.C. bar argued the cause for the intervenors James Nile and James V. Carver (*Mr. Anthony Ambrose*, attorney; *Messrs. Hanson, O'Brien, Birney, Stickle & Butler*, and *Mr. Ralph N. Albright, Jr.*, of the Washington, D.C. bar, of counsel).

Mr. Stephen B. Wiley argued the cause for the defendants Morristown and Regional Boards of Education (*Mr. Jeffrey L. Reiner*, on the brief).

Mr. Arnold H. Chait argued the cause for the defendant Board of Education of the Township of Morris.

Mr. Gordon J. Golum, Deputy Attorney General, argued the cause for the defendant Commissioner of Education of the State of New Jersey (*Mr. George F. Kugler, Jr.*, Attorney General, attorney; *Mr. Stephen L. Skillman*, Assistant Attorney General, of counsel).

PER CURIAM:

On June 25, 1971 this Court handed down its comprehensive opinion in *Jenkins, et al. v. Tp. of Morris School Dist. and Bd. of Ed., et al.*, 58 *N.J.* 483. We there detailed the special circumstances, including the existing and impending severe racial imbalance in the schools of the essentially single Morristown-Morris Township community, which pointed to the urgent need for merging the Town and Township school districts and to the absence of any likelihood of a voluntary merger under the consensual and referenda procedures set forth in *N.J.S.A.* 18A:13-34. And we there found, *inter alia*, that under the broad powers vested in him pursuant to State constitutional and statutory law, the Commissioner of Education could mandate a merger of the Town and Township districts on his own, if he found such course "necessary for fulfillment of the State's educational and desegregation policies in the public schools." 58 *N.J.* at 508. The Commissioner readily and properly understood that our opinion gave explicit recongition to an alternate method of achieving merger in a compelling situation such as that presented by the Morristown-Morris Township community, namely, a compulsory merger by direction of the Commissioner without the local procedural incidents of a voluntary merger under *N.J.S.A.* 18:13-34.

After meeting jointly and separately and with the County Superintendent of Schools, the Boards of Education of the Town and the Township adopted resolutions on July 26, 1971 in which they recommended to the Commissioner that, without any further local procedures, he direct a K-12 merger of the two districts into a regional district to become fully effective as of July 1, 1972. Both Boards also recommended that the allocation of costs between the component municipalities of the regional district be on the basis of apportionment valuations rather than on pupil enrollment. *Cf. N.J.S.A.* 18A:13-34; *N.J.S.A.* 18A:13-23; *N.J.S.A.* 18A:13-25. In a newsletter the

Township Board of Education set forth the reasons which impelled this choice. It considered that it was the "fairest method," and it also considered that the trend evidenced by the recent rise of the Township's school population "from 45 per cent to 60 per cent" would continue and the trend evidenced by the recent decline in the Township's per cent of assessed valuation would continue in view of "major construction contemplated in Morristown." In the light of all this it expressed the view that allocation of costs on the basis of apportionment valuations was best calculated to serve the Township residents in the long run even though at the moment the aggregate Township valuations slightly exceeded the aggregate Town valuations.

On July 28, 1971 the Commissioner entered an order which created "an all purpose regional school district for all the school purposes of the Town of Morristown and the Township of Morris." He directed that the regional district shall function in the same manner as if created by voluntary merger and that the amounts to be raised for annual or special appropriations "shall be apportioned upon the basis of apportionment valuations as defined in Section 54:4-49 of the Revised Statutes as if so determined by referendum under *R.S.* 18A:13-34, subject to change in the manner provided by law." See *N.J.S.A.* 18A:13-25; *cf. N.J.S.A.* 18A:13-23. Thereafter the County Superintendent appointed an interim regional school board, an administrative staff was hired and engaged in the necessary preparations for the integration of the facilities of the Town and Township Boards, and on February 1, 1972 a regional school board election was held.

On September 13, 1971 the Township Committee of the Township of Morris filed a complaint in the Law Division naming the Boards of Education of the Town and Township along with the Regional Board and the Commissioner of Education as defendants. The complaint did not attack the compulsory merger or the creation of the Regional Board but did attack that portion of the Commissioner's order which determined that the amounts to be raised for annual or special appropriations for the regional school district shall be on the basis of apportionment valuations. The complaint alleged that the Commissioner had no authority to make such a determination and that under "*N.J.S.A.* 18A:13-34 only the voters have such authority." It further alleged that at the commencement of the regional district "the Township of Morris will be paying 1.8% more than the Town of Morristown" and that accordingly the Township voters should have the "absolute right to make such determination in accordance with *N.J.S.A.* 18A:13-34." The complaint sought a declaration that the Commissioner's direction that the taxes be apportioned on the basis of apportionment valuations is illegal, an order that a school election be held on the matter of apportionment, and a restraint against the Regional Board and the Commissioner.

In the Law Division Judge Waugh permitted James Nile and James V. Carver, residents and taxpayers of Morris Township, to intervene in support of the Township's complaint. He declined to permit them to broaden the litigation or reargue matters determined by *Jenkins*, and his order permitting their intervention expressly provided that it shall not have the effect of "enlarging the

scope of the issues in the case as filed by the Township Committee of the Township of Morris." Judge Waugh denied interlocutory relief to the plaintiffs and granted a motion to transfer the cause to the Appellate Division. In the Appellate Division the Morristown and Regional Boards of Education moved to dismiss the complaint, which may now be viewed as an appeal from an administrative determination under *R.* 2:2-3, and also moved before this Court for certification. On December 21, 1971 we granted certification and the matter was duly argued on January 24, 1972.

We are entirely satisfied that the appeal presents nothing which calls for judicial intervention. It is grounded on the erroneous notion that the requirement in *N.J.S.A.* 18A:13-34, 35 for an affirmative vote by the voters of each of the constituent municipalities is applicable to the merger directed by the Commissioner. That requirement applies only to a voluntary merger and has no application whatever to a compulsory merger directed by the Commissioner in the exercise of his lawful powers as found in *Jenkins.* Indeed if it were applicable it would disable effective action towards fulfillment of the State's educational and desegregation policies in the compelling situation presented by the Morristown-Morris community and would nullify the very holding in *Jenkins.*

Since *N.J.S.A.* 18A:13-34 is not applicable, the Commissioner's determination as to allocation of the costs is not governed by any requirement in our statutes for prior voter approval. Nor is there any requirement for prior voter approval in our State Constitution, or for that matter in the Federal Constitution. See *Detroit Edison Co. v. East China Tp. School Dist.*, 247 *F. Supp.* 296 (*E.D. Mich.* 1965), *Aff'd*, 378 *F.2d* 225 (6 *Cir.*), *cert. denied*, 389 *U.S.* 932, 19 *L.Ed.* 2*d* 284 (1967); *Nile and Carver v. The Board of Education of the Township of Morristown, et als.*, ---- *F. Supp.* ---- (*D. N.J.* Jan. 12, 1972); *cf. Adams v. City of Colorado Springs*, 308 *F. Supp.* 1397 (*D. Colo.*), *Aff'd mem.*, 399 *U.S.* 901, 26 *L.Ed.* 2*d* 555, *reh. denied*, 400 *U.S.* 855, 27 *L.Ed.* 2*d* 93 (1970); see also *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 *N.J.* 501 (1970); *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick*, 48 *N.J.* 94 (1966); *Jersey City v. Martin*, 126 *N.J.L.* 353, 361 (*E. & A.* 1941).

The Commissioner's determination as to the allocation of the costs was reasonable and was well within the ambit of his powers. It was in line with the goals of *Jenkins* and with the spirit of *N.J.S.A.* 18A:13-23 and it gave due recognition to the availability of later change under *N.J.S.A.* 18A:13-25. It coincided with the recommendations of both Boards and the further expressions of the Township's Board. There is nothing in the record which either evidences or charges unreasonableness nor is there anything to rebut the customary presumption of administrative validity. See *Flanagan v. Civil Service Department*, 29 *N.J.* 1, 12 (1959); *Thomas v. Bd. of Ed. of Morris Township*, 89 *N.J. Super.* 327, 332 (*App. Div.* 1965), *aff'd*, 46 *N.J.* 581 (1966).

In the light of all of the foregoing, we find that the Commissioner's order was lawfully entered and that it is invulnerable to the attack made in the present appeal; accordingly it is:

Affirmed, without costs.

Board of Education of the Township of Parsippany-Troy Hills,

Petitioner-Appellant,

v.

Township Committee of the Township of Parsippany-Troy Hills, Morris County,

Respondent-Appellee.

Decided by the Commissioner of Education, December 8, 1971

STATE BOARD OF EDUCATION

DECISION

For the Petitioner-Appellant, Schenick, Price, Smith & King (Alten Read, Esq., of Counsel)

For the Respondent-Appellee, Ryan, Foster & Garofalo (Robert C. Garofalo, Esq., of Counsel)

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

April 12, 1972

The Board of Education of Passaic in the County of Passaic, David Hammer and Robert Hopkins, individually, and as Taxpayers, and Board of Education of the City of Paterson in the County of Passaic, Intervener,

Plaintiffs,

v.

Board of Education of Township of Wayne, Board of Chosen Freeholders of Passaic County, and Board of Trustees of Passaic County Children's Shelter,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – PASSAIC COUNTY
CIVIL ACTION OPINION

Argued: April 14, 1972, Decided: July 6, 1972

Mr. Louis Marton, Jr. argued the cause for plaintiffs, Board of Education of Passaic, David Hammer and Robert Hopkins (*Mr. Robert P. Swartz* on the brief).

Mr. Robert P. Swartz argued the cause for intervener, Board of Education of the City of Paterson.

Mr. Herman W. Steinberg argued the cause for defendants, Board of Chosen Freeholders of Passaic County and Board of Trustees of Passaic County Children's Shelter (*Mr. Anthony J. Orrico* on the brief).

Mr. Sylvan Rothenberg argued the cause for defendant, Board of Education of Township of Wayne.

ROSENBERG, J.C.C.

The matters before this court are cross-motions by plaintiffs and defendants for summary judgment. The issues raised are of novel impression to the courts of New Jersey.

In December 1954 the Passaic County Board of Chosen Freeholders adopted a resolution creating a Children's Shelter in accordance with *N.J.S.A.* 9:12A-1 and further provided for the appointment of a Board of trustees in accordance with the statute. The Shelter was constructed in Wayne and intended as a temporary facility for delinquent and abandoned or neglected children.

No formal educational program was conducted at the Shelter prior to September 1968. In 1968 both the Board of Trustees of the Passaic County Children's Shelter and the Board of Freeholders adopted resolutions providing for an educational program to be instituted at the Shelter under the auspices of the Wayne Board of Education. In addition it was provided that the cost of the educational program would be supported on a pro rata basis among the various school districts which had pupils in attendance at the Shelter.

The tuition charges for the Shelter for the years 1968-69, 1969-70 and 1970-71 totaled $36,256, $45,800 and $37,240 respectively. The decision to apportion said costs on a pro rata basis resulted in assessments against Paterson in the amounts of $26,574, $31,056 and $23,328, and against Passaic in the amounts of $6,901, $10,712 and $8,392 for the same periods. Thus, although there are 14 other municipalities in Passaic County, the school districts of Passaic and Paterson have been assessed with approximately 90% of the cost of the Shelter's educational program.

At first the plaintiff Boards of Education objected to the charges submitted for the program and resisted payment. After it was threatened to discontinue the education classes, both Boards decided to make payments under protest.

The dispute was brought before the court by the instant action in lieu of prerogative writ, commenced by the Board of Education of the City of Passaic and by David Hammer and Robert Hopkins, individually At the pretrial the Board of Education of the City of Paterson was granted leave to intervene as a party plaintiff. The complaint alleges that the educational program established at the Passaic County Children's Shelter is in violation of existing laws and that

monies paid by the plaintiff Boards of Education pursuant to such program were paid by mistake. Consequently, plaintiff Boards of Education seek an accounting, restitution of the monies prevously paid, and a restraint upon defendants from collecting additional monies from them for the educational program at the County Shelter. Additionally, the individual plaintiffs seek this court to adjudge that the Passaic County Board of Chosen Freeholders, or, in the alternative the Board of Education of the Township of Wayne is required to provide free education for the children housed at the Passaic County Children's Shelter.

Under *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954) summary judgment may be rendered when the pleadings, depositions and admissions on file, together with affidavits submitted on the motion, show clearly that there is no genuine issue of material fact requiring disposition at a trial. In the instant case there is no factual dispute and judgment may be rendered on the applicable law.

Plaintiffs contend that *N.J.S.A.* 9:12A-1 places the responsibility of funding the educational program conducted at the County Shelter on the Passaic County Board of Chosen Freeholders. This court is in full agreement with such a contention.

N.J.S.A. 9:12A-1, in authorizing the establishment of a children's shelter, states in part: "*** the board of chosen freeholders shall provide the funds for carrying on the shelter and for the betterments, improvements and replacements that may be required, in the annual appropriations, but money for new buildings and the equipment thereof and other permanent improvements may be raised by bond issue." Thus the statutory language itself has established that the funds for the operation of the Shelter, which in this court's opinion encompasses the educational program conducted therein, are to be provided by the Board of Chosen Freeholders.

Plaintiff's contention is further supported by a comparison of *N.J.S.A.* 9:12A-1 with *N.J.S.A* 18A:54-1 *et seq.*, dealing with county vocational schools, and *N.J.S.A.* 18A:47-1 *et seq.*, dealing with schools for dependent and delinquent children. In both of the last mentioned statutes, provision is specifically authorized for the receiving school district to collect from the sending school district a sum for the tuition and maintenance of children attending classes within the receiving school district. However, in enacting *N.J.S.A.* 9:12A-1 the Legislature failed to provide for the payment of tuition for educational programs at county shelters to be made on a pro rata basis by sending school districts. Had the Legislature intended for the sending school districts to be responsible for the tuition costs of pupils at the Shelter, it would have so provided as it did with vocational education, *N.J.S.A.* 18A:54-1 *et seq.*, and detention schools, *N.J.S.A.* 18A:47-1 *et seq.* Such silence in failing to so provide is interpreted by this court to mean that the Legislature intended that a county organized educational program operated at a county facility should be funded by the county through the Board of Freeholders. Such an interpretation is consistent with the literal meaning of *N.J.S.A.* 9:12A-1.

Defendants argue that the cost of educating the children at the County Shelter should be borne on a pro rata basis by the sending school districts. Defendants have presented two arguments to support their contentions:

(1) shelter children are non-residents of Wayne school district and as such their tuition costs must be reimbursed under *N.J.S.A.* 18A:38-1 *et seq.*, and

(2) the educational program at the Shelter consists of a special class under either *N.J.S.A.* 18A:46-1 *et seq.* or *N.J.S.A.* 18A:47-1 *et seq.*

Defendants' first argument is based on *N.J.S.A.* 18A:38-3 which states that: "Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe." Defendants further contend that the payment of tuition expressed in *N.J.S.A.* 18A:38-3 is further implemented by *N.J.S.A.* 18A:38-19 which provides in part: "Whenever the pupils of any school district are attending public school in another district *** the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district."

This court is not satisfied that *N.J.S.A.* 18A:38-1 *et seq.* is applicable to the case at bar for two reasons. The first is that the defendants have not demonstrated that the abandoned or neglected children housed at the Shelter have any other residence than that of the Shelter. Secondly, the educational program at the Shelter does not constitute a "public school of the receiving district." Although the program is conducted under the auspices of the Wayne School Board, it cannot be said to be a school of just one district since it is controlled by the County and has been funded by various municipalities within the County. Due to these factors, this court holds that the educational program at the Shelter does not constitute a public school of the Wayne School District and as such the sending school districts are under no obligation to pay tuition for the children attending the program at the Shelter.

Defendants' second argument is that the educational program at the Shelter consists of special classes under either *N.J.S.A.* 18A:46-1 *et seq.* or *N.J.S.A.* 18A:47-1 *et seq.*, both of which provide that the sending school district should make tuition payments to the receiving school districts.

Defendants readily admit however, that *N.J.S.A.* 18A:47-1 *et seq.*, which is restricted to schools for dependent and delinquent children, is not applicable to all the children at the Shelter. This is due to the fact that the abandoned or neglected children housed at the Shelter have not been adjudged juvenile offenders. Thus since *N.J.S.A.* 18A:47-1 *et seq.* does not apply to all of the children at the Shelter, this court is of the opinion that no part of the educational program conducted at the Shelter can fall within the statute merely because some of the pupils would qualify for a school for dependent and delinquent children.

The same reasoning is applicable to defeat defendents' contention that *N.J.S.A.* 18A:46-1 *et seq.*, which deals with schools for handicapped children, is controlling. In attempting to stretch the coverage of this statute, the defendants contend that the children confined at the Shelter fall within the definition of a handicapped child as set forth in *N.J.S.A.* 18A:46-1 in that all shelter children are "socially maladjusted." Such a conclusion cannot be accepted. To say that a child is "socially maladjusted" merely because the child was abandoned or neglected by his or her parents is in fact repulsive to this court. Although abandonment or neglect could cause social maladjustment in a child, this court thinks it highly unfair to conclude that all such children are "socially maladjusted." Thus, since it has not been shown that *N.J.S.A.* 18A:46-1 *et seq.* is applicable to all the children housed at the Shelter, this court is again of the opinion that no part of the educational program conducted at the Shelter can fall within the statute merely because some of the group members would qualify for a school for handicapped children.

In sum, it is this court's opinion that there is no statutory direction by which the Passaic County Board of Chosen Freeholders is authorized to seek tuition payments from the plaintiff school boards.

Having decided that the plaintiff school boards were under no legal obligation to pay the tuition costs which were assessed against them, this court must now concern itself with the issue of whether the plaintiffs may recover the monies previously paid. Such a question seems to be one of first impression in this jurisdiction.

Plaintiffs argue for restitution on the grounds that the tuition assessments were paid under mistake of law. The general rule is that such payments made by municipal corporations or agents thereof under mistake of law are recoverable.

In his treatise on municipal corporations, McQuillin states that "*** although the authorities are by no means uniform, the prevailing view seems to be that payments are by no means uniform, the prevailing view seems to be that payments made by a municipality under mistake of law may be recovered." 17 *McQuillin, Municipal Corporations* (3 ed. 1968), § 49.62, p. 317. Agreement is *Corpus Juris Secundum* which provides:

> Although there are decisions to the contrary, the general rule is that payments made by public officers under mistake of law may be recovered back, and that action may be maintained to recover public funds paid without authority, although paid under a mistake of law, regardless of the good faith of the payee.
>
> Similarly, it is generally held that payments made by muncipal subdivisions of the state under mistake of law may be recovered back***. 70 *C.J.S., Payment,* §156, p. 365 (1951).

In dealing with the issue of whether the government could recover erroneous refunds, the court in *UnitedStates v. Hart*, 12 *F. Supp.* 596, 597 (E.D. Pa. 1935), aff'd. 90 *F. 2d* 987 (3rd Cir. 1937) held that "*** it is well settled

that in case of the government, states, and even municipalities, money paid by mistake may be recovered." So also, the case of *Powell v. Lawlor*, 95 *N.Y.S.* 2d 193, 194-195 (Sup. Ct. 1950) held that "*** payment of public funds or trust funds by agents of municipalities is not subject to the general rule that money paid under a mistake of law may not be recovered back."

The issue not having been previously decided in this jurisdiction, this court will adopt the majority view and hold that municipalities may recover payments made under mistake of law. The reasoning behind such a decision is that this court does not feel that a municipality or subdivision thereof, as the instrument of the people, should be bound by a misinterpretation of the law by the authorities in charge.

Applying the holding of law above to the facts of the case, this court is of the further opinion that the tuition payments were made under a mistake of law. As defined in the case of *Flammia v. Maller*, 66 *N.J. Super.* 440, 459 (App. Div. 1961) a mistake of law occurs where a person is truly acquainted with the existence or non-existence of facts, but is ignorant of or comes to an erroneous conclusion as to their legal effect. In the case at bar the plaintiff school boards paid the tuition payments under protest, but such payments certainly would not have been made had plaintiffs realized the invalidity of the assessments.

Having determined that municipalities may recover payments made under mistake of law and that the tuition payments in the instant case were so made, it is hereby ordered that an accounting be made, that all previously paid tuition assessments be returned, and that the Passaic County Board of Chosen Freeholders is to provide free education to the children housed at the Children's Shelter.

Present an order accordingly.

William Potter,

Petitioner-Appellant,

v.

**Board of Education of the Township of Holmdel,
Monmouth County,**

Respondent-Appellee.

STATE BOARD OF EDUCATION

DECISION

For the Petitioner-Appellant, Rosen and Kanov (Leon M. Rosen, Esq., of Counsel)

For the Respondent-Appellee, Doremus, Russell, Fasano and Nicosia (William L. Russell, Jr., Esq., of Counsel)

The decision of the Commissioner of Education of the State of New Jersey, dated August 12, 1971, is affirmed for the reasons set forth therein.

January 5, 1972

**In the Matter of Duncan Raymond and the
Board of Education of the Township of Montgomery,
Somerset County.
Decided by the Commissioner of Education, April 22, 1971**

STATE BOARD OF EDUCATION

DECISION

For the Board of Education of Montgomery Township, A. Dix Skillman, Esq.

For the Respondent Mr. and Mrs. Raymond, Albridge C. Smith, Esq.

For the Respondent Flemington-Raritan Regional, Wesley L. Lance, Esq.

The Decision of the Commissioner of Education is affirmed with one dissenting opinion.

April 12, 1972

Joseph F. Shanahan,

Plaintiff-Appellant,

v.

New Jersey State Board of Education; Carl L. Marburger, Commissioner of Education for State of New Jersey; Norman A. Gathany, Superintendent of Schools for Hunterdon County, and South Hunterdon Regional High School Board of Education,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Argued January 31, 1972 – Decided January 31, 1972.

Before Judges Collester, Mintz and Lynch.

On Appeal from a decision of the Superintendent of Schools for Hunterdon County.

Mr. Joseph F. Shanahan argued the cause *pro se.*

Mr. Lewis M. Popper, Deputy Attorney General, argued the cause for respondents (Mr. George F. Kugler, Jr., Attorney General for New Jersey, attorney).

PER CURIAM

This is an appeal by plaintiff from a ruling of the Hunterdon County Superintendent of Schools refusing to permit plaintiff to inspect and copy the poll lists of voters who voted in the February 2, 1971 election for members of the South Hunterdon Regional High School Board of Education.

Plaintiff is a candidate for election to the Board of Education of the Regional High School, which election will be held on February 1, 1972. On January 4, 1972 he applied at the office of the Hunterdon County Superintendent of Schools to inspect and copy the poll lists of voters who voted at the election for members of the board of education on February 2, 1971. His application was refused. Thereafter, on the same day, he communicated with the office of the state commissioner of education and was informed that the ruling of the county superintendent of schools was based on a prior decision of the State Board of Education.

Plaintiff filed a complaint in lieu of prerogative writs in the Superior Court, Law Division, for a judgment (a) compelling defendant county superintendent of schools to permit plaintiff to inspect and copy the election poll lists, (b) compelling defendant state commissioner of education "to permit

others similarly situated to the plaintiff throughout the State to inspect and copy pertinent election poll lists," and (c) "restraining, if necessary, the holding of school board elections throughout the State until this matter is adjudicated." He alleged that he was entitled to inspect the poll lists under the provisions of the Right To Know Law, *N.J.S.A.* 47:1A-1 *et seq.* On January 21, 1972, the Superior Court ruled that it lacked jurisdiction of the subject matter and ordered that the complaint be transferred to this court pursuant to *R.* 1:13-4.

We scheduled oral argument on an accelerated basis in view of the emergent nature of the case. We think the Law Division had jurisdiction to hear and determine the issue raised in the complaint. *N.J.S.A.* 47:1A-4. However, that point has not been raised and we will proceed to decide the case on the merits.

The Right To Know Law, *N.J.S.A.* 47:1A-1 *et seq.*, declares it to be the public policy of this State that public records shall be readily accessible for examination by citizens of this State, with certain exceptions, for the protection of the public interest. One of the exceptions is where the examination of the record is governed by another statute. *N.J.S.A.* 47:1A-2.

N.J.S.A. 18A:14-61 and 62, which pertain to elections of members of a board of education, provide that immediately following an election the poll lists, ballots and tally sheets shall be placed in a sealed package and delivered to the secretary of the board of education. The secretary shall, within five days after the date of the election, forward the sealed package to the county superintendent who shall preserve the records for one year.

We conclude that *N.J.S.A.* 18A:14-61 and 62 clearly fall within the meaning of "any other statute," one of the exceptions set forth in the Right To Know Law. The legislative requirement that the poll lists shall be *sealed* and retained for one year implicitly bars a public inspection of such records, in the absence of a claim of irregularity in the election. No such claim is advanced by plaintiff. He admittedly seeks to obtain the names and addresses of persons who voted in the 1971 election to solicit their support for his candidacy in the 1972 election.

The complaint in lieu of prerogative writs is dismissed.

Juanita Zielenski,

Petitioner-Respondent,

v.

Board of Education of the Town of Guttenberg, Hudson County,

Respondent-Appellant.

Decided by the Commissioner of Education, July 16, 1970
Decided by the State Board of Education, Feb. 8, 1971

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Argued January 24, 1972 – Decided February 16, 1972

Before Judges Conford, Matthews, and Fritz.

On appeal from State Board of Education.

Mr. John Tomasin argued the cause for appellant.

Mr. George P. Moser argued the cause for respondent (Mr. Joseph V. Cullum, of counsel; Messrs. Moser, Roveto & Roveto & McGough, attorneys).

Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney for State Board of Education, filed a statement in lieu of brief (Mr. Gordon J. Golum, Deputy Attorney General, of counsel).

PER CURIAM

There is substantial credible evidence in the whole record supporting the factual determinations of the State Board of Education. We are persuaded that the Board's considered and well articulated view of the law sufficiently comports with legislative intent as statutorily expressed that its decision cannot be said to be arbitrary, capricious or unreasonable under the facts of this case.

Accordingly, we affirm.

State of New Jersey
Department of Education
225 West State Street
Trenton, N.J. 08625