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NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1983 to December 31, 1983

Vol. 1

New Jersey State Department of Education
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New Jersey
State Department of Education
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NEW JERSEY SCHOOL LAW DECISIONS

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Commissioner of Education

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7815-81
AGENCY DKT. NO. 431-10/81A

SAYREVILLE EDUCATION ASSOCIATION, DAVID BATT, BEVERLY QUILES, NANCY RUSSELL AND RANIERO TRAVISANO,
Petitioners
v.
BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

Arnold S. Cohen, Esq. for petitioners (Rothbard, Harris & Oxfeld, attorneys)

Casper P. Boehm, Esq. for respondent (Boehm & Campbell, attorneys)

Record Closed October 12, 1982 Decided November 22, 1982

BEFORE **ERIC G. ERRICKSON,** ALJ:

The Sayreville Education Association joins its four individually named petitioners who are guidance counselors, in seeking declaratory judgment in the form of an order of the Commissioner, declaring that the Sayreville Board of Education (Board) was in violation of the education laws when it assigned each of the four individually named petitioners to teach two courses in career education.

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The Board, denying that its assignment of the four guidance counselors to teach career education courses is a violation of prevailing education law, asserts that it has legally asserted its managerial prerogative by assigning them to teach those courses.

When the pleadings were joined in October 1981, the Commissioner transferred the matter as a contested case, on November 12, 1981, to the Office of Administrative Law for processing, pursuant to N.J.S.A. 52:14F-1 et seq. Pursuant to provisions of a prehearing order, dated March 18, 1982, counsel stipulated all relevant facts, thus obviating the necessity of a plenary hearing. Briefing of cross-motions for summary decision was completed with the receipt of petitioner's Letter Reply Brief on October 12, 1982.

STIPULATED FACTS:

I **FIND** that the following facts, as agreed upon by respective counsel in their properly executed Statement of Stipulated Facts (J-1), are those relevant to a determination of the dispute.

Petitioners David Batt, Beverly Quiles, Nancy Russell and Raniero Travisano, who are members of the Sayreville Education Association (Association) and who are employed by the Board, are assigned to the Sayreville Junior High School. The dates when they first worked as guidance counselors by the Board are as follows:

David Batt	September 1, 1970
Beverly Quiles	September 1, 1973
Nancy Russell	November 1, 1980
Raniero Travisano	September 1, 1970

Each of these four individually named petitioners is properly certified as a guidance counselor and has continued as a guidance counselor with the Board since being assigned to a guidance counselor position, except for Beverly Quiles, who resigned and who was not employed by the Board for approximately one year from July 1, 1975 to September 1, 1976.

Effective September 1, 1981, the Board assigned each of the four individually named petitioners to teach two courses daily in career education. They have since

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followed the instruction of the Board, and they each teach two classes daily of a course entitled "Career Development." Each of the individually named petitioners also continues to perform as a guidance counselor.

The career development course is being offered by the Board, pursuant to a regulation by the State Board of Education which requires that, effective September 1, 1981, each school district must offer such a course as part of its curriculum. At this time, there is no specific certification required to teach the career development course, which is designed to meet graduation requirements. The only requirement is an appropriate New Jersey teacher certificate.

A description of the career development course, as prepared by the school staff and approved by the Board, specifies that it is a half-year course for which two and one-half credits are assigned. It further describes the course as one which offers basic information about the world of work and which is designed to develop pupil awareness of self-interests and aptitudes in order to facilitate decision making. It further delineates the understandings and proficiencies which each pupil is expected to attain (Exhibit A).

Duties of guidance counselors are set forth in both the "Teachers Handbook" of the junior high school (Exhibit B) and in the job description of the position of guidance counselor as approved by the Board (Exhibit C).

An "Annual Performance Report" form is used in the district for the evaluation of guidance counselors (Exhibit D).

Junior high school enrollment in the district and the student guidance counselor ratio for recent years, as well as projected figures for 1982-83 and 1983-84, are as follows:

1970-71	1718	429.5
1971-72	1660	415.0
1972-73	1631	407.7
1973-74	1677	419.2
1974-75	1694	423.5
1975-76	1700	425.0
1976-77	1630	407.5

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1977-78	1591	397.7
1978-79	1610	402.5
1979-80	1487	371.7
1980-81	1358	339.5
1981-82	1220	305.0
	[Exhibit E]	
1982-83	1213	303.2
1983-84	1171	297.7
	[Exhibit F]	

The New Jersey State Department of Education, during July 1980, issued a publication entitled "Guidelines for Comprehensive Guidance and Counseling Services," which discusses such subjects as purpose of guidance and counseling services, and what these services should encompass, as well as personnel and facilities for the rendering of such services (Exhibit G).

DISCUSSION:

Petitioners, contending that a full-time guidance counselor cannot also be required to teach scheduled classroom courses in career education, argue that one who teaches classes in career education is then filling a separate and distinct position from that of a guidance counselor. Petitioners further contend that, absent the guidance counselors' consent to teach career education classes, the Board had no legal right to assign them those duties. In this regard, they contend that as teachers of career education, they must perform duties in the category of teacher, which is separate and distinct from the category of guidance counselor in which they are tenured. In support of these contentions, petitioners cite Andrew Horun v. Watchung Hills Bd. of Ed., 1981 S.L.D. _____ (decided March 23, 1981); Madeline Childs v. Union Twp. Bd. of Ed., 1980 S.L.D. _____ (decided September 29, 1980); Richard Gincel v. Edison Twp. Bd. of Ed., 1980 S.L.D. _____ (decided August 11, 1980), aff'd State Board of Education November 5, 1980, aff'd Superior Court of New Jersey, App. Div. Dkt. No. A-1813-80-T3.

The respondent Board, in turn, argues that it has, under its managerial authority, legally required each of the four individually named petitioners to teach two career education classes daily, that the cases cited by petitioner are factually dissimilar

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to the facts in the instant matter, and that teaching the career development course is incident to their responsibilities as counselors rather than being a transformation to the role of a classroom teacher.

After carefully weighing and considering, in the light of applicable education law, the arguments advanced by respective counsel, I hold for the Board.

This case differs sharply from Childs, supra, wherein Childs was transferred from her tenured guidance position to the position of an English teacher. It likewise differs from Horun, supra, in which Horun was reassigned from his full-time guidance counselor position to a part-time guidance position and part-time mathematics position. Thus, the Watchung Hills Board of Education assigned Horun to a totally different academic discipline for part of his teaching day. Such is not the case herein as is seen below. In Gincel, supra, that Board unilaterally transferred Gincel to a teaching position without proper consideration of his seniority rights to a principalship. No similar factual pattern to Horun, Gincel, and Childs is presented herein. Thus, I **CONCLUDE** that by reason of factual differences, Gincel, Childs and Horun are not controlling in the instant matter.

The guidance counselors herein have not been reduced in rank and have not suffered loss of compensation. Nor have they had their guidance positions reduced to less than full-time. The Board's assignment to teach career education on a group basis does not, ipso facto, transform the counselors into classroom teachers, in the sense of a transfer, as was found improper in Childs, supra. Rather, their two period per day assignment to teach that course is merely an extension of their duties, organized on a group basis, to better inform pupils of facts incident to career development.

The petitioning guidance counselors are assigned, within the scope of their certification, to perform such group guidance. In this regard, see N.J.A.C. 6:11-12.13(a)4ii (1)(A), which specifies that study in theory and procedures in individual and group guidance is a requisite to certification as a guidance counselor. I **CONCLUDE** that its inclusion in the rule as a required area of study can only be interpreted to indicate that the State Board of Examiners and the State Board of Education, in promulgating this rule, considered group guidance to be an appropriate activity to which a guidance counselor could be assigned properly within the scope of the pupil personnel services certificate.

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An analysis of the career development course description, Exhibit A, reveals that this course is designed to foster awareness of the needs, values and aptitudes needed in career decision making, economic and social influences affecting career decisions, sources of occupational information, and the relationships between careers and other activities. It also sets forth certain skills and proficiencies to be developed by pupils in achieving career goals. These responsibilities match closely the major responsibilities of counselors as set forth in the description of counseling and guidance services in the teachers handbook (Exhibit B). Those responsibilities include but are not limited to the following:

1. Counseling (group and individual)
2. Career Planning
3. Orientation
4. Testing
5. Information
6. Placement
7. Referral
8. Follow-up

Similarly, the Board's job description for guidance counselors specifies as a major duty and responsibility the following:

> 10. Provides career and program planning, college placement data, and career instruction of pupils.
> [Exhibit C at 2]

That same job description also specifies that the counselor:

> 8. Provides appropriate group guidance activities.
> 17. Performs other duties which may be within the scope of his/her employment and certification(s) as may be assigned by his/her superiors under authority of the Board of Education.
> [Exhibit C at 2]

I **CONCLUDE** from the above that the Board's assignment of the individually named petitioners to teach the career development course two periods daily is consistent with both the Board's job description for counselors and the description of counseling and guidance services in the teachers handbook (Exhibits B and C).

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DETERMINATION:

In consideration of the facts and conclusions set forth above, it is **DETERMINED** that the individually named guidance counselors have been assigned by the Board under its statutorily based managerial authority to instruct classes in career development and that their assignment by the Board was also consistent with the applicable rules of the State Board of Education and the Board's own rules and procedural guidelines. Accordingly, it is **ORDERED** that petitioners' request for a declaratory judgment stating that the Board has illegally assigned its guidance counselors to teach a course in career development is **DENIED.**

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

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

November 22, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

November 22, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 24, 1982
DATE

Ronald L. Lockspeiser
OFFICE OF ADMINISTRATIVE LAW

bm

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DOCUMENTS IN EVIDENCE:

Exhibit A Career Development Course Description
Exhibit B Counseling and Guidance Services Excerpt from Faculty Handbook
Exhibit C Guidance Counselor Job Description
Exhibit D Annual Performance Report for Guidance Counselor
Exhibit E Enrollment Figures
Exhibit F Projected Enrollment Figures
Exhibit G Guidelines for Guidance and Counseling Services

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SAYREVILLE EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, Eric G. Errickson, ALJ.

It is observed that timely exceptions to the initial decision were filed by petitioners and that reply exceptions were filed by the Board in accordance with the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

In their exceptions to the initial decision, petitioners maintain that the ALJ's findings in the initial decision of this matter are in error. They argue that the Career Development course to which each of them has been assigned two periods daily requires them to perform duties as teachers in addition to their duties as guidance counselors. Petitioners maintain therefore that the Board's action flies in the face of established case law. They contend that the established principles in prior decisional law are apposite in the instant matter. In this regard petitioners rely upon the prior decisions of the Commissioner which were also argued before Judge Errickson. See Childs, Horun, Gincel, supra.

Petitioners reason that in view of the foregoing decisions a guidance counselor cannot be assigned to a full or part-time classroom position without (1) the individual's consent; (2) a reduction in force; (3) a tenure hearing. (Petitioners' Exceptions, at p. 6).

Petitioners maintain further that, because the position of guidance counselor represents a service category in which tenure can be obtained, it is a separate and distinct position from that of a classroom teacher. Petitioners therefore conclude that the Career Development course offered by the Board (Exhibit A) is, by its very description, an academic course which is the function and duty of a classroom teacher.

Petitioners' reject the ALJ's conclusion and determination stating that the administrative rules, N.J.A.C.

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6:11-12.13(b) (4)ii(1)(A)(B), can be construed to require them to teach the Career Development course. The only mandate in the aforementioned regulation is that guidance counselors are required to take a minimum of six semester hours in theory and procedures in individual and group guidance for certification purposes.

Finally, petitioners argue:

> "***[T]he students assigned to the Career Development course are asked to master certain skills, are examined as to their proficiency, and receive credit for successful completion of the course. Quite simply, they are being asked to complete an academic course; they are not being group counselled. And, in this regard, it bears noting that no specific certification is required to teach the Career Development course. Accordingly, any classroom teacher can be assigned to teach the course.***"
>
> (Petitioners' Exceptions, at p. 8)

The Board, in its reply exceptions to the positions taken by petitioners herein, raises a serious question pertaining to petitioners' argument that they are being required to complete an academic course in the career development classes assigned to them and they deny that they are group counselling the pupils in such classes. The Board maintains that were petitioners to advance such an argument as an issue before the Commissioner, it would then be compelled to view petitioners' actions as being violative of their job descriptions (Exhibit C) which would constitute just cause for its consideration of tenure charges against them pursuant to the applicable provisions of N.J.S.A. 18A:6-11 as amended.

The Board also relies on its brief which was originally filed with the ALJ in rebutting petitioners' exceptions which reads in pertinent part:

> "***Unlike the petitioners in the above-cited cases, the guidance counselors who now claim a violation of their tenure rights have not been reduced in rank; nor have they suffered a loss of compensation; nor have their positions been diminished to half-time. In fact, all that has happened here is that the Board has given these guidance counselors, who already work less than a full day, additional duties that are within the scope of their expertise. True, the additional duties involve 'teaching' in a classroom setting. The use of the word 'teaching' is used in that it is a classroom concept but a more apt

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> term would be 'group counselling'. But that fact alone does not rise to the level of a violation of petitioners' tenure rights. That the petitioners, in carrying out their duties as guidance counselors, might during a certain time of the day have to counsel a group of students on 'career development' does not make these counselors 'classroom teachers' within the meaning of the education laws in the sense that there has been an effective transfer to that of a classroom teacher. Indeed, this duty is part of the very essence of the guidance counselor's responsibility.***" (Board's Brief, at p. 6)

The Commissioner has reviewed the exceptions and reply exceptions filed petitioners and the Board. In the Commissioner's judgment the prior decisional law upon which petitioners rely in support of their contentions herein is misplaced.

The Commissioner, upon examination and consideration of the course description for Career Education and the job descriptions under which petitioners are employed, finds and determines that the Board acted within its discretionary authority to assign petitioners these duties.

The Commissioner further finds and determines that the arguments advanced by petitioners are without merit since they are erroneously premised upon the assumption that the required duties of a guidance counselor are not an integral part of the teaching-learning process and may not, under these specific circumstances, be incorporated into their recently-assigned functions as full-time guidance counselors. Given the undisputed factual circumstances of the instant matter, the relief sought by petitioners by virtue of the arguments presented lacks merit, absent specific statutory or regulatory language.

In this regard the Commissioner relies on the ruling handed down by the Court in re: Tugender, 186 N.J. Super. 178 (App. Div. 1982). The Court therein stated in part:

> "***Statutorily empowered agencies, especially those regulating professions, have implied powers to effectuate their purposes. In re Heller Suspension, 73 N.J. 292, 303 (1977). Hence, 'the powers of an administrative agency should be liberally construed to permit the agency to achieve the task assigned to it.' Ibid. (quoting In re Banking & Ins. Comm'r v. Parkwood Co., 98 N.J. Super. 263, 271-272 (App. Div. 1967)). Furthermore, an administrative agency is expected to act to accomplish its goals even

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> without prior specific rules or regulations. Sheeran v. Progressive Life Ins. Co., 182 N.J. Super. 237, 246-249 (App. Div. 1981).***" (at 182)

Accordingly, for the reasons set forth above which supplement the findings and determination of Judge Errickson, the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

JANUARY 5, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5286-82
AGENCY DKT. NO. 137-5/82A

CARL W. DOHM,
Petitioner
v.
BOARD OF EDUCATION OF WEST MILFORD,
Respondent

APPEARANCES:
Carl W. Dohm, Pro Se

Geraldine E. O'Kane, Esq.,
for respondent
(Dines, English & O'Kane, attorneys)

Record Closed October 15, 1982 Decided November 19, 1982

BEFORE **SYBIL R. MOSES**, ALJ:

This matter comes before the Office of Administrative Law as the result of a petition filed by Carl W. Dohm on April 28, 1982, asking the Commissioner of Education to render declaratory judgment on whether N.J.S.A. 18A:25-3 applies to his request to be absent on February 12, 1982, Lincoln's Birthday and a State holiday. Petitioner also asks that he receive one day's pay or a compensatory day off of his choice, in lieu of working on Lincoln's Birthday and that the Commissioner order the West Milford Board of Education to refrain from preventing him from being absent from school on any future State holidays, if he so elects, without a penalty. An answer was filed on May 17, 1982,

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conceding that petitioner is entitled to be absent on State holidays but alleging that he must fulfill his contractual obligation to respondent to teach for 185 days. The matter was forwarded to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held in the matter on June 30, 1982, before the Honorable Ken R. Springer, ALJ. The parties decided that the issues in controversy were:

A. If a board of education schedules a school day on a public holiday, does it violate N.J.S.A. 18A:25-3 for the board to require an absent teacher to work an extra day or suffer a loss of pay?

B. Does a collective negotiating agreement which requires teachers to work a maximum of 185 days violate N.J.S.A. 18A:25-3, by requiring a teacher who observes a public holiday to work an additional day to meet the 185-day maximum or suffer a loss in pay?

Judge Springer disqualified himself from further participation in the case after conducting the prehearing conference. The matter was then assigned to this judge and a hearing was held on September 20, 1982.

Petitioner did not present any evidence but relied on his petition, filed on April 28, 1982, and on the joint exhibits marked into evidence. The joint exhibits are:

J-1 Request for absence, February 5, 1982
J-2 Memorandum to Mr. Dohm from Mr. Koy, February 9, 1982
J-3 School calendar 1981-82
R-1 Collective Bargaining Agreement between Board of Education of the Township of West Milford and the West Milford Education Association, Inc., July 1, 1979 to June 30, 1982, moved into evidence by respondent, Board of Education

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The Board of Education presented the testimony of John Neary, President of the West Milford Education Association, and William Koy, Assistant Superintendent of Schools.

Mr. Neary, as President of the Association, was the chief negotiator for the contract, which runs from 1979-1982. Mr. Dohm is a member of the Association, which is the bargaining unit for the certified teachers for the schools in the school district. Article IV, page 4 of the contract (R-1 in evidence) is the school calendar, which sets a 185-reporting day requirement, plus five snow days which are readjusted at the end of the school year. The contract requires discussion of the calendar with the teachers, although it is conceded by all that the Board of Education has the right to set the calendar. Because there are many snow days in the West Milford area, which impacts on the length of Easter and school vacations, a majority of the Association voted to indicate to the Board that it preferred to work on public holidays so as not to affect the length of Easter vacation and so as not to delay the end of the school year. (Approximately 220 voted yes and approximately 17, including Mr. Dohm, voted not to work on public holidays.) Mr. Neary conceded that some calendar suggestions of the teachers were not adopted and he further conceded that the calendar was not negotiable but pointed out that the Board was receptive to input and suggestions.

Mr. Neary discussed the problem of the holidays with the Superintendent of Schools, knowing that the teachers have the right to be off on public holidays, yet also knowing the unique problem with snow days in West Milford. He knew that Mr. Dohm was opposed to working on holidays and opposed to the contract. He does not know how other teachers or employees, who have taken the holidays, have dealt with the problem; that is, whether they took a sick day or a personal day, were docked pay, or worked an extra day at the end of the year.

Mr. Koy was aware that Mr. Dohm wanted to be absent on February 12, 1982 because it was a public holiday. However, he did report to work and was paid for the day, and thus, in 1981-82, Mr. Dohm worked the requisite 185 days. If he gets one day's pay, or a compensatory day, to make up for the fact that he worked on Lincoln's Birthday, he will

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get 186 days pay. At the end of the 1980-81 school year, Mr. Dohm had to make up two days that he missed for being absent on two legal holidays. The duties assigned to him were commensurate with his position as a Social Studies teacher. All other teachers who took a holiday (such as the October 12, 1981 Professional Day) also made up days the same way. During the 1982-83 year, there will be 184 reporting days, which were the subject of negotiation with the collective bargaining unit for the teachers. All the districts in the area, including Vernon and Sussex, as well as West Milford, try to get as many days in during the winter as possible, in order to avoid the problems of excess snow days.

The parties stipulated to the following facts:

1. The union contract with the Board for the 1981-82 school year sets forth a reporting requirement of 185 days. The document that each individual teacher received just called for the teachers to work for a period of ten months.

2. For the 1982-83 school year the document that each individual teacher received set forth a requirement of 184 working days.

Both Mr. Dohm and Ms. O'Kane submitted suggested findings of fact and conclusions of law in a timely fashion. No responses were filed and the record closed on October 15, 1982.

Mr. Dohm argues that the Board does not have the right to demand attendance on public holidays by teachers, or to dock teachers' pay or to require a day to be made up after school is closed for the year, in order to have each teacher fulfill the requirement of 185 reporting days. He argues that N.J.S.A. 18A:25-3 specifically prohibits deductions from teachers' salaries because a public holiday happens to be a school day. Furthermore, he argues that forcing teachers to make up missed holidays after schools are closed in June was not the intent of the Legislature, because the Legislature could not have meant to have children attend school without teachers and then have teachers work without students. Mr. Dohm urges that the Board is using the 185-day requirement to discourage teachers from exercising their right to take public holidays. He argues that since the

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Board cannot force teachers to work on public holidays, the reasons for the calendaring in this manner are irrelevant. Mr. Dohm relies on Moldovan v. Bd. of Ed. of Hamilton Township, 1971 S.L.D. 246, where the Commissioner stated that the intent of N.J.S.A. 18A:25-3 is that no teacher shall be required to perform duties on any public holiday and no salary deduction shall be made for absence because such a holiday falls on a school day and that no contract term may violate that statute.

The Board of Education concedes that no teacher may be required to teach school on any day declared by law to be a public holiday, but states that is not the issue in this case. The issue here is whether the Board may enforce the contractual obligation of 185 reporting days by requiring a teacher who chooses to be absent on the public holiday to report at the end of the school year to meet that requirement, or to face a deduction in pay for the number of days he is short of his contractual obligation. Counsel relies on Freehold Regional High School Ed. Ass'n and Walter Holcombe v. Bd. of Ed. of Freehold Regional High School District, 1977 S.L.D. 1057, where the Commissioner determined that the board, having exclusive authority to structure the school calendar, could extend the calendar at the end of the year because of closing schools on a public holiday. Counsel further points out that a contract negotiated pursuant to N.J.S.A. 34:15A-5.3, which sets forth a specific number of reporting days, does not conflict with N.J.S.A. 18A:25-3. Petitioner must meet his contractual obligations, although at the same time he is free to exercise his right to be absent on a holiday. Counsel points out that the petitioner has suffered no damage in that he reported for work on the public holiday in issue, was paid for same and fulfilled his contractual obligation.

After considering the testimony and evidence in this matter, and after considering the proposed findings of fact and conclusions of law submitted by both parties, the court has determined that there is no real factual dispute in this case. The following facts are uncontroverted:

1. Petitioner is a tenured school teacher employed by the West Milford Board of Education.

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2. At all relevant times there was a collective bargaining agreement in force and effect, negotiated between the West Milford Education Association, of which petitioner is a member, and the West Milford Board of Education. Article IV of that agreement sets forth a ten-month school year with a requirement of 185 reporting days for teachers.

3. Included in reporting days are authorized sick leave days, personal days, legal days and professional days. Days on which school is closed for a public holiday do not count toward the 185 reporting days.

4. Any teacher reporting less than 185 days is docked for the number of days he or she is short. Teachers using more than their authorized sick time do not have the opportunity to make up those lost days at the end of the school year.

5. The West Milford school system encounters a significant number of school closings due to snow because of its geographical location and because it buses all students. To compensate for this, there are five emergency days scheduled in the calendar.

6. In past years, teachers were required to report to work during Easter vacation or at the end of the year to make up reporting days lost because of snow days. As a result, a majority of the West Milford Education Association voted to ask the Board of Education to schedule school on some public holidays in order to prevent cutting short the Easter vacation and to allow school to close on time. Petitioner voted against this request.

7. The Board of Education has the authority and power to set the school calendar. It is not negotiable. The Board did adopt some of the Association's suggestions. It scheduled school for some legal holidays, including February 12, 1982, Lincoln's Birthday. Lincoln's Birthday, February 12, is one of the days declared a legal holiday by the New Jersey Legislature, N.J.S.A. 36:1-1.

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8. On February 5, 1982, petitioner requested that he be allowed to be absent on February 12, Lincoln's Birthday, because it was a State holiday (J-1).

9. On February 9, 1982, William Koy, Assistant Superintendent of Schools, wrote to petitioner (see J-2) advising him of his right to be absent on the holiday but advising him further that he would be one day short of his contractual obligation and could make up same by working one day at the end of the school year or by being docked one day's pay.

10. Petitioner reported to work on February 12, 1982 and was paid for the day. Petitioner met his 185-day contractual requirement in the 1981-82 school year. No deductions were made from petitioner's salary for the 1981-82 school year.

In reviewing the arguments of both parties, the court has determined that the central issue in the case at bar is whether petitioner can be forced to make up the holiday, on which he has the right to be absent, at the end of the school year in order to meet the 185-day contractual obligation. A subissue is whether the contract in question violates N.J.S.A. 18A:25-3 by scheduling school on legal holidays.

N.J.S.A. 18A:25-3 states:

> No teaching staff member shall be required to perform his duties on any day declared by law to be a public holiday and no deduction shall be made from such member's salary by reason of the fact that such a public holiday happens to be a school day and any term of any contract made with any such member which is in violation of this section shall be void.

This law clearly permits petitioner to determine on his own not to teach school on a day declared by law to be a legal holiday. See Moldovan v. Bd. of Ed. of Twp. of Hamilton, 1971 S.L.D. 246. Further, this law is clear that if the terms of the contract between the West Milford Education Association and the West Milford Board of Education were such that a teaching staff member were required to teach, and if he or she took the day off on a public holiday, automatically had salary docked, that term would be null and void, as

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there is no requirement that teachers work on public holidays. However, it is equally clear that there is no requirement in N.J.S.A. 18A:25-3 that school be closed on public holidays. Its only mandate is that the teachers shall not be required to perform duties on said days, as the Commissioner stated:

> The clear intent of this long standing statute, N.J.S.A. 18A:25-3, supra, is that teaching staff members shall not be required to perform duties on any public holiday, that no salary deduction shall be made for absence because a public holiday happens to be a school day, and that no contract term may violate this statute. It is evident that this statute does not prohibit school sessions on public holidays, but instead protects the right of teaching staff members to be absent on public holidays without suffering financial loss. Moldovan v. Bd. of Ed. of Hamilton Twp., 1971 S.L.D. at 253.

Accordingly, the court concludes that while Mr. Dohm cannot be required to work on Lincoln's Birthday, there is no requirement that the West Milford Board of Education has to close school on any or all public holidays. The question is whether petitioner is required to make up the holiday absence at the end of the school year, in order to meet his contractual obligation. The collective bargaining agreement requires 185 reporting days for teaching staff members, and was approved by a majority vote of the West Milford Education Association, of which Mr. Dohm is a member, and applies to Mr. Dohm, despite the fact that he was in the minority when voting against the contract. The court has reviewed Freehold Regional High School Ed. Ass'n and Walter Holcombe v. Bd. of Ed. of Freehold Regional High School District, 1977 S.L.D. 1057, and concludes that the Board has the right to require reporting days after the end of the school year. In Freehold, the Commissioner held that the board has the sole authority to adopt a calendar, and to require that any days on which school is closed be made up at the end of the school year. Those petitioners' claim for extra days pay because they worked at the end of the school year was disallowed because the Commissioner found nothing in the record revealing that petitioners worked more days than they agreed to work, pursuant to their collective negotiation agreement with the Freehold Board of Education. Analogously, there is nothing in the record before me that Mr. Dohm, if he was absent on Lincoln's Birthday, as is his right, and was required to work one day at the end of the school year, would be working any more days than his collective bargaining agreement called for. Furthermore,

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there is nothing in this record to indicate a lack of a valid educational basis for any work he would be assigned if he worked at the end of the school year. Mr. Dohm did not testify. The only evidence on that point is Mr. Koy's statement that if he were working at the end of the year, he would be assigned duties commensurate with his position as Social Studies teacher.

Accordingly, this judge concludes that Section IV of the Collective Bargaining Agreement, R-1 in evidence, between the West Milford Education Association and the West Milford Board of Education is not in violation of N.J.S.A. 18A:25-3; as it only requires that all teachers had to work 185 days during the 1981-82 school year and as there is nothing in N.J.S.A. 18A:25-3 or N.J.S.A. 36:1-1 which requires the closing of schools on legal holidays. Therefore, the court concludes that if a teacher were to be absent on a public holiday, as is his or her right, and if, in fact, that teacher had not, by the end of the school year, reported to school on 185 days, the Board of Education would be within its rights to require that teacher to perform duties commensurate with his or her position for the number of days lacking after school was closed. The court is quite sure that there would be either preparatory or conclusory work to be done by a teacher for a one-or-two day period at the end of the school year.

There has been no evidence presented to this judge that Mr. Dohm suffered any damages as a result of his request for a paid absence on February 12, 1982, or as a result of the memo setting forth his options. He did report to work on Lincoln's Birthday and did not have to work after the close of the school year. He should not be entitled to receive pay for an additional days work when no other teacher in the school system is entitled to same. There is nothing in N.J.S.A. 18A:25-3 which requires the Board of Education to compensate him in that fashion.

Accordingly, based on the foregoing analysis of law and on the uncontroverted facts, this court makes the following Declaratory Judgment:

1. N.J.S.A. 18A:25-3 does not prohibit the scheduling of school on a public or legal holiday, as set forth in N.J.S.A. 36:1-1, provided teachers are not required

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to work on said holiday and provided that the pay of said teachers is not automatically docked for their being absent on said holiday.

2. Enforcement of the contract provision requiring a specific number of reporting days for teaching staff members in a school district, by requiring teachers, who exercise their conceded right to be absent on a public holiday when school is scheduled to be in session on that holiday to meet the specific number of reporting days by working at the end of the school year or losing pay for the days they are lacking toward the contractual commitment, does not violate the spirit or the letter of N.J.S.A. 18A:25-3.

Accordingly, the petition asking the Commissioner of Education to direct the West Milford Board of Education to refrain from preventing Mr. Dohm from absenting himself from school on State holidays if he so elects, without requiring him to meet the contractual number of required reporting days, is hereby **DENIED.**

That portion of the petition requesting construction of N.J.S.A. 18A:25-3 in such a way as to state that petitioner cannot be required to work on a public holiday and cannot be automatically docked for that day is hereby **GRANTED,** as set forth above in the Declaratory Judgment.

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

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OAL DKT. NO. EDU 5286-82

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

Nov. 19, 1982
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

November 23, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 29, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

sv

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CARL W. DOHM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by petitioner in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in his exceptions to the initial decision by the Honorable Sybil R. Moses, ALJ contends that the interpretation by Judge Moses flies in the face of the intent of the Legislature. No proof is offered by petitioner in support of this speculative assertion. The Commissioner finds no merit in petitioner's exceptions.

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

Accordingly, that portion of the Petition asking that the West Milford Board of Education be directed to refrain from preventing petitioner from absenting himself from school on State holidays as he chooses, without meeting the contractual number of days required of him, is denied.

That portion of the Petition requesting affirmation of N.J.S.A. 18A:25-3 such that petitioner shall not be required to work on a public holiday and cannot be automatically docked for that day is granted.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4598-82
(OAL DKT. NO. EDU 4980-80 REMANDED
AGENCY REF. NO. 106-4/79A)
AGENCY REF. NO. 125-81

TEANECK BOARD OF EDUCATION,
Petitioner

v.

ETHEL P. HOGUE,
Respondent

APPEARANCES:

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

Anthony N. Gallina, Esq., for the respondent
(Aronsohn & Springstead, attorneys)

Record Closed November 17, 1982 Decided November 30, 1982

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

This matter was opened by the filing of certified charges of incompetency April 10, 1979, and was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 523:14F-1 et seq. by the Commissioner of Education for a hearing on the charges and a determination as to whether said charges are to be classified as incompetency or inefficiency. It was docketed as EDU 4980-80.

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The Board filed a Motion for Declaratory Judgment that respondent is not a tenured teaching staff member, and respondent filed a Cross-Motion for Summary Decision that respondent is tenured. The Board's Motion was granted and respondent's Cross-Motion was denied in reliance on Point Pleasant Beach Teachers Association v. Callam, 173 N.J. Super. 11 (App. Div. 1980), certif. den. 84 N.J. 469 (1980). The Commissioner affirmed. The State Board reversed and remanded for hearing on the merits of the tenure charges, Point Pleasant being subsequently overruled by the New Jersey Supreme Court in Spiewak, et al. v. Rutherford Board of Education, 90 N.J. 63 (1982).

A plenary hearing was held on October 13, 14, 15 and 21 at the Office of Administrative Law in Newark. Simultaneous briefs were filed and the record closed on November 17, 1982, the date established for optional responses, which was exercised only by respondent.

Ethel P. Hogue (Hogue) was initially employed by the Teaneck Board of Education in September 1973 as a small group remediation teacher under the Emergency School Aid Act, 20 U.S.C. §1601, et seq. (ESAA). She was continuously employed until her suspension and the certification of tenure charges by the Board on April 5, 1979.

During her employment Hogue was assigned to small group remedial instruction from September 1973 to June 1976; assigned to teach a first grade class at Bryant in 1976-77; assigned to teach a second grade class at Whittier for the 1977-78 school year, but was transferred with her consent to small group remedial instruction for the second half of that year; and was assigned to teach a fifth grade class at Longfellow for the 1978-79 school year.

The following facts were stipulated by the parties during the course of hearing:

1) Hogue possessed proper certification.

2) Hogue's increment was withheld for the 1978-79 school year.

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3) Hogue performed satisfactorily in her assignment to small group remedial classes.

4) Hogue's performance prior to September 1977 was not found to be unsatisfactory.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

ALFRED J. MITCHELL

Mitchell was Hogue's principal and supervisor during the latter's assignment as a second grade teacher at Whittier beginning with the 1977-78 school year. His observation reports of Hogue clearly indicate dissatisfaction with her performance. See P-1, P-3 and P-5.

Mitchell testified that Hogue did not appear to be aware of what constitutes a good instructional program; Hogue was oblivious of pupil behavioral problems; her classroom was in disarray; pupil records of test results could not be located; parental complaints of Hogue were received after their visitations during American Education Week; Hogue did not respond substantively on his observation findings during post-observation conferences; he arranged for Mrs. Kelly, a reading consultant, to assist for three days in the improvement of Hogue's performance and had her teach a demonstration lesson; and also arranged for supervisory aid to Hogue through his assistant, who also assessed Hogue's performance as unsatisfactory.

Mitchell further testified that the failure of Hogue to implement some suggestions for improvement, and particularly her failure to improve her performance to an acceptable level, left him no recourse but to appeal to his supervisor, Lucy Stamilla, for Hogue's removal from his building. See P-6.

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VICTOR A. KLEIN

Klein became principal at Longfellow in January 1979, after having served as principal for five and one-half years at Emerson and as an assistant principal for four years before that assignment.

Klein stated that he had supervised Hogue at Emerson when she was assigned there with small group remediation responsibilities; but his first experience with Hogue as a regular classroom teacher was at Longfellow in January 1979.

Klein testified that Hogue's performance was unsatisfactory; her classroom was disorganized; discipline was lacking, as Hogue did not have control of her class and her pupils appeared to lack respect for her; he found several of Hogue's pupils outside the classroom on several occasions; he saw no evidence of careful planning or effort by Hogue; Hogue was disorganized, did not give clear instructions, and was oblivious of disruptive pupil activites in the room; Hogue's parent folders were a disgrace as they were torn, sloppy, filled with errors and unchecked pupil work; the classroom environment was chaotic; pupils did not respond to Hogue's disciplinary efforts; and that pupils assigned to Hogue's class suffered academically because of her ineffectiveness as a teacher.

Klein further testified he provided, through his supervisor Lucy Stamilla, supplemental assistance to Hogue for performance improvement by a Mrs. Dabek in Language Arts and a Mr. Pelkey in Mathematics, which did not result in any significant improvement. See P-20.

Klein also testified that a PTA subcommittee of parents of pupils in Hogue's class met with him to discuss their concerns because their children did not want to go to school anymore.

The final testimony of Klein was that he recommended an increment withholding and that his response to the Superintendent's inquiry about Hogue was that she was incompetent.

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The cross-examination of Klein was an effort to discredit his direct testimony. See P-9, P-10, P-11, and P-12.

EMILE MASSA

Massa was principal at Longfellow when Hogue was assigned there as a fifth grade teacher from September 1978 until his retirement in January 1979. He moved out of State and was not available to testify. His observation and evaluation of Hogue was unsatisfactory and admitted into evidence without objection. See P-16, P-17.

LUCY STAMILLA

Stamilla was the Director of Elementary Education during the period of Hogue's employment. She supervised and evaluated principals and was responsible directly to the Superintendent. She evaluated nontenured teachers, and tenured staff upon request of principals or when problems came to her attention.

Stamilla testified that she observed Hogue three or four times when the latter was assigned to Whittier as a second grade teacher and was not pleased with what she saw. She stated that Hogue's room was in disarray; pupils were unruly and lacked good work habits; pupil movement about the room was permissive; excessive pupil talking persisted; Hogue was disorganized; and she observed little meaningful teaching.

Stamilla also testified that she received complaints from parents following their visitations during American Education Week, and also was the recipient of grave concerns from principal Mitchell. She further testified she effectuated a transfer of Hogue from Whittier to the E.S.A.A. Program in January 1978. She also testified she assigned Hogue to a higher grade level, fifth grade, in 1978-79 in a different building with a different principal, Mr. Emile Massa. This assignment resulted from Massa's willingness due to his previous satisfactory relationship with Hogue when she was assigned as an E.S.A.A. teacher.

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Further testimony of Stamilla indicated that she kept the Superintendent abreast of the Hogue problem and the concerns about the lack of performance improvement. She advised the Superintendent in late February 1979 that the Hogue situation was serious and consideration was given to a recommendation that Hogue be removed from the classroom due to the failure of Hogue to effectively generate a satisfactory teaching-learning process. See P-14, P-18 and P-19.

Cross-examination efforts were made to discredit the testimony of Lucy Stamilla, but without success.

ETHEL P. HOGUE

Ethel P. Hogue had teaching experience prior to her employment in Teaneck, which consisted of one year in Indiana, one year as a kindergarten teacher in a private school, six years as a sixth grade teacher in Colorado, and five years as a fifth and sixth grade compensatory education teacher in Sacramento, California. She received a B.S. degree from Indiana Central and an M.A. degree from Paterson State College.

Hogue testified that her grade two assignment at Whittier under Mitchell was in a less traditional classroom environment, defined by her as "structured open" and by Mitchell as "modified open."

Hogue's testimony disputed much of the testimony of her supervisors but also included admissions, and a rationalization in recognition of situations where she disagreed with the observations and evaluations of her supervisors.

The court does not feel compelled to detail at length her responses to supervisory evaluations, which are incorporated herein by reference to evidentiary documents R-4 through R-14.

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Hogue recognized her responsibilities as a teacher, and on cross-examination often did not know if a recognized problem was a pupil or teacher fault, but also testified that disruptive pupil behavior was sometimes a pupil fault and other times a teacher fault.

Hogue did not dispute the quantity of supervisory efforts to assist her, and testified that a reading consultant, a Dr. Spinrod, offered help but she could not recall suggestions made by Spinrod concerning pupil behavior and classroom rules designed to inhibit and control it.

CREDIBILITY OF WITNESSES

I **FIND** the testimony of petitioner's witnesses to be believable. The failure of strong efforts by respondent to discredit the testimony of Hogue's principals and supervisors resulted in strengthening the credence of their testimony.

The testimony of respondent Hogue, expected to be self-serving, fell considerably short of successfully rebutting that of her supervisors. Her lack of recall on occasion was bothersome.

The Board's witnesses were sincere in their efforts to help Hogue and displayed no dislike of her, but rather a genuine unhappiness that Hogue's failure to perform satisfactorily forced them to act in fulfilling their supervisory responsibilities as they placed their highest regard in the educational welfare of their pupils.

Hogue impressed the court as being very pleasant with many positive characteristics, which unfortunately do not include the ability to perform at a reasonably acceptable level.

FINDINGS OF FACT

1. Hogue's performance as a teacher in a small group remedial setting was satisfactory.

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2. Hogue's performance as a first grade teacher in Bryant in 1976-77 was not found to be unsatisfactory.

3. Hogue's performance since September 1977 was unsatisfactory as a classroom teacher.

4. Staff members Stamilla, Mitchell, Massa, Klein, Dabek, Relkey, Spinrod and Kelly put forth considerable efforts to assist Hogue in improving Hogue's performance as a classroom teacher.

CONCLUSION OF FACT

The preponderance of credible evidence points to the failure of Hogue to respond to the sincere and genuine efforts of eight staff members with a satisfactory performance improvement, rather than the failure of the staff members to provide qualitative assistance to her.

INEFFICIENCY v. INCOMPETENCY

Guidelines for Implementaiton of the Tenure Employees Hearing Law, New Jersey State Department of Education (May 3, 1977) states:

> The determination by a local board of education as to whether a specific charge constitutes inefficiency should be made as follows: inefficiency presumes that the teaching staff member is capable and competent to perform the specific duty or function, but is performing that duty or function in a careless, ineffective or inefficient manner. Inefficiency is particularly distinguished from incompetence because incompetence presumes that the teaching staff member is not capable of performing a specific duty or function. (at II-B, page 5)

In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Sayreville, Middlesex County, 1967 S.L.D. 271, aff'd State Board of Education, 1968 S.L.D. 273, the

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Commissioner said:

> Each of the school administrators testified as to detailed observations which had been made of the teacher's performance in the classroom over most of the span of his employment. The Commissioner finds no necessity to attempt to analyze and evaluate each of the incidents or instances related. Evaluation of a teacher's competency is generally a matter of total impression resulting from a synthesis of observations made over a period of time (at 272).

In Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944) it was held that:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way (at 371).

The Commissioner also stated in Starego:

> The paramount purpose of the public schools is to provide a thorough and efficient education for the children of the district. That purpose would be vitiated by protection in their employment of teachers who are proven to be inept and incompetent (at 274).

In the Matter of the Tenure Hearing of Inez McRae, School District of the City of Trenton, Mercer County, 1977 S.L.D. 572, the Commissioner said:

> In the context of such dicta [Redcay], applicable to all teaching staff members, the findings set forth herein comprise a series of many incidents which demonstrate respondent's unfitness to hold a post. The Commissioner holds, therefore, that respondent is found to be incompetent .... (at 584, 585).

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In the instant matter, eight staff members put forth great efforts over a period of approximately a year and one-half to assist Hogue in the improvement of her performance. Results were predominantly negative to the extent that her performance never did rise to the level of reasonable acceptability. **I FIND** those efforts to have been made in good faith.

CONCLUSIONS OF LAW

The preponderance of credible evidence in this matter clearly demonstrates respondent's unfitness to hold the position of classroom teacher, and clearly establishes a total impression of incompetency in that position. **I SO FIND.**

The paramount purpose of the public schools, as stated by the Commissioner in Starego, mandates that Hogue's satisfactory performance as a teacher in a small group remediation setting is overwhelmingly outweighed by the evidence of her poor performance as a classroom teacher.

This court is not constrained to speculate as to why respondent has performed satisfactorily in a small group setting and so unsatisfactorily in the general classroom setting, but determines it would be contrary to the public interest to place a Board under a heavy burden to restrict assignments of teachers found to be incompetent in any assignment within certification held.

Without finding it necesary to address each of the ten charges of incompetency, **I FIND** that the Board has met its burden of proof with a prepondeance of credible evidence that respondent Hogue is incompetent.

I CONCLUDE, therefore, that Ethel P. Hogue shall be and is hereby **DISMISSED** as a teacher in the school district of Teaneck.

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

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

30 November 1982
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

2 December 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 3, 1982
DATE

Ronald L. Parker /sa
FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

WITNESSES

For Petitioner

Alfred J. Mitchell, elementary school principal

Victor A. Klein, elementary school principal

Lucy Stamilla, coordinator of educational services and director of elementary education

For Respondent

Ethel P. Hogue, respondent

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EVIDENTIARY DOCUMENTS

P-1 November 16, 1977, Mitchell's observation report of Hogue
P-2 November 30, 1977, Parentini's observation report of Hogue
P-3 December 2, 1977, Mitchell's observation report of Hogue
P-4 December 5, 1977, Parentini's observation report of Hogue
P-5 December 13, 1977, Mitchell's observation report of Hogue
P-6 December 15, 1977, Mitchell to Stamilla letter
P-7 December 22, 1977, Mitchell's mid-year observation report of Hogue
P-8 February 14, 1978, Mitchell to Hogue letter
P-9 February 5, 1979, Klein's observation report of Hogue
P-10 February 16, 1979, Klein's observation report of Hogue
P-11 February 28, 1979, Klein's to Hogue letter
P-12 March 16, 1979, Klein's summary evaluation of Hogue
P-13 December 22, 1977, Stamilla to Rees memo
P-14 March 21, 1978, Superintendent to Hogue letter
P-16 November 15, 1978, Massa's observation report of Hogue
P-17 December 18, 1978, Massa's observation report of Hogue
P-18 December 4, 1978, Stamilla's observation report of Hogue
P-19 February 9, 1979, Stamilla's observation report of Hogue
P-20 February 16, 1979, Dabek to Stamilla memo

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EVIDENTIARY DOCUMENTS

R-1 February 18, 1979, Hogue to Mitchell letter
R-2 Our Language Today text (page 161)
R-3 March 2, 1979, Hogue to Klein letter
R-4 Hogue's response to P-2
R-5 Hogue's response to P-3
R-6 Hogue's response to P-4
R-7 Hogue's response to P-5
R-8 Hogue's response to P-7
R-9 Hogue's response to P-10
R-10 Hogue's response to P-12
R-11 Hogue's response to P-14
R-12 Hogue's response to P-16
R-13 Hogue's response to P-18
R-14 Hogue's response to P-19
R-15 Hogue's attendance record, September 1978 through June 1979
R-16 March 2, 1979, Hogue to Klein letter

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IN THE MATTER OF THE TENURE	:	
HEARING OF ETHEL P. HOGUE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION ON REMAND
TOWNSHIP OF TEANECK, BERGEN	:	
COUNTY.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent in excepting to the initial decision by the Honorable Ward R. Young, ALJ contends that Judge Young failed to include a sufficiency of testimony to properly illuminate the initial decision. Respondent contends further that each charge must be individually considered, weighed and evaluated for a proper determination to be made. The Board's reply exceptions refute those of respondent and affirm the initial decision. The Commissioner finds no merit in respondent's arguments.

A thorough examination of the record herein, the documents submitted in evidence and the testimony of witnesses convinces the Commissioner that Judge Young properly considered a sufficiency of facts relevant to his decision while determining the credibility of witnesses. In determining such credibility the Commissioner has considered "***'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility***." Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)

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

It having been determined that Respondent Ethel P. Hogue is incompetent, she shall be and is hereby dismissed as a teacher in the school district of Teaneck.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

JANUARY 13, 1983

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IN THE MATTER OF THE TENURE	:	
HEARING OF ETHEL P. HOGUE,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF TEANECK, BERGEN	:	
COUNTY.	:	
	:	

Decided by the Commissioner of Education, January 13, 1983

For the Petitioner-Respondent, Greenwood & Sayovitz
(Sidney A. Sayovitz, Esq., of Counsel)

For the Respondent-Appellant, Aronsohn & Springstead
(Anthony N. Gallina, Esq., of Counsel)

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

June 1, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9183-81
AGENCY DKT. NO. 434-11/81A

BARBARA LUKAS, ET AL.,
Petitioners
v.
STATE OF NEW JERSEY,
DEPARTMENT OF HUMAN SERVICES, ET AL.,
Respondent

APPEARANCES:

Sidney Reitman, Esq., for petitioners
(Reitman, Parsonnet, Maisel & Duggan, attorneys)
Of Counsel: Thomas S. Adair
(Adair & Goldthwaite, P.C.)

Alfred E. Ramey, Jr., Deputy Attorney General, for respondents
(Irwin I. Kimmelman, attorney General of New Jersey, attorney)

Record Closed November 10, 1982 Decided December 2, 1982

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

Barbara Lukas, Alfred Pierce, Herbert Gaiss, and Audrey Williams alleged they and others similarly situated were each employed in teaching or supervisory capacities, variously, in New Lisbon State School, Woodbridge State School, Marlboro Psychiatric Hospital, and Greystone Park Psychiatric Hospital, institutions that formed part of the Garden State School District pursuant to N.J.S.A. 30:4AA-1 et seq. The institutions are presently within and under the Department of Human Services and were formerly under

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the aegis of the latter's predecessor agency, the Department of Institutions and Agencies. After the Garden State School District was abolished by the "State Facilities Education Act of 1979," N.J.S.A. 18A:7B-1 et seq., which transferred the functions of the district to the Office of Education in the Department of Human Services and in the Department of Corrections, and after petitioners had continued in their teaching and supervisory capacities at their respective institutions, they were laid off and/or displaced from their positions on or about August 27, 1981 by the Department of Human Services. Alleging such lay offs and displacements were violative of their rights of tenure under N.J.S.A. 18A:28-5, which they alleged they had acquired by and through their service as recognized and preserved under N.J.S.A. 18A:7B-11 (b) as former teaching staff members of the Garden State School District, they filed a petition of appeal in the Bureau of Controversies and Disputes of the Department of Education on November 4, 1981 against the State of New Jersey, the Department of Human Services, and their respective institutional employers seeking a declaration by the Commissioner of Education that they and others similarly situated have achieved tenure under education law, seeking judgment revoking their lay offs and displacement, and seeking judgment requiring their reinstatement with back pay and emoluments.

In an answer filed in the Bureau of Controversies and Disputes on December 16, 1981, the institutional employers denied petitioners' claims, contending petitioners were never employed in the Garden State School District and were therefore not entitled to tenure protections applicable to Garden State School District teachers. Instead, alleged respondents, petitioners were unclassified employees not entitled to tenure protection.

The Commissioner of the Department of Education, whose jurisdiction in controversies and disputes was invoked under N.J.S.A. 18A:6-9, transmitted the matter to the Office of Administrative Law on December 31, 1981 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. On notice to the parties, the matter came on for prehearing conferences on May 11, 1982, July 7, 1982, September 17, 1982, and November 10, 1982. On August 2, 1982, petitioners filed motions in the Office of Administrative Law (1) for partial summary judgment holding they occupied positions to which tenure could attain; and (2) for certification of the petition by the

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Administrative Law Judge as a class action by petitioners as representatives of the class of all certificated teaching staff personnel employed in institutions presently administered pursuant to the terms of the State Facilities Education Act of 1979, N.J.S.A. 18A:7B-1 et seq. In the latter motion, petitioners invoked the class action certification procedure of New Jersey Court Rules, R.4:32-1 et seq., which, it was urged, are made applicable to adjudication of contested administrative agency cases in the Office of Administrative Law by N.J.A.C. 1:1-3.8 (b) of the New Jersey Uniform Administrative Procedure Rules.

On September 10, 1982, respondents filed cross motions for summary decision of dismissal of the petition of appeal and for summary decision in their behalf, pursuant to N.J.A.C. 1:1-13.1 et seq., on the grounds that the doctrines of res judicata and collateral estoppel barred re-litigation of the issues raised by petitioners and that prior litigation ending in final agency judgments in a companion case precluded re-litigation under the doctrine of stare decisis as a matter of law, there being no genuine triable issues of apposite material fact or law in the present action that were not addressed and disposed of in the prior litigation. As to petitioners' motion for class action certification pursuant to court rule R.4:32-1 et seq., respondents agreed such procedures were applicable to adjudication of contested cases in the Office of Administrative Law but argued, nevertheless, petitioners failed to show any entitlement to class action status on behalf of themselves and others persons similarly situated under standards and criteria in the court rule.

Issues raised by the respective motions were briefed; the record on the motions closed November 10, 1982.

New Jersey Court Rules provide in R.4:32-1 (a) for the general prerequisites to maintaining a class action. The rule provides, preliminarily, that one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly

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and adequately protect the interests of the class. Additional prerequisites are spelled out in R.4:32-1 (b) for maintainability of the class action. The rules are generally applicable to adjudicatory procedures in courts of the judicial branch of government. Enabling legislation for the Office of Administrative Law, N.J.S.A. 52:14F-1 et seq., created the Office of Administrative Law in the executive branch of state government. Under N.J.S.A. 52:14F-5, the Director of the Office of Administrative Law shall:

> e. Develop uniform standards, rules of evidence and procedures, including but not limited to standards for determining whether a summary or plenary hearing should be held to regulate the conduct of contested cases and rendering of administrative adjudications;
>
> f. Promulgate and enforce such rules for the prompt implementation and coordinated administration of the Administrative Procedure Act P.L., 1968 c.410 (N.J.S.A. 52:14B-1 et seq.) as may be required or appropriate;
>
> g. Administer and supervise the procedures relating to the conduct of contested cases and the making of administrative adjudications, as defined in . . . (N.J.S.A. 52:14B-2.)

Pursuant to such statutory enabling authority, the Director of the Office of Administrative Law has promulgated uniform administrative procedure rules of practice in N.J.A.C. 1:1-1.1 et seq.; and such rules govern conduct of all contested cases in the executive branch of state government. N.J.A.C. 1:1-1.1 (a).

Nowhere in such uniform administrative procedure rules of practice is contained any express provision for certification and maintenance of class actions like that in New Jersey Court Rules in R.4:32-1 et seq.

The question arises, therefore, whether, absent such express power and authorization for certification of class actions as contained in New Jersey Court Rules, the Office of Administrative Law has implied power or duty to adopt and employ, ad hoc, such a rule of judicial procedure in administrative agency actions like this one. Petitioners argued such power and, therefore, duty is implicit even if not explicit.

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N.J.A.C. 1:1-3.8 (b) provides, petitioners argued, that unless otherwise provided in the chapter or clearly implicable in context, the rules and standards contained in the New Jersey Court Rules governing the conduct of lawyers, judges and court personnel shall govern the conduct of lawyers, judges and agency personnel appearing in or processing contested cases in the executive branch of state government.

N.J.A.C. 1:1-1.3 (a) provides, petitioners argued further, the chapter shall be construed "to secure just determinations, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any procedural rule may be relaxed or dispensed with by a judge if adherence to it would result in unfairness or injustice. In the absence of rule, a judge may proceed in any matter compatible with these purposes."

Respondents agreed in principle and argued there would seem no reason why a class action procedure proper in judicial proceedings should not likewise be utilized in administrative agency hearings.

It is my view, however, that the class action procedure specifically allowed in judicial proceedings is, perhaps, more than just a simple rule of adjective or procedural law. Its utilization implicates the rights, duties, obligations and liabilities not only of those expressly named parties to the action but those of all members of the class. That implication obviously is one of wide scope and one that is of potentially wide consequence in terms, at least, of manageability and the due process of law. To that extent, therefore, I do not think the power of the Office of Administrative Law to adopt such a wide-ranging procedural mechanism should be inferred in absence of express provision therefor from a simple general provision, such as in N.J.A.C. 1:1-1.3, that "in absence of rule, a judge may proceed in any manner compatible with these purposes." One should also note, it seems to me, the State Board of Education has promulgated no procedural rule for class action maintenance and certification in N.J.A.C. 6:4-1.1 et seq., governing procedural requirements in contested education matters.

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Accordingly, therefore, based on the foregoing, **I CONCLUDE** petitioners' motion for class action certification as if in accord with R.4:32-1 et seq. of the Rules of Court of New Jersey in this, the adjudication of a contested administrative agency action pursuant to the Administrative Procedure Act, absent express provision therefor in the Uniform Administrative Procedure Rules should be, and is hereby, **DENIED.**

The petition in this matter seeks judgment determining petitioners were entitled to tenure status at the time they were laid off or otherwise displaced or removed from their teaching or supervisory positions within the Department of Human Services. Petitioners claim they are entitled to such status because the facilities where they were employed were a part of the former Garden State School District (N.J.S.A. 30:4AA-1 et seq.) and because of language contained in section 15 of the State Facilities Education Act of 1979, N.J.S.A. 18A:7B-11 (b). Specifically, petitioners alleged they were employed as teachers 1, 2, as assistant supervisor of educational programs, or in other teacher capacities in New Lisbon State School, Woodbridge State School, Marlboro Psychiatric Hospital and Greystone Park Psychiatric Hospital, all of the Department of Human Services. Respondents deny those institutions were part of the Garden State School District pursuant to N.J.S.A. 30:4AA-1 et seq., though respondents admit the Garden State School District was transferred to the Department of Education pursuant to N.J.S.A. 18A:61B-1.

By their cross motions for summary decision here, the parties essentially contend there are no material operative facts open to dispute. That is, the parties agreed, in effect, their respective motions are ripe for determination in summary fashion upon admitted operative facts or assumed operative facts necessary for determination of the questions of law raised. The essential question of law raised, necessarily, is whether the institutions that employed petitioners were brought within the Garden State School District by or following its creation by N.J.S.A. 30:4AA-1 et seq. in 1972. At that time the Legislature in creating the Garden State School District specified it was to be composed of such correctional, charitable, hospitable, relief, training and other institutions and non-institutional agencies within the Department of Institutions and Agencies as the Commissioner thereof should determine. N.J.S.A. 30:4AA-2. The

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composition was not automatic but was to be implemented in two phases, as the Commissioner of the Department of Institutions and Agencies should determine. Phase two of the statutory transition, it seems clear, was never implemented so as to provide for inclusion in the Garden State School District of various institutions for mental health, state hospitals, charitable institutions and others then within the Department of Institutions and Agencies. The various institutions named by petitioners in this matter, by which they were employed until their termination, it seems clear, are such phase two institutions.

The relevant and operative facts of these petitioners' employment by such institutions are in apposition to relevant and operative facts before the court in New Jersey Civil Service Association, et als. Warren E. Ward, v. Ann K. Klein, Commissioner of Human Services, et als., OAL DKT. NO. EDU 1075-81, (February 16, 1982) aff'd Commissioner of Education, (March 26, 1982); aff'd State Board of Education (August 6, 1982), 1982 S.L.D. _____. In that case, Warren E. Ward served in a position of teacher 1 in Woodbine School, Department of Human Services, under state certification, from 1958 until October 9, 1980 when he was terminated. He alleged he was under tenure as an employee of the Garden State School District, pursuant to N.J.S.A. 30:4AA-1 et. seq. and had continued in such status from 1979, when the Garden State School District was abolished, by merit and virtue of section 15 (b) of the State Facilities Education Act of 1979, N.J.S.A. 18A:7B-11 (b), which provides:

> All rights and privileges enjoyed by teaching staff members of the Garden State School District shall be enjoyed by teaching staff members employed in State facilities.

The administrative law judge found and determined in that matter that Ward was not tenured upon termination in October 1979, that he was not entitled to a hearing before the Commissioner of Education on tenure charges prior to his termination, and that other petitioners employed as teachers by the Department of Human Services, in situations similar to his, did not serve in tenurable positions. In essence, and for the reasons and reasoning considered, that determination was affirmed and adopted by the Commissioner of Education, a determination that in turn was affirmed by the State Board of Education.

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The question results, therefore, whether legal issues in the present matter, by reason of the apposition of operative facts and events alleged and admitted, should not be precluded from re-litigation. Respondents here argued such re-litigation is precluded by principles of res judicata and collateral estoppel. Although I am inclined to agree that legal issues here are precluded from re-litigaton by the decision in Ward, I believe such preclusion is required on the principle of stare decisis. That rule, generally, is founded on consideration of expediency and sound principles of public policy to preserve the harmony and stability of law and to make as steadfast as possible judicially declared principles affecting rights of the parties.[1] The Ward case has proceeded to final agency adjudication, its finality there, at least for the present, being in no wise eroded by the circumstance there may presently be pending an appeal therefrom before the Appellate Division of Superior Court.

CONCLUSION

Based on the foregoing, therefore, I **FIND** and determine specifically there is clear and dispositive apposition of operative facts and events alleged in the present petition of appeal by and between the operative facts and events alleged, heard and determined in the Ward case, the holding in which, accordingly, is controlling on the legal issues here. Accordingly, I hereby **CONCLUDE** as follows:

1. Petitioners' motion for partial summary judgment on their petition of appeal should be, and is hereby, **DENIED**;

2. Respondents' motion for summary judgment in their favor dismissing the petition of appeal should be, and is hereby, **GRANTED:**

3. Judgment in favor of respondents dismissing the petition of appeal is entered accordingly.

---

[1] See, generally, concerning the stare decisis rule and the distinction between it and res judicata, 21 C.J.S. Court § 187, 188 at 302-5.

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OAL DKT. NO. EDU 9183-81

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

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

December 2, 1982
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

December 6, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

December 6, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

mt

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BARBARA LUKAS ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF HUMAN SERVICES ET AL.,	:	DECISION
RESPONDENTS.	:	

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

The Commissioner observes that exceptions were filed by petitioners in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners except to the determinations made by the Honorable James A. Ospenson, ALJ, contending that Judge Ospenson erred in denying petitioners' motion for class action certification and partial summary judgment while granting respondents' motion for summary judgment. Petitioners argue that Judge Ospenson erred in relying on New Jersey Civil Service Association, supra, because portions of the case reliance therein were overruled in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The Commissioner finds no merit in petitioners' exceptions.

An examination of the arguments of law submitted in this matter convinces the Commissioner that Judge Ospenson properly denied petitioners' motion for class action certification. The Commissioner finds respondents' arguments therein to be persuasive:

> "To be maintainable as a class action, a suit must satisfy the requirements of R.4:32-1(a).***
>
> "The action must further fit one of the descriptions listed in R.4:32-1(b).***
>
> "Petitioners claim they represent, 'a class of all certificated teaching staff personnel employed in institutions presently administered pursuant to the terms of the State Facilities Education Act of 1979.' (Pb1). They allege without submitting any evidence to the administrative court that the class is so numerous that joinder of all

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> members is impracticable. It is submitted that without competent evidence, the petitioner has not presented enough information to the hearer to decide the question of numerousity (sic). On this basis the application for class action should be denied."
> (Respondents' Brief, at pp. 7, 8)

The Commissioner agrees.

Further, an examination of the circumstances surrounding the present case convinces the Commissioner that Judge Ospenson properly relied on New Jersey Civil Service Association et al., supra. Therein any issue of fact concerning the nontransfer of Human Services' components to the Garden State School District was considered and resolved by the Court. There remaining no material issues of fact there can be no preclusion of summary judgment in favor of respondents. The Commissioner so holds.

Accordingly, the Petition of Appeal is and shall be dismissed.

COMMISSIONER OF EDUCATION

JANUARY 19, 1983

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BARBARA LUKAS ET AL.,

PETITIONERS-APPELLANTS,

V.

STATE OF NEW JERSEY, DEPARTMENT OF HUMAN SERVICE ET AL.,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 19, 1983

For the Petitioners-Appellants, Reitman, Parsonnet, Maisel & Duggan (Sidney Reitman, Esq., of Counsel)

For the Respondents-Respondents, Irwin I. Kimmelman, Attorney General of New Jersey (Alfred E. Ramey, Jr., Deputy Attorney General of counsel)

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

Maud Dahme abstained in this matter.

July 6, 1983

PENDING N.J. SUPERIOR COURT

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. —
AGENCY DKT. NO. EDU 433-12/78

ROCKAWAY TOWNSHIP BOARD OF EDUCATION,
Petitioner
v.
WHARTON BOROUGH BOARD OF EDUCATION, MORRIS COUNTY,
Respondent.

APPEARANCES:

Jacob Green, Esq. for the petitioner (Green and Dzwilewski, attorneys)

Eugene J. Porfido, Esq. (Fullerton, Porfido and Wronko, attorneys)

Record Closed November 8, 1982 Decided December 13, 1982

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

The Board of Education of the Township of Rockaway (sometimes referred to as Rockaway) seeks a determination from the Commissioner of Education designating Rockaway as the sole district for compulsory attendance by school-age pupils residing on the Picatinny Arsenal, Morris County.

The Commissioner transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Two days of hearing were conducted, December 3, 1981, and April 30, 1982. Briefs were filed after the hearing.

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In December 1978, Rockaway filed a Petition for Declaratory Judgment with the Commissioner. Rockaway sought a declaratory judgment as to the application of N.J.S.A. 18A:38-1 et seq. to a controversy which had arisen between Rockaway and the Wharton Borough Board of Education (Wharton). Rockaway requested that the Commissioner declare Rockaway Township as the district of attendance for all elementary school pupils residing at the U.S. Army Armament Research and Development Command (hereinafter Picatinny, Arsenal, or ARRADCOM). Rockaway also asked the Commissioner to terminate whatever sending-receiving relationship might be considered to exist between it and Wharton.

In January 1979, the Board of Education of the Town of Dover filed a Petition of Declaratory Judgment with the Commissioner, seeking a declaration that Dover is the district of attendance for all pupils of compulsory school age residing on the Arsenal. This action named Rockaway, Wharton, and the Morris Hills Regional High School District Board of Education as respondents.

A consolidated prehearing conference was held in the two matters before the undersigned administrative law judge (ALJ) on July 26, 1979. The ALJ denied consolidation of the two petitions. In September 1979, Dover waived any claim with respect to elementary school pupils. Therefore, its action against Rockaway and Wharton was dismissed and an Initial Decision was rendered on November 15, 1979 (Bd. of Ed. of the Town of Dover v. Bd. of Ed. of the Borough of Wharton, Bd. of Ed. of the Morris Hills Regional School District, and Bd. of Ed. of the Twp. of Rockaway, Morris County; Docket No. EDU 4-1/79A). There is no record of any action by the Commissioner regarding the above matter.

On September 14, 1979, the ALJ conducted a prehearing conference, directing the completion of discovery and the filing of motions for summary decision. Cross-motions were filed, but were denied without written opinion. A second prehearing conference was held on June 15, 1981. The parties agreed upon the following issues:

1. Is Rockaway the district of attendance for all K-8 pupils in the military reservation (ARRADCOM)?

2. Are the pupils on the government reservation domiciliaries or residents within the meaning of the relevant statutes?

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3. Assuming they are domiciliaries or residents of Rockaway pursuant to the statutes, is there any statutory prohibition against the residents choosing their own school district?

4. Is the Commissioner limited in assigning pupils to a district other than that in which they reside?

5. Is there presently a binding order from the Commissioner or his representative or a binding agreement between the Boards establishing the present pupil ratio?

The federal acronym "ARRADCOM" is a relatively new term applied to the federal enclave which has for more than a generation been known as "Picatinny" or "Arsenal." In March 1880, the United States Congress appropriated funds to purchase lands in Rockaway and Jefferson Townships for an Army power depot (P-2, p. 7); (See also P-1a). For more than a decade, Picatinny was mainly a storage and powder depot, but in 1907 because of the expansion of its activities it became known as the "Picatinny Arsenal." By the outbreak of World War I, the arsenal was producing all sizes of propellants and weapons, and by 1926 Picatinny became known as "The Cradle of America's Ammunition Industry."[1]

As the major production plant for powder, artillery and sea-coast ammunition, Picatinny was always the largest employer in the area. From 1940-1945, Picatinny employed, in addition to Army personnel based there, more than 20,000 civilians; during the Korean War, this number dropped to approximately 12,000 civilian personnel, and in 1970 to approximately 4,500.

ARRADCOM, having been acquired by the U.S. Government from lands originally a part of Rockaway and Jefferson Townships, exists under the jurisdiction of the U.S. Government, the State of New Jersey having ceded jurisdiction by virtue of this arrangement. N.J.S.A. 52:30-1. The U.S. Government from its inception has maintained a military complement and a civilian working force in the development and production of munitions at the Arsenal, exercising jurisdiction over police, traffic, and zoning, to the exclusion of State, county and local governments.

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[1]"Profile, Picatinny Arsenal, Dover, New Jersey," published by Picatinny Arsenal, March 1961.

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Pursuant to the provisions of 20 U.S.C.A., § 236 et seq., providing for federal assistance to local education agencies affected by federal activity, the Rockaway Township Board of Education receives grants in aid for property removed from its tax rolls by reason of the Picatinny Arsenal; Wharton does not. Both litigants, however, receive federal impact aid by reason of their providing free education to children in daily attendance at their schools, which children reside, or whose parents are employed, on the federal property.

The oldest records available show that Rockaway struggled for many years over the problem of educating the children of parents based at the ARRADCOM reservation. Minutes of the Rockaway Township Board of Education have survived only from approximately 1910, although a public school district has presumably existed in the Township since 1842, according to its Superintendent. The minutes reveal that children living on the government reservation at Picatinny Arsenal were receiving a free public education in the schools of Rockaway in 1910. Because Rockaway did not operate a high school, the Board of Education directed that arrangements be made with Wharton or Dover for the education of high school pupils at Rockaway's expense (Minutes of October 8, 1910; P-3(b), P-4).

In 1912, the commanding officer of the Arsenal asked the State Board of Education to provide school facilities on the site for the children living there. His request was referred to the Rockaway Township Board. The Board, believing it to be "the duty of this Board to provide a teacher and necessary textbooks and supplies," agreed to operate a public elementary school on the Arsenal at its expense in a building provided by the federal government (P-3(f) through (g); P-4). The Board operated the "Picatinny Arsenal School" as School No. 7 of the Rockaway Township Schools, from 1912 through 1926, when the building was destroyed in the great explosion at the Arsenal (See P-3(h) through (kk); P-4).

During the 1920's and 1930's, the Rockaway Township Board of Education permitted dependents of military personnel living on the Arsenal to attend the public schools of the District free of charge. Surviving minutes and school registers show that a number of Arsenal residents attended the Mount Hope and Mount Pleasant Schools between 1922 and 1938 (see P-3(pp) through (xx); P-4; P-7(a) through (e)). Some elementary school pupils from the Arsenal attend Rockaway schools today.

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The record shows that the federal authorities transported the military dependents from the Arsenal to its Mount Hope School (See P-3(rr); P-4). A life-long resident of Rockaway Township who herself attended the Mount Hope School in the late 1920's and early 1930's testified and vividly recalled seeing the Army and Navy children coming to school in a horse-drawn surrey provided by the government.

In the late 1930's, the federal government extended the Arsenal to the south, buying additional land in Rockaway Township. This property, an unincorporated village known as "Spicertown," was located entirely within Rockaway Township. The federal government continued to purchase land in Rockaway Township in the 1940's and 1950's, most recently in 1957 (P-20, Part II).

According to a letter by the Rockaway Township Superintendent of Schools, dated November 6, 1978, from at least 1938 to 1963, children from the Arsenal attended schools in the Town of Dover. In 1963, the Morris County Superintendent of Schools, who is the Commissioner's representative (N.J.S.A. 18A:7-1 and 7-5), provided that the Wharton School District and the Rockaway Township School District would thereafter be the districts to serve the Arsenal.

In 1974, a successor county school superintendent confirmed that arrangement and decided that the enrollment of the pupils in the school districts of Rockaway Township and Wharton Borough would remain constant at the ratio of 71.5 percent and 28.5 percent, respectively. This ratio was based upon then recent averages. The county superintendent's letter states that the ratio was established to provide "greater stability in enrollments." His letter does not indicate whether the ratio was a result of an affirmative decision on the part of the county superintendent, or whether it was a result of the mutual agreement of the school districts involved.

Rockaway takes the position that it was not a formal decision, but to the contrary, an agreement which was ultra vires both Boards of Education. Rockaway's petition was filed, presumably, because of its declining enrollments and its interest in federal impact aid monies.

Rockaway operates five elementary schools and one middle school, with a total enrollment of approximately 2,400 pupils (P-20). Rockaway provides for the

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education of its older pupils through a formal sending-receiving relationship with the Morris Hills Regional High School District Board of Education.

Wharton, also a governing body of a public school district, educates all pupils of compulsory school age residing within its territorial limits. Wharton operates one elementary school, one middle school, and has a total enrollment of approximately 621 pupils (P-19). Wharton has also entered into a sending-receiving relationship with the Morris Hills Regional High School District.

I

Rockaway argues that official maps clearly show that ARRADCOM is located almost entirely within its boundaries and that no portion of ARRADCOM lies within the boundary of Wharton (P-1a). Rockaway concedes that ARRADCOM is a federal enclave, however, it contends that the Arsenal remains geographically located within the State of New Jersey and its Township. Although conceding that the federal government has exclusive jurisdiction over its federal property, Rockaway argues that the State and the Township retain jurisdiction over ARRADCOM for local purposes "so long as there is no interference with the jurisdiction asserted by the Federal Government." In support of this conclusion, Rockaway cites Howard v. Commissioners, Sinking Fund, Louisville, KY, 344 U.S. 624, 627 (1953); Petition of Salem Transportation Company, Inc., 55 N.J. 559, 562-563 (1970). Rockaway also cites other court cases supporting its contention that under New Jersey law, pupils residing on the federal enclave at ARRADCOM are residents of Rockaway Township and are therefore entitled to a free public education in the schools of Rockaway Township.

Wharton argues that ARRADCOM is a federal enclave over which the United States Government has exclusive jurisdiction. Rockaway concedes in its brief that New Jersey has expressly ceded the land to the United States. N.J.S.A. 52:30-2, concerning the acquisition of New Jersey land by the United States, provides in part as follows:

> Exclusive jurisdiction in and over any land so acquired by the United States is hereby ceded to the United States for all purposes except the service of process issued out of any of the courts of this state . . .

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Wharton argues that Rockaway's position is not in concert with statutory and decisional law of the State of New Jersey, citing N.J.S.A. 18A:38-3, which provides as follows:

> Any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with consent of the Board of Education upon such terms, and with or without payment of tuition, as the Board may prescribe.

Based on this statute and several decisions by the Commissioner and the courts, Wharton argues that the parents of pupils living on ARRADCOM have the right to choose the school district they wish to attend since they reside on a federal enclave, and that this arrangement, previously worked out by the Morris County Superintendent of Schools, has been in effect since 1964 (J-3).

The record shows that a former county superintendent determined that the Arsenal was located in Wharton Borough, Rockaway Township, and the Morris Hills Regional High School District. The pupils in the Arsenal had previously attended the schools in Dover Town which created a problem because of the geographic location of the Arsenal. That county superintendent recommended to the Commissioner's office on May 27, 1963, that all children of new military personnel assigned to the Arsenal should be enrolled in the schools located in Wharton Borough, Rockaway Township and Morris Hills Regional High School Districts (J-1). This recommendation was accepted and approved by the Deputy Commissioner of Education and other officials in the State Department of Education on June 20, 1963 (J-2).

The number of pupils attending the Rockaway Township Schools and the Wharton schools fluctuated widely over the ten-year period between 1964 and 1974. For example, Rockaway experienced a low of 3 pupils in the 1964-65 school year and a high of 86 pupils in the 1970-71 year; whereas, Wharton experienced a high of 62 pupils in the 1964-65 year and a low of zero pupils between the 1970 and 1972 school years. Apparently, as a result of this widely varying pupil attendance pattern, State and local education officials, together with the commanding officer from the Picatinny Arsenal, met in the Office of the Morris County Superintendent of Schools on December 13, 1973. The result of this meeting was that the county superintendent averaged the pupil attendance pattern at both schools for the past 10 years and arrived at a ratio of attendance for each school. As previously indicated, Rockaway Township was thereafter

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to receive no fewer than 71.5 percent of the pupils from the Arsenal and Wharton would receive no fewer than 28.5 percent. The determination and assignment of pupils to the public school district would be the responsibility of the commanding officer of Picatinny Arsenal. The county superintendent concluded that the designations and determinations he made would remain in force and effect until such time as there was shown sufficient reasonable grounds on which to conduct a further review (J-3).

On November 6, 1978, the Superintendent of Schools of Rockaway Township wrote to the County Superintendent of Schools seeking a re-allocation of all pupils to Rockaway Township. The Superintendent stated in his letter that the original allocation permitting some of the Arsenal pupils to attend school in Wharton Borough was based on the mistaken assumption that part of the Arsenal is located in Wharton Borough (J-5). The county superintendent suggested a full hearing to resolve what he perceived to be complex legal and technical questions, giving all concerned parties an opportunity to participate (J-6).

II

The first issue to be decided is whether or not ARRADCOM is a part of Rockaway Township. In this regard the record is quite clear. The land mass known as the Picatinny Arsenal has been ceded to the United States Government, therefore it is a federal reservation which is not "in" the State of New Jersey. As respondent points out in his brief, this is not an uncommon legal fiction when dealing with the sovereignty of nations as well as the dual sovereignty of federal and state governments within the borders of the United States. As an example, respondent asserts that Vatican City is not a part of Italy; and in fact the embassy of one country is not a part of the country in which it is located.

I FIND this argument to be persuasive. The Picatinny Arsenal is a federal enclave which is not located in Rockaway Township. Neither is it located in Wharton Borough; in fact, according to the maps and documents in evidence, no part of the Arsenal was ever located geographically in Wharton Borough irrespective of the earlier view by a county superintendent (J-1).

Despite this mistaken view by the county superintendent in May 1963, a successor county superintendent in 1974 decided that a ratio of Arsenal pupils had to be

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established so that both districts would be able to better budget and plan for their needs for the coming school years. There is no indication in this county superintendent's writing that he perceived the Arsenal to be physically located in either district; rather, his determination was based on stability in each district, the needs for more efficient pupil transportation, economics and efficiency (J-3).

I **FIND** and **CONCLUDE** that pupils residing within the federal enclave known as the Picatinny Arsenal or ARRADCOM are domiciliaries or residents of the Picatinny Arsenal. Consequently, these pupils are neither domiciliaries of Rockaway Township nor of Wharton Borough. This determination having been reached, it follows that Rockaway cannot demand to be legally named the district of attendance for all K-8 pupils in the military reservation.

The only issue left is the designation of the school district for attendance of the ARRADCOM pupils. In that regard, the record shows a fluctuating pattern of attendance for both school districts. In 1963, a county superintendent resolved that disparity by averaging the attendance patterns of pupils for the past 10 years and establishing a ratio. Under the pertinent statute, a board may allow pupils to attend its schools who reside outside its district boundaries (N.J.S.A. 18A:38-3). There is no question in the instant matter that both boards involved in this matter have opened their doors and offered a free education to the ARRADCOM pupils. When a problem arose because of pupil attendance patterns, the county superintendent exercised his authority pursuant to statute and resolved the problem by as signing the aforementioned ratios.

There is no evidence presented in the record to show that these ratios established in 1964 are any less effective today; however, more than eight years have passed since the last ratio was established and pupil populations in both Rockaway Township and Wharton Borough have declined during that time. As a matter of fact, the Rockaway Township enrollment declined from 3,551 pupils in 1974 to 2,426 pupils in 1981, a loss of 1,125 pupils or a 31.7 percent decline (P-10). During the same time, the number of pupils in the Wharton public schools declined from 764 in 1974 to 629 in 1981, a loss of 135 pupils who represent 17.7 percent of its pupil population (P-9).

Utilizing the same formula and rationale established by the Morris County Superintendent in 1974 (J-3), the numbers of pupils attending each school district and the

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resultant percentages are set forth in the table below. The figures utilized are taken from the Answers to Interrogatories supplied by both litigants.

Year	Rockaway Twp.	Wharton	Total
Sept. 1974	49	27	76
" 1975	52	18	70
" 1976	61	10	71
" 1977	60	10	70
" 1978	47	22	59
" 1979	50	16	66
Total Enrolled	319	93	342
Average Annual Enrollment	53.2	15.5	68.7
Percent Average Annual Enrollment	77.4	22.6	100.00

Using the 1964 ratio calculations of 71.5 percent and 28.5 percent, the average number of pupils decreased by .5 for Rockaway Township and 5.9 for Wharton Borough during the six-year period from 1974 to 1979. Measured in percentages, Rockaway Township experienced a 5.9 percent increase, while Wharton Borough experienced a 5.9 percent decrease in the number of pupils attending their respective schools.

Consequently, it appears from the record and from this new calculation, that the changes in the numbers of pupils are so insignificant when compared to the ratios set by the county superintendent in 1974 (J-3), that no change will be made in his earlier determination.

Absent any showing of a significant change in the number of pupils attending each school district, the percentages and formula established by the county superintendent in reaching those percentages will stand. If either superintendent determines that a change in pupil attendance is becoming significant, he/she may apply to the Morris

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County Superintendent to establish a new ratio of attendance. Until such a new procedure is effectuated, the ratios established by the Morris County Superintendent in 1974 and the entire rationale set forth by him will remain unchanged (J-3).

I **FIND** no statutory prohibition against the residents of ARRADCOM choosing their own school district, according to the formula that has been successfully worked out by the County Superintendent (J-3; N.J.S.A. 18A:38-3).

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

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

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

13 December 82
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

14 December 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec 21, 1982
DATE

Ronald L. Parker/jeh
OFFICE OF ADMINISTRATIVE LAW

ml

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BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WHARTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of the instant matter including the initial decision rendered by the Office of Administrative Law, August E. Thomas, ALJ.

The Commissioner observes that exceptions to the initial decision were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Rockaway Board (Rockaway) primarily excepts to the initial decision on the following grounds:

***

"1. The A.L.J. erred in finding that 'Picatinny Arsenal is a federal enclave which is not located in Rockaway Township.' (Slip Opinion at page 8.)

***

"2. The A.L.J. erred in finding and concluding that pupils residing on ARRADCOM are domiciliaries or residents of ARRADCOM. (Slip op. at 9.)

***

"3. The A.L.J. erred in ruling that the county superintendent had the authority to assign students to Wharton. (Slip op. at 9.)

***

"4. The A.L.J. erred in holding the present pupil ratio binding on the parties. (Slip op. at 9-11.)

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***

"5. The A.L.J. erred in finding that ARRADCOM residents may choose their own school district. (Slip op. at 11.)"
(Rockaway's Exceptions, at pp. 1-4)

The legal arguments set forth by Rockaway in support of the above exceptions are incorporated by reference herein. In its exceptions, Rockaway requests the following relief from the Commissioner:

> "***For the foregoing reasons, Petitioner respectfully requests the Commissioner to partially overrule the A.L.J. and hold that Rockaway Township is the district of attendance for all children of mandatory school age in grades kindergarten through eight residing at ARRADCOM, to determine that there is no binding order or agreement which would preclude Petitioner from educating its students within the schools of the district, and to order Respondent to refrain from offering admission to children residing at ARRADCOM on any basis other than that offered to other non-residents of the Borough of Wharton." (Rockaway's Exceptions, at pp. 5-6)

The Wharton Board (Wharton) in its reply exceptions rejects those exceptions and arguments advanced by Rockaway in opposition to the initial decision of this matter. Similarly, Wharton's legal arguments contained in its reply exceptions are incorporated herein by reference. Wharton's conclusions are as follows:

> "***The A.L.J. properly found that the AARADCOM (sic) is a federal enclave located 'in' the State of New Jersey for the purpose of educating AARADCOM (sic) students. The A.L.J. properly found that although jurisdiction was ceded to the United States Government, the State of New Jersey and the United States Government have concurrent jurisdiction in local matters such as education. Furthermore, the A.L.J. found that the State of New Jersey properly delegated authority to the Commissioner of Education to make determinations as to school districts for those districts that did not have appropriate facilities. The Commissioner, through the County Superintendents, acted within this delegated authority when he designated Wharton Borough Board of Education and the

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> Rockaway Township Board of Education as receiving district for AARADCOM (sic) pupils and in establishing ratios. Petitioner has failed to show that the facts and circumstances have changed in any way requiring a reconsideration of the Commissioner's Decision."
>
> (Wharton's Reply Exceptions, at p. 5)

The Commissioner observes from the exceptions filed by Wharton that it has mistakenly concluded that the ALJ found that the federal enclave was located "in" New Jersey. The Commissioner, from a review of page 8, ante, finds that the ALJ stated the following:

> "***The land mass known as the Picatinny Arsenal has been ceded to the United States Government, therefore it is a federal reservation which is not 'in' the State of New Jersey.***"

Moreover, it is Wharton's contention that the ALJ determined that the treating of ARRADCOM as a sending district and Rockaway and Wharton as receiving districts was appropriate and within the Commissioner's jurisdiction. In support Wharton relies on N.J.S.A. 18A:38-8 which reads as follows:

> "The board of education of any school district having the necessary accommodations may receive, or may be required to receive by order of the state board, pupils from another district not having sufficient accommodations, at rates of tuition fixed as in this article provided."

The Commissioner determines that the above-cited statute may not be relied upon to support Wharton's contentions for the following reasons:

1. ARRADCOM is not a school district pursuant to statutory prescription.

2. It has not been found or determined that Rockaway was unable to accommodate those pupils residing on the federal enclave in order for the provisions of N.J.S.A. 18A:38-8 to be invoked.

3. The authority for invoking the provisions of N.J.S.A. 18A:38-8 rests with the State Board of Education. There has been no finding that the State Board of Education has ever issued such an order pertaining to the matter herein controverted.

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Consequently, it must be concluded that the pupil-district ratio formula, established by the County Superintendent for the assignment of pupils residing at ARRADCOM, was mutually acceptable to the parties; however, it may not be construed as a long-term, irrevocably binding agreement since there is no basis in law for such an agreement to be entered into between the parties. The Commissioner so holds.

In the Commissioner's judgment, the primary issue to be addressed herein is the finding and conclusion rendered by the ALJ and supported by Wharton that Rockaway has no legitimate claim to receive the pupils residing on the federal enclave. Preliminarily, the Commissioner takes note that the facts of this matter clearly establish that Wharton's geographical boundaries do not encompass any portion of the federal enclave. However, in regard to whether or not Rockaway's geographical boundaries encompass any portion of the federal enclave for school purposes, the Commissioner is constrained to rely upon what he considers pertinent statutory and case law to be applied in pari materia to resolve the issue requiring his determination herein.

The Commissioner does not consider his prior ruling In the Matter of the Inquiry of the School District of the Township of Sandyston-Walpack, 1975 S.L.D. 78 to be inapposite to the instant matter. The Commissioner held therein that petitioner's children were entitled to be enrolled for the purpose of receiving a free public school education in the Sandyston-Walpack School District, inasmuch as the federal land upon which petitioner was domiciled was located within the geographical area comprising the Sandyston-Walpack School District.

More recently, the Commissioner again addressed the issue of pupils who live on federal land located, in part, within the physical boundaries of a school district and their right to receive a free public school education. In this regard the Commissioner by virtue of an Administrative Order held in pertinent part as follows:

> "***IT IS this 20th day of August, 1982, ORDERED that the Board of Education of the Township of Pemberton is hereby required to educate pupils presently residing on Fort Dix and within the physical boundaries of the Pemberton School District in the upcoming school year and thereafter as such education has been provided to pupils residing on Fort Dix in the 1981-82 school year and without regard to the amount of federal impact aid received by the Pemberton Board of Education in the upcoming school year and thereafter.***" (In the Matter of the Board of Education of the Township of Pemberton, Burlington County)

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It is noted further that the State Legislature, in enacting legislation (c. 155, L. 1982) to provide for the tuition of children residing on federal property, set down the following statutory prescription which holds in pertinent part:

> "***[F]or those persons of school age who reside on federal property located wholly or partly within the geographical boundaries of a school district***
>
> "***[t]he school district so designated [by the Commissioner] shall count such children as residents of the district for school funding purposes.***" (N.J.S.A. 18A:38-7.1 and 7.5)

It is of equal importance to note that the Court in Oceanport v. Hughes, 186 N.J. Super. 109 (Chan. Div. 1982) declared unconstitutional certain portions of the provisions of N.J.S.A. 18A:13-8 which pertain to the manner of apportioning membership of the Shore Regional Board of Education, in accordance with the 1980 official census figures. The pertinent part of that statute under constitutional challenge reads as follows:

> "***In making the apportionment of the membership of a regional board of education...there shall be subtracted from the number of inhabitants of a constituent school district, as shown by the last Federal census officially promulgated in this state, the number of such inhabitants who according to the records of the Federal Bureau of the Census...are military personnel stationed at, or civilians residing within the limits of, any United States Army, Navy or Air Force installation, located in such constituent school district.***" (at 114)

The Court therein concluded as follows:

> "***The equal protection argument here is that of all of the inhabitants of the Borough of Oceanport. Their proportionate representation on the regional board is diminished by the statutory exclusion of some of the inhabitants who happen to live on the military reservation. Had those same inhabitants, military or civilian, lived off-post in Oceanport, they would have been counted. In final analysis the exclusion turns on the intangible boundary line of property in the borough owned by the United States Government.

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> "The arbitrariness of the statute is patent. The exclusion discriminates against the legitimate concern of all inhabitants of Oceanport in the decisions and policies of the regional board - policies which will have a direct effect on the tax burden ultimately imposed on them. The denial of equal protection of the laws resulting from the exclusion is clear. Accordingly, the words of the above sentence of N.J.S.A. 18A:13-8, 'or who are military personnel stationed at, or civilians residing within the limits of, any United States Army, Navy or Air Force installation,' are declared unconstitutionally void and of no effect since they are in derogation of the Fourteenth Amendment of the United States Constitution.***"
> (Emphasis supplied.)(at 115)

In view of the foregoing language of the Court and applicable statutory prescription, the Commissioner rejects that portion of the initial decision which holds otherwise.

The undisputed facts of this matter reveal that the pupils residing at ARRADCOM are located for all intents and purposes within the geographical area of the Rockaway School District which claims the right to provide them with a free public school education. The Wharton School District cannot make a similar claim since no portion of the federal enclave is located within its geographical boundaries. The Commissioner so holds. The fact remains, however, that both parties herein are involved in the education of these pupils by virtue of a long-standing pupil-district ratio formula devised and implemented by a previous County Superintendent of Schools. The Commissioner does not deem it to serve any useful purpose to examine the merits of the previous action taken with regard to the education of the pupils in question.

Accordingly, the Commissioner hereby reverses that portion of the initial decision which holds that the federal enclave is not located within the geographical boundaries of a portion of the Rockaway School District. The Commissioner hereby finds and determines further that the existing pupil-district ratio formula for the prospective distribution between Wharton and Rockaway of pupils who reside on the federal enclave shall terminate as of the 1983-84 school year. The Wharton School District may, however, continue to educate those pupils who are currently enrolled in its schools. The Rockaway School District, on the other hand, may properly claim the right to provide a free public school education for those pupils living on the federal enclave within its geographical boundaries as of the 1983-84 school year, except for those pupils currently attending the Wharton School District.

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Finally, it is further understood that the provisions of N.J.S.A. 18A:38-3 allow the Wharton School District to continue to enroll nonresident pupils including those pupils from ARRADCOM, provided that Wharton has a policy to that effect and that it is uniformly applied to all nonresident pupils whose parents choose to enroll their children in the Wharton School District.

Accordingly, for the reasons set forth herein, the Commissioner hereby sets aside the findings and conclusions rendered in the initial decision and grants the relief sought by Rockaway as provided above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 28, 1983

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0774-82
AGENCY DKT. NO. 12-1/82A

DUNELLEN EDUCATION ASSOCIATION, DELORES P. WHEELAN, AGNES D. RYDBERG AND KAREN OAKLEY,
Petitioners
v.
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

Stephen E. Klausner, Esq. for petitioners (Klausner & Hunter, attorneys)

Edward J. Johnson, Jr., Esq. for respondent

Record Closed November 12, 1982 Decided December 20, 1982

BEFORE **ERIC G. ERRICKSON,** ALJ:

Petitioners appeal from an action taken by the Dunellen Board of Education (Board) at its meeting of August 12, 1981, requiring the three individually named petitioners to provide the Board Secretary with a physician's certificate each time any one of the three was absent for illness during the 1981-82 school year. They assert that the Board's action should be declared null and void and that they should be reimbursed for physician's fees incurred when complying with this requirement.

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The Board, conversely, asserts that its requirement was reasonable, legal and fully justified by the number of absences of the three individually named petitioners prior to the 1981-82 school year.

When the pleadings were joined before the Commissioner in January 1982, the matter was transferred as a contested case to the Office of Administrative Law for processing, pursuant to N.J.S.A. 52:14F-1 et seq. At a prehearing conference conducted on April 19, 1982, the parties agreed to stipulate all relevant facts and to move the case forward on cross motions for summary decision. Briefing was completed and the record declared complete on November 12, 1982.

FACTS:

I **FIND** the following to be relevant facts as agreed to by the parties in the form of stipulations with appended exhibits:

On August 12, 1981, the Board adopted resolutions requiring petitioners Wheelan, Rydberg and Oakley to procure a physician's certificate for each day's absence for which they claimed personal illness in the 1981-82 school year. These three were the only teaching staff members required by the Board to procure physicians' certificates for the days reported ill during the 1981-82 school year.

The Board's policy statement on sick leave in effect during 1981-82 reads as follows:

> The Board recognizes its statutory duty to pay regularly employed employees of this district in full for days on which they are absent from work for reasons of personal disability. All employees of the district eligible for sick leave and not otherwise covered by the terms of a collectively negotiated agreement shall receive 10 such sick leave days annually, all of which shall be accumulative if unused.
>
> Twelve-month employees are entitled to twelve sick leave days annually, all of which shall be accumulative if unuesed.
>
> The Board reserves the right to require of any employee claiming sick leave pay sufficient proof, including a physician's certification, of the employee's illness or disability.

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> The Board shall consider the application of any eligible employee for an extension of sick leave, pursuant to law, when the employee's own bank of accumulated sick leave is exhausted.
>
> The Superintendent shall prepare rules for the administration of the Board's policy on sick leave which shall be binding on all employees. The misuse of sick leave shall be considered a serious infraction and subject to the Board's power to discipline employees.
>
> [Exhibit J]

Article XV-1 of the negotiated agreement provides, in pertinent part, as follows:

> All employees who are steadily employed by the Board of Education shall be allowed sick leave with full pay for a minimum of 10 school days in any school year in accordance with the provisions of the State School Statutes and local Board of Education rules and regulations pertaining thereto.
>
> Teachers Leave of Absence for Health Reasons
>
> 1. . . .
>
> 5. A teacher who exceeds his allowable sick leave, both current and accumulated, is subject to a deduction at the rate of 1/200th of his annual salary for each day of said excess.
>
> a. Any case where this deducation [sic] is applicable, the Board at its discretion may grant additional sick leave benefits.
>
> b. The Board shall notify the Association of its decision.
>
> c. At the request of the Association, representatives of the Association shall meet with the Board to discuss the Board's action in the case.
>
> d. Any decision made concerning such extended sick leave benefits shall not be subject to the grievance procedure.
>
> 6. All teachers shall also be given the written accounting of accumulated sick leave each year.
>
> [Exhibit K]

Data regarding employment and use of sick leave by the three individually named teacher petitioners is summarized in the following table:

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First Year Of Employment	Sick Leave Days Used Through 1980-81	Average Used Per Year	No. Days Used In 1980-81	Accumulated Unused Days 9/1/81	No. Years In District
Oakley					
1968	114	8.5	6	17	13
Rydberg					
1954	364.5	13.5	19	10	27
Wheelan					
1974	64	9.14	10	13.5	8

[Exhibit M]

The Board had expressed, in a letter to Oakley, concern over her attendance pattern as early as 1971 when she was offered a tenure contract for the ensuing year. That letter advised Oakley that it was expected that there would be a marked improvement in her future attendance (D-30). Similar statements of continuing concern over Oakley's absences and lack of promptitude were placed on her subsequent evaluations in 1972 (D-28), 1976 (D-25), 1977 (D-23) and 1978 (D-18). On June 30, 1978, the superintendent notified Oakley that a deduction in salary was being made because she had exceeded her available sick-leave time (D-17). At that same time, the superintendent required that she submit a physician's certificate for each subsequent day of illness.

On October 14, 1980, Oakley requested the Board to relieve her of that obligation (D-12). The Board denied this request and required that Rydberg, Oakley and Wheelan submit physician's certificates when absent for illness. When her request was not granted, Oakley refused to submit a physician's certificate for her absences on December 1 and 2, 1980 and was docked $117.90 in salary for those days. Litigation begun on behalf of Oakley, Wheelan and Rydberg and one other teacher was ultimately settled. As part of the settlement of that dispute, the Board rescinded its October 14, 1980 notice requiring them to submit physician's certificates when absent for illness (D-2).

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Numerous documents relating concerns over the attendance of Oakley, Rydberg and Wheelan during their employment prior to 1981-82 are stipulated as exhibits (Exhibits D,E,F).

In compliance with a directive of the Commissioner of Education's request to submit data on attendance of teaching staff members in the district, the superintendent, in a memorandum dated October 10, 1971, advised the county superintendent that the percentage rate of teacher absenteeism, including three extended illnesses totaling 177 days, was 3 percent for the 1978-79 school year (Exhibit L).

On October 7, 1981, Wheelan submitted a physician's certificate for her absences on October 5 and 6, 1981, and requested the Board to reimburse her for the cost of one visit to the doctor. Similar requests for reimbursement were submitted by Oakley and Rydberg for doctors' bills in connection with their respective absences of November 5 and November 6, 1981. In all three instances, the teachers were informed by the superintendent that the Board would not reimburse them for the cost of their visits to their physicians.

DISCUSSION AND CONCLUSIONS:

N.J.S.A. 18A:30-4, which provides that a Board of Education has the right to require an employee to file a physician's certificate with the Secretary of the Board of Education in order to obtain sick leave, reads:

> In case of sick leave claimed, a Board of Education may require a physician's certificate to be filed with the Secretary of the Board of Education in order to obtain sick leave.

Pursuant to this statutory authority, this Board has adopted Policy No. 432, which provides, in pertinent part, as follows:

> The Board reserves the right to require of any employee claiming sick leave pay sufficient proof, including a physician's certification, of the employee's illness or disability. . . .
> [Exhibit J]

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I **CONCLUDE** that both the statute, N.J.S.A. 18A:30-4, and the Board's Policy No. 432 authorize the Board to require certification by a physician when personal illness is claimed by one teacher, a group of teachers or all its teachers. Since the statute is permissive rather than mandatory, the Board, a body with authority to do only that which is either mandated or permitted by statute, had authority to promulgate a policy as long as the policy did not contravene the statute. That authority stems from N.J.S.A. 18A:11-1, which provides that:

> The Board shall . . . [m]ake, 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; . . . and 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.

Similar authority for the Board to promulgate a rule is found in N.J.S.A. 18A:27-4:

> 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 in rights and duties with respect to such employment shall be dependent upon and governed by the rules and force with reference thereto.

Given the clear language of these statutes, I **CONCLUDE** that the Board's Policy No. 432 was legally promulgated. I further **CONCLUDE,** after a careful reading of the policy in question, that it is consistent with the provisions of the cited statutes.

Having reached the above-stated conclusions, it is also necessary to examine whether the Dunellen Board abused its discretionary authority in any way when it required Wheelan, Rydberg and Oakley to submit doctors' certificates for personal illness during the 1981-82 school year.

Analysis of Rydberg's attendance records shows that in 27 years, she had accumulated only 10 days of unused sick leave. This computes an accumulation of only

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four-tenths of one day of unused sick leave per year. Similar analysis of the records of Oakley and Wheelan reveal that they had accumulated an average of 1.3 and 1.7 days of unused sick leave, respectively.

Only four other teachers (E, Y, FFF, and PP) have accumulated unused sick leave at a rate of less than 1.7 per year (Exhibit M). Of these, E and FFF evidently were not assigned ten full days' sick leave for each year of service, teacher PP did not use a single day of sick leave in 1980-81 and teacher Y retained at the end of the 1980-81 school year 25 days of unused sick leave, more than any of the three individually named petitioners.

The extensive documentation in the record persuades me that the Dunellen Board and its administrative staff have been diligent in attempting to reduce to a minimum the absenteeism of their teachers and to provide sick leave only for teaching staff members who have been ill. These attempts are salutary in that the presence of regular teaching staff members on a regular basis is a requisite to compliance with N.J.S.A. 18A:7A-1 et seq. and with the thorough and efficient requirements of educational programs set forth in the New Jersey Constitution since 1875. The Board's efforts are also in compliance with the Commissioner's admonitions to boards to reduce teacher abseenteeism to a minimum, admonitions consistent with his authority under N.J.S.A. 18A:30-5 and with his broad powers to oversee programs of education in New Jersey.

A reading of the Board's policy nevertheless convinces me that, despite its efforts to keep teachers in the classrooms, the Board provides for, and invites, its teachers on an individual basis to apply for extended sick leave when such is appropriate (Exhibit J). An analysis of the sick leave authorized for, and used by, certain staff members, including petitioners Oakley and Rydberg, leads to the conclusion that the Board has, on a number of occasions, provided sick leave above and beyond the minimum required by law (Exhibit M). Such humanitarian provisions for the unusual needs of individual staff members contraindicates a conclusion that the Board abused its discretion. Accordingly, I **CONCLUDE** that the Board has neither abused its discretionary authority nor acted in an arbitrary, biased or capricious manner in requiring that Oakley, Wheelan and Rydberg submit medical certificates when they were absent for personal illness during the 1981-82 school year.

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DETERMINATION:

In consideration of the above-stated conclusions, it is **DETERMINED** that petitioners have failed to meet their burden of proof in support of allegations that the Board abused its discretionary authority when it required petitioners Rydberg, Oakley and Wheelan to present doctors' certificates in support of their reported personal illnesses during the 1981-82 school year.

It is further **DETERMINED** that, absent a showing that the Board required them to procure certificates of illness from Board-designated physicians, the Board is not required to reimburse them for obtaining the physicians' certificates. N.J.S.A. 18A:23-4. is silent as to who shall bear the cost of such physicians' office visits. In this regard, it contrasts sharply with N.J.S.A. 18A:16-3 in which it is specified that, under certain circumstances surrounding the selection of a physician for the more comprehensive physical or mental examination, a board may be required to pay for those examinations. N.J.S.A. 18A:16-2.3 et seq. are neither applicable to, nor controlling of, the factual pattern herein, where a mere certificate of illness is required, pursuant to N.J.S.A. 18A:30-4 and the Board's Policy No. 432.

It is **ORDERED** that the Board's actions in this matter are **AFFIRMED** as being consistent with admonitions of the Commissioner, as set forth in Wilma Farmer v. Camden Board of Education, 1967 S.L.D. 287 at 292, wherein there was also a dispute over the sick leave laws, albeit in a different factual context:

> Respondent's action to prevent the expenditure of public funds for services not performed, under "questionable" conditions, must be viewed as within its discretion and designed to protect the public interest. It cannot be gainsaid that the public interest is always paramount. New Jersey Turnpike Authority v. American, etc., Employees, 83 N.J. Super. 389, 397 (Ch. Div., 1964) This is especially apropos in this case, since petitioner's right to appeal to the Commissioner from an adverse decision by respondent upon the merits of such proofs as she may offer in response to the requirement of respondent's resolution, is not impaired by the Commissioner's determination that such a resolution was a proper exercise of the Board's discretionary authority to administer the Sick Leave Law. . . .

In conclusion, it is **ORDERED** that petitioners' request for a directive to the Board declaring its resolution of August 12, 1981 of no force and effect, is **DENIED.** It is

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further **ORDERED** that petitioners' request for a further directive to compensate Oakley, Rydberg and Wheelan for the costs of procuring physicians' certificates for their days of personal illness in 1981-82 is also **DENIED.**

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

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

December 20, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

December 21, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 23, 1982
DATE

Ronald L. Parkes/jes
OFFICE OF ADMINISTRATIVE LAW

fms

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DOCUMENTS IN EVIDENCE:

Exhibit A Data on Karen Oakley's Use of Sick Leave

Exhibit B Data on Agnes Rydberg's Use of Sick Leave

Exhibit C Data on Delores Wheelan's Use of Sick Leave

Exhibit D Exhibits D-1 through D-31 on Karen Oakley's Use of Sick Leave

Exhibit E Exhibits E-1 through E-106 on Agnes Rydberg's Use of Sick Leave

Exhibit F Exhibits F-1 through F-27 on Delores Wheelan's Use of Sick Leave

Exhibit J Board Policy No. 432

Exhibit K Sick Leave Provisions in Negotiated Agreement

Exhibit L Superintendent to County Superintendent, October 29, 1979

Exhibit M Teacher Data on Use of Sick Leave

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DUNELLEN EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners except to the determination herein by the Honorable Eric G. Errickson, ALJ that the Board acted within its statutory authority by requiring each of the individual petitioners, as a condition precedent to obtaining salary for sick days used, to file a physician's certificate with the Board Secretary for each absence. Petitioners contend that such action by the Board, applicable to them as the only individuals so singled out, was arbitrary and capricious. Petitioners rely on Rall v. Board of Education of the City of Bayonne et al., 104 N.J. Super. 236 (App. Div. 1969), rev'd 54 N.J. 373 (1969); King v. Board of Education of the Borough of Woodcliff Lake Board of Education, 1972 S.L.D. 449; Woodbridge Federation of Teachers v. Woodbridge Board of Education, 1974 S.L.D. 1201.

The Board's reply exceptions refute those of petitioners and affirm the initial decision. The Board argues that the three cases cited by petitioners involve facts which are distinguishable from the facts which exist in the case presently controverted. The Commissioner finds merit in the Board's arguments.

Rall, supra, is an action by the board of education which shortened the period of tenure for the superintendent of schools to six and one-half months. This case and the others cited by petitioners sought to grant and bestow benefits on certain employees to the exclusion of others. The Commissioner finds by the evidence presented that the Board acted properly herein by singling out three teachers from the group of all employees based upon their disparate attendance records. The Commissioner so holds.

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

The relief requested by petitioners herein is denied. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

FEBRUARY 3, 1983

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DUNELLEN EDUCATION ASSOCIATION, DOLORES PANZINO WHEELAN, AGNES DUVET RYDBERG, and KAREN OAKLEY, :

PETITIONERS-APPELLANTS, : STATE BOARD OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY, :

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, February 3, 1983

For the Petitioners-Appellants, Klausner & Hunter (Stephen E. Klausner, Esq.)

For the Respondent-Respondent, Edward J. Johnson, Jr., Esq.

This case involves three teachers who were required to provide a physician's certificate as a condition precedent to the payment of any sick leave during the 1981-82 school year. Petitioners-Appellants allege the Dunellen Board's resolution of August 12, 1981, which authorized such action, was arbitrary, capricious, illegal, discriminatory and taken in bad faith. Petitioners-Appellants request reimbursement for medical bills unnecessarily incurred and a declaration that the Dunellen Board's resolution is null and void. The Dunellen Board asserts its requirement was reasonable, justified by the excessive absences of the three teachers in the school years prior to the 1981-82 school year, and permitted pursuant to N.J.S.A. 18A:30-4.

The State Board has carefully and thoroughly reviewed the record in this matter. We read the statute in question, N.J.S.A. 18A:30-4, as specifically vesting boards of education with the discretionary authority to require the submission of a physician's certificate, as a condition precedent to the payment of sick leave. The statute provides 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."

N.J.S.A. 18A:30-4 is a permissive statute and its provision may be exercised by the board of education at its discretion, when and if it determines that it is appropriate to do so.

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Consistent with the statute, the Dunellen Board of Education exercised its legislatively vested discretion and notified three teachers, the Petitioners-Appellants herein, that salary payments for sick leave would be denied unless a physician's certificate was furnished. The Board's imposition of the physician's certificate requirement upon these three teachers was based on their past disparate sick leave records.

In view of the record in this matter, we do not find that the Dunellen Board's action was inappropriate. The record in this matter contains the complete employment history of Petitioners-Appellants' absentee records from the time of their initial employment with the Dunellen Board through March of the 1981-82 school year. (Exhibits A, B, C) Ample documentation exists supporting the Board's determination to differentiate the sick leave records of these three teachers from the entire faculty. We are satisfied that there was a reasonable basis for doing so.

Further, there is nothing in the record which would indicate that Petitioners-Appellants were deprived of their statutory entitlement to annual and accumulated sick leave under N.J.S.A. 18A:30-1 and 18A:30-3; nor was there any infringement on Petitioners-Appellants' utilization of sick leave. Unquestionably, sick leave is a statutory benefit which exists for those who are ill, and utilization of sick leave for proper purposes may not be subject to penalty; however, the Legislature, in its wisdom, has also provided boards of education with the managerial right to implement measures which control its abuse. Based on this record, we do not find that the Dunellen Board's efforts to monitor the utilization of sick leave by Petitioners-Appellants was arbitrary, unreasonable, or in any way constituted an abuse of its legislatively vested discretion.

Lastly, we believe that any medical expense incurred in connection with the procuring of a physician's certificate is a personal expense to be borne by the individual involved, and should not be charged to the board of education. In this regard, we also agree with the reasoning of the Administrative Law Judge, and his conclusion, recommending denial of reimbursement for medical expenses.

Based on this amplification and the reasons expressed by the Commissioner of Education, the State Board of Education affirms the decision of the Commissioner of Education.

October 26, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8953-82
AGENCY REF. NO. 138-8/71

RUTH LEVITT and ESTHER E. SASLOE,
Petitioners
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK,
Respondent

APPEARANCES:

Richard J. Abrahamsen, Esq., for petitioners
(Giblin & Giblin, attorneys)

Louis C. Rosen, Esq., for respondent

Record Closed December 8, 1982 Decided December 20, 1982

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

This matter was transmitted to the Office of Administrative Law on September 28, 1982 by the Commissioner of Education pursuant to N.J.S.A. 52:14F-1 et seq., on remand from the Superior Court, Appellate Division "to determine the dollar amounts owed to plaintiffs consistent with his [Commissioner's] decision and Order of October 1977 and May 8, 1978, respectively."

A prehearing conference was held on October 29, 1982, and after unsuccessful attempts to amicably resolve the dispute, the following issues were framed:

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1. What backpay is due petitioners as the result of previous decisions of the Commissioner of Education and subsequent remand by the Appellate Division, Superior Court?

2. Is interest in addition to principal due petitioners as a result of compensatory delay? If so, how much?

As is noted in the Prehearing Order, the issues were determined by the court, with petitioners concurrence, but "without the consent of the Board due to its disagreement with the Commissioner's decision as a matter of law and this court's interpretation of the decision of the Superior Court, Appellate Division." See Other, 1 and 2, in Prehearing Order.

Petitioners filed a Motion for Summary Decision, opposed by respondent, and the record closed on December 8, 1982 with the expiration of the time established for petitioners' reply, which was not filed. The matter is ripe for Summary Decision in the absence of any relevant material facts in dispute. The emphasis is added in light of respondent's position that disputed facts do exist, which this court deems to be facts which are irrelevant.

A brief history of this litigation is appropriate.

Petitioners filed a claim with the Commissioner of Education, joined on August 5, 1971, wherein tenure and improper salaries were alleged. The Commissioner decided the matter in favor of petitioners on October 5, 1977 and ordered "the Board to compensate petitioners for the difference in back wages . . . and compensate or credit petitioners with . . . fringe benefits." See C-1.

No appeal of the Commissioner's decision was filed by the Board.

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Due to the failure of the Board to comply with the Commissioner's decision, the Commissioner entered an Order on May 8, 1978 directing the Board to comply with his October 5, 1977 decision.

Counsel for respondent wrote a letter to petitioners' attorney under date of September 8, 1978 wherein it was said: "We wish to advise you that the sum due your clients respectively is Ruth Levitt $34,186.00 and Esther Sasloe $27,250.00." See C-3.

On April 30, 1979, respondent sent another letter to petitioners' attorney which said: "Enclosed you shall find salary schedules calculated by our Personnel Department indicating the amount to which your clients are entitled . . ." The enclosures indicated the amounts due to each petitioner on an annual basis and totaled $34,186 for Ruth Levitt and $26,550 for Esther Sasloe, see C-4. [The sum of the annual amounts for Sasloe clearly establishes the $26,550 amount to be correct, rather than the $27,250 indicated in C-3.]

Due to the continued failure of respondent to comply with the Commissioner's Order, petitioners filed for enforcement with Superior Court, Chancery Division, which ordered the decision of the Commissioner vacated. See C-5.

Petitioners then filed an appeal with Superior Court, Appellate Division, and in its decision of October 26, 1981 the Court said:

> This case does not involve a rule or regulation promulgated by the Commissioner or State Board of Education in conjunction with powers delegated by the Legislature. This was an adversarial proceeding before the Commissioner wherein he was called upon to render a decision to resolve the dispute. If defendant had any challenge to the legal or procedural basis for the Commissioner's decision, such as it seeks to raise now, the time and place for challenging it was in 1977 or 1978 when the decision and order were rendered.
>
> We conclude that the Chancery Division judge erred in permitting a collateral attack of the Commissioner's order, and resolving the merits of that controversy. We find, however, that his ultimate determination to dismiss plaintiff's complaint was proper since the Commissioner's

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> order sought to be enforced was not complete, and therefore not capable of enforcement. The order, while finding that plaintiffs had tenure and were entitled to back wages, emoluments and other benefits, did not specify the dollar amount due. Thus, there was nothing for the Chancery Division to enforce.
>
> The judgment of the Chancery Division dismissing the complaint is affirmed and the cause is remanded and transferred to the Commissioner of Education for the purpose of holding a hearing to determine the dollar amounts owed to plaintiffs consistent with his decision and order of October 1977 and May 8, 1978 respectively (slip opinion at 10 and 11).

Respondent continues its quest to argue that the Commissioner's decision was legally incorrect and further disputes the determination of this court to decide the dollar amounts due to petitioners was not the intent of the Appellate Division decision. I **FIND** respondent's efforts have the appearance of further delaying enforcement of the Commissioner's Order and its obdurate conduct to be perplexing and incomprehensible.

Respondent further argues that the due amounts incorporated in C-3 and C-4, admittedly calculated by its own Personnel Department, represented a settlement offer and not entitlement. This argument is totally rejected in light of the clear language in the exhibits and the absence of any evidence that petitioners ever disputed said amounts as representing the principals due. Petitioners did litigate an issue of emoluments related to the Teachers Pension and Annuity Fund, which this court finds to be irrelevant as only claims of principal and interest are made here.

Respondent finally argues in opposition to Summary Decision, alleging relevant facts to be disputed, which is rejected here after a most careful and thorough review of the entire record.

Chief Justice Vanderbilt wrote for a unanimous New Jersey Supreme Court in Duke Power Co. v. Patten, 20 N.J. 42 (1955) and said: "Where the wording of a statute is clear and explicit we are not permitted to indulge in any interpretation other than that called for by the express words set forth . . . " (at 49). Although the wording questioned

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here is not statutory, but those of the Board's own counsel (in C-3 and C-4) and the Honorable Robert A. Matthews, P.J.A.D. (in C-6), the language in those exhibits is so clear and explicit as to belie misinterpretation. **I SO FIND.**

The Honorable William J. Brennan, Jr. wrote for the New Jersey Supreme Court in addressing standards for summary judgment in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 and said:

> The standards of decision governing the grant or denial of a summary judgement emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact. (at 74).

And further stated:

> However, if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an unsubstantial nature, a mere scintilla, 5 Vanderbilt L. Rev.. 607, 613 (1952), "fanciful, frivolous, gauzy or merely suspicious," 6 Moore, Federal Practice, par. 56.13(3), he will not be heard to complain if the court grants summary judgement, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact (at 75).

I FIND the documents transmitted by the Commissioner in the case file and marked by this court as evidentiary, sua sponte, and relied on by petitioners in support of the Motion for Summary Decision, clearly establishes the absence of any genuine issue of material fact.

I CONCLUDE that peititoners' Motion **IS GRANTED.**

IT IS ORDERED, therefore, that the Newark Board of Education compensate Ruth Levitt and Esther Sasloe the principal amounts of $34,186 and $26,550, respectively, and additionally compensate petitioners in accordance with their reasonable claims of simple post judgment interest incorporated in the Prehearing Order (see Proposed Stipulation of Facts -Petitioner - 2).

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Post judgment interest in this matter is not punitive, but an allowance based on wrongful detention, the purpose being to compensate petitioner "for detention of money due him, [them] and to afford him [them] full indemnification or compensation for the wrongful interference with his [their] property rights." See 28 C.J.S. Damages §51, at 789-790. See also Wilentz v. Hendrickson, 135 N.J. Eq. 244, 255-256 (E. & A. 1944); Consolidated Police, etc., Pension Fund Comm'n v. Passaic, 23 N.J. 645, 652 (1957); Busek v. Levine, 63 N.J. 351 (1973), appeal dismissed, 414 U.S. 1106, 38 L.Ed. 2d, 733 (1973); and Fallon v. Bd. of Ed. of Scotch Plains-Fanwood School Dist., Union Cty, 185 N.J. Super. 142 (Law Div. 1982).

Interest is computed at 12 per cent for two years and represents $8,204.64 and $6,372 for Levitt and Sasloe, the sum total of entitlements determined to be $42,390.64 and $32,922.00, respectively. Unreasonable delay by the Board in compensating petitioners in accordance with this determination shall increase judgments in the amount of $11.24 and $8.73 per day, calculated at the rate of 12 per cent per annum for Levitt and Sasloe, respectively.

It is customary for the Commissioner to grant a reasonable amount of time for a Board to compensate prevailing petitioners when the amount of a judgment is large. Since the inordinate delays in this matter lie predominately at the feet of the respondent Board, the Board is **ORDERED** to comply in full, forthwith. In the event the Commissioner determines otherwise, it is strongly recommended that the daily interest amounts as heretofore calculated, be added to the judgments.

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

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OAL DKT. NO. EDU 8953-82

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

20 December 1982
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

22 December 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 27 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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EVIDENTIARY DOCUMENTS

C-1 Decision of the Commissioner of Education, October 5, 1977

C-2 Order of the Commissioner of Education, May 8, 1978

C-3 September 8, 1978 letter, respondent's attorney to petitioner's attorney

C-4 April 30, 1979 letter, respondent's attorney to petitioner's attorney

C-5 Order of Superior Court, Chancery Division, October 24, 1980

C-6 Superior Court, Appellate Division, decision of October 26, 1981

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RUTH LEVITT AND ESTHER E. SASLOE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that no exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes with approval the following history of litigation set down by the Honorable Ward R. Young, ALJ:

1. Claim filed with the Commissioner of Education, joined on August [6], 1971.

2. Decided in favor of petitioners October 5, 1977, the Board to compensate petitioners "***back wages***and fringe benefits***." No appeal was made by the Board.

3. Board's inaction precipitated Order by Commissioner to Board on May 8, 1978 for compliance thereto. Still no action by the Board.

4. On appeal to the Superior Court, Chancery Division, decision against petitioners October 24, 1980.

5. On appeal to the Superior Court, Appellate Division, decision on October 26, 1981 that the Chancery Division erred in resolving the merits of the controversy but acted properly in dismissing the complaint because of unspecified total amounts due.

6. The Commissioner notes the amounts calculated by the Board and due petitioners as $34,186 for Ruth Levitt and $26,550 for Esther Sasloe. (C-4)

The Commissioner further notes the award of interest promulgated herein by Judge Young but cannot agree that such be made. The Commissioner has consistently held that there is no statutory prescription for such awards (Fred Bartlett v. Wall

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Township, 1971 S.L.D. 163, at 165-166) and continues to do so in the present case. The award of interest by Judge Young is accordingly set aside. However, the Commissioner deplores in the strongest possible terms the cavalier treatment by the Board of petitioners' claims and his decision herein not to award interest does not preclude petitioners seeking such relief in the appropriate forum.

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

The Commissioner finds the Board's continued assertion that the decision by the Commissioner in this controverted matter is legally incorrect to be totally without merit. The courts have spoken; the Board failed to appeal the determination herein in a timely fashion. The Commissioner views with distaste the Board's continued defiance of the Commissioner's Order. There being no issue of material fact herein, the Commissioner grants petitioners' Motion. Accordingly, the Newark Board of Education shall compensate Ruth Levitt and Esther Sasloe the amounts of $34,186 and $26,550, respectively, in a timely fashion.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

FEBRUARY 4, 1983

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RUTH LEVITT AND ESTHER E. SASLOE, :

PETITIONERS-RESPONDENTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY, : DECISION

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, February 4, 1983

Request for oral argument denied by the State Board of Education, May 4, 1983

For the Petitioners-Respondents, Giblin & Giblin (Kenneth M. Bushell, Esq., of Counsel)

For the Respondent-Appellant, Louis C. Rosen, Esq.

The liability of the Newark Board of Education for back wages due the petitioners is res judicata. In accordance with Ruth Levitt and Esther Sasloe v. Newark Board of Education, No. A-1221-80-T1, N.J. Superior Court, October 26, 1981, this matter was remanded to the Commissioner of Education

> "***for the purpose of holding a hearing to determine the dollar amounts owed to plaintiffs consistent with his decision and order of October 1977 and May 8, 1978 respectively."

The Commissioner of Education has ordered the Newark Board of Education to compensate Ruth Levitt in the amount of $34,186 and Esther Sasloe in the amount of $26,550. We agree with the Commissioner's characterization of the Newark Board's treatment of petitioners, and affirm his decision for the reasons expressed therein. The State Board of Education directs immediate payment of these amounts by the Newark Board of Education.

June 1, 1983

PENDING SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7446-82
AGENCY DKT. NO. 248-7/82A

JULIETTE MACKEY,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,
Respondent

APPEARANCES:

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

Stanley Turitz, Esq.,
for respondent

Record Closed December 15, 1982 Decided January 18, 1983

BEFORE **SYBIL R. MOSES**, ALJ:

This matter comes before the court as the result of a petition filed by Juliette Mackey with the Commissioner of Education on July 7, 1982, asking the Commissioner to find that her employment was terminated in violation of N.J.S.A. 18A:17-2 and to direct the Ridgefield Board of Education to employ her pursuant to her tenure rights and to retroactively compensate her for salary and benefits lost as a result of its actions. The

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Ridgefield Board of Education (hereinafter Board) responded on July 19, 1982, alleging that it had acted within its legal authority and capacity and asking that the petition be dismissed. The matter was forwarded to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on September 16, 1982, and it was determined that the only legal issue in this matter was whether tenure rights accrued to Ms. Mackey's specific position as secretary to the principal of Slocum School. Both attorneys agreed that an evidentiary hearing was not necessary, as the issue in controversy could be decided as a matter of law. Cross-motions for summary decision and a stipulation of facts were filed by both counsel in timely fashion. Reply memoranda were filed and the record closed on December 15, 1982.

The court adopts the following stipulated facts as the facts of this case:

1. Petitioner has been employed by respondent as a ten-month full-time secretary since 1967. Since that time, she has worked on a regular and continuous basis, except for three periods of paid leaves of absence, as follows:

   (a) May - June 1971 (43 days)
   (b) April (2 days), May and June, 1973 (33 days)
   (c) May 22, 1981 - June 30, 1982

2. Petitioner is possessed with tenure pursuant to N.J.S.A. 18A:17-2.

3. Prior to June 30, 1982, respondent maintained five (5) schools within its boundaries:

   (a) Ridgefield Memorial High School
   (b) Bergen Boulevard Elementary School
   (c) W. Arthur Skewes Middle School
   (d) Shaler Elementary School and
   (e) Slocum Avenue Elementary School

4. Petitioner's assignment throughout her employment with respondent was as secretary to the principal of Slocum Avenue Elementary School.

5. Respondent determined to close its Shaler Elementary School, effective on or about June 30, 1982.

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6. At all times prior to June 30, 1982, there existed a ten-month secretarial position to the principal of the Shaler Elementary School.

7. On April 29, 1982, the respondent resolved to abolish one and one-half secretarial positions in the school system.

8. On or about April 29, 1982, respondent determined to terminate petitioner's employment effective June 30, 1982.

9. For the period from September 1, 1976 through June 30, 1982, Judith Cummings was employed as a ten-month secretary in the Ridgefield School District. Ms. Cummings' assignment was in the Shaler Elementary School.

10. Judith Cummings possesses tenure pursuant to N.J.S.A. 18A:17-2.

11. Since September 1, 1982, Judith Cummings has been assigned as a ten-month secretary in the Slocum Elementary School and W. Arthur Skewes Middle School (a single building known as the Slocum/Skewes Complex).

The parties also agreed that the following documents were to be entered into evidence:

J-1 List of ten-month and twelve-month secretaries for the 1981-82 and 1982-83 school years

J-2 Resolution of April 29, 1982

J-3 Resolution of June 16, 1982

Motions for summary decision before administrative law judges are governed by N.J.A.C. 1:1-13.1 et seq. N.J.A.C. 1:1-13.2(a) provides that a decision on a motion for summary decision ". . . shall be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. . . ." In this case the foregoing stipulated facts reveal that there is no dispute as to any material fact. Therefore, the matter is ripe for summary decision as a matter of law.

Counsel for petitioner argues that it is uncontroverted that during her entire employment history with the Board she was employed as secretary to the principal at the

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Slocum School. That employment was terminated by resolution of the Board on April 29, 1982 (J-2). Counsel argues that this was an improper termination because the position in which she was employed was never abolished. The April 29 resolution did abolish a position at the Shaler Elementary School because that school was being closed. Yet, the person who had held the Shaler position (Judith Cummings) is still employed while the Board terminated petitioner's employment even though the post of secretary at Slocum School is still in existence. Counsel argues that Ms. Mackey's tenure rights have been abrogated by the abolition of a position of employment in the Shaler School and the termination of her employment, which employment was unconnected to the abolished position. He urges that in order for a termination for reasons of economy to be valid there must be a specific linkage between the person who is being terminated and the position being abolished. See Booth v. Bd. of Ed. City of Salem, 1980 S.L.D. _____ (March 24, 1980) as well as Kigerl v. Bd. of Ed. Borough of So. Plainfield, 1981 S.L.D. (August 18, 1981), aff'd St. Bd. of Ed. 1981 S.L.D. (Dec. 2, 1981). This is especially crucial since seniority is alien to clerical and secretarial employees in a school system, and thus the recognition of a right to employment in a particular position in which tenure is acquired takes on great significance.

Counsel for the Board argues that it has broad discretion and authority to reduce the number of its employees, including secretaries who have achieved tenure pursuant to N.J.S.A. 18A:17-2, and that discretionary decisions made by a board of education should be given a presumption of validity and not be overturned by the courts in the absence of a showing of bad faith. Counsel takes the position that tenure does not attach to a specific secretarial position but rather attaches to the category of secretary in order to protect an individual's status or employment security. In effect, counsel is saying that one achieves tenure in a category of employment, but that tenured status does not protect an individual's specific position. Counsel relies on Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980) where a tenured principal was transferred to another school in the position of principal. The Appellate Division held there was no violation of tenure rights because tenure cannot attach to a specific position, as a school board can transfer a tenured employee from one position to another position in the same category without triggering the protection afforded by N.J.S.A. 18A:6-10. The Board's attorney states that

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the stipulation of fact to which petitioner agreed indicates that she was employed as a secretary by the Board of Education and assigned to the Slocum School and therefore, at any time during her employment as a secretary, the Board could have assigned her to any of the schools which it maintained (emphasis added). He points out that neither N.J.S.A. 18A:17-2 nor N.J.S.A. 18A:6-10 state that secretarial tenure can only be terminated for cause or as a result of the abolition of a position of employment through a reduction in force, but merely provide that secretarial tenure is subject to a reduction in force.

The issue in this case is whether tenure rights accrued to Ms. Mackey's specific position as secretary to the principal of the Slocum School, and, concomitantly, did the Board violate her tenure rights when it terminated her employment. This judge notes that there is a presumption of correctness granted to the actions of a board of education, as well as a presumption that the action of a board is one that will be upheld by the Commissioner of Education absent a showing of bad faith, illegal motive or lack of rational basis. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1959). It is given that premise that I have reviewed N.J.S.A. 18A:17-2 and N.J.S.A. 18A:6-10, which deal with the granting of tenure to secretaries and the manner in which a person who is tenured can be dismissed or a reduction in force can be effected. I have also reviewed the cases cited by both counsel and find that the law is clear. There is no question that a secretary who has achieved tenure with a board of education (which Ms. Mackey clearly has) can be assigned and transferred at will by the board so long as said transfer is not a demotion. See Fegen v. Bd. of Ed. of Fair Lawn, 1966 S.L.D. 167, quoting with approval Lascari v. Lodi, 36 N.J. Super. 426 (App. Div. 1955). The law is clear that a transfer within the same category of employment in no way effects a transferee's tenure rights. Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154. Therefore, I must conclude that tenure does not attach to a specific position but to a category or class of employment.

Counsel for petitioner relies on Feit v. Bd. of Ed. of Borough of Roselle, App. Div. A-3761-80T1, decided November 16, 1982, in support of his theory that tenure for secretaries accrues in specific positions. I find that that reliance is misplaced. In Feit the Appellate Division found that tenure attachs to a specific category of teacher, which category was limned by the type of certificate a teacher obtained and held during the

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employment which led to tenure. (In Feit, Ms. Feit was initially employed as an art teacher, having held a certificate in that field from 1969 until 1975 and achieving tenure in that position. In 1976 she was certified as an elementary (K-8) teacher, and was employed in that capacity from 1976 to 1978. She was not rehired for the third year as an elementary teacher. She argued that she was entitled to tenure because of her previous employment as an art teacher. That argument was dismissed by the Appellate Division which held that while she might have had tenure in the field of fine arts, that tenure did not attach in respect to her employment under her elementary certification merely by her employment to teach the sixth grade in the Roselle school sytem. Rather, she had to fulfill the requirements of the tenure statute in order to achieve tenure as an elementary school teacher.) Although the Appellate Division said " . . . we are satisfied that the position of art teacher and sixth grade teacher are separate and apart. . ., " at page 5 of slip opinion, this judge does not construe that to mean that tenure is acquired in a particular position in a particular school but rather in a particular position for which the teacher holds a valid certificate. Applying that rationale to the case at bar there is no question that Ms. Mackey had tenure as a secretary in the Ridgefield school system and that had she applied for a position which was not a secretary but for which other duties and other qualifications were required, her tenure would not have carried over. It does not stand for the proposition that she had tenure in the position as secretary in Slocum School any more than it stands for the proposition that Ms. Feit had tenure as an art teacher in a particular elementary school in the Roselle sytem.

Petitioner's reliance on Beaute and Sheridan is likewise misplaced. Beaute deals with the issue of whether or not the petitioner functioned in a position for the requisite period of time in order to acquire tenure and discusses the fact that employment should be viewed in light of the actual duties performed as opposed to the creation of a paper job. (The board was alleging that she had changed to a different job, inter alia, and therefore should not have been granted tenure.) That is not on all fours with the instant case and cannot be relied upon. The holding of Sheridan v. Bd. of Ed. Ridgefield Park, 1976 S.L.D. 995 actually supports this Board's position. In Sheridan, the Commissioner adopted the board of education's contention ". . . that no statute nor rule of the State Board of Education has ever been promulgated which provides tenured educational

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secretaries with a set of clearly delineated seniority rights or procedures governing dismissal when a reduction in force is effected by employing boards. Nor have categories of employment been promulgated for secretaries such as have been established for teaching staff members. N.J.A.C. 6:3-1.10. Absent such categories and established seniority standards, the Commissioner rejects petitioner's argument that seniority procedures would be triggered within the ranks of tenured secretaries by a reduction in force effected by a board of education." 1976 S.L.D. at 997. What Sheridan is actually saying, and what is applicable to the case at bar, is that a board of education has the authority, absent a showing of bad faith, to terminate positions of tenured secretarial employees without regard for seniority or length of service and without regard to the actual position which is no longer being maintained by the board.

Counsel for petitioner also argues that any action in derogation of tenure rights is the antithesis of good faith and therefore must be considered bad faith. I cannot accept this argument, especially in light of the Commissioner's discussion of examples of bad faith actions of boards in Fegen v. Bd. of Ed. Fair Lawn, 1966 S.L.D. 167 at 170. Bad faith means improper or evil purpose or motive. The record here is devoid of any evidence, or even inference, that the abolishment of one and one-half secretarial jobs and the termination of Ms. Mackey's employment were motivated by "any improper purpose."

It is true, as petitioner's attorney points out, that the cases analyzing the tenure rights of secretaries or clerks, pursuant to N.J.S.A. 18A:17-2, do deal with fact situations where the positions of petitioners in those cases were abolished. Nevertheless, those cases can be distinguished by their own facts and really do not offer guidance for the situation where a position was abolished in a school system and a secretary or clerk who was not in that position was terminated. The reason those cases are not dispositive, by analogy, is that the law is clear that secretaries can be transferred within a school system into other like positions, just as teachers, holding a certificate in a specific category, can be transferred within a school system. (See Williams v. Plainfield.) The fact that transfers can be made at will within a category of employment mitigates against a linkage theory between abolishment of position and termination of employment.

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It is clear from the stipulation of facts that Ms. Mackey was employed as a full-time ten-month secretary by the Board of Education of Ridgefield and assigned to the Slocum School. (See page 2, Stipulation of Fact #4.) She could have been assigned, and reassigned, to any school in the system. The protection given to secretaries by tenure rights is that tenured secretaries must be offered the positions before nontenured secretaries. See Sheridan v. Bd. of Ed. Ridgefield Park, 1976 S.L.D. 955. I conclude that the fact that a board can transfer a secretarial employee from one position to another, which right cannot be questioned, means that if a board determines that a position of secretary in its school system must be abolished that it is not necessary to terminate the secretary who has been working in the position which was abolished. See Given v. Bd. of Ed. East Windsor Regional School District, 1978 S.L.D. 43, aff'd St. Bd. of Ed. 1978 S.L.D. 46, aff'd App. Div. 1979 S.L.D. 832.

Thus, the general law that a board's authority to terminate the employment of a tenured secretary is circumscribed only by the guidelines that it must be done without improper motive and in good faith, is applicable to the case at bar. The fact that respondent did not close the school (Slocum) in which petitioner was working as a tenured secretary, but closed another school (Shaler), and the fact that respondent chose not to retain Ms. Mackey when it determined that it was no longer going to maintain the same number of secretarial positions that it had when the Shaler School was open, does not mean that the person who was working in the Shaler School has to be the person who is terminated. There is no showing here of a lack of good faith and the Board's authority to choose which secretary is to be terminated cannot be circumscribed by reference to which secretarial position was abolished, especially in light of the fact that tenured secretaries are not entitled to seniority rights.

For all the foregoing reasons, I **CONCLUDE** that tenure does not accrue in a specific position as secretary in a specific school, but rather as a secretary in a school system. Therefore, the petition asking for reinstatement, back pay and any other remedies must be **DISMISSED** and Ms. Mackey's claims for relief must be **DENIED**.

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Accordingly, it is hereby **ORDERED** that the petition in this matter be, and is, hereby **DISMISSED.**

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

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

Jan. 18, 1983
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

January 19, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 20, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

sv

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JULIETTE MACKEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner's primary exceptions argue that the Honorable Sybil R. Moses, ALJ erred in concluding that tenure for a secretary does not accrue to a specific position in a particular school. Petitioner contends that, in order for the termination of a tenured secretary to be valid, there must be a specific linkage of that secretary to the position being abolished. The Board's reply exceptions argue otherwise, contending that tenure as a secretary accrues in a school system, not in a specific position in a particular school. The Board's exceptions refute those of petitioner and affirm the initial decision. The Commissioner finds merit in the Board's exceptions.

The Commissioner observes that in the matter presently controverted Judge Moses properly considered N.J.S.A. 18A:17-2, tenure rights for secretaries, and N.J.S.A. 18A:6-10, the manner in which a tenured employee can be dismissed or a reduction in force effected. The Commissioner finds that Judge Moses also properly considered Sheridan, supra, as not being supportive of petitioner's position. The Commissioner notes with approval Judge Moses' conclusion, ante, that Sheridan determines that "***[t]he protection given to secretaries by tenure rights is that tenured secretaries must be offered the positions before nontenured secretaries.***" The Commissioner finds and determines that a secretary in a school system does not acquire tenure to a specific office position in a particular school but rather gains tenure as a secretary in that entire school system.

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The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own. Petitioner's plea to be made whole has no merit.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

MARCH 2, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4176-82

AGENCY DKT. NO. 60-3/82A

BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Petitioner

v.

BOROUGH OF SEA BRIGHT,

Respondent.

APPEARANCES:

Alexis Tucci, Esq., for the petitioner (Gagliano, Tucci, Iadanza and Reisner, attorneys)

Thomas J. Smith, Jr., Esq., for the respondent (Smith and Shaw, attorneys)

Record Closed: November 30, 1982 Decided: January 18, 1983

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

The Board of Education of the Shore Regional High School District (Board), after being advised by its Superintendent of Schools and its Business Administrator that it had financial difficulties in the school year 1981-82, requested a midyear cap waiver. Its request was based upon a deficit in the 198081 school year of $142,000.00 and of an anticipated shortfall of $158,000.00 for the school year 1981-82.

The Board and its Administration prepared documentation and met for its review with the County Superintendent of Schools. The County Superintendent of Schools approved the midyear cap waiver and its approval was directed to the fiscal officers of

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the State Department of Education. On February 17, 1982, the request was submitted to the Commissioner of Education who approved the midyear cap waiver by a communication to the Board.

The Board, on March 2, 1982, then submitted its midyear cap waiver to the voters of each of its four constituent districts; however, the request failed to receive a majority of the voters' approval.

The four constituent districts of the Shore Regional High School District are: the Boroughs of West Long Branch, Oceanport, Monmouth Beach, and Sea Bright. Sea Bright, alone, is contesting the cap waiver grant. The remaining school districts elected not to participate in this contested case.

On March 3, 1982, the Board petitioned the Commissioner to approve the cap waiver irrespective of the votor rejection at the polls. On March 15, 1982, the Commissioner issued an Order approving the midyear cap waiver and directed the County Board of Taxation to levy the appropriate taxes in each of the four constituent districts to meet his $300,000 cap waiver approval. The Commissioner's Order further stated that the matter was subject to further adversarial proceedings between the Board and the local municipal governing body of each of the constituent districts of the regional school district.

The Borough of Sea Bright formally objected to the petition filed by the Board, and the matter was thereafter transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was conducted on May 26, 1982, and a hearing was thereafter conducted on October 5, 1982, at the Office of Administrative Law, Trenton.

The issues identified for adjudication follow:

A. Does the Commissioner have the authority to grant a cap waiver according to documentation presented to him by the Board through the County Superintendent of Schools?

B. Subsequent to a voter's defeat of the cap waiver at the polls, can the Commissioner certify the amount in question to the County Board of Taxation to be raised by local taxes?

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C. When the Board prepared its 1981-82 school budget, could it have reasonably anticipated that the budget would be inadequate to meet its needs for the school year?

I

The budget matter presented here is not the usual annual school budget submitted to the voters for approval; rather, it is a cap waiver approval and the certification by the Commissioner which is now contested. Irrespective of this distinction, this matter must be decided as a school budget issue.

The parameters for budget disputes have long ago been established in E. Brunswick Tp. Bd. of Ed. v. E. Brunswick Tp. Council, 48 N.J. 94 (1966) where the Court said:

> *** The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community." [at 105-106].

In addition to this caveat, the legislature enacted N.J.S.A. 18A:7A-25 which provided for a permissible increase in school budgets as follows:

> The Commissioner may approve the request of a local board of education for a greater increase, having adjudged that (1) a reallocation of resources or any other action taken within the permissible level of spending would be insufficient to meet the goals, objectives and standards established pursuant to this act. . .

Therefore, the Commissioner has authority to approve budget increases when requested by a local board of education to provide a thorough and efficient education when there is a failure of fiscal resources. In Robinson v. Cahill, 69 N.J. 449, 462 (1976) the court commented as follows:

> On the other hand, under the Act of 1975 the Commissioner does not in any sense stand as an arbitrator among local groups, nor does he wait for the matter to be presented to him. Directly or indirectly, he is the initiator. His study and review of the results of the tests and other monitoring procedures that are prescribed,

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> and his consequent action pursuant to such study and review are vastly different from the task he undertakes in putting into final form the terms of an annual budget. These are separate and quite distinct responsibilities that have been allocated to the Commissioner. They call upon him to follow quite separate procedures. For example, his function under the new Act is by no means confined to budget analysis. . . . But where it is clear that an inadequacy stems from a failure of fiscal resources, then the power given the Commissioner and the State Board to effect changes in local budgets does include the power to increase such budgets beyond the amounts locally determined. Such power must of course be wisely exercised and any such exercise will always be subject to judicial review, but there is no doubt that under the terms of the Act of 1975 such power exists.

The procedure for approval of a cap waiver request under N.J.S.A. 18A:7A-25 is set forth in the Cap Review Procedures Guide issued by the State Department of Education. The court in East Windsor Regional Bd. of Ed. v. State Bd. of Ed., 172 N.J. Super. 547, 553 (App. Div. 1980), summarized the procedure as follows:

> The Cap Review Procedures Guide issued by the State Department of Education requires the county superintendent initially to review the local board's budget cap work sheet and cap review fact sheet for accuracy and completeness and "make specific written recommendations to the Commissioner concerning the district's cap waiver request." The Commissioner thereafter reviews the material submitted and decides upon the action to be taken with respect to the cap waiver.

The record shows that this procedure was followed in the instant case; consequently, the law provides convincing language that the Commissioner has the authority to grant a cap waiver according to documentation presented to him through the county superintendent of schools.

II

The voters' defeat of the cap waiver placed no constraints on the Commissioner's authority in his determining an appropriate budget amount in the school district (N.J.S.A. 18A:22-38).

The rationale set forth in section I, above, is applicable here. There is no statute, nor is there decisional law, which states that a budget must be reduced when rejected by the voters (East Brunswick, supra). Taxpayers, through the governing body, may be heard respecting their dispute with the Board over the budget; however, the governing body must do more than register dissatisfaction with the budget.

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The Commissioner is the authority to be convinced that budget monies must be reduced. This conclusion is set forth in many of his School Law Decisions. Also in, In re Upper Freehold Regional School District, 86 N.J. 265, 273 (1981), the Court was evaluating the voters' rejection of the issuance of bonds necessary for repair of structural deterioration of a school building. In that case, the voters rejected the school board's proposal twice; nevertheless, the Commissioner ordered the issuance of bonds. His decision was affirmed by the Court. Thus, the N.J. Supreme Court has certainly taken an expansive view of the Commissioner's authority by ordering the issuance of bonds twice rejected by the voters in a school district.

The Commissioner has further certified the amounts necessary to be raised by taxes directly to the county board of taxation. In In the Matter of the Application of the Henry Hudson Regional School District, 1979 S.L.D. 346, 349, the Commissioner commented as follows:

> The Commissioner, pursuant to his responsibility and the authority conferred upon him by the Legislature, is empowered to adjust school budgets. N.J.S.A. 18A:7A-15 provides, in pertinent part:
>
> > "If, after a plenary hearing, the Commissioner determines that it is necessary to take corrective action, he shall have the power to order necessary budgetary changes within the school district***".
>
> The Commissioner, pursuant to that authority, certifies to the Monmouth County Board of Taxation the additional amount ... to be raised by local taxation in the municipalities of the Borough of Highlands and the Borough of Atlantic Highlands for the current expenses of the Henry Hudson Regional School District for the 1978-79 school year.

I **CONCLUDE** from my review of the aforementioned decisions and N.J.S.A. 18A:22-38, that the Commissioner has the power to increase this school budget and to certify the amount necessary to be raised by taxes to the Monmouth County Board of Taxation. The Upper Freehold Regional decision, supra, is dispositive of this issue.

III

In consideration of the issue of the Board's ability to anticipate the adequacy of its budget for the 1981-82 school year, the record reveals those accounts for which the Board requested additional monies and the Board's evidence concerning its needs. The $300,000 request is itemized in the chart below.

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ACCOUNT NUMBER	ACCOUNT TITLE	AMOUNT
200	Special Ed	$ 10,000
610	Attendance	10,000
700	Employee Benefits	90,000
705	Board of Education	30,000
735	Cafeteria	30,000
740	Central Services	10,000
750	Plant Operations	50,000
755	Transportation	70,000
	TOTAL	$300,000

The Auditor, the Board Business Administrator, a former Board member chairman of the Finance Committee, and the Superintendent testified about the budget shortfall. Their collective testimony shows that the district knew in late November 1980 that there was a $142,000 deficit. The Board's request for a $300,000 cap waiver was intended to cover this $142,000 deficit with the remainder being utilized for unanticipated expenditures in the 1981-82 school year, generally, as set forth in the chart above.

The Finance Chairman testified that the State Department of Education reduced transportation aid monies for the 1981-82 school year after the budget had been set in the fall of 1980. The Business Administrator testified that Blue Cross-Blue Shield rates increased by $71,000 and that this increase was not known until August 1981. The Business Administrator also testified that:

— the Board lost $15,000 in federal impact aid monies because of P.L. 874.

— there was a $10,000 increase required for special education tuition.

— attendance office supplies increased by $10,000.

— employee benefits for social security, workers' compensation, health benefits, pension contributions, and district insurance premiums increased by $90,000 in total amount.

— account No. 705 showed an unanticipated $30,000 increase.

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- the cafeteria losses were anticipated at $30,000, but the program was "turned around" so that its losses were only $10,400.

- central services expenses increased $10,000 over the budgeted amount.

- plant operations increased by $50,000.

- transportation expenses including aid paid to parents of non-public school pupils increased $70,000.

The Business Administrator and the Superintendent testified finally that the former school Business Administrator had "hidden" $70,000 in unpaid bills in his desk drawer. These bills were discovered after this official left the school district.

The total of these expenditure needs far exceeds the $300,000 cap waiver grant, and the Board's letter Brief corroborates $186,000 of these unanticipated expenses for the 1981-82 school year.

Respondent suggests in its Brief that the Business Administrator should have anticipated some of these expenditures since she testified that she was able to so in her former position. Respondent suggests also that the Board should recover monies from its former Business Administrator through appropriate legal proceedings. Respondent also suggested that the Board made no attempt to reallocate any of its resources, pursuant to N.J.S.A. 18A:7A-25.

However, there is no proof by the constituent governing body that the expenditures were in fact anticipated, or that they should have been anticipated. On the other hand, the Board has sustained its burden, by a preponderence of the evidence, that it was in dire need of its cap waiver of $300,000.

I **CONCLUDE** that the Commissioner's decision granting the Board's requested cap waiver in the amount of $300,000 has been supported adequately by the testimony of the witnesses.

Therefore, I concur with the decision of the Commissioner to grant the $300,000 cap waiver.

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

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

January 18, 1983
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

January 19, 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 21, 1983
DATE

Ronald L. Parker/jr
OFFICE OF ADMINISTRATIVE LAW

bm

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DOCUMENTS IN EVIDENCE

P-1 School District Audit dated 6/30/82

Exhibit A Answers to Interrogatories

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BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH OF SEA BRIGHT,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, August E. Thomas, ALJ.

The Commissioner observes that timely exceptions to the initial decision were filed by respondent pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Initially the Commissioner observes that respondent excepts to the legal conclusions reached by the ALJ with respect to the Commissioner's authority to authorize the inclusion of a $300,000 cap waiver to be raised through local taxation for school purposes for the 1981-82 school year.

Respondent's exceptions are summarized in pertinent part below:

> "***In summary, the Borough's position is two fold. First, that the Board should have and could have anticipated the short fall (at the very least $142,000) before it submitted the annual budget for 1981-82. Second, when the Board convened a special election seeking the people's response, that response, the will of the people, is binding on the Board.***"
> (Respondent's Exceptions, at p. 2)

The Commissioner, upon review of the record including respondent's exceptions, finds and determines said exceptions to be without merit for those reasons set down in the initial decision of this matter. The Commissioner so holds.

Accordingly, the Commissioner finds and determines that the Board's requested cap waiver of $300,000 which was previously granted will not be rescinded.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 2, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1262-81
AGENCY DKT. NO. 14-1/81A

LOIS MISHKIN,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,
Respondent

APPEARANCES:

Joel S. Selikoff, Esq., for petitioner
(Selikoff & Cohen, attorneys)

Raymond D. O'Brien, Esq., for respondent
(O'Brien, Liotta & Mandel, attorneys)

Record Closed December 6, 1982 Decided January 19, 1983

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

The petitioner, Lois Mishkin (hereinafter "Mishkin"), has filed a Petition of Appeal with the Commissioner of Education alleging that the respondent, Board of Education of the Borough of Mountainside (hereafter "Board"), had violated her tenure and seniority rights. Specifically, Mishkin claimed that she was "constructively dismissed" during the 1979-80 school year because the Board (through its Superintendent) had treated

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her improperly and expected her to perform her speech correctionist duties on a three-day per week basis under circumstances which required more time than that be devoted to those duties. Mishkin, who had full-time tenure in the district and had been employed for several years on a full-time, five-day per week basis, left the three-day per week position in February 1980 after sending a letter proclaiming her "dismissal" to the Board in December 1979. Subsequently, in October 1980, the Board increased the position from three to four days per week. When Mishkin learned of that change she maintained that she was entitled to the position. The Board refused, claiming that her voluntarily leaving employment in the previous school year meant she had relinquished any claim to other than a full-time position. Her Petition followed.

The Board, in its Answer, denied that it had conducted itself in any improper fashion with regard to either Mishkin's tenure or seniority rights. By way of separate defense, the Board claimed, as well, that Mishkin had voluntarily resigned from employment in the district and thus waived any claim she may have had to be re-engaged when the Board increased the speech correctionist position to more than three days per week in October 1980.* Thus, the Board's essential posture was that it had acted perfectly properly in reducing the position in the first place, that Mishkin had resigned voluntarily and thus waived any rights she may have had to claim a position and, in any event, that she had unduly delayed in bringing the action following the Board's determination in April 1979 to move the position from fulltime to three days per week.

STIPULATION OF FACTS

Prior to the proffer of petitioner's testimony there was admitted in evidence a joint Stipulation of Facts (Exhibit J-1) whose contents, including several attached exhibits, provide a framework for the discussion and Findings of Fact which will follow. The Stipulation set forth that Mishkin was initially employed by the respondent in September 1972 as a full-time speech correctionist. By April 1979 she had served continuously in

* In fact, the Board denied that there even was an "increase" from three to four days per week, claiming that the three-day position was merely "extended" on a temporary basis.

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that position and thus obtained tenure. On April 10, 1979, the Board voted to abolish the respondent's full-time position (the only one in the district) and determined to reduce it to a three-fifths position, effective September 1979. On the following day, the Secretary-Business Administrator wrote to advise petitioner both of the Board's action and that as a tenured staff member in the speech area she was being offered the new three-fifths position. Petitioner accepted the offer and beginning with the opening of school in September 1979 commenced employment as a speech correctionist on the reduced three-fifths basis. However, in a letter dated December 21, 1979 to the then Superintendent of Schools, Dr. Levin B. Hanigan, petitioner advised that in her judgment the working conditions which existed with respect to her employment, and the "arbitrary and capricious treatment towards me," compelled her to conclude that she was "constructively dismissed" as a teaching staff member in the school district and that she would be leaving her employment in 60 days unless a mutually satisfactory earlier date was agreed upon. In that same letter, petitioner set forth that if her position had been continued on a full-time basis, the needs of the students, the school and her own individual professional standards would have been satisfied. Thus, she stated that, "This constructive dismissal applies only to the current three-day position. I am prepared to work on a full-time basis. I am not waiving the tenure rights that have inured to me as a result of my holding the full-time position of speech correctionist during the previous years." Approximately 60 days thereafter, in February 1980, petitioner left her employment with the Board.

On October 14, 1980, the Board adopted a resolution which approved an "extension" of the speech position from three to four days a week. On October 23, 1980, petitioner, having learned of the Board's action, wrote to the Board Secretary and stated that given her tenure as a speech correctionist she was now entitled to claim the four-day position. In that letter petitioner referred to the fact that, in her judgment, she had been compelled to leave her employment because of the Board's action in cutting back in the speech service area and she reminded the Board that her departure was only applicable to the unacceptability to her of the particular three-day position in which she was serving in December 1979. The Board did not accede to petitioner's insistence that it employ her in the four-day per week position, informing Mishkin that her only rights were to a full-time position. Subsequently, at its meeting of March 10, 1981, the Board adopted

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a resolution which again modified the position of speech correctionist and reduced it from four-fifths back to three-fifths, effective September 1, 1981..

The Joint Stipulation also addressed itself to certain other pertinent activitites. Specifically, in November 1978 the Board engaged as a consultant one Rita Fass to prepare a report with regard to the Special Education Services in the school district. In April 1979, the administration, following receipt and review of the Fass report, recommended to the Board that the role of the speech teacher in screening, "be limited to articulation deficiencies." The administration also estimated that, "the required time for this is three days a week." During the 1979-80 budget adoption process in Mountainside the Board had already taken action with regard to the speech correction area and had made certain cuts which were the subject of scrutiny by the Union County Superintendent of Schools Office. In particular, under date of March 21, 1979, a school program coordinator in the Office of the Union County Superintendent wrote to the Board to advise that the county office was seriously concerned about the ability of the district to deliver adequate services for handicapped children. To that end, the office ordered the Board to restore $17,000 for child study team services, inclusive of speech correction. As noted, however, the Board commenced the 1979-80 school year in September 1979 with a speech correctionist position which had been reduced to three-fifths time. Thereafter, under date of November 20, 1979, the County Superintendent wrote to the Board Secretary in reference to the program coordinator's letter of the previous March. In that letter, Mr. Clancy advised the Board that based upon a thorough review of the records of the school district with regard to handicapped children, it was now no longer deemed necessary for the Board to restore the $17,000.

TESTIMONY FOR PETITIONER

Mishkin is a certified speech correctionist and holds a Bachelors and Masters Degree from New York University. With regard to her letter of December 21, 1979 to Superintendent Hanigan, she maintained that it was prompted by her conviction that both legally and professionally it was not possible for her to perform the duties and responsibilities expected of her on a three-fifths time basis. She felt that she was being forced to leave and deliberately used the term "constructive dismissal"

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to describe that event. She maintained that when she learned in the spring of 1979 that the Board was considering a reduction in her work week, she spoke to the then Director of Special Services and told her of the inability to carry out her job in an effective manner if she only worked three days per week. Although she felt that she could make an effort to comply with the needs of the children and the law, she still had an expected caseload, even though reduced, consisting of students who needed more attention and help than the Board was providing. With regard to the numbers of children whom she saw over the years, she indicated that raw numbers were not the only test—that the types of problems and disorders and the particular requirements of each individual child also had to be fully considered. She stressed that in her letter of December 21, 1979 she intended to make clear to Hanigan that she was only determining that she would not and could not perform on a three-day a week basis with the particular caseload she had, but was preserving any and all rights she had to a greater work week position. She insisted that she did not intend to limit herself to "fulltime"; that her concern was directed strictly at the particular three-day per week position.

On cross-examination, a somewhat more detailed analysis took place with regard to the numbers of students involved in the speech area. Admitting that her caseload decreased from 43 in 1978-79 to about 25 in 1979-80, Mishkin pointed out that in her professional judgment the decrease in numbers should have been handled by an increase in the amount of time spent with those remaining students who were in need of her help. In other words, even the reduced number required more than a three-day per week specialist since the remediation they required should have been given on a more intensive basis. Although petitioner agreed that she was able to handle 43 students during 1978-79, and even more in earlier years*, and that there was a substantial decrease in the numbers beginning in September 1979; nevertheless, the reduced caseload still required a full-time speech correctionist because of the variety of communication disorders involved and the help that was needed. In particular, since Mountainside is a K-8 district, Mishkin opined that the children under her jurisdiction who were going on to high school would not be able to receive the sort of help which she could give them at the elementary level.

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* The numbers of students between 1973-74 and 1978-79 ranged, it appears, from over 70 down to 43 (Exhibit R-15).

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During both her redirect and on recross examination, Mishkin testified as to certain directions she claimed she got from Hanigan regarding delay in having I.E.P.s signed by parents. In addition, there was testimony by Mishkin with regard to the fact that she did not believe that she began her direct services any later than normal in the school year. The Fass report had made reference to this and, according to Mishkin, for her always to begin to work with students in September is not appropriate since this is an adjustment period, particularly for students with various sorts of problems. On an ideal basis she said she did not have to get involved until October.

The testimony by petitioner bracketed testimony offered by a witness on her behalf, Ms. Diane Pandolfi, a certified speech correctionist holding degrees in speech pathology. Presently, she is employed as Chairperson in the Speech Department by the Wayne Township Board of Education. She had reviewed the situation involving Mishkin and, in her judgment, did not believe that reduction by the Board of the speech correctionist position from five to three days per week was either appropriate or proper within the statutes and regulations pertaining to the communication handicapped. Pandolfi also took issue with the notion that the speech correctionist should limit her activities to "articulation" problems.

The next witness for petitioner was her husband, Lewis J. Mishkin. He is an attorney at law and licensed to practice in the State of New York. Mr. Mishkin's testimony related to his computation of his wife's claim for damages. He divided her claim into five separate categories including: (1) salary; (2) time and cost of commuting to new employment; (3) pension rights; (4) private practice opportunities; and (5) longer hours. The gist of his testimony subsequently was set forth in the post-hearing memorandum filed on petitioner's behalf. Contained in that memorandum under Point III (pages 35-44) are mathematical calculations and rationale for the figures submitted. The total sought consists of $22,581.52 by way of back pay through June 1982, a claim for additional back pay from that date until the date of any reinstatement and certain pension monies lost both by way of her own contributions and the loss of eligibility for a period of time.

The next witness on petitioner's behalf was Mrs. Gwen McCarthy who was the

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Director of Special Services in Mountainside between July 1, 1969 and June 30, 1979. During the 1978-79 school year, McCarthy learned that the speech correctionist position was to be reduced from five to three days per week. No one, she said, had consulted with her with regard to that proposed reduction. McCarthy mentioned that the student caseload during 1977-78 had caused some discontent and she agreed that a problem did exist with regard to the late activity in starting the I.E.P.s. She saw the Fass report around the end of March 1979 and recalled speaking to Fass. McCarthy claimed that Hanigan had wanted her and the special services staff to provide the minimal possible services. According to McCarthy, in her judgment the reduction from five to three days per week was not consistent with State mandates regarding the delivery of special education services since it did not leave enough time to do the job properly. She stressed that Hanigan nevertheless was insisting that the process be accelerated so that all the work was done, and that this required the elimination of certain activities such as necessary parent contact.

McCarthy said she resigned because Hanigan did not appreciate the problems that she had. The Special Services Department, she said; was attempting to do a quality job, but was opposed by Hanigan who, she assumed, was being pressured by the Board. She found the situation totally frustrating.

TESTIMONY FOR RESPONDENT

The first witness for respondent was its consultant, Dr. Rita Fass. Dr. Fass holds degrees from New York University and Columbia University, teaches at Fairleigh Dickinson University and is presently Director of the Learning Disabilities Program and Center of Clinical Teaching at that institution. In November 1978, she was engaged by the Board to conduct a survey of the special services area and to make a report pertaining to the same. She said she was directed to view generally the special services system and to comment upon four problem areas, including particularly speech needs of children in the face of a shrinking school population. Dr. Fass met with the Board and others during the course of her study and interviewed Mishkin and McCarthy. While she agreed that McCarthy indicated that morale in the special services area was low because of budget cutbacks; nevertheless, she felt that Mountainside still offered services "above and

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beyond" what was required. Fass also felt that although Mishkin was highly qualified, she seemed to be spending too much time with classroom teachers and was also being used to screen for communication handicapped. This function, she felt, was not necessary in order for the district to meet legal requirements.

On cross-examination, Fass indicated that although certified in a variety of areas in New Jersey, including school administrator, she is not certified in the speech area. She also agreed that there is no particular statute or rule of which she is aware which would support her conclusion that as a rule of thumb there should be a speech therapist for each 1,000 pupils. Fass pointed out, however, that although at no time did she ever recommend specifically that there be a reduction in the speech correctionist position from full to part-time, she felt Mishkin was doing more than she had to do insofar as the legal requirements.

The next witness for the Board was its former Superintendent of Schools, Dr. Levin B. Hanigan. Dr. Hanigan served as Superintendent for 20 years until he retired in June 1980. He is certified as a school administrator and said he has always been involved in the special education context throughout his career. He conceded, however, that he is not certified as a speech correctionist.

Hanigan related that during the mid-1970s the emerging need for the processing of a great deal of additional paperwork in the special education area became a problem. He began receiving complaints that the speech services were not starting until the beginning of November and spoke to McCarthy about it. In fact, sometime during 1977, he said that the Board met with special services staff to discuss the complaints and the lateness in starting the services was particularly mentioned. Thus, when the efficiency of the total overall program remained a concern, the Board decided to hire a consultant (Dr. Fass) to review the situation and to make a report. After she completed her survey and before writing her report, Fass met with Hanigan. According to Hanigan, Fass agreed with him that a recommendation of a reduction to three days per week for the speech position would be appropriate. Accordingly, Hanigan made that recommendation to the Board. In fact, he notified Mishkin prior to the Board meeting and gave her an opportunity to be in attendance to hear the discussion and to be present when any action was taken.

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Following Board approval of the work week reduction in April 1979, Hanigan then discussed scheduling with Mishkin. He conceded that she told him that she did not think the job could adequately be done on a three-day per week basis. Under date of July 10, 1979, Hanigan provided the Board with a summary of special service information related to the 1978-79 and 1979-80 school years. With respect to speech, in particular, he noted that a review of the statistics revealed that during the 1978-79 school year 43 children had received such help and that a projection of enrollment for 1979-80 indicated that only 22 children had been scheduled for help in this area. However, he did note the possibility that as a result of children moving into the district, additional screenings and referrals, etc., the total could rise to a maximum of 30. Hanigan noted in his report that in view of the drop in speech enrollment, in contrast to the previous years, the Board had reduced the teaching contract of the speech teacher from five to three days per week and that if any additional help was needed due to any unexpected circumstances, he would look to the Board to authorize the same on a per case basis (Exhibit J-1, attachment "I").

With respect to his particular relationship with Mishkin and the events surrounding her departure from the district, Hanigan explained that when he received her letter of December 21, 1979, he was "quite flabbergasted." He said that he did not know what to make of her charge of arbitrary and capricious treatment—that he was "bowled over." According to Hanigan, Mishkin had never complained to him about any arbitrary action, only about scheduling difficulties. He admitted that he did not thereafter discuss her letter with her, nor did she approach him to discuss it either. He simply presented it to the Board and recommended that the Board accept it, which it did. Based upon his knowledge and understanding of the entire situation, Hanigan was satisfied that offering speech correction services on a three-day per week basis as of September 1979 was perfectly legal and appropriate.

On cross-examination, Hanigan explained that at no time did he feel that the Board was placing any "pressure" on him with regard to the financial aspects of the special services program. He noted that the district had suffered a rapid decrease in school population and that this presented a challenge to the Board with regard to reducing its budget accordingly. Mountainside, he said, had regularly provided services above and beyond that normally expected and it was concluded that a reduction was now called for,

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given the decline in enrollment. With regard to the reduction in the speech correctionist position, he explained that it was a pure management decision based upon the statistical data at hand. Hanigan believed that Mishkin could handle the job on a three-day per week basis. Although no professional staff member in the special education area had recommended a reduction of the position of speech correctionist from five to three days per week, the Board decided from a managerial standpoint to make that move in view of its own independent conclusion that there would not be any serious impact on the program. Basically, with a reduction in case load of the sort noted earlier (43 to 22), it was a compromise position which appeared to be appropriate. According to Hanigan, he reviewed the Fass data and brought his own experience to bear in making the recommendation. As indicated, enrollment decline was the most significant consideration. He did not see any reason why the district could not perform the job required in the speech correction area on a three-day per week basis.

Hanigan also made reference to a claim by Mishkin that he directed her to forget about getting IEPs timely signed. He denied he ever told her to do this, or to ignore any other legal requirements. Rather, he only suggested that the special services people find alternative ways to provide prompt service to the children in need without getting "bogged down" in unnecessary paperwork delay.

The next witness for the Board was the present Child Study Team Director, Mrs. Linda Levine. She holds New Jersey certification as a learning disability teacher consultant and commenced employment in Mountainside in August 1980. Both Levine and the next Board witness, Ms. Gertrude Stager, the speech correctionist hired in September 1980, testified as to the speech caseload during 1980-81 and 1981-82. As noted earlier, the Board increased (or "extended") the position to four days per week in October 1980 due to a caseload increase. Stager, in particular, testified that in September 1980 she had advised Levine of the need for additional time to be spent beyond the three days per week.

The final witness for the Board was its present Superintendent of Schools, Margaret Kantes, who was appointed in July 1980 to succeed Hanigan. During the fall of 1980 she met with Levine and Stager to discuss the speech area and stressed to them that

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she wanted the program to begin in September. By October 1980, Kantes said she felt that an expansion of the position was needed because the caseload had increased to an extent that there were too many pupils (34 by October 2, 1980 with four more possible) for a three-day per week position. Thus, the Board received a recommendation that there be an extension to four days per week, on a temporary basis only, related to the number of students and the particular needs. By February 1981 there were 40 students in the caseload, with an estimate that it would drop back to the 30s by September 1981. Kantes stressed that there was no creation of a new position, but simply an "extension" of the existing position. There was no posting nor was there any official action by the Board abolishing the three-day per week position. With regard to the 1981-82 school year, Kantes recommended that the three-day per week position be reinstated because of the particular caseload which was anticipated for that school year. This was done.

Finally, there was brief rebuttal offered by the petitioner with regard to some of the Hanigan testimony. In particular, petitioner stressed that Hanigan did, in fact, direct her to start her work without first having signatures of parents on all I.E.P.s.

The foregoing summarizes the bulk of the essential testimony offered by the parties in this case. Naturally, it was neither necessary nor desirable to set forth each and every point covered during the course of testimony. The court has attempted to highlight those portions which appeared to it to be most critical to the issues articulated in the Prehearing Order.

DISCUSSION

The primary issue to be addressed concerns, of course, the legal consequences of the action taken by Mishkin in December 1979 when she dispatched her letter to the Board advising that, in her judgment, she felt that under the circumstances which surrounded her terms and conditions of employment she considered herself "constructively dismissed," but was preserving her claim to a "full-time" speech correctionist position. Mishkin argues that as a tenured teaching staff member in December 1979 she was entitled to the full panoply of rights which attached to that status. Accordingly, she maintains that she had and continues to have every right to claim a speech correctionist

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position, be it full or part-time in the district, other than the one she left. Other than a procedural issue involving a contention that her claim is "time-barred" (to be addressed infra), the Board's position is that the conduct manifested by petitioner in December 1979 represented a total relinquishment by her of any further employment in the district other than on a totally "full-time" basis. Indeed, this case commenced only after the Board either "extended," "increased" or otherwise changed the speech correctionist position in October 1980 from three to four days per week. At that point, the petitioner wrote to the Board and claimed that since this was no longer the particular three-day per week position from which she considered herself to have been "constructively dismissed," she had a tenure claim to it. The Board denied any such proposition. Obviously, then, a close scrutiny of the letter of December 21, 1979 therefore is mandatory. As noted, it was written to the Superintendent and begins with a charge by Mishkin that in light of Hanigan's particular actions, her working conditions and his treatment of her, she was compelled to conclude that his actions constituted a "constructive dismissal of me from the teaching staff of the Mountainside school system." Thus, she told him that unless some mutually satisfactory earlier date was agreed, she would be leaving the staff in 60 days. Mishkin next pointed out that her action was further based upon her conclusion that she could not carry out her professional duties, "in the abbreviated, inadequate and incomplete manner that has resulted from my part-time employment." She went on to say that the time restrictions of the new position also interfered with her ability properly to communicate with teachers and parents.

Next, Mishkin attempted to particularize that what she called the "constructive dismissal," stating that it applied "only to the current 3-day position." She continued, "I am prepared to work on a full-time basis. I am not waiving the tenure rights that have inured to me as a result of my holding the full-time position of speech correctionist during the previous years." (Emphasis added).

It is incumbent upon the court to determine what legal effect that letter had and it is this inquiry which has been substantially addressed by counsel in their respective post-hearing briefs. As previously indicated, the petitioner stoutly maintains that the only position from which she deemed herself dismissed was a particular three-day per week position, and while she might have made references to "full-time," the thrust of the

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letter was to preserve her claim to any set of circumstances wherein the singular position of three days per week was either abolished or otherwise modified and replaced by a position beyond that. At the hearing, Mishkin was even more particular in this respect, noting that it was her clear intention to limit her action to the continuation of the exact situation which she found herself in; namely, three days per week with the particular caseload and particular group of children involved. According to petitioner, her letter neither was intended nor could it reasonably have been construed as a "resignation" since she deliberately set forth that she had been "constructively dismissed." To that end, she further argues that Hanigan and the Board's action in deciding to treat that letter as a resignation was simply a self-serving act which cannot be bootstraped into a legal conclusion that a resignation had actually occurred. In sum, Mishkin maintains that her action of December 21, 1979 was not a voluntary resignation, but was conduct that she was compelled involuntarily to do and thus was tantamount to a dismissal. Further, she claims she still retained all of her rights to re-employment, except that particular set of working conditions which existed at the time she left.

The Board, of course, flatly rejects the claim of "constructive dismissal," stating that by her action Mishkin revealed that she did not even treat her own leaving as such. To that end, it points to her setting forth a 60-day notice provision which, it maintains, is absolutely inconsistent with a dismissal, as such. Further, it points to the fact that she was well aware that the Board treated her letter as a resignation, and of its action accepting the same in that context. The Board also points out that her failure in challenging the Board's action in accepting her "resignation" is evidence of her agreement with the Board's analysis of what the consequences of her letter were. In short, it is the Board's position that the petitioner's conduct, as revealed in her letter of December 21, 1979, was no more nor less than a voluntary resignation from the three-day per week position that was neither forced or otherwise imposed upon her, except insofar as she harbored a subjective, erroneous belief that it was. There being, in the Board's view, no improper inducement, her act thus results in a total exoneration of the Board's subsequent refusal to offer her another part-time speech correctionist position which involved more than three days per week. Further, since it treats Mishkin's letter as a resignation, and since the letter refers to a full-time position as the condition for her return, the Board

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further argues that Mishkin "waived" any claim she might otherwise have had as a tenured employee to a part-time position different from that of the three-day speech correctionist job which she left.

My review of the evidence leads me to conclude that the Board's action in this case was perfectly proper. Although Mishkin claimed in her letter that Hanigan had treated her in an arbitrary and capricious manner and that it was therefore "impossible" for her to proceed with her duties under the particular conditions, I find a plain lack of evidence sufficient to support any finding in that regard. What I perceive to have happened is that the tensions and aggravations which surround a situation wherein a valued teacher found herself "hemmed in" with regard to time available to carry out her duties finally led to an explosion of sorts in the nature of a disagreement as to what was or was not professionally proper. While not necessarily to be characterized as a "perfectionist," Mishkin took it upon herself to decide to disagree with Hanigan and the Board and conclude that she could not adequately perform the duties with the constraints placed upon her. From her particular, subjective vantage point, her ability to function in a professionally effective manner seems to have been impeded, if not obliterated. Nevertheless, I find no basis in the evidence to support her conclusion that she was treated in an arbitrary or capricious fashion, or was deliberately made the victim of such insidious conduct by Hanigan, the Board or anyone else.

Pertinent to this case is the decision of the Commissioner of Education in Boguszewski v. Board of Education of Demarest, 1979 S.L.D. 232. In that case, the petitioner had been a full-time teacher of instrumental music for approximately 17 years. His employing board adopted a resolution which abolished his position for reasons of economy as of the next school year. He then found a new position in another school district and signed a contract for full-time employment in that district to commence the following September. However, in August Boguszewski was notified by the Demarest Board that his former full-time position had been restored to a three-fifths time position and since he still retained tenure and seniority rights, he was entitled to it at an appropriate pro rata salary. He then wrote to the Demarest Board and stated that he could not accept the part-time position because of financial considerations, but if a full-time position was offered him he would certainly reconsider. Thereafter, at the

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conclusion of the next school year, the new board for whom he worked declined to reemploy him and he notified Demarest that he now was available to resume teaching and would take the three-fifths position. The Board, however, denied his request stating that he had waived any claim by declining employment when it was offered to him the previous August.

The Commissioner found that although under N.J.S.A. 18A:28-9 and N.J.S.A. 18A:28-12 Boguszewski did enjoy tenure and seniority rights which entitled him to any part-time position which was created, since he refused the part-time offer "for his own personal reasons," there was a clear waiver of both his tenure and seniority in the three-fifths position. Since Boguszewski's basis for rejection was that he had received a more lucrative job offer, it would not be appropriate to construe the statutes to protect a teaching staff member who chooses a "better" job and then, when losing it, comes back to demand the less lucrative one which he previously had turned down. As characterized by the hearing examiner, the petitioner's contention, if accepted, would "allow a teaching staff member to forever opt between his alleged tenure entitlement and a more lucrative position, returning to his old position only when all other job opportunities have been exhausted." Boguszewski, supra. at 235. Thus, it was determined that because Boguszewski voluntarily relinquished his right to claim the part-time position when offered to him, he had waived any future claim to it.

There are, of course, distinctions between the Boguszewski case and the matter sub judice. Here, Mishkin left the three-fifths position not for a better job offer but because, in her words, she was "constructively dismissed." Based upon my review and analysis of the testimony, I reject that conclusion. She was not "dismissed," constructively or otherwise. She freely and voluntarily decided that her own professional standards could not be honored under the particular conditions which she found herself in. While the Board's action certainly could be the subject of appropriate criticism by experts in the field with regard to its decision to reduce the speech correctionist position strictly on the basis of raw numbers, I cannot say that the Board's action was arbitrary, capricious or unreasonable or otherwise so deficient as to set it aside by tagging it as a "constructive dismissal." Thus, although the facts, as noted, are different from that in Boguszewski, I

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believe that the principle is the same. In both cases, a tenured staff member had his or her full-time position abolished and for personal reasons found the part-time employment then offered (or, as here, in which service was taking place) to be personally unacceptable. Having rejected Mishkin's claim that the circumstances were tantamount to having "forced" her to do what she did, the only conclusion to be drawn is that she, like Boguszewski, voluntarily left as the result of her own independent decision.

Of course, in Boguszewski the claim involved a request that he be given the exact position which he had turned down the previous year. In the instant matter that is not precisely the case as Mishkin seeks recognition that she had a right to claim the new position which the Board adopted in October 1980 whereby there was either a four-day a week position or an "enhanced" three-day a week position. In this respect, of course, the Board claims that Mishkin's letter constituted, at best, a refusal to accept any position which was not a full, five day a week position. Although in her letter the petitioner made specific reference to rejecting the three-day a week job, she made clear that what she would find acceptable would be a full-time position. It is not clear from the letter itself that she was ready, willing and able to accept or would expect to be advised of some position which was more than three days, but not full-time. However, having carefully scrutinized her letter, and taking into account all of the background circumstances, I can not find that petitioner has carried her burden of proving that her condition for being employed extended to whatever position the Board created and/or modified in October 1980. Rather, from the facts that were adduced at the hearing, I must construe her letter to have limited her demand to only the full-time, five day a week position which she had enjoyed for seven years previous thereto. Here, again, the Boguszewski decision can be of value by way of reference. As noted by the hearing examiner in that case, any recognition of Boguszewski's argument would have placed the Board in the untenable position of having to rely solely upon the whim of the teacher to decide whether or not to opt to return, depending upon whether he believed it was a better job than one which he may have had or expected that he could get. This is not unlike the situation here where the Board would have to rely upon Mishkin to decide whether a modified speech correctionist position was more acceptable to her, even though not strictly a full-time position.

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From my review of the evidence, and as will be set forth in the specific Findings of Fact which will follow, I have determined that the Board, during the spring of 1979, honestly and sincerely concluded on the basis of reports received from its Senior Administrator, and from a consultant, that a shrinking of the special education offerings, both in terms of time required and dollars spent, would be appropriate. While one may disagree with that determination, it was nevertheless well within the discretion of the Board to make and there was no sufficient demonstration that such action was arbitrary, capricious or unreasonable. Further, although one may fully sympathize with the petitioner in her independent, subjective determination that she could not with full effectiveness carry out the duties expected of her within the time allowed; nonetheless, that is a decision which, absent any legal deficiencies, is one which the employer not the employee has to make. See, Wexler v. Board of Education of Hawthorne, 1976 S.L.D. 309.

The determination as to the carrying out by boards of education of their managerial activities is one which is left in the hands of the board to make. Absent some violation of law, demonstration of bad faith or other overriding aspect, substitution of the judgment of an Administrative Law Judge, or the Commissioner, for that of a Board is inappropriate whether or not one agrees or disagrees with the wisdom or policy of the Board's particular action. While the petitioner honestly perceived that she was being forced to leave her employment, and while she may have believed that she had the right to set down certain conditions under which she would return, the fact remains that it was not up to her to conclusively determine those issues. Boards make these decisions, not staff members.

In rejecting petitioner's claim, I should also note that I do not accept the Board's argument that a four-day position was never effectively created, and that all that it did in October 1980 was, for convenience sake, add some extra hours to the three-day per week position. While technically that argument has some appeal, I believe that from a practical standpoint there was a new position created which was more than three days per week and not simply three days plus, as the Board phrases it, a "per case basis position." Further, I am rejecting the Board's argument that the provisions of N.J.A.C. 6:24-1.2 (the 90-day rule) apply. That position had been referred to by way of oral argument at the initial

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stage of the hearings and was the subject of an oral motion. Specifically, the Board takes the position that as early as April 1979, and certainly no later than December 1979, petitioner was on notice that her position was going to be reduced and that it was not until many months later that she filed the instant action. I must reject that contention. What petitioner challenged was the failure of the Board to provide her with the new four-fifths position which it created in October 1980, it being Mishkin's view that since this was different from the three-day per week position which she left she was entitled to claim it in accordance with her December 1979 letter. The petition, in that light, was filed within the 90-day period.

By way of recap, although the petitioner enjoyed both certain tenure and seniority rights as of December 1979, by her voluntary action in December 1979 she relinquished any claim which she may therafter have had to a speech correctionist position which was not full-time. Further, petitioner was not the victim of a "constructive dismissal" which would immunize her from the above determination. Accordingly, petitioner had no claim to the position which the Board created in October 1980 and therefore suffered no deprivation of tenure or seniority rights by virtue of any action of the Board. Consequently, no damages are to be awarded to her.

The following, then, are the specific Findings of Fact which the court has reached with regard to this case and upon which the above discussion essentially rests.

FINDINGS OF FACT

1. Petitioner commenced employment as a speech correctionist in Mountainside in September 1972 and obtained tenure in that position with the commencement of the 1975-76 school year.

2. Beginning some time during the mid-1970s, and particularly in or about 1977, Mountainside began to experience a reduction in its total enrollment. In addition, at about the same time, Superintendent Hanigan began to be concerned, along with the Board, with regard to the paperwork which was required, particularly in the special services area.

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3. As a result of the enrollment decline and concerns which Hanigan and the Board had with regard to the special services area generally, it was determined that a consultant be engaged by the Board to examine into some of these problems.

4. In November 1978, the Board hired Dr. Rita Fass and charged her with the obligation of reporting back to it with regard to the delivery of special education services. This action was prompted by the Board's previously noted concerns in this area and its determination that an evaluation by an outside consultant would be necessary and appropriate in order to help the Board meet the concerns which it had.

5. Dr. Fass addressed herself, particularly, to certain problem areas, including what was perceived to be a "late" start with regard to the delivery of speech therapy to students in need, the large volume of special services referrals through the Child Study Team, a growing backlog of cases for initial processing and annual appraisal and a growing demand for services in areas of special needs in the face of a declining school population.

6. Although Dr. Fass had no specialized training or certification in the area of speech services, she holds a Doctorate Degree from N.Y.U., a Masters Degree in Education from Columbia, has been employed as a coordinator of guidance programs, an elementary school principal, a superintendent of schools and currently is Director of the Learning Disabilities Program and Center of Clinical Teaching at Fairleigh Dickinson University. In connection with her career, Dr. Fass has had experience in the supervision of speech teachers.

7. Dr. Fass undertook a study and evaluation of the Mountainside special services area and came to the conclusion that the district was offering services beyond that which one might consider to be "minimal" in nature.

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8. Based upon her study and review, Dr. Fass concluded that modifications in the speech area could be implemented, including a limiting of the role of the teacher to screening for articulation problems.

9. In analyzing the district's needs in the area of speech correction services, Dr. Fass did not make any specific recommendation to the Board with regard to the numbers of days per week which would be required of a speech correction teacher. However, she did discuss this aspect with Dr. Hanigan and acquiesced, at least, in his ultimate recommendation to the Board that the speech correctionist position could be reduced from five to three days per week commencing in September 1979.

10. In analyzing the speech area, Dr. Fass did consider the question of the number of speech teachers needed per 1,000 pupils and surveyed certain other school districts to determine how Mountainside was faring in that respect. To that end, she identified seven other districts which she believed to be comparable to Mountainside on a socio-economic basis and found that the range of student population and range of student services were such that it supported her "rule of thumb" that you would need one full-time speech teacher for every 1,000 pupils. Application of that rule of thumb to Mountainside would support a determination that a speech correction teacher be engaged on a three day rather than a five-day per week basis.

11. The Mountainside Board received a report from its Superintendent at its meeting of April 10, 1979 which dealt with the evaluation of the area of special services. In that report the Superintendent recommended that it was the administration's estimate that only three days rather than five days per week would be needed in order for the speech correction teacher effectively to carry out her role, given the number of anticipated pupils that would need such services.

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12. The Board decided at its meeting of April 10, 1979 to reduce the speech correctionist position in accordance with the Superintendent's recommendation, beginning in September 1979.

13. During the 1978-79 school year, the petitioner was responsible for delivering speech correction services to a total of 43 students. For the previous five school years the caseload had always been higher, once reaching 70. It was estimated by the administration in reporting to the Board in April 1979 that the number of such students for the 1979-80 school year would approximate 30, at most.

14. Following its determination to reduce the speech correction position from five to three days per week beginning in September 1979, the Board offered Mishkin, and she accepted, employment beginning in September 1979 on a three-day per week basis.

15. Even taking into account any concerns expressed by Mishkin, it was Hanigan's conclusion, and the reason for his recommendation to the Board, that a reduction of the speech correction position to three days per week was an appropriate and educationally sound way to deal with the reduction in number of students as well as dealing with the need for the Board to more closely prioritize its budget so as to deal with financial pressures which it was facing (Exhibit J-1, attach. "I").

16. Commencing in September 1979, Mishkin began working as a speech correctionist on a reduced, three-day per week basis.

17. During the period following her commencement of employment in September 1979 and into December 1979, petitioner came to the conclusion in her own mind that her ability to effectively provide speech correction services was not possible on a three-day a week basis.

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18. In a letter to Hanigan dated December 21, 1979 (Exhibit J-1, attach. "C") petitioner stated as follows:

> In light of your actions with respect to my employment status, working conditions and your arbitrary and capricious treatment towards me, I am compelled to conclude your actions a constructive dismissal of me from the teaching staff of the Mountainside school system. Accordingly, I will be leaving the staff in 60 days, unless a mutually satisfactory earlier date is agreed upon.
>
> I have thoroughly enjoyed working with the children and with many of the personnel. It is impossible to proceed with my professional duties in the abbreviated, inadequate and incomplete manner that has resulted from my part-time employment. I am distressed, and you should be as well, by the fact that I am unable to give service to all those who need it. Your time restrictions also preclude proper communication with the classroom teachers and parents of those children being treated, another factor reducing the effectiveness of my position.
>
> If I had continued to be employed on a full time basis, the needs of the students, the school and my professional standards would all have been satisfied. Therefore this constructive dismissal applies only to the current 3 day position. I am prepared to work on a full time basis. I am not waiving the tenure rights that have inured to me as a result of my holding the full time position of speech correctionist during the previous years.
>
> I, as a parent and resident of Mountainside, hope that you will remember that my position was to service children with speech and language problems and that a highly qualified and experienced person will be hired to fill this position. (Emphasis added).

19. Following receipt of petitioner's letter of December 21, 1979, neither Hanigan nor the Board conferred with her concerning its contents. Nor did petitioner approach either Hanigan or the Board with regard to that subject.

20. Hanigan ultimately presented the letter to the Board of Education and recommended that it be accepted. Thereafter, in January 1980, the Board

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at a public meeting accepted the letter, treating it as petitioner's resignation (Exhibit R-2).

21. Although petitioner's letter set forth allegations concerning the reasons she said led up to its having been sent, her conclusions that she was treated in an "arbitrary and capricious" manner and was being "constructively dismissed" were not supported by the evidence and, therefore, her letter was tantamount both to a resignation from the part-time employment which she held at that time, as well as a waiver of her rights to any but full-time employment.

22. Shortly after the commencement of the 1980-81 school year, and as a result of an increased number of students requiring speech correction services, the then Superintendent, Margaret Kantes, in cooperation with the special education staff, determined to increase the workload of the speech correctionist position to the equivalent of four days per week (Exhibit J-1, attach. "D", Exhibit R-18).

23. Upon learning of this change in the workload, petitioner promptly wrote to the Board Secretary concerning the fact that she believed she was entitled to this speech correctionist position and therefore was ready, willing and able to resume her employment (Exhibit J-1, attach. "E").

24. In response to petitioner's request, she was advised that the Board took the position she would only be entitled, by virtue of her tenure, to a full-time position (Exhibit P-8).

25. In January 1981, petitioner commenced the instant action by filing a Verified Petition of Appeal with the Commissioner of Education, said filing having occurred within 90 days of her receipt of notice from the Board that she would not be given the position of speech correctionist which was established by the Board in October 1980.

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26. In March 1981, subsequent to the filing of the Petition, the Board again modified the speech correctionist position by decreasing it from four-fifths to three-fifths time, said change to become effective September 1981. The Board also approved a contract for the person who was then employed as the part-time speech correctionist teacher (Exhibit J-1, attach. "F").

Based upon the above Findings of Fact, and in view of the discussion previously set forth, I have **CONCLUDED** that contrary to petitioner's claims, the action of the respondent in this matter did not impinge in any way upon her tenure or her seniority rights. In essence, petitioner simply took it upon herself to disagree on a personal and professional level with the decision made by the Board in April 1979 to reduce her position to part-time. She voluntarily and without coercion or inducement determined to give up that part-time employment in December 1979. That, of course, was her decision to make, but she made it at her peril. I have further determined from all of the evidence that the petitioner preserved no right to any other part-time position, particularly the one which the Board created in October 1980. While petitioner may have had some legitimate concerns with regard to the manner of operation of the speech correctionist position, the appropriate channel through which to express those concerns would have been by way of dialogue, discussion and conferencing with her superiors. In retrospect, her letter of December 21, 1979, while certainly most well-intentioned, was a precipitous act, contained unsubstantiated charges and the Board responded appropriately to it.

Nor can petitioner prevail on her claim that the resignation was related strictly to the particular three-day per week position which she left. Although her letter refers to that position, petitioner is not entitled to lay down specific conditions which she unilaterally would consider in deciding whether to return to her employment. Because of the nature of the speech position and the varying caseload, the Board would have been placed in a totally untenable position if it had to first present for her approval any possible part-time employment in any way different from that which petitioner voluntarily left. The totality of the circumstances, then, leads the court inexorably to the conclusion, regretable though it may be with regard to a fine professional, that her

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conduct in December 1979 was in the nature both of a resignation from her part-time employment and a waiver of any right to reemployment, other than to a full-time position which was never again created by the Board.

In view of the findings reached, there is no further need to address the issue of damages. Since petitioner's claims are being dismissed, it follows that no damages are to be awarded to her. It is hereby **ORDERED** that the Petition of Appeal be **DISMISSED**.

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

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

January 19, 1983
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

January 21, 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 24, 1983
DATE

Ronald L. Parker/pa
FOR OFFICE OF ADMINISTRATIVE LAW

ms

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APPENDIX

List of Witnesses

For Petitioner:

Lois Mishkin
Diane Pandolfi
Lewis J. Mishkin
Gwen McCarthy

For Respondent:

Dr. Rita Fass
Dr. Levin B. Hanigan
Linda Levine
Gertrude Stager
Margaret Kantes

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List of Exhibits

Exhibit No.	Description
J-1	Joint Stipulation of Facts
P-1	Memorandum of November 1, 1977 re speech and language program review
P-2	Letter of September 21, 1979 from Mishkin to Hanigan
P-3	Job description—speech/language correctionist
P-4	Memorandum from Hanigan to McCarthy, et als. re Fass report, dated April 3, 1979
P-5	Memorandum from Mishkin to Hanigan, dated October 30, 1979
P-6	Memorandum from Mishkin to Hanigan, dated December 5, 1979
P-7	Memorandum from Mishkin to Hanigan, dated December 18, 1979
P-8	Letter from McDonough to Mishkin, dated November 5, 1980
P-9	Proposed school calendar (1979-80)
P-9A	School register summary (1979-80)
P-10	School calendar (1980-81)
P-10A	School register summary (1980-81)
P-11	School calendar (1981-82)
P-12	Letter of November 4, 1977 from Ronald Benford to Hanigan
P-13	Letter of January 4, 1980 from Hanigan to Mishkin
P-14(Id.)	Packet of documents
P-15(Id.)	Copy of N.J.A.C. 6:28-1 et seq.

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P-16(Id.)	Interrogatory #5, April 7, 1981
P-17(Id.)	Page 1 of Interrogatory, April 7, 1981
P-18	Letter from Mishkin to Clancy, dated June 29, 1979
R-1	General comments on Special Services Department, dated March 8, 1979
R-2	Extract of minutes of Mountainside Board of Education meeting, January 15, 1980
R-3	1978-79 daily schedule
R-3A	1979-80 tentative schedule
R-3B	1979-80 schedule as of 9/79
R-3C	1979-80 actual schedule as of 1/25/80
R-4(Id.)	List of students
R-5	Follow-up record on student "M.D."
R-6	Letter from Hanigan to Mishkin, dated April 6, 1979
R-7	Memorandum from Fass to McDonough, dated March 22, 1979
R-8	Letter from Clancy to Hanigan, dated August 8, 1979
R-9	Letter from Williams to Clancy, dated August 1, 1979
R-10	Letter from Hanigan to Clancy, dated August 1, 1979
R-11	Letter from Clancy to McDonough, dated March 15, 1979
R-12	Interrogatory response from Benford, dated February 3, 1982
R-13	Extract of minutes of Mountainside Board meeting, July 8, 1980
R-14	Letter from Clancy to Mishkin, dated July 3, 1979

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R-15	Speech data memorandum, dated July 9, 1979
R-16	Memorandum from Stager to Levine, dated September 10, 1980
R-17	Memorandum from Stager to Levine, dated October 2, 1980
R-18	Memorandum from Stager to Levine, dated November 24, 1980
R-19	Memorandum from Stager to Levine, dated February 3, 1981
R-20	Memorandum from Stager to Kantes, dated September 17, 1980

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LOIS MISHKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, Stephen G. Weiss, ALJ.

The Commissioner observes that timely exceptions to the initial decision were filed by the parties and that the Board subsequently filed reply exceptions, pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner finds and determines that the exceptions of the parties are essentially the same arguments advanced before the ALJ and have been addressed in detail in the initial decision. These exceptions are noted by the Commissioner and are incorporated by reference herein.

In the Commissioner's judgment the main issue to be resolved in the matter controverted herein pertains to the resignation tendered by petitioner and accepted by the Board. It is clear that petitioner's position is that her resignation from the Board's employ pertained only to the 3/5 position in which she commenced part-time employment as a speech correction teacher, after the Board had abolished her full-time employment in that position.

The record of this matter fails to establish that the Board's action in abolishing petitioner's full-time position was in any way arbitrary, capricious or illegal. The Commissioner is constrained to observe that petitioner's resignation from her 3/5 teaching position effectively terminated her employment in the Mountainside School District. No other full-time or part-time position existed for a speech correction teacher when petitioner acted to terminate her employment with the Board. The Commissioner finds that petitioner's arguments with respect to her claim that her resignation from the Board's employ did not constitute a waiver of her tenure or seniority rights to a 4/5 or full-time position thereafter is without merit. The Commissioner so holds. There is nothing in the record of this matter to convince the Commissioner that petitioner's resignation was not voluntary and of her own doing. Petitioner's claim with respect

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to her continued tenure and seniority rights to a 4/5 or full-time position as a speech correction teacher was effectively terminated upon the acceptance of her resignation by the Board.

As the Commissioner said with respect to the effect of a resignation in F. Rupert Belles v. Board of Education of the Township of Wayne, 1938 S.L.D. 556 (1933):

> "***Acceptance is to offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone.***" (at 557)

In view of the above, the Commissioner reverses that part of the ALJ's findings which pertains to petitioner's entitlement to a full-time position as speech correction teacher, should the Board create such position. The Commissioner adopts the ALJ's determination that petitioner's Appeal be dismissed.

Accordingly, the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

MARCH 4, 1983

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LOIS MISHKIN, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, March 4, 1983

For the Petitioner-Appellant, Selikoff & Cohen
(Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Respondent, O'Brien, Liotta & Mandel
(Raymond D. O'Brien, Esq., of Counsel)

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

September 7, 1983

PENDING SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7095-81
AGENCY DKT. NO. 385-9/81A

WILMA COLELLA,
Petitioner,
v.
ELMWOOD PARK
BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Frances J. Vernoia, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys;
Robert A. Fagella, Esq., on the brief)

Matthew P. DeMaria, Esq., for respondent
(Baldino and DeMaria, attorneys)

Record Closed: November 12, 1983 Decided: January 26, 1983

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

Statement of the Case

This is an appeal by a tenured school administrator who was transferred without loss of salary from the position of high school principal to high school vice principal for the 1981-82 school year. It raises the question of whether, as petitioner contends, her removal

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from the tenured position of principal in the absence of the bringing of specific charges against her or a reduction in force constitutes a "dismissal" in violation of her tenure rights under N.J.S.A. 18A:28-5 and 6. Or whether, as the local school board maintains, petitioner's reassignment to other duties was merely an exercise of its powers under N.J.S.A. 18A:25-1 to transfer an employee from one assignment to another within the scope of her certification. As shall be seen, the controlling law vindicates the board's position that its action was not a dismissal within the meaning of the tenure statute. Therefore, the board remains free to utilize petitioner's considerable talents in the position for which it has determined she is best suited.

Procedural History

On September 21, 1981, petitioner Wilma Colella filed her verified complaint with the Commissioner of Education seeking to overturn her allegedly "illegal demotion" from high school principal. She asked for reinstatement to her prior job title of principal and an award of any salary increases she could have expected to receive in her former position. Respondent Elmwood Park Board of Education filed its answer on October 7, 1981. While the board recognized Colella's tenure status, it denied that she was entitled to any particular assignment or salary increase.

Subsequently, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A hearing was held on September 14, 1982. Witnesses who testified at the hearing and documents considered in deciding this case are listed in the appendix. Both parties filed post-hearing documents by November 12, 1982. Time for completion of the initial decision has been extended to January 26, 1983. N.J.S.A. 52:14B-10(c).

Undisputed Facts

Most of the material facts have been stipulated. Wilma Colella has been continuously employed as a teaching staff member by the board for a total of 23 years. At the time of her initial employment, she held a regular instructional certificate issued

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by the State Board of Examiners authorizing her to teach mathematics and physical science in the secondary schools. During her first 11 years of service in the district, she was employed as a teacher. In August 1966, she received a certificate from the State Board of Examiners qualifying her to serve as a secondary vice principal. From September 1969 to December 1975, she was assigned to the position of vice principal of the high school. Meanwhile, in March 1968, she obtained a separate certificate from the State Board of Examiners qualifying her to become a secondary school principal. Between December 1975 and March 1976, Colella was assigned as acting principal of the high school. Then, in March 1976, Colella was appointed to the position of principal of the high school. Except for an eight-month interval during 1979-80 when she was temporarily reassigned to the position of vice principal, Colella remained as the principal of the high school until June 1981.

On June 24, 1981, the board transferred Colella to the position of vice principal of the high school for the upcoming 1981-82 school year. Her salary for the 1981-82 school year was $26,951, which is the same amount she had received as principal of the high school during the 1980-81 school year. If she had continued as principal, her salary would have been $28,176 for the 1981-82 school year under the contract then in effect. A vice principal who did not have tenure as a principal was transferred to replace Colella in the position of high school principal.

It is agreed by the parties that Colella has attained tenure in the position of principal. Since her performance on the job has always been more than acceptable, no charges have ever been brought to remove Colella from office. Nor did her recent transfer come about as the result of a reduction in force for reasons of economy or efficiency. Instead, the Superintendent of Schools John Santini recommended the change of assignment to the board because of his perception that curriculum development and staff morale at the high school needed substantial improvement. Although Colella was doing "satisfactory" if not "spectacular" work, the superintendent believed that another qualified individual available in the district could do an even better job as principal. By the same token, he estimated that Colella's personal strengths could be put to more effective use if she were moved to the duties of vice principal.

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Summary of Disputed Evidence

Each side acknowledged that the duties shown on the official job descriptions adopted by the board do not accurately depict the actual duties assigned to the occupants of the two positions. To the extent that any disagreement on facts exists in this case, it centers on the parties' differing attitudes toward the respective roles of the principal and the vice principal.

Colella, who has served the district in both capacities, viewed the switch of jobs as a significant loss in the nature and extent of her responsibilities. As a practical matter, she considered her transfer to be a complete role reversal between herself and the person who had previously been her immediate subordinate in the educational hierarchy. Before the transfer she had been directly responsible for managing the entire high school, answerable only to the superintendent and the board of education. Now everything she wanted to do required the approval of the new principal. Basically, her present duties as vice principal were limited to directing student activities and resolving student problems such as locker assignments and lunch supervision. In particular, she complained about the lack of any involvement with planning of the budget, administration of the insurance program, supervision of student teachers and discipline of students. These were all areas in which she had actively participated while she was principal, but which her successor had delegated to other staff members.

On the other hand, the superintendent of schools regarded the duties belonging to principal and vice principal as overlapping. Some of the vice principal's functions he described as areas of "shared responsibility," including development and evaluation of curriculum, supervision of teaching staff, and implementation of school activities. Other tasks, such as budget preparation or oversight of food or library services, would be the concern of the vice principal only if the principal specifically assigns those duties. Nonetheless, the vice principal must be prepared to fulfill any or all of the administrative duties in the principal's absence.

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At one point the superintendent went so far as to suggest that the two jobs, which presently require the same qualifications, were essentially "identical," aside from minor distinctions such as the authority of the principal to suspend a delinquent student. But eventually he was forced to concede that indeed the principal had much greater responsibility and could override any decision made by the vice principal. Such difference in the degree of responsibility is reflected in the much higher range on the salary guide for the salary of a principal as compared with a vice principal.

Findings of Fact

I **FIND** that, realistically, the transfer from the position of principal to vice principal represents a genuine loss of power and prestige for the transferee. While the vice principalship is a responsible job demanding great skill and proven ability, it cannot possibly be equated in importance with the principalship itself. The relationship between principal and vice principal is like that of chief executive and high-level assistant. Undoubtedly, Colella suffered a "demotion" or diminution in "rank" when she was removed from the top position and placed in a lower one. However, that finding is not dispositive of the legal issue involved here.

Conclusions of Law

Based on the applicable law, I **CONCLUDE** that the transfer of its administrator from principal to vice principal was properly within the board's discretion.

Generally, N.J.S.A. 18A:25-1 confers upon local boards of education the broad authority to transfer or reassign staff members within the scope of their certifications. Power to transfer teachers is an inherent managerial responsibility. Downs v. Hoboken Bd. of Ed., 12 N.J. Misc. 345 (Sup. Ct. 1923), aff'd sub. nom. Fletcher v. Hoboken Bd. of Ed., 113 N.J.L. 401 (E. & A. 1934); Cheeseman v. Gloucester City, 1 N.J. Misc. 318 (Sup. Ct. 1923). A board has a "duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education." Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978). No teaching staff member has a vested right to any particular assignment, class or school.

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Nevertheless, a board's authority is limited by other statutes granting tenure rights to certain positions. Petitioner points to N.J.S.A. 18A:28-5 which provides that "all teaching staff members including ... 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" shall acquire tenure after service in the district for the appropriate three-year probationary period. Thereafter, they "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause." N.J.S.A. 18A:28-6 goes on to provide that any staff member under tenure "who is transferred or promoted with his consent to another position" obtains tenure "in the new position" after a two-year period of employment. Here the board cannot deny that Colella acquired tenure in the position of principal which she served for more than five years after already having acquired tenure as a teacher and vice principal. Thus the issue becomes whether her transfer to vice principal should be considered either a dismissal or reduction in compensation prohibited by N.J.S.A. 18A:28-5 without the establishment of cause for removal.

Any doubts about the board's power to transfer a tenured principal to the duties of vice principal were laid to rest by the Appellate Division in Parsippany-Troy Hills Bd. of Ed. v. Morell (N.J. App. Div., Dec. 16, 1981, A-1619-80T2) (unreported), certif. den. 89 N.J. 419 (1982). On facts parallel to those of the present case, the Appellate Division squarely held that the transfer of a tenured elementary school principal to the position of acting principal of a junior high school does not constitute a dismissal as that term is used by N.J.S.A. 18A:28-5. In so doing, the court rejected the principal's objection that the tenure law protected him against "demotion." That word, the court noted, is "nowhere mentioned in the statute."

Similarly, in the recent case of Childs v. Union Twp. Bd. of Ed. (N.J. App. Div., July 19, 1982, A-3603-80T1) (unreported), the Appellate Division found no need to even consider whether the transfer from guidance counselor to teacher was a demotion or change in rank. Instead, the court explained:

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> What is important is that the certifications for teachers and for guidance counselors are based upon different qualifications. This case does not present, as was true in Williams v. Plainfield Bd. of Educ., [176 N.J. Super. 154 (App. Div. 1980), certif. den. 87 N.J. 306 (1981)], a transfer back to a position where "the certification required is the same." 176 N.J. Super. at 158. Childs earned her right to tenure in her separately certificated position as guidance counselor. She cannot, without proper statutory grounds established at a statutory hearing, be removed or dismissed from that position. (slip op. at pages 8-9)

In short, the outcome turns on whether the transfer is to a position requiring a different certification (in which case it is an improper dismissal) or the same certification (in which case it is merely a reassignment within the same position).

At the time of the transfer with which we are concerned, the same endorsement on the administrative certificate was required for both principal and vice principal. N.J.A.C. 6:11-10.4. Although Colella happened to have acquired separate certificates for principal and vice principal, the requirements for certification have since been merged so that presently a single certificate qualifies the holder to perform either job. Under the rationale of Childs, therefore, the transfer to a position "where the certification required is the same" was not in contravention of Colella's tenure rights.

With regard to the claimed reduction in compensation, it is well settled that employees have no vested right in any future salary increases. Reduction in salary expectancy has no bearing on the validity of a transfer. Williams v. Plainfield Bd. of Ed., 176 N.J. Super. at 162. Colella has not suffered a reduction in compensation contemplated by N.J.S.A. 18A:28-5 since she earns at least as much as she formerly did when she was principal.

There having been neither a dismissal nor a reduction in compensation, Colella is not entitled to any relief under the tenure laws.

Order

It is **ORDERED** that the action of the school board transferring Colella from the position of high school principal to the position of high school vice principal is **AFFIRMED.**

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

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

January 26, 1983
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

January 26, 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 28, 1983
DATE

Ronald L. Parker/pa
FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Wilma Colella

2. John Santini

List of Exhibits

No.	Description
J-1	Copy of a letter, dated June 17, 1981, to Colella from Santini
J-2	Certified copy of a resolution of the Elmwood Park Board of Education, dated June 23, 1981
J-3	Copy of a letter, dated June 24, 1981, to Colella from Santini
J-4	Certified copy of a resolution of the Elmwood Park Board of Education, dated August 25, 1981
J-5	Copy of a letter, dated August 27, 1981, to Colella from Santini
J-6	Copy of Collective Bargaining Agreement for 1981-82 and 1982-83
J-7	Copy of Collective Bargaining Agreement for 1976-77 and 1977-78
J-8	Copy of Renewal Agreement for 1978 through June 30, 1981
J-9	Job Description of High School Principal, dated August 31, 1976

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J-10 Job Description of High School Vice Principal, dated August 31, 1976

J-11 Copies of Colella's certifications

(a) Certification as secondary school principal, issued March 1968

(b) Certification as secondary vice principal, issued August 26, 1966

(c) Certification as teacher of grades 7 through 12 of mathematics and physical science, dated March 16, 1964

(d) Limited secondary teachers certification, dated October 6, 1958

J-12 (a) Personnel Record of Colella

(b) Updated Personnel Record of Colella

P-1 Personnel evaluation of Colella, dated April 7, 1981

P-2 for id. Commentary on 1980-81 evaluation

R-1 Copies of certifications of Nicholas Matlaga

(a) Certification as secondary school teacher of social studies, issued June 1976

(b) Certification as secondary school teacher of English, issued June 1976

(c) Certification as secondary school teacher of Health Education, issued January 1970

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(d) Certification as secondary school teacher of General Science, issued January 1970

(e) Certification as Assistant Executive Supervisor with specialization in supervision and curriculum, issued December 1979

(f) Certification as school business administrator, specialization in supervision and curriculum, issued December 1979

(g) Certification as school business administrator and assistant superintendent for business, issued December 1980

(h) Certification as principal and supervisor, issued May 1974

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WILMA COLELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, Ken R. Springer, ALJ.

It is observed that timely exceptions to the initial decision were filed with the Commissioner by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes that petitioner excepts to the legal conclusions rather than to the findings of fact relied upon by the ALJ in reaching his determination with respect to the matter herein controverted.

Petitioner takes specific issue with the following conclusional language of the ALJ, ante, upon which his initial decision is predicated:

> "***In short, the outcome turns on whether the transfer is to a position requiring a different certification (in which case it is an improper dismissal) or the same certification (in which case it is merely a reassignment within the same position).***"

Petitioner argues that the ALJ's conclusion, that her involuntary transfer from the tenured position of high school principal to that of vice principal may be construed as a reassignment within the same position, is contrary to the applicable statutory provisions of N.J.S.A. 18A:28-5, as amended, and N.J.S.A. 18A:28-6, as well as the Commissioner's recent decision in the matter of Philip Howley and Dewey Bookholdt, Jr. v. Board of Education of the Township of Ewing, Mercer County, decided December 20, 1982.

Moreover, petitioner in her exceptions points out the distinctions to be made in the matter herein controverted based upon the Court's construction of the following cases: Williams v. Plainfield Board of Education, 176 N.J. Super. 154 (App. Div. 1980), cert. den. 87 N.J. 306 (1981); Parsippany-Troy Hills Board of Education v. Morell, N.J. Superior Court, Appellate Division,

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December 16, 1981, A-1619-80T2 (unreported), cert. den. 89 N.J. 419 (1982); Childs v. Union Township Board of Education, N.J. Superior, Appellate Division, July 19, 1982, A-3603-80T1 (unreported), cert. den. October 25, 1982.

The Commissioner, upon careful review of petitioner's exceptions to the initial decision, is constrained to observe that they clearly and precisely reflect his own analysis for the purpose of rendering a final determination in the instant matter. The Commissioner so holds.

Thus, in the Commissioner's judgment, it is essential to incorporate petitioner's exceptions in pertinent part below in order to provide the underlying basis upon which the Commissioner's decision is grounded:

> "***The fundamental problem with the reasoning of this decision emanates from confusion and imprecision by the ALJ in analyzing the interrelationship of the distinct concepts of tenure, position, certificates and transfers. See Howley v. Board of Education of Ewing, 1982 S.L.D. (Dec. 20, 1982). The erroneous conclusion of the ALJ is capsulized in the following rationale he offered for his decision permitting petitioner's unilateral removal from her tenured position as principal:
>
> > '...the outcome turns on whether the transfer is to a position requiring a different certification (in which case it is an improper dismissal) or the same certification (in which case it is merely a reassignment within the same position).' (op. at 7).
>
> "As noted in the Commissioner's recent decision in Howley, supra, this is simply a misstatement of existing education law. Howley specifically held that the cases cited by the Administrative Law Judge in this matter:
>
> > '...do not stand for the proposition that a tenured principal, for example, may be transferred to any other position comparable to the one he already holds and which his certificate qualifies him to fill...' (slip op. at 13. Emphasis supplied).

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By confusing the separate and distinct concepts of positions and certificates in his analysis, the ALJ has not only reached a wrong result in this case but also violated the long-standing meaning of the tenure laws. An individual tenured in the position of principal, such as petitioner, cannot be transferred to any other position, such as vice-principal, without her consent.

"The starting point for this conclusion is contained in N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6. Both statutes provide a comprehensive scheme for obtaining tenure. N.J.S.A. 18A:28-5 provides in pertinent part:

> 'The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, [and] assistant superintendents,... 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.)

Thus, the first point to be made is that the legislature could not have been clearer in its intention to award tenure in a position. This conclusion is best illustrated by the holding in Lascari v. Board of Education of Lodi, 36 N.J. Super. 426 (App. Div. 1955), and the subsequent amendment of N.J.S.A. 18A:28-5 into its present form by virtue of that decision. In Lascari, the court held that a vice-principal could not obtain tenure in that position because it was not enumerated in N.J.S.A. 18A:28-5 at that time. Accordingly, the legislature reacted to this judicial interpretation and amended the Tenure Act to add to those specific categories for which tenure was provided the additional positions of

> '...assistant principal, vice-principal,...and such other employees as are in positions which require them to hold appropriate certificates issued by the [b]oard of [e]xaminers...'

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"The statement of purpose which was attached to the bill (A-343) which amended N.J.S.A. 18A:28-5 into its present form noted that the purpose of the bill was to:

> '...amend the Tenure of Office Act that applied to most professional educators by extending its provisions to include assistant principals and vice-principals -- in addition to assistant principals and vice-principals, the following positions would be covered by the bill: general supervisors, secondary, elementary and vocational supervisors, directors of student personnel services, counselors, teacher-counselors, psychologists and subject supervisors who supervise more than 50% of the time.' (Emphasis supplied.)

"Thus, N.J.S.A. 18A:28-5 was amended into its present form in order to provide specifically for tenure in the separate positions of vice-principal and principal. Absent specific reference in the statute to particular positions which are tenure eligible, an individual cannot claim a right to continued employment in that position. Lascari, supra.

"The inclusion of the additional positions requiring specific certificates from the Board of Examiners also created a category of tenure eligible positions in addition to those specifically enumerated in the statute. Neither certificates nor endorsements, however, can define or limit the protection of tenure afforded the positions specifically enumerated in the statute.

"That tenure is acquired in a particular position is also made clear by the language of N.J.S.A. 18A:28-6, which provides that a teaching staff member under tenure or eligible for tenure can also obtain tenure in a new position to which he is transferred, with his consent, 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

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> (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...'

"Clearly, the statutory scheme specifically enumerates the positions of both 'principal' and 'vice-principal' as separate ranks, each affording the occupant the protection of tenure in that particular position after completing the requisite amount of continuous service required by statute. [Viemeister] v. Board of Education of Prospect Park, 5 N.J. Super. 215 (App. Div. 1949).* By permitting transfers between positions only with the consent of the occupant, the statute was also designed to prohibit transfers or reassignments between different positions without the consent of the affected individual. As noted most recently in Childs v. Union Township Board of Education, (App. Div. unreported, July 19, 1982, A-3603-80T1):

> 'The clear intent of this statute is that the right of a board of education to transfer and to re-transfer a teaching staff member is limited where tenure in the new position is acquired...'(Id. at 5).

"Thus, it is clear that once an individual has obtained tenure in a position enumerated in N.J.S.A. 18A:28-5, she cannot be removed or transferred from that position without her consent, absent resort to N.J.S.A. 18A:28-10. Of course, transfer of a tenured individual to the same position but in another assignment has always been permissable (sic) under the tenure laws. Huth v. Board of Education of Morris Plains, 1980 S.L.D. [847]. Thus a

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*Petitioner's service for 5-1/2 years in the position of principal following her promotion from vice-principal in 1975 effectively affords her tenure in the rank of principal under either N.J.S.A. 18A:28-5 or N.J.S.A. 18A:28-6.

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teacher may be transferred from one teaching position to another within a school district, even if tenured, so long as he is qualified for the position and suffers no loss in pay. This conclusion is logically dictated because such an action simply does not constitute a removal from the tenured position. Tenure protects positions, not assignments within that position.

"The ALJ decision in this case, however, is based upon the erroneous premise that tenure rights are determined by the nature of the individual's certificate. It bears repeating that certificates do not determine tenure; only positions enumerated in N.J.S.A. 18A:28-5 are protected by tenure. The statute does confer tenure on other positions, in addition to those specifically enumerated, for which a specific certificate and endorsement is required. However, the statute consistently uses the term position when defining tenure eligibility. Certificates may create additional positions eligible for tenure, but they cannot supercéde (sic) the legislative mandate conferring tenure on a person in the specific position of principal. As noted in the Commissioner's decision in Howley:

> '...an endorsement [certificate] is not synonomous (sic) with a "position," although in some cases they may actually be the same.' (Id.at 8.)

That opinion goes on to point out that endorsement for 'principal' entitles the holder to serve in several positions, including vice-principal, assistant superintendent of schools and assistant superintendent of curriculum. Qualification to serve in a variety of positions, however, cannot abrogate the statutory right to tenure in a particular position.

"In specifically enumerating in N.J.S.A. 18A:28-5 the ranks of both principal and vice-principal as tenure eligible, the legislature made a special effort to guarantee that incumbents of such positions would have security in their particular ranks. Respondent's actions blatently (sic) violated this

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statutory purpose. Obviously if the position of vice-principal were synonomous (sic) with that of principal (a category previously recognized as tenure eligible following the 1952 amendment), a statute affording tenure in the rank of vice-principal would simply have been unnecessary.

"This has been pointed out most recently by the Appellate Division in the recent case of Childs v. Union Township Board of Education, supra. In that case the petitioner was tenured in the position of guidance counelor. The board of education subsequently assigned her to the position of teacher, albeit at the same salary as her previous position of guidance counselor. In rejecting the board's argument that Childs had merely been 'transferred' from the position of guidance counselor to teacher, the court held that the board's action violated the petitioner's tenure rights and stated:

> '...it is pure sophistry to assert her "transfer" is anything less than dismissal from her clearly tenured position.' (Slip op. 7-8.)

"The decision in Childs effectively refutes the contention that certificates rather than positions define tenure rights. The court recognized that tenure rights are defined by N.J.S.A. 18A:28-5, and although the statute specifically enumerates a large number of service categories by specific position ('teachers, principals, vice-principals...'), it is not an exhaustive list. The statute also confers tenure upon individuals 'as are in positions which require them to hold appropriate certificates issued by the board of examiners...' In short, tenure accrues either in specifically enumerated positions or those described more generally (certificate required). The court's reference in Childs to the fact that the positions of guidance counselor and teacher required separate certificates simply meant that Childs was tenured as a guidance counselor and could not be removed or transferred from that position without her consent. In the case of a guidance counselor, a certificate does define both the position and concommitant (sic) tenure rights; for a teacher (or

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principal), the tenure rights to that position are fixed by specific statutory reference. In short, Childs stands for the proposition that once tenured in a position, whether a result of statutory reference or certificate endorsement, removal or transfer from that position cannot be effectuated without the individual's consent (N.J.S.A. 18A:28-6) or resort to the statutory procedures for detenuring (N.J.S.A. 18A:28-10).

"The absurdity of claiming that certificate endorsements for a position are dispositive of the issue of whether petitioner, tenured as a principal, could be involuntarily transferred to the position of vice-principal, is best illustrated by review of the certification regulations themselves. N.J.A.C. 6:11-10.4 admittedly provides that certificate endorsement to serve as principal also constitutes certification to serve as a vice-principal. However, those regulations also provide that a school administrator certificate, N.J.A.C. 6:11-10.4(a), permits the holder to serve as a 'superintendent, assistant superintendent, principal or supervisor.' Thus, under the ALJ's reasoning, a tenured superintendent could apparently be reassigned to a position as assistant superintendent, principal or ever (sic) supervisor, simply because his certificate makes him eligible to serve in those other categories. Clearly, the fact that the certificate determines eligibility and qualification to serve in those other positions cannot justify equating the positions themselves. Obviously, an analysis of the duties involved in each position, and not its title, certificate or salary is required. Such an analysis demands the conclusion that the positions of principal and vice-principal are each protected by the tenure laws. Although certifications for the two positions may be the same, it is simply indisputable that these are not equal or identical positions. One is subordinate to the other and entails substantially more limited duties and responsibilities. Any attempt to equate the positions as if they were interchangeable and not distinct is simply belied by the facts.

"In Howley, supra, the Commissioner adopted the ALJ decision which clearly elucidated

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these concepts and illustrated their application with specific examples. With reference to the identical situation contained in the instant case, that decision noted:

> ...a hypothetical tenured principal who holds an Administrative and Supervisory Certificate with a 'Principal' endorsement... may be transferred by the Board within the scope of his tenured position (principal) to any other principal's assignment in the district; e.g., principal of the elementary school; he may not be transferred by the board to another position in the district even though it is within the scope of his endorsement; e.g., assistant superintendent of schools or vice principal, whatever the specific assignment, without his consent.' (Id. at 20-21, emphasis in original and supplied).

Clearly, this analysis requires the conclusion that the respondent's actions in this matter have violated petitioner's tenure rights in the position of principal.

"Petitioner is aware of the unpublished Appellate Division decision in Board of Education v. Morrell (sic), (Dec. 16, 1981, A-1619-80T2), certif. den. 89 N.J. 419 (1982). In that case the court held, in a quite perfunctory decision, that there was no statutory infirmity in reassigning Morrell (sic) from his tenured position as a tenured elementary school principal to acting assistant high school principal. The court apparently held that this action was not violative of the provisions of N.J.S.A. 18A:28-5.

"The decision, however, is totally lacking in any analysis and is simply conclusory (sic) in nature. No inquiry into the nature of the two positions was made. No discussion of the distinction in job duties ensued. The court simply concluded that '...the transfer of petitioner from a principal to an acting assistant principal was not a dismissal.' No reasoning whatsoever accompanied this

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declaration. It is submitted that the reasoning of Childs, which was decided after Morrell (sic) and which was accompanied by a detailed and thorough analysis, should control the instant matter.

"Moreover, a careful review of the Morrell (sic) decision indicates that the court's conclusionary (sic) declaration noted above was mere dictum which was unnecessary to an adjudication of the appeal as it was presented to the court. The opinion notes that the decision of the State Board of Education was that the petitioner in that case had been 'demoted'. It was that conclusion of the State Board which was appealed to the Appellate Division, and it was solely that conclusion which was reversed. As stated by the court in the only explanation of its decison:

> 'The clear language of N.J.S.A. 18A:28-5 proscribes the dismissal or reduction in the compensation of administrators, such as a principal, who have acquired tenure except for just cause. The word 'demotion' is no where mentioned in the statute.' (slip op. at 3.)

"Thus, Morrell (sic) stands for the limited proposition that N.J.S.A. 18A:28-5 does not prohibit 'demotions'. The decision actually does not reach the issue of whether a change from the position of principal to vice-principal constitutes a prohibited 'removal' under that statute. The more searching analysis of the issue by the Appellate Division, as noted, does not occur until the subsequent case of Childs.

"***In the instant matter, however, it is beyond dispute that Ms. Colella has been placed in a position which bears little if any relationship to that which she previously held. This is emphasized by the testimony which clearly indicated that the job description for petitioner was simply erroneous and that her duties were even more limited than those traditionally assumed by a vice-principal. Thus, even if the positions of principal and vice-principal are presumptively similar, a searching analysis of the record in this matter clearly indicates that such a conclusion would be completely unwarranted here.

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> "Finally, if substance is to prevail over form and certifications are to supercede (sic) responsibilities, Ms. Colella should still be reinstated to her principalship. It is undisputed that she received a certification to serve as a vice-principal in 1966, at a time when separate certification was required for the positions of principal and vice-principal by the State Board of Examiners. In 1969 she obtained her certificate as principal, completing the additional requirements necessary to qualify for that post. She was tenured as a vice-principal, served as a principal beginning in 1969 and became tenured in that latter position in 1971 pursuant to N.J.S.A. 18A:28-6. The fact that the State Board of Examiners has subsequently seen fit to remove the separate certification requirement for vice-principal cannot change the fact that at the time she obtained tenure in her position, separate certifications for each position were required. Indeed, if certificates are to control tenure rights in the future, then consistency requires that this doctrine be applied in an even-handed manner. Any other result would subject the statutorily created tenure rights of all teaching staff members to the regulatory requirements of certifications, which are enacted for reasons wholly unrelated to the purposes underlying tenure laws. Such a conclusion was clearly not envisioned by the legislature and yet would be the effective result if the ALJ decision in this matter is not reversed.***"
>
> (Emphasis in text.)
>
> (Petitioner's Exceptions, at pp. 2-12)

The Commissioner further notes at this juncture, that the Court in Williams, supra, did, in fact, take into consideration that the Board in transferring Petitioner Williams from high school principal to elementary principal did not violate the law since she retained her rank in position of principal and was not reduced in compensation. See Williams, supra, at 159-162.

Accordingly for the reasons set forth above, the Commissioner finds and determines that petitioner has been improperly and illegally transferred from her tenured position as principal of the Elmwood Park High School. The initial decision rendered in this matter is hereby reversed. The Board is

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directed to immediately reinstate petitioner to her former position of principal of the high school, together with all back salary and other fringe benefits and emoluments which may be otherwise owing and due her.

COMMISSIONER OF EDUCATION

MARCH 10, 1983

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WILMA COLELLA,

PETITIONER-RESPONDENT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY, : DECISION

RESPONDENT-APPELLANT.

Decided by the Commissioner of Education, March 10, 1983

Decision on Motion for Stay, by the Commissioner of Education, April 7, 1983

For the Petitioner-Respondent, Zazzali, Zazzali & Kroll (Robert A. Fagella, Esq., of Counsel)

For the Respondent-Appellant, Baldino & DeMaria (Matthew P. DeMaria, Esq., of Counsel)

The exceptions filed on behalf of the Elmwood Park Board of Education to the Initial Decision of the Administrative Law Judge are noted and have been considered on this appeal. The Motion for Stay by the Elmwood Park Board is denied and the decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Maud Dahme abstained in this matter.
S. David Brandt and P. Paul Ricci opposed in this matter.

July 6, 1983

PENDING SUPERIOR COURT

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1293-81
AGENCY DKT. NO. 83-3/79A

LOVELL KENDALL,
Petitioner
v.
CAMDEN CITY BOARD OF EDUCATION, CAMDEN COUNTY,
Respondent.

APPEARANCES:

Jeffrey M. Hall, Esq., for the petitioner (Katzenbach, Gildea, and Rudner, attorneys)

M. Allan Vogelson, Esq., for the respondent (Supnick, Mitnick, Vogelson, and Josselson, attorneys)

Record Closed: December 27, 1982 Decided: February 1, 1983

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

Petitioner, formerly employed as a guidance counsellor by the Camden City Board of Education (Board), filed a Petition of Appeal with the Commissioner of Education alleging that the Board failed to follow the provisions of the tenure statutes when she was suspended, and subsequently terminated. The Board denied that it has violated petitioner's rights.

The Commissioner transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted on June 5, 1981, in the Office of Administrative Law, Trenton. The

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resultant issues established a question of law not requiring a hearing; therefore, the matter was submitted for Summary Decision with the filing of letter briefs. Petitioner filed a reply memorandum. The Board requested that its brief should be treated as a cross-motion for summary decision. Because no facts are in dispute, that motion is **GRANTED.**

FACTS

Petitioner, a tenured teacher employed by the Board, was indicted by the Camden County Grand Jury for welfare fraud and Medicaid fraud in a two count indictment. Petitioner entered a plea of guilty to both charges on February 28, 1979, and a judgment of conviction was entered on May 1, 1979. Petitioner was sentenced, on the first count, to 364 days in the Camden County Jail, of which she was required to serve three months on weekends, with the balance being suspended. Further, she received probation for two years and was ordered to pay $2,500 in restitution. A similar sentence was entered on the second count, without any additional restitution requirement. Sentence on the second count was made concurrent to the first count. (A copy of the indictment, letters, judgment of conviction and the Court's sentencing rationale are attached to the petitioner's letter brief.)

Two days after petitioner's guilty plea, the Superintendent suspended petitioner without pay, by letter of March 2, 1979. Later, the Board paid petitioner through May 1, 1979, the date of her conviction. The Board asserts that it considered petitioner's guilt to be a crime of moral turpitude which resulted in the automatic forfeiture of her position under N.J.S.A. 2A:135-9 (See, N.J.S.A. 2C:51-2). After institution of this Petition of Appeal, the Board, on March 2, 1981, took formal action (allegedly for purpose of the record only) and terminated petitioner on the above statutory grounds, effective May 1, 1979. The Board contends that petitioner's termination happened automatically, by operation of law, on May 1, 1979.

Petitioner seeks reinstatement retroactively to March 2, 1979, with full benefits and salary from that date. Petitioner asserts that the grounds entitling her to such reinstatement are that she was suspended without the Board certifying charges to the Commissioner, as required by the Tenure Employees Hearing Law (N.J.S.A. 18A:6-10 et seq.)

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The statute under which the Board alleges it acted in this matter is N.J.S.A. 2A:135-9 (now 2C:51-2). It reads as follows:

> Any person holding an office or position, elective or appointive, under the government of this state or of any agency or political subdivision thereof, who is convicted upon, or pleads guilty, non vult or nolo contendere to, an indictment, accusation or complaint charging him with the commission of a misdemeanor or high misdemeanor touching the administration of his office or position, or which involves moral turpitude, shall forfeit his office or position and cease to hold it from the date of his conviction or entry of plea.
>
> If the conviction of such officer be reversed, he shall be restored to his office or position with all the rights and emoluments thereof from the date of the forfeiture.

N.J.S.A. 2C:51-2a(1) states in pertinent part that

> a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime. . . .

Thus, both statutes mandate that a guilty person "shall forfeit" such office or position when the crime involves moral turpitude (N.J.S.A. 2A:135-9), or, dishonesty or a crime of the third degree (N.J.S.A. 2C:51-2).

Black's Law Dictionary (rev. 4th ed. 1970) defines moral turpitude as follows:

> An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man. [Cites omitted.]
>
> Conduct contrary to justice, honesty, modesty, or good morals. [Cites omitted.]

N.J.S.A. 2C:51-2 provides for the forfeiture of public office after conviction of an offense. This statute applies to "[a] person holding any public office, position or employment, elective or appointive, under the government of this State or any agency or

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political subdivision thereof . . ." N.J.S.A. 2C:51-2 would apply to all public employees with no distinction arising from the terms "office," "position" or "employment." The statute itself makes no distinction, nor is one made in its legislative history. The legislative history of this provision is contained in The New Jersey Penal Code, Volume II: Commentary, Final Report of the New Jersey Criminal Law Revision Commission, October 1971. The commentary with respect to Section 2C:51-2 states:

> This Section mandates forfeiture of any public office position or employment state or municipal upon conviction for any offense involving dishonesty or crime involving moral turpitude. [Emphasis added.]
>
> Conviction of lesser offenses, i.e., disorderly persons offenses, would result in forfeiture only if the offense involves or touches the public position. Finally, where the Constitution or a statute so provides, the office is forfeited. The forfeiture under Subsection 6 is immediate upon conviction in the trial court and will be stayed only by order of a court for good cause shown. See N.J.S.A. 2A:135-9. If the person is ultimately exonerated, subsection 6 provides for restoration as does existing law under N.J.S.A. 2A:135-9. Commentary, pg. 361.

In Newark v. Dept. of Civil Service, 68 N.J. Super. 416 (App. Div. 1961), the court determined the issue of the force and effect of a forfeiture statute, N.J.S.A. 40:69A-166, as compared to civil service rights. In Newark, an Electrical Inspector was originally suspended from employment on charges that his nolo contendere plea to income tax evasion violated civil service rules. The rules provided for discretionary removal in instances of "commitment of any criminal act" or "conviction of a criminal offense or of a misdemeanor involving moral turpitude." On appeal, the contention was raised that the forfeiture statute was applicable, depriving the Civil Service Commission of jurisdiction. The court held:

> The creation of statutory offenses and provision for penalties for violation thereof, do not impair or diminish in any way Civil Service tenure rights but, to the contrary, implement our substantive laws for the betterment of government and for the protection of the rights of citizenry. The fact that the Faulkner Act ordains penalties of greater severity than those prescribed by the rules of Civil Service should admit of no doubt that the agency rules must yield to the legislative command. The Legislature is not precluded by Civil Service laws from establishing reasonable standards of conduct for those operating within local, as well as state, government, nor from imposing penalties or sanctions for violation of pronounced standards. Id. at 426-427.

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Another aspect of the application of forfeiture provisions is the entitlement to administrative proceedings. The courts in applying N.J.S.A. 40:69A-166 have provided prior to forfeiture the determination of the issue of "moral turpitude." Newark v. Dept. of Civil Service, supra, remanded the case to the local appointing authority to determine if the crime for which the employee was convicted upon a plea of nolo contendere involved moral turpitude. Galloway v. Council of Clark Twp, 92 N.J. Super. 409 (Law Div. 1966) concerned a challenge to the renewal of a city councilman which occurred not upon conviction but after a determination by the municipal council that the crime involved moral turpitude. The court held that N.J.S.A. 40:69A-166 was not self-executing or automatic but would occur after ". . . a hearing is held to determine whether a crime involving moral turpitude has been committed . . ." Id. at 420.

However, O'Halloran v. DeCarlo, 156 N.J. Super. 249 (Law Div. 1978) aff'd 162 N.J. Super. 174 (App. Div. 1978) cert. den. DeCarlo v. New Jersey, 442 U.S. 917, 99 S. Ct. 2837, 61 L. Ed. 2d 284 (1979) involved an application of N.J.S.A. 2A:135-9 to a police officer. The officer was convicted of conspiring to violate public bidding laws. The officer challenged the removal action, claiming a right to an administrative hearing prior to forfeiture. The court held that the application of N.J.S.A. 2A:135-9 is immediate and automatic. It noted that the ". . . public policy against the holding of public office upon certain criminal conviction [was] . . . peculiarly relevant when applied to a police officer . . ." Id. at 254. The policeman's effort to obtain an administrative hearing failed. However, the court did engage in making the determination that the crime involved "moral turpitude" within the meaning of N.J.S.A. 2A:135-9. An application of N.J.S.A. 2A:135-9 (2C:51-2) would follow the holding of O'Halloran, supra.

The court's determination that the holding of public office after certain criminal convictions is against the public policy when applied to policemen must be applied to teachers a fortiori. Both are in a position of public trust. The Commissioner, as the State's chief school officer, is constitutionally, and statutorily bound to regulate the conduct of the local public schools and their employees (N.J.S.A. 18A:4-23; 18A:6-9). It is, therefore, within the purview of the Commissioner to examine the guilt and criminal conviction of a teaching staff member and determine whether such person is barred by statute from holding a public office, position or employment.

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In the instant matter, and in accordance with the view expressed in O'Halloran, supra, the petitioner has committed a crime of moral turpitude (N.J.S.A. 2A:135-9) and/or a crime of the third degree under N.J.S.A. 2C:51-2. Consequently, pursuant to N.J.S.A. 2A:135-9, petitioner forfeited her position immediately upon her conviction.

Although the Teacher Tenure Law demands an administrative hearing prior to a teacher's termination, the criminal statute (N.J.S.A. 2A:135-9) does not (O'Halloran, supra). In O'Halloran, the court determined that the policeman's crime was one involving moral turpitude, after a finding of guilt by a jury. The court commented as follows:

> It is well settled law that where the intent to defraud is an essential element of a crime, that crime is one of moral turpitude. Jordan v. DeGeorge, 341 U.S. 223, 227, 71 S. Ct. 703, 95 L. Ed. 886 (1950); Berardi v. Rutter, 42 N.J. Super. 39, 48 (App. Div. 1956) aff'd 23 N.J. 485 (1957). [Id. at 252-253.]

The record of petitioner's sentencing shows that she had an opportunity to give the trial court reasons for her fraudulent receipt of welfare benefits (Exhibit B).

According to N.J.S.A. 18A:6-8.3, petitioner could have been suspended without pay from the date of her indictment, and although initially suspended without pay at that time, she has now been paid through the date of her conviction.

The only purpose to be served by a hearing under the Tenure Employees Hearing Law (N.J.S.A. 18A:6-10) in this case, would be to allow petitioner an opportunity to show that her crime was not a crime involving moral turpitude. However, the court has already decided that issue (O'Halloran, supra) where intent to defraud was determined to be the essential element in the crime. Here, as in O'Halloran, petitioner clearly intended to defraud the welfare agency, and she fraudulently accepted $11,695.45 over a period of three years (Indictment 64-77, Counts 1 and 2). Proof of the crime is her plea of guilt and her subsequent sentence. Consequently, there is no further relief to which she is entitled. (See also Fridy v. Board of Education of the City of Long Branch, App. Div., A-4470-80T3, decided January 26, 1983.)

Based on the foregoing, petitioner's Motion for Summary Decision is **DENIED**. The Board's application to treat this matter as a cross-motion for summary disposition has been **GRANTED**; therefore

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The Petition of Appeal is **DISMISSED** with prejudice.

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

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

1 February 83
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

2 February 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 4, 1983
DATE

Ronald L. Parker Jr.
OFFICE OF ADMINISTRATIVE LAW

plb

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DOCUMENTS IN EVIDENCE

Exhibit A The pleadings

Exhibit B Indictment, conviction, and sentence

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LOVELL KENDALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that no exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

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

COMMISSIONER OF EDUCATION

MARCH 16, 1983

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LOVELL KENDALL,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 16, 1983

For the Petitioner-Appellant, Katzenbach, Gildea & Rudner (Jeffrey M. Hall, Esq., of Counsel)

For the Respondent-Respondent, Supnick, Mitnick, Vogelson & Josselson (M. Allan Vogelson, Esq., of Counsel)

The State Board of Education, after considering Petitioner Appellant's exceptions to the Initial Decision of the Administrative Law Judge, and the issues raised on appeal, affirms the decision of the Commissioner of Education for the reasons expressed therein.

Maud Dahme abstained in this matter.

July 6, 1983

Pending N.J. Superior Court

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4920-82
AGENCY DKT. NO. 109-4/82A

BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,
Petitioner
v.
ROBERT BURGESS,
Respondent.

APPEARANCES:

James W. Lance, Esq., for petitioner (Wesley L. Lance, attorney)

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

Record Closed: December 28, 1982 Decided: February 10, 1983

BEFORE **ERIC G. ERRICKSON,** ALJ:

The Clinton Township Board of Education (Board) in this action petitions the Commissioner of Education for an order, pursuant to his authority under N.J.S.A. 18A:26-10, suspending the teaching certificate of respondent who, as one of its tenured teachers, gave less than 60 days notice when terminating his employment.

Respondent Burgess contends that the action sought by the Board is contraindicated by the facts which surround the termination of his employment.

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When the pleadings were joined on May 12, 1982, the matter was transferred on May 19, 1982 by the Commissioner for processing, as a contested case, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq.

A plenary hearing was scheduled and concluded at Annandale, New Jersey, on October 6, 1982. The record was closed with receipt of post hearing briefs of counsel.

UNDISPUTED FACTS:

I **FIND** the following to be facts which are either stipulated by the parties or are not in contest within the record:

Respondent, a tenured teacher, had been employed by the Board since September 1977 (J-1), when he submitted to his Superintendent the following letter dated January 29, 1982:

> I, Robert J. Burgess, regretfully submit to the Clinton Township Board of Education my resignation from the position of classroom teacher effective as of Monday, February 15, 1982. I realize that this request is somewhat extraordinary, however, it is only the nature of the career opportunity offered to me that necessitates this termination date. I intend to do anything I can to assist in securing and familiarizing my replacement.
>
> I have thoroughly enjoyed working with the administration and staff in Clinton Township. My teaching here has been a pleasant and rewarding experience that I will always treasure.
>
> Thank you for all your assistance and kind consideration. It was, and is, greatly appreciated.
>
> [J-2]

The Superintendent submitted this letter of resignation to the Board which on February 1, 1982, considered it and other matters at a special meeting for personnel matters. At the recommendation of the Superintendent, respondent personally presented his resignation to the Board which then considered his proposal in executive session. When the Board reconvened in public session about forty minutes later, the following action, approved by an 8-0 vote, is recorded in its minutes:

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> Motion by Mr. Coffman and seconded by Mr. Lotyk to accept the resignation of Robert Burgess effective sixty days from January 29, 1982, or when an acceptable replacement can be found.
> [J-3]

On February 2, 1982, the Superintendent posted a vacancy in respondent's sixth grade position (J-4) and advertised the vacancy in newspapers, published on February 4 and 10. On February 8, 1982, respondent's principal at the Round Valley School, after interviewing a number of candidates in keeping with district policy, recommended two candidates, one of whom was Marilyn Rosado, for consideration by the Superintendent in filling the vacancy (J-5). In response to the principal's recommendation, the Superintendent, on February 16, commented in writing, as follows:

> I do not have anything to show that Mrs. Rosado is interested in the job. Mrs. Rosado and Mrs. Steckel are not on our substitute list.
>
> Mrs. Stickel does not have teaching experience. Neither could be hired until a Board meeting is held. Is there a substitute on our list that could be hired to fill this position?
> [J-5]

On the same date, Ms. Rosado, the teacher who was in fact later appointed by the Board to respondent's sixth grade position, submitted the following letter together with a copy of her teaching certificate, references, experience data, and a statement of standards she seeks to maintain as a teacher:

> I am writing to apply for the position of Sixth Grade Teacher.
>
> Enclosed is my resume and a copy of my State Certificate. As you will note, I have recently taught sixth grade in Clinton Township. I feel this qualifies me to better serve your needs in this position.
>
> Thank you for your consideration. I will be pleased to furnish any additional information you may require.
> [J-6]

On March 8, 1982, the Board, by unanimous roll call vote of eight members present, recorded in its minutes the following action:

> Motion by Mr. Coffman and seconded by Mrs. Bench to award a 1981-82 contract, as teacher, to Marilyn Rosado, effective March 9, 1982, salary to be based on annual figure of $13,665.
> [J-7]

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On March 9, 1982, the Board issued Rosado a contract and she began to teach in the sixth grade position which Burgess had vacated on February 16 (J-8, P-1).

TESTIMONY OF WITNESSES:

DORIS CRAMER, the Board Secretary, testified that, after its special meeting on February 1, 1982, the Board's next meeting was on February 8, at which time when no action was taken regarding the Burgess resignation. She testified that the Board's next meeting was on March 8, when Rosado was hired to fill the sixth grade vacancy created by Burgess' leaving. She also testified that at the Board's direction, she posted a letter to the Commissioner asking that he revoke respondent's teaching certificate for one year.

PATRICK MC GAHERAN, testified that, when he first learned of Burgess' resignation, he personally advised him to appear before the Board three days later on February 1 to explain his request to be released by February 15. McGaheran testified that, although his recommendation to the Board was that it accept Burgess' resignation as submitted, effective February 15, the Board, after discussing the matter in executive session, accepted the resignation within 60 days subject to procurement of a suitable replacement. He testified that Burgess' last day at his teaching post was February 11 since school was not in session from February 12 through February 15. He testified that two substitutes selected by the principal taught Burgess' class from February 16 until March 10 when Rosado began teaching. He testified that although the principal recommended that Rosado or another teacher be selected as the replacement teacher, the principal was not at liberty to assign Rosado as a substitute, since her name was not on the approved substitute list for 1981-82.

McGaheran also testified that the then current policy governing selection of a teacher required the following:

1. Posting of the vacancy

2. Advertising of applications

3. Receiving of applications

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4. Interviews by the principal

5. Recommendation to the Superintendent by the principal of two candidates

6. Interviews by the Superintendent

7. Recommendation by the Superintendent of one candidate to the Board

8. Action by the Board

The Superintendent testified that, since he was not at the school from February 8 through February 16, he did not receive or review the principal's recommendation until February 16. He testified that, since Rosado was well known to him because of her satisfactory previous service as a certified teacher on a number of extended periods, he recommended to the Board after receiving her letter of application on February 16 that she be employed to fill the vacancy. He further testified that favorable action was taken on his recommendation at the next Board meeting on March 8. When asked whether he and the Board could have met earlier than March 8, he responded that he could have but that he could not speak for the Board.

ANTHONY PIERRO, principal of Round Valley School, testified that he interviewed five candidates for the position prior to recommending, on February 8, Rosado and one other teacher for consideration by the Superintendent (J-5). He testified that Rosado had advised him by telephone prior to February 8 that she would be available at any time, if she were appointed to teach the sixth grade class.

In regard to Burgess' service as a teacher, Pierro testified that he was valued as an excellent professional who had never had to be disciplined, who carried out all his duties in a professional and exemplary manner, and who would be favorably considered if he were ever to reapply to teach in the district. Corroborating testimony to this exemplary service was heard from the Superintendent. The principal testified that, before Burgess left, he prepared his lesson plans in advance and offered to meet on his own time with his replacement to effect an orderly transition. That he made the offer was corroborated by Burgess, who also testified that he left many personal items he had collected as a teacher for use of his successor, especially in the field of science

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instruction. Burgess also testified that, before he left the district, he reviewed his plans with his principal and with the other sixth grade teachers and also offered to meet on Saturdays with his replacement, on request.

ROBERT J. BURGESS, respondent in this case, testified that he had begun to consider leaving the teaching profession in the summer of 1981, at which time he and his wife were considering starting a family and were already shouldering higher living costs in the form of a home mortgage. He testified that he had concluded that, if his wife were to be unemployed by reason of child rearing, he could not manage their living expenses on his teaching salary alone. He testified that when his inquiries for alternate, more lucrative employment eventually led, on January 28, to an offer of employment by an insurance firm, he learned that he was required to begin a training program on February 16 in order to be assured of that opportunity.

Burgess testified that, when he personally explained his circumstances to the Board on February 1, asking that he be released on February 15, the Board told him they would do all in their power to try to replace him by February 15 but that in the interest of the educational program, he would not be released prior to 60 days, unless a suitable teacher were procured.

FINDINGS OF FACT:

On the basis of a preponderance of the credible evidence within the record, I **FIND** the following to be relevant facts to be considered together with those undisputed facts, above, when reaching a determination:

1. The Superintendent recommended to the Board that it accept Burgess' resignation, as submitted, effective February 15, 1982.

2. Burgess' class was taught by two substitutes until the appointment of Rosado on March 10, 1982.

3. Rosado and one other teacher were recommended by the principal to replace Burgess on February 8. This was in keeping with the Board's policy that two candidates should be recommended for consideration by the Superintendent.

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4. The Superintendent, who was not at the school from February 8 through February 16, required, on February 16, that the principal submit written evidence that Rosado was a candidate. This was submitted on that very day.

5. Rosado, a fully certified teacher who proved to be the candidate selected, was available on February 8 or on any date thereafter. Since she was not on the Board's substitute list, however, she could not then be assigned until Board action. Rosado had served the Board as a teacher for extended periods on numerous occasions in the past.

6. The Board's next regularly scheduled meeting was on March 8, the date on which the Board acted to appoint Rosado.

7. Burgess' record of service with the Board had been free of disciplinary actions and was considered by his principal and the Superintendent to be exemplary. That this is so is highlighted by testimony from his immediate superior that any future candidacy on his part would be favorably considered.

8. Burgess left detailed lesson plans as well as teaching materials he personally owned for use by his successor. He personally reviewed those plans with his principal and fellow sixth grade teachers. He also volunteered to meet with his successor off school hours to assist her with planning.

9. Burgess' reason for leaving was to enhance his own income because of parenting plans, the added expense of a house into which he and his wife had recently moved and the probability that his wife's income would cease at least for a period with the advent of a child.

10. When Burgess was successful in finding a position which held promise of meeting his financial goals, he was told, on January 28, that to be admitted he would have to attend a regional training program, scheduled to begin on February 16.

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11. Burgess submitted his letter request to the Board the next day.

12. When he explained these circumstances to the Board, he was told by the Board that they would do all in their power to try to replace him by February 15 but that he would not be released earlier than 60 days unless the Board procured a suitable replacement teacher.

DISCUSSION AND CONCLUSIONS:

The statute of reference, N.J.S.A. 18A:28-8, reads as follows:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.
>
> [Emphasis added.]

It is unquestioned that Burgess gave the Board less than 60 days notice. The statute, however, does not specify, in every instance in which less than 60 days notice is given, that the teacher's certificate shall be suspended for one year by action of the Commissioner. Rather, it provides that the Commissioner may take that action. Implicit in the use of the word may is the exercise of discretion by the Commissioner. Thus, in considering such action as the Board requests, the Commisioner is called upon to view all of the attendant circumstances. In Re Joseph Choplick, 1979 S.L.D. unpublished (decided November 2, 1979).

The facts here presented contrast sharply with the facts presented In the Matter of the Suspension of the Teaching Certificat on of Lance Cronmiller, School District of Willingboro, 1970 S.L.D. 147. In that case, Cronmiller, also a tenured teacher, because of a dispute with his superiors, submitted a resignation on January 19, 1970, which stated, " . . . This is my resignation effective immediately." (1970 S.L.D. 148). He thereupon left the district. The Commissioner, in that case, suspended Cronmiller's certificate stating:

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> The provocation under which he acted, whether fancied or real, is not relevant. Whatever feelings the teacher may have had cannot constitute a valid excuse for flouting the law and unilaterally abrogating the terms of his employment. Moreover, the teacher had avenues of appeal by which he could have sought a resolution of his grievances which he failed to employ. Nor did he attempt to arrange terms under which he could be relieved of his duties, obtain an early release, or in any other way reach an agreement. Instead, he walked off the job. Under such circumstances the Commissioner can find no justification for or condonation of the teacher's actions.
>
> [1970 S.L.D. at p. 148]

Burgess' action was not precipitated by such rashness or dissent. He did not "walk off" the job without notice but, in exemplary fashion, left carefully made plans as well as personally owned teaching materials for the benefit of his successor, his pupils, his administrators and his employer. His act was not one in which he took employment in another school, an act which has in the past been adjudged by the Board of Examiners to be sufficient reason to suspend a teaching certificate.

Of great import in this case is the fact which is not disputed by the testimony of any witness or document in evidence; namely, that the Board told Burgess at the February 1, 1982 meeting that "they would do all in their power to try to replace him by February 15."

There is scant evidence that this promise of the Board was fulfilled. Principal Pierro recommended consideration of Rosado, Burgess' replacement, as early as February 8. She was available on that date. Because of his absence, the Superintendent did not respond to this recommendation until Feburary 16. Thereafter, the matter lay dormant, with substitutes in the classroom, until March 8, the Board's next regular meeting.

Fault cannot reasonably be imputed to the Superintendent for being away from the school from February 8 to February 16. Nor can the Board, all of whom are unpaid elected members commendably acting in a fiduciary relationship for their constituents, be faulted for not calling a special meeting. The fact remains, however, that neither the Board nor its chief school administrator in fact carried out the promise made to Burgess on February 1 that all in their power would be done to replace him by February 15.

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While the promise was without doubt one made in all good faith, it appears that, after it was made, the press of business and other matters caused any activity along that line to stall until the Board's regular March meeting. I **CONCLUDE** that the Board had the power to act, but that it did not do so for an entire month between February 8, when an appropriate replacement had been found, and March 8, its next meeting.

I further **CONCLUDE** that, having made its promise to Burgess on February 1, 1982, to attempt to secure a replacement prior to February 15, 1982, the Board was obligated to do more than sit on its hands in regard to securing a replacement by February 15.

DETERMINATION:

The undersigned has carefully weighed all of the arguments of respective counsel and considered, in the light of applicable statutory and case law the relevant facts and conclusions set forth above. It is **DETERMINED** that suspension of the teaching certificate of Robert Burgess for a one year period would be inappropriate. Many classrooms of this state and many of the administrative and supervisory offices of our schools are staffed by those who, for temporary periods, have entered other employment, and have later returned as more experienced teaching staff members. While there is no assurance that Burgess, who has proven himself an exemplary and conscientious teacher, will do likewise, there appears no justifiable reason to impose the requested penalty which, to some, might appear a blot on his otherwise excellent record. Accordingly, it is **ORDERED** that the Board's request to suspend Burgess' certificate for a period of one year, pursuant to N.J.S.A. 18A:28-8, is **DENIED.**

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

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OAL DKT. NO. EDU 4920-82

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

February 10, 1983
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

2/14/83
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 15, 1983
DATE

Gabriel J. Lyon, Jr.
OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS IN EVIDENCE:

J-1 Burgess' Employment Contracts

J-2 Burgess to McGaheran, January 29, 1982

J-3 Board Minutes, February 1, 1982

J-4 Posting of 6th Grade Teacher Position, February 2, 1982

J-5 Pierro to McGaheran with response, February 8, 1982

J-6 Rosado to Pierro, February 16, 1982

J-7 Board Minutes, March 8, 1982

J-8 Rosado's Employment Contract, March 8, 1982

R-1 McGaheran to Rosado, March 9, 1982

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IN THE MATTER OF THE	:	
SUSPENSION OF THE TEACHING	:	COMMISSIONER OF EDUCATION
CERTIFICATE OF ROBERT J.	:	DECISION
BURGESS, SCHOOL DISTRICT OF	:	
THE TOWNSHIP OF CLINTON,	:	
HUNTERDON COUNTY.	:	
	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

The Commissioner deems it proper that at this juncture he stress his entire agreement with the initial decision herein by the Honorable Eric G. Errickson, ALJ. The teacher by all reports from his principal and superintendent had an exemplary record; nor in his leaving the system, did he exhibit a truculent or defiant attitude. In fact, his actions were to his credit by making detailed plans for his successor and offering assistance on his own time if necessary. A teacher of experience in the system with a good record was known to be available as respondent's replacement as early as February 8. The fact that the Board, for whatever reason, took no action to fill the position until March 8 should not be counted against the teacher nor tarnish his admittedly excellent record. The Commissioner so holds.

Accordingly, the request of the Board for suspension of the teacher's certificate pursuant to N.J.S.A. 18A:28-5 is denied. The Petition is herewith dismissed.

COMMISSIONER OF EDUCATION

MARCH 17, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7717-82
AGENCY REF. NO. 273-7/82A

CHARLES RABOLLI, ET. AL. and THE BERGEN COUNTY VOCATIONAL-TECHNICAL SCHOOLS ADMINISTRATORS ASSOCIATION,
Petitioners
v.
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL-TECHNICAL SCHOOLS,
Respondent

APPEARANCES:

Wayne J. Oppito, Esq., for petitioners

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

Record Closed December 31, 1982 Decided January 13, 1983

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

A Petition for Declaratory Judgment was filed with the Commissioner of Education on July 19, 1982, wherein petitioners seek a declaration they hold tenurable positions as administrators in the adult vocational education program which would vest them with seniority rights. The Board contends its program is not mandated and therefore not governed by the tenure laws or related court decisions concerning tenurable positions in required programs.

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The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on August 12, 1982. A prehearing conference was held on November 8, 1982 at which the sole issue framed for declaratory judgment by agreement of the parties is as follows:

Are the positions to which teaching staff members are assigned in the Adult Vocational Education Program tenurable pursuant to Spiewak v. Rutherford Bd of Ed, 90 N.J. 63 (1982) and N.J.A.C. 6:8-4.3?

Memoranda of Law were filed by the parties and the record closed on December 31, 1982 with the expiration of time established for optional replies, which was exercised by petitioners.

The relevant facts which triggered the petition were stipulated in the pleadings and are as follows:

1. Petitioners are all certified administrators and teaching staff members within the meaning of N.J.S.A. 18A:1-1 in the Bergen County Vocational-Technical School District.

2. Bergen County Vocational-Technical School is a vocational school within the meaning of N.J.S.A. 18A:54-1, N.J.S.A. 18A:54-11 et seq., and N.J.A.C. 6:46-1.1.

3. Bergen County Vocational-Technical Schools curriculum of instruction includes high school and adult vocational education within the meaning of N.J.A.C. 6:41-1.1.

4. On or about April 26, 1982, respondent notified petitioners that the periods of their employment in the adult vocational education program would not be credited toward their tenure and seniority rights as prescribed in N.J.S.A. 18A:28-5, N.J.S.A. 18A:28-6, N.J.S.A 18A:28-9 et seq. and N.J.A.C. 6:3-1.10.

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5. Some petitioners were employed and tenured in the 9-12 high school program in respondent's district, then reassigned by transfer to the Adult Vocational Program.

ARGUMENTS OF COUNSEL

Petitioners contend they are teaching staff members pursuant to N.J.S.A. 18A:1-1; hold valid certificates issued by the New Jersey Department of Education; are assigned to positions that require certificates pursuant to N.J.A.C. 6:8-4.3; those that have served in said positions the requisite time prescribed by N.J.S.A. 18A:28-5 or N.J.S.A. 18A:28-6 are tenured; those that have not served the requisite time are assigned in tenure-eligible positions; and rely on Spiewak, in support of their tenure or tenure-eligible claims.

Petitioners further buttress their contention by citing supervisory requirements pursuant to N.J.A.C. 6:44-2.3(d) and N.J.A.C. 6:44-3.1(a)7.

The Board seeks dismissal of the petition on mootness since petitioners have not been terminated, and cites Weehawken Education Association v. Board of Education of the Township of Weehawken, 1978 S.L.D. 924; City Association of Supervisors v. Board of Education of Newark, 168 N.J. Super. 184, (App Div. 1979); and Bergen County Vocational Technical School Education Association v. Board of Education of Bergen County Vocational School District, 1983 S.L.D. _____ (undecided by Commissioner, Initial Decision rendered November 30, 1982) (hereinafter Bergen County #2).

The Board also argues that petitioners are employed in a voluntary program funded by the federal government which does not give rise to tenure rights, and cites Perth Amboy Federation of Teachers, Local 857 v. Board of Education of the City of Perth Amboy, 1981 S.L.D. _____ (decided December 24, 1981); Bergen County Vocational Technical School Teachers Association et al. v. Board of Education of Bergen County Vocational Technical School District, 1981 S.L.D. _____ (Initial Decision not reviewed by Commissioner, reversed by State Board November 10, 1981). (Hereinafter Bergen County

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#1). The Board also cites Capella v. Board of Education Camden Voc. Tech. School, 145 N.J. Super. 209 (App. Div. 1976), and contends that neither Perth Amboy or Capella were overruled by Spiewak.

DISCUSSION

Relative to mootness, the instant matter is distinguished from the cases cited by the Board. Weehawken was an appeal of Board action which assigned noncertificated personnel to supervise cocurricular activities, and was dismissed as moot as no noncertified personnel were assigned to supervisory duties at the time Summary Judgment was rendered. The Appellate Division of Superior Court dismissed City Association on mootness as "subject matter of dispute, coaching contracts for school year 1976-77, had long since ceased to exist." Bergen County #2 was an appeal for damages resulting from the termination of the employment of petitioners, wherein the petition was dismissed for all but two petitioners on mootness as all but two had been reemployed, therefore removing their cause of action.

The instant matter is an appeal for declaratory judgment triggered by the Board's notice to petitioners that the periods of their employment in the adult vocational education program would not be credited toward their tenure and seniority. See Stipulation #4. The record is void of any Board action rescinding said notice. I FIND no merit to the Board's contention as petitioners are employed in positions which the Board is not crediting for tenure or seniority. The matter is not moot and is ripe for declaratory judgment as a matter of law.

Capella was decided by the Superior Court, Appellate Division, on November 16, 1976. In that matter, part-time guidance counselors in an evening adult program, who were tenured in full-time day positions, were denied tenure in the part time positions. The court affirmed the Commissioner's and State Board's denial of tenure in respecting the Commissioner's expertise, noting desired flexibility in operation of the evening program, the impracticability of conferring tenure on petitioners, and that the over-protection petitioners seek would be a disservice to the schools, Id. at 211.

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Perth Amboy was decided by the Commissioner on December 24, 1981, and was a matter in which teaching staff members and secretarial/clerical employees sought a declaratory judgment that they held tenurable positions in the daytime adult school program. Tenurability was denied in reliance on case law, namely, Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175; Capella; Point Pleasant Beach Teachers Assn. v. Callan, 173 N.J. Super. 11 (App. Div. 1976), certif. den. 84 N.J. 469 (1980); Teaneck Bd. of Ed. v. Ethel P. Hogue, 1981 S.L.D. ____ (decided September 28, 1981); and Hamilton Tp. Supplemental Teachers Association et al. v. Hamilton Tp. Bd. of Ed. 180 N.J. Super. 321 (App. Div. 1981).

The rationale expressed for the denial of tenure and tenurability in Capella and Perth Amboy must be examined.

The Commissioner noted in Capella that conferring tenure to part-time instructions would impede flexibility of operation and that the "over-protection petitioners seek would be a disservice to the schools . . . and is not intended by the school laws" Id. 211 (petitioners were tenured as full time teaching staff members in the day time vocational program). The Superior Court, Appellate Division, respected the Commissioner's expertise in affirmance, and also said, "But we do so because we also concluded that analysis of the pertinent sections of the Education Law, N.J.S.A. 18A:1-1 et seq., read in pari materia, evinces a legislative intent not to confer tenure in the part-time positions here involved" Id. 211 (emphasis added).

The Commissioner and Administrative Law Judge held for the non-tenurability of petitioners in Perth Amboy in reliance on case law previously cited, the rationale in those cases being here generalized as need for flexibility, optional programs, and uncertain funding. Although Perth Amboy was decided after the Superior Court determination in Spiewak, there is no record of an appeal of that matter.

In Hogue, the State Board reversed the Commissioner in holding she was tenured, and remanded the matter for a tenure hearing. The reliance of Perth Amboy on Hogue was incorporated in the Commissioner's decision.

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In Hamilton Township, the Commissioner held 26 Beadleston supplemental teachers to be tenured, which was reversed by the State Board on the basis of Point Pleasant. The Appellate Division reversed and held that petitioners were eligible for tenure, distinguishing the fact that teachers in Hamilton Township were not federally funded, which was a fact in Point Pleasant. The Supreme Court affirmed.

The Appellate Division in Point Pleasant held the teachers did not hold tenurable positions due to the uncertainty of federal funding, and determined that the source of funds was a proper consideration when considering tenurability. This holding was overruled by the Supreme Court in Spiewak.

The Appellate Division held for the tenurability of supplemental teachers in Spiewak and established tenure criteria to be a certified teaching staff member serving in a position requiring the certificate for the requisite period of time pursuant to statute. Id. 317, 318. In reference to Point Pleasant, the court said: "In short, Point Pleasant Beach was not, we are convinced, intended to constitute a license for the circumvention of the tenure laws" Id. 320.

In the instant matter it appears appropriate to discuss the possible and probable circumvention of tenure laws. It was stipulated that some petitioners had already acquired tenure in administrative positions in the 9-12 program before transfer to the adult program. Assuming one had acquired four years of seniority at the time of transfer, a replacement serving five years would acquire five years of seniority. A proper abolishment of petitioners' position in the adult program pursuant to N.J.S.A. 18A:28-9 would result in petitioner's dismissal after nine yers in the district, pursuant to N.J.A.C. 18A:28-10, while his replacement in the 9-12 program would continue in his employment after five years of service in the district. This would occur if the Board prevails in its argument, and appears "to constitute a license for the circumvention of the tenure laws."

The Supreme Court in Spiewak affirmed the standards for tenure, and in reference to N.J.S.A. 18A:1-1 and N.J.S.A. 18A:25-5 said: "By the express terms of these statutes, an employee of a board of education is entitled to tenure if (1) she works in a

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position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time" Id. 74.

The Court also addressed Schultz v. State Bd. of Ed., 132 N.J.L. 345 (E. & A. 1945) and previously cited cases which relied on it, namely, Biancardi and Capella, in stating: "The cases relied upon by the court in Point Pleasant do not support its creation of a new exception to the tenure statute" Id. 77.

Schultz does not stand for the proposition that courts may create exceptions to the clear terms of the tenure statute" Id. 78. "[T]he Biancardi Court erroneously stated that Schultz 'is binding upon us until overruled by competent authority.' . . . Thus, by reaffirming the Schultz substitute teacher exception, Biancardi in effect did no more than restate the express legislative exclusion of substitutes from tenure eligibility" Id. 79. Capella "incorrectly relied on Schultz" Id. 79.

The Board here argues strongly that Perth Amboy and Capella were not overruled by the Supreme Court in Spiewak, and relies heavily on what the Court said at 79:

> However, the Capella court did act correctly in examining the various tenure provisions in the current statute to determine whether the Legislature intended to grant tenure to teachers in adult evening school programs. Referring to related provisions of the Tenure Act, the court concluded that those teachers were not within its protection.

A careful reading of the above appears only to uphold the process utilized by the Capella court in reaching its determination.

The Court in Spiewak also said:

> To summarize, neither Schultz nor Biancardi nor Capella holds that courts may themselves define exceptions to N.J.S.A. 18A:28-5. To the extent those decisions imply that the right to tenure derives from contract rather than statute, they are wrong. To the extent they suggest that courts may

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create exceptions to the clear language of N.J.S.A. 18A:28-5 based on policy considerations, they are disapproved, at 80.

THE LAW

"Teaching staff member" is defined at N.J.S.A. 18A:1-1:

> '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 (emphasis added).

N.J.S.A. 18A:28-5 provides in part:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positons 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

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(c) the equivalent of more than three academic years within a period of any four consecutive academic years; (emphasis added).

Tenure upon transfer or promotion is provided in N.J.S.A. 18A:28-6:

Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for each 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 added).

Staffing of schools is incorporated in N.J.A.C. 6:8-4.3, which provides in part:

(a) Teaching staff members shall be employed by the district board of education based upon the specific instructional needs of pupils of the district and each school within the district. The district board of education shall provide certified personnel needed to implement a thorough

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and efficient system of free public schools, which may include but not be limited to the following:

1. Adult, continuing and community education teachers;

2. Art teachers;

3. Educational supervisors;

4. Foreign language teachers;

5. Health teachers;

6. Instructional media specialists (librarians);

7. Instrumental and vocal music teachers;

8. Nurses;

9. Physical education teachers;

10. Reading specialists;

11. School counselors;

12. Speech correctionists;

13. Teachers of handicapped; and

14. Vocational educational specialists.

(b) The district shall employ for its teaching staff members, only persons certified under the rules and regulations of the State Board of Education.

(c) Rules on the principal are:

1. Each school shall be assigned the services of a full-time nonteaching principal to be responsible for administration and supervison of the school.

2. A district board of education, upon advice of the chief school administrator, may request from the Commissioner an exception to the provision of N.J.A.C. 6:8-4.3(c)1.

3. Assistants to principals and to principals assigned as chief school administrators shall be provided where

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> necessary because of school enrollment, educational program and/or complexity of operation . . . (emphasis added).

The State Board of Education adopted standards for adult education reimbursement, codified in N.J.A.C. 6:44-3.1, pertinent parts of which follow:

> (a) To be eligible for reimbursement, local programs of adult education must be approved by the Commissioner of Education. To meet the approval of the Commissioner, the educational services provided by the local public schools of the State for out-of-school youth and adults must:
>
> 1. Be operated under the authority and responsibility of a board of education and administered through the office of the superintendent of schools;
>
> 2. Be designed to serve persons beyond the compulsory school age and not regularly enrolled in a public or private secondary school;
>
> 3. Be organized to accomplish legitimate educational purposes;
>
> 4. Maintain a level of attendance consistent with good instruction and sound economy;
>
> 5. Maintain a comprehensive program of adult education that includes classes or activities, representing, at least, six of these curriculum areas:
>
> . . .
>
> iii. High school education prepares the non-high school graduate to gain a high school diploma;
>
> . . .
>
> 6. Be consistent with the traditional policy of public education in the State and operated on a nonprofit basis;
>
> 7. Be administered and supervised by a person holding a valid supervisor's or administrator's certificate issued by the New Jersey State Department of Education.
>
> . . .

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> iii. No school district should assign a person to spend less than half of his working time in the administration and supervison of the adult education program.
>
> iv. It should be the responsibility of the supervisor of adult education to establish a close relationship between his office and the total school system, other agencies and organizations engaged in adult education in the community and related Federal programs of adult education.
>
> v. It should be the responsibility of the supervisor of adult education to submit to the Commissioner of Education whatever reports are deemed necessary by the Commissioner to indicate that such program has been operated in accordance with the law and regulations governing the administration of adult education programs under the public schools of the State (emphasis added).

CONCLUSIONS OF LAW

It is undisputed that the adult education program adopted and approved by respondent here is permissive and not mandatory. It is abundantly clear that once a Board exercises its discretionary authority, it is then required to be consistent with New Jersey statutes and regulations of the State Board of Education.

The Supreme Court in Spiewak said:

> Since the wording of N.J.S.A. 18A:28-5 is clear and unambiguous, we will apply it as written in the absence of any evidence of a contrary legislative intent. As Justice Clifford stated in construing a different portion of the Tenure Act:
>
> > Fundamental principles of statutory construction require that [i]f the [statutory] language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning [Citation omitted].
> >
> > Our duty is to construe and apply the statute as enacted. We are not at liberty to presume the Legislature intended something other than what it expressed by its plain language. This Court will not

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> engage in conjecture or surmise which will circumvent the plain meaning of the act. [In re Jamesburg High School Closing] 83 N.J. 540 (1980).
>
> Moreover, because of its remedial purpose, the Tenure Act should be liberally construed to achieve beneficent ends. Barnes v. Jersey City Bd. of Ed., 85 N.J. Super. 42, 45 (App. Div. 1964). Accord, Manchester Bd. of Ed. v. Raubinger, 78 N.J. Super. 90, 101 (App. Div. 1963); Viemeister v. Prospect Bd. of Ed., 5 N.J. Super. 215, 218 (App. Div. 1949). Cf. Capella v. Bd. of Ed. of Camden County Voc. Tech. Sch., 145 N.J. Super. 209, 214 (App. Div. 1976). (at 74, 75)

The Spiewak court further stated at 79: "It is not proper for courts to override that determination [Legislature's] on the basis of their independent policy conclusions."

I **FIND** the holdings in Perth Amboy and Capella to have been determined by policy conclusions of the Commissioner and the court, and not those of the Legislature. I further **FIND** those holdings overruled by the Supreme Court in Spiewak, which is dispositive of the instant matter.

Following the court's endorsement of the process followed by the Appellate Division in Capella, I have examined the various tenure provisions in the current statute, as well as the regulations of the State Board of Education, to determine whether the Legislature intended to grant tenure to petitioners in this matter, and also in review of the entire record **FIND:**

1. The Board exercised its discretionary authority pursuant to N.J.S.A.18A:50-1 in maintaining a program of adult education.

2. Petitioners herein are teaching staff members pursuant to N.J.S.A. 18A:1-1.

3. Petitioners herein are certified, and hold positions requiring certification pursuant to N.J.A.C. 6:8-4.3, and N.J.A.C. 6:44-3.1.

4. No explicit exceptions in N.J.S.A. 18A:28-5 or related statutes applicable to deny tenure eligibility to petitioners in this matter.

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I **CONCLUDE**, therefore, the administrative positions to which petitioners are assigned in the Adult Vocational Education Program are tenurable, and further **CONCLUDE** the time served in said positions shall count for seniority purposes, effective upon the acquisition of tenure. To hold otherwise would be in conflict with Spiewak, N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6.

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

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

13 January 1983
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

19 January 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

January 20, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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CHARLES RABOLLI ET AL. AND THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOLS ADMINISTRATORS ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOLS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, Ward R. Young, ALJ.

It is observed that the Board has filed timely exceptions to the initial decision pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board's exceptions are grounded on two points of legal argument set forth in its accompanying brief filed with the Commissioner:

> "THE PETITIONERS CONTINUED EMPLOYMENT BY THE RESPONDENT HAS RENDERED THIS ACTION MOOT AS NO VIABLE CONTROVERSY EXISTS."
>
> ***
>
> "PETITIONERS EMPLOYMENT IN THE BERGEN TECHNICAL TRAINING CENTER, A VOLUNTARY PROGRAM FUNDED SOLEY WITH FEDERAL FUNDS, DOES NOT GIVE RISE TO TENURE RIGHTS."
>
> (Board's Brief, at pp. 1 and 4)

In regard to the first point, the Board argues that petitioners at no time have had their employment terminated and therefore this matter may not be considered to rise to the level of a controversy or dispute before the Commissioner of Education in accordance with the provisions of applicable school law. The Board maintains that the instant Petition for Declaratory Judgment is moot and must thereby be dismissed by the Commissioner, who has previously held that he will not render determinations on moot issues. In this regard the Board relies on Weehawken Education Association v. Board of Education of the Township of Weehawken, 1978 S.L.D. 924, 925; City Association of Supervisors

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and Administrators v. Board of Education of Newark, 168 N.J. Super. 184, 185 (App. Div. 1979) and Bergen County Vocational Technical School Education Association v. Board of Education of Bergen County Vocational School District, Agency Docket No. 176-5/82A, O.A.L. Docket No. EDU 05971-82 (Partial Summary Judgment rendered by Judge Samuels, Office of Administrative Law). (Board's Brief, at pp. 1-3)

In regard to the second point, the Board maintains that it is clear that petitioners are currently employed in a full-time adult day school operated by the Board as a voluntary, rather than statutorily mandated, education program. The Board argues that the optional nature of its adult day school program is apparent from the context of the statutory provisions of N.J.S.A. 18A:50-1, where the maintenance of adult schools is discretionary. Moreover, the Board avers that the Court's decision in Capella and Fitts v. Board of Education of Camden Vocational and Technical School, 145 N.J. Super. 209 (App. Div. 1976) and the Commissioner's previous ruling in Perth Amboy Federation of Teachers, Local 857 v. Board of Education of the City of Perth Amboy, Middlesex County, decided December 24, 1981 stand for the proposition that, where adult school programs are involved, whether they be full-time day programs or part-time evening programs, the teaching staff employed in those programs are not tenure eligible pursuant to N.J.S.A. 18A:28-5 et seq. nor can they lay claim to seniority protection. Finally, the Board maintains in its exceptions that the above-cited case law upon which it relies herein was not overturned by the Court in Spiewak et al. v. Rutherford Board of Education, 90 N.J. 63 (1982). In this regard the Board argues as follows:

> "***The Court in Spiewak did directly overrule a prior decision, Point Pleasant Beach Teachers' Assn. vs. Callams, 173 N.J. Super. 11, cert den 84 N.J. 469 (1980) which had held certain remedial reading teachers, whose positions were funded under Title I, were ineligible for tenure.
>
> "The cases before the Court in Spiewak all involved remedial and supplementary instructors. The question for the Court to decide was stated by Justice Pashman thus:
>
> > 'Today we decide whether public school teachers who provide remedial and supplemental instruction to educationally handicapped children may acquire tenure.' p. 66.
>
> "Although the Court stated it found no legislative intent to exclude remedial and supplemental teachers and thus concluded they were

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eligible, it relied also on the fact mandated services were involved.

> 'We find further support for this conclusion in the statutes which mandate that remedial and supplemental services be provided to children who need them. The Public School Education Act of 1975, N.J.S.A. 18A:7A-1 to -33, enacted in response to this Court's ruling in Robinson v. Cahill, 69 N.J. 133 (1975), specifically requires public schools to provide "[p]rograms and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs." N.J.S.A. 18A:7A-5(e). See also N.J.S.A. 18A:7A-6; N.J.A.C. 6:8-2.1; 6:28-3.2. We agree with the Appellate Division in Spiewak which stated:
>
> "We deem it beyond cavil that elementary school children unable to read at grade level are included within this mandate and that remedial programs for such children are encompassed by this legislative directive. Certainly the programs prescribed by N.J.S.A. 18A:46-1 et seq. are also generally encompassed within the definitional scope of this directive. [180 N.J. Super. at 319]"
>
> 'We have previously alluded to the strong legislative policy of providing adequate remedial education to students with special needs. See e.g., Levine v. Institutions & Agencies Dept. of N.J., 84 N.J. 234, 249-50 (1980). Such programs are a permanent part of New Jersey's system of "thorough and efficient education." N.J.S.A. 18A:7A-2.' p. 75

"Since it was thus cited by the Court, the distinction between a mandated and an optional program would appear to still be a significant one.

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"It must also be noted that the Capella decision was not overruled by Spiewak as the initial decision would indicate. The Court in Spiewak discussed the Capella decision at length. It cited as incorrect the proposition that a need for flexibility would impede tenure rights, but did not criticize its holding concerning adult schools. Rather than just note the procedural correctness of Capella, the Court then noted the decision that teachers in adult schools were not within Tenure Act protection and did not criticize it.

"Spiewak noted that, to the extent Capella and other decisions held, Courts could create exceptions on policy grounds, or that tenure derives from contract status, they were disapproved. But, where it reached its determination by examining the statutes, as it did, it was cited as acting correctly. Spiewak at p. 79.

"Nowhere is the distinction regarding optional and mandated programs disapproved although the Court specifically disapproved other distinctions found to be erroneous.

"The cases relied on in respondent's brief before Judge Young are still the law regarding tenure in optional programs; they have not been overruled.***"

(Board's Exceptions, at pp. 2, 3)

The Commissioner has carefully reviewed the Board's exceptions to the initial decision. In the Commissioner's judgment the Board's exceptions with regard to its urging that the instant Petition for Declaratory Judgment be dismissed on the grounds of mootness is without merit. It is clear that the cause giving rise to petitioners' application for declaratory ruling emanates from the Board's action of April 26, 1982, notifying petitioners that it had determined they were not under tenure protection nor did they acquire a seniority status for those periods of employment service in the full-time adult day school program operated by the Board.

In this regard the Commissioner finds and determines that petitioners acted correctly and in accordance with the provisions of N.J.A.C. 6:24-1.2 which state in pertinent part:

"To initiate a proceeding before the commissioner to determine a controversy or dispute arising under the school laws, a

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> petitioner shall file with the commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested.***"

The remaining issue to be decided by the Commissioner is whether the State Supreme Court's ruling in Spiewak applies to the question raised herein with respect to the tenure eligibility of teaching staff members, as defined in N.J.S.A. 18A:1-1, who are employed by a local board of education and assigned or transferred to its adult education program pursuant to N.J.A.C. 6:8-4.3.

It is observed that the Court in Spiewak set aside in part those prior determinations of the lower courts which defined exceptions to the clear and unambiguous language of the provisions of N.J.S.A. 18A:28-5, as amended, by declaring such exceptions as being contrary to the intent of the Legislature through the enactment of the above-cited statutory provisions. More specifically, the Court in Spiewak stated in pertinent part:

> "***The Point Pleasant court also relied on Capella for the proposition that an employee is not entitled to tenure if the program in which she is employed 'requires a flexibility in operation which would be impeded if its instructors were granted tenure.' 173 N.J. Super. at 18. See Capella v. Camden Cty. Voc. Tech. Sch. Bd. of Ed., 145 N.J. Super. at 214-215. This is incorrect for several reasons. First, the Legislature has determined that the utility of tenure to improving education outweighs any costs in decreased 'flexibility.' That is a policy determination that has been made by the Legislature. It is not proper for courts to override that determination on the basis of their independent policy conclusions. Second, the tenure statute in no way deprives a school board of flexibility. A board can deny tenure to a teacher simply by dismissing her before she has completed the required years of service. Finally, the Legislature has expressly provided that tenured teachers may be dismissed if the board deems it advisable to reduce the number of teaching positions for economic reasons or because of reduction in the number of pupils or other good cause. N.J.S.A. 18A:28-9. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 51-52 (App. Div. 1979).

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> "To summarize, neither Schulz nor Biancardi nor Capella holds that courts may themselves define exceptions to N.J.S.A. 18A:28-5. To the extent those decisions imply that the right to tenure derives from contract rather than statute, they are wrong. To the extent they suggest that courts may create exceptions to the clear language of N.J.S.A. 18A:28-5 based on policy considerations, they are disapproved.***" (90 N.J. at 79-80)

However, the Court in Spiewak concluded that:

> "***[I]n Capella v. Camden Cty. Voc. Tech. Sch. Bd. of Ed., the Appellate Division held that teachers in an adult evening school program were ineligible for tenure. That court again incorrectly relied on Schulz. 145 N.J. Super. at 212-13. At the time Capella was decided, the statute construed in Schulz was no longer in existence. However, the Capella court did act correctly in examining the various tenure provisions in the current statute to determine whether the Legislature intended to grant tenure to teachers in adult evening school programs. Referring to related provisions of the Tenure Act, the court concluded that those teachers were not within its protection. Id. at 211, 214. See N.J.S.A. 18A:28-6.1.***"
>
> (Emphasis supplied.) (Id., at 79)

In the Commissioner's judgment the issue herein is not analogous to those specific circumstances enunciated in Capella and he finds the Board's reliance on that case herein is misplaced.

It is noted that there is no dispute with respect to those prior periods of employment of certain petitioners who were formerly employed in tenure eligible positions in the Board's regular 9-12 high school program. It is apparent, however, that some petitioners were either transferred or assigned to the Board's day school adult education program while others may have been initially employed by the Board in said program.

It is also undisputed that the Board operates an approved vocational-technical school pursuant to applicable statutory prescription and that the curriculum includes day time vocational high school and adult vocational programs.

Thus, the Commissioner, in relying on Spiewak, need only apply the standards for tenure pursuant to the pertinent statutes of reference addressed therein in order to reach a determination regarding whether those positions in which petitioners are currently employed in the adult education program are tenurable.

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In applying such standards the Commissioner finds and determines that petitioners are employed by the Board in tenurable positions in the adult education program by virtue of the following:

1. They are employed in positions for which teaching certificates are required.

2. They hold appropriate certificates issued by the State Board of Examiners to be considered by definition as teaching staff members.

3. Such employment service, if rendered for the requisite period of time as prescribed in N.J.S.A. 18A:28-5, affords them tenure status as intended by the Legislature in accordance with the above-cited provisions.

Except for the modifications set forth above, the Commissioner hereby affirms the findings and conclusions in the initial decision and adopts them as his own.

Accordingly, having found and determined that petitioners are employed in tenurable positions as assigned by the Board, it is further found and determined that the time served in such positions shall count for seniority purposes, to become effective upon the acquisition of tenure by petitioners in accordance with the specific provisions of N.J.S.A. 18A:28-5.

COMMISSIONER OF EDUCATION

MARCH 18, 1983

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CHARLES RABOLLI ET AL. AND BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOLS ADMINISTRATORS ASSOCIATION,	:	
PETITIONERS-RESPONDENTS	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOLS, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 18, 1983

For the Petitioners-Respondents, Wayne J. Oppito, Esq.

For the Respondent-Appellant, Greenberg & Covitz (Morton R. Covitz, Esq., of Counsel)

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

Maud Dahme abstained in this matter.

July 6, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9169-82
AGENCY DKT. NO. 381-9/82A

I.C. AND M.C., HIS WIFE,
ON BEHALF of J.C., THEIR INFANT CHILD,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CITY OF PATERSON, PASSAIC COUNTY,
Respondent

APPEARANCES:

James M. Larsen, Esq., for petitioners
(Passaic County Legal Aid Society)

Herman W. Steinberg, Esq., for respondent

Record Closed: January 13, 1983 Decided: February 8, 1983

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

I. C. and M. C., parents of their 14 year old son J. C., alleged though they were domiciliaries in the City of Paterson, Passaic County, they were refused enrollment in and admission to school for their son by the Paterson Board of Education in contravention of rights granted them under N.J.S.A. 18A:38-1 et seq. and the equal protection clauses of state and federal constitutions. The Board admitted refusal but justified its action on the ground petitioners were illegal alien residents in the United States whose status disentitled their son to free public school admission. Petitioners sought temporary (until final determination) and permanent relief by way of judgment mandating the infant petitioner's enrollment in and admission to school.

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The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on September 28, 1982. Because the petition sought emergent interim relief, the Commissioner transmitted the matter before answer to the Office of Administrative Law on October 5, 1982 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The Board's answer, filed in the Bureau of Controversies and Disputes on October 20, 1982, provided as follows in a separate defense:

> Petitioners individually and their infant child are illegal residents of the United States, overstaying their visas and have failed to produce the necessary and proper authorization from the Immigration and Naturalization Department of the United States which would affirm the right of petitioners to remain in this country and the infant petitioner to attend the New Jersey public school system.

On short notice to the parties, the matter came on for hearing on the motion for interim relief and for prehearing conference on October 26, 1982. As appeared from the prehearing conference order, petitioners admitted they entered the United States from Peru on March 15, 1982 under six-month tourist visas, which have since expired. They have no present intention voluntarily to leave the United States. They presently reside in an apartment in the City of Paterson, Passaic County. Both parents are employed. They do not qualify for permanent alien resident status. Their infant son J. C. was born August 19, 1968 in Lima, Peru. In an affidavit, they deposed their present domicile and residence is in the City of Paterson, Passaic County; they have no other. They deposed it is their intention to maintain that domicile and residence.

Ultimately at issue in the matter was whether, as set forth in the prehearing conference order, the Board's denial of enrollment to petitioners' son as an illegal resident alien under federal immigration laws, which right of enrollment but for such alleged status would otherwise be his under N.J.S.A. 18A:38-1, is violative of the equal protection clauses of state and federal constitutions. N.J.S.A. 18A:38-1 provides:

> Public schools shall be free to the following persons over 5 and under 20 years of age:
>
> (a) Any person who is domiciled within the school district.

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At issue first, however, was whether petitioners were entitled to immediate preliminary injunctive relief requiring the Board to admit the infant petitioner to school pending final determination on the merits of the ultimate issue raised in their petition of appeal. In Hornik v. Bd. of Ed. of the Twp. of Marlboro, 1976 S.L.D. 987, the Commissioner of Education said:

> Issuance of a preliminary injunction is a matter within the sound discretion of the court. That discretion is traditionally exercised upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, and the balancing of damage and convenience generally (at 988).

That irreparable harm might result to a 14 year old of high school age while awaiting adjudication of his right to admission to school appeared self-evident when balanced against the consequence to the school district his immediate admission to school would have caused. In a word, it seemed far less irretrievably harmful to all that the 14 year old be admitted to school pending adjudication than that he be denied such admission. It was clear the infant's constitutional rights were implicated in the proceeding, as well as rights under New Jersey statute law to free public education as a presumptive domiciliary in the district. That parents and son were presumptive domiciliaries within the district appeared from their affidavit. It is axiomatic in law that one may have many residences but only one domicile. Domicile is frequently defined as a matter of subjective intent. It is that permanent place to which one, when absent from it, intends to return.

The question resulted, therefore, whether on the evidential record on motion and under applicable law petitioners were likely ultimately to prevail in their petition for permanent injunctive relief. That issue turned on whether N.J.S.A. 18A:38-1 might be so construed as to import into the phrase "domiciled" a necessary and sufficient exclusion therefrom for illegal resident aliens within the school district. In Plyler v. Doe,

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__ U.S. __, 72 L. Ed. 2d 786, 102 S. Ct. _____ (1982), a statute expressly so invidious was struck down. It appeared the Texas Legislature had enacted a statute that withheld from local school districts any state funds for the education for children who were not "legally admitted" into the United States and that authorized local school districts to deny enrollment in their public schools to such children. In a plurality opinion the Supreme Court held the Texas statute violated the equal protection clause of the Fourteenth Amendment of the United States Constitution, which provides:

> No States shall. . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Whatever their status under federal immigration laws, the Court said (at 795 of 72 L. Ed. 2d), aliens are persons in the ordinary sense of the term and are persons guaranteed due process of law under the Fifth and Fourteenth Amendments.

At 800-01 of 72 L. Ed. 2d, the Court said:

> Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.
>
> The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold beneficence from those whose very presence within the United States is the product of their unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our laws should be prepared to bear the consequences, including, but not limited to, deportation . But the children of those illegal entrants are not comparably situated. Their parents

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> have the ability to conform their conduct to societal norms, and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases can affect neither their parents' conduct nor their own status. Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

Based on the foregoing, and upon a balancing of equities of harm and convenience and a consideration of the likelihood that petitioners might have ultimately prevailed herein, the administrative law judge **CONCLUDED** petitioners' motion for interim relief against the Board mandating and directing the infant petitioner's immediate enrollment in and admission to public school should have been , and it was, **GRANTED,** on November 12, 1982, pending final adjudication herein.

By order dated November 18, 1982, the Commissioner of Education determined, pursuant to N.J.A.C. 1:1-9.7(a), (b) and (c), not to review the Order granting interim relief.

Thereafter, before final hearing scheduled in the Office of Administrative Law on January 24, 1983, the Board informed the administrative law judge, by letter of counsel dated January 19, 1983, that it withdrew any objection to entry of a permanent order granting relief requested in the petition.

CONCLUSION

Based on the foregoing, therefore, I **CONCLUDE** (1) the Order heretofore entered on November 12, 1982 should be, and is hereby, made **FINAL;** and (2) the Board of Education of the City of Paterson, Passaic County, is hereby **ORDERED** to enroll and admit, and/or continue to enroll and admit, the infant petitioner to public school in the district without regard to his or his parent's federal immigration status as hereinabove alleged or admitted.

It is further **ORDERED,** nonetheless, that a certified copy of proceedings herein be transmitted forthwith to the United States Attorney for the District of New Jersey for such action, if any, as he shall deem proper.

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

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

February 8, 1983
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

February 10, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb 10, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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I.C. AND M.C., on behalf of J.C., their infant child,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, James A. Ospenson, ALJ.

The Commissioner observes that no timely exceptions to the initial decision were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner concurs with that portion of the initial decision which finds and determines that J.C. is entitled to be enrolled in the School District of the City of Paterson for the purpose of receiving a free public school education. He is constrained to observe further, however, that the issue of J.C.'s enrollment in the Paterson School District does not empower him to direct the Board to transmit a copy of these proceedings to the United States Attorney for the District of New Jersey for the purpose of determining petitioners' Federal immigration status. The Board, of course, may take whatever action it deems appropriate pursuant to applicable State or Federal statutes. However, to the extent that it has been directed to take such action by the ALJ, that portion of the initial decision is hereby set aside. The Commissioner so holds.

In all other respects the Commissioner concurs with the findings and determination in the initial decision and adopts them as his own.

Accordingly, the Board is hereby directed to enroll and admit, and/or continue to enroll and admit, J.C. to public school in the Paterson School District without regard to his parents' Federal immigration status as hereinabove alleged or admitted.

IT IS SO ORDERED this 25th day of March 1983.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5284-82

AGENCY DKT. NO. 130-4/82A

IN THE MATTER OF THE TENURE HEARING OF GEORGE MC CLELLAND, SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MERCER COUNTY.

APPEARANCES:

John A. Selecky, Esq., for petitioning Board of Education (Selecky, Gilanyi & Rowe, attorneys)

John B. Prior, Esq., for respondent McClelland (Greenberg, Kelley & Prior, attorneys)

Record Closed: December 30, 1982 Decided: February 10, 1983

BEFORE **ERIC G. ERRICKSON,** ALJ:

This matter was certified on April 21, 1982, by the Washington Township Board of Education (Board) in the form of tenure charges alleging unbecoming conduct, pursuant to N.J.S.A. 18A:6-10 et seq., against respondent George McClelland, who was suspended without pay from his teaching position at the Board's Sharon Elementary School at the time of certification of charges. Essentially, respondent is charged with improperly touching female pupils on a number of occasions. Respondent vigorously denies that his actions were, at any time, improper or inappropriate. The Board, however, asserts that the charges, if true, are such that dismissal or financial penalty should be invoked.

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When the pleadings were joined before the Commissioner of Education, he transferred the matter to the Office of Administrative Law for processing as a contested case, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. Following a prehearing conference conducted at the Office of Administrative Law, Trenton, New Jersey, on July 14, 1982, respondent filed a Notice of Motion to Dismiss on August 25, 1982. Briefs addressing the Motion were filed by respective counsel. In an Order, dated September 9, 1982, issued by the undersigned, denying the Motion to Dismiss, the following was stated:

> While it appears that respondent is correct when he asserts that the 12 charges certified by the Board all center about the alleged incident(s) of touching, hugging and caressing of minor female pupils, the charges are of sufficient importance to warrant a tenure hearing under administrative law. Respondent has been cast under a cloud of suspicion and uncertainty which, if the charges are not true, should be dispelled. Similarly, the Board, in its fiduciary relationship to the community in the operation of its school, must not do so under a cloud of mistrust or uncertainty. A plenary hearing is required.

After a plenary hearing was conducted at the Washington Township Municipal Building on December 2, 6, 7, 14 and 16, briefs were filed closing the record on December 30, 1982.

UNDISPUTED FACTS:

I **FIND** the following to be facts which are not controverted in this record and which reveal the contextual setting of the dispute:

The Board, on April 21, 1982, certified tenure charges of unbecoming conduct against respondent, George McClelland, a tenured teacher who had taught in the district for 13 years and was, at that time, assigned as a fifth grade classroom teacher at the Sharon Elementary School. At the same time, the Board suspended respondent without pay. The text of the charges as certified and set forth below were in all points identical to charges preferred by Madeline Redmond, the Board's Superintendent of Schools, who also serves as principal in this elementary school district:

> 1. That the teacher, George McClelland, exhibited conduct unbecoming a teacher, by his habitual flagrant conduct in touching, caressing and hugging minor female students in his charge.

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2. That the teacher, George McClelland, exhibited conduct unbecoming a teacher, in that his habitual flagrant conduct of touching, caressing and hugging minor female students caused the minor female students to be afraid of him which was contrary to the welfare of the students.

3. That the teacher, George McClelland, exhibited conduct unbecoming a teacher in that his habitual flagrant conduct of touching, caressing and hugging minor female students caused these students to talk negatively about him which was contrary to the good order of the public school system.

4. That the teacher, George McClelland, exhibited conduct unbecoming a teacher, in that his habitual flagrant conduct of touching, caressing and hugging minor female students violated the high public trust that is expected of a teacher and also violated the trust that the students place in a teacher.

5. That the teacher, George McClelland, exhibited conduct unbecoming a teacher in that his habitual flagrant conduct of touching, caressing and hugging minor female students caused these students to become afraid to attend his classes; these children are required to attend school and they have no choice but to attend the classes of this teacher, if they are assigned. This condition is contrary to a thorough and efficient education and is not in the best interests or welfare of the students.

6. That the teacher, George McClelland, exhibited conduct unbecoming a teacher, in that his habitual flagrant conduct of touching, hugging and caressing minor female students caused these students to form negative attitudes against this teacher. A teacher is required to exhibit to students of immature age and experience positive attitudes and habits, for a teacher's actions, as well as words, influence the opinions and decisions of the students who look to a teacher for guidance.

7. That the teacher, George McClelland, exhibited conduct unbecoming a teacher by his habitual flagrant conduct in touching, caressing and hugging minor female students, in that he did not exercise that high degree of self-restraint and controlled behavior to students that is expected of a school teacher.

8. That the teacher, George McClelland, exhibited conduct unbecoming a teacher by his habitual flagrant conduct in touching, caressing and hugging minor female students in that his conduct caused the students to talk and react negatively towards and about him, resulting in the character and reputation of this teacher to be far below the high standard required of a school teacher.

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9. That the teacher, George McClelland, exhibited conduct unbecoming a teacher, by his habitual flagrant conduct in touching, caressing and hugging minor female students in that his conduct deliberately and willfully violated the trust placed in him by the students, the parents and the administration.

10. That the teacher, George McClelland, had been warned, several years ago, by this school official then in charge of the Sharon School, to cease touching, caressing and hugging minor female students and his habitual flagrant conduct in touching, hugging and caressing minor female students exhibits willfull and deliberate insubordination in not so following and complying with a lawful order of a school official who was entitled to give such order and to have it obeyed and was conduct unbecoming a teacher.

11. That the teacher, George McClelland, had been warned, several years ago, by this school official, then in charge of Sharon School, to cease touching, hugging and caressing female students and his habitual flagrant conduct in touching, hugging and caressing minor female students exhibits a complete indifference to the sensitivity of his situation brought on by his insubordination and his habitual flagrant conduct, conduct totally unacceptable in a school teacher.

TESTIMONY OF WITNESSES:

C.P., a twelve-year-old female pupil now in the seventh grade, who was in respondent's fifth grade class during 1980-81, testified that, on one occasion when she was at respondent's desk getting assistance, he scratched her back and asked that she scratch his, a request with which she complied.

She testified that about a year later, after they viewed a film entitled Girls, Beware, while in a health class, she and certain of her friends discussed with two teachers, Bursuk and Cook, the matter of respondent's touching female pupils in his classes. C.P. testified that those teachers then set up a half-hour meeting in a vacant classroom the next day at which time the girls could talk with the two teachers about their concerns. C.P. testified that, after the teachers said they would check it out, she told her parents that respondent had scratched her back and later related the incident to the Superintendent and the assistant principal.

When questioned on cross-examination about details of the incident, whether she had witnessed other such incidents and whether she remembered details of the film, C.P. repeatedly responded, "I don't remember."

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S.N., another twelve-year-old female pupil in respondent's sixth grade class in 1980-81, testified that while correcting her paper at his desk at the front of the classroom, respondent touched her with his hand on her side, under her garment on the bare skin of her midriff. She testified that when she said, "Don't," and pushed his hand away, he put it back again, whereupon she again pushed his hand away and the incident ended. She testified that she related the incident to her parents two days later and, after Girls, Beware was shown during the next school year, attended a meeting with the two teachers, discussed with them the touching incident, and later gave the following statement to the Superintendent:

> I am a sixth grade student in the Sharon School. I saw a film at school called "Girls Beware" and this film made me think of some of the things Mr. McClelland did while I was in his class.
>
> I remember that Mr. McClelland put his hand up my blouse and touched my bare skin. I had to push his hand away twice.
>
> I did not like this being done by my teacher, but, I was afraid to say anything to anyone until I saw the film.
>
> [R-1]

J.M., a fifth-grade girl in respondent's class during the 1981-82 school year when the charges were certified, testified that sometime during the winter months of that year, she was standing at the head of a line of pupils ready to leave respondent's classroom when respondent came up to her and placed his hand inside the back of her slacks, touching her on her bare buttock. She, too, testified that she saw Girls Beware, talked with her friends about it, attended the half-hour meeting with Bursak and Cook, and gave an oral statement to the Superintendent.

A.C., a seventh- grade girl, testified that, while in respondent's fifth grade class, she was standing one day at his desk in the front of the room, he reached his hand up the back of her blouse. She testified that when her "bra" came undone, she became fearful, left the room, and went to the rest room to adjust her clothing. She testified that, although she did not tell her mother of the incident, she told her older sister and friends, stating that the bra's coming undone might have been an accident. She, too, related that she saw the film, attended the meeting and later gave the following signed statement to the Superintendent:

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> I am a sixth grade student and along with my class, I saw a film called "Girls Beware." After seeing the film, the girls talked about what they had seen and about a teacher, Mr. McClelland. This teacher was always touching the girls and once he put his hand up my blouse and my bra became loose. I was very scared of Mr. McClelland after that and tried to keep away from him.
> [R-2]

When asked on cross-examination whether she had had any disciplinary problems at the school, A.C. testified that she had had none in respondent's class but that she had, on one occasion, been apprehended for writing on a special education lavatory wall: "Mrs. Z's class stinks." When asked again if that is exactly what she wrote on the wall, A.C. responded affirmatively.

In regard to this incident, however, the special education teacher and another teacher both testified that the lavatory wall inscription for which both A.C. and C.P. were given a written punishment assignment was: "Mrs. Z's class s...." (an obscenity).

A.B., who also had been in respondent's class, testified that, while she was at respondent's class in the front of his classroom, Mr. McClelland scratched her back on a number of occasions. She testified that, when he did so, she did not like it and moved away but never told him to stop. A.B.'s mother testified that, when her older daughter complained to her in 1978 about this same type of back scratching, she talked to the Superintendent about it early in the school year.

ELIZABETH BURSUK and **MARY ELLEN COOK,** teachers at the Sharon School, corroborated that they were approached by pupils after the film, Girls Beware, was shown, that they set up a meeting during March 1982 at which about 13 girls aired their concerns and that they then reported to the Superintendent the concerns expressed by the girls about the respondent.

JULIA THEOHARUS, secretary at Sharon School the past 24 years, testified of incidents she had seen in 1978, when respondent was teaching fourth grade. The substance of her testimony is incorporated in the following written statement she made when this case was in preparation:

> I went to Mr. McClelland's room one day in 1978 to borrow a pair of pliers. As I entered the room I noticed Mr. McClelland sitting on a chair with a female student sitting on his lap. He had one arm

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> around the student and with the other hand he was rubbing her back. He remarked as I came in that they liked to be cuddled.
>
> When I returned later with the pliers Mr. McClelland was standing with his arms crossed around a female student pressed against his body.
>
> At another time within a few days of the first visit I took a package to Mr. McClelland's room and he was standing in front of the classroom swinging a female student between his legs with both arms around her body.
>
> I returned to the office and informed the principal of what I had seen.
>
> I also told Mrs. Roszel, Mr. McClelland's sister-in-law, that [respondent] was leaving himself wide open for trouble with his actions. . . .

SALLY ANN MESH, who substituted at Sharon School from 1978 to 1980, testified that she prepared the following written statement on September 1, 1982:

> While employed as a substitute teacher with Washington Township Schools during the 1978-79 and 1979-80 academic years, I observed Mr. McClelland on several occasions with female students in physically close situations. Specifically, these situations included: holding a student on his lap while in charge of a class, rubbing the back and shoulders of a student during a class, standing behind a student and leaning over so as to position his head over the student's shoulder unusually near the face while assisting a student during class.
>
> [R-4]

Mesh testified that, although she had never discussed these observations with anyone until the Board was considering the instant tenure charges, she spoke about them to her mother, Thelma Bickford, assistant principal at Sharon School and was later asked to make the above statement. Mesh testified that, in her professional opinion, better academic results are achieved if a teacher does not "invade student space" as respondent did.

THELMA BICKFORD, assistant principal, testified that during March 1982, she went into respondent's classroom where she saw him seated at his desk with his hand under the back of a girl's sweater or blouse and that on another occasion, she saw him "scratching a girl's back on top of her sweater." She testified that, although she had never spoken to respondent about touching pupils, she had heard the Superintendent in the next

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office during February 1982, admonish him not to touch female pupils. When asked whether she had ever touched pupils, she testified that she had, but only to pat them on the head or shoulders.

KATHRYN PETITO, a parent and a hair stylist, testified that she had mentioned to the Superintendent that she had learned that some boys in respondent's class were contemplating filing a petition against respondent on grounds that he "liked the girls and hated the boys" in his class. When asked whether her son had any problems in respondent's class, she answered in the negative, stating that her son had told her he would not sign any petition since he liked respondent.

MADELINE REDMOND, Superintendent of Schools, testified that she has known respondent for six and one-half years, first as his principal and then as his Superintendent. She testified that four years ago, after the mother of A.B. complained to her, she admonished respondent not to touch or scratch the backs of pupils. She testified that respondent told her he would cease doing so but that she might have to help him to remember. She testified that, during February 1982, when she again admonished respondent not to touch female pupils, he once more agreed to comply saying, "You'll have to remind me. I'll have to sit on my hands."

Redmond testified that, when it was reported to her in early March that there had been repeated instances, she again talked to respondent about the problem on March 9, 1982. She testified that, when she asked him what he was going to do about it, he said that, although he had not touched any pupil with carnal intent, he was being treated fairly and that he would think about resigning and get back to her. Redmond testified that, when he told her on March 12 that he chose not to resign, he also told her he believed in the hands-on approach in teaching, to which she responded that she, too, believed in hands-on study methods by pupils but not in teachers hands on pupils.

VIRGINIA ZDANOWICZ, appearing as the first of respondent's witnesses, testified that as the parent of three pupils, all of whom had been in respondent's classes, she had frequently been in his classroom as a parent or a volunteer helper to assist pupils who needed individualized help. She testified that she had never heard a complaint from a pupil or parent about respondent's touching or display of affections. She testified that respondent had the remarkable ability of bringing out good qualities in his pupils, that he always had good control of his classes, used a variety of teaching materials and

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techniques, and sometimes played the guitar and sang with his pupils at the end of a school day. She testified that respondent's 1980-81 class spontaneously took up a donation to honor him and presented him with a suitably lettered plate of Lenox china honoring "Bud," as respondent was affectionately known by his pupils.

PATRICIA SHINAL, a parent of three pupils, who worked as a teacher's aide and sometimes as a homeroom mother for respondent's class, testified that she frequently saw pupils clustered about his desk and that she had never heard an unfavorable comment about respondent. She testified that respondent has a reputation for honesty, integrity and good character and that he conducted his classroom in a relaxed atmosphere with many interesting projects that tended to build pupil confidence. In regard to touching, she testified that she is not a "touching sort of person and that if she saw more than a pat on the head, it would probably send her into orbit."

CHARITY ROSZEL, who was, for 15 years, an LDTC and child study team supervisor in the district, testified that, when she and respondent had frequently accompanied classes on camping activities, she had never observed any improper touching of pupils. She testified that respondent's "song fests" and other activities made pupils like him and "feel good about themselves." She also testified that she had never heard a complaint or expression of fear from a pupil about respondent.

JAMES GIORDANO, president of the local education association, who offered similar testimony, also testified that as a teacher who often joined classes with respondent, he has formed the opinion that respondent is "a talented teacher who works well with pupils."

JANE PICKERING, a first-grade teacher at Sharon School, described respondent as a warm, caring, loving, well-meaning man who enjoys a good reputation among his fellow teachers. She testified that she has seen respondent scratch pupils' backs but nothing more. Similar testimony was educed from **MARION REYNOLDS,** another teacher, who spoke of respondent as one who has "a way with children who need help and are elsewhere discipline problems" in the school. Similar testimony was educed from **JOSEPH SCHIENHOLZ,** who had been a principal at Sharon School until 1973.

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JAMES WEAVER, a minister who knew respondent as a member of his congregation from 1962 to 1977, described respondent as a warm, generous person, highly respected as a man of character and as an active leader in his church.

ROBERT RAFFO, MARY RAFFO and three of their children variously testified that as either parents and pupils, they have known respondent as a warm, loving, understanding, compassionate, relaxed, respected, and caring teacher. In this regard, the three children all testified that back scratching on a two-way basis was not only common in respondent's class but something that they enjoyed and appreciated. M.R. testified that when respondent would play the guitar and sing with his class and she would sometimes sit on his knee during these song fests, she would have a happy feeling as she left for home. A.R. in turn, testified that she felt that respondent was able to make her whole class feel like a happy family who worked out their problems together. She also testified that when respondent announced in February 1982 that the back scratching would have to stop, the pupils in her class were upset. Similar testimony was educed from another pupil, L.W., who had been in respondent's classroom.

Respondent, **GEORGE MC CLELLAND,** testified that he had never touched a pupil in the school on her bare back, buttocks or waist or thigh. He testified that he had, on many occasions in a fatherly manner, not only encouraged pupils by patting and hugging, but had also taken a pupil by the arm or shoulder to keep that child in line in the classroom or the hallway. He testified that, although he often scratched a child's back and that some children responded in kind to him, he ceased and instructed the pupils in his class that they, too, must cease back scratching after the superintendent, in February 1982, told him such acts could be misconstrued and ordered him to stop. He denied that after February 1982 he had held any pupil on his knee or lap, despite his opinion that some pupils need such a show of affection from a teacher.

THE GIRLS BEWARE FILM

This film, shown at the hearing, is one in which, through a series of episodes involving teen-age girls, the viewer is made aware of the dangers to teen-age girls who, too trustingly, accept the advances of men whom they do not have reason to trust. The episodes end in rape, severe emotional upset and, in one instance, the kidnapping and death of the trusting teenage girl. The film encourages the viewer to be cautious and to

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seek the counsel of a person such as a parent or teacher before exposing oneself to possible danger.

FINDINGS OF FACT:

On the basis of a preponderance of the credible evidence within the record, I **FIND** the following relevant facts to be considered together with the uncontested facts set forth above when reaching a determination:

1. Respondent frequently, over a period of years, scratched the backs of both female and male pupils in his classes. Some of his pupils, at times, scratched his back.

2. Madeline Redmond, principal of Sharon School in 1978, cautioned respondent in that year, after receiving a complaint from A.B.'s mother, against continuing the practice. Redmond did not, however, give him a direct order at that time to cease the practice.

3. Redmond, as respondent's superintendent in February 1982, after learning that this touching of female pupils by respondent continued, did order him to cease touching pupils.

4. Other occasional forms of "touching" of pupils by respondent included hugging, setting them on his lap, patting their heads or shoulders and taking them by the arm to guide or keep them in line.

5. Respondent, in February 1982, agreed that he would cease the "back scratching" and other touching of pupils and told his pupils that the practice would not continue.

6. On at least one occasion in early March, however, the assistant principal observed respondent scratching the back of a female pupil. I am unable, however, after analyzing the assistant principal's testimony, to find that this touching was on the pupil's bare skin.

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7. When, on March 9, the superintendent took respondent to task for this, respondent told her he would consider resigning. When, on March 12, he announced to her that he would not resign, Superintendent Redmond preferred charges against him.

8. All occasions of respondent's "touching" testified to by pupils who were touched or by adults who witnessed the touching were at the front of the room in full view of other pupils sitting facing him in his classroom. At other times, pupils were lined up ready to leave the classroom or gathered about him for a song fest. The incident involving J.M. occurred when he sent J.M. from the front of the line to the rear of the line of pupils ready to leave the room. No incident occurred in a secluded place out of the view of pupils or of other adults.

DISCUSSION AND CONCLUSIONS:

Respondent is charged with unbecoming conduct in the form of flagrant touching, caressing and hugging minor female pupils in his charge, causing those pupils to fear him, to form negative opinions and to comment negatively about him. He is also charged with violating the public trust in him as a teacher and with being insubordinate.

The testimony of young pupils, although frequently necessary, must be viewed with great caution in such proceedings at all times (Tenure Hearing of Anthony Polito, 1974 S.L.D. 666, at 676). It is especially necessary in this case to weigh their testimony carefully, since all but one of the complaining pupils were testifying of things which had occurred a year or more before they made their complaints known to any teacher or administrator at the school. It was only when the film, Girls Beware, was shown that they reached back into their memories, matched their experiences in respondent's classroom with the film episodes and the cautionary words of the film narrator, compared notes and reported their concerns to teachers Bursuk and Cook. In such a context, it is not beyond belief that their stories may have been embellished in the process. Nevertheless, it is the responsibility of the undersigned, as a finder of fact, to evaluate their testimony.

Having done so, I am unable to place any credence at all in the testimony of A.C. who, even when reminded on cross-examination that she was under oath, falsely

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testified as to what she wrote on the special education lavatory wall. It is unquestionably established by the corroborative and totally believable testimony of the special education teacher and her fellow teacher that A.C. wrote an obscene vulgarism with sexual connotations on the wall rather than the word "stinks." In the face of this untruth uttered by A.C., while under oath at the hearing, I **CONCLUDE** that no credence may be given to either A.C.'s testimony or her written statement (R-2), wherein she testified that respondent reached under the back of her blouse causing her bra to become unhooked.

While I am similarly reluctant to accept the testimony of C.P. because of her pronounced inability to recall detail after detail of the things that occurred, I am constrained to note that her only testimony was that respondent scratched her back and she scratched his. Given the admission of respondent that he often scratched pupils' backs and the testimony of numerous other pupil and adult witnesses regarding similar instances, I **CONCLUDE** that this did occur. I also **CONCLUDE** that L.B.'s testimony was credible wherein she related that respondent similarly scratched her back, that she did not like it, and that the incident ended when she moved away.

Having considered the forthright demeanor and the testimony of S.N., I **CONCLUDE** that respondent, while correcting her paper, did reach over with his free hand, as was his habit, to scratch her back, that his hand inadvertently touched the bare flesh of her side at the midriff.

I do not, however, credit the testimony of J.M. that respondent touched her bare buttocks inside her slacks. Her timid, hesitant, uncertain manner of testimony, viewed within the context of her being sent to the end of the line for a minor infraction when the incident occurred, causes me to discredit her testimony. While she may be convinced that it happened, I am unable, in the face of respondent's forthright and convincing denial, to accept her testimony in the absence of a corroborating witness from among the other pupils who were present or of any evidence that her parent ever complained. While I accept J.M.'s testimony to the extent that respondent touched her, I do not credit it regarding her allegation that he touched her bare flesh.

Respondent was cautioned about touching pupils by Redmond after she received a parent complaint in 1978. She again spoke to him about the same concern in February 1982 and ordered him at that time to cease touching pupils since his intentions could be misconstrued. On both occasions, respondent agreed to comply but asked her to

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remind him if he should inadvertently, by force of habit, do so again. When the assistant principal of Sharon School reported that she had seen respondent scratching the back of a female pupil in early March, Redmond acted by preferring charges of unbecoming conduct and unsubordination against respondent.

I **CONCLUDE** that, to the extent that respondent had been both warned and ordered to cease touching female pupils, his continued action in this regard in March 1982 did constitute unbecoming conduct. I further **CONCLUDE** that, to the extent that he had been ordered to cease the practice, he was insubordinate. I further **CONCLUDE,** however, that his touching of pupils, both male and female, was a father-figure type gesture, rising from an inner conviction that body contact has certain psychological values in the education process. That this is considered true by some persons is shown by the sincere testimony of L.S., M.R., A.F., and Robert and Mary Raffo. Respondent was naive, however, not to recognize that, for some, it has psychological drawbacks and is considered to be an invasion of privacy. In this regard, witness the testimony of C.P., S.N., A.B., A.B.'s mother, and Patricia Shinal.

It has long been recognized in the teaching profession, as was iterated by Sally Ann Mesh in her testimony, that a teacher ought not invade the privacy of a pupil. Maintaining an appropriate "distance" between teacher and pupil has long been advocated by administrators as advantageous to the orderly operation of schools. That distance does not prevent a caring teacher from conveying to pupils the warmth and concern for individual pupils. That appropriate "distance" also assures that when a "catalyst" such as the film Girls Beware comes into the picture, there will be no mistaken conclusions such as those which were drawn in this case by a number of female pupils.

As was said in In the Matter of the Tenure Hearing of Frederick L. Ostergen, School District of Franklin Township, Somerset County, 1966 S.L.D. 185:

> 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 teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty.
> [at 187]

Similarly, parents have the right to be assured that their children will not, in the public schools, be subjected to psychological indignities. While I **CONCLUDE** that respondent

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had no intent to inflict such indignities on his pupils, his actions, which continued despite the cautionary words of Redmond, had an adverse spontaneous effect on some pupils. On others the effect was delayed until they witnessed the film Girls Beware, which proved to be the catalyst which aroused their fears and apprehensions.

I **CONCLUDE** that, although respondent continued to touch pupils after he was cautioned not to do so in 1978 and after he was forbidden to do so in February 1982, he did so not as a conscious act of defiance, but as a reflexive habit deeply ingrained from his many prior years of teaching. This factor should be given proper consideration when considering what penalty, if any, is appropriate.

DETERMINATION:

Respondent unwisely disregarded the counsel of his principal and superintendent. There was no showing, however, that his touching of any pupil was lecherous, deviant, covert, surreptitious, sexually oriented, vicious or cruel. The touching was not intended to be offensive. Nor is there convincing evidence on which to draw a conclusion that he was intentionally insubordinate. This absence of defiance and lack of intent to offend, together with respondent's service of 13 years as a teacher in the district, are proper considerations when determining what penalty is appropriate. There is, in this case, a strong showing that respondent is a dedicated teacher who enjoys the respect of a large segment of his former pupils. His reputation among his peers is exemplary. In consideration of the above, it is **DETERMINED** that the penalty of dismissal in this case is too severe. See, Tenure Hearing of David Fulcomer, 1967 S.L.D. 201, at 220.

Nevertheless, respondent, by his persistence in failing to modify his actions in conformity with the wise admonitions of his superior, is deserving of a penalty. Appropriate to this consideration is that which was said in In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302:

> . . . teachers . . . are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This

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> heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. . . . Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.
> [at 321]

The Commissioner has also spoken In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, that:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.
> [at 98-99]

Respondent's failure to conform to the reasonable directives of his superior has caused the Board to engage in this lengthy and costly litigation and merits a penalty. The threat to his professional career in the tenure charge hearing process is, in itself, a penalty which has undoubtedly caused respondent both mental anguish and some damage to his professional reputation. In this regard, see, Tenure Hearing of David Fulcomer, 1967 S.L.D. 215, at p. 219. Unlike Fulcomer, who was found guilty of a single offense, respondent's inappropriate actions spanned several years. An adult professional cannot continually plead that he may need continued help in maintaining an appropriate distance from his pupils. Accordingly, it is **DETERMINED** and **ORDERED** that respondent will not be paid for the 120 days of salary already withheld after the certification of tenure charges (N.J.S.A. 18A:6-14). It is further **DETERMINED** and **ORDERED** that respondent will suffer the additional penalty of loss of any salary increment or adjustment increment which would otherwise have been provided, pursuant to the Board's salary policies, had his performance been satisfactory. Finally, it is **ORDERED** that the Board is to reinstate respondent to his tenured position, forthwith, contingent upon the Commissioner's concurrence with this initial decision.

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

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

February 10, 1983
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

2/14/83
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 15, 1983
DATE

OFFICE OF ADMINISTRATIVE LAW

fms/e

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OAL DKT. NO. EDU 5284-82

DOCUMENTS IN EVIDENCE:

R-1 Statement of S.N., dated March 18, 1982

R-2 Statement of A.C., dated March 18, 1982

R-3 Statement of Julia Theoharus

R-4 Statement of Sally Ann Mesh

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IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE MC CLELLAND,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF WASHINGTON, MERCER	:	
COUNTY.	:	
	:	

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

The Commissioner observes that exceptions were filed by the Board in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in its exceptions to the initial decision by the Honorable Eric G. Errickson, ALJ contends that the court erred in discrediting the testimony of J.M. The Board contends that this young fifth-grade girl was sincere and told only the truth, in spite of her evident fright in court resulting in a timid, hesitant manner. The Board also alleges error on the part of Judge Errickson in discrediting the testimony of A.C. because she did not accurately describe the word she had written on a lavatory wall. The Board argues that Judge Errickson failed to attach proper significance to the testimony of Assistant Principal Thelma Bickford. The Board does not agree that, because the "touching" incidents occurred in view of other pupils, such behavior was therefore excusable. Lastly, the Board contends that the teacher should be dismissed from his tenured position. The Commissioner agrees in part with the aforementioned exceptions.

In evaluating the testimony of children the Commissioner has long advised as follows:

> "***Such testimony must, of course, be examined with '***extreme caution, and with meticulous care. Palmer v. Board of Education of Audubon, Camden County, 1939-49 S.L.D. 183; In the Matter of the Tenure Hearing of Pauline Nickerson, Peapack-Gladstone, Somerset County, 1965 S.L.D. 130; In the Matter of the Tenure Hearing of Mary Worrell, School District of the Township of Lumberton, Burlington County, 1970 S.L.D. 378***.' (In the Matter of the Tenure Hearing of Mary Louise Connolly, School District of the Borough of Glen Rock, Bergen

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> County, 1971 S.L.D. 305, at 313) The necessities of circumstance sometimes require the use of just such testimony.***"

(In the Matter the the Tenure Hearing of Frederick J. Nittel, School District of the Borough of Roselle Park, 1974 S.L.D. 1269, 1278, aff'd State Board of Education, 1975 S.L.D. 1111)

The Commissioner is fully cognizant of the weight to be accorded the opinion of the one who conducted the hearing in consideration of "***'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility***. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).***" (Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973))

Notwithstanding such decree, the Commissioner is constrained to comment on Judge Errickson's ruling on the testimony of J.M., a fifth-grade girl. Judge Errickson described, ante, the manner of this pupil as "timid, hesitant and uncertain." The Commissioner finds nothing surprising that such characteristics be exhibited by a young girl of about ten years of age faced with the full panoply of the court and the legal process. In the opinion of the Commissioner, it would be surprising if such characteristics under similar circumstances for one so young were not the norm. J.M. in her childish testimony said that respondent "touched her bare buttocks inside her slacks." Judge Errickson discredited that portion of J.M.'s testimony, yet went on to accept as creditable that respondent touched her. (ante) The Commissioner finds nothing in the record to dissuade him from concluding that respondent placed his hand on J.M.'s buttocks, whether inside or outside her slacks. Such a gesture to the Commissioner's mind is indefensible. Nor can the Commissioner accept such gesture as a form of punishment. As was said in Nittel, supra:

> "***In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County, 1969 S.L.D. 159, affirmed State Board of Education, 1970 S.L.D. 448, affirmed Docket No. A-539-70 New Jersey Superior Court, Appellate Division, March 14, 1972, the Commissioner was primarily concerned with a charge of corporal punishment. In the course of the decision, however, the Commissioner also said:
>
> > '***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

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> but also to freedom from offensive bodily touching even though there be no actual physical harm.***' (1969 S.L.D. at 173)***" (at 1279)

The Commissioner agrees with the Board's exception stating that Judge Errickson did not give proper weight to the testimony of Thelma Bickford, Assistant Principal. There is nothing in the record to prove that this administrator was anything other than a totally competent witness. Judge Errickson's summation, ante, of her testimony states "[she] testified that during March 1982, she went into respondent's classroom where she saw him seated at his desk with his hand under the back of a girl's sweater or blouse and that on another occasion she saw him 'scratching a girl's back on top of her sweater.'***" Judge Errickson later stated in his Findings of Fact No. 6, "I am unable, however***to find that this touching was on the pupil's bare skin." The Commissioner determines that respondent was totally insubordinate in such actions in that he had been previously advised and warned as recently as February not to touch female pupils. Nor can the Commissioner accept as a valid excuse that respondent's habit of touching pupils was so ingrained that he was not aware of what he was doing.

Nor can the Commissioner accept Judge Errickson's conclusion that "his [respondent's] touching of pupils, both male and female, was a father-figure type gesture, [having] psychological values in the education process." A thorough examination of the record fails to reveal to the Commissioner any incidents involving boys. The eleven charges certified by the Board all refer to respondent's touching, caressing and hugging minor female students in his charge. (See Board's Charges.)

Further, the Commissioner has difficulty with the concept of the "father figure" advanced under the present circumstances. Surely each child, boy or girl, should be treated with the warmth and friendliness to be exercised by any good teacher without engaging in questionable bodily contact. The Commissioner is fully cognizant that good teachers often use a quick hug or a pat on the head as a tactile reinforcement of a healthy relationship, always, however, in full cognizance of the age, maturity and sex of the recipient. In the Commissioner's view, the exercise of judgment and restraint is an essential ingredient to successful teaching. Respondent's proclivities herein far exceed the bounds of good judgment and restraint. The Commissioner so holds.

The Commissioner finds nothing in the record by way of explanation of respondent's philosophy to include the need for him to have his back scratched by female pupils. Respondent admitted that on frequent occasions he scratched pupils' backs and the pupils scratched his. The Commissioner finds this behavior of respondent, along with other questionable physical contact, to constitute unbecoming conduct. Such conduct, par-

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ticularly in light of his having been advised and then ordered by his administrator to cease and desist, constitutes insubordination.

In particular the Commissioner expresses his concern over respondent's continued refusal to accept advice and admonitions from his superiors to refrain from touching his pupils. The Commissioner observes there to be direct conflict in the record between respondent's testimony wherein he states that he was warned by the Superintendent of Schools on or about February 23, 1982 to cease the "affectionate type touching that I do with the youngsters and the back scratching."

Q. "And thereafter did you touch any of your students?

A. "No, sir, never again." (Tr. 41-42)

The assistant principal's testimony standing unrefuted on the record states that in March she saw him repeating his actions.

The Commissioner notes with approval Judge Errickson's determination, ante, that "[a]n adult professional cannot continually plead that he may need continued help in maintaining an appropriate distance from his pupils." In the Commissioner's opinion, it strains credulity for respondent to claim that his habit of touching young girls was so ingrained that he needed help to break his habit. (Tr. 46) Prudence would dictate that, no matter how innocent the teacher might feel his touching of pupils might be, after having been first warned and then directed to cease such activities, a professional teacher in full awareness and control of his actions would have heeded his superior. In the present instance respondent's failure to do so raises in the Commissioner's mind very real concerns as to respondent's ability to control himself.

For the foregoing reasons the Commissioner finds respondent to be insubordinate and guilty of conduct unbecoming a teacher. The Commissioner so holds.

This long and difficult litigation occasioned by respondent's admitted inability to keep his hands off female pupils, even after the advice and direct order from his superiors, warrants removal from his tenured position. Accordingly, the penalty devised by the court herein is set aside. Respondent shall be removed from his tenured position as of the date of his suspension by the Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 25, 1983

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IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE MC CLELLAND,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF WASHINGTON, MERCER	:	
COUNTY.	:	
	:	

Decided by the Commissioner of Education, March 25, 1983

For the Petitioner-Respondent, John A. Selecky, Esq.

For the Respondent-Appellant, Greenberg, Kelley & Prior (John B. Prior, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the modification that Respondent-Appellant shall be dismissed from his position as of March 25, 1983, the date of the Commissioner's decision in this matter. This matter is referred to the State Board of Examiners for its review.

Maud Dahme abstained in this matter.

July 6, 1983

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7587-82
AGENCY DKT. NO. 265-7/82A

WALTER LIGGETT,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF WAYNE,
Respondent.

APPEARANCES:

Louis P. Bucceri, Esq. and **Gregory T. Syrek**, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Stephen R. Fogarty, Esq., for respondent
(Aron, Till & Salsberg, attorneys)

Record Closed: January 12, 1983 Decided: February 10, 1983

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OAL DKT. NO. EDU 7587-82

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

Walter Liggett (petitioner), tenured as an elementary teacher, vice principal and principal contends that, under N.J.S.A. 18A:28-5, 28-10 and N.J.A.C. 6:3-1.10, the Wayne Township Board of Education (Board) improperly assigned him to a teaching position while permitting other less senior vice principals and principals to retain their positions. The Commissioner of Education transmitted the matter for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The facts were submitted by stipulation and affidavit on cross motion for summary judgment. None of the underlying facts were disputed and **I FIND** them to be true. Respondent requested that I take notice of the history of the rules applicable to the legal issues, at least that of N.J.A.C. 6:11-3.24, for which the March 12, 1968 minutes of the State Board of Examiners were supplied. No objections to this request for notice were made. Since the interpretation of several rules is in issue, I will take notice generally of the history of relevant rules.

DISCUSSION OF THE FACTS AND ISSUES

The seniority as of June 1982 of petitioner and at least three of the staff against whom he contends for a position as a middle school vice principal and principal must be determined. Although all the schools mentioned below were apparently called junior high schools, since that designation touches a legal issue, I shall use the term middle schools in my discussion because these schools deviate from a 7-8-9 grade organization. William Megnin (Megnin) is principal of Schuyler-Colfax Middle School (S-C). William Ginter (Ginter) is vice principal of George Washington Middle School, opened in 1967 (G-W). James Simon (Simon) is vice principal of S-C Middle School. Petitioner now teaches fifth grade in Pines Elementary School. In 1981-82, he was principal of Anthony Wayne Middle School, the oldest middle school in the district which was closed that year. The middle schools over the years in issue included various combinations of grades from 6 to 9. In one year, one of these schools (Anthony Wayne) included grade 5 (1961-62).

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The Board does not dispute petitioner's calculation of his own seniority except to note that it does not necessarily agree with the effects of N.J.S.A. 18A:28-12, mandating military credits. The Board states that a determination of that issue is not necessary whichever legal theory prevails, since petitioner's mode of calculation would result in his being more senior than the other three individuals without the need to consider military credits. Petitioner argues that the present middle school administrators cannot be credited for seniority purposes for most of the time they spent in such positions because the middle schools in question for most of the relevant time periods, must be regarded legally as elementary schools, whereas the three individuals in the positions held only secondary school principal endorsements. Petitioner argues that only he, who held endorsements as a principal/supervisor (K-12) and administrator, was properly certificated to be a vice principal or principal of a middle school, since his endorsement permitted him to serve as an elementary school administrator.

Resolution of petitioner's claim involves the issue of "grandfathering": what is the effect on staff of changing certification requirements and how should N.J.A.C 6:11-3.24 be applied in a seniority context. That rule permits use of either a secondary or elementary principal's certification when a school reorganization results in the inclusion of elementary grades in combination with higher grades. Petitioner claims that the rule permits use of a secondary certificate in the middle schools only in such years subsequent to a reorganization in which the middle schools include grade 9. The Board admits that during Simon's first year of employment in 1967-68 at G-W, he should perhaps have been required to hold an elementary principal's certificate, but notes that reorganization occurred one year later, in 1968-69, at which time grade 9 was added. The initial year of Simon's employment was also the first year the G-W school was open. In Megnin's first year of employment as a vice principal, he was admittedly properly certificated since that school had a 7-8-9 grade organization in 1957-58. Similarly Ginter was properly certificated as a vice prinicipal in his first year at A-W, which then had a 6-7-8-9 grade organization (1960-61).

The following tables illustrate undisputed facts as of June 1982 and the effects of the parties' legal theories upon the seniority of the men against whom petitioner contends for a middle school position.

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LONGEVITY COMPARISONS

	Liggett	Ginter	Megnin	Simon
Hired	2/24/65	9/1/55	9/1/52	9/1/61
Endorsement	Principal	Sec. Princ.	Sec. Princ.	Sec. Princ.
Date of above	8-70	2/3/64	6/8/61	11-67
Total service (approximate) Including Military	17 19	27 29	30 30	21 25

SENIORITY - BOARD'S CALCULATION

Elem. V. Pr.	8*	27		15
Elem. Pr.	12*		24.5	
Jr. H. V. Pr.		28	28.5	18
Jr. H. Pr.			22.5	

*Includes 2 yrs. military

SENIORITY - PETITIONER'S CALCULATION

Elem. V. Pr.	6		2*	3*
Elem. Pr.	10		5*	
Jr. H. V. Pr.		6		
Jr. H. Pr.				
Military Credit, add	2	2		4

*at most.

DISCUSSIONS OF LAW

There is no longer any serious question of the manner in which military service should be credited for seniority purposes pursuant to N.J.S.A. 18A:28-12. On December 20,

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1982, the Commissioner affirmed, with one minor factual modification, a comprehensive decision setting forth the appropriate interpretation and application of all statutes and rules concerning seniority and military credit and their interrelationships with those controlling certification, tenure and transfers. Howley et al v. Ewing Tp. Bd. of Ed., EDU 3664-82, October 21, 1982 aff'd 1982 S.L.D. ____ (December 20, 1982). Staff members are entitled to have military credit added to their years of employment at the time they acquire tenure status in the district.

Petitioner first became tenured in the district as an elementary teacher. It is only to seniority in the teacher category that his two years of military service credit attaches. Similarly, Simon attained tenure in the district as a secondary science teacher, and his four years of military credit attached to his seniority in that category. Both Ginter and Megnin likewise attained tenure in the teaching category. **I CONCLUDE** that military credits attach to the seniority time of none of the contenders within the categories of vice principal or principal, since such credits would have attached once, to their seniority as tenured teachers.

REGULATORY HISTORY

Although Howley, supra, provides the most comprehensive legal and historical framework for resolving most issues concerning tenure and seniority, it cannot resolve the issues here which relate to the grandfathering of the pre-1969 endorsements. Whether or not the contenders for placement on the seniority list held the appropriate endorsements for their assignments was not at issue in Howley, nor was it necessary to resolve that question in Cohen et al v. Piscataway Bd. of Ed., EDU 2629-81 (August 27, 1981) aff'd 1981 S.L.D ____ (October 2, 1981), aff'd 1982 S.L.D. ____ (Feb. 4, 1982). In the Cohen case, cited by petitioner, it was decided that the Board had no authority to establish a category of middle school vice principal since that category is not specified in the seniortiy rule, N.J.A.C. 6:3-1.10(k).

In Cohen, supra, no question was raised concerning whether or not individuals from the middle school seniority list held an appropriate endorsement during the time served in middle school administrative positions. None of the individuals lost seniority credits as a

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result of the Cohen decision. The successful petitioners there asked that elementary and middle school vice principal lists be merged. The Board argued that the middle schools were junior high schools and the Commissioner adopted with approval the ALJ's use of N.J.A.C. 6:27-1.2(a) to resolve that issue against the Board. That rule classifies secondary schools by grade organizations for the purpose of applying standards for approval of schools. Petitioner argues that the same rule should be used to determine the category of service of all contenders in the instant case and further argues that if, in any year, Simon, Megnin and Ginter were serving as administrators in a middle school which contained no ninth grade, such service was given while these men were improperly certified and cannot be counted toward seniority. I do not agree.

Petitioner questions the endorsements of the contenders for the purpose of removing from them two decades of seniority credit achieved through serving in principal or vice principal positions in middle schools while petitioner is to retain seniority credit for 5 and one half years of service in middle schools as a result of holding post-1969 principal endorsement which can be used for either secondary or elementary school service. The positions petitioner contends for at this time are middle school vice principalships. It seems to me that petitioner's legal arguments, which are well-briefed and appear cogent at first blush would reach a result contrary to the intent of the Tenure Act, of which the seniority provisions are a part.

> "The tenure provisions in our school laws were designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service. They represent important expressions of legislative policy which should be given liberal support, consistent, however, with legitimate demands for governmental economy." Viemeister v. Bd. of Ed. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949) (emphasis added).

Prior to February 5, 1969, the effective date of N.J.A.C. 6:11-10.4 (the 1976 amendments are not relevant here), the single endorsement of "Principal" for principals and vice principals was not available. Applicants for these positions had to possess either an elementary or secondary principal's endorsement on their administrative and supervisory certificates. The date is significant since Ginter, Megnin and Simon obtained

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their secondary principal endorsements in 1964, 1961 and 1967 respectively. Petitioner was granted an endorsement as principal/supervisor and administrator under the new rule in 1970 and was first employed as a principal in 1972. Ginter, Megnin and Simon were first employed as principals or vice principals in 1960, 1957 and 1967 respectively. In a case initiated in 1974, wherein the Commissioner modified the hearing officer's findings as to salary remedy, but otherwise adopted them, the history of the administrative certification rule is set forth. DiNunzio v. Bd. of Ed. of Tp. of Pemberton, 1977 S.L.D. 24, aff'd 1979 S.L.D. 819. Since DiNunzio, supra was more contemporaneous with the certification rule changes and the school organization observable at the time when respondent's three most senior principals or vice principals were promoted from their teaching positions, I find the observations therein more persuasive than the assumptions stated in Cohen supra, in considering the interrelationship of certification, seniority and high school approval rules.

In DiNunzio, the hearing officer related that when the new rule establishing a principal endorsement was adopted in 1969, "Those persons previously certified and already serving as school principals were not required to obtain the new specific certificates." Since Di Nunzio, in pertinent part, was affirmed by the Commissioner and State Board, that statement must be considered policy with respect to the grandfathering of specific endorsements. The same case relates,

> "In recent years, a plethora of plans for the organization of school districts emerged. [describing 8-4, 6-3-3, and 6-2-4 plans]. Still other arrangements call for a 4-4-4 plan, a 6-6 plan, and there are districts which have a fifth grade or a sixth grade plan under which all fifth or sixth grades of the district are housed in one school building. These several plans have been outlined to show that at times there is a very fine line to be drawn between the position of elementary and secondary school principal. For example, some educators label a seventh and eighth grade school as a secondary school if it offers a departmentalized program such as is generally offered in a seventh through ninth grade junior high school. On the other hand, the traditional kindergarten through eighth grade school has been clearly designated as an elementary school although it may offer some departmentalized programs."

DiNunzio was written by a departmental hearing officer, after the "approval of high schools" rules pursuant to N.J.S.A. 18A:4-51 were adopted. These rules were filed prior to

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1969 and were amended in 1971 (except for N.J.A.C. 6:27-1.13.) The history, placement, and statutory authority for N.J.A.C. 6:27-1.2 leads me to conclude it was not intended as authority for Tenure Act (including seniority) and certification purposes. To the contrary, the adoption of the principal endorsement rule in February 1969 and the school reorganization rule N.J.A.C. 6:11-3.24 in 1968 support the DiNunzio interpretation of agency policy for grandfathering and the minutes of the Board of State Examiners of March 12, 1968 (Appendix A) explain the reasons for these certifcation changes:

> "3. The Secretary presented a progress report on the work of the committee studying a revision of the principals and supervisory certificates. In his report the Secretary stated that the committee is taking into account the new types of schools which are developing, including the Middle School, an attempt to reduce the number of certificates we issue, a consideration of the common core of preparation needed for all administrators, and the desirability of an increase in local discretion in assignment. The committee is working with the idea of a general certificate which would have an endorsement on it for the superintendency. The committee is planning for another meeting before presenting recommendations to the Board.
>
> 4. The Secretary presented the problem of certification for the Middle School. After discussion, the following policy was proposed, on a motion by Dr. Richardson, seconded by Dr. Fisher: When school reorganization results in the inclusion of elementary grades in combination with higher grades, the elementary or secondary principal's certificate will be recognized as valid for this reorganized school; further, the elementary or secondary teacher's certificate will be recognized as valid for teaching the particular subjects covered by the certificates in this reorganized school. This motion was carried."

The last six lines include the entire text of N.J.A.C. 6:11-3.24.

It is clear that the adoption of the new "principal" endorsement and the validation of the older secondary and elementary specific principal endorsements for use in reorganized schools were for the purpose of increasing local discretion in assignment in light of the many new grade combinations in middle schools. Obviously, local discretion in assignment could in no way be promoted by an interpretation of N.J.A.C. 6:11-3.24 which would mandate a change in principals whenever grade 9 is removed from a middle school or an interpretation of the post-1969 principal endorsement by means of reference to the

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school approval rule (N.J.A.C. 6:27-1.2) which would require principals holding secondary endorsement with substantial experience in schools including grades 7-8 to be reassigned if grade 6 is added. Such interpretations would appear to run counter to a thorough and efficient education standard as well as the intent of the relevant certification and tenure statutes.

In interpreting the reorganization rule and its interaction with the seniority rule, the historical perspective at the time of its adoption is vital because the most senior principals were certified and assigned to schools on the basis of rules, policy and practice at the time. Appropriateness of endorsements for assignments was enforced by the local county superintendents then as now. N.J.A.C. 6:11-3.5 The senior staff members here have not previously had the appropriateness of their assignments questioned. The meaning of "elementary and higher" grades in the context of the reorganization rule must be read in pari materia with the seniority rule wherein "secondary" applies to grades 7-8 in elementary schools having departmental instruction and "elementary" also includes grades 7-8. N.J.A.C. 6:3-1.10(K) 27 and 28.

A search of the history of these rules reveals two additional facts. On November 6, 1967, the State Board adopted an interim certification regulation to address the emergence of new patterns of grade combinations. (Appendix B). The relevant portion of this rule says:

> "1. Principal Certification:
>
> The holder of a principal's certificate may be assigned as principal of a school which (a) includes, in addition to the grades authorized by his certficate, not more than 50% of other grade levels, or (b) which has as an assistant a person with a principal's certificate for the other grade levels."

This rule, applicable when secondary and elementary principal endorsements existed, clearly validates the appropriateness of the certification of all the individuals here in subsequent years when middle schools included grade 6, and even, on occasion grade 5. It is specifically applicable to Simon's first year at G-W, 1967-68, when it housed grades 6-7-8.

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I CONCLUDE that pre-1969 secondary principal endorsements are appropriate for middle school assignments when the schools include grades 7 and 8. I also **CONCLUDE** that in the term "elementary and higher grades" as used in the 1968 school reorganization rule N.J.A.C. 6:11-3.24(a), the word "elementary" refers to grades, not schools and in that context, elementary or "lower" grades refers to all grades in which staff was required to have a pre-1969 elementary endorsement, which includes grades K-6. Thus whenever a school goes through a grade reorganization such that a middle school is created (one which includes higher grades 7-8 or 7-8-9, for example, with clearly elementary grades 5-6), pre-1969 secondary or elementary principal endorsements are appropriate. The above conclusions lead to a further conclusion that in all the years served by Megnin, Simon and Ginter in their tenured or tenure eligible vice principal and principal positions, they were properly certified and seniority in those positions must be counted.

The standards for determining seniority do not include a category of middle school vice principal or principal. N.J.A.C. 6:3-1.10. Finding "middle schools" to be elementary schools for the purpose of seniority categories presents less of a problem for post-1969 endorsement holders. I am not satisfied that inclusion of elementary and middle school principals and vice principals on the same seniority lists when some of the listees hold post-1969 and others hold pre-1969 endorsements reaches the results intended by the statutory and regulatory scheme. Surely a Board should have the discretion of considering the actual experience of those on a preferred hiring list consistent with fairly recognizing the number of years of service of all bumped administrative staff. In this context, it is instructive to consider the continuous nature of school reorganizations over time. The attached stipulated exhibit (Appendix C) shows that since 1972 Wayne has had two four-year high schools (9-10-11-12) and three middle schools (6-7-8).

A preferred hiring list for junior high school principals or vice principals, if junior high is defined as a school having a 7-8-9 organization (N.J.A.C. 6:27-1.2), would be a mere sham on the facts of this case. Further, only the most senior employees would be relegated to such a list, since the district has had no schools with a 7-8-9 or 6-7-8-9 configuration since 1972. The RIF which resulted in this case occurred when A-W middle school (6-7-8) of which petitioner was acting principal, was closed in June 1982. In the prior four years, 1977-78 through 1980-81, petitioner was vice principal in S-C middle

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school (6-7-8). In September to December 1976, 5 months, petitioner was also assigned to S-C. Thus petitioner actually has 5 years and 4 months in 6-7-8 schools and 4 years and 6 months of elementary experience (K-5, since grade 6 was in the middle schools). The positions to which he presently aspires in the remaining middle schools are held by men having 15, 23 and 22 years experience there.

It is a facile solution to hold that all the aforesaid middle school experience in schools not including grade 9 was in the category of elementary principal or vice principal for seniority list purposes. What then would occur if Wayne opens a new elementary school (K-6) and eliminates a middle school? On the facts of the case, the Board would then be forced to hire a former middle school principal who was originally a junior high principal rather than one, like petitioner, with significant experience as an elementary (K-5) principal. None of the statutory intendments, whether for flexiblity in the best interests of children's education or for protection of tenure and seniority are served by rigid or convoluted interpretations of the seniority rule in an attempt to find justice on a case by case basis. Under the present rule which does not include a middle school category, it is not possible to address the hypothetical problem.

For the instant case, I consider the general standards of N.J.A.C. 6:3-1.10 to be instructive. While "title" was intended to refer to position, it could also be read to include level of position (i.e. middle school, a title which does not appear in the cited rules). When title of any employment shall not be found in the certfication rules or in these [seniority] rules, the holder of the employment shall be classified as nearly as may be according to the duties performed. (Section f). It should be noted that reference is to be made only to the certification and seniority rules. For these purposes, the failure to refer to the high school approval rule, N.J.A.C. 6:27-1.2, which is authorized under N.J.S.A. 18A:45-1, the establishment of secondary schools statute, is not insignificant.

The seniority rule, based upon statute, provides to the greatest extent possible that all years served in tenured or tenure eleigible positions shall be recognized. It allows tacking of time under limited certifications when tenure accrues under a standard certificate (d). It counts the years whenever a person moves from or reverts to a

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category toward all categories in which he previously held employment (g). The rule allows a staff member to elect a category if time spent in two is equal, and if employed simultaneously in two categories, the principal one is used to count seniority time (e). Although middle schools may have included both secondary (7, 8 or 9) and elementary grades, **I CONCLUDE** that classification as nearly as may be made to a category results in middle school service, in a school which includes grade 9, being classified as junior high school service. Respondent Board's position is consistent with this conclusion. The conclusion is also consistent with the holding of Cohen, supra.

It is not necessary to go further to resolve the competing seniority claims in the instant case since the most senior contenders' positions are secured consistent with statute, by such a ruling. In order to promote administrative efficiency, it might be well to come to one further conclusion: that service in a middle school (7 and 8 combined with 6), be considered either elementary or junior high school experience for seniority purposes. Otherwise, it is conceivable that persons having long-standing experience as tenured principals or vice principals in a middle school would not be listed as preferred for a junior high school position, that is, after grade 9 is added to a middle school or when a new junior high school is opened.

Based upon the stipulated facts and the conclusions discussed above, as calculated in appendices (D, E, F, G) attached to this initial decision, the seniority standings are as follows:

	Liggett	Ginter	Megnin	Simon
Elem. V.P.	6	21	22	15
Elem. Pr.	10		18.5	
Jr. High V.P.		22	23	14
Jr. High. Pr.			18	

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It is, therefore, **ORDERED** that the respondent revise its seniority lists to reflect the above findings and conclusions.

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

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

February 10, 1983
DATE

Naomi Dower-La Bastille
NAOMI DOWER-LaBASTILLE, ALJ

Receipt Acknowledged:

February 15, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 16, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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WALTER LIGGETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, Naomi Dower-LaBastille, ALJ. It is observed that exceptions to the initial decision were filed by petitioner and reply exceptions were filed by the Board in a timely manner pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner's points of exceptions to the decision are summarized below:

1. The ALJ's finding and conclusion regarding the appropriateness of the principal's certificates of Board employees Megnin, Ginter and Simon completely ignore the mandated requirements of the existing certification rules pertaining to the qualifications of the above-named individuals who hold principal's certificates endorsed solely for the purpose of allowing them to be employed in their respective capacities in schools which are organized and recognized as approved secondary high schools according to the regulations promulgated by the State Board of Education pursuant to N.J.A.C. 6:27-1.2.

2. The schools in which each of the above-named persons have served as principals bear a strong similarity to the grade 6-8 middle schools operated by the Board and may not be classified as junior high schools pursuant to N.J.A.C. 6:27-1.2, but, rather, these schools are, in fact, middle schools and must therefore be classified as elementary schools. Consequently, the findings and conclusion reached by the ALJ which accord Board employees Megnin, Ginter and Simon tenure and seniority status in those positions of principal in the middle schools is clearly in error and flies in the face of existing statutory and regulatory prescription. The Board, in assigning Megnin, Ginter and Simon to middle school principalships, has assigned them outside the scope of their certification which is ultra vires, notwithstanding the rationale developed by the ALJ in the initial decision of this matter. The ALJ's findings and conclusions effectively deny petitioner his tenure protection and seniority rights (N.J.A.C. 6:3-1.10 et seq.) to retain his employment as an elementary middle school principalship to which he is qualified by virtue of his certification and employment service.

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3. The ALJ's determination that Megnin, Ginter and Simon may lay claim to elementary middle school principalships when they possess secondary principal's certificates is completely illogical and contrary to the interpretation of the Commissioner's prior ruling in Cohen et al. v. Piscataway Board of Education, supra. Petitioner argues further that the ALJ's reliance is misplaced in re DiNunzio, supra.

In this regard petitioner specifically states in his exceptions as follows:

> "***An even more egregious error is committed by the misuse of the DiNunzio decision, supra. The initial decision states:
>
> > 'In DiNunzio, the hearing officer related that when the new rule establishing a principal endorsement was adopted in 1969, "Those persons previously certified and already serving as school principals were not required to obtain the new specific certifications." Since DiNunzio, in pertinent part, was affirmed by the Commissioner and State Board, that statement must be considered policy with respect to the grandfathering of specific endorsements.'
>
> (Initial Decision at 7.) Unfortunately, this comment is in error as it juxtaposes two events, which took place 25 years apart. The language to which the Initial Decision refers states:
>
> > 'A brief history of the certificates required by the State Board of Examiners for the position of school principal reveals that, from about 1944 to 1969, persons seeking such employment had to qualify for a specific certificate, either [elementary principal or secondary principal, in order to serve as an] elementary or secondary school principal respectively. Those persons previously certified and already serving as school principals were not required to obtain the new specific certificates. Subsequently, the rule was modified in 1969, whereby the specific certificates were no longer

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> required or offered, and persons who were eligible applied for and received a "School Principal" certificate. N.J.A.C. 6:11-10.4. Such a certificate confers on the holder the eligibility to serve either as an elementary or secondary school principal.'

DiNunzio, 1977 S.L.D. at 26.

"The cited history of principal certification requirements reveals that prior to 1944, there was a general (K-12) form of certification. In 1944 and continuing to 1969, this general certification was, in essence, divided into two more limited certificates: elementary principal and secondary principal. In 1944, holders of the general certificate 'were not required to obtain the new specific certificates.' Logically, there would be no need to obtain one of the specific (elementary or secondary) certificates because the prior general certification covered all grades. In essence, one who possessed the 'whole' principal certificate (general) was not also required to obtain one of the parts (elementary or secondary) of that same whole. This conclusion is a matter of simple, rational logic.

"Clearly, in 1944, there was no need to acquire one of the new principal certificates. Unfortunately, the initial decision takes the events of 1944 and claims that they occurred in 1969. There is absolutely no basis for such a conclusion. Indeed, DiNunzio specifically states that when specific certificates were no longer required 'persons who were eligible applied for and received a "School Principal" certificate.' Rather than the grandfathering effect claimed by the initial decision, this language, taken in the context in which it arises, indicates that only holders of the specific certificates 'who were eligible' received the new general principal certificate in 1969. Thus, the language found in DiNunzio, supra actually comes to the opposite conclusion alleged in the initial decision. Once again, it is a matter of simple logic. Just as one who holds a general 'whole' certificate need not obtain one of the specific 'parts' so to is it clear that a holder of one of the parts

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> (elementary or secondary) cannot automatically take any position covered by the general whole. N.J.A.C. 6:11-3.24(a) makes this even more clear by setting forth the limited, specific situation in which the holder of a secondary principal certificate may act as a principal in the elementary grades.
>
> "Based upon this obvious misinterpretation of the grandfathering impact of DiNunzio, supra (which applies to 1944 but not 1969 changes in certificates) the initial decision is fatally flawed and should be rejected.***"
>
> (Petitioner's Exceptions, at pp. 2-3)

The Board, in its reply to petitioner's exceptions to the initial decision, avers that the findings and determination reached by the ALJ herein are logically correct and accurately construe the intent of the Teachers Tenure Act of which the seniority provisions are an integral part. The Board rejects those arguments raise by petitioner in his exceptions to the initial decision. The Board urges the Commissioner to adopt those findings and determination rendered by the ALJ as his own in rendering a final determination of the matter herein controverted. In this regard the Board maintains the following set forth in pertinent part in its reply exceptions:

> "***Resolution of petitioner's claim implicates N.J.A.C. 6:11-3.24, and its application in a seniority context. N.J.A.C. 6:11-3.24 permits the use of either a secondary or elementary principal's certificate when a school reorganization results in the inclusion of elementary grades in combination with higher grades. Petitioner claims that the rule permits use of a secondary certificate in the middle schools only in such years subsequent to a reorganization in which the middle schools include grade nine (9). Not so.
>
> "The administrative law judge, after an exhaustive review of the reorganization rule N.J.A.C. 6:11-3.24, concluded that the adoption of the new 'principal' endorsement and the validation of the older secondary and elementary specific principal endorsements for use in reorganized schools were for the purpose of increasing local discretion in light of the many new grade combinations in middle schools. (Initial Decision at 8). Petitioner's interpretation of N.J.A.C. 6:11-3.24, which would mandate a change in

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principals whenever grade 9 is removed from a middle school or grade 6 is added would run counter to his agency's expressed intentions when N.J.A.C. 6:11-3.24 was promulgated by the State Board.***

"As correctly pointed out by the administrative law judge, in interpreting N.J.A.C. 6:11-3.24, and its interaction with the seniority rule, the historical perspective at the time of its adoption is vital because Ginter, Simon and Megnin were certified and assigned to schools on the basis of the then existing rules and policies of the State Board of Examiners.

"Petitioner's attempt to summarize the administrative law judge's initial decision as effectively ruling that any type of principal certification may be used when a local board of education creates an entity called a middle school is obtruse. (sic) (Petitioner's letter brief at 1). To the contrary, the administrative law judge concluded only that pre-1969 secondary principal endorsements are appropriate for middle school assignments when the schools include grades 7 and 8 and that in the term 'elementary and higher grades' as used in the 1968 school reorganization rule N.J.A.C. 6:11-3.24(a), the word 'elementary' refers to grades, not schools. (Initial Decision at 10)***(sic) reached by the administrative law judge was that whenever a school undergoes a grade reorganization thereby creating a middle school, which includes higher grades in combination with elementary grades, for example, the inclusion of grades 5-6-7-8 or 5-6-7-8-9, pre-1969 secondary or elementary principals are appropriate. In the final analysis then, Megnin, Simon and Ginter were properly certificated in their positions as vice principals and principals during all of the years they served in these reorganized schools.

"Petitioner also suggests that the administrative law judge completely ignored the fact that when respondent transferred or assigned Megnin, Ginter and Simon to elementary schools it assigned them to positions outside the scope of their secondary principal certificates, citing DiNunzio v. Bd. of Ed., Township of Pemberton, 1977 S.L.D. 24, 26-27

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> (Comm. Ed. 1977). This, petitioner suggests, renders the Initial Decision somehow fatally flawed. Petitioner's statement entirely misses the mark. Megnin, Simon and Ginter were neither transferred nor assigned from an elementary school to a secondary school. The schools in which they acted as either principals or vice principals underwent continual reorganizations which resulted in the inclusion of elementary grades with higher grades.***It was these events which the administrative law judge properly concluded triggered the operation of N.J.A.C. 6:11-3.24, a fact which petitioner heretofore refuses to even address." (Emphasis in text.)
>
> (Board's Reply Exceptions, at pp. 2-4)

Finally, the Board maintains that, even assuming arguendo that Megnin, Ginter and Simon were employed in positions for which they did not possess the appropriate principal's certificates, it is clear that such action, were it determined to be ultra vires, should not be construed to be to their detriment inasmuch as it was effected by Board decision to assign them to service in the respective schools in question. The Board, in support of the above contention, relies on several prior school law decisions including, but not limited to, Robert Schmidt v. Board of Education of Weehawken, Hudson County, decided by the Commissioner August 19, 1982. It is pointed out that the Commissioner in Schmidt, supra, held in pertinent part that:

> "***'The S.C.E. assignments will first be addressed. As ludicrous as it may appear, the certificate of Reading Specialist does not itself entitle one to teach reading. Only those teachers possessing elementary or reading certificates may teach reading, and those with English certification who were teaching reading on February 4, 1976. I FIND petitioner did not possess an appropriate certificate to teach reading, nor did Brian Long or Thomas Urchuk, and their assignment to S.C.E. classes at any time was ultra vires. The time spent in illegal assignment was caused by the Board, and shall not be to the detriment of petitioner. Petitioner's 1980-81 employment as an S.C.E. teacher shall be counted toward his seniority as a seconary teacher of English.' Slip op. at 10. [Emphasis supplied]***"
>
> (Board's Reply Exceptions, at pp. 5-6)

The Commissioner has carefully reviewed the exceptions filed by the parties herein.

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In the Commissioner's judgment the ALJ correctly concluded that the relevant State Board regulations which apply to the matter herein controverted, in addition to N.J.A.C. 6:3-1.10 (Seniority), are N.J.A.C. 6:27-1.2 (High School Classification) and N.J.A.C. 6:11-3.24(a) (Certification in Reorganized Schools). However, the Commissioner does not agree that the application and construction of N.J.A.C. 6:27-1.2 and N.J.A.C. 6:11-3.24(a) lead to the same conclusions reached by the ALJ with regard to the specific facts of the matter recited herein.

In the first instance the Commissioner observes that he has previously ruled in Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, Morris County, decided August 25, 1980 that any school grade level configuration which fails to comply with the provisions of N.J.A.C. 6:27-1.2 may not be deemed to be classified as a high school or junior high school. (Slip Opinion at p. 22)

Moreover, N.J.A.C. 6:27-1.2 requires that high schools or junior high schools which contain the required grade level configurations must be approved to operate within their respective grade level designations. What is not clear from Exhibit C attached to the initial decision is whether the Board had been granted approval to operate a junior high school when the grade level configurations in a given school conformed with N.J.A.C. 6:27-1.2.

If it were assumed that the Board did operate an approved junior high school during the years when the grade levels of those school(s) were organized or reorganized to accommodate grades 7-9 inclusive, then it is without question that a secondary principal's certificate was required prior to 1969. In all other instances, however, any other grade level configurations of the schools in question by virtue of reorganization would deem them to be organized as elementary schools.

Consequently, it can be concluded that if any of the above-named individuals possessed a secondary principal's certificate at the time the Board operated a junior high school, he would be eligible to gain tenure as a principal with seniority in the category of junior high school principal, vice principal or assistant principal, as the case may be, if he served the requisite time pursuant to N.J.S.A. 18A:28-5 et seq. and N.J.A.C. 6:3-1.10(k).

Conversely, when the above-named individuals with secondary principal's certificate served as a principal or vice principal in those schools reorganized as middle schools, the provisions of N.J.A.C. 6:11-3.4(a) must be applied. In construing what is meant by "higher grades" in combination with "elementary grades" according to the above-cited regulations, "higher grades" are determined to be any grades in the school so organized containing 7th, 8th or 9th grades or any combination thereof. It is clear from Exhibit C that schools A.W., S.C., and

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G.W. at all times contained one or more of the above designated grade levels to qualify said schools as elementary schools.

It is also true that, by virtue of the provisions of N.J.A.C. 6:11-3.24, Megnin, Ginter and Simon were eligible to serve in the capacities of principal, vice principal or assistant principal of said schools while possessing a secondary principal's certificate and thereby become eligible to accrue seniority in the categories of elementary principal, vice principal or assistant principal.

This determination, however, may not be construed to grant seniority to any of the above-named individuals in the seniority categories of elementary principal, vice principal or assistant principal, should the Board reorganize its middle schools without one of the "higher grades" present within the grade level reorganization. This is so because of the limitations imposed by N.J.A.C. 6:11-3.24(b). The Commissioner so holds.

In view of the above findings and determinations which in effect reverses the premise upon which the ALJ has calculated the seniority of petitioner and that of Megnin, Ginter and Simon, this matter is hereby remanded to the ALJ for a further finding of fact and determination with respect to the issue of seniority calculation.

The Commissioner retains jurisdiction in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 31, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5761-82
AGENCY REF. NO. 173-5/82A

KENNETH MISCIA,
Petitioner
v.
EAST HANOVER BOARD OF EDUCATION,
Respondent

APPEARANCES:

Robert M. Schwartz, Esq., for petitioner

Joseph S. Accardi, Esq., for respondent
(Accardi & Koch, attorneys)

Record Closed: February 17, 1983 Decided: February 23, 1983

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

Kenneth Miscia alleges the Board of Education abused its discretionary authority and acted in violation of law when it transferred him from his tenured position as elementary school principal to the position as middle school assistant principal without his consent, which is denied by the Board.

The matter was transmitted to the Office of Administrative Law on June 11, 1982 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on August 9, 1982 and a plenary hearing was held on November 15, 1982 at the Morris Township Municipal Building. The record was closed on February 17, 1983 upon receipt of petitioner's reply brief.

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The parties stipulated that Miscia served as principal from July 1, 1969 to June 30, 1982; is tenured; and possesses the appropriate principal's certificate which qualifies him to serve in both positions at issue. N.J.A.C. 6:11-10.4(b). It is also stipulated the Superintendent recommended the transfer on March 19, 1982, which was affirmatively adopted by the Board on March 23, 1982.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Miscia testified the Board reduced the position of Middle School Assistant Principal from 12 months to 10 months, effective 1981-82, which was not negotiated with the administrator's assertion, in which he was president. See J-1. The association filed a grievance, which was later withdrawn. Miscia opposed the withdrawal and advised the Superintendent of his opposition to the change, and testified that the Superintendent's evaluations of his performance became negative. He also testified his transfer was involuntary, but accepted with notice of intent to appeal the matter to the Commissioner of Education. See P-1.

Miscia further testified he was president of the Administrator's Association for six years. He also stated no salary reduction was related to the position change from 12 to 10 months.

The Superintendent testified that he commented on the weaknesses of Miscia relative to teacher evaluations in 1978-79 and conferred with Miscia about his concern. See R-1. He further testified that Miscia showed minimal improvement in this area, which was reflected in his evaluation with an increment recommendation made with reservation. See R-2.

The Superintendent also testified that Miscia's 1979-80 goal was improvement in teacher supervision, which was in fact noted, and improvement was expressed in 1980-81. See J-3. The 1981-82 evaluation of Miscia noted in a negative assessment that

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improvement did not apparently rise to the Superintendent's level of satisfactory and his transfer recommendation was recorded. See J-2.

Relative to the evaluation of 1980-81, marked as J-3, the Superintendent stated he used the instrument as an incentive to encourage Miscia to further improve in the area of teacher evaluation, which he now believes to have been poor judgment.

The Superintendent also testified the Board discussed their concern of the Miscia transfer on February 9, 1982 and March 9, 1982. See C-9 and C-10.

FINDINGS OF FACTS

In addition to facts stipulated, a thorough review of the entire record reveals additional findings adopted herein:

1. Miscia was fully aware of the Superintendent's concern for the weakness perceived by the latter relative to the principal's evaluations of teachers, which the Superintendent communicated to him in conferences and written evaluation documents. See C-1, C-3, C-4, C-5, C-7, C-8, R-1, R-2 and J-2.

2. The Superintendent's recommendation and subsequent Board adoption of Miscia's transfer were made in the interest of administrative and educational efficiency to improve the quality of education in East Hanover.

DISCUSSION AND CONCLUSIONS

Having found the Board did not abuse its discretionary authority in transferring Miscia within his certificate, it now remains to determine if said action was in violation of law.

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Petitioner contends that all "positions contained and enumerated in N.J.S.A. 18A:28-5 represent distinct ranks in a school district's hierarchy and as such, boards are precluded from transferring a teaching staff member from one such position to another absent consent." Pb8. He views the transfer within his certificate as a demotion, and relies heavily on the tenure statutes, N.J.S.A. 18A:28-5 and 28-6, which incorporate a scheme for protecting a staff member in a position in which tenure was acquired, while serving a probationary period in a consensually transferred position in which a tenure status has not yet been acquired.

The briefs of the parties, incorporated herein, make many references to decisions of Administrative Law Judges, the Commissioner, the State Board of Education, and the courts in support of their respective arguments. I do not feel compelled to address them individually.

The first distinction to be made here lies in the issue to be adjudicated. This is not a tenure matter. It is a matter concerning the right of a Board to transfer staff members within their certificates.

The second distinction to be made relates to the many distinguishable fact patterns to be found in the cases cited. However, commonality is found in relative motives and good faith.

Petitioner's contention the legislature intended a ranking by enumerating various teaching staff positions in N.J.A.C. 18A:28-5 is rejected here on the belief the intention was for inclusiveness, and indeed not designed for application in transfer disputes.

It is undisputed the Article VIII, §4, para. 1 of the New Jersey Constitution commands the provision for the maintenance and support of thorough and efficient educational opportunities for the children of our State. This provision has resulted in the promulgation of statutes and regulations in support thereof, and has provided guidelines for the courts in adjudicating disputes.

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In the instant matter, petitioner has not met his burden of proof that the Board's transfer action was motivated in bad faith, was arbitrary, capricious, or unreasonable. I **FIND** the rationale for the Superintendent's transfer recommendation and subsequent action by the Board to be in accord with the mandate of our Constitution.

Relative to petitioner's contention he was demoted, the Appellate Division in Board of Education of the Township of Parsippany-Troy Hills v. George Morell, (A-1619-80T2, unpublished) said: "The clear language of N.J.S.A. 18A:28-5 proscribes the dismissal of or reduction in the compensation of administrators, such as a principal, who have acquired tenure except for just cause. The word "demotion" is nowhere mentioned in the statute."

I **FIND**, in the absence of bad faith by either the Superintendent or the Board, Miscia's transfer is neither a dismissal or demotion; no reduction in compensation; and a proper exercise of the Board's discretionary authority.

I **CONCLUDE**, therefore, the Petition of Appeal shall be and is hereby **DISMISSED.**

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

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

23 February 1983
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

28 February 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 1, 1983
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

g

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ADDENDUM

WITNESSES:

Kenneth V. Miscia, petitioner

Charles Magliaro, Superintendent of Schools

EVIDENTIARY DOCUMENTS

P-1: April 20, 1982, Magliaro to Miscia salary memo

R-1: January 29, 1979, evaluation of Miscia by Superintendent
R-2: March 29, 1979, evaluation of Miscia by Superintendent

J-1: March 23, 1982, Board minutes
J-2: March 19, 1982, evaulation of Miscia by Superintendent
J-3: March 20, 1981, evaluation of Miscia by Superintendent
J-4: Policy #304 - Job description of Principal
J-5: Policy #306 - Job description of Assistant Principal

C-1: January 28, 1981, Magliaro to Miscia evaluation report memo
C-2: October 5, 1981, Magliaro to Miscia evaluation report memo
C-3: December 2, 1981, Magliaro to Miscia report card memo
C-4: December 3, 1981, Magliaro to Miscia performance review memo
C-5: December 8, 1981, Board minutes
C-6 December 22, 1981, report card conference notes
C-7: January 5, 1982, Board minutes
C-8: January 28, 1982, Magliaro to Miscia performance review memo
C-9: February 9, 1982, Board minutes
C-10: March 9, 1982, Board minutes
C-11: 1981-82 and 1982-83, administrative salary guides

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KENNETH MISCIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST HANOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by petitioner in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes that petitioner filed primary exceptions to the initial decision herein by the Honorable Ward R. Young, ALJ. Petitioner excepts to the initial decision on a three-fold basis. It is contended therein that Judge Young erred in his reliance on Morell, supra. Petitioner argues that his transfer from the tenured position of elementary principal to the position of middle school assistant principal without his consent is wrong and, further, was done for improper reasons, i.e. arbitrary and capricious. The Commissioner cannot agree in entirety with petitioner's exceptions.

Petitioner argues that Morell is in disrepute and points to Childs v. Union Township Board of Education, Docket No. A-3603-80T1, N.J. Superior Court, Appellate Division, July 19, 1982 (unreported), cert. den. October 25, 1982. The Commissioner observes that the Childs decision was made subsequent to the decision in Morell. Whereas Morell held that tenure was not acquired in a particular position but rather in a district, Childs held "***the right of a board of education to transfer and re-transfer a teaching staff member is limited 'where tenure in a new position' is acquired***." (Slip Opinion, at p. 5) Seemingly, the Court is saying therein that a transfer could only be made to another assignment within the same position without consent of the teaching staff member. The Commissioner so holds.

Further, the Commissioner recently decided a case with strikingly similar circumstances to the present matter. Wilma Colella v. Board of Education of the Borough of Elmwood Park, Bergen County, decided March 10, 1983 In that decision, petitioner, a tenured high school principal, was transferred by the board to the position of vice principal without her consent.

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The Commissioner reversed the determination in the initial decision, relying on recent Court dicta and Commissioner's decision and holding that tenure accrues to a position and therefore petitioner was protected in the position of principal. The board was directed to reinstate Colella.

In the present matter the Commissioner finds that the circumstances warrant the application of Colella, supra. Accordingly, without finding it necessary to address each argument in petitioner's exceptions, the Commissioner determines that Judge Young's conclusion in the present matter be set aside. The Board is directed to reinstate petitioner to his former position as tenured elementary principal, together with all emoluments to which he is entitled as though steadily employed in that position.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 31, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CROSS-MOTIONS FOR
SUMMARY DECISION
OAL DKT. NO. EDU 1029-83
AGENCY DKT. NO. 43-2/83A

BOARD OF EDUCATION OF THE STERLING REGIONAL HIGH SCHOOL DISTRICT & MICHAEL J. MC KINNEY,
Petitioners
v.
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,
Respondent.

APPEARANCES:

William D. Hogan, Esq., for petitioner (Davis & Reberkenny, attorneys)

Michael J. Herbert, Esq., for respondent (Sterns, Herbert& Weinroth, attorneys)

Record Closed: March 21, 1983 Decided: March 24, 1983

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

The Sterling Regional High School Board of Education and Michael J. McKinney, a senior in that high school (petitioners) challenge an action of the New Jersey State Interscholastic Athletic Association (NJSIAA) which denied McKinney a waiver from the so called "eight-semester rule," so that McKinney may participate on the Sterling High School's interscholastic track team during the coming track season which commences

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April 1, 1983. Petitioners contend that the NJSIAA acted arbitrarily and capriciously because it did not apply definite standards in making its decision, that it treated him differently from other students in similar circumstances, that it failed to provide any reasons for its denial of the requested waiver, and that the eight-semester rule is unconstitutional on its face. The appeal is brought under N.J.S.A. 18A:11-3, which authorizes appeals to the Commissioner of Education from decisions of the NJSIAA involving public school districts. The NJSIAA denies petitioner's allegations and, in its defense, contends that the Commissioner should not interfere in the internal affairs of a private association. Furthermore, the NJSIAA maintains that the present petition should be dismissed for failure of petitioners to bring the action within 90 days under N.J.A.C. 6:24-1.2, and upon the application of the doctrine of laches.

The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. It was agreed by counsel to the parties at a prehearing conference conducted in the matter on March 4, 1983, that, because the track season commences April 1, 1983, the matter should be decided by way of cross-motions for summary decision. It was also agreed that the record would consist of the pleadings, exhibits, affidavits, and initial and reply briefs to be filed by the parties. Counsel were very cooperative so that this matter can be adjudicated in a timely fashion. The record closed on March 22, 1983, following the filing of reply memorandum by NJSIAA.

Uncontroverted Background Facts

The NJSIAA is as a voluntary association of public schools in respect of interscholastic athletic activities. It presently consists of 436 member schools, both public and parochial. Among its announced purposes, in recognition of the fact that thousands of students in its member schools participate in interscholastic athletics, are to foster and develop amateur athletics among the secondary schools, to equalize athletic opportunities by standardizing rules of eligibility for individuals, and to supplement the physical education program of the secondary schools of New Jersey by making a practical application of the theories of physical activity (C-1 at p. 21). In 1979, the NJSIAA was granted what amounts to semi-governmental status as an official policy-making body in respect of interscholastic athletics through the passage of L. 1979, c. codified at N.J.S.A. 18A:11-3. That enactment provides:

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> A board of education may join one or more voluntary associations which regulate the conduct of student activity between and among their members whose membership may include private and public schools. Any such membership shall be by resolution of the board of education, adopted annually. No such voluntary association shall be operative without approval of its charter, constitution, by-laws and rules and regulations by the Commissioner of Education. Upon the adoption of said resolution the Board, its faculty, and students shall be governed by the rules and regulations of that association. The said rules and regulations shall be deemed to be the policy of the board of education and enforced first by the internal procedures of the associations.
>
> In matters involving only public school districts and students . . . appeals shall be to the Commissioner and thereafter the Superior Court . . . .

The NJSIAA has adopted a constitution, by-laws, and rules and regulations which govern athletic contests among its member schools (C-1). There is an implied stipulation in the record that the Sterling Regional Board of Education adopted a proper resolution to be a member of the NJSIAA and that the by-laws, rules and regulations were approved by the Commissioner of Education for neither side raises an issue in either regard.

The controverted rule here, the "eight-semester rule", is found in Article V, Section 4, Subsection j of the by-laws and is as follows:

> Semesters of Eligibility - No student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his her entrance into the 9th grade. A student becomes ineligible for high school athletics when a class in which he she was originally enrolled has graduated. This rule shall not apply to an honorably discharged serviceman servicewoman, in which case the Executive Committee may make any adjustment of this rule as it may deem equitable.

The Executive Director of the NJSIAA, Robert F. Kanaby, attests in an affidavit filed that the eight-semester rule serves the following purposes:

a. it prevents "red-shirting" whereby parents or coaches have promising athletics repeat a grade so as to assure another year of athletic ability.

b. it prevents students who are not as athletically gifted from being deprived of an opportunity to compete in an

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interscholastic sport by being replaced by a more athletically gifted student who is repeating a semester or more of secondary school.

c. it promotes uniformity of eligibility throughout the State, so that no member school obtains an unfair advantage.

d. it provides motivation for athletes to observe appropriate academic standards. To allow a student to fail or repeat a semester or more of secondary school, and to be benefited by continuing eligibility in interscholastic sports would make a mockery of the principle goal of the association in maintaining and reinforcing high academic standards.

e. as with the 49 other members of the National Federation of State High School Associations, the athletic eligibility rules are intended to corrolate with a secondary school student's academic progression. In other words, the four year athletic eligibility of a student is intended to corrolate with the traditional four year secondary academic program. To do otherwise would subordinate the academic program of secondary schools to athletic endeavor.

Kanaby also attests as follows:

I have been involved with the NJSIAA as a high school principal, coach, executive committee member end as executive director for the last ten years. Based upon this personal knowledge, and my review of the association records, I have not uncovered any case where a student has been allowed to participate for more than eight semesters, except in instances involving medical or other disability which prevented the student from continuously attending a secondary school.

McKinney, as already noted, is presently a senior at Sterling High School. When he was first enrolled in the 9th grade in 1978-79, he was in attendance at the Camden high school district. He had 110 absences from school that year. McKinney was required to repeat the ninth grade at Camden. Consequently, McKinney is presently in his tenth semester "following his . . . entrance into the 9th grade." McKinney commenced his second year in the ninth grade at the Camden High School District, but subsequently moved to Magnolia, where he then enrolled in the ninth grade at Sterling High School. In an affidavit filed, McKinney attests that his initial failure in the ninth grade was due to physical injuries he sustained in gym class in the eighth grade at Camden. He also attests to having "... a good deal of ability ..." for the "dash", "hurdling" and "long jump" events in track (McKinney's affidavit at p. 4). McKinney desires to participate in

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interscholastic track in his senior year as a means of attracting college scouts in the hope of obtaining an athletic scholarship. McKinney claims that without such an athletic scholarship, his family's financial circumstances are such that he probably would not have the opportunity to attend college. It is noted that where a student athlete participates on an interscholastic team in this State, who is otherwise ineligible for such participation under the by-laws of the NJSIAA, the NJSIAA may impose the penalty of having the team forfeit any games it may have won while such ineligible student participated on that team. The imposition of this penalty could forclose the entire team from participation in post-season tournaments or championship games (See transcript of oral opinion, Stephen G. Weiss, A.L.J., preliminary injunction denied to bar NJSIAA from imposing such sanction, Old Bridge Bd. of Ed. v. NJSIAA, OAL Dkt. No. EDU 9570-82, Oct. 21, 1982).

On June 2, 1982, near the end of McKinney's junior year at Sterling High School, the assistant principal, obviously aware of the penalty which may be imposed on the 1983 track team if McKinney was not eligible to participate and knowing McKinney desires to participate, requested the Executive Secretary to have the Executive Committee review McKinney's eligibility status for interscholastic athletics for 1982-83. It is well to note that appeals in respect of NJSIAA's eligibility requirements must be taken through two internal levels before reaching the Commissioner. First, an appeal goes to the Eligibility Committee which consist of ten persons, representatives of member schools, who meet periodically to issue interpretations about the application of rules in specific instances. Decisions of the Eligibility Committee are based upon a review of written materials including the school principal's letter on the student's behalf and the student's record. An adverse decision by the Eligibility Committee may be appealed to the Executive Committee which is comprised of approximately 40 persons, all of whom are representatives of the member schools and of the community at large. The Executive Committee conducts a hearing at which the student and the school officials are allowed to present "evidence" to a panel of Executive Committee members. The principal, in his letter on behalf of McKinney, advised the Executive Secretary as follows:

> Michael [McKinney] attended Morgan Village Middle School in Camden prior to entering Camden High School for grade nine in 1978-79. While at Morgan Village, he injured his knee in physical education class during the spring and missed the remainder of the school year (approximately one marking period).
>
> In 1978-79, Mike attended Camden High School. He re-injured his knee and didn't participate in athletics. Also, he didn't complete the ninth grade academic requirements.

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> During the 1979-80 school year, Mike transferred to Sterling in October. While at Sterling, Mike has maintained the appropriate NJSIAA and Sterling eligibility requirements.
>
> Next year (1982-83), will be Mike's 5th year in high school. Your consideration in this matter is appreciated.

The Executive Director, by letter dated June 10, 1982, advised the principal that the NJSIAA Eligibility Committee "...has concluded the documentation presented does not justify waiving the eight (8) consecutive semester rule; therefore, Michael has been declared ineligible to represent Sterling High School in interscholastic athletic competition after June 30, 1982 in accordance with Article V, Section 4.J of the NJSIAA by-laws. . . . "

The assistant principal, by letter dated June 24, 1982, advised the Executive Director that he wished to appeal the Eligibility Committee's ruling to the Executive Committee. The basis for that appeal, as stated by the assistant principal, is McKinney was unable to attend school due to injuries incurred in both the eighth and ninth grades while at Camden and that as a result he suffered academically. The principal also queired, "Haven't there been precedents that would justify the Executive Committee ruling in favor of Michael McKinney?" In response, the Executive Director advised the Sterling Superintendent that the Eligibility Committee would hear the appeal of McKinney on September 16, 1982. The Executive Director advised that:

> The appeal will be considered on the basis of an informal hearing before the entire Committee composed of 40-4 (44) members. You are advised of the opportunity to have present any representative of your choosing, including counsel; and it is hoped you will be able to focus attention upon the new evidence which has become available to you in such a manner as to permit the Committee to consider this and other hearings in the most judicious and expedient manner which the situation warrants.
>
> A spokesman may present all or part of your presentation which will be followed by a questioning period by the hearing body. At the conclusion of the hearing your representation will be excused during the Executive Committee's deliberation, and you will be advised of the decision by the Executive Director via phone and in writing at the earliest possible time.

A hearing was conducted on September 16, 1982 before 28 members of the Executive Committee. A transcript of the hearing was prepared and is part of this record.

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The Executive Director, on September 22, 1982, advised the superintendent that:

> . . . the Executive Committee has upheld the decision of the Eligibility Committee in ruling Michael McKinney ineligible to participate in interscholastic athletics at Sterling High School as of June 30, 1982.

The superintendent, by letter dated December 2, 1982, requested the Executive Committee to reconsider its ruling by which McKinney was declared not eligible to participate in interscholastic track, on new evidence in support of the position that McKinney had to repeat ninth grade due to physical injuries sustained. The superintendent submitted documents he secured from Camden High School, medical reports from Affiliated Radiologists of Cherry Hill, and clinical records of McKinney. The Executive Committee granted the superintendent and McKinney a second hearing on December 8, 1982. By letter dated December 10, 1982, Kanaby advised the superintendent:

> After hearing the new evidence presented, the Executive Committee has reaffirmed their decision of September 16, 1982 and ruled Michael McKinney ineligible to participate in interscholastic athletics at Sterling High School as of June 30, 1982.

The superintendent, by letter dated December 22, 1982 protested the Executive Director, the decision of to the Executive Committee to deny McKinney eligibility for participation in interscholastic athletics ". . . despite the overwhelming evidence we submitted on his behalf. . . ." The Executive Director, by letter dated January 14, 1983, advised the superintendent that the Executive Committee, on January 12, 1983, having heard the matter on two occasions, determined that further appeals of the matter should be taken to the Commissioner of Education. The present Petition of Appeal was filed before the Commissioner on February 15, 1983. This concludes the recitation of the uncontroverted facts of the matter.

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Application of N.J.A.C. 6:24-1.2 and the Doctrine of Laches

The administrative rule, N.J.A.C. 6:24-1.2 requires a person who is aggrieved by an action taken by a board of education, in this case the NJSIAA, to file a petition within 90 days after receipt of notice by the person of the order, ruling, or other action concerning which the hearing is requested. The petition was filed February 15, 1983. The NJSIAA contends that that rule was implicated on September 22, 1982 when petitioners were informed of the original decision by the Executive Committee denying its appeal on the eligibility status of McKinney from the adverse ruling of the Eligibility Committee. Thus, the NJSIAA contends that the matter should have been filed no later than December 21, 1982. I disagree. To the extent that the NJSIAA granted petitioners another hearing on December 8, 1982 and, to the extent that the NJSIAA considered the superintendent's letter of protest in January 1983 and ultimately advised the superintendent that it would no longer consider the matter further, but that appeals then should be taken to the Commissioner, the rule in my view should not be invoked until the receipt of the Executive Director's letter of January 14, 1983, by the superintendent on January 19, 1983. Applying that standard, the present Petition of Appeal was clearly filed in a timely fashion.

In respect to the doctrine of laches, laches may be properly invoked as a defense which would bar a petitioner from seeking relief if the petitioner delays filing his suit for so long that the respondent loses his opportunity to defend himself. The NJSIAA contends that because petitioners waited three years to assert that McKinney's first ninth grade year at Camden High School in 1978-79 should not be counted toward McKinney's present eligibility, laches should apply.

Even if a delay can be seen in respect of McKinney asserting his rights here, the NJSIAA has brought forward no evidence upon which it can be found that the delay, if in fact a delay exists, has precluded it from defending against the present action. In the total circumstances of the matter presently before me I see no basis upon which the doctrine of laches should apply.

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Nature of the Appeal filed before the Commissioner of Education

At the prehearing conference conducted in this matter, the question was raised as to the nature of the appeal which was filed before the Commissioner of Education. That is, is a petition filed before the Commissioner from an action taken by the NJSIAA to be heard de novo or on the record below? NJSIAA takes the position that such petitions before the Commissioner must be limited to the record below, while petitioners contend that petitions filed before the Commissioner from adverse actions of NJSIAA must be de novo.

The Legislature saw fit to afford boards of education authority to join associations such as NJSIAA so long as the board, by resolution, adopts the rules and regulations of the association as its own policy. As noted earlier, there is no issue presented that this board did not in fact adopt such a resolution. Consequently, the rules and regulations of the Association are the policies of the Board. NJSIAA has adopted rules in respect of hearings it shall afford parties who are aggrieved by any decision made by Association officers (C-1, at pp. 42-44). The statute, N.J.S.A. 18A:11-3, provides "... appeals shall be to the Commissioner and thereafter the Superior Court ..." The referenced appeals are appeals from actions taken by the NJSIAA following the application of its hearing procedures. In the present case, the Eligibility Committee rendered its determination adverse to petitioner based upon the vice principal's letter request submitted to it through the Executive Director. That adverse determination was appealed to the Executive Committee which granted a hearing first on September 8, 1982, for which there is a transcript of the proceeding, and another hearing was afforded petitioners by the Executive Committee on December 8, 1982, for which there is also a transcript of the proceeding.

To the extent the NJSIAA has rules and regulations, approved by the Commissioner and adopted by each and every member board of education as policy, the "appeal" to the Commissioner follows. If an appeal to the Commissioner from an adverse action of the NJSIAA was to be considered de novo, or a full plenary hearing, it would be the Commissioner who would be interpreting and applying the rules and regulations of the NJSIAA on a day to day basis. Such a process would neither be economical, feasible, nor within the intent of the authorizing legislation in respect of a board's membership in NJSIAA.

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I conclude that appeals taken from adverse decisions of the NJSIAA to the Commissioner for review are appeals on the record. That is, the inquiry before the Commissioner is whether the action of the Executive Committee is sustainable on the record it had before it at the time the adverse action was taken.

The Record Before NJSIAA

The record shows the following circumstances to have been presented the Executive Committee on behalf of McKinney's application for a waiver from the eight-semester rule. At the hearing conducted September 16, 1982, McKinney appeared before 28 members of the Executive Committee and explained that during his eighth grade at the Camden public schools he injured his knee. McKinney missed the last several months of school and was placed on home instruction by the Camden schools. When McKinney began ninth grade, he explained that around Thanksgiving he injured his knee again in gym class. He explained that, as the result of that reinjury, he was out of school for the rest of the year. He explained that he was told on three different occasions he was to receive home instruction from the Camden schools, but that he never did. McKinney also explained that his knee was in a cast on one occasion for three weeks, and, on another occasion, for a full month.

McKinney explained that when he enrolled at the Sterling High School, and began the repeat of his ninth grade, he injured his knee again. There is evidence to show that when this injury occurred at Sterling High School, which caused McKinney to miss school, the Sterling Board did in fact provide him with home instruction There is further evidence which shows that the Sterling High School medical inspector has approved McKinney for track and cross country, while withholding permission for McKinney to play football. McKinney also explained to the Committee the circumstances of his family life, the fact that he assists his mother in raising his three brothers, and that, his mother has been in and out of the hospital for physical ailments for the past several years.

The superintendent of Sterling High School appeared at the September 16, 1982, hearing on behalf of McKinney. The superintendent's argument is that the Eligibility Committee's decision not to waive the eight-semester rule for McKinney is unreasonable, unfair, and not in the best interests of McKinney himself. The superintendent called upon the assistant principal to explain to the Committee the

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difficulty encountered in attempting to get official records from Camden High on behalf of McKinney. Prior to the September hearing, the superintendent did in fact attempt to get records from Camden High School in respect of McKinney's 110 absences during his freshman year. However, such records were not forthcoming by the September hearing.

It is noted by letter that dated October 1, 1982, the superintendent was advised as follows:

> Please accept my apologies for the delay in reference to your request [McKinney's ninth year at Camden].
>
> Our records indicate that Michael J. McKinney entered Camden High School September 14, 1978, and was absent a total of 110 days and late 7 times during the school year 1978-79. You will have to find out from the parent why her son was absent.
>
> Transcripts [of McKinney's grades] were issued to Sterling on December 5, 1979. We have no knowledge of his whereabouts after October 2, 1979. According to our records he did not receive Home Instruction nor was home instruction requested. Had he received Home Instruction, the records would not have indicated that he was absent 110 days nor would he have failed all of his subjects.
>
> We also have no indication of his having sustained physical injury in any of our Gym Classes.

This letter was received by the superintendent over the signature of the Camden High School principal. The principal also forwarded a memorandum in which she states that McKinney was on home instruction from May 10, 1978 through June 10, 1978 while he was in eighth grade. The principal further states that McKinney was never on home instruction at Camden High School. The principal submitted records which show that the Spring 1979 semester, during the time that McKinney was absent the 110 days, four of his teachers at Camden High School prepared unsatisfactory reports of his academic progress. Each teacher noted that his attendance at high school needed improvement.

At the September 15, 1982, hearing, the Executive Committee was also in receipt of a notarized statement from McKinney's mother who could not personally appear. That statement provide that:

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> Michael's education during his 8th and 9th grades in Camden were very unfortunate and disastrous. In 8th grade he had two injuries to his knees and was absent for four months. Nobody came to tutor him. He was strictly on self-study and occasionally received work from school.
>
> In 9th grade he reinjured his leg and missed over six months of school. Despite our efforts to get homebound instruction, we were unsuccessful. At times they [Camden officials] would send work home for him to do but he was strictly on his own. He did the best he could do. It was a very bad year for him since he failed all of his subjects. He lost interest and became very discouraged.
>
> During his 8th and 9th grade at Camden I was a hospital patient myself of at least two months each year. During this time Michael was responsible for the household looking after his younger brothers and trying to find a job.

Following the September 16, 1982, hearing, the Executive Director then advised the superintendent, as noted earlier, that the Executive Committee had upheld the decision of the Eligibility Committee in ruling McKinney ineligible to participate in interscholastic athletics.

At the December 8, 1982 hearing, the Committee was presented the documents finally obtained by the superintendent from Camden High School in respect of McKinney's ninth grade there. A review of the transcript of the December hearing shows that some Committee members were concerned with McKinney's lack of attendance at Camden even if the injury had occurred to him; whether, if McKinney had been on home instruction during the 110 days of absence in ninth grade, he would have successfully passed his ninth grade at Camden and, hence, would have graduated from high school in June 1982; while other Committee members questioned whether a board has a duty to search out pupils who are absent from their school to ensure that such pupil receives home instruction; while others addressed the duty of the parent to ensure that when their child is absent from school that home instruction is provided. The transcript shows that petitioners were then excused from the meeting and were advised that the Executive Director of NJSIAA would advise petitioners of its determination on the second appeal. The transcript shows that during the Executive Committee's deliberation one member was concerned because McKinney would be 19 1/2 years of age should he be declared eligible to participate in track during the Spring 1983 and that Committee member did not want a 19 1/2 year old pupil competing with 16 year old pupils; some members seem to have believed that McKinney was a truant during his 110 absences at Camden, while other

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members talked about prior waivers NJSIAA had given where a pupil had a severe head injury, and, another case, where a pupil suffered a broken back. Needless to say, the determination of the Executive Committee on the second appeal conducted December 8, 1982, was adverse to petitioners.

Discussion

I am struck by the attestations of Executive Director Kanapy that "... except in instances involving medical or other disability which prevented the student from continuously attending a secondary school" waivers of the eight-semester rule are not granted. The record here clearly shows that McKinney was absent from his ninth grade at Camden High School in 1978-79 for 110 days. Those absences, more probably than not, were consecutive. Inexplicably, the principal of Camden discloses no explanation for those absences and, in fact, advises the superintendent that to determine the reason why McKinney was absent for such a length of time the mother must be contacted. One must wonder how McKinney was absent for 110 days, if not for illness or injury, without Camden officials moving against him under N.J.S.A. 18A:38-27, et seq., the truancy provisions.

Neither transcript of either hearing afforded below, nor the Executive Director's letter that the Eligibility Committee denied the waiver, nor his letter that the Executive Committee denied the waiver as the result of the September hearing, nor the letter which followed the December hearing, discloses a statement of reasons why, in the first instance, the Eligibility Committee denied the waiver, nor why the Executive Committee denied the appeal to that Eligibility Commitee's ruling. Arguably, the reasons for the Eligibility Committee's denial of McKinney's application for the waiver may have been because the Eligibility Committee believed McKinney was truant during his ninth year at Camden, or that McKinney merely elected not to attend school, or that McKinney was not in fact injured, or that McKinney simply wasted his time in his ninth grade. Nonetheless there are no reasons in this record which can attach to the determinations of the Eligibility Committee or the Executive Committee with respect to McKinney's denial of his waiver application.

Nor is there contained within this record any standard which the NJSIAA applies in respect of its consideration of waiver applications. It is clear through the

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affidavit of Executive Director Kanapy that waivers have been granted on prior occasions in instances involving medical or other disability which prevented students from continuously attending school. It is further clear that more than two such waivers have been granted. The question, of course, remains as to the standards the NJSIAA applies in respect of granting such waivers in instances which involve medical or other disabilities In the instant case, the individual members of the Executive Committee considered factors such as the relative age of McKinney compared to other persons, the issue of the lack of homebound instruction that some members felt was the duty of McKinney's parent to secure, while others felt it was the duty of the board of education to provide. Nowhere, though, is there a standard against which waiver applications are considered.

Recently, Ken R. Springer, ALJ, in Smith v. NJSIAA, OAL Dkt. No. EDU 7753-82, June 24, 1981 (aff'd Comm. of Ed., Aug. 13, 1981) stated the matter succinctly when he said:

> On its face, the eight-semester rule would appear to admit of only a single exception for honorably discharged servicemen and women. In actual practice, the NJSIAA has historically recognized a variety of different exceptions which have never been adequately publicized so that all those who potentially qualify may take advantage of the same opportunity afforded to others. Criteria used to determine entitlement to a waiver do no fit into any readily—ascertainable pattern, but appear to depend to a large extent on a personal attitudes of decision-makers. For the sake of basic fairness, the NJSIAA has an obligation to '". . . let the standard be generally known as to assure that it is being applied consistently and so as to avoid both the reality and appearance of arbitrary denial of benefits to potential beneficiaries."' Morton v. Ruiz, 415 U.S. 199, 231 (1973). Our State's highest court has cautioned that ad hoc determinations made without '"pre-existing, properly published and adequately defined standards"' are inherently arbitrary. Robinson v. Cahill, 69 N.J. 449, 520 (1976). Uncertainty as to the appropriate standard increases the likelihood, as occurred here, of inconsistent decisions reached in comparable situations. Opposite results obtained under identical circumstances are the essence of '"capriciousness"'. [Citation omitted]
>
> . . .
>
> Of equal importance, the NJSIAA has a responsibility to advise an unsuccessful applicant of the reasons his request for a waiver was rejected. Such explanation need not be elaborate or detailed. Ordinarily a short written statement setting forth the reasons should suffice. (at p)

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The reply memorandum of NJSIAA asserts that waivers from the eight-semester eligibility rule are granted only in the rarest of cases. The "rare" cases are asserted to be situations when a student is prevented from actually attending school and completing an academic program at a school because of physical or mental impairment. It is unclear what the NJSIAA intends to connote as "rare" cases. The record here discloses that waivers from the eight-semester eligibility rule have been granted on prior occasions. Executive Director Kanapy's affidavit suggests that on prior occasions waivers have been granted in instances involving medical or other disability. The inference to be drawn from these assertions is that NJSIAA denied McKinney's waiver because it determined he was not physically impaired from attending school in 1978-79 while in ninth grade at Camden High. When one considers the medical reports submitted to NJSIAA from Affiliated Radiologists in conjunction with McKinney's own affidavit and explanation to the Committee on September 16, 1982, together with McKinney's mother's certification in respect of her son's injury during the ninth grade, and in the absence of contrary evidence from Camden High School, one is hard pressed to find support in the record for that conclusion of the NJSIAA if, in fact, that be the reason for its denial of McKinney's requested waiver.

The position of the NJSIAA that the Commissioner should not interfere in the internal affairs of a private association is recognized. However, that position is not well grounded in the record before me. The NJSIAA has achieved what can be reasonably considered a semi-governmental status. It is the official policy-making body for interscholastic athletics and such policies have the potential for affecting thousands of public school children in this State. The Commissioner of Education has broad statutory authority to generally supervise all activities of public schools in this State, N.J.S.A. 18A:4-22. The Commissioner may not stand by and remain silent when a public school pupil is subjected to an arbitrary or capricious action taken by an entity which subject to his authority. The Commissioner must take steps to undo the wrong inflicted upon a pupil who is subjected to such action.

In the instant matter, I **FIND** the action of the NJSIAA denying a waiver of its eight-semester eligibility rule to Michael McKinney to be an arbitrary and capricious action in light of the absence of reasons, and of standards upon which waiver would be granted, given McKinney for such denial. The absence of explanation by Camden High School officials in respect of McKinney's 110 days of absence in 1978-79 is simply not sufficient to overcome McKinney's attestations and explanations, in conjunction with the

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medical reports submitted to NJSIAA, and in conjunction with McKinney's mother's certified statements, that he was physically incapacitated during 1978-79. Consequently, I can discern no reason from the record why, in the circumstance where it is admitted that waivers have been granted by the NJSIAA for physical disability, such a waiver was not granted in the instant case. Even assuming that the rule has a rational basis to achieve a legitimate goal, the rule may not be applied in a capricious fashion.

Accordingly, it is directed that Michael McKinney be granted a waiver from the NJSIAA eight-semester eligibility rule and that Michael McKinney be declared eligible to participate on the interscholastic track team of the Sterling High School public school system for any and all purposes for which the track team otherwise exists.

Having decided the matter on the record below, there is no need to address petitioner's constitutional attack on the eight-semester rule, nor the defense entered thereto.

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

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

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

March 24, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 28, 1983
DATE

Ronald L. Tacker/ps
OFFICE OF ADMINISTRATIVE LAW

fms

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BOARD OF EDUCATION OF THE STERLING REGIONAL HIGH SCHOOL DISTRICT AND MICHAEL J. MC KINNEY, CAMDEN COUNTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTER-SCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

NJSIAA excepts to the conclusion by Judge McKeown that it was arbitrary and capricious in denying a waiver of its eight-semester eligibility rule to Petitioner Michael McKinney. NJSIAA argues that petitioner's filing herein was not done in a timely fashion (N.J.A.C. 6:24-1.2) and reaffirms its contention that the doctrine of laches precludes any relief for petitioner. NJSIAA submits extensive cataloging of the meetings held by the Eligibility Committee and the Executive Committee of NJSIAA in its consideration of McKinney's case. In so doing the Commissioner notes NJSIAA's agreement with the "uncontroverted background facts" set forth in the initial decision. NJSIAA expresses its alarm in consideration of the internal proceedings in this matter which it categorizes as extensive, that, if the initial decision is accepted by the Commissioner, the entire system of scholastic eligibility will be placed in immediate jeopardy.

Petitioner's reply exceptions strongly affirm the findings and conclusions of law by Judge McKeown in his initial decision and further rely on previously submitted arguments of law. Petitioner places particular reliance on Smith, supra. The Commissioner finds merit in petitioner's arguments.

The Commissioner cannot agree with NJSIAA's contention that the application of N.J.A.C. 6:24-1.2 and the equitable doctrine of laches renders petitioner's complaint untimely and precludes eligibility for relief. A close reading of the initial decision and the findings and conclusions advanced by Judge McKeown in his consideration of the application of these two

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arguments convinces the Commissioner that Judge McKeown properly found that the present Petition of Appeal was clearly filed in a timely fashion and that the doctrine of laches should not apply. The Commissioner so holds.

In the opinion of the Commissioner there is nothing in the record to affirm the prognosis of doom of all eligibility rulings as argued by NJSIAA. Rather, the Commissioner is in total agreement with the findings of Judge McKeown herein that, in summary, point to the action of NJSIAA which denies petitioner the benefits accorded others but does not distinguish to petitioner how his case was different from the others. The Commissioner finds Smith, supra, to be directly on point and notes with approval the statement made by Judge Springer, ante:

> "***For the sake of basic fairness, the NJSIAA has an obligation to '...let the standard be generally known as to assure that it is being applied consistently and so as to avoid both the reality and appearance of arbitrary denial of benefits to potential beneficiaries.' Morton v. Ruiz, 415 U.S. 199, 231 (1973).
>
> ***
>
> "Of equal importance, the NJSIAA has a responsibility to advise an unsuccessful applicant of the reasons his request for a waiver was rejected. Such explanation need not be elaborate or detailed. Ordinarily a short written statement setting forth the reasons should suffice."

In the present matter NJSIAA has failed to state to petitioner the reasons and standards upon which it based its decision to deny his request for a waiver of the eight-semester rule. Where it is patently obvious that a decision by NJSIAA is based on established rules, regulations and standards and is not arbitrary and capricious, the Commissioner will not disturb that decision. As the Commissioner said in Board of Education of the Northern Highlands Regional High School District, Bergen County v. NJSIAA et al., decided November 18, 1982:

> "***[T]he Commissioner finds no compelling reason to set aside the original determination rendered by the NJSIAA which was made in accordance with its established Constitution and Bylaws pertaining to the eligibility of transfer students to participate in interscholastic high school competition."
>
> (Order, at p. 4)

Such is not the case herein.

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

Petitioner shall be granted a waiver from the NJSIAA eight-semester eligibility rule and shall be declared eligible to participate on the interscholastic track team for any and all purposes for which the track team exists.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

APRIL 11, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10260-82
AGENCY DKT. NO. 426-10/82A

GORDON F. VAN NOTE,
Petitioner
v.
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,
Respondent.

APPEARANCES:

Gilbert H. Van Note, Jr., Esq., for petitioner (Pearce, Maguire, Burns, O'Brien and Van Note, attorneys)

Michael J. Herbert, Esq., for respondent (Sterns, Herbert & Weinroth, attorneys)

Record Closed: January 25, 1983 Decided: March 8, 1983

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Gordon F. Van Note (petitioner) asks the Commissioner of Education to reverse a decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) prohibiting his participation in interscholastic sports in the 1982-83 school year.

Basic facts are essentially uncontroverted. Petitioner began his secondary school education at Manasquan High School in 1978-79. He was, at that time, a ninth grade pupil. During that school year he participated in freshman football and varsity golf. He completed tenth grade and eleventh grade at St. Andrew's Preparatory School, Middletown, Delaware. St. Andrew's did not have a golf program. He returned to

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Manasquan High School for the 1981-82 school year. Based upon the advice of his parents and the chairman of the guidance department and in consideration of the low grades and low class standing he had achieved at St. Andrew's, petitioner repeated his eleventh grade year. He participated in interscholastic golf at Manasquan High School during the 1981-82 school year.

Petitioner is now in his fifth year of secondary school. He wants to compete on the Manasquan High School golf team in his tenth semester. He has been denied eligibility by the New Jersey State Interscholastic Athletic Association to compete in interscholastic golf in the spring 1983 season.

On September 22, 1982, a letter was sent by Robert F. Kanaby, Executive Director of NJSIAA to Jeffrey C. Osborn, Principal of Manasquan High School. The letter stated that the NJSIAA Eligibility Committee had declared petitioner ineligible to represent Manasquan High School in interscholastic athletic competition for the 1982-83 school year in accordance with Article V, Section 4.J of the NJSIAA bylaws (petitioner's exhibit A). On October 13, 1982, the matter was appealed to the NJSIAA Executive Committee. On October 15, Mr. Kanaby wrote to Mr. Osborn stating, "[a]fter hearing all testimony relevant to this appeal, the Executive Committee has upheld the decision the Eligibility Committee in ruling Gordon Van Note ineligible to participate in interscholastic athletics at Manasquan High School for the 1982-83 school year."

Petitioner subsequently appealed asking the Commissioner of Education to reverse the decision of the NJSIAA and to grant him eligibility to compete on the Manasquan High School golf team in the spring 1983 season. The foregoing are adopted as **FINDINGS OF FACT.**

Petitioner's Arguments

Petitioner contends that Article V, Section 4.J of the NJSIAA bylaws denies his right to a thorough and efficient education. Article VIII, Section 4, paragraph 1 of the New Jersey Constitution, and the New Jersey Supreme Court language in Robinson v. Cahill, 69 N.J. 133 (1975), established the right of children to a thorough and efficient system of education as fundamental. N.J.S.A. 18A:7A-4 and -5 provide for the goal of a thorough and efficient system of free public schools and the guidelines of "thorough and efficient education." Although no reported cases appear in which participation in

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interscholastic athletics has been applied to the education clause, expert opinion supports the view that it is an integral part of the public school education process. In support of this contention, petitioner offers affidavits of two New Jersey superintendents of schools stating in essence, that interscholastic athletics is a part of the program offerings designed to develop the individual talents and abilities of students (N.J.S.A. 18A:7-5(a)). This leads to the conclusion that interscholastic athletics, therefore, is one element of a thorough and efficient education. (Affidavits of Smith and Pentony, attached to petitioner's brief).

Petitioner also contends the Eight Semester Rule serves no practical purpose except to police situations in which a student has purposely prolonged his secondary school education in order to continue his high school athletic career. In petitioner's case, he repeated his seventh and eighth semesters solely for academic reasons based on the advice of his parents and his school. In addition, he complies with the age, transfer and all other eligibility rules of Article 5 of the NJSIAA constitution and bylaws. Therefore, the rule and its interpretation by NJSIAA in this case have arbitrarily and capriciously deprived petitioner of a thorough and efficient education.

Petitioner further contends that NJSIAA has interpreted the rule literally and without any clear-cut standards although the decision of the Eligibility Committee did imply that additional documentation might have warranted an exception. "Our State's highest court has cautioned that ad hoc determinations made without 'pre-existing, properly published and adequately defined standards are inherently arbitrary. Robinson v. Cahill, 69 N.J. 449, 520 (1976)." Smith v. NJSIAA, 1981 S.L.D. ___, OAL Dkt. EDU 7752-80 (June 24, 1981), adopted, Comm'r of Ed. (August 13, 1981).

The Eight Semester Rule seems to be based on preventing older, more mature students from repeating school years in order to extend their period of participation in sports. However, the record here indicates that petitioner complies with the age and transfer rules and that the decision to repeat a year was made by his parents and his school purely for academic reasons. Some exceptions to the Eight Semester Rule have been granted to nonveterans, as documented in the Smith case. But these decisions, as well as those denying eligibility, show no pattern of clear-cut standards to guide the decision-making process. Referring to respondent's arguments, below, petitioner says that except for "red-shirting," the other four guidelines for the Eight Semester Rule announced in the affidavit in support of respondent's brief are unclear, subjective pronouncements

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without any practical meaning. It is clear here that petitioner has not been "red-shirted" the whole year just to play an extra year on the golf team. Petitioner questions why it would be unfair or unsportmanslike to allow him to compete in golf in his tenth semester. Petitioner also questions how it would affect uniformity or how it would lower academic standards.

The Eight Semester Rule should apply only to "red-shirting," the reason for the rule in the first place. A more deliberate and time-consuming hearing process should be developed at the administrative level to obtain all relevant facts. Participation in interscholastic athletics is beneficial and desirable to high school pupils as a part of the thorough and efficient education to which they are entitled and should not be arbitrarily and capriciously denied simply because the governing authority may be concerned about the increase in the number of waiver applications or its ability to make absolutely correct decisions. Smith, above.

There is no evidence in this matter which suggests that in repeating his junior year there was an attempt on petitioner's or his parents' part to extend his participation in interscholastic golf. If he were to compete in interscholastic golf in his tenth semester, no advantage would accrue to him nor would any unfairness to anyone else result.

Petitioner also contends that no findings and no reasons were given by NJSIAA for its decision in this matter. The decision of the Eligibility Committee and the decision of the Executive Committee gave no findings or reasons. The only reference to reasoning consisted of a portion of one sentence in the letter concerning Eligibility Committee denial stating: "The Committee has concluded that the documentation presented does not justify waiving the Eight Consecutive Semester Rule." This implies that some quality of documentation might have succeeded and that there was some standard of proof that was lacking or that additional facts should have presented. Without any statement of its reasons, however, it is impossible to tell why the Eligibility and Executive Committees decided to treat this case differently by any of the prior rulings granting waivers. Petitioner concludes that the NJSIAA administrative decision in his case was not supported by findings and reasons and therefore was fatally defective. Smith, above; Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236 (1974).

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Respondent's Arguments

NJSIAA has maintained comprehensive eligibility rules since its foundation in 1918 and has observed the Eight Semester Rule since 1922. The rules are intended to fulfill the broad goals of the Association in assuring that educational purposes are not subordinated to athletic activities, that there is an equalized athletic opportunity for both schools and individuals, and that there is uniformity in eligibility rules to assure that no school or individual obtains an unfair advantage.

The controverted section does allow an exception to be granted in the case of an honorable discharged serviceman or servicewoman. However, the only other exceptions that have been granted by the Eligibility Committee deal with students who were prevented from continuously attending a school because of medical or other disabilities. In no case has NJSIAA voluntarily granted an exception to the Eight Semester Eligibility Rule to students who have actually attended school for eight semesters as is the case presented in this petition.

Respondent argues that the Commissioner should not disturb either the Eight Semester Rule or its application in this case because both have a rational basis in public policy. Petitioner alleges that his constitutional rights of due process have somehow been violated by the declaration of ineligibility. Petitioner appears to assume that there is some constitutional right to participate in interscholastic athletics. Our courts have uniformly held that students do not have a constitutional right to participate in interscholastic athletics. Rather, the courts hold that participation is in the nature of a privilege and unless a student can show that an ineligibility ruling does not have a rational basis which is related to public policy, then no judicial relief will be granted. In re: U.S. Ex Rel. Missouri State High Sch., Etc., 682 F.2d 147 (8 Cir., 1982); Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152, 159-61 (5th Cir., 1980), cert. den. 449 U.S. 1124 (1981).

In Walsh, the court held that the Eight Semester Rule was a permissible limitation to be placed on students. The court observed that the disallowance of one year of athletic eligibility should be reviewed as de minimis in any constitutional sense and was certainly not sufficient to overcome the worthy public policies which were advanced by the rule.

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As with numerous other cases, the court held that if there were any rational relationship between the restriction on eligibility and public policy, then the judicial inquiry should end, even if the reviewing court would have constructed a different rule or would have determined that the student involved should be declared eligible. To do so, the courts properly reasoned, would be a judicial interference with the internal policy-making of a voluntary association which has specific state legislative sanction.

The petitioner apparently bases his appeal on the fact that, since he repeated an additional year of school for academic reasons, that the Eight Semester Rule should not come into play. Of course, the section is quite explicit. The period of eligibility begins from the date that the student enters his or her freshman year. As the Kanaby affidavit shows, aside from the explicit military exception in that rule, the only exceptions that have been granted through the years have been to students who did not attend school for eight continuous semesters because of illness or other compelling reasons. The NJSIAA has never voluntarily granted an exception to a student such as petitioner here who did, indeed, continuously attend school for eight semesters. The fact that the student may have held himself back for academic reasons is totally irrelevant.

There can be no question that the Eight Semester Eligibility Rule has a rational relationship to several, laudable principles of public policy. First, it prevents "red-shirting" whereby parents or coaches have promising athletes repeat a grade so as to assure another year of athletic eligibility.

Second, it prevents students who are not as athletically gifted from being deprived of an opportunity to compete in an interscholastic sport by being replaced by a more athletically gifted student who is repeating a semester or more of secondary school.

Third, it promotes uniformity of eligibility throughout the State, so that no member school obtains an unfair advantage.

Fourth, it provides motivation for athletics to observe appropriate academic standards. To allow a student to fail or repeat a semester or more of secondary school and to be benefited by continuing eligibility in interscholastic sports would make a mockery of the principal goal of the Association in maintaining and reinforcing high academic standards.

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Fifth, as with the 49 other members of the National Federation of State High School Associations, the athletic eligibility rules are intended to correlate with a secondary school student's academic progression. In other words, the four-year athletic eligibility of a student is intended to correlate with the traditional four-year secondary academic program. To do otherwise would subordinate the academic program of secondary schools to athletic endeavor.

In sum, the rule is a universally accepted standard which bears a clear rational relationship to public policy. As such, it is beyond the province of a reviewing court or the Commissioner to change or abridge it in any way. There certainly has not been any arbitrary application of that rule in this case. Therefore, the ruling declaring the petitioner ineligible to participate in interscholastic sports during his ninth and tenth semesters should be upheld.

Discussion

The eligibility rules maintained by NJSIAA are found in Article V of its bylaws. The controverted section, 4.J, reads as follows:

> Semesters of Eligibility - No student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his/her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated. This rule shall not apply to an honorably discharged serviceman/servicewoman, in which case the Executive Committee may make any adjustments of this rule as it may deem equitable.

There was no element of compulsion in the decision to have petitioner repeat the eleventh grade upon his return to Manasquan High School. The decision seems to have been based on educational considerations and there is no indication in the record as to whether eligibility to participate in varsity sports was even considered at the time. In Smith, above, Judge Springer points out that over an eight-year period, NJSIAA had granted 32 exceptions to its own Eight Semester Rule. Each of the cases involves some sort of extenuating circumstances and these, presumably, were considered by the Association to be more compelling than the facts of Smith's case. Although every decision was admittedly made on its individual merits, an Association official claimed that the Eligibility Committee followed hitherto unwritten guidelines in arriving at its decisions. These informal guidelines were reduced to writing for the first time in

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preparation for the Smith litigation. The guidelines generally provided that a waiver would not be granted unless the applicant suffered a severe physical or mental disability causing an absence from school which could not be compensated by tutoring, summer school or additional courses after recovery.

Judge Springer points out, however, that some of the exceptions recognized by the Association clearly went beyond the guidelines. Waivers had been granted on account of language barriers, because of a year spent abroad and on account of class time missed by a worthy student who withdrew from school in order to care for his physically incapacitated parents. Smith was able to identify several examples of waivers which he claimed to be indistinguishable from his own circumstances.

Although it may be argued with some cogency that local education officials are in a better position to have knowledge of the strengths, weaknesses and needs of a pupil seeking a waiver, it would be bootless to shift eligibility determinations from NJSIAA to the local school officials. The salutary effect of the eligibility rules would be diminished and the rules themselves much more open to possible abuse if the effective decision-making power were taken from the State Association.

Findings

1. The decision to have petitioner repeat the eleventh grade was based on educational and social considerations which, in turn, were based on his low grades and relatively poor rank in class.

2. There is no indication that a desire to prolong petitioner's participation in varsity sports influenced the decision.

3. Neither the Eligibility Committee nor Executive Committee of NJSIAA provided petitioner or his school with a statement of reasons for denial of his request for a waiver of the Eight Semester Rule.

4. Neither the Eligibility Committee nor the Executive Committee of NJSIAA provided petitioner or his school with any information as to the standards or guidelines on which the decision in petitioner's case would be made.

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5. By failing to provide reasons for its actions, NJSIAA created the appearance of arbitrary and capricious action.

Conclusions of Law

Based on the discussion and findings above, I **CONCLUDE** that NJSIAA has contravened fundamental protections of due process which guard against abuse of discretion.

The Eight Semester Rule set out above appears to allow an exception only for honorably discharged servicemen and servicewoman. In Smith, above, of which I take notice, Judge Springer concluded that NJSIAA has recognized different exceptions but has failed to adequately publicize these decisions so that those in similar circumstances might take advantage of the same opportunity afforded to others. Ad hoc determinations made without "pre-existing, properly published and adequately defined standards" are inherently arbitrary. Robinson v. Cahill, 69 N.J. 449, 520 (1976).

NJSIAA has an affirmative obligation to advise an unsuccessful applicant for a waiver of the reasons his or her request was denied. The explanation need not be elaborate. A short, written statement setting forth the reasons would normally be sufficient. The New Jersey Supreme Court has held that a local board of education must give its reasons for nonrenewal of a nontenured teacher's contract (Donaldson, above) and that the State Parole Board must give reasons for denial of parole to inmates (Monks v. N.J. State Parole Bd., 58 N.J. 238 (1971). In Monks, the court stated:

> [w]hen dealing with administrative agencies we had long pointed to the need for "suitable expression of the controlling findings or reasons" (58 N.J. at 244) and we quoted Professor Davis to the effect "One of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." [Citation omitted.] We stressed that the need for fairness was "as urgent in the parole process as elsewhere in the law" and that "the furnishing to reasons for denial would be the much fairer course." 65 N.J. at 243-4.

NJSIAA contends the traditional doctrine of judicial noninterference in the internal affairs of a private association should control here. The Association is not wholly a private entity, however. It exerts a great deal of influence on an important aspect of public school programs and is financed to a great extent by money raised for school

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purposes by local levy. N.J.S.A. 18A: 11-3 (L. 1979, c.172) conferred what amounts to semigovernmental status on the NJSIAA and gave the Commissioner of Education a greater role in reviewing its rulings.

Finally, as in Smith, above, it is irrelevant that a student may not have a federal constitutional right to participate in interscholastic athletics. The State has independently devised "procedural safeguards against arbitrary and unjust action though there may . . . have been no comparable safeguards in the federal sphere." Donaldson, 65 N.J. at 243. As a matter of State law, petitioner is entitled to customary due process protections when administrative actions are taken which affect his interests.

In consideration of the foregoing, it is **ORDERED** that the determination of the NJSIAA in this matter is **AFFIRMED**. It is further ordered that NJSIAA, within ten days of receipt of the final decision in this matter, provide petitioner with a written statement of its reasons for the decision which is the basis of this matter. Monks, above; Donaldson, above.

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

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OAL DKT. NO. EDU 10260-82

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

8 MARCH 1983
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

10 March 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 16, 1983
DATE

Elizabeth J. Kagan CS
OFFICE OF ADMINISTRATIVE LAW

bm/e

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GORDON F. VAN NOTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTER-SCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner's primary exceptions plead for reversal of the initial decision by Judge Campbell which affirms the decision of the NJSIAA denying petitioner eligibility to play golf in his fifth year of secondary school because of the application of its Eight Semester Eligibility Rule. Petitioner contends that he has no knowledge of the standards and guidelines which form the basis of why his eligibility application was rejected. Respondent in reply exceptions agrees with the determination of Judge Campbell that the action by the NJSIAA herein should be affirmed while it strongly objects to the conclusion of the ALJ that petitioner must be provided with a written statement of its reasons for the decision forming the basis of this matter. The Commissioner finds merit in respondent's arguments.

The Commissioner agrees with Judge Campbell in finding value in the Eight Semester Eligibility Rule and requires its application in a consistent, uniform manner. The Commissioner observes that the various eligibility standards prescribed by NJSIAA are set down in its Constitution and Bylaws including those prescribed in Article V, Section 4J.

In the present matter petitioner is now in his fifth year of secondary school. He repeated his seventh and eighth semesters solely for academic reasons and now seeks eligibility to play an extra year on the golf team in contravention of the Eight Semester Rule. The Commissioner agrees with the action of NJSIAA in enforcing that rule. Nor does the Commissioner find any merit in that portion of the initial decision mandating further reasons in writing for the denial of petitioner's eligibility application and/or waiver.

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The Commissioner observes that the application of the rule herein is clear and unequivocal with no mitigating circumstances offered by petitioner as to why such rule should be set aside. In the Commissioner's judgment, this matter is to be distinguished from other cases in which the Commissioner set aside eligibility rulings of the NJSIAA in that those matters denied waivers for seemingly the exact reasons for which waivers had previously been granted without providing distinguishing reasons or rationale. See Smith v. NJSIAA, decided by the Commissioner of Education August 13, 1981 and Sterling Regional High School and McKinney v. NJSIAA, decided April 11, 1983.

In the opinion of the Commissioner, the Eight Semester Rule herein described is a laudable one and its enforcement in this instance is based on obvious, self sufficient reasons that require no further statement and explanation for the decision forming the basis of this matter. The Commissioner so holds.

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

That portion of the instant decision affirming the action of the NJSIAA herein is upheld; however, the provision requiring a further statement of reasons is set aside.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

APRIL 22, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8565-82
AGENCY DKT. NO. 317-7/82A

BOARD OF EDUCATION OF THE BOROUGH OF EDGEWATER, BERGEN COUNTY,
Petitioner,
v.
ANTHONY J. SCARPIGNATO,
Respondent.

APPEARANCES:

Steven J. Zaben, Esq., for petitioner

Louis P. Bucceri, Esq., for respondent
(Bucceri and Pincus, attorneys)

Record Closed: March 1, 1983 Decided: March 24, 1983

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OAL DKT. NO. EDU 8565-82

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

On June 21, 1982, the Board of Education of the Borough of Edgewater (Board) certified charges of insubordination in four counts against Anthony J. Scarpignato, a tenured teaching staff member, seeking his dismissal pursuant to N.J.S.A. 18A:6-10 et seq. The Commissioner transmitted the matter to the Office of Administrative Law on September 13, 1982 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Respondent was suspended without pay effective September 8, 1982.

The Board offered Roman Colantoni, its secretary, and Mildred Merlo, acting administrative principal, as witnesses. Mr. Colantoni's testimony was very brief: he identified a transcript of a meeting which several of the witnesses attended. Mrs. Merlo provided virtually all the supporting testimony for the Board's charges. Respondent himself provided the principal defense testimony. He also offered the testimony of a colleague, Carol Marino, and his former principal, Richard Dexheimer. A list of exhibits introduced into evidence is attached to this decision. The transcripts of January 17, 1983 and January 18, 1983 are referred to as 1T and 2T. Respondent moved to dismiss at the close of the Board's case. In light of the Commissioner's strong concern that in serious cases of this nature there be a full and complete factual record, I denied the motion although it appeared meritorious with respect to the second count of the charges.

DISCUSSION OF THE TESTIMONY

Respondent accurately notes that Mrs. Merlo had very little independent recollection of the events which led to the charges. She relied almost entirely upon the documents entered as exhibits and particularly, upon her own log notes. She was apparently in the habit of noting each day's events briefly on a personal calendar. Although this contemporary record assured considerable accuracy concerning events and when they occurred, the log notes, by virtue of their brevity, could not convey a complete picture. In the absence of recollection to fill in the details, the testimony was

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somewhat sparse with respect to certain charges. When evidence upon a charge such as the second count is principally the unsupported recollection of Merlo, I have given it less weight.

Respondent's recollections were not always complete, however. For example, he could not recall receiving any note from Merlo concerning the meeting relating to the second count, yet Marino remembered having seen the note. Respondent's colleague, Carol Marino, had almost a complete recollection of the events involving her. Her testimony was very reliable as was that of Mr. Dexheimer.

THE FIRST CHARGE - FINDINGS OF FACT

On March 21, 1980, administrative principal McGill sent a schedule of post-evaluation conferences to the teachers at Eleanor Van Gelder (EVG) school. Respondent's conference with Ms. Merlo, the then curriculum coordinator, was set for 1:05-1:45 p.m. on Monday the 24th. Of the 14 teachers involved, two did not attend on the scheduled dates: respondent and Carol Marino. On the 24th, respondent advised Merlo in writing that "the time you scheduled for the conference is not convenient. Please schedule a meeting for after school on any day. Thanks." (P-1). All of the conferences were ordinarily scheduled during a teacher's preparation periods. Administrative principal McGill, who was then the highest administrative official in the Edgewater district, immediately answered respondent's note on March 24. He stated, "We have allotted Monday and Tuesday of this week for follow up observation conferences in order to meet Board mandated deadlines. It is necessary, therefore, to conduct these conferences during scheduled professional periods in the school day." (J-3).

McGill spoke with respondent on Tuesday the 24th and was of the impression respondent found lunchtime a more convenient time. On Wednesday the 25th, McGill wrote again offering lunch period that day or second period the following day (March 26) as additional times during which respondent could have his required meeting with Merlo.(J-4). Respondent's immediate response on March 25, by way of a typed letter (J-5)

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was:

Dear Mr. McGill:

During our discussion yesterday, March 24, 1980, I never stated that lunchtime would be more convenient for post conference. What I did want to know was when Mrs. Merlo could meet with me after school. Mrs. Merlo refused to consider my request and refused to answer my communication. I think it is not much to ask of an administrator to spend ten or so minutes after school if I am willing to spend the extra time. Furthermore, not to answer a correspondence is rude and inexcusable. Where is the input and where is the cooperation?

Again, I submit that I am willing and available for the post conference anytime after school. However, I will abide by your decision and consider the matter accordingly.

A. J. Scarpignato

On the same day, McGill replied:

Dear Mr. Scarpignato,

In all written and oral communications which have reached this office, it appears that the initial appointment for the post observation conference was not convenient to you, as were the alternate times and dates which were suggested.

I gather that the only time convenient for you is after school hours. However, Mrs. Merlo has other commitments after school this week.

This office has a Board mandated deadline of Thursday, March 27, for the completion of this second observation session which will be met. Review your scheduled professional preparation periods and alternate times offered and make a selection in order to meet this March 27 deadline. We will not deviate from this. I personally am not convinced of any hardship to personnel in carrying out this post observation conference during regular school hours. (J-6).

The next morning, respondent received McGill's letter and immediately replied, again with a typed letter. (J-6(a)). It should be noted that the following day was the date of the Board mandated deadline for the completion of the evaluation period reporting.

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Dear Mr. McGill:

Your last written communication, dated March 25, 1980, appeared in my mailbox on the morning of March 26, 1980.

In response, allow me to say that in addition to offering time after school, I would be most willing to meet with Mrs. Merlo before school hours for the post conference. Let me also say that Mrs. Merlo is not the only individual who has commitments after school.

On Friday, March 21, 1980, you forwarded a memo to the teachers stating that there is a very short time between now and Easter vacation and, for this reason, you were requesting teachers to forward report cards to your office on Monday, March 24, 1980. This was to give special subject teachers ample time to place their marks on the cards and also to afford the regular teachers time to add their marks, as well as attendance marks prior to report card distribution. You also expect completed report cards in your office on April 14, the first day we return from Easter vacation.

I have science tests scheduled for four classes this week. They had to be prepared and will have to be scored in order to meet your deadline for report cards. People who teach, or who have taught a class, know what is involved in closing out grades at the end of a marking period.

I use preparation time to do the aforementioned tasks. It is obvious that Mrs. Merlo is not concerned with this situation or even sympathetic with it since she does not believe in grading the children as evidenced by the way the remedial program, of which she has charge, is carried on, and as evidenced by the scheduling of teacher's preparation time for post conference irregardless of the needs of teachers.

As stated in my previous correspondence to you, you decide when this conference is to take place if my suggestions are of no value and I will abide by your decision.

Sincerely,

A. J. Scarpignato

On the same day, Merlo, whose office was in a different school (George Washington), traveled to the EVG school, a distance of over a mile, and remained available 40 minutes for respondent to conference with her during his preparation period. Thus, subsequent to

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Monday and Tuesday of that week when Merlo was in EVG school the whole day for scheduled conferences, she had to, and did, travel back and forth from her office to EVG school to make herself available during each of the newly proposed conference times. On the last day, before the deadline, March 27, Merlo again waited for respondent to appear during his preparation period. When he did not appear, she went to his classroom and asked him if he was going to attend. He said he would not meet with her. (1T24).

On March 28, McGill advised respondent that his conduct with respect to the conference would be included in his evaluation. All respondent's prior evaluations had been satisfactory. The Board did not contend that respondent was anything but a good teacher excepting for the alleged incidents of unfitness at issue here. McGill's letter (J-7) ably set forth good cause for his directives and the root cause of respondent's conduct:

> Convenience is one consideration but negotiating scheduled conferences is another matter.
>
> One important fact is being overlooked. All staff members are employed by our Board of Education. By Board and administrative directives teaching hours and load are established. Included in these teaching hours, staff members are granted, with Board and administration discretion, allotted periods of time called "professional preparation periods" which frees the teaching staff member for other professional duties. This allotted time fails within the regular school day, thus falls within the jurisdiction of the Board of Education and administration as to its utilization.
>
> Post observation conferences are an intricate part in our endeavor to improve classroom instruction, where need be, and also to note individual strengths. Within this framework it is the duty of all staff members to make themselves available at the designated time, whether it be post observation or evaluation conferences or other professional matters of a personal nature.
>
> I am well aware of the suggestion made by your professional organization in regard to utilization of preparation periods for this type of conference. However, I draw your attention to the memorandum of agreement included in the present contract regarding preparation periods in this building. We now exceed this number of minimum preparation periods in the majority of classroom teacher positions.

Respondent and his colleague, Carol Marino, the other teacher who did not attend the scheduled conferences, were both closely involved with union (ETO) activities.

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The practice of other administrators in setting up conferences, as testified to by Mr. Dexheimer, is not relevant here since there was no ambiguity in McGill's directives. The written directives are prima facie clear. Respondent was required to meet with Merlo during his preparation periods or at lunch prior to March 28. Twelve other teachers understood and met the requirements. The mental processes of respondent which contributed to his conduct are not relevant either. His belief that the resort to formal memoranda was an attempt to document a claim that he had voluntarily agreed to use preparation or lunchtime for other than their stated purpose even if reasonable (which it was not) could not constitute good cause to ignore the clear directives of his superior. Whether or not Marino, who also did not meet with Merlo, received more than a reprimand has no bearing on this matter since the Board has not alleged any series of incidents concerning her.

All the above constitute my findings of fact on the first count.

THE FIRST CHARGE - CONCLUSIONS

I conclude respondent's conduct clearly constitutes insubordination which is a form of unfitness. There was willful disobedience of a substantive nature. If every teacher were to follow a similar course, management in furtherance of legitimate educational goals would be stymied. It seems obvious that the time respondent spent on typing replies during school hours could readily have been given over to attending a conference. Yet he did not even respond to a direct oral request of Merlo who made herself available and sought him out on the last day when the reports were due. "A teacher is expected to exhibit loyalty to the district in which he or she is employed and to cooperate with the administration in seeking the education goal . . . . A teacher is expected to show a reasonable respect for the authority of his or her employer. . . ." Pietrunti v. Bd. of Ed. of Brick Tp., 128 N.J. Super. 149, 165 (App. Div. 1974).

Respondent argues that laches should bar consideration of these 1980 events. I do not agree. While tenure charges are often brought as the result of one flagrant episode,

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many result from a pattern of conduct which becomes clear over time. "Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents." Redcay v. State Bd. of Ed. 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E.&A. 1944). Obviously some incident must be the first in a series. In this instance, petitioner alleges a series of events over a period of about two years, which is not unduly lengthy given the seriousness of a tenure proceeding. Such cases should be undertaken with due deliberation.

THE SECOND CHARGE - FINDINGS OF FACT

Petitioner charges that on October 16, 1981, respondent refused to meet with Merlo as she requested and would only agree to participate in a group conference to air grievances. On that date three teachers including respondent requested a meeting with Merlo and Dr. Murphy, the then chief school administrator, in a handwritten note stating, "Several problems have arisen concerning the remedial program. We would like to meet with you both to clarify these issues. Please give us a list of convenient dates." Merlo sent back the note offering specific dates for teachers Tunick and Marino (J-9) and a different date for respondent. (2T118:8-21). The note to respondent is not of record here and he testified that he did not recall it, although Marino testified that he showed it to her. Merlo spoke with respondent on the 16th about a meeting. She told him that the nature of the problem, which involved determining the least destructive time for removing children from the classroom for special remedial instruction, could best be discussed with respect to each individual classroom teacher in her opinion. Respondent replied that he would not conference unless all the teachers for a grade level were included in one conference. He also stated that he wanted to air grievances. Merlo felt that grievance airing would not solve the particular problem upon which she was focusing.

On October 13, 1981, Dr. Murphy wrote to the three teachers advising them that he would be willing to meet with them only after Merlo had her "meeting with the three of you." Respondent's telephone conversation with Merlo occurred on October 16. There was no proof of the specific time and place when Merlo had directed respondent to meet with her. Merlo did not recall the contents of her note. Respondent was of the belief that

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Merlo agreed to a group meeting on October 26. He spoke to Marino when he concluded the telephone call and related that information to her. That afternoon (October 16), Marino wrote to Merlo confirming a meeting on behalf of the three teachers for an October 26 date. She did not receive a reply but on October 22, Dr. Murphy cancelled the meetings with Merlo and set up a group meeting for the 26th. (J-11).

From the above underlying facts, it should be noted that the teachers rather than Merlo requested a meeting in the first instance. Although they received notes from Merlo on October 15, listing dates convenient to her for individual meetings, Merlo's superior (Dr. Murphy) had sent a memo on October 13 which could be interpreted to mean that all three tachers were to meet together with Mrs. Merlo. ("I have asked Mrs. Merlo to set up a meeting with the three of you.") (J-10). Thus there is ambiguity as to whether or not the two administrators were directing the same course of action and Murphy was superior to Merlo. Such were the circumstances when respondent called Merlo on the 16th and concluded from the conversation that the teachers were to meet as a group with Merlo on the 26th. There is no question that respondent believed that this was the telephoned communication since Marino vividly recalled the incident and followed it up with a note confirming a meeting on the 26th. Therefore, on the 21st, the first date offered by Merlo in her note to the two women teachers and on whatever date respondent was directed to meet with her individually, none of them expected to appear. The very next day (the 22nd), Dr. Murphy noted that he had asked Merlo to cancel her meetings at some time prior to the transmission of his communication.

In all the above circumstances, it cannot be found that respondent willfully refused to meet with Merlo. He exhibited an insubordinate attitude during the telephone conversation. (1T107 and 30). Merlo's log noted that respondent wanted a written note from her as to why she did not wish to meet with all three teachers together. She did not otherwise recollect that and other facts concerning the telephone call (1T30 and 109), thus the log note is fully admissible. Merlo's inability to recall the conversation in greater detail precludes more specific findings. I have no doubt, however, that respondent conveyed the impression that he would not meet with Merlo without the other teachers, and I so find. The incident has some significance when the charges are viewed as a whole.

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The above constitutes my findings on the second charge.

THE SECOND CHARGE - CONCLUSIONS

I CONCLUDE that the Board has failed to prove insubordination on these facts. The insubordinate attitude of respondent toward Ms. Merlo merely serves to lend credence to the alleged continuance of a course of insubordinate conduct.

THE THIRD CHARGE - FINDINGS

Petitioner charged that on Monday, November 9, 1981, Merlo directed respondent to submit his lesson plan book for her review but that he neither submitted it nor any reasonable explanation for not doing so.

Merlo testified that there was a wire basket on the table outside the EVG principal's office. She checked the plan books left there by the teachers. Respondent's was not there. The teacher's manual requires submission of lesson plans, but ordinarily the principal (Dexheimer) checks them. Dr. Murphy asked Merlo to review the plans during Dexheimer's absence due to illness from November 9 to November 16, 1981. Initially Board secretary Colantoni advised the teachers in writing to submit plan books by Friday, November 6. Such was the prior practice, but Marino reminded the administration that Dr. Murphy had changed plan book submission to Mondays.

Actually, respondent put his plans in his own mailbox on Friday, one of the methods used to comply in the past. On Monday he picked them up to use in the classroom, wondering why they were not initialed by Merlo. He looked around for her in the office. He did not see Merlo's notice (J-12) which had been placed in or near the sign-in book that morning (Monday).

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On Tuesday at 3:00 p.m., respondent received another copy of Merlo's note (J-12) with her handwritten request to him specifically to "Please hand me plan book today." He again "looked around for her" but did not leave the book since he would be returning that night for conferences and might see her. He did not want to leave the book since he was using it. Wednesday was the last school day of the week; school was closed Thursday and Friday. On Wednesday the 11th, respondent received a note from Merlo stating, "On two separate occasions I requested to see your plan book which is normally due in the office on Monday morning. Please explain, in writing, why you were not able to comply with the request. cc. file." (J-13).

Instead of relating the explanatory sequence of events described above which arose out of missed communications and reasonable understandings based on past practices, respondent went to see his ETO representative, Carol Marino, "to find out if something was placed in my file without anyone talking to me." While respondent was in the EVG office looking into his personnel file, the secretary, Mrs. Hoppe, asked where he had left his plans and when told he left them in his mailbox, she said, "Oh, Mrs. Merlo would never look for them there." Thus, respondent had a fairly clear idea of the origin of his problem.

Nevertheless, respondent refrained from making an explanation to Merlo for two weeks but went back later to check his file again. Finding the letter in the file at that time, respondent wrote to Merlo on November 25, 1981:

> Today I discovered that you have placed your letter dated 11/11/81, regarding lesson plans, in my file. According to contract, it is to be understood that due process is accomplished after a "discussion" has taken place between administrator and teaching staff member before any document is placed into the personnel file. This was not done. In addition, current labor laws support the aforementioned contractual agreement. Please remove the letter in question immediately. (J-14).

Merlo answered, "I would be happy to discuss this with you. Please call and make an appointment." She followed this up with an explanation on December 3:

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> My letter dated November 11, 1981 was an effort to discover [whether the employee would, in fact violate or disobey a rule or order of management] and it is not at this time a reprimand. Failure to comply with this request for a satisfactory response will result in disciplinary action which may include a written reprimand. (J-15).

Despite this second opportunity to forward an explanation, respondent took no action to comply. His rationale was that, "by nature of the words in the letter, it sounded like I didn't turn my plans in. I felt if I answered that I would be admitting. I'd be giving an excuse for something that never happened." (1T214).

On January 18, Merlo followed up her offer to discuss the matter with respondent, offering him a choice of four meeting times. (J-16). Respondent chose a time, stated an ETO representative would be present but advised Merlo that "unless your letter dated 11-11-81 is removed from my file prior to our meeting, I will not enter into any discussion relative to my plan book. Kindly inform Mrs. Marino of your decision." (J-17). On January 21, 1982, Merlo directed respondent to meet to discuss the "noncompliance" and stated "my letter will remain in your file until I receive an acceptable explanation." (J-18). At the meeting, which the Board secretary taped, respondent repeated his demand that the letter be removed before he would provide an explanation. After the tape was shut off, Marino attempted to relate to Merlo that "very possibly" Mr. Scarpignato did hand in his lesson plans but ETO felt his rights were being violated because Merlo did not speak to him personally before requesting an answer in writing (2T127). Respondent continued to withhold the information Merlo requested even though she eventually notified him that she was bringing the matter to the Board's attention for disciplinary action in her letter of June 4, 1982. (J-19).

On June 4, Merlo advised respondent that the Board would be discussing "your non-compliance" at a closed session on June 9. Respondent replied, "what non-compliance are you referring to? I need to know to make a decision." Merlo noted, "your plan book submission." Subsequently, ETO filed a grievance, but it was withdrawn when the Board brought tenure charges. Respondent points to the negotiated contract (R-10) Articles VIII B4 and IVB in support of his failure to submit an explanation. Section IVB says:

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B. Just Cause Provision

> 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.

Article VIII, "Assignment, Evaluation and Liaison" says:

B. Teacher Evaluation

> 4. All observation of the work performance of a teacher shall be conducted openly and with full knowledge of the teacher. No report shall be submitted to the central office, placed in the teacher's file, or otherwise acted upon without prior conference with the teacher.

The above constitutes my findings of fact on this count.

THE THIRD CHARGE - CONCLUSION

Neither of the cited contract provisions was relevant to interdict the direction of respondent's superior to explain in writing why she didn't receive his plan book and to meet with her to give an explanation. In the clearest possible language, Merlo told respondent on December 3, 1981 she was not reprimanding him but rather, seeking to discover whether he intended to and did fail to comply with a rule. As to the Article VIII provision, it concerns statutorily mandated evaluations specifically. No such report or evaluation was placed in the file: an unanswered inquiry was placed in the file in the exercise of managerial prerogatives. Since respondent indicated he wanted a conference, Merlo offered him one, and subsequently directed that he appear.

Article IVB of the contract in using the term "just cause" refers to the tenure act language prohibiting dismissal or reduction in compensation under N.J.S.A. 18A:6-10. Our appellate courts have made it clear that negotiated contracts cannot oust the statutory jurisdiction of the Commissioner. Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17 (1973). Indeed the Commissioner will determine the disciplinary matter herein

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as a result of the consequent tenure charges. As to disciplinary actions short of tenure act charges, it has been held that the placing of letters of reprimand in personnel files is an inherent managerial prerogative of a local board and that such sanctions are non-negotiable. State v. Local 195 IFPTE, 179 N.J. Super. 146, 152, 153 (App. Div. 1981) certif. den. 89 N.J. 433 (1982); Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144, 160-161 (1978) and see Demarest Bd. of Ed. v. Demarest Ed. Ass'n, 177 N.J. Super. 210 (App. Div. 1980) specifically dealing with insubordination and holding discipline for cause to be nonnegotiable.

The above-cited cases were decided subsequent to the adoption of the Board's four-year contract effective July 1, 1978 to June 30, 1981 which in pertinent part was also in effect in 1981-82. The point here is not that the contract clauses in effect at the time may have been invalid but that it was not for respondent, in his role as an employee of the Board, to refuse to comply with clear directives of authorized administrators except in grave and unusual circumstances. Grievance procedures and appeals to the Commissioner constitute the legally sanctioned means of resolving disputes. Respondent chose insubordination, demands and counter demands, and by refusing to participate in a conference sought to block a reprimand or force the administration to act in accordance with his interpretation of the contract. (J-14).

I CONCLUDE that respondent willfully and intentionally disregarded a lawful and reasonable instruction of his duly authorized superior on November 11, 1981 through December 3, 1981 when he refused to explain in writing the circumstances surrounding her inability to see his plan book. He was again insubordinate when he met with Merlo on January 21, 1982 and refused to discuss or explain the plan book incident. Since he continued to be insubordinate from November of 1981 through June of 1982, his conduct evidenced unfitness and a lack of the "good behavior" required as the term is used in N.J.S.A. 18A:6-10 to retain tenure. Respondent's obstinate continuance of such conduct was much more grave than a single act of insubordination or actions over a short period of time.

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THE FOURTH CHARGE

The Board stated the fourth charge as follows:

> On May 21, 1982, Mr. Scarpignato absented himself from school and did not notify the school of his intended absence. After the students had arrived and classes had commenced, the building principal gave the secretary Mr. Scarpignato's home phone number (which he had not permitted the school to place on its "calling" list) and asked that she call him. When she called and asked his intentions, Mr. Scarpignato simply said he was not coming in that day and gave no explanation. It was then too late to call for a substitute teacher.

The Edgewater Teacher's Handbook states the relevant rule. (J-21A). All staff members are required to call the secretary (Mrs. Hoppe) at her home before 7:00 a.m. to report their absence on a school day. In 1980, respondent filed with the administration a request that his (unlisted) telephone number and address not be placed on the snow emergency calling list or on any other correspondence at the school. (1T142). When classes began on May 21, and respondent had not arrived, the secretary tried to call respondent at the principal's request but could not find his telephone number on the list. The building principal, Mr. Dexheimer, obtained respondent's telephone number from the personnel files. By the time his absence was certain, it was too late to get a substitute and Principal Dexheimer covered respondent's class. Mrs. Hoppe telephoned Merlo and informed her what had occurred.

Respondent lives ten minutes away from school and does not ordinarily get up before 7:25 a.m. On the date in question, respondent waked up at 7:25 a.m. and, while preparing to go to work, became ill suddenly. He subsequently tried to call the school at least once but there was no answer. Respondent then remained in his bathroom sick until Mrs. Hoppe called him at about 8:30 a.m. She said, "Are you coming in?" He responded, "No, I'm not," and both hung up. (1T222). Respondent did not call Mrs. Hoppe at home because it was very late, getting close to eight o'clock, and he was unable to call at seven because he usually doesn't get up until 7:25 a.m. He never previously had any problem with absences. When Merlo asked for an explanation, he submitted one on January 25.

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Principal Dexheimer, while covering respondent's class, sent a note to Mrs. Hoppe between 8:00 and 8:30 a.m. requesting she call respondent. Although respondent's number was not on the snow emergency list, it was in the personnel file. After the incident in question, Principal Dexheimer spoke to respondent and asked if he could place respondent's phone number in his own telephone book. He obtained the number from the personnel file. Dexheimer did not pursue disciplinary action against respondent. This was done by Merlo when she discovered the alleged noncompliance with the absence rules. When Merlo required respondent's explanation for not notifying anyone concerning his absence, she advised him "of the seriousness of this incident" and advised him of four alternative contacts he should attempt to make if unable to reach Mrs. Hoppe at home. (J-23).

The above paragraphs constitute my findings of fact on this count.

FOURTH COUNT CONCLUSIONS

I CONCLUDE that respondent did not willfully fail to follow the 7:00 a.m. notice rule because he did not know he would be unable to go to work until about 7:45 a.m. when he became ill. At worst, one could conclude that his attempt to follow the notification procedure was not as vigorous as it could have been. One single incident which occurred when respondent asserts he was incapacitated by illness does not rise to the level of insubordination although his failure to give any explanation, such as, "I'm sick" when asked if he would come in, suggests a churlish attitude.

FACTS RELATING TO DEFENSES AND PENALTY

In the first count, I addressed the allegation that the Board's action was not arbitrary and discriminatory in that no charges were brought against other teachers. The failure to take disciplinary action against Marino for not meeting conference schedules and against a single other teacher who did not submit a plan book in time is insufficient to

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support such a defense. No other incidents concerning these other teachers were proved. No facts support a defensive allegation that either the Board or its supervisory personnel had animus toward respondent as a result of his union-related work or for any other reason. This defense rests solely upon speculation and innuendo.

There are facts which I find as follows which relate to the context of the case and the penalty:

Respondent has always received satisfactory evaluations. Even Mrs. Merlo complimented respondent on his adjustment from departmentalized (seventh and eighth grade) to a self-contained teaching situation. (2T85). Principal Dexheimer also complimented respondent upon his ability to adjust to an entirely different reading program when the system he was familiar with changed completely during respondent's absence for an extended time for medical reasons. (2T86). Respondent was assigned to part-time kindergarten teaching for 1982-83 after a RIF.

Dexheimer was elected president of the Edgewater Teacher's Association for 1980-81 in the 1979-80 school year. Subsequently, he was appointed a principal and could not remain active in ETO during his period as an administrator. In June 1980, the principal position was eliminated so that Dexheimer did act as president of the local teacher's union in 1980-81. (2T99-102). In the 1980-81 school year, while Dexheimer was a teacher, he was a named party plaintiff with a group called Save Edgewater Schools which instituted legal action against the Board to try to prevent if from sending seventh and eighth graders to out-of-district schools. Loss of these grades from the system eventually resulted in unemployment for Dexheimer in 1982-83 who held no elementary teaching certification.

Dexheimer's administrative style was nonauthoritarian. His style was consistent with ETO leadership. For example, upon the theory that evaluations were threatening to teachers, he held post-evaluation conferences informally and met with teachers entirely at their convenience. (2T64, 65). If more than one administrator was participating in a conference, this mode of administration led to Dexheimer's need to renotice conferencing schedules. McGill and Merlo did not always agree with Dexheimer's style. (2T67). Dexheimer never pushed teachers to meet his conference schedules. (2T68).

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Dexheimer did not always enforce administrative rules. When Dr. Murphy changed the time when lesson plans were to be submitted from Friday to Monday, Dexheimer did not take action other than speaking to teachers to enforce that rule and if the teachers did not comply by Monday, Dexheimer would go to their classrooms to find the plans or look in their mailboxes. If they were missing, he would just mention it to the teacher. (2T75, 76,78).

Having been habituated to loose procedures, respondent resented Merlo's exercise of a more authoritarian management mode and her requirements that rules be adhered to. Respondent unreasonably expected administrators to seek him out in his classroom and "talk to him" when obtaining or monitoring compliance with rules. He reacted with outrage and insubordination when administrators put directives in writing. The fact that his attitude was tolerated by Dexheimer does not provide mitigation for respondent's conduct. Although respondent also exhibited surprise or resentment of written directives from Colantoni, McGill and Murphy, his animus against authority was specially focused on Merlo. (2T28 through 38 and findings on each count). Respondent exhibited his disrespect by letting Merlo wait for him and not meeting with her. When she finally came to his classroom to ask him to confer with her, he refused and turned his back on her. (1T172).

All the above I find to be facts affecting a determination of penalty.

CONCLUSION - PENALTY

The Commissioner has in past tenure cases pointed to the significance of a series of incidents for determining unfitness or insubordination, citing Redcay, supra. In Tenure Hearing of Matilda Grabert, Bd. of Ed. of Tp. of Egg Harbor, 1977 S.L.D. 163, 191 a single incident was found insufficient to support dismissal. See Tenure Hearing of Nancy Patras, Bd. of Ed. of Woodbridge, 1978 S.L.D. 726; Tenure Hearing of William Fleming, Bd. of Ed. of Hawthorne, 1974 S.L.D. 246. The incidents of insubordination or unfitness which appear in these and other tenure cases often occur in situations where, contrary to Board policy or administrative directive, the staff member opts to place personal interest above that

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of the educational system. For example, Patras placed family interest above her work by taking an unauthorized leave. No continuing intent or animus toward administrative authority can be seen in a single isolated instance. Other examples include single incidents of claiming illness while being absent for other personal reasons. Felmey, supra. Yet, in Felmey, the Commissioner directed the withholding of 60 days salary.

The Commissioner has also stated in Tenure Hearing of Joseph A. Maratea, Bd. of Ed. of Tp. of Riverside, 1966 S.L.D. 77, aff'd S.B. 106, aff'd Superior Court, App. Div. Dkt. A515-66, Dec. 1, 1969 (1967 S.L.D. 351):

> ***The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit.*** [at 106]

Similarly, the Commissioner has said In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, 1974 S.L.D. 97 that:

> ***Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher.

Respondent cites In the Matter of the Tenure Hearing of Helen Dolphin, S.D. of Tp. of Westhampton, 1978 S.L.D. 884 for the proposition that a teacher can refuse to comply with directives if noncompliance is based on a contract claim, even if the claim is wrong as a matter of law. Dolphin does not so hold. In that case, respondent reasonably believed she was not required to sign a contract because the Superintendent's communication did not state an order (i.e., that she was required to accept an assignment); instead he "offered" her a contract in circumstances where voluntary acceptance was the past practice. The Superintendent precipitously declared

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insubordination. It was the Board which then pointed to contract language in support of its charges.

The parties have not brought to my attention any case which says that a superior's directives may be ignored with impunity based upon an individual's personal and erroneous interpretation of law. Such a holding would indeed stall the educational machinery. Although stated in a PERC setting, the same public policy considerations apply to preclude such a holding:

> Unless there is room in the joints for modification and adaptation necessary to make the system work, educational machinery would become stalled in endless dispute, greivance procedures, arbitration, unfair labor practice charges, hearings, reviews and appeals. Caldwell-West Caldwell E.A. v. Caldwell-West Caldwell Bd. of Ed., 180 N.J. Super. 440, 447 (App. Div. 1981).

Respondent never claimed or proved reliance on advice of counsel with respect to the refusal to explain found in charge three. A refusal coupled with pursuit of immediate consultation with counsel and a consequent prompt cure of the insubordination might suffice as a defense. Such was not the situation herein.

In the instant case, when respondent failed to attend the mandatory post-evaluation conference and, in fact, never attended it, he adversely affected the proper operation of the schools. The Board had ordered completion and report of evaluations on a date certain. Respondent knew this, yet continued in his defiance. Five months later, he resisted another directive to confer, although there was no action of direct insubordination. The incident does show continuation of an attitude, however. One month later and continuing through the entire school year 1981-82 respondent obstinately refused to explain why his lesson plans for one week were not available to be checked by his supervisor. He was given several opportunities to comply, but would not. Finally, in May 1982, although his failure to advise the administration in a timely fashion of his absence may have been excusable, his attitude was so resentful that he could not even bring himself to give two words of explanation ("I'm sick") when the secretary got him on the phone.

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While the above incidents of themselves may not appear to have obstructed school operations seriously, what would occur if numbers of teachers followed the same course? Administrators would experience difficulty in performing their duties in such circumstances. While a flagrant incident of conduct unbecoming may result in ready justification of detenurization, the steady attrition of efficiency resulting from the need to deal with an insubordinate course of conduct may well be more detrimental to the educational system than one gross act.

I note also that teachers influence the opinions of their pupils. Tordo, supra. By his insubordinate actions, respondent communicates a lack of respect for duly appointed authority and lawful methods of dispute resolution. **I CONCLUDE** that by his continuing actions of insubordination, respondent has shown himself unfit pursuant to N.J.S.A. 18A:6-10 to retain his tenure status. His insubordination constitutes good cause for removal.

It is therefore **ORDERED** that Anthony J. Scarpignato be dismissed from his teaching staff position in the employ of the Board of Education of Edgewater as of the date of his suspension, September 8, 1982.

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

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OAL DKT. NO. EDU 8565-82

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

March 24, 1983
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

Receipt Acknowledged:

March 25, 1983
DATE

Seymour Lewis
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 29, 1983
DATE

Ronald L. Lukes/jrp
FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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LIST OF EXHIBITS

J-1	Sworn charges dated June 30, 1982
J-2	March 21, 1980 memo to teachers
J-3	March 24, 1980 letter, McGill to Scarpignato
J-4	March 25, 1980 letter, McGill to Scarpignato
J-5	March 25, 1980 letter, Scarpignato to McGill
J-6	March 25, 1980 letter, McGill to Scarpignato
J-6A	March 26, 1980 letter, Scarpignato to McGill
J-7	March 28, 1982 letter, McGill to Scarpignato
J-8	October 12, 1981 note
J-9	October 12, 1981 note with scheduling
J-10	October 13, 1981 memo from Murphy
J-11	October 22, 1981 memo from Murphy
J-12	November 9, 1981 directive to submit plan books
J-13	November 11, 1981 letter, Merlo to Scarpignato
J-14	November 25, 1981 note, Scarpignato to Merlo
J-15	December 3, 1981 memo, Merlo to Scarpignato
J-16	January 18, 1982 memo, Merlo to Scarpignato
J-17	Scarpignato's reply to above
J-18	January 21, 1982 memo, Merlo to Scarpignato
J-19	June 4, 1982 letter, Merlo to Scarpignato
J-20	June 7, 1982 note, Scarpiganto to Merlo
J-21	May 24, 1982 note, Merlo to Scarpignato
J-21A	Page from Teacher's Handbook
J-22	May 25, 1982 memo, Scarpignato to Merlo
J-23	June 2, 1982 memo, Merlo to Scarpignato

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OAL DKT. NO. EDU 8565-82

P-1	March 24, 1980 note, Scarpignato to Merlo
P-2	March 26 and 27, 1980 calendar pages
P-3	October 16, 1981 calendar page
P-4	Lesson plans excerpt from Teacher's Handbook
P-5	Transcript of January 21, 1982 meeting
P-6	Affidavit of September 29, 1980
P-7	For identification - Note of Dexheimer

R-1	Evaluation 1981-82
R-2	For identification - October 16, 1981 note, Marino to Merlo
R-3	Daily Lesson Plans
R-4	For identification - Evaluation check list 1981-82
R-5	For identification - Evaluation check list 1979-80
R-6	Evaluation check list 1976-77
R-7	Evaluation check list 1977-78
R-8	Evaluation check list 1978-79
R-9	Evaluation check list 1980-81
R-10	Negotiated contract

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IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY J.	:	COMMISSIONER OF EDUCATION
SCARPIGNATO, SCHOOL DISTRICT	:	DECISION
OF THE BOROUGH OF EDGEWATER,	:	
BERGEN COUNTY.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent in his primary exceptions to the initial decision by Judge Dower-LaBastille, while excepting to much of the decision's factual findings, particularly emphasizes disagreement with his dismissal on the basis of the two charges upheld herein. Respondent states that he has always received unblemished evaluations and stresses that a lesser penalty should be imposed. Respondent avers that his actions were necessary to protect his rights. Respondent argues that he had grown to expect a friendly and unpressured atmosphere of cooperation with administration and new administrative procedures confused him as to his rights. Considerable praise is devoted by respondent to the alleged nonauthoritarian approach by former principal, Dexheimer. Finally, respondent prays that all findings against him be reversed, in particular the penalty of dismissal.

The Board's reply exceptions refute those of respondent and affirm the initial decision. The Board refers to the credibility of witnesses as best determined by Judge Dower-LaBastille. The Board further points to the fact that Mr. Dexheimer was president of the Edgewater Teachers Association, a position which he had to relinquish on appointment to being principal but one that he resumed when his principalship was abolished. The Board contends that respondent has consistently chosen to override managerial prerogatives as were set down in Ridgefield Park Education Association, 78 N.J. 144, 160-161 (1978). The Board cites Tordo, supra, favorably as emphasis for teachers as molders of pupils' feelings. The Commissioner cannot agree in entirety with the exceptions filed by either party.

A thorough examination of the record, the testimony of witnesses and the documents submitted in evidence convinces the Commissioner that Judge Dower-LaBastille properly determined that in charges one and three respondent's conduct clearly constitutes insubordination by willful disobedience of a substantive nature.

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The Commissioner is fully cognizant of the weight to be accorded the opinion of the one who conducted the hearing in consideration of "***'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility***. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).***" (Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973))

The Commissioner can give little credence to respondent's allegations that his actions were motivated by a lack of knowledge of his rights and a fear that he was losing them. The Commissioner notes that respondent consulted freely and directly with his bargaining representative and the Commissioner finds it difficult to believe that as a consequence respondent did not know the extent of his rights.

The Commissioner finds and determines that Judge Dower-LaBastille properly found respondent insubordinate and, in the Commissioner's judgment, such willful and continued disobedience to administrative directives exhibits deliberate arrogance.

Further the Commissioner finds and determines that respondent was accorded ample opportunity of a reasonable and appropriate nature to cooperate with administration. There is nothing in the record to prove to the Commissioner that such simple cooperation would jeopardize respondent's rights. To the contrary the Commissioner finds that such a positive attitude on the part of the teacher would enhance the smooth conduct of the school system to the direct benefit of the pupils involved therein. As the Commissioner has previously stated in Clinton F. Smith v. Paramus, 1968 S.L.D. 62, 67:

> "***The principle enunciated by the Court in Bates v. Board of Education, 72 P. 207 (Calif. Sup. Ct. 1903), and quoted with approval in McGrath v. Burkhard, 280 P.2d 864 (Calif. App. 1955), bears repeating here:
>
> > 'The public schools were not created, nor are they supported, for the benefit of the teachers therein,***but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.'***"

The Commissioner finds that respondent's proven insubordination merits an appropriate penalty and the well-reasoned decision of Judge Dower-LaBastille herein, in view of all the circumstances, must be sustained.

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

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Accordingly, Anthony J. Scarpignato shall be dismissed from his position in the employ of the Board as of the date of his suspension September 8, 1982.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 9, 1983

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IN THE MATTER OF THE TENURE :

HEARING OF ANTHONY J. SCARPIGNATO, : STATE BOARD OF EDUCATION

SCHOOL DISTRICT OF THE BOROUGH : DECISION

OF EDGEWATER, BERGEN COUNTY. :

_____:

Decided by the Commissioner of Education, May 9, 1983

For the Petitioner-Respondent, Steven J. Zaben, Esq.

For the Respondent-Appellant, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the modification that Respondent-Appellant is dismissed from his position as of May 9, 1983, the date of the Commissioner's decision in this matter.

James Jones, Deborah P. Wolfe and Robert J. Wolfenbarger opposed in this matter.

September 7, 1983

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 445-83

AGENCY DKT. NO. 17-1/83A

M.G., an infant by his mother and natural guardian, M.G.,

Petitioner

v.

BOARD OF EDUCATION OF WEST DEPTFORD, GLOUCESTER COUNTY,

Respondent.

APPEARANCES:

Donald C. Brown, Esq., for petitioner

Robert G. Holston, Esq., for respondent (Holston, Holston, & MacDonald, attorneys)

Record Closed: February 22, 1983 Decided: April 8, 1983

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on January 24, 1983, with the filing with the Commissioner of Education of a Petition of Appeal seeking a determination that M.G. (hereinafter petitioner)[1], formerly a twelfth grade pupil at the West Deptford High

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[1]At the time this action was instituted, M.G. was a minor. On March 29, 1983, he became 18 years of age. Petitioner's mother, the original named petitioner, will hereinafter be referred to as Mrs. G. to avoid confusion between her son's initials and hers.

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School, had been wrongfully expelled from school by the Board of Education of the Township of West Deptford (hereinafter respondent) as a result of an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution. The Petition requested immediate reinstatement of petitioner in the school system and expungment from his school records of all disciplinary action taken against him related to the alleged illegal search and seizure.

A Notice of Motion for Interim Relief and Stay of Local Board's Action was filed simultaneously with the Petition; an argument on the motion was scheduled on an expedited basis for Wednesday, January 26, 1983, at the Trenton Office of the Office of Administrative Law. Following oral argument on the motion, a prehearing conference was held. The Prehearing Order which was entered on January 27, 1983 scheduled the plenary hearing for February 7, and February 9, 1983. The Order denied petitioner's motion for interim relief and reinstatement; however, because petitioner was a twelfth grade pupil who would be eligible for graduation in 1983 and because the matter had been scheduled on an expedited basis for determination on the merits, respondent was ordered to provide home instruction for the pupil pending final decision in this matter by the Commissioner of Education. The Order further provided for an Answer to the Petition to be filed on or before February 4, 1983 and for prehearing briefs to be submitted prior to the commencement of the hearing on February 7, 1983.

The issues for determination at hearing were identified as follows:

(1) Was the expulsion a result of an illegal search and seizure and therefore invalid?

(2) Do the proofs establish a justifiable cause for expulsion, pursuant to N.J.S.A. 18A:37-2j?

Because of a snowstorm, the February 7, 1983 hearing date was adjourned. When it became necessary to adjourn the February 9, 1983 hearing date because of the sudden illness of respondent's counsel, the matter was rescheduled for February 15, and 16, 1983 at the West Deptford Municipal Court, Thorofare, New Jersey.

Prior to the commencement of the hearing, on February 15, 1983, an Answer to the Petition was filed on behalf of respondent, and prehearing briefs were received

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from both parties. At the conclusion of the hearing it was determined that the record would remain open for any additional written submissions by the parties and also for receipt of copies of respondent's written policy manual concerning disciplinary action. Copies of the relevant portions of respondent's written policy were transmitted by respondent's counsel under cover letter dated February 16, 1983; they were received on February 17, 1983, and were marked into evidence as exhibits R-1 and R-2. A supplemental brief on behalf of peitioner was received on February 22, 1983, whereupon the record closed.

FINDINGS OF FACT

Some of the relevant facts in this matter are not in dispute, and I therefore **FIND** the facts set forth in the following summary as uncontested fact in this matter.

On January 4, 1983, Dr. Walter C. Quint, an assistant principal at West Deptford High School, summoned petitioner and his brother to the office to discuss with them a suspension which had been imposed in an entirely unrelated disciplinary matter. Mr. Norwood R. Cuff, a school administrative aid, escorted petitioner to Mr. Quint's office. Because petitioner's brother was not in his classroom, Mr. Cuff went to search for him. Mr. Cuff located petitioner's brother in the boy's lavatory where he and three other students were standing around one of the open stalls. Mr. Cuff detected what he believed to be the smell of marijuana; he asked the students if they were smoking. They responded that they were not, and all left the lavatory together. Mr. Cuff then escorted petitioner's brother to Mr. Quint's office, after which he reported to Bernardette Menna, another assistant principal, his belief that he had detected the ordor of marijuana in the lavatory. In accordance with Ms. Menna's directions, Mr. Cuff returned to the boy's lavatory where he located a roach (a marijuana cigarette) floating in the toilet bowl of the stall where the boys had been standing. Mr. Cuff retrieved the roach, wrapped it up, and took it back to Ms. Menna's office. Ms. Menna then alerted Dr. Quint, who was still meeting with petitioner and his brother on the other matter, by telephone of Mr. Cuff's findings. Thereafter, petitioner and his brother left the office together and were observed by Ms. Menna, Dr. Quint and Mr. Cuff walking in the senior hallway toward petitioner's locker, although petitioner's brother was a junior and his classes were in another direction.

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Dr. Quint performed a field test on the cigarette with a commercial, pre-packaged test kit; he had been instructed concerning its use by Detective Sergeant Joseph Butts of the West Deptford Police Department. When the cigarette tested positive for marijuana, Dr. Quint and Ms. Menna looked up the locker numbers of petitioner, petitioner's brother, and the three other boys who had been in the lavatory with petitioner's brother. Ms. Menna, Dr. Quint, and Mr. Venturi, an administrative intern, then conducted a search of all five lockers. When they opened petitioner's locker, they observed the jacket which petitioner had been wearing in the office approximately ten minutes before. In the pocket of the jacket they discovered what appeared to be a marijuana cigarette. They took the jacket back to the office, placed it on a radiator behind Ms. Menna's desk, and summoned petitioner to the office.

Upon petitioner's arrival at Ms. Menna's office, some conversation followed, the exact nature of which is in dispute. Petitioner's Miranda rights were read to him, after which he voluntarily emptied his pockets and lifted his pant legs to show his socks. Petitioner requested that Dr. Quint call his brother to the office to "clear this up." Petitioner was placed in detention hall, and his mother was summoned to school. Petitioner's brother was called to the office. He was also found to be in possession of a marijuana cigarette. He denied that the cigarette that was found in petitioner's jacket belonged to him and disavowed any knowledge of how it came to be in the jacket pocket. Thereafter, petitioner's mother arrived at the office, accompanied by petitioner's older brother. After a brief conference, both boys were suspended from school.

Both cigarettes were subsequently tested by Sergeant Butts and were positively determined to be marijuana.

Petitioner's brother received a five-day suspension because this was his first offense. Because petitioner had been disciplined on March 2, 1982, as a result of having been discovered in the lavatory with a "drug type pipe" which later proved to contain traces of marijuana, pursuant to mandatory Board policy, an expulsion hearing before the Board of Education was scheduled (see written Board Policy, R-1 and R-2 in evidence).

By letter dated January 7, 1983, Mrs. G. was advised as follows:

> This letter is to confirm our communications with you which established Monday, January 17, 1983, 9:30 P.M., West Deptford Middle School Library as the date, time, and place for a meeting on

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the expulsion charges placed against your son, (petitioner). Said meeting will be conducted by the West Deptford Board of Education.

The charges brought against (petitioner) are quoted below as stated in New Jersey Statutes Annotated, Title 18A:

"Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include but not limited to any of the following:

a. continued and willful disobedience;"

Since February, 1980, (petitioner) has been charged and found guilty of 18 violations of school rules and regulations resulting in 10 suspensions from school.

j. "knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises. . . . "

During the school day on January 4, 1983, (petitioner) was apprehended with 1 marijuana cigarette in his coat which was in his school locker. (Petitioner) was previously suspended on March 2, 1982 for possession on school premises of a pipe with traces of marijuana.

Please be aware at the aforementioned hearing, that you have a right to all due process procedures: to be represented by counsel, to not give incriminatory testimony, to present your case, to know the names of witnesses who will be present and or the type of records or files which will be presented to substantiate the charges delineated above, to cross-examine said witnesses and examine said records. Your appearance will be held in closed session subject to the provision of the Open Public Meeting Act of 1975.

The following witnesses and documents will give testimony and be presented to substantiate the aforementioned charges

Mr. William Stubbs, Principal, High School
Ms. Bernardette Menna, Asst. Principal, High School
Dr. Walter Quint, Asst. Principal, High School
Assistant Principal's Discipline File

If you have any further questions regarding this matter, do not hesitate to call my office.

The preliminary review conducted on January 10, 1983, pursuant to N.J.A.C. 6:28-1.5(e), indicated that further child study team involvement was not warranted (J-6 in evidence).

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Following a full due process hearing on January 17, 1983, Mrs. G. was advised by letter dated January 19, 1983, as follows:

> Please be advised that the West Deptford Township Board of Education passed a motion during the meeting of January 17, 1983, to find (petitioner), a twelfth grade student, guilty of the charges of continued and willful disobedience and knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises and to enact the following penalties relative thereto:
>
> (1) that (petitioner) be expelled from school for the remainder of the 1982-83 school year with loss of all course work for said academic year.
>
> (2) that (petitioner) be provided with the option after June 30, 1983 to apply for readmittance to school for the 1983-84 school year contingent upon presenting documentation of successful participation in a drug rehabilitation program such as that offered by SODAT or a similar agency.
>
> (3) that a police complaint be signed against (petitioner).

Petitioner's Disciplinary Record, which was considered by respondent in making its determination, is set forth in J-4 in evidence:

1979-80 School Year GRADE: 9

DATE	OFFENSE	TEACHER	DISPOSITION
2-22-80	Cut a teacher detention	Wilson	2 demerits & re-assigned
	Late to Class - 3 times	Kesler	1 demerit
3-17-80	Late to Class & sent to office	Pfau	2 demerits
	Late to Class - 3 times Letter sent home concerning demerits	Kesler	1 demerit

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	Late to Class - 3 times	Kesler	1 demerit
	Late to Class - 3 times	Kesler	1 demerit
	Late to Class - 6 times	Kesler	2 demerits
4-30-80	Possession of Cigarette (In process of lighting it)	Mayan	2 Days Int.*
5-7-80	Mother Conference		
6-11-80	Cut Typing class on 6-10	Holefelder	3 days Int.*

1980-81 School Year GRADE: 10

10-2-80	In the lav without a pass - should have been in lunch	Kelley	2 demerits & warning
10-3-80	In the lav without pass Letter sent home concerning demerits	Johnson	3 demerits
11-25-80	In hall without a pass	Venturi	2 demerits
12-11-80	Did not sign into library as he was supposed to . . . Letter sent home concerning demerits	N. Wasilewski	2 demerits
1-29-81	Smoking	Mayan	2 Days Int.*
	Late to class - 3 times	Bailey	1 demerit

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3-4-81	Violation of attendance policy	Menna	3 Days Int.*
3-9-81	Conference with Mother		
5-1-81	Put Out of Study Hall - lateness	Wolensky	2 demerits
	Late to Class - 3 times	Bailey	1 demerit

1981-82 School Year GRADE: 11

11-6-81	Smoking - Halls	Becker	2 Days Int.*
12-3-81	Smoking - Main Hall Lav	Quint	3 Days Int.*
12-7-81	Mother Conference		
January	Late to School - 2 times		2 demerits
3-2-82	Was found in lav near room 28 with a "drug type" pipe in his hand (3-2-82 - 12:35 p.m.) (Petitioner) emptied his pockets in office. Pipe sent to police.	Quint	5 days External*
3-2-82	Called Mother and Mother came to school		
	Late to Class - 3 times	Hanker	1 demerit

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1982-83 School Year GRADE: 12

9-24-82	Dress Code Violation - Beer T-Shirt	Menna	Put shirt over it and warned
10-27-82	Lateness to study hall - not assigned area	Krauss	2 demerits
11-29-82	Violation of School Attendance Policy on 11-24 - verified by Mother	Quint/Menna	2 days Int.*
11-30-82	Called Mother		
12-23-82	Violation of School Attendance Policy	Menna	3 days Int.*
12-23-82	Conference with Mother (Suspension limited to 1 day due to circumstances surrounding absence)		
1-4-83	Possession of smoking paraphernalia (pending Board Hearing)	Menna	External*

*Denotes suspensions, internal and external

The disciplinarian who imposed the five-day suspension on March 2, 1982 with respect to possession on the "drug type pipe" was Dr. Quint who advised petitioner at that time that any future drug violations would result in a mandatory expulsion hearing.

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Respondent's policy concerning school lockers is set forth at page 30 of the "West Deptford High School Students and Parents Handbook," a copy of which is distributed to all students:

> LOCKERS:
>
> All students will be assigned a locker at the beginning of the school year. To protect your books and other materials, keep your combination confidential. Students are permitted to go to their lockers between assignments and or before and after school, but must get to class on time. Lockers are loaned to students, but are the property of the school. They are subject to inspection by school authorities at any time. Lockers are provided as a convenience, hence, no student is required to use one. (J-3 in evidence)

This concludes the recitation of uncontested facts.

The only area of factual dispute in this matter relates to the conversation which transpired in Ms. Menna's office after petitioner's jacket had been removed from his locker. Petitioner admits only that he saw his jacket behind Ms. Menna's desk and advised Dr. Quint and Ms. Menna to call his brother down to explain. Dr. Quint testified that when petitioner came into the office he immediately stated something to the effect of "I know why you're calling me down; its because of what you found in my jacket." Dr. Quint also testified that petitioner denied that the cigarette was his and said his brother had given it to him. Ms. Menna also testified that petitioner was the first to speak. She testified that he said, "I know why I'm down here; I know what you found in my locker." Ms. Menna also testified that petitioner had said that it was not his, it was his brother's and that he had taken it from his brother because he knew his brother was in enough trouble already. Dr. Quint and Ms. Menna were both candid, sincere, and credible witnesses. Petitioner's testimony, on the other hand, was very limited in this area and somewhat evasive. I **FIND** that upon arriving in Ms. Menna's office petitioner said something to the effect, "I know why you called me down here. I know what you found in my locker." I also **FIND** that petitioner was aware that the cigarette was, in fact, marijuana.

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APPLICABLE LAW AND DISCUSSION

ISSUE A - LEGALITY OF THE SEARCH

Standards for determining the constitutionality of a search conducted by school officials are articulated in State in the Interest of T.L.O., 178 N.J. Super. 329 (J & DR Ct. 1980), aff'd. 185 N.J. Super. 279 (App. Div. 1982). Addressing the issue of whether or not a school official is subject to the Fourth Amendment and the standard of probable cause which must exist before said official may engage in the search of the student on school grounds in order to enforce a diciplinary rule, the Court concluded that the Fourth Amendment, which does not prohibit all searches and seizures but only unreasonable ones, is applicable to school searches, but the doctrine of in loco parentis operates to lower the standard to be applied in determining the reasonableness of the search. The Court determined "that a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or to enforce school policies." Factors to be judged in assessing the reasonableness of a search are:

1) The child's age, history, and school record;

2) The prevalence and seriousness of the problem in the school to which the search was directed;

3) The exigency of the situation requiring an immediate warrantless search;

4) The probative value and reliability of the information used as a justification for the search;

5) The teacher's prior experience with the student. Id. at 342.

State in the interest of T.L.O. involved the search of a student 's person. No reported New Jersey case specifically deals with the legality of school locker searches; this issue has been addressed by the Federal courts, however. Those cases clearly indicate that there is a reduced expectation of privacy in a school locker. In Zamora v. Pomeroy, 639 F. 2d 662 (10 Cir. 1981), an assistant district attorney had offered the school board

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the assistance of sniffer dogs who went through the building after school hours sniffing each locker, and if the dog made three indications at the same locker of the existance of drugs, the principal opened the locker and the contents were seized. The only contents in Zamora's locker were a leather strap and a bag of marijuana.

In upholding the search, the Court noted first that there was a state school board regulation specifically prohibiting the sale, use, or possession or transportation of marijuana on school premises. The Court specifically authorized the search of school lockers on the rationale that they were school property. Moreover, the Board of Education in Zamora, implementing the State regulation, had published and issued a tract to all students entitled, "Rights, Responsibilities, and Limitations of Students" which was interpreted by the Court as follows:

> It was stated that the locker remain under the jurisdiction of the school, notwithstanding the fact that they were assigned to individual students; that the school reserve the right to inspect all lockers at any time; and that the students were to assume full responsibility for securing of the lockers and were to make certain that they were locked after being opened, and the combination not be given to a friend. Zamora, supra, at 665.

On the basis of this warning, the Court concluded that the student had given prior consent and that under the rationale of in loco parentis the search was reasonable. The Court held, "In as much as the school had assumed joint control over the locker, it cannot be successfully maintained that the school did not have a right to inspect it." Id., at 670. Further, the Court noted that the basic theroy is that although a student has rights under the Fourth Amendment, these rights must yield to the extent that they interfere with the school administration's fundamental duty to operate the school as an educational institution and that a reasonable right to inspect is necessary in the performance of this duty, even though it may infringe to some degree upon the students Fourth Amendment rights. See also, United States v. Venman, 536 F. 2d. 1003 (10th Cir. 1977) (upholding locker search on rationale that it was located in a public area, and thereby defendant had a reduced expectation of privacy); Overton v. Rieger, 311 F. Supp. 1035 (D.C.N.Y. 1970) (upholding constitutionality of locker search on the basis that school authorities were entrusted with care of children and consequently found retention of control over lockers by authorities.

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Respondent cites Zamora, supra, for the proposition that petitioner had no expectation of privacy in the locker. Petitioner cites Horton v. Goose Creek Independent School Dist, 677 F. 2d 471 (5th Cir. 1982) where the Court upheld the constitutionality of the locker searches but stated with respect to the reduced expectation of privacy in school lockers:

> . . . At the same time, though, it is important to bear in mind that a locker is one of the few 'harbors of privacy' permitted a student who is compelled to spend most of his day in a public school.
>
> It is the only place where (the student) may be able to store what he seeks to preserve as private-letters from a girlfriend, applications for a job, poetry he is writing, books that may be ridiculed because they are too simple or too advanced, or dancing shoes he may be embarrassed to own. Buss, The Fourth Amendment and Seaches of Students in Public Schools, 59 Iowa L. Rev. 739, 772-73 (1974). That factor, along with the common practice of assigning each student exclusive use of a locker and treating it as his dominion and responsibility, we think, gives the student a reasonable expectation of some privacy in the contents of his locker. Id. at 479, n. 21.

Petitioner acknowledges, however, the legality of locker searches when there are some articulable facts which focus suspicion on a specific student. With respect to the facts in this matter petitioner argues:

> If we apply the above stated state and federal standards to the case at bar, it is respectfully submitted that the "reasonable suspicion" of the school officials amounts to no more than mere intuition. It would be nothing more than trial by "consanguinity" and subject every sibling in the school system to a search of his locker if a school official desired or felt like searching on the particular day and hour. Especially if the school official took into account all past records of discipline of the sibling, searches would be the order of the day, not an exception. Petitioner's letter brief, page 6.

In arguing that there was indeed reasonable suspicion warranting a search of petitioner's locker, respondent addresses each of the factors set forth in State in the Interest of T.L.O., supra:

1. Petitioner had a history of drug possession as evidenced by the March 2, 1982 pipe incident. Moreover, in the three years petitioner had been enrolled in West Deptford High School there were 18 separate violations of school rules.

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2. The administrative law judge may take judicial notice of the "prevalence and seriousness" of the drug problem in all New Jersey schools.

3. There was indeed an exigency requiring an immediate warrantless search as the Board officials had good cause to believe that once petitioner was alerted to his brother's situation, he would attempt to dispose of the "joint" or spread it to others.

4. Mr. Cuff was an experienced school disciplinary aid and both he and Dr. Quint observed pettitioner and his brother heading toward petitioner's locker after the lavatory incident.

5. The 18 previous violations of school rules provided the school authorities with ample prior experience demonstrating petitioner's disregard of authority. Dr. Quint himself had disciplined petitioner at the time of his first drug related violation in March 1982 and was quite familiar with him.

Respondent also argues that the factual situation presented herein is very similar to that set forth in Zamora:

> The student was specifically informed that the school authorities were maintaining control over the lockers and that the lockers were subject to inspection at any time by the authorities. The School Board's authority to maintain control over the contents of the locker is again founded in the doctrine of in loco parentis, i.e., the need of the School Board to protect the students from drugs and other dangers that could be present in the lockers. Therefore, it is respectfully submitted that the search of petitioner's locker by the West Deptford School Board authorities was not unconstitutional, and that the contraband seized was properly presented to the West Deptford Board of Education in support of its decision to expell him. Respondent's brief pages 11 through 12.

Based upon the foregoing law as applied to the facts in this matter, I **CONCLUDE** that under all of the circumstances here present respondent was justified in conducting a search of petitioner's locker on January 4, 1983. Petitioner had a reduced expectation of privacy in his locker because of the joint control by respondent and himself, especially in view of the specific provisions set forth in the student handbook. All of the factors cited by respondent—petitioner's prior drug related offense coupled with

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his physical proximity to his brother who had been observed in the boys lavatory at a time when Mr. Cuff detected the odor of marijuana and the fact that what was later determined to be a marijuana cigarette was retrieved from the lavatory area immediately thereafter, together with the fact that any amount of drugs in a public school is a serious problem requiring immediate attention by school authorities—combined to provide respondent with a reasonable suspicion for justifying the warrantless search of petitioner's locker. The facts in this case certainly involve more than guilt by "consanguinity" as petitioner suggests. If petitioner had been in his classroom during the entire time period relevant to this action, the mere fact of his brother's involvement, without more, would probably not have been sufficient to justify a warrantless search. Suspicion was accurately focused upon petitioner, however, when Dr. Quint, Ms. Menna, and Mr. Cuff observed petitioner leaving the office with his brother heading toward petitioner's locker area while petitioner's brother's class was in another direction. For all these reasons I CONCLUDE that the search was legal and that the evidence seized during the search was properly before the Board for consideration during the disciplinary proceedings on January 17, 1983.

ISSUE B - APPROPRIATENESS OF THE EXPULSION

Power to expel is vested in each school board. N.J.S.A. 18A:37-5. The statutory provisions governing suspension and expulsion in New Jersey are set forth at N.J.S.A. 18A:37-2 and provide in pertinent part:

> 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.
>
> Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:
>
> (a) Continued and willful disobedience;
>
> ....
>
> (j) Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence

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of intoxicating liquor or controlled dangerous substances while on school premises.

Petitioner argues, assuming arguendo that the search was legal, that the facts herein do not warrant expulsion 1) because petitioner was not involved in the sale or distribution of drugs within the school system either in his first incident or the second incident and 2) because none of his prior problems in the school have been of a violent or disruptive nature, since they have been mostly for smoking or attendance violations, and, finally, 3) because given petitioner's academic record to date he has "a good chance to graduate with his class this June," and without a high school diploma he will not be able to attend welding school in Philadelphia in September as he had planned.

Respondent argues that its determination to expel petitioner for the balance of the school year and to permit him to reapply for admission next September was more than reasonable under the circumstances: This was petitioner's second offense involving a controlled dangerous substance, a specifically enumerated reason for expulsion under the statutes. Furthermore, petitioner's disciplinary record establishes his unacceptable attitude toward school authority and supports the reasonableness of the penalty imposed.

The appropriate standard of review of the Board's action in this matter is set forth in Kopera v. West Orange Board of Education 60 N.J. Super. 288 (App. Div. 1960). Where the issue is one involving the exercise of a local board's discretion, the scope of the Commissioner's review is "not to substitute his judgement for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Id. at 297. The State Board of Education in Kobb v. Board of Education of the Township of Ocean, 1980 S.L.D. 262, recognized this standard in finding that the danger presented by drug abuse within the school system created such a danger to other pupils that the student's permanent expulsion from the system was warranted. The Boad specifically overturned the Commissioner's decision reinstating a student with directions that he seek psychotherapy, noting that because of the danger of drugs on school property, the Board acted well within its rights and its decision should not have been overturned by the Commissioner. Similarly in R.S. & A.S. v. Board of Education of the Camden County Vocational School District, 1978 S.L.D. 870, the Commissioner upheld the expulsion of a student for smoking marijuana on school premises. This was despite the fact that the School Board did not expel other students that were apprehended at the same time, as the pupil in question had a history of offenses, which in combination with the drug use, warranted expulsion.

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In the present action, petitioner's second violation of one of the specifically enumerated statutory criteria justifying expulsion together with 17 previous breaches of school rules provided more than sufficient justification for the actions taken by respondent herein. Respondent's action was especially reasonable in view of the fact that petitioner will be permitted to reapply for admission in September 1983; he holds the key to readmission—all he has to do is comply with the Board's reasonable requirements.

While not being able to graduate in June will unquestionably cause "harm" to petitioner, the harm is by no means irreparable as petitioner suggests. Were respondent's determination in this matter to be reversed, it is more likely that irreparable harm would be done to respondent's ability to maintain discipline and a proper learning environment in its school system.

Accordingly, the **ORDER** entered in this matter on January 27, 1983, directing respondent to provide home instruction for petitioner during the pendency of this action is hereby **VACATED,** and respondent's determination, as set forth in its letter to Mrs. G. dated January 19, 1983, is hereby **AFFIRMED.**

It is further **ORDERED** that pursuant to E.E. v. Board of Education of the Township of Ocean, Monmouth County, 1971 S.L.D. 97, 101-102 and W.G. v. Board of Education of the Township of Ocean, Monmouth County, 1974 S.L.D. 780, respondent is directed to refrain from placing any notation of the drug incident herein on petitioner's official transcript of permanent record; if such notation has already been made, it is **ORDERED** expunged.

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

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OAL DKT. NO. EDU 445-83

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

April 8, 1983
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

April 8, 1983
DATE

Seymour Lewis
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 1 2 1983
DATE

Gabriel Fragale, Jr.
OFFICE OF ADMINISTRATIVE LAW

fms

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EXHIBITS

J-1 in evidence, Letter dated January 7, 1983 from Superintendent of Schools to Mrs. M.G., petitioner's mother (2 pages)

J-2 in evidence, Letter dated January 19, 1983 from Secretary of the Board to Mrs. M.G., petitioner's mother

J-3 in evidence, West Deptford High School Students and Parents Handbook, revised 8-82

J-4 in evidence, Discipline Summary Report for Board of Education Expulsion Hearing, dated January 17, 1983 (7 pages)

J-5 in evidence, Request for examination of evidence and laboratory report (2 pages)

J-6 in evidence, Memo to Mr. Charles B. McNally, Superintendent from Mrs. Pearl O. Decker, Chairman Child Study Team, dated January 12, 1983 with confidential report attached (4 pages)

R-1 in evidence, Policy Chapter Nine, Section 9.5.2.8, Student use of drugs and narcotics, "Misuse of Controlled Dangerous Substance Policy" (1 page)

R-2 in evidence, Policy III, "Suspected possession of drugs on school property" (3 pages)

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WITNESSES

For petitioner:

M.G. - mother of petitioner

M.G. - petitioner

For Respondent:

Dr. Walter C. Quint

Ms. Bernardette Menna

Mr. Norwood R. Cuff

Detective Sgt. Joseph Butts

Mr. William G. Stubbs

Mr. Charles B. McNally

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M.G., an infant by his mother and natural guardian, M.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

Accordingly, the Commissioner affirms that the Order of January 27, 1983 directing the Board to provide home instruction for M.G. during the pendency of this matter be and is vacated. Further the Board's determination set down in its letter to Mrs. G. of January 19, 1983, ante, is affirmed. The Commissioner notes with approval the expungement of any notation of the drug incident from M.G.'s permanent record, if any, and affirms his opportunity to reapply for admission in September 1983. The Commissioner is constrained to emphasize to M.G. that he shall comply with the Board's reasonable requirements clearly established to maintain discipline and an environment in the school system conducive to learning.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

MAY 23, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 7585-82
AGENCY DKT. NO. 234-6/82A

IN THE MATTER OF THE TENURE HEARING OF DONALD ROWLEY, SCHOOL DISTRICT OF THE MANALAPAN-ENGLISHTOWN REGIONAL, MONMOUTH COUNTY

APPEARANCES:

Sanford D. Brown, Esq., for petitioner, Board of Education (Dawes & Brown, P.A.)

Thomas W. Cavanagh, Jr., Esq., for the respondent (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

Record Closed: March 15, 1983 Decided: April 7, 1983

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

The Board of Education of the Manalapan-Englishtown Regional School District (Board) filed tenure charges of inefficiency against Donald Rowley with the Commissioner of Education.

This matter was thereafter transferred to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. After a prehearing conference, respondent filed a Notice of Motion to Dismiss with supporting affidavit and several exhibits. The basis for respondent's motion was his assertion that the Board failed to follow statutory procedure and the decisional law of this State in filing the charges against him.

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After reviewing the record and the letter briefs of counsel, the undersigned administrative law judge (ALJ) concluded that the Board had complied with the statute in certifying the charges (N.J.S.A. 18A:6-11). The ALJ **DENIED** the Motion to Dismiss. (See, Order, dated January 25, 1983). There was no appeal.

Hearings were thereafter conducted on seven days commencing February 15, 1983 and ending March 2, 1983. At the end of the Board's case, respondent offered an oral motion to dismiss the charges on procedural and substantive grounds, asserting that the Board had failed to sustain its burden of proof that the charges were true. The ALJ reserved decision on the motion.

At the conclusion of the case, respondent again offered an oral motion to dismiss the charges. Argument on the motion was heard and letter briefs on the motion were filed after the hearing.

MOTION TO DISMISS

Statement:

Did the Manalapan-Englishtown Regional Board of Education comply with the statutory prerequisites of N.J.S.A. 18A:6-11, insofar as those prerequistes apply to tenure charges grounded in inefficiencies?

When filing charges of inefficiency against a tenured teacher, the statute requires the following procedure:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a

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> dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S.A. 18A:6-16, together with a certificate of such determination. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency. The consideration and actions of the board as to any charge shall not take place at a public meeting. [emphasis added]
>
> [N.J.S.A. 18A:6-11]

In accordance with this statute, the Superintendent filed 19 written charges of inefficiencies against respondent Rowley on March 11, 1982. Those charges were based on respondent's performance during the 1981-82 school year and are set forth in full in P-1, 33a-c. Respondent was notified that he had 90 days in which to improve (P-1 at 34) and the inefficiency period commenced.

Thereafter, respondent was observed and given written evaluations of five classroom lessons. These evaluations were followed by conferences with respondent. Each evaluation was performed by a different evaluator.

The record shows that these five different evaluators prepared written evaluations of respondent's performance during the 90-day period, without any one of them following respondent's performance through the trial period until its termination near the middle of June 1982. What respondent received in the way of guidance or assistance were merely five critiques of five single unrelated lessons by five different evaluators, along with each evaluator's recommendations as to what he/she perceived during that particular classroom performance. The evaluators were either not willing or not prepared to compare respondent's performance, as they perceived it, against the list of inefficiencies developed by the Superintendent. Curiously, one of the observers' evaluations was complimentary and respondent was deemed to have given a satisfactory lesson. Respondent replied in writing, thanking the evaluator for his positive and favorable comments. Other observers likewise noticed improvement in some areas in respondent's teaching and indicated so in their written evaluation comments, or following the evaluation conference. Many of their comments indicated a need for continued improvement.

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However, through all of this procedure not one evaluator assisted respondent through the 90-day improvement period in an effort to help him improve his inefficiencies. The evaluators testified that they were asked to evaluate the respondent's performance by the Superintendent. It seems reasonable to conclude from this procedure that was followed that the Superintendent utilized respondent's evaluations during the 1981-82 school year to file the charges of inefficiency with the Board on March 11, 1982, and later in June 1982 utilized the evaluations compiled during the 90-day trial period in comparison with those evaluations performed prior to March 11, 1982. The Superintendent concluded that respondent had not improved as required. This recommendation was made to the Board and the charges were thereafter filed with the Commissioner.

In 1977, the Department of Education, through its Division of Controversies and Disputes, developed and distributed to all local school boards a document entitled Guidelines For Implementation of The Tenure Employees Hearing Law. This document states clearly that these guidelines are not formal rules and that they were compiled and distributed merely to assist local boards in their preparation for tenure hearings if they believed they had a need for such assistance.

These guidelines state that "inefficiency presumes that the teaching staff member is capable and competent to perform the specific duty or function, but is performing that duty or function in a careless, ineffective or inefficient manner." The guidelines also state that "[d]uring the 90-day improvement period allowed to the affected teaching staff member, members of the administrative/supervisory staff should make reasonable efforts to provide assistance to the teaching staff member to overcome the specific inefficiencies."

In In the matter of the Tenure Hearing of Franklin Johnson, Sch. Dist. of the Tp. of Cherry Hill, Camden Cty., decided by the Commissioner on July 2, 1981, the Commissioner, affirming the initial decision of the ALJ, commented as follows:

> School authorities have the duty during the 90-day period to assist a teacher in improving the areas in which they allege he/she may be inefficient, and at the conclusion of the improvement period, if no improvement is shown and the Board certifies the charges, the Board carries the burden of proof by a preponderance of the credible evidence to establish the truth of the charges.

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At the prehearing conference, respondent argued that the Board's charges of inefficiency lack specificity and that they should therefore be dismissed. I agreed that facially the charges appeared vague and lacking in specificity; however, I was convinced by a review of the evaluations which were used as a basis for the charges, that the Superintendent could develop such a list from the written evaluations of respondent's supervisors. Consequently, after my review of the charges and the evaluations supporting those charges the motion to dismiss was denied. However, after the hearing, I had a much greater sense of the problem respondent faced in meeting the charges filed with the Board against him; therefore, I again reviewed the charges. It is not necessary to go through the 19 charges at this juncture, which are set forth in full at P-1, 33a-c; nevertheless, I will repeat the first four charges as examples of the dilemma respondent faced. The following charges are taken verbatim from P-1 at 33a.

He has failed:

1. To meet the needs of students within the classroom when possible.

2. To teach toward perceivable objectives.

3. To encourage pupils in creative skills as well as the acquisition of concepts and facts.

4. To utilize evaluation to determine students strengths, weaknesses and measure growth.

These charges of inefficiency are clearly lacking in specificity. The only procedure which would enable respondent to understand these charges against him would be for him to review his evaluations; to compare them with the critical remarks made by his evaluators in the early part of the school year; and to further compare them with the inefficiency charges as certified by the Superintendent to the Board. Even this procedure might not have been such an impossible task if one supervisor had been assigned to work with respondent throughout the 90-day period so that his prior evaluations could be measured against his present performance as it related to the charges. In this way, respondent would have had an ongoing dialogue about his improvement or his continued failings in the specific items on which he was directed to improve. This is not the procedure which was followed; consequently, respondent did not get the ongoing assistance that he needed to show him how and why he was or was not improving in certain areas.

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As stated before, even the five observers' evaluations during the 90-day improvement period were inconsistent. Respondent was criticized by different evaluators for some of the same inefficiencies; however, the record shows that he had improved in many of the previously criticized areas. Finally, at the end of the 90-day period when the charges were filed with the local Board, the Board did not decide whether or not respondent had improved sufficiently on any of the charges. The record shows merely that the Board resolved at a meeting that it had considered the statement of position in support of the charges and the statement of position and supporting evidence by respondent and decided that there was probable cause to credit the charges to the Commissioner. The tenure hearing followed.

In my judgment, the intent of N.J.S.A. 18A:6-11 as it relates to charges of inefficiency, is to give a teacher who has rendered satisfactory service during his/her tenure in a school district an opportunity to demonstrate that he/she can still be an effective teacher. A board of education is under no obligation to file charges of inefficiency against any teacher. If it determines through its administrative and supervisory personnel that a teacher lacks the capacity or is no longer capable of performing properly, the board may file charges for those reasons pursuant to the statute. Further, the statute is sufficiently broad so that a board of education may file tenure charges against a teacher for "just cause." Nevertheless, the statute also provides that a teacher may be charged with inefficiency. Thus, a board of education may give a teacher an opportunity to further demonstrate his/her abilities to continue to perform well in the district. When this elective is chosen, the teacher must have some yardstick against which he/she is measured during the improvement period. In effect, the teacher must be told precisely about the alleged inefficiencies, so that he/she has a reasonable opportunity to correct them by the end of the improvement period.

Here, the record shows that each of the evaluators testified that they neither referred to nor compared their evaluations to the items set forth in the charges filed with the Board by the Superintendent. Accepting this truth, it is inconceivable to see how any one of these evaluators could help respondent improve on any of the 19 items set forth in the charges filed against him by the Superintendent. Further, after the 90-day period began, not one of the evaluators returned to the classroom to find out whether or not respondent had improved over his/her previous evaluation during the 90-day period. Finally, the local Board itself never notified respondent of its determination as to whether some, all, or none of the original inefficiencies were corrected.

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In Teaneck Bd. of Ed. v. Ethel P. Hogue, decided by the Commissioner of Education in 1983, the Commissioner affirmed the conclusions of the ALJ quoting from the decision in In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Sayreville, Middlesex Cty., 1967 S.L.D. 271, aff'd State Bd. of Ed., 1968 S.L.D. 273, where the Commissioner said:

> Each of the school administrators testified as to detailed observations which had been made of the teacher's performance in the classroom over most of the span of his employment. The Commissioner finds no necessity to attempt to analyze and evaluate each of the incidents or instances related. Evaluation of a teacher's competency is generally a matter of total impression resulting from a synthesis of observations made over a period of time. [at 272]

In the present matter, there was no synthesis of respondent's observations by any one of his observers, during or after the 90-day inefficiency period. Not one observer attempted to synthesize or to make a meaningful and understandable record of respondent's performance during this 90-day period in an effort to help him improve.

The record in Hogue shows that eight staff members "put forth considerable efforts to assist Hogue in improving (her) performance as a classroom teacher" (slip opinion at 8). Unlike respondent in the present matter who is charged with inefficiency, Hogue was charged with incompetency; therefore, the school officials had no duty to help her improve during the trial period. The ALJ concluded in Hogue, that she had failed "to respond to the sincere and genuine efforts of eight staff members" in assisting her (slip opinion at 8). The record shows in the present matter that Rowley did respond affirmatively to his supervisors and that improvement was made.

If, as alleged, respondent began floundering in the performance of his teaching after years of good service, causing the filing of charges of inefficiency by the Superintendent, then the Board's supervisors were duty-bound to assist him during his improvement period. As stated before, they did not.

Their observations concluded with five independent evaluations by five different supervisors which were unrelated to the charges filed against respondent. Further, there was no effort by the supervisors to synthesize or incorporate their

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evaluations with respondent's alleged inefficiencies. In short, the evaluations had little or no relationship to the task which is required by regulation and decision law, i.e., to assist respondent in improving his classroom instruction.

For all of the above reasons, the original order denying the motion to dismiss the charges is set aside. It is clear from the record after this hearing, that respondent received no ongoing assistance during the improvement period and that he had no specific direction from his supervisors.

I **CONCLUDE**, from my review of the statute, that the intent behind the guidelines of the Department of Education and behind the decisions of the Commissioner of Education, in particular Johnson, supra, is that when a board elects to file tenure charges of inefficiency against any teacher, the school authorities have a duty during the 90-day period to assist a teacher in improving in the areas which they allege he/she may be inefficient. Since that did not occur in this case, respondent's motion to dismiss the charges of inefficienies filed against him is **GRANTED**.

The tenure charges of inefficiencies are **DISMISSED**.

Although these charges are dismissed, the Board is not precluded from utilizing the evaluations already a part of respondent's past performance as evidence against him, if it should be necessary to later file tenure charges, pursuant to N.J.S.A. 18A:6-11.

The Board is directed to reinstate respondent Rowley in a teaching position commensurate with his certification, and reimburse him for any salary and emoluments withheld during the 120-day suspension period in accordance with N.J.S.A. 18A:6-14.

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

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

7 April 83
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

4/7/83
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 12 1983
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD ROWLEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF MANALAPAN-	:	DECISION
ENGLISHTOWN REGIONAL,	:	
MONMOUTH COUNTY.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board takes exception to the initial and summary decision by Judge Thomas wherein he finds that it failed to comply with the statutory prerequisites of N.J.S.A. 18A:6-11. The Board excepts to the conclusion that respondent did not receive assistance from administration to aid him to improve his inefficiencies. Finally, the Board contends that the judge placed improper emphasis on Guidelines for Implementation of the Tenure Employee Hearing Law (1977). Respondent's reply exceptions refute those of the Board and, in so doing, reliance is placed on the previously submitted briefs. Respondent contends that the Board has not presented any additional information nor salient exceptions and prays for affirmation of the initial decision herein. The Commissioner finds merit in respondent's arguments.

In the opinion of the Commissioner, the judge properly interpreted prior Commissioner's decisions, including Johnson, Hogue, and Starego, supra. Nor does the Commissioner find that the judge placed undue reliance on the guidelines document. He clearly showed that these guidelines are not formal rules but are intended to assist boards in their preparation for tenure hearings.

The Commissioner notes the lack of specificity of the charges of inefficiency filed herein. Further, the Commissioner observes that, although respondent was observed by five different evaluators, their testimony reveals that not one of them used the charges filed by the Board as a cross-reference or as evaluative criteria during their observations of respondent. The Commissioner strongly reaffirms his stance that, if a board chooses to file tenure charges of inefficiency against any teacher, the administration bears the heavy responsibility to render positive assistance to the teacher in an effort to overcome his inefficiencies. The Commissioner so holds.

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

The Board shall reinstate Rowley to a teaching position as determined by his certification with full tenure rights and appropriate emoluments and salary withheld during the 120-day period of suspension in accordance with N.J.S.A. 18A:6-14.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

MAY 23, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2563-82
AGENCY DKT. NO. 57-3/82A

THOMAS JOHNSTONE, JR.,
Petitioner
v.
BOARD OF EDUCATION OF RINGWOOD,
Respondent

APPEARANCES:

James V. Segreto, Esq., for petitioner
(Segreto & Segreto, attorneys)

William P. Higgins, Esq., for respondent
(Corrado & Higgins, attorneys)

Record Closed: March 23, 1983 Decided: April 6, 1983

BEFORE **ROBERT P. GLICKMAN,** ALJ:

Petitioner, Thomas Johnstone, Jr., was terminated from his employment as a custodian with respondent. Petitioner asserts that he was a tenured employee and that his dismissal was in violation of his tenure rights. Alternatively, petitioner argues that as a fixed term employee, his dismissal was in violation of board policy, bylaws and his due process rights. Furthermore, Johnstone urges that his dismissal was in violation of the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.). Respondent denies all of petitioner's allegations and asserts that his dismissal was proper and in conformance with law.

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On March 1, 1982, the petitioner filed an appeal with the Commissioner of Education. On March 18, 1982, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on June 7, 1982, the following issues were identified:

A) Was petitioner a term employee or was he a tenured employee pursuant to N.J.S.A. 18A:17-3?

B) Was petitioner's dismissal by respondent in violation of any tenure status and/or in violation of the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.)?

C) If petitioner should prevail, what is the appropriate relief?

D) If it should be determined that petitioner was not tenured, was his dismissal in violation of Board policy SP 406 adopted June 29, 1981?

E) If Board policy SP 406 is applicable in the instant case, should it be struck down as being inconsistent with and in violation of N.J.S.A. 18A:17-3?

F) Were petitioner's due process rights violated pursuant to the case of Donaldson v. Wildwood?

G) Is the Board barred or estopped from dismissing petitioner based on a prior incident for which he was docked three days' pay?

H) Did petitioner obtain tenure since the Board granted tenure to some custodians and thus created the classification of custodian to be tenurable?

I) Is respondent bound by the prior Board action in allegedly creating a classification of custodian?

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A hearing was held at the Office of Administrative Law, Newark, New Jersey, on September 28, 29, and 30, 1982 and February 23, 1983. Posthearing proposed findings of fact and conclusions of law were filed by the parties and the record was closed on March 23, 1983. The witnesses who testified and the exhibits marked into evidence are set forth in the attached appendix.

DISCUSSION OF FACTS
RELATING TO WHETHER JOHNSTONE OBTAINED TENURE

It is undisputed that from January 20, 1971 until August 18, 1981, Thomas Johnstone, Jr. and the Ringwood Board of Education executed "employment contracts" whereby Johnstone was employed as a custodian (R-2a through R-12). These previously mentioned 12 employment contracts indicate the period of time Johnstone was hired for and his yearly salary.

At a Board of Education meeting on April 26, 1976, the Board approved granting tenure to the following custodians: William Griffiths, Michael Conklin, and Joseph Feola (P-11). At the same meeting, the Board approved teachers' salaries for a one-year period from September 1, 1976 to June 30, 1977. At the Board meeting of June 21, 1976, the Board voted to approve the salaries of custodians, including Michael Conklin, William Griffiths, and Joseph Feola (who had obtained tenure at the April 26, 1976 meeting, P-11) and Thomas Johnstone, Jr. On April 7, 1975 (P-12), the Board approved tenured staff members' salaries which were listed. At the June 21, 1976 Board meeting (P-13), the Board approved a contract for Donald Gudaitis, superintendent, at a fixed salary. A salary guide for the 1975-76 school year contained eight steps from $6,950 to $9,150 (see P-14a). At the June 16, 1975 Board of Education meeting (P-14b), the Board approved salaries for administrators, secretaries, and custodians. Johnstone's salary was approved in the amount of $8,200. This salary was according to a custodial salary guide (P-14b) which contained eight steps from $7,225 to $9,500. At the June 15, 1981 Board meeting (P-16), the Board approved personnel and salaries for all areas including custodians. Johnstone's salary was approved in the amount of $11,310 pending ratification of the contract. At the Board meeting of July 13, 1981 (P-17), the Board approved salaries for custodians for the 1981-82 school year. Johnstone's salary was approved in the amount of $12,665.

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The just-referred-to uncontroverted facts are hereby adopted as this court's **FINDINGS OF FACT.**

DISCUSSION OF FACTS RELATING TO WHETHER JOHNSTONE'S DISMISSAL WAS IN VIOLATION OF BOARD POLICY, BYLAWS, OR DUE PROCESS RIGHTS

Board policy SP 406 (P-1) adopted June 29, 1981 by the Ringwood Board of Education states:

> In the event of an infraction of district rules by a noninstructional employee, it shall be the policy of the Ringwood Board of Education to apply the statutes of the State, these policies and the regulations of the district with equal consideration to each employee. The Ringwood Board of Education reserves the right within law to impose penalties for disciplinary reasons. However, where an employee fails or refuses to perform contracted work without acceptable reason, the Superintendent may deduct, without further authorization, wages reasonably related to the time not worked. The Superintendent shall prepare disciplinary rules for situations most often encountered which provide for progressive penalties including where appropriate: verbal warning, written warning, transfer, suspension, freezing annual wages or dismissal.

According to the Board of Education Bylaws, Article III, Section 3. (P-2):

> The Board of Education may assume jurisdiction over any dispute or controversy arising within this school district and concerning any matter over which the Board has authority either through a contract or policy of this Board. In furtherance of its adjudicatory function, the Board may hold hearings which shall offer the parties to a dispute, on notice duly given, a fair and impartial forum for the resolution of the matter. Beyond the basic requirement of due process a hearing may vary in form and content in line with the severity of the consequences which may flow from it, the difficulty of establishing findings of fact from conflicting evidence, and the impact of the Board's decision on the school district.

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At a Board of Education private session meeting on November 2, 1981, a discussion took place concerning the termination of Thomas Johnstone, Jr.'s employment. According to the minutes, it was the recommendation of the acting superintendent to give Johnstone the choice of resigning or being released (P-2).

By letter dated November 2, 1981 and signed by Joseph G. Donnelly (P-21), Johnstone was notified as follows:

> A review of your evaluations has indicated a continued need for improvement in job performance. Although time was given to improve no significant change was noted.
>
> In addition to this you were observed working on a job outside the schools on a day when you had called in "sick" (Sept. 24, 1981). Also, the number of sick days you have taken since September 1, 1981 has placed unnecessary burdens on other staff members who have had to assume your duties.
>
> As a result of the above the Board of Education has directed me to notify you of termination of employment.
>
> You are hereby given 60 days notification, effective November 3, 1981 as per your signed, formal contract with the Board of Education.

At a private session meeting of the Board of Education on November 16, 1981 (P-22), the Board discussed receiving a request from Frank Farrell, union representative, who wanted to review the termination of Johnstone's employment. The secretary of the Board was directed to contact the job steward and notify him to follow the proper procedure and request a hearing with the full Board.

On December 21, 1981, there were three private session meetings of the Board of Education, one held from approximately 7:40 p.m. until 8:17 p.m. (P-24), the second held from approximately 8:01 p.m. until 8:22 p.m. (P-25), and the third held from 9:35 p.m. until 10:00 p.m. (P-26). At the first private session meeting, Johnstone was there with Thomas Havriluk, business representative of Local 153 of the Office and Professional Employees International Union. Also present were Barrett and Farrell, shop stewards, as well as Board members and Dr. Sellitti, superintendent. The purpose of the meeting was

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to hold a hearing concerning the termination of Johnstone. Havriluk, on behalf of Johnstone, admitted that Johnstone was wrong with regard to his job performance but asked for leniency with regard to the severe penalty. At approximately 7:57 p.m., Havriluk, Johnstone, Barrett, and Farrell were dismissed from the meeting. The meeting recessed at 7:57 p.m. and reconvened at 8:02 p.m. At that time, three teachers, Mrs. Grant, Mrs. Wells, and Mr. Depree, entered the Board's private hearing and communicated certain information about Johnstone to the Board members. The second private session meeting lasted until approximately 8:22 p.m. (P-25).

After a public meeting took place from approximately 8:22 p.m. to 9:35 p.m., the Board again retired to private session to hear testimony from Mr. Gardner and Mr. Donnelly concerning Johnstone's job performance. Johnstone was not present during this third private meeting nor was any representative there on his behalf. Prior to the termination of this third meeting, the Board voted to follow the administration's recommendation to terminate Johnstone (P-26).

On December 23, 1981, the Board secretary sent Johnstone the following letter (P-27):

> This letter will confirm that the Ringwood Board of Education, after your informal hearing held on December 21, 1981, has decided not to rescind its action of November 2, 1981, in terminating your employment.

On January 18, 1982, the Board met to correct a mistake made by the Board on December 21, 1981 when it voted to terminate Johnstone in private session. The motion involving Johnstone reads as follows (P-30):

> A motion was made by J. Kenny and seconded by G. Dean to affirm the Superintendent's recommendation to terminate a custodial employee, known as file #1 in the Office of the Superintendent, effective January 4, 1982. (Name of person known as file #1 is stated in the attachment of the public meeting minutes of January 18, 1982).

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In an unimproved minutes (P-31), the last part of the same motion reads:

> (Name of person known as file #1 is stated in the attachment of the private caucus meeting minutes of January 18, 1982).

Attached to the minutes is the following (P-31a):

> In action taken at the public meeting on January 18, 1982, be it known that the name of the custodial employee terminated, effective January 4, 1982, known as file #1 in the office of the Superintendent, is Mr. Thomas Johnstone, Jr.

It should be noted that on December 21, 1981, when a "hearing" was conducted concerning the termination of Johnstone, there appeared on the agenda for that meeting a personnel item to approve the appointment of Frank Kennedy as district custodian. Apparently, the Board was prepared to approve the appointment of a new custodian to take Johnstone's place before a hearing was conducted or a vote taken on the termination of Johnstone. However, this agenda item was removed from consideration by president of the Board of Education, Nancy Gogates.

By letter dated January 12, 1982, Johnstone was notified by the secretary of the Board of Education as follows (P-33):

> On Monday, January 18, 1982, action will be taken on the termination of your employment. This matter will be confidential unless you desire to have the matter made public.
>
> If you desire to have the matter public, please inform this office, in writing, by 4:00 p.m. Monday, January 18, 1982.

The above facts are uncontroverted and are adopted by me as part of my **FINDINGS OF FACT.**

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DISCUSSION OF FACTS RELATING TO WHETHER JOHNSTONE'S DISMISSAL WAS IN VIOLATION OF THE OPEN PUBLIC MEETINGS ACT

Most of the witnesses for respondent were in agreement about many of the aspects concerning the Open Public Meetings Act. Firstly, there was testimony from the Board of Education secretary, superintendent and Board president that in April of each year, an annual notice of meetings is published and circulated to comply with the Sunshine Law (see R-27). Additionally, the same procedure was utilized at all Board meetings to comply with the Open Public Meetings Act. The Board secretary at the beginning of the meeting would read the following statement (R-13):

> In conformance with the Open Public Meetings Act N.J.S.A. 10:4-6 adequate notice of this meeting has been provided to the following publications and places: Administration Building Bulletin Board, Borough Hall, Paterson News, Herald News, Suburban Trends, Ringwood Public Library, T.V. 3, and the Ringwood Bulletin.

When the Board intended to adjourn to private session in order to discuss any business dealing with personnel or legal matters, it was testified that the Board president would entertain a motion to go into private session. This motion would be made by a Board member and voted upon. On the following significant dates, the following language is gleaned from the Board minutes:

November 2, 1981 - Regular Public Meeting (P-19)

> A motion was made by G. Dean and seconded by B. Woronovitch to adjourn the meeting at 9:45 p.m. and to move into private session for discussion of personnel items.

No roll call vote was taken on this motion according to the minutes, nor was it indicated how long the private session would last nor was it indicated when such private discussion conducted in closed session would be disclosed to the public.

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The private session meeting of November 2, 1981 reveals that a discussion took place concerning the release of Johnstone and it was the recommendation of the superintendent to give him the choice of resigning or being released. The Board was in agreement. Although the minutes do not indicate that the Board voted to terminate Johnstone's employment, this is clearly the inference to be drawn from the language contained in the minutes. This inference is further buttressed by the letter mailed by Superintendent Donnelly dated November 2, 1981 (P-21).

The next significant Board of Education meeting took place on December 21, 1981. According to the testimony and Board minutes, three private sessions took place. The first private session meeting took place at 7:40 p.m. and ran to approximately 7:57 p.m. (see P-24). At this private session, Havriluk, a union representative, appeared with Johnstone and requested the Board to reconsider its termination of Johnstone and to afford him leniency. At 8:00 p.m., after leaving the private session, the president called the public meeting to order. Mrs. Yolman, the Board secretary, read the law required under the Open Public Meetings Act. Next, a motion was made by G. Dean and seconded by P. Reiner to go into private session for approximately 15 minutes for discussion of a personnel matter. A roll call vote was taken on this. Again, there was no indication when such information would be disclosed to the public. According to the minutes, the public meeting was recessed at 8:01 p.m. and reconvened at 8:22 p.m. The minutes of the private session (P-24) indicate that three teachers testified between 8:02 p.m. and 8:17 p.m. Johnstone was not present at this portion of the private meeting.

Next, at the public meeting of December 21, 1981, a motion was made by G. Dean at approximately 9:30 p.m. and seconded by J. Kenny to hold a private session to discuss two personnel items for approximately 20 to 30 minutes. The public meeting was recessed at 9:30 p.m. and reconvened at 10:12 p.m. No reference was made at the time the motion was made when and under what circumstances the discussion conducted in closed session would be disclosed to the public. The private session minutes of December 21, 1981 (P-26) indicate that the meeting took place between 9:35 p.m. and 10:00 p.m. Mr. Gardner and Mr. Donnelly testified about Johnstone's performance. Johnstone was not present at the meeting. The minutes indicate:

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> The Board determined to follow the administration's recommendation to terminate Mr. Johnstone.

Although this was not put in the form of a vote, obviously it is clear that the Board voted to terminate Johnstone's employment. This action of the Board on December 21, 1981 was followed up by a letter to Johnstone from Helen Yolman, Board Secretary, dated December 23, 1981, in which she states the following (P-27):

> This letter will confirm that the Ringwood Board of Education, after your informal hearing held on December 21, 1981, has decided not to rescind its action of November 2, 1981, in terminating your employment.

On January 4, 1982, a regular public meeting of the Board of Education was held. At approximately 10:12 p.m., a motion was made by B. Woronovitch and seconded by G. Dean to adjourn the meeting and proceed into private session for the discussion of personnel. A roll call vote was taken on this motion. At the private meeting which lasted from 10:22 p.m. until 10:56 p.m., the following notation appears in the minutes (P-29):

> Dr. Sellitti informed the Board that on Wednesday, December 23, 1981 he and Mr. Gardner spoke to Mr. Johnstone informing him of the Board's determination to proceed with his termination. Dr. Sellitti stated that he also spoke to the teachers who had defended Mr. Johnstone, as well as the principal of the school.

At the regular Board meeting of January 18, 1982, the following matter appears from the minutes (P-30):

> A motion was made by J. Kenny and seconded by G. Dean to affirm the Superintendent's recommendation to terminate a custodial employee, known as file #1 in the Office of the Superintendent, effective January 4, 1982. (Name of person known as file #1 is stated in the attachment of the public meeting minutes of January 18, 1982).

The motion was carried eight, yes; zero, no. Attached to P-30 is a document (P-31a) which states:

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> In action taken at the public meeting on January 18, 1982, be it known that the name of the custodial employee terminated, effective January 4, 1982, known as file #1 in the office of the Superintendent, is Mr. Thomas Johnstone, Jr.

The previously mentioned facts are undisputed and are hereby adopted by me as part of my **FINDINGS OF FACT.**

CONCLUSIONS OF LAW
RELATING TO WHETHER JOHNSTONE OBTAINED TENURE

If Johnstone were a tenured janitor, it is clear that the procedure by which the Board attempted to terminate his employment was improper. None of the requirements established pursuant to N.J.S.A. 18A:6-11 were complied with. Accordingly, if I should find that Johnstone was tenured, it would follow that the Board's action was improper and illegal and the discussion of this case would stop here.

In order to ascertain whether Johnstone obtained tenure, it is useful to look at the applicable statute, N.J.S.A. 18A:17-3, which states:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title . . . (emphasis added).

The statute, according to its plain meaning, states that unless a school district appoints a janitor for a fixed term, he is tenured. The statute is not clear as to how many years he has to be in the district before he obtains tenure.

Johnstone received a contract each year from respondent on what appears to be a standard employment contract form used by the Board of Education setting forth the period of time of employment, the salary, and when he was to be paid. All of Johnstone's employment contracts contained a 60-day termination clause (see R-2a to R-12).

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Respondent argues that the employment contracts between petitioner and respondent were for a fixed term, constitute appointment for that term and, thus, meet the exception to tenure provision under N.J.S.A. 18A:17-3. Petitioner argues that three janitors were specifically granted tenure by the Board of Education on April 26, 1976: William Griffiths, Michael Conklin and Joseph Feola (P-11). Because of this, respondent created a class to which petitioner beongs and, thus, would have an entitlement to tenure.

In the instant case, it is clear that respondent appointed Johnstone to a fixed term each and every year.[1] The Board's method of employment precluded Johnstone from acquiring tenure under the statute. The mere fact that respondent granted tenure to three other janitors does not vest Johnstone with tenure. Nothing under the statute precludes the Board from granting tenure to one custodian and denying tenure to another janitor by appointing him to a fixed term. I do not conclude that the Board, by granting tenure to three janitors, was then obligated to grant tenure to Johnstone. Under all of the facts and circumstances before me, I do not conclude that Johnstone was ever vested with, nor did he have an entitlement to tenure. At all times, he was merely a contractual employee for a fixed term.

Apropos, I **CONCLUDE** that Johnstone at no time obtained tenure in the Ringwood School District.

CONCLUSIONS OF LAW
RELATING TO WHETHER JOHNSTONE'S DISMISSAL WAS IN VIOLATION OF BOARD POLICY, BYLAWS OR DUE PROCESS RIGHTS

The procedure by which the Board attempted to terminate Johnstone's employment was improper and illegal. The entire process was tainted and flawed. At no time did the Board get "its act together." It first attempted to terminate Johnstone's employment after a meeting on November 2, 1981. In fact, petitioner was notified by letter after that

[1]This includes the years 1975-76 and 1976-77, even though the Board modified its previous procedure by voting first to approve custodians' salary guide and then by voting to approve contracts of specific custodians, Johnstone being one.

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meeting that his employment was terminated (P-21). This alleged termination was admittedly defective and invalid. The Board, in an attempt to rectify the defective action, granted Johnstone a "hearing" on December 21, 1981. On that date, the Board, going back and forth from private to public session, conducted three private "hearings." These "hearings" dealt with the termination of Johnstone. At the first one, Johnstone was present with his union representatives. At the second one, when three teachers were present, Johnstone was not present. At the third one, when Johnstone's superiors testified about his job performance, Johnstone was not present. What the Board euphemistically called a "hearing" was a sham. Fundamental concepts of procedural due process were missing. Neither Johnstone nor his union representative was provided with specific charges; although Johnstone had an opportunity to appear and present witnesses and materials, this opportunity was only afforded him at the first "hearing"; he was not permitted to remain at the second and third ones. Johnstone had no opportunity to contradict anything said by any witnesses at the second or third private "hearings." Johnstone was not permitted to have counsel at any of the "hearings" nor was he permitted to have his union representatives at the second and third private ones.

As stated in the case of Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549 (1979), which case involved a physician who was denied admission to the staff of a hospital, the court discussed the concept of fundamental fairness and what was required:

> Fundamental fairness dictates that the hospital apprise the physician of the specific charges . . . and that the applicant be afforded the opportunity to appear and present witnesses and material in support of his position and to contradict or explain the basis asserted for the proposed denial. . . . [cite omitted, at 564]

Additionally, our Supreme Court felt that the applicant in Garrow was entitled to have an attorney present at the hearing. See also Nicoletta v. New Jersey District Water Supply Commission, 77 N.J. 145 (1978) and Morrissey v. Brewer, 409 U.S. 471 (1972).

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As might be expected, there are no cases construing N.J.S.A. 18A:17-3 or discussing what type of hearing a nontenured school custodian would be entitled to. Garrow does shed some light on what our Supreme Court feels is required under a concept of fundamental fairness.

The Board adopted a resolution on June 29, 1981 (P-1) affording noninstructional employees who are charged with an infraction of the district rules with those safeguards provided by the statutes of the State of New Jersey. It is assumed and I so conclude that the applicable statutes would be the tenure statutes under Title 18A. Additionally, according to the Board of Education bylaws (P-2):

> The Board may hold hearings which are offered to parties to a dispute, on notice duly given, a fair and partial forum for the resolution of the matter. Beyond the basic requirement of due process . . .

The adoption by the Board of the policy and bylaws impose upon it an extra obligation to provide a noninstructional employee charged with an infraction of district rules a fair and impartial forum where the basic requirements of due process are followed. Also, those statutory requirements set forth in N.J.S.A. 18A:6-11 seem to be incorporated by reference pursuant to Board policy SP-406 (P-1). The Board clearly violated its own policy and bylaws by conducting the type of "hearing" which it conducted on December 21, 1981. Although not germaine, because of the existence of the Board policy and bylaws, it is worth noting that nontenured teachers who are dismissed are entitled to a statement of the reasons and an informal appearance before the Board of Education. Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236 (1974). In the absence of a policy providing for a hearing, nontenured janitors would be presumably entitled to a minimum of a statement of the reasons and an informal appearance before the Board of Education.

In terms of fundamental fairness, anything that occurred subsequent to December 21, 1981 did not correct or cure the fatal defect of the December 21, 1981 "hearing." The Board's action on January 18, 1982 did not correct the defective hearing, although it attempted to correct defects dealing with voting in private, rather than public, and notifying the public.

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Based on what has just been enunciated, I **CONCLUDE** that Johnstone's termination was in violation of the Board policy, bylaws and his basic due process rights. Accordingly, the action of the Board in terminating Johnstone's employment is hereby **SET ASIDE** and the Board is **ORDERED** to reinstate Johnstone with the proper back pay (mitigated by any earnings) and other benefits and emoluments which he is owed.

CONCLUSIONS OF LAW
RELATING TO WHETHER JOHNSTONE'S DISMISSAL
WAS IN VIOLATION OF THE OPEN PUBLIC MEETINGS ACT

Since I have already found and concluded that Johnstone's termination was improper and invalid because of the Board's violation of its own bylaws, policy and Johnstone's due process rights, it is unnecessary to this decision to decide whether there was a violation of the Sunshine Law. However, it may be instructive to briefly comment on what a board of education should do when going from public to private session and then back to public session. Under the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., it is required that meetings of public bodies be open to the public in most cases. An exception to this requirement is that matters which involve the hiring and termination of employees, unless the employee involved requests in writing that the matter be discussed during a public meeting, may be discussed with the public excluded (N.J.S.A. 10:4-12(b)(8)); see Oliveri v. Carlstadt-E. Rutherford Bd. of Ed., 160 N.J. Super. 131 (App. Div. 1978)). Clearly, the hearing and discussion of Johnstone's termination would fall within the exception contained in N.J.S.A. 10:4-12(b)(8). Thus, the hearing could have been conducted in private providing the requirements of N.J.S.A. 10:4-13 were met. This section of the Sunshine Law requires that before a public body excludes the public from any meeting to discuss such matters as termination of an employee's employment, the public body shall first adopt a resolution at a meeting to which the public shall be admitted. Such a resolution shall contain some of the following (N.J.S.A. 10:4-13):

> stating the general nature of the subject to be discussed; . . stating as precisely as possible the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

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None of the resolutions passed at any of the meetings concerning Johnstone wherein the Board moved to go into private session to discuss the termination of Johnstone's employment complied with the aforementioned statute.

Some of the resolutions substantially complied with the statute but did not indicate the circumstances under which the discussion conducted in closed session could be disclosed to the public. The threshold question, then, becomes whether the omission of such statutory requirements would constitute a fatal defect under the Open Public Meetings Act. It is significant to note that in Oliveri, supra, the omission of a formal resolution was not considered significant, 160 N.J. Super. at 135. I also do not consider the Board's omissions as constituting a fatal defect under the law which would require me to declare the Board's action voidable.

The Board is instructed in all further circumstances when it must go from public session to private session to discuss those matters to which the public may be excluded to fully and faithfully comply with N.J.S.A. 10:4-13.

Based on the discussion which I have just set forth, I **CONCLUDE** that this decision has resolved all existing issues and all other other issues not specifically discussed or dealt with are deemed to be without merit.

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

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OAL DKT. NO. EDU 2563-82

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

4-6-83
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

April 8, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 11 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

md/E

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APPENDIX

WITNESSES

Thomas Johnstone, Jr.	Marisa F. Zani
Barbara Woronovitch	Helen Yolman
Gerard Scola	Howard Horsford
Rudolph E. Sellitti	Thomas Havriluk
Nancy Gogates	

EXHIBITS

P-1	Board Policy SP 406
P-2	Bylaws
P-3	Letter dated November 11, 1981
P-4	Letter dated November 10, 1981
P-5	Letter dated November 10, 1981
P-6	Letter dated November 10, 1981
P-7	Letter dated November 10, 1981
P-8	Letter dated December 7, 1981
P-9	Memorandum from Gardner to Johnstone dated September 29, 1981
P-10	Legal Opinion dated April 3, 1978
P-11	Minutes, April 26, 1976
P-12	Sheet No. 2 of Minutes, April 7, 1975
P-13a	Sheet No. 11 of Minutes, June 21, 1976
P-13	Sheet No. 14 of Minutes, June 21, 1976
P-14a	Minutes, 1975-1976
P-14b	Minutes, 1976-1977
P-14c	Minutes, June 16, 1976
P-15	Agenda of Meeting June 15, 1981
P-16	Minutes, June 15, 1981

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P-17	Minutes, July 13, 1981
P-18	Agenda, November 2, 1981
P-19	Minutes, November 2, 1981
P-20	Minutes of Private Session, November 2, 1981
P-21	Letter of Termination, November 2, 1981
P-22	Minutes of Private Session, November 16, 1981
P-23	Minutes of Public Session, November 16, 1981
P-24	Minutes of Private Session, December 21, 1981
P-25	Minutes of Regular Meeting, December 21, 1981
P-26	Minutes of Private Session, December 21, 1981
P-27	Letter to Johnstone dated December 23, 1981
P-28	Minutes, January 4, 1982
P-29	Minutes of Private Session, January 4, 1982
P-30	Minutes of Public Session, January 18, 1982
P-31	Minutes of Public Meeting, January 18, 1982
P-31a	Attachment #1
P-32	Agenda, December 21, 1981
P-33	Letter, January 12, 1982

R-1	Work Application, April 16, 1981
R-2a & b	1971 Employment Contract
R-3	1972 Employment Contract
R-4	1973 Employment Contract
R-5	1974 Employment Contract
R-6	1975 Employment Contract
R-7	1976 Employment Contract
R-8	1977 Employment Contract
R-9	1978 Employment Contract
R-10	1979 Employment Contract
R-11	1980 Employment Contract
R-11	1981 Employment Contract

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R-13	Sunshine Law Statute
R-14	Minutes, December 21, 1970
R-15	Minutes, May 17, 1971
R-16	Minutes, April 17, 1972
R-17	Minutes, April 30, 1973
R-18	Minutes, May 6, 1974
R-19	Minutes, June 16, 1975
R-20	Minutes, April 26, 1976
R-21	Minutes, June 27, 1977
R-22	Minutes, May 15, 1978
R-23	Minutes, July 10, 1978
R-24	Minutes, May 14, 1979
R-25	Minutes, June 16, 1980
R-26	Agreement
R-27	Amended Notice of Meeting

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THOMAS JOHNSTONE, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RINGWOOD, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board excepts to the determination by Judge Glickman wherein he concludes that petitioner's dismissal was in violation of the Board's policy, its bylaws and petitioner's due process rights. The Board contends that the termination of petitioner was a valid exercise of the Board's general management duties and was not defective or invalid in any way. The Board objects to the reliance by the Court herein on Nicoletta, supra, as being completely opposite to the holding by Judge Glickman that Johnstone should be reinstated. The Board objects to the conclusion by the judge that its policy (P-1) and by-laws (P-2) extend to noninstructional employees the protection set forth in N.J.S.A. 18A:6-11.

Petitioner's reply exceptions refute those of the Board and affirm the remedy of reinstatement set down by the judge. Petitioner contends that Board policy SP 406 applies to both tenured and nontenured noninstructional employees and clearly was intended to apply to custodians. Petitioner, relying on his brief, claims to have acquired tenure in 1975 when other custodians, not including petitioner, were named as having tenure. The Commissioner notes that petitioner, when filing reply exceptions (timely by extension), also included his primary exceptions to the initial decision. These, not having been filed within the ten days so allotted, were not timely and therefore not considered. The Commissioner finds merit in the Board's exceptions.

A thorough examination of the record, the testimony of witnesses, the exhibits marked into evidence and the exceptions filed by the parties leads the Commissioner to make the following conclusion. Judge Glickman properly determined that Johnstone did not obtain tenure in the system. Petitioner was accorded

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employment contracts for a fixed term, thus satisfying the exception clause in N.J.S.A. 18A:17-3, ante. The Commissioner finds no merit in petitioner's argument that, because three other janitors were specifically granted tenure in April 1976, such action automatically accorded him tenure.

Further, the Commissioner finds and determines that Judge Glickman properly concluded that the Board was in substantial compliance with the Open Public Meetings Act when discussing petitioner's case. Such a finding does not mitigate Judge Glickman's admonition to the Board to fully and faithfully comply with N.J.S.A. 10:4-13.

The Commissioner determines that petitioner errs in his attempt to accord to nontenured, noninstructional employees the same rights as tenured employees. Nor can there properly be an extrapolation of the rights accorded to teachers to those for noninstructional employees. Such was not intended by the Legislature and statutory law. Nor in the opinion of the Commissioner can such extraordinary rights be attributed to Board policy.

The Commissioner observes that the Board accorded petitioner a hearing at which he was represented by the business representative of Local 153 of the Office and Professional Employees International Union, as well as his shop stewards. Petitioner did not ask to be represented by counsel nor does the Board have a policy that would forbid such requests. In the opinion of the Commissioner, petitioner was accorded the due process rights accruing to a nontenured nonprofessional employee.

Accordingly, the Commissioner finds that the termination of petitioner was a valid exercise of the Board's general management duties in conformance to the contractual relationship existing between petitioner and the Board. The determination of the court is set aside. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

MAY 23, 1983

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THOMAS JOHNSTONE, JR., :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH : DECISION
OF RINGWOOD, PASSAIC COUNTY,

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, May 23, 1983

For the Petitioner-Appellant, Segreto & Segreto
(James V. Segreto, Esq., of Counsel)

For the Respondent-Respondent, Corrado & Higgins
(William P. Higgins, Esq., of Counsel)

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

Gustavo A. Mellander abstained.

November 2, 1983

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7996-82
AGENCY DKT. NO. 300-7/82-A

KAREN LINGELBACH,
Petitioner

v.

BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,
Respondent

APPEARANCES:

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

David J. Weaver, Esq., for respondent
(Trapasso, Dolan & Hollander, attorneys)

Record Closed: March 7, 1983 Decided: April 21, 1983

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

Karen Lingelbach, a certificated and tenured full-time school social worker employed by the Borough of Hopatcong Board of Education, Sussex County, from 1971 to June 30, 1982, was notified by the Board on April 28, 1982 that it had acted to abolish the position of full-time school social worker as part of an economy and reorganization plan

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and that her employment, as a result, was to be terminated on June 30, 1982. Alleging such termination was arbitrary and contrary to N.J.S.A. 18A:28-9 and 12, in view of the circumstance the Board hired two part-time school social workers for 1982-83 to perform functions previously performed by petitioner for total employment time in excess of that done by petitioner, petitioner sought judgment determining abolishment of her full-time social worker position violated her tenure rights and sought reinstatement with back pay and emoluments.

The Board admitted petitioner's tenure status but alleged its action was reasonable and proper under N.J.S.A. 18A:28-9 and was within its management prerogatives generally, being consistent with a district - wide plan for reorganization and flexibility purposes as well as for economy. The Board admitted further it established a position of part-time hourly employment for school social workers for 1982-83 and hired two such part-time workers who currently serve between 15 and 25 hours weekly each. The Board alleged it had offered petitioner part-time employment, though not at her prorated salary schedule hourly rate but instead at $12 per hour.

The Petition of Appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on July 26, 1982. The Board's answer was filed there on August 16, 1982. Accordingly, the Commissioner of the Department of Education transmitted the matter on August 20, 1982 to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A 52:14F-1 et seq.

On notice to the parties, a prehearing conference was held in the Office of Administrative Law on November 1, 1982 and an order entered establishing, inter alia, a hearing date for February 28, 1983. The parties were directed to confer and thereafter to file for the record stipulations of all uncontradicted relevant and material facts in sequential and chronological order, together with relevant documentation, certifications and contracts. Hearing on oral testimony was thereafter to be limited to such contradicted issues of fact as were not reasonably susceptible to stipulations.

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At issue generally was whether petitioner shall have proven by a preponderance of the credible evidence that the Board in acting to terminate her full-time employment as school social worker by abolishment of position and substitution therefor of two part-time hourly positions was arbitrary and/or abridged petitioner's tenure and seniority rights under N.J.S.A. 18A:28-5, 9 and 12.

STIPULATIONS AND FINDINGS OF FACT

The parties having so stipulated, I hereby make the following findings of fact:

1. Karen Lingelbach began her employment with the Hopatcong Borough School District in 1971-72 as a full time social worker.

2. Karen Lingelbach became tenured in the position of full time social worker with the Hopatcong Borough School District as of September 1974.

3. Petitioner's employment as a full time social worker with the Hopatcong Borough School District was continuous from 1971-72 to 1982.

4. In February 1982, the Special Services Department of the district stopped accepting new referrals for the 1981-82 school year. The case load for reevaluations had increased from 47 in 1981-82 to 66 in 1982-83 school year. The total case load projection for 1982-83 was 120 cases compared to approximately 60 for the year 1981-82.

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5. The primary duties of Karen Lingelbach as the school social worker centered around referral, evaluation, classification and reevaluation procedures as described in N.J.A.C. 6:18 et seq.

6. The child study team social worker's daily schedule varied from week to week and month to month. During September, January and April, the social worker scheduled district-wide child study team case reviews for all classified children. Those case reviews allowed the child study team to interact directly with the teachers, speech correctionists, school nurses, aides and principals in each building. In the spring, when special education program changes were being recommended for the following year, the social worker was the usual child study team contact with the parents. The social worker was a primary contact with the home in all and any matters concerning classified children. That contact covered the areas of attendance, hygiene, truancy, inappropriate school behavior, medical examination related to evaluation and the social worker acted as the interpreter of school correspondence to the home. The social worker also has the primary line of communication with all support and diagnostic agencies that interact with the classified student population. Those agencies include probation, D.Y.F.S., welfare, mental health and the diagnostic centers of neighboring hospitals.

7. The basic child study team in Hopatcong Borough School District in the 1981-82 school year consisted of school social worker (Karen Lingelbach), a psychiatric social worker (Elaine Zekind), three learning consultants, and two psychologists. The Hopatcong Borough School had employed, in addition to the basic school social worker, a psychiatric social worker for many years. In the year 1981-82, that position was held by Elaine Zekind.

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Miss Zekind's title was that of social worker while she was employed in the district, although she actually served in a clinical and counseling position. Miss Zekind's actual job functions were dissimilar from petitioner's during the period of their employment, although Miss Zekind did assist in performing certain social work functions by taking over and reevaluating approximately ten to fifteen cases in 1982.

8. By February of 1982, it was evident that the child study team could not accept any additional child study team referrals and still remain in compliance with administrative code directives. The projections for the 1982-83 social worker case load were done and the figures petitioner reported to James Gifford, her supervisor, clearly indicated that present staff was insufficient to meet the need.

9. On February 23, 1982, a memorandum concerning referrals to the child study team was circulated to the child study team's staff, guidance personnel and all building principals. (That memo is attached as Exhibit "A.")

10. On or about March 2, 1982, Hopatcong School District received notification of a cut in state aid in the amount of $225,071.

11. After conference with petitioner, James Gifford on March 25, 1982, wrote a memo to Wayne Threlkeld, Superintendent of Schools in Hopatcong, and to James F. Clark, Assistant Superintendent and Board Secretary concerning suggestions for dealing with the increase in child study case load and the responsibility of the child study team school social worker (That memo is attached as Exhibit "B.")

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12. On March 29, 1982, Gifford wrote a memorandum to Threlkeld and Clark, concerning the 1982-83 child study team case load. (That memo is attached as Exhibit "C.")

13. On April 13, 1982, Gifford wrote a memo to Threlkeld concerning the benefits of using hourly paid social workers. (That memo, as well as Hopatcong Board of Education Policy #111, is attached as Exhibit "D.")

14. On March 29, and on April 13, Gifford met with Threlkeld and Clark to discuss the suggestions contained therein and alternatives.

15. On April 22, 1982, a meeting was held between Threlkeld, Clark and petitioner, in which petitioner was advised the administrative recommendation to abolish the full time positions of social worker was part of an economy and reorganizational plan that would be presented to the Hopatcong Board of Education for consideration at an executive session at the April 26, 1982 Board meeting. A letter was sent by certified mail to petitioner informing her of the same information prior to the meeting.

16. On April 23, 1982, petitioner wrote the Board of Education requesting discussion of the topic to eliminate the position be done in public.

17. On April 26, 1982, the Hopatcong Board of Education adopted and passed the administrative recommendation to abolish the positions of full-time social workers as part of an economy and reorganizational plan effective in 1982-83 school year. (A copy of the minutes of that meeting are attached as Exhibit "E.")

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18. On April 28, 1982, the Hopatcong Board of Education notified petitioner by letter of the Board's action to abolish full time positions of school social workers and to place her on a preferred eligibility list for reemployment pursuant to the provisions of N.J.S.A. 18A:28-12.

19. On July 19, 1982, the Hopatcong Board of Education voted unanimously to establish the position of part time hourly employment of social workers as part of an economy and reorganizational plan, at the rate of $12.00 per hour. The action was to be effective for the 1982-83 school year and thereafter, and authorized the administration to utilize out-of-district social worker consultants on an as-needed basis as determined by the Supervisor of Instructional Support Services, James Gifford, and approved by the Superintendent. (The minutes of that meeting are attached as Exhibit"F.")

20. On July 23, 1982, the Hopatcong Board of Education offered the position to petitioner for the 1982-83 school year. (A copy of the letter is attached as Exhibit "G.")

21. In succeeding weeks and months there was various communication between the Board's representatives and petitioner concerning the employment opportunity. It was made known to petitioner that she could accept this position without prejudice to any rights or claims she may have had, and that she could still seek full time employment in her field and leave the position at Hopatcong upon obtaining such employment. (The correspondence is attached collectively as Exhibit "H" and is as follows letter dated July 29, 1982 from petitioner; letter from Hopatcong Board of Education dated August 5, 1982; letter from petitioner dated August 12 1982; letter from Hopatcong Board of Education dated September 1, 1982 letter from petitioner dated September 6, 1982.)

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22. On or about August 19, 1982, the Hopatcong School District published the position vacancy for part-time social workers. (A copy of the publication is attached as Exhibit "I.")

23. On August 30, 1982, a memo was written by Gifford to Clark concerning the projected hours for hourly social workers. (That memo is annexed as Exhibit "J.")

24. Since September 1982, the Hopatcong Board of Education has hired two part-time social workers, Tobie Kramer, who had training as a psychiatric social worker, and Cassandra Kolloff. The projected hours for each was as follows:

> Tobie Kramer - 4 days per week: 7:30 a.m. - 12:30; 1 day per week: 4:00 p.m. - 9:00 p.m.; Cassandra Kolloff - 4 days per week; 8:30 a.m. - 12:30 p.m. - 1:30 p.m. to 2:30 p.m.; 1 day per week: 2:00 p.m. - 5:00 p.m. and 6:00 p.m. - 8:00 p.m.

25. Kolloff has been taking the social worker's responsibilities for children in the elementary school, while Kramer has been taking the responsibilities for children in the middle school and high school levels. In addition to the staff previously utilized by Hopatcong, Vincent D'Elia, a psychologist, has been hired for counseling and psychological reevaluations four nights per week from 4:00 - 9:00 p.m.

26. It is stipulated and agreed by the parties that all correspondence referred to was received and that there are no procedural irregularities alleged nor any irregularities or violations of N.J.S.A. 10:4-6 et seq., of the meetings or conferences in this matter.

27. A copy of the 1982-83 Annual Plan for the Education of all handicapped children is annexed as Exhibit "K.")

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EVIDENCE AT HEARING

The Borough of Hopatcong School District consists of one high school with grades 9-12, one junior high school or middle school with grades 5-8, and three elementary schools with grades K-4. There are approximately 3,000 pupils in all grades, K-12.

According to the District's job description for school social worker (R-1), petitioner's function was as a member of the basic child study team pursuant to N.J.S.A. 6:28-1.3. The school social worker assists in the total process of identification, referral, comprehensive evaluation, classification and development of individual educational plans for those children referred to the team for either physical, social, mental or emotional problems or some combination of them, which prevents or impedes the child's learning in a public school setting. During her tenure, petitioner said in her testimony, she was the only school social worker on the district's child study team. She described her basic functions as those required to obtain the social histories of children referred to the team by others, to report her findings, present them, and meet with parents and with the team generally as required. Under standard contract, petitioner said she had no set hours but usually worked from 8:00 a.m. until 2:40 p.m. She took a lunch period only. She worked approximately 6 or more hours each day. She received full benfits and vacation. She worked at night occasionally as authorized by administration. She denied ever having been told of dissatisfaction with her work or with her scheduling of her appointments. She was never asked, she said, to work evenings. She denied ever having objected tc administration oncerning working in evening hours as violative of her contract.

For 1982-83, it was stipulated by the parties petitioner would have earned a salary of $24,311. Actually, it was stipulated, petitioner earned some $2,800 i unemployment compensation benefits and earnings from substitute teaching during th

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period September 1, 1982 to January 12, 1983. On that latter date petitioner was employed as a social worker by Randolph Township Board of Education at an annual salary of $18, 200. Pro-rated for the period January 12, 1983 to June 30, 1983, her salary will be $10,920. Her claim for alleged back pay, therefore, is the difference between her 1982-83 earnings subtracted from her projected earnings in Hopatcong District of $24,311 for 1982-83. That difference is $10,591. The Board argued a further mitigation of damages should be applied in the sum of $2,300, which represents seventeen weeks of employment from September 1982 to January 12, 1983 at $12 per hour. Petitioner disputed that mitigation claim.

Cassandra Kolloff, one of the two part-time social workers employed by the Board for 1982-83, testified she worked principally with pupil reevaluation originating from the District's three elementary schools. She is paid $12 per hour, works five days a week, and usually works day-time hours from 9:00 a.m. until approximately 2:00 or 2:30 p.m. For evening work, she said, it is left to her to schedule hours as demanded or needed by parents. She said generally she has noted an increase in those pupil evaluations and pupil reevaluations over the past year. She was first hired, she said, on an expected 20-25 hour per week basis. She was expected, she said, to log evening hours with parent interviews.

Tobie Kramer, the second school social worker employed by the Board since September 1982, testified she is the member of the child study team whose job is assessment of family dynamics and counseling. She does the same work, she said, as Kolloff, except that she, Kramer, is also a psycho-therapist. Her schedule, she said, is four mornings and one evening per week. She works about 20-25 hours. As a psycho-therapist, she also has a private practice in Randolph Township. She holds the A.C.S.W. degree. In the Hopatcong District, she said, her work is with middle school and high school students and their parents, in contrast to Kolloff's work in the elementary schools. She found parents of children with whom she works to be mostly working parents who cannot attend interviews except during evening hours.

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The Supervisor of Instructional Support Services, James Gifford, testified that in 1981-82, the child study team was composed of three learning consultants, two psychiatrists, a psychiatric social worker, and a social worker (petitioner). On February 23, 1982 he wrote a memorandum cautioning members of the child study team concerning new referrals that there must be severe constraints placed on scheduling additional full referrals to the child study team because of a back-log of evaluations and reevaluations, functions that were the responsibility of the school social worker (Exhibit A of Stipulations). A later memorandum on March 25, 1982 (Exhibit B of Stipulations) underscored the increasing case load and posited the hiring of a school social worker on an hourly basis to ease the load on the social worker. Another memorandum of March 29, 1982 noted other members of the child study team were able to share cases to even out individual case loads but that such sharing was not possible with the single social worker handling 120 or more cases. A memorandum from Gifford to the Superintendent dated April 13, 1982 outlined benefits expected to be achieved from hiring two hourly paid social workers (Exhibit D attached to Stipulations). There were several such expected benefits, including flexibility because of schedule conflicts with working parents during ordinary school hours, necessity of attendance by working fathers at home visits, expansion of mini-screening by the child study team to full scale screening, increased chances to deal with families of non-classified students that a single school social worker could not provide, particularly with single-parent families and with families with working parents. The memorandum concluded one child study team social worker as ther presently provided was not enough to meet the needs of District Education Policy #111, an requirements of law and regulations generally under N.J.A.C. 6:8-4.3(d). Th memorandum concluded that in view of present budget constraints and recent cuts i federal funding for special education, hiring two hourly paid social workers was the mos desirable alternative to hiring additional contracted personnel.

Gifford testified that when two part-time school social workers were hired fc 1982-83, the result permitted staffing of an elementary school team and a high schoo middle school team. Both teams, he said, were able to interact on the same day. It h

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been proven, he added, delivery of special education services through the child study team has been more effective with such a double delivery of services. In the District, Mrs. Kolloff, as part-time social worker, presently works with the three elementary schools (K-4), while Mrs. Kramer works with assignments from the middle (5-8) and high schools (9-12). Crises intervention in cases from the high schools and the middle school, Gifford said, is more effective now with Mrs. Kramer, a psychiatric social worker, whose experience becomes a benefit in such cases. The dual system of delivery of services provides greater flexibility, in short, he said, as well as permitting the District to expand basic services.

At a meeting of the Board on April 26, 1982, acting on administrative recommendation to abolish the positions of full-time social workers as part of an "economy and reorganizational plan effective for the 1982-83 school year", the Board voted unanimously to take such action, pursuant to the provisions of N.J.S.A. 18A:28-9. At the same time the Board acted to terminate the employment of petitioner effective June 30, 1982, in accordance with N.J.S.A. 18A:28-10 and N.J.S.A 18A:28-12, and to place her on a preferred eligibility list for reemployment (Exhibit D attached to Stipulations).

Wayne L. Threlkeld, Superintendent of the District, testified it was his administrative recommendation to the Board in April of 1982 to abolish the full-time social worker position and to hire hourly part-time social workers. With a single social worker, he said, increased case load presented problems. The single-staffing was manifestly inefficient. Because of State aid cuts, the currently dictated measures were taken both to lower costs and to achieve greater flexibility and maximum delivery of services for increased case loads.

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DISCUSSION

In broad prospect here, what seems implicated is the Board's power to reduce its force of tenured teaching staff members. N.J.S.A. 18A:28-9 provides:

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

Petitioner argued that as a tenured full-time school social worker, who worked appproximately six hours per day, five days per week, her position and functions were effectually no different from the combined positions and functions of the Board's two part-time social workers employed for 1982-83 after abolishment of petitioner's full-time position. As a result, said petitioner, since the social worker case loads increased after abolishment as opposed to decreased, and since the combined part-time salaries of her replacements was less than her salary level, the Board's action in eliminating her full-time position was necessarily an action taken in bad faith, and, therefore, was contrary to her tenure and seniority rights and to N.J.S.A. 18A:28-9. Cf., Viemeister v. Board of Educ., Borough of Prospect Park, 5 N.J. Super. 215, 218-9 (App. Div. 1949)(otherwise, presumably, tenure would rest on "frail reeds").

The Board, on the other hand, argued its action had a practical and workable rationality, namely, both economy and a legitimate administrative adaptive reorganization of functions of the school social worker as a member of the child study

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team[1] and, therefore, that the action was in no way one done in bad faith nor one outside powers of the Board so to act under N.J.S.A. 18A:28-9.

In Outslay v. Board of Education of the Borough of Midland Park, Bergen County, 77 S.L.D. 1033, the Board upon advice of its Superintendent acted for reasons of economy to abolish two full-time nurses' positions and to create two part-time nurses' positions, one of which was offered to petitioner. Evidence showed the Board had deemed it necessary to provide adequate nursing services in two separate schools: from 10:00 a.m. to 2:00 p.m. in one school and from 11:00 a.m. to 2:30 p.m. in another school. Evidence showed the hours of those two positions could not be combined into a single full-time position. Against petitioner's argument that her tenure and seniority rights under N.J.S.A. 18A:28-9 were abridged, the Commissioner determined there was neither arbitrariness nor bad faith behind the Board's action. Managerial prerogatives under N.J.S.A. 18A:11-1 vested it with power to staff its district as it reasonably saw fit. Its action in so doing, absent arbitrariness or bad faith, must be accorded a presumption of correctness. A need for two part-time nurses simultaneously in different schools having been made apparent, petitioner's claims were dismissed (at 1039 of 77 S.L.D.).

In Klinger, v. Board of Education of Township of Cranbury, Middlesex County, -- N.J. App. Div., November 10, 1982, A-2227-81T3) (unreported) certification denied. -- N.J. — (1983), the issue was whether reduction in petitioner's duties as a teacher from full-time to 7/10ths time with a corresponding reduction in salary violated his tenure and

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The school social worker is part of the basic child study team. N.J.S.A. 18A:46-8; N.J.A.C. 6:28-1.3.

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seniority rights. Petitioner, a tenured physical education teacher, had taught physical education classes with another non-tenured teacher at the same time during the school day. In April of 1979, the Board reduced petitioner's employment to 7/10ths time and continued employment of the non-tenured teacher for the same fractional employment. Petitioner alleged that by reason of his tenure and seniority the Board was required to retain him in a full-time position rather than employing both him and the other non-tenured teacher part-time. The Appellate Division found the Board had chosen dual instruction in its physical education program for years. When the Board terminated its full-time physical education program and replaced it with a three and one-half day program taught by two 7/10ths time teachers under a reduction in force for reasons of economy, the Appellate Division said the Board choice was entirely within its authority under N.J.S.A. 18A:28-9, 10 and the fact it preferred two teachers part-time instead of one full-time was no concern of the courts so long as petitioner was not treated unfairly. In affirming, the Appellate Division noted the words of the State Board of Education:

> The law is well established that unless the local board's action to reduce full-time positions to part time was taken in bad faith or constituted an abuse of discretion, its determination to abolish or change positions may not be disturbed by the Commissioner of [sic] the Courts. [Citations omitted] We do not find it arbitrary for a local board to decide when having to reduce its physical education program to have two part-time teachers rather than one full-time. The tenure and seniority rights of incumbent cannot prevail against the authority of the board when exercised in good faith and with some rational basis. The mere fact that Petitioner was qualified to handle the entire physical education program on his own is not material; nor is the fact that the Board might have organized its physical education differently (at 3 of slip opinion).

Here, it seems reasonably plain the Hopatcong Board, relying on administrative recommendations on April 26, 1982, acted to abolish its single full-time

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school social worker position then presently held by petitioner. Administrative documentation and Board minutes as well as the testimonial evidence of record here show the Board's abolishment of the single full-time position in favor of dual part-time positions staffed by two part-time school social workers was advised and undertaken ultimately for reasons both Board and administration found compelling and reasonable. Duality of staffing permitted a division of labor in making of evaluations and reevaluations when volume of such child study team business was on the increase. Duality of staffing permitted one part-time school social worker to concentrate on cases from elementary schools and another part-time school social worker to concentrate on middle school and high school cases. Flexibility in delivery of such school services was enhanced since evening hours were made available for parents' interviews for working families unable to be interviewed during the school day. Flexibility in delivery of services was further enhanced in improvement in crisis intervention by the full team during emergent calls for it.

There was thus planned and achieved, in my view, such reasonable administrative or supervisory reorganization of the District as lay within the power of the Board to effectuate, within the meaning of N.J.S.A. 18A:28-9. Petitioner's rights of tenure and seniority, therefore, remained subject to the action of the Board as so planned and effectuated; and petitioner's rights, as result, for the present remain those she possesses under N.J.S.A. 18A:28-10 (seniority) and N.J.S.A. 18A:28-12 (preferential eligibility for reemployment in order of seniority).

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CONCLUSION

Based on the foregoing, I hereby **CONCLUDE** that petitioner has failed to establish by a preponderance of the credible evidence that Board action in abolishing her position as school social worker on April 26, 1982 and in employing two part-time school social workers for 1982-83 was violative of petitioner's rights of tenure and seniority under N.J.S.A. 18A:28-5,9,12. On the contrary, I **CONCLUDE** the Board's action has here been shown to have been a reasonable and lawful administrative reorganization of the District within in the meaning of N.J.S.A. 18A:28-9. As a result, therefore, I hereby **ORDER** the petition of appeal herein should be, and it is hereby, **DISMISSED.**

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

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

April 21, 1983
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

April 22, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 27, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

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LIST OF EXHIBITS

P-1 Petitioner's annual performance evaluation reports for 1980, 1981 and 1982

P-2 Analysis of district child study team cases completed for 1980-81

R-1 Job description of role and responsibilities of position of school social worker

R-2 Minutes of Board of Education for public hearing on 1982-83 Budget, dated March 9, 1982, reflecting announcement of reduction of state aid for the district in the amount of $225,000

R-3 Negotiated contract between Hopatcong Education Association and Hopatcong Board of Education for years 1980-83

J-1 Employment contract between petitioner and Board of Education of Randolph Township, Morris County reflecting petitioner's employment from January 12, 1983 through June 30, 1983 as school social worker at annual salary rate of $18,200 to be paid in eleven equal semi-monthly installments

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KAREN LINGELBACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in primary exceptions contends that Judge Ospenson erred in finding that the action of the Board in reducing petitioner's position to two part-time positions was not arbitrary and capricious or violative of her tenure rights. Petitioner argues that neither administrative flexibility nor management prerogative constitutes an acceptable response by the Board as to why its actions in this matter are proper. Petitioner avers that the initial decision was simply wrong and should be reversed. The Board in reply exceptions refutes those of petitioner and affirms the initial decision. The Board argues that testimony and evidence clearly establish the need for economy and a reorganizational plan to ensure flexibility, both of which justify the Board's action herein. The Commissioner looks with favor on the Board's arguments.

The Commissioner observes that each party relies on Outslay, supra, while petitioner argues as well that the ALJ's primary reliance upon Klinger, supra, is improper. A close reading of the initial decision, the arguments of law, and the exceptions filed by each party convinces the Commissioner that the judge properly determined that the Board's action herein lies within its management prerogatives to reorganize the administrative and supervisory structure in the district pursuant to N.J.S.A. 18A:28-9. Petitioner's rights remain those under N.J.S.A. 18A:28-10 and 12. The Commissioner so holds.

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

Accordingly, the Petition of Appeal is hereby dismissed.

JUNE 6, 1983 COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 929-83

AGENCY DKT. NO. 14-1/83A

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Petitioner

v.

GARY E. LANTZ,

Respondent.

APPEARANCES:

Martin M. Barger, Esq., for petitioner (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Thomas W. Cavanagh, Jr., Esq., for respondent (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

Record Closed: April 14, 1983 Decided: April 26, 1983

BEFORE **ERIC G. ERRICKSON,** ALJ:

The Board of Education, on January 11, 1983, certified tenure charges of unbecoming conduct against respondent, a teacher employed by the Board, pursuant to N.J.S.A. 18A:6-11 et seq. Respondent was not suspended.

The Commissioner of Education, on February 10, 1983, forwarded the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. At a prehearing conference conducted on March 4, 1983, at the Office of Administrative Law, Trenton, New Jersey, counsel for both parties expressed a desire to

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settle this matter without the necessity of a plenary hearing. Accordingly, the parties were directed to stipulate all of the relevant facts and the penalty they believed to be appropriate to the offenses with which respondent is charged and to which he admits. Essentially, the charges are that respondent, without authorization, brought alcoholic beverages in the form of three six-packs of beer onto school property, which beer was consumed, at least in part, by certain police officers and custodians who were on duty at or after a school homecoming dance.

The full text of the facts agreed to by the parties in the Stipulation of Settlement is here reproduced:

1. The teacher involved, Gary E. Lantz, has been continuously employed in the Monmouth Regional High School System for 15 years, and has never received a negative evaluation, nor any evaluation which did not indicate superiority in his assigned areas.

2. A review of the employee's personnel file for the last 15 years discerns numerous letters of appreciation and commendation for various situations involving both community and school involvement.

3. During the 15 years of employment with the District, the teacher involved has over the years developed various courses of study and material for slow learners and each Summer has taught make-up courses and administered the summer enrichment sessions.

4. The aforesaid employee has coached both boys and girls track and for the last six years has been the J.V. coach of the girls varsity basketball team.

5. The aforesaid employee has served on and off over the last eight years as various class advisors in the school system, and in 1983 is presently serving as the senior class advisor, which position requires extensive involvement in coordination of fund raising responsibilities in order to pay for the senior prom, year book, and annual senior class trip.

6. The aforesaid employee, Gary E. Lantz, is currently involved as the producer of the senior class play.

7. Throughout the years in question, he has consistently volunteered and assisted various clubs and organizations with their social fund-raising efforts in an attempt to enrich the atmosphere at Monmouth Regional High School.

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8. At the time of the incident which is the subject of this petition, the employee was acting in a volunteer capacity and assisting the student body through his supervision of the school dance on a voluntary basis.

9. Furthermore, on the day in question, the involved employee had been on campus all day operating a football concession on behalf of the senior class, in addition to serving as a volunteer assistant during the evening at the homecoming dance at which the incident occurred.

10. It is to be further acknowledged by both parties that at the time and place of the incident, there is no allegation nor any suspicion that any of the students were involved or even affected by the events referenced in the Statement of Charges.

11. There is no contention nor even suggestion by anyone that the homecoming dance which was held on November 7th, 1982 was in any way disrupted or even affected by the events set forth in the Statement of Charges.

12. The absence of any disruption or involvement of the students is corroborated by the fact that it was not until after the homecoming dance that the allegations set forth in the Statement of Charges were even known to the administration or the Board of Education.

13. At no time during the homecoming dance did the aforesaid, Gary E. Lantz, take part in the distribution or consumption of any alcoholic beverages, nor to the best knowledge of the employee at the time, did anyone else. During the entire period of time the employee was acting as a volunteer for the homecoming dance, he did not consume, distribute, nor in any other way have any connection with any of the materials referenced in the Statement of Charges.

As a result of the foregoing, the Monmouth Regional High School Board of Education and the employee, Gary E. Lantz, agree that the appropriate penalty for his involvement in the events set forth in the Statement of Charges would be a reduction in his salary of an amount of money equal to five days pay on the basis of his 1982-83 salary. It is respectfully submitted that both parties feel the above is a fair and equitable penalty in light of the unique circumstances and facts involved in this situation.

Respondent has admitted that he brought alcoholic beverages onto school property without authorization. Both he and his employer agree that as the result of this indiscretion, he is deserving of an appropriate penalty.

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The Board's agreement to the facts concerning respondent's excellent evaluations over 15 years and his willingness to volunteer and serve during non-school hours speaks eloquently that Lantz is a valued tenured employee. The Board does not press for dismissal. Both the Board and respondent agree that a financial penalty is warranted for his indiscretion and submit for consideration of the Commissioner that respondent's penalty should be a loss of five days' salary.

A thorough review of the preferred charges, the charges as certified, and the facts as stipulated indicates that dismissal of respondent from his position in which he has had a good record for fifteen years, would indeed be overly harsh.

The position of a teacher in New Jersey's schools, however, demands that one so appointed not only exhibit conduct free of unbecoming conduct but also avoid the very appearance of improper conduct. Respondent, however meritorious his volunteer services, did not so conduct himself in regard to his bringing an alcoholic beverage onto school property without authorization. A search of the record reveals no pupil involvement. Nevertheless, a financial penalty is warranted.

The penalty of loss of five days' salary appears to be a reasonable penalty for respondent's offense. Accordingly, the Board is **ORDERED,** subject to the Commissioner's concurrence, to deduct an amount from respondent's salary equal to the salary to which he was entitled for five working days during 1982-83.

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

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OAL DKT. NO. EDU 929-83

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

April 26, 1983
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

April 27, 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 29, 1983
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

plb

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IN THE MATTER OF THE TENURE	:	
HEARING OF GARY LANTZ, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE MONMOUTH	:	DECISION
REGIONAL HIGH SCHOOL,	:	
MONMOUTH COUNTY.	:	
	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

Accordingly, the Petition of Appeal is hereby dismissed. A penalty of five days' salary is ordered by the Commissioner to be deducted from respondent's salary.

COMMISSIONER OF EDUCATION

JUNE 13, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2958-82
(OAL DKT. NO. EDU 3862-81
ON REMAND)
AGENCY DKT. NO. 212-6/81A

IN THE MATTER OF TENURE HEARING OF:
KENNETH S. SMITH,
SCHOOL DISTRICT OF THE CITY
OF ORANGE, ESSEX COUNTY

APPEARANCES:

Arthur N. D'Italia, Esq., for petitioner
(Chasan, Leyner, Tarrant & D'Italia, attorneys)

Alan Ackerman, Esq., for respondent
(Stern, Lavinthal & Ackerman, attorneys)

Record Closed: March 15, 1983 Decided: April 28, 1983

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

On May 26, 1981, petitioner, Board of Education of the City of Orange, certified charges of incapacity, unfitness, and unbecoming conduct to the Commissioner of Education against respondent Kenneth S. Smith.

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On July 6, 1981, the Department of Education, Bureau of Controversies and Disputes, transmitted this dispute to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. After notice to all parties, a prehearing conference was held on September 18, 1981. As a result of settlement conferences between the parties, an agreement was reached. A recommended decision embodying the terms of this settlement as set forth in the stipulation of settlement was issued.

The Commissioner, upon review of the stipulation of settlement and the charges certified by the Board, as well as the written statements in evidence appended thereto and respondent's answer to said charges, determined that the charges were of such a serious nature, involving the allegations of the administering of corporal punishment to numerous pupils by a school principal, as to preclude their disposition in the manner provided for in the stipulation of settlement entered into by the parties. He, therefore, rejected the settlement and remanded the matter to the Office of Administrative Law for a full plenary hearing on the merits.

A prehearing conference was held at which time the issues were defined as follows:

1. Did the alleged actions of respondent, Kenneth Smith, constitute incapacity, unfitness or conduct unbecoming a principal in violation of N.J.S.A. 18A:6-10?

2. If the charges are found to be true, would such alleged conduct warrant dismissal or reduction in salary or other action?

Thereafter, the case proceeded to hearing with the stipulation that all exhibits previously marked, as well as all prior testimony taken, in the hearing held In the Matter of Kenneth Smith, School District of the City of Orange, OAL Dkt. No. EDU 3862-81, prior to the settlement reached therein, was to be relied upon for purposes of the hearing

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held in this matter. Witnesses who testified and exhibits marked into evidence are listed in the appendix attached hereto.

In an effort to put this controversy into its proper perspective, the court notes at the outset that it is undisputed that Kenneth Sebastian Smith has the appropriate educational certification to be a principal. Further, he has earned a doctorate in Educational Administration and Supervision from Rutgers University, a Masters in Administration and Supervision from Rutgers, as well as a Bachelor of Arts in English from Rutgers, and a Bachelor of Arts in Elementary Education from the University of the West Indies. In regard to his employment record, it is uncontroverted that Dr. Smith, after receiving a teaching certification in 1968, was employed in Highland Park as a teacher for three and one-half years. After returning to school full time in order to earn a doctorate, he was employed in 1973 by the Orange Board of Education as assistant principal of the Central Middle School. After serving one year in this capacity, he applied and was appointed principal of Central School in 1974. As principal, he functioned as an ex officio member of the PTA. Apparently, he worked with the association and, in addition, established, participated and supervised (on the average of once a week) various extracurricular programs.

It is, however, his actions as principal of Central School that are at issue. Dr. Smith is charged with incapacity, unfitness and unbecoming conduct, in that it is alleged he did on numerous occasions unlawfully inflict corporal punishment upon pupils attending Central School by striking them across the buttocks and hands with a stick, all in violation of N.J.S.A. 18A:6-1, and that he wilfully persisted in such conduct after having been directed to cease. The hearing, therefore, centered on the testimony presented by the Board in support of this charge and Dr. Smith's defense in refutation thereof.

Corporal Punishment as to A.K.

First to testify on behalf of petitioner was seven-year-old A.K., who attended Central Avenue School when Dr. Smith was principal. He recalled that he had been

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playing in the bathroom with two other boys, D. and S., when he was taken to Dr. Smith's office by a lady. He stated that once the boys were alone in the office with the door closed, Dr. Smith told him to bend over a chair and hit him, as well as the two other boys, once with a pointy stick or ruler (a white stick approximately three feet in length) on the backside. He described how Dr. Smith was alongside of him, on his left side, while he hit him and recalled that D. was hit first, S. second and he was hit last. He stated that he was hurt and cried, as did the other boys.

After the occurrence, he returned to the classroom. When he came home from school, he told his mother of the incident. A.K. indicated that as a result of being hit, he had a line across his backside.

Although A.K. did not dispute the fact that at a prior hearing he had stated that Dr. Smith came into the bathroom rather than a "lady," he explained the inconsistency by stating that at the other hearing he forgot that the lady had come into the bathroom and had thought that Dr. Smith had come in. A.K. recalled, however, that the lady who came into the bathroom was a short, heavyset black woman with dark hair, wearing an all-black outfit and white shoes.

Testifying in support of A.K.'s testimony was A.K.'s mother, who had had three children attending Central School. Apparently, they transferred to another school in March or April 1981. She testified that her oldest son, H.K., had advised her in January 1981 or February 1981 that Dr. Smith had hit him on the buttocks, several days prior to the time that he reported it to her. Mrs. A.K. recalled that there were brownish marks in a line across H's buttocks.

She further testified that approximately a week and one-half later, her son, T.K., advised her that Dr. Smith had hit him with a ruler on his shoulder. She indicated that there was no mark on T.K.'s shoulder and that she took no action with respect to either of these incidents.

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In the second week of February 1981, A.K. advised her that Dr. Smith had hit him. When she examined him, she observed a swollen red mark a half-inch thick, across his buttocks. She stated that upon questioning A.K., he advised her that he had been playing in the boys' room when he was brought to the office and hit by Dr. Smith. Mrs. A.K. recalled that when she met with Dr. Smith alone in his office the next day and asked Dr. Smith if he had hit her son, he stated, "yes." Questioned by her as to why he hit A.K., she recalled that he said, "He needs punishment." Mrs. A.K. testified that she advised Dr. Smith that he could call her into the office to determine the punishment and that A.K. should get extra homework or stay late, but that nobody should hit her children. Mrs. A.K. further recalled that when she asked Dr. Smith what was used to hit A.K., Dr. Smith reached over, and pulled up a stick two feet long, as round as a drumstick (three-fourths of an inch in circumference) with no point on the end of it. When she questioned Dr. Smith as to why he used the stick, she recalled Dr. Smith advising her that that is how he punishes kids. She advised him that she did not want her kids hit and informed him that she would go to see Superintendent Zaros. Since Superintendent Zaros was not available at that time, Mrs. A.K. reported the incident to Miss Holmes, an assistant superintendent of schools, who advised her to file a complaint in municipal court (which Mrs. A.K. did) and promised to inform Superintendent Zaros of the situation.

On cross-examination, Mrs. A.K. recalled that there had been an investigation prior to this incident as to whether her three children were properly attending Central School and admitted that she was annoyed with the Orange Public Schools because they questioned whether, and seemingly did not believe, she lived at the address she had given. More specifically, prior to the incident with A.K., she was apparently questioned by Smith as to where she lived. Mrs. A.K. recalled that after she informed Dr. Smith that they lived on Spring Street, and not on Williams Street with an aunt as A.K. had apparently stated, the conversation ended. She indicated that although she was not upset, she was concerned as to the questioning.

In an effort to refute the testimony of A.K. and his mother, Mrs. P.F., the mother of J.F. and D. W., both of whom attended Central School, was called to the stand

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to testify. She indicated to the court that D., who is presently in the third grade, had been disciplined by Dr. Smith when he was in the first grade for hanging on the steam beams in the boys room. She recalled learning of this incident from Mrs. A.K., who called her two weeks after the incident to ask her if D. had told her that he had been misbehaving with A.K., and been hit for this as was A.K., who had a bruise as a result. Mrs. F. told Mrs. A.K. that if D. had been hit, he would have told her, which he had not done. She indicated, however, that she would ask him. She testified that when she questioned D.W., at first he did not remember it. When asked again, he recalled that he and A.K. were hanging on the steam beams and could not get down. As a result, the teacher got Dr. Smith to get them down. He told her that they were yelled at by Dr. Smith and told that they were bad, and he was further advised by Dr. Smith that he would call their parents if they did it again and would have their parents spank them in front of the whole class. Mrs. P.F. told Mrs. A.K. that D.W. had no bruise on him and had not said that he was hit. In response to Mrs. A.K. advising her that she might have to go to court, Mrs. P.F. recalled telling her that she would not go because D.W. had said he had not been hit.

Mrs. P.F. recalled having a conversation with Superintendent Zaros, in regard to this incident, during which he asked her if Mrs. A.K. had spoken to her and inquired as to whether D.W. had been hit. On a second call, Superintendent Zaros wanted to know if she had reconsidered and wished to bring charges. Thereafter, she saw Zaros at a Board meeting during which he said, "if it weren't for you, the incident would not have gone this far." She stated that she did not know what Zaros meant by this comment.

On further questioning, it became apparent that Mrs. P.F. has positive feelings for Dr. Smith. When she had problems with her oldest son who had to repeat the fifth grade, Dr. Smith (apparently, in order to allow him to graduate with his sixth grade class) worked with him for one year. (Her son reported to Dr. Smith with his homework prior to the beginning of the school day.)

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More importantly, it became apparent that this witness is a member of a coalition (with an approximate membership of 40-50 people), whose primary goal is to try and retain Dr. Smith as principal. (It is to be noted that in addition to this goal, the coalition had other goals: a better school system, removing drugs, getting rid of police on the grounds and eliminating discontent with the Board of Education.) The witness participated in demonstrations sponsored by this group to achieve these ends.

Apparently, this group thought Superintendent Zaros should be discharged and Dr. Smith should be continued as principal of Central School. Mrs. P. F. indicated that the coalition felt that Smith was being harassed because he was black and that corporal punishment was an issue only because a white parent had complained. (Although blacks had made complaints for years, nothing had been done about their complaints.) In sum, the coalition believed that Dr. Smith should be retained even if the charges were true; there were no bruises, the students were still in school and teachers in other schools had "bopped kids over the head." They felt an improvement of the whole system was needed, not simply the removal of one individual.

In addition to the above, it became apparent on cross-examination that Mrs. P.F. is personally in favor of corporal punishment. Her belief is based on a religious conviction — which amounts to "sparing the rod and spoiling the child." Thus, she indicated that she would have no objection to corporal punishment being inflicted on her child with her permission as long as there was no excessive use of force. In fact, when she was having difficulty with her older son J.F., she gave Dr. Smith permission to use corporal punishment. More specifically, upon being told by Dr. Smith that he sometimes had to reprimand J.F., she recalled advising Dr. Smith that he could spank J.F. In response, Dr. Smith did not inform her that it was against the law of the State of New Jersey for a principal to spank a child, but apparently indicated instead that although he doubted he would use it, he would call first to advise her prior to doing so. Mrs. P.F. claimed that he never did this. (It is to be noted that this testimony was confirmed by Smith who testified that Mrs. P.F. did give him permission to hit D.W. Admitting that he

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did not tell her that corporal punishment was against the law, he claimed, however, that he had no intention to use it.)

On questioning by this judge, the witness indicated that while it would not concern her if she found that Dr. Smith had hit her child for hanging on the steam beams (apparently, she would have been concerned if she had not been informed), when she called to inquire, she was advised by Dr. Smith that, although the incident had occurred, he had not hit the boys. It is noteworthy that Mrs. P.F. was apparently annoyed at Mrs. A.K.'s interest in the matter and the actions which she took in order to have D.W. testify in prior proceedings. She was similarly annoyed at Superintendent Zaros.

In an effort to explain and counter Mrs. P.F.'s statements, Superintendent Zaros, testifying for the Board, indicated that in response to Mrs. A.K.'s complaint, he called Mrs. P.F. to tell her that Mrs. A.K. had said that D.W. was hit along with her son, A.K. He recalled that Mrs. P.F. indicated that it was true but stated that she did not wish to get involved. He remembered that after the charges were proferred against Dr. Smith, at a meeting of 12 parents and the majority of the members of the Board (apparently in regard to the charges herein), Mrs. P.F. screamed at him, stating that she had never said that. He recalled advising her that if she had not confirmed Mrs. A.K.'s accusation, they would not be at that meeting.

In a further effort to refute the testimony of A.K. and Mrs. A.K., Dr. Smith assumed the stand and recalled that after he received a report of children hanging on the pipes, he saw A.K. and D.W. hanging on the pipes. Inasmuch as they were in imminent danger, he took them down from the pipes. Prior to sending them back to class, he brought them to the office and spoke with them regarding their behavior. He denied that he ever struck A.K. It is noteworthy that Smith also indicated that his only dealings with Mrs. A.K. were in regard to an attendance check which became necessary when A.K. indicated that he did not live at the address given. Although Superintendent Zaros transferred the children to another school, despite the fact that Dr. Smith advised him that they might be living outside of Orange and a check was being done, he recalled

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that the record reflected that Mrs. A.K. did in fact live on Spring Street where she claimed to live.

In a further effort to prove that A.K. had not been hit by Dr. Smith, respondent relies on the testimony of Jeffrey Luckman given in municipal court on May 26, 1981. See R-12 in evidence. (It is noteworthy that since the court found that Luckman was unavailable to testify, R-12 was received into evidence.)

Mr. Luckman testified that he was in Dr. Smith's office on February 12, 1981 when one or more children were brought in. However, when asked if one of those children was A.K., he stated that he did not know the names of the children. When asked whether he saw the child in court, he replied, "Tm not sure. I know he was very little." Apparently, Mr. Luckman on direct examination could not identify A.K.

Mr. Luckman testified that he was in Dr. Smith's office the entire time the children were there and that Dr. Smith did not hit them. Importantly; however, what he did hear was "Dr. Smith speaking to them about misbehaving in class and peeing on the floor in the bathroom and then telling them not to, not to keep carrying on in class and to go back, that he would get in touch with their parents."

The court agrees with petitioner's argument that the reprimand overheard by Mr. Luckman had nothing whatsoever to do with the incident discussed above. The incident resulting in A.K. being present in Smith's office involved climbing on doors and swinging on pipes in the boys' room. It had nothing whatsoever to do with misbehaving in class and certainly nothing to do with anyone urinating on the floor in the bathroom.

Although on cross-examination, Luckman identified A.K., he indicated that he did not know the names of the youngster involved and when asked whether he was sure about his identification of A.K. said, "Well you have to take into consideration it's for a few — it's not very long I see these boys and, you know, I didn't keep them in my memory." The court acknowledges that the next question and answer cemented his lack of certainty:

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"Q — Okay. You don't know their [sic], you don't know their names, do you?

A — No."

In evaluating the testimony regarding the A.K. incident, the court has, as discussed above, given very little weight to the testimony of Jeffrey Luckman. Although he apparently observed some incident with a young child and Dr. Smith, the incident to which he was privy apparently did not involve the incident of hanging on the steam beams. The court is further unimpressed with the testimony of Mrs. P.F., and finds it to be, due to her feelings for Dr. Smith as well as her belief in corporal punishment, incredible. In contrast, this court, recalling the testimony and the demeanor of both A.K. and his mother, finds their testimony to be not only corroborative of each others, but also both believable and credible. It is to be noted that the court dismisses the notion that since there was some dispute as to where the K. family lived, this provided the motivation for A.K. and his mother to fabricate their testimony.

Corporal Punishment as to O.G.

The next student to testify on behalf of petitioner was 11-year-old O.G., who attended Central Avenue School when Dr. Smith was principal and he was in grades K through four. O. testified that when he was in the first grade, he and another boy were sent to the office for fighting in the coatroom. Alone with Dr. Smith in his office, they were told by Dr. Smith to bend across the chair and to hold the chair. O. stated that Dr. Smith hit him twice on his backside with the drumstick, which hurt him and made him cry. He recalled that the other boy was hit once and cried.

On another occasion, when he was in the fourth grade, he recalled that as a result of leaving school with a boy named K.P., he was sent to Dr. Smith's office. At that time, upon being advised by Dr. Smith to turn around on the chair and with the office door closed, he was hit by Dr. Smith three times on his backside, with a pointer approximately

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three feet long and one-half inch to three-quarters of an inch in circumference. He noted that the pointer hurt him more than the drumstick and made him cry. He further stated that he saw K.P. hit two times and cry. As a result of being hit, O. left the building without permission and, thus, was called to the office the next day and hit with the pointer once. Again, he cried because it hurt. On this occasion, since he left before K.P., he did not see Dr. Smith hit him.

While he could not specifically recall any other times he had been hit, he stated that he had been hit by Dr. Smith about 15 separate times and had been with K.P. on most of these occasions. Although all of these "hits" occurred on the backside, the number of whacks varied. He further indicated that Dr. Smith would get on his left-hand side and come down with a snap with the stick. He recalled that after one such occasion he used a mirror to look at his body and saw a purple mark, like a dent, straight across his buttocks.

In addition to the above, O.G. testified that he saw Dr. Smith hit J.B. (who is in the fourth grade), and observed J.B. cry. On another occasion, he recalled that when he was sent by an aide to accompany B.A., a third grader, to the office, he waited outside and heard B.A. crying. Although he did not see B.A. hit, he testified that, about three minutes after the incident, B.A., upset, told him that Dr. Smith had hit him. He stated that he never told his teachers that he had been hit by Dr. Smith, and did not tell his mother until she found out and confronted him.

On cross-examination, O.G. indicated that most of the incidents of "hitting" occurred when he and K.P. cut classes to go to Orange Park. He claimed, however, that he cut classes as a result of being hit. Although he recalled that he was not disciplined other than by being hit, he admitted that he was suspended every time he was hit and was also suspended for fighting, which occurred three times a week while he was in the fourth grade. He indicated that he did not think that his mother and Dr. Smith got along and stated that he did not like Dr. Smith because he hit him. O.G. noted that his stepfather

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advised Dr. Smith not to hit him. However, after his stepfather left his mother, Dr. Smith started hitting him again.

O.G.'s testimony was confirmed by Ms. Burt, team leader of the intermediate unit at Central School (grades 4, 5, and 6) for the last eight years. She recalled that O.G., who was in her class for three years, the fourth, fifth and sixth grades, came into her class crying, pushed the books aside and was muttering. She advised O.G. to settle down and asked him what happened. He told her that he had gone to the office, and in his muttering, said, "He is not going to hit me again." Ms. Burt indicated that the same situation occurred with O.G. on more than three but less than ten other occasions, but did not recall if she had sent O.G. to the office on the occasions when he came back crying. She noted, however, that it was unusual for boys of that age to cry in front of female teachers.

Of further interest in evaluating O.G.'s testimony is the fact that the testimony of Debbie Luckey, a teacher, who testified for respondent, indicated that she talked to O.G. a great deal in the hall and the playground during the last school year, and that during these conversations, O.G. never told her a lie. In addition, in her dealings with O.G. regarding fighting, O.G. never denied striking another individual. Nonetheless, she had no opinion regarding O.G.'s honesty and veracity. It is to be noted that although Reginald Thaxton, a juvenile aide officer, who testified for respondent, indicated that O.G. had lied to him in the past, he did not testify as to O.G.'s reputation in the community for truth, honesty and veracity.

In a further effort to refute the testimony of O.G., Dr. Smith indicated that O.G. is dishonest, incorrigible, and has a terrible reputation. He believed the reputation to be accurate, and stated that O.G. is untruthful and has an ability to corrupt other students.

In any event, Dr. Smith, who recalled suspending O.G. about 15 times, indicated that he observed O.G. fighting in school on several occasions and thinks he struck O.G. Noting that karate kicking had become fashionable, he stated that he hit O.G. when he

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was fighting or to restrain him. Noting that this may have occurred three, four or five times, he admitted that on occasion he "used force." While he did not recall each specific incident, he indicated that he intervened on five occasions, by grabbing O.G. off a kid or hitting him on the leg because O.G. was going to hit somebody. He indicated, moreover, that he may have use a pointer or drumstick and, in fact, went to the schoolyard (where these incidents occurred) carrying a drumstick.

On cross-examination, Dr. Smith recalled that he observed from his office O.G. karate-kicking someone. Determined to go out and stop the boys from kicking, he picked up a stick and went to the yard. When O.G. persisted, after being directed to stop, Dr. Smith struck him (he may have struck another child also) one time on the backside and made a general announcement to them to stop. He acknowledged that he did not grab the child and say stop, but, rather, not knowing if O.G. heard him, instead inflicted the blow to get his attention. He indicated that if there had been two children involved there would have been no problem restraining O.G. with his hand; however, with eight to ten children this could not be done.

Testifying as to incidents of discipline concerning O.G., Dr. Smith recounted his sincere efforts on one occasion to find and speak to O.G. who had been missing from Thursday to Monday. In addition, he recalled specifically that two weeks after O.G. had been disciplined for leaving school on one occasion, O.G. and another boy left again and went to Orange Park. Concerned that O.G. would have two major roads to cross to go to the park, Dr. Smith made an effort to find him. Annoyed at finding O.G. in Orange Park, Smith grabbed O.G. and the other boy to bring them back to school. When O.G. resisted his efforts, was rude, disrespectful and pulled away, Dr. Smith stated that he may have used force with the pointer, which he "may" have had with him.

On cross-examination, Smith admitted that when he went to find O.G. he took the stick with him. Denying that he intended to use it to discipline O.G., he stated that he probably had the stick in his hand because he was using it at lunchtime. He further

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admitted that once at the park when he got out of the car, he took the stick with him; he claimed to be worried about the boys and desirous of discontinuing their misbehavior.

Of further interest was Smith's testimony on cross-examination to the effect that after he asked the boys why they went into the park and directed them into the car, when O.G. walked away, he apparently believed O.G. to be physically resisting him, and, thus, struck him on the backside as he walked away. Smith further indicated that he did not take O.G. by the arm to pull him into the car despite the fact that he considered the possibility of doing so. It is to be noted that Smith apparently, at this point, retracted on his testimony. He claimed that O.G. not only walked away but when Smith held on to him, kept pulling away and therefore was swatted. Further, Dr. Smith, who claimed that he was not angry at O.G., then stated that he struck O.G. apparently in order to protect himself. (It should be noted for the record that Dr. Smith is six feet, one inch tall and weighs 141 pounds.) Although he recalled stating in municipal court that he never hit O.G., he claimed that that statement was true in the context of that charge.

It is noteworthy that Dr. Smith testified as to his relationship with O.G.'s mother. He recalled that when O.G.'s mother received a telephone call to come to school, apparently angry at having to do so, she rushed in and swept everything off Dr. Smith's desk. Dr. Smith advised his secretary to call the police and, thereafter, filed charges against O.G.'s mother, N. J. When asked why O.G. would have lied, Dr. Smith indicated that O.G. lied because he resented authority and because of the number of times Dr. Smith had conflicts with him, his mother and his brother; this was a way for O.G. to get back at him. He stated emphatically that he never struck O.G. with a stick in his office at any time.

In a further effort to refute the testimony of O.G., Dr. Smith presented the testimony of Dehlia Rose Tortorella, who has been employed by the Orange Board of Education as an instructional aide since 1973 and has functioned in that capacity at

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Central School since March 1975. As an instructional aide, she is responsible for helping the teachers with the students, especially the slower students, and making dittos. From March 1975 until April 1981 Ms. Tortorella worked in the principal's office as an office aide and, as such, had a desk in the office parallel to Dr. Smith's office, although facing away from it. She spent the workday in the office, leaving only for breaks or to relieve a teacher, perhaps on the average of one hour a day. Apparently, from the position she maintained in the outer office, she could observe a portion of Dr. Smith's office wall which, although it was glass, was not transparent. Although she could hear sounds, talking and raised voices emanating from his office, she stated that these were indiscernible. She indicated, however, she never heard any noises from the office that indicated that an individual had been struck with a pointer or drumstick. Referring specifically to O. G., Ms. Tortorella testified that O. G. had been sent to Dr. Smith's office but did not recall that O. left the office crying nor did he indicate that Dr. Smith had hit him.

On cross-examination, Ms. Tortorella stated that she had in fact worked for Dr. Smith approximately 32 months at 20 workdays a month. Since on the average workday ten or more students were sent to the office, there were approximately 6,000 "comings and goings" of students to the office during her tenure at Central. She admitted that it was, therefore, difficult to remember a particular incident with any degree of precision; however, just because she did not recall a particular incident this did not mean that it did not occur.

It is of further note that Ms. Tortorella stated that almost all times students are being disciplined the door to Dr. Smith's office is closed. She claimed that although she observed students crying when they left Dr. Smith's office, she testified that she could not remember clearly which students cried. In essence, she felt Dr. Smith's discipline not to be her business and, therefore, kept out of it. She indicated, however, that she never saw Dr. Smith with a pointer and did not know if he had it in his office. In sum, she stated that she had no suspicion that Dr. Smith was hitting students, she had not heard parents giving permission to Dr. Smith to hit their children, never heard a student complain about

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Dr. Smith hitting him, never heard a parent complain about a child being hit and never heard sounds that indicated that a child had been hit. In fact, if she thought a student had been hit, she contended that she would have reported this to the parent.

Despite these contentions, it is of interest to this court that Ms. Tortorella did recall the altercation between O.G.'s mother, N.J. and Dr. Smith which resulted in her calling the police. Although she claimed not to know what Mrs. N.J. was angry about, it cannot be ignored that she did reveal on cross-examination that Mrs. N.J. might have said something about her son being hit.

This court, in evaluating Ms. Tortorella's testimony, finds it to be less than credible. In so concluding, the court has been swayed by the testimony of Superintendent Zaros, who indicated that when he interviewed Ms. Tortorella with Mr. D'Italia (regarding the charges), she advised him that she understood that certain parents had given Dr. Smith permission to hit their children. More important, however, is the fact that Dr. Smith, by his own testimony (as will be discussed in greater detail herein), stated that he did in fact have a pointer and use it upon students. The fact that Ms. Tortorella now claims that she never saw Dr. Smith with a pointer is incredible and makes her testimony unbelievable. At best, Ms. Tortorella, apparently believing that Dr. Smith's discipline was none of her business, completely disassociated herself from any aspect of it. This can be gleaned from her testimony that, although she called the police regarding the N.J. incident, she did not know what Mrs. N.J. was angry about.

It is also important to consider the testimony of Carole Sunshine who was employed by petitioner from 1977 or 1978 and until 1982 as a math teacher of the fourth, fifth and sixth grades. Assigned to Central School, where Dr. Smith was principal, she indicated that she never observed Dr. Smith strike or hit a student. In addition, no student came to her directly and indicated that he had been hit. While her testimony related to many of the students who testified, in regard to O.G., she stated that she taught O.G. in fourth and fifth grades, during which time he lied about not doing work; he said he could not do the work when he could. She also experienced problems getting

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messages to his parents. She indicated that he was dishonest in regard to the other students to whom he told untrue stories. Recalling that the other teachers had the same problems with him, she stated that she found him to be dishonest and untruthful. While the testimony of Ms. Sunshine will be discussed in greater detail herein, it should be noted that Ms. Sunshine determined that O.G. (as well as certain other students) was untruthful and dishonest because he complained to her that he did not know how to do certain work assignments. Because in her mind she was satisfied that he had the ability, she determined that he was lying to her. The court agrees with petitioner that Ms. Sunshine apparently made no distinctions between lack of knowledge, lack of motivation, lack of ability to concentrate or the sundry other reasons which a teacher might explore in trying to understand why her students said "I don't know how to do it." The court, in any event, does not accept Ms. Sunshine's conclusion that as a result of this statement by O.G., he should be considered a liar.

In evaluating the testimony in regard to corporal punishment as it relates to O.G., the court has accepted the testimony of O.G. He appeared to this judge to be a credible witness who could recall with some degree of specificity the incidents of "hitting." His testimony was confirmed by Ms. Burt and was not refuted by Debbie Luckey. In addition, it appears that Dr. Smith, by his own testimony, admitted having hit O.G. In reviewing Dr. Smith's testimony, the court finds it to be fairly characterized as a fencing match in which he changed his strategy at all times in order to protect his position. Not secure in his attempts to demonstrate that he "used force" when O.G. was going to hit somebody (apparently, even in this context he used the pointer when words or grabbing O.G. off another child would have been sufficient), or to meet physical resistance (which translates into a refusal to comply with his wishes), he then implies that he used force to protect himself. However, despite this obvious jockeying for position, the fact that he used the stick in regard to the Orange Park incident indicates to this court the manner in which he approached the discipline of O.G., and causes this court great concern. Assuming the truth of Dr. Smith's testimony in regard to that incident, there appears to be no reason why O.G.'s pulling away or walking away from Dr. Smith would necessitate his being swatted with a pointer. Despite the inappropriateness of O.G.'s resistance, if true in fact, it still did not warrant Dr. Smith's response. Dr. Smith

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simply did not use such methods as talking to O.G. or if necessary holding him by the arm in order to pull him into the car. Rather, his first reaction was to use the stick he carried with him. Thus, even Dr. Smith's own testimony appears to this court to indicate an improper and unnecessary response. In any event, this court, however, as noted above, finds the testimony of O.G. to be credible and, therefore, has concluded that the usual manner in which Dr. Smith disciplined O.G. was, in fact, to hit him with a stick while in his office.

Corporal Punishment of W.G.

W.G., O.G.'s 15-year-old brother who is presently in the 9th grade, testified that when he attended Central School from the second through the sixth grades, Dr. Smith was principal. W. recounted an incident in which the custodian advised W. and his two friends, L.M. and K.H., who he believed were part of a gang, that they had been caught writing on the bathroom wall and brought them to Dr. Smith's office. W.G. stated that he went into Dr. Smith's office alone, while the other boys sat outside on chairs; he recalled that the door to the secretarial area was closed. After Dr. Smith asked him what happened, and he responded that the gang called the Black Knights had written on the bathroom wall, Dr. Smith told him to turn around, bend over the chair and put his hands on the handles of the chair. Having done this, Dr. Smith, who had never hit him before, hit him hard twice, with a regular one-foot long drumstick. W.G. stated that he knew what Dr. Smith was going to do when he saw the drumstick from the cabinet, inasmuch as other students had advised him that they had been hit. W.G., who did not cry because he considered himself "too cool," recalled that he left the office shaking and, although he observed the other boys going into Dr. Smith's office together, did not talk to them or the secretaries about this. Rather, he went to his homeroom and did his work. Although his buttocks hurt him during the class, he stated that he never examined his buttocks to see if there was a welt. He stated that towards the end of class he told L.M. that he had been hit and when he went home, similarly advised his mother. Although he could not recall her response, he noted that she was angry at Smith.

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W.G., who indicated that on most occasions Dr. Smith hit him for fighting, recalled specifically that in the fifth or sixth grade he had a fight with a boy and was taken by the custodian to Smith's office. After being asked what happened, Dr. Smith said to him, "Do you want to get hit or go to the second grade?" He then hit W.G. two times in the manner described above and sent him to the second grade for about one week.

On further questioning, W.G. stated that while he was in the fourth or fifth grade, he was sent to the office for fighting at lunchtime and Dr. Smith hit him two times "hard" on the palm of his hand with a stick (which he described as round and thinner than the end of a gavel). Referring specifically to the manner in which he was hit, he recalled that, at Dr. Smith's request, he put his left hand out, palm up, grasping his left wrist with his right hand. In order to describe the strength with which he was hit, W.G. demonstrated for the court how he was hit by Dr. Smith. Using a stick and a chair, W.G. hit the chair with what was described by this judge at the time "as a forceful blow from a distance of approximately nine inches and including a jerk back motion prior to hitting the chair." W.G. indicated that at the time he was hit it stung so much that he closed the hand that had been struck. Asked by Dr. Smith to open his hand, he was then struck again by him and started to cry.

W.G. described how on one occasion an aide whose name he could not recall brought him to Dr. Smith's office and advised Dr. Smith as to what W.G. had done wrong. After W.G. admitted to Dr. Smith that the aide had reported the matter accurately, Dr. Smith took a drumstick, advised him to get over on the chair and hit W.G. on the buttocks. He recalled that he was alone in Dr. Smith's office when he was hit on this occasion as well as all the other times.

W.G. indicated that he was hit approximately eight or nine times during the 4th and 5th grades and, on those occasions, always turned his chair around, put his arm on the chair and was hit on the backside two times with the drumstick. He recalled that on one occasion he was hit with a drumstick that was long, skinny, and had a black tip at the end. Although he never saw Dr. Smith hit another student, he did recall that his homeroom

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teacher, Mr. Williams, upon observing students return to class crying, asked, "Did Smith do it again?" More specifically, W.G. indicated that after the pointer incident Williams asked him why he was crying. After W.G. explained, the other students said, "He did it to me too." Referring to the fact that he advised others of the incidents, W.G. stated that he told everyone about the incident precipitated by a fight in the sixth grade, when Dr. Smith hit him and then told him to go to second grade. He specifically recalled telling his teachers, Miss Stainman, Ms. Benjamin and Mr. Williams. (Apparently, every time he was sent to the second grade in this manner, he advised his teachers of what had occurred; he did not recall their responses.) In addition, he advised Ms. Burt and Ms. Winnick that he had been hit on the palm of his hand and also told Ms. Bonodeo on one occasion and Ms. Burt on two or three occasions about being hit on the backside. In sum, he claimed that when he was hit he told either a friend or a teacher. Apparently, he told his mother about the situation and she went to see Superintendent Zaros. Admitting that on some occasions he cried, he stated that he usually cried as he was leaving, inasmuch as he attempted to hold back the tears. Although the secretaries saw him cry on at least three occasions, they never said anything to him.

Although W.G. admitted that he grabbed an aide on one occasion because she grabbed him, and on another occasion responded to being grabbed by a teacher, by grabbing back, he claimed that he never touched Dr. Smith because he believed Dr. Smith to be the "big man in the school." Not only did he look up to him more than to a teacher, but he was concerned that he would get a "worse punishment." In essence, he was "too scared" to do anything to Dr. Smith. He stated that when he told his brothers about the situation, they wanted to go and get Dr. Smith; he felt this approach would simply make matters worse.

On cross-examination, W.G. admitted that he was usually wrong when he was sent to the office. Although angry at Dr. Smith for hitting him, W.G. denied that he made up any of his testimony because of this feeling. He stated that he signed an affidavit in this case to help and protect other kids by getting Dr. Smith out of the school.

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On questioning by this judge, he stated that he remembered the incidents because it was scary to be hit by someone other than his mother; nobody had ever hit him other than his mother.

W.G.'s testimony was not in fact corroborated by the testimony of Mr. Williams, his teacher. Although Williams admitted that he believed corporal punishment was being inflicted based on the conversations he heard, (see subsequent discussion of testimony of Williams), he stated, however, that W.G. never told him that he was hit by Dr. Smith and never came to him about it.

In an effort to attack W.G.'s credibility, respondent offered the testimony of Everett Vernon Zabriskie, who has been employed by petitioner for 26 years as a physical education instructor, and, as such, is assigned to Central as well as four other schools. Until last year when his service at Central was cut, he spent two and one-half days there. During that time, no student ever told him that he was hit by Dr. Smith nor did he ever observe a student hit. In regard to W.G., Zabriskie indicated that he had taught W.G. in gym class during the last three years. Questioned about his reputation, he revealed that at times W.G. was not honest and would lie. (The statement that W.G. had lied on occasion was confirmed by Reginald Thaxton who indicated that although W.G. "lied to him in the past" he did not know W.G.'s reputation in the community.) Believing that W.G. would be honest as far as it suited his purposes, he explained that if W.G. figured that he was cornered he would lie. Of further interest is his testimony regarding Dr. Smith. Although he did not know Dr. Smith's reputation in school, he believed Dr. Smith had done a fine job, backed his teachers and tried to give the students a better education.

A further indictment of W.G. came from Ms. Sunshine who indicated that she had taught W.G. for one year. During that time, she had difficulty with him because he said he could not do work when in fact he could do it and, in addition, recalled having problems getting notes to his parents. According to her, he lied a lot to the other children and scared them by saying that he would beat them up. In discussions concerning W.G. with the other teachers, she recalled that they believed him to be an untruthful force. She concluded that he was not a truthful, honest child.

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Ms. Tortorella, testifying as to W.G., did not remember him crying or complaining that Dr. Smith hit him after leaving Smith's office. Further, she did not remember W.G. going to Dr. Smith's office with L.M. or K.H., or any other boys.

Of further import was the testimony of Dr. Smith, who attempted to refute W.G.'s statements. It should be noted at the outset that Dr. Smith's opinion of W.G. was that he is untruthful and dishonest. Although he believed W.G's reputation to be better than O.G.'s, Smith felt W.G. had a reputation for untruthfulness and dishonesty.

Recalling that he disciplined W.G. (i.e., talked to him, kept him in the office, sent him to a different grade or sent him home) he stated more specifically that on one occasion when W.G. and the other boys were beating up someone else, he ran out to put a stop to it. When W.G. persisted, Dr. Smith used a pointer to get him off the boys. He then took the boys to his office, investigated the reason for the incident and suspended W.G. for one or two days.

On another occasion, Dr. Smith received a report that W.G. was writing on the bathroom wall. He then observed writing on the bathroom wall, which referred to a group to which W.G. belonged, and, further, found W.G. in the bathroom. After taking W.G. to the office, he thereafter sent him to the bathroom to clean up the wall. He denied striking W.G. while in his office for writing on the bathroom wall.

Although Dr. Smith could not be specific as to the occasions, he admitted that on a number of occasions he intervened when W.G. fought or used karate. For example, he recalled hitting W.G. with a stick in order to stop him from punching a girl in the schoolyard. In sum, Dr. Smith testified that he never struck W.G. in his office in the manner testified to, nor had he ever struck W.G. on the palm of his hand. He admitted, however, that he would strike W.G. across the buttocks in the playground "to get his attention" but not with the intent to inflict harm. He believed that W.G. lied because of the conflict Smith had with his mother and the persistence of Dr. Smith in trying to stop his behavior.

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The court was unimpressed with Dr. Smith's attempt to refute the testimony of W.G. The court is less than satisfied with testimony from a principal that attempts to justify the striking of a child in order to "get his attention" and further to break up fights or karate kicking which occurred on "unspecified" occasions. In addition, the breaking up of a fight through the use of a pointer being inflicted on a child appears to this court to be unwarranted as a general approach to the resolution of such actions. Although the court has taken cognizance of the testimony of Zabriskie, Thaxton and Smith that W.G. could lie, especially if cornered, the court does not believe that W.G. lied in his testimony before this court. Not only was W.G. not "cornered" in these proceedings (he was not on trial here) but he had no real motivation to fabricate his testimony. In any event, in evaluating his testimony, this court felt it to be an honest rendition of what occurred. It was noted by this judge at the time that W.G. testified that W.G. was an excellent witness; he was bright, believable and unshakable. His testimony had the ring of truth and is accepted as credible.

Corporal Punishment as to A.R.

A.R., who is 13 years old, testified that in 1981, while in the sixth grade at Central Avenue School, he was hit on one occasion when he was sent to Dr. Smith's office by his teacher, Ms. Burt, for passing out candy in class. Alone in Dr. Smith's office, with the office door closed, he recalled being asked by Dr. Smith (whom he did not believe even knew his name prior to this time) to turn around, put his hands on the arm of one of the chairs in front of Dr. Smith's desk and bend over the chair. (There was enough room to bend over the chair without moving it.) His backside was then facing Dr. Smith, who came from around his desk in order to hit him. A.R. recalled that he was then hit two times by Dr. Smith with a stick, which he had noticed in Dr. Smith's hand, and which he described as like a drumstick but not a drumstick, around 15-18 inches long, round and about one-half inch in diameter, all one thickness, with nothing on the ends. He stated that the strike hurt him, and he started to cry after the two hits. A.R. left the office and, still crying, returned to Ms. Burt's class. When his classmate, K.M., asked him if he had gotten hit, he said "Yes." In response to Ms. Burt asking him if it was

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true, he said that it was. He recalled, however, that Ms. Burt told him that nothing could be done. After his mother overheard him discussing it with his brothers and sisters, he told his mother about being hit. She appeared to be upset.

Although he did not recall with any specificity prior proceedings related to this matter, claiming they were a long time ago, he did state when asked why he remembered being hit, "If I hit you, wouldn't you remember?" Admitting that it was important to him, he indicated that he did not like Dr. Smith after he hit him, was angry at him and wanted to hit him because he believed that since Dr. Smith was not his father, he had no business putting his hands on him. Although he acknowledged he was wrong for passing out candy, he believed he should have been suspended instead.

A.R.'s testimony was corroborated by Ms. Burt, team leader of the intermediate unit at Central School (grades 4, 5 and 6) for the last eight years. While she did not recall sending A.R. to the office for passing out candy, and did not think he habitually did this, she stated she would have sent a child to the office for this after three times. She indicated, however, that she had not sent him to the office on the occasion when he advised her he had been hit.

She testified that when A.R. was in the sixth grade he came from the office to her fourth, fifth, and sixth grade language arts class crying. Although usually well-behaved, on this occasion he was nasty. Agitated, he became a serious problem in class. She recalled that he said, "I got hit, Dr. Smith hit me." After he told her that he had been hit, she did not give him any more time to discuss this but told him to tell his parents; she could not help him. Although she admitted that she knew that corporal punishment was a violation of the law, she stated that she took no action because Dr. Smith was principal and she felt he could do, and had the authority to do, what he wanted.

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Of interest to this court is Burt's acknowledgement that because of the complaints she received and seeing the students cry, she had an idea that corporal punishment was being inflicted. Although she had knowledge of this for two to three years, she did nothing about it and allowed it to go on. She stated that she believed that she had to obey the rules of the principal and attempted to justify her inaction by stating that she had not seen him do anything. Apparently, afraid for her own job, she did not tell the parents of the students who complained.

A.R.'s testimony was further corroborated, at least in part, by the testimony of Mr. Williams. Apparently, there were many discussions in front of him because he had a close relationship with the students, and if there was a problem, the students would naturally come to him. In fact, when the students, who came from the office crying, calmed down, they would ask certain types of questions which indicated that they had been hit. He apparently admitted, therefore, that the students were accurate when they said, before this court, that they told Mr. Williams about being hit. Mr. Williams indicated that he overheard conversations in which A.R. was involved regarding Dr. Smith hitting children. In regard to A.R., he specifically recalled overhearing A.R. say, "He is not my father. I'm not going to let him get away with this," which he believed was a clear reference to being hit by Dr. Smith. Although he admitted he concluded, based on the above facts, that Smith was administering corporal punishment and believed that A.R. had not fabricated these stories, he stated, however, that he did not advise the students that this was against the law and to take official action. In addition, he informed no one, believing instead any action to be the responsibility of the parents. Further, inasmuch as he was new to this system, he did not want to make waves or have problems with Dr. Smith, with whom he had a good relationship. He felt he was in a quandary.

In an effort to refute A.R.'s testimony, corroborated in part by Ms. Burt and Mr. Williams, Dr. Smith testified that A.R. was not truthful or honest and had a similar reputation. Although he did not dispute the fact that A.R. had been sent down to the

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office for passing out candy and that he advised A.R., who had just transferred to Central, that this was impermissible (which A.R. apparently understood since he did not do it again), when questioned as to whether he ever struck A.R. in his office for passing out candy, he described such a suggestion as "ridiculous." Although he claimed that he never struck A.R., he stated that he may have used force to restrain him, hold him or pull him off a child. (Apparently, he did not have to strike him.) When questioned as to why A.R. may have given misstatements about him, Dr. Smith indicated that A.R. may have disliked him because he called his mother into school and, in addition, had to maintain an image with the "gang." Dr. Smith further recalled that A.R. advised him to watch it, because he got one principal fired.

In addition to the above testimony regarding A.R., the court has also considered the testimony of Ms. Tortorella, who indicated that she did not recall receiving a note that A.R. had been passing out candy, nor did she recall him crying or claiming to have been struck by Dr. Smith. In addition, the court looked to the testimony of Carol Sunshine, who indicated that she taught A.R. math for two years and was familiar with his reputation in the school community for honesty, veracity and truthfulness. She alleged that A.R. never admitted starting fights and his behavior could be deemed untruthful. Upon discussion of A.R. with the other teachers, they revealed that they had the same problems with him. She stated, therefore, that A.R. had a reputation in the community for not being honest or truthful. It is noteworthy that on cross-examination Ms. Sunshine was not sure she had in fact taught A.R. for two years and revised her testimony to indicate that he transferred to Central in the sixth grade. It is further noted that although Reginald Thaxton indicated that A.R. lied to him in the past, he did not know his reputation in the community.

In reviewing the evidence in regard to the charge of corporal punishment as to A.R., this court finds the testimony of A.R. to be supported in large measure by that of Ms. Burt and Mr. Williams. They have, in essence, corroborated A.R.'s statement that he

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was hit by Dr. Smith. The testimony of Ms. Tortorella, even if believed, is of no moment since it simply constitutes a statement as to what she recalls. In addition, as will be discussed herein, the testimony of Ms. Sunshine has been given little weight by this court. In sum, therefore, the court believes A.R. to be a credible witness and further gives his testimony credence due to the fact that it was corroborated by two teachers at Central School.

Corporal Punishment as to J.B.

J.B., who is 13 years old and presently in the eighth grade, indicated that he was struck by Dr. Smith several times while in the sixth grade at Central School. He recalled that he had been sent to the office with another boy, R.J., for fighting in the schoolyard. The boys, alone in the office with Dr. Smith (the door to the office closed), were questioned as to what had happened. R. told Dr. Smith that J.B. had kicked him, which J.B. apparently denied. R. then advised Smith that J.B. had kicked him and that he had kicked J.B. back. At this point, Dr. Smith asked R. to get up and turn around. R. placed his hands on the arm of the chair, faced the chair, his behind toward the front of the desk, and after he pushed his chair out so Dr. Smith could get in front of him, Dr. Smith hit R. with a pointer, approximately 20 inches long and three-quarters of an inch round, slightly above his buttocks, two to three times. R. said nothing but began to cry. His turn, J.B. turned around, assumed the same position and was hit two to three times. In response to his statement to Dr. Smith, "What's wrong with you," he was hit again. He stated that it hurt him and he cried. Told by Smith that they could leave, he went back to his class, advising no one that he had been hit.

On another occasion, he recalled that he was in Ms. Sunshine's class when Dr. Smith walked into the room and sent him to his homeroom to look for his homework. J.B. went back to his homeroom and was looking for his homework when Dr. Smith came into the room and said to him, "What is taking so long, you know that it is not there." He then asked J.B. to step outside of the classroom, into the hallway. Alone with Dr. Smith in the

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hall (his homeroom teacher, Mr. Williams, remained in the classroom), he was told to put his hands on the wall and then Dr. Smith hit him one time above his buttocks with a pointer which Smith had picked up in the classroom. J.B. recalled crying.

J.B. recalled another incident where he had been pulled out of the lunchroom line by an aide (whose name he did not know) when accused by F., a younger student, of punching him. Both boys were then sent to Dr. Smith's office. After J.B. explained why he was there, and F. indicated that J.B. had hit him, Dr. Smith pulled J.B. by the top button of his shirt and asked why he was pushing little kids. He then hit him more than once with the same stick and in the same manner in which he was hit before. J.B. recalled that, before he was hit, Dr. Smith sent F. out of the office and closed the door. J.B. recalled that he cried and also told Mr. Williams that he had been hit. It is noteworthy that on cross-examination, J.B. did not remember if he was hit during this incident and could only remember being hit on other occasions. On redirect, however, he claimed that Dr. Smith had, in fact, hit him when he was sent to the office as a result of F.'s complaint. He claimed to have said otherwise on cross-examination because he was tired and getting confused.

J.B. further testified that on one occasion when he was crying, Mr. Williams asked him if had been beaten, and he said that he had been. Although the only student he saw beaten was R., he stated, however, that he saw D.L. coming from Dr. Smith's office. When he asked D.L. what was wrong with him, D.L. told him that Dr. Smith had beaten him and that he was angry at his stepmother because she had given Dr. Smith permission to hit him. He recalled that, on another occasion, while he was sitting on a chair in the secretary's office as a punishment, he saw T.L. and A.B. come out of Dr. Smith's office crying. (It was apparently on this occasion that J.B. heard a "whack" in regard to D.L.) He asked them if Dr. Smith had beaten them and they said, "Yes." T.L. stated that he was going to tell his sister about it.

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J.B. recalled that when he advised his mother that he had been hit, she responded by asking "who Smith thought he was to hit J.B." More specifically, J.B. indicated that when he told his mother about the incident in which he and R. were hit, she was angry and stated that she did not want Dr. Smith hitting him. When he was hit again (the incident with the homework) his mother spoke to Smith. However, when he was hit after that (the incident with F.), he advised his mother, who determined to speak to Superintendent Zaros about it. Although he was not hit again, he did advise his mother that his friends had been hit and specifically remembered telling his mother that T.L. and A.B. said that they had been hit.

On cross-examination, J.B. admitted that his conduct (in particular, fighting) sometimes caused him to get suspended and that he had been suspended (at least three times) prior to advising his mother that he had been hit. He recalled, however, that after his mother became involved, Dr. Smith took it out on him, and he was suspended every other day. He denied that he wanted to get back at Dr. Smith for this.

In an effort to corroborate the testimony of J.B., petitioner called Mr. Williams to the stand to testify. He did not recall Smith coming into his room while J.B. was looking for homework, nor did he recall Smith taking the pointer out of his room. Moreover, he did not remember J.B. informing him that he had been hit by Dr. Smith, although he did state that he might have overheard a conversation J.B. had with other students to this effect.

In order to refute the testimony of J.B., petitioner relied on the testimony of Carole Sunshine, who stated that she had taught him for one year. Demonstrative of the fact that he was underhandedly untruthful, she noted that he opened letters that had been sent home. In discussions that she had with the other teachers regarding J.B., she was advised that they had the same problems with him. It was Ms. Sunshine's opinion, which, according to her, matched that of the other teachers, that he was not an honest and

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truthful child. To substantiate Ms. Sunshine's testimony, and prove that the events testified to by J.B. did not occur, Ms. Tortorello was called to testify. Although she recalled J.B. coming into the office crying, she did not recall that he claimed that he had just been hit. Further, she did not recall if J.B. and R.B. had been together in Dr. Smith's office, did not know a student named F., and did not recall J.B. going into Dr. Smith's office with T.L. or A.B.

Testifying as to this charge, Dr. Smith recalled that J.B. had a reputation for being untruthful, untrustworthy and a bully. His opinion of J.B.'s honesty was the same as his reputation.

More specifically, Dr. Smith testified that the first time he used force to restrain J.B. was in the primary students' bathroom. Observing J.B. holding a first grader's head and pushing it into the toilet bowl, threatening to drown him, Dr. Smith smacked him and pushed him off the boy. Dr. Smith admitted that he struck J.B. with a pointer on his backside while in the bathroom. (Upon hearing of the incident while in his office, he apparently took his stick with him to the bathroom.) He recalled using force on a second occasion when J.B. was administering a karate kick to a second grader. He stated that he smacked him with a pointer for this type of behavior, but did not bring him to the office. Although he indicated that J.B. had been in the office about ten times for disciplinary purposes (and recalled disciplining him by sending him command letters and changing his grade) he denied that he ever struck J.B. in the office with a pointer as J.B. described. Moreover, he did not recall J.B. coming into the office with R.J., denied striking J.B. in the hallway for not having his homework, or in the office for fighting in the lunchroom. When questioned as to why J.B. would tell such a different version of the facts, he indicated that J.B. would do so because he felt that Dr. Smith was unjustified in contacting his mother, changing his grade level and suspending him. According to Dr. Smith, J.B. denied events; in essence, he changed facts and believed events to be as he saw them.

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This court does not agree with Dr. Smith's assessment of J.B.'s credibility. The court observed the demeanor of the witness and evaluated his testimony. In so doing, this court found it to be quite specific and worthy of belief. Although J.B. did seem confused on one point, certainly his testimony in regard to the other specific incidents of corporal punishment was clear and consistent. By accepting the testimony of J.B., this court need not determine whether the scenario painted by Smith, if believed, would be exculpatory of Smith's actions. It may be that even if, as Dr. Smith indicated, J.B. was holding a first-grader's head and pushing it into the toilet bowl, Dr. Smith's action in smacking J.B. with a pointer might not be justified. Similarly, it is unclear whether his use of the pointer would be justified if he saw J.B. karate kicking a second-grader. The court observes only that this stick, by Dr. Smith's own testimony, appeared to be used continuously as a disciplinary measure, and, given that there are other, less severe, measures to be employed to stop unwarranted behavior, such action would be difficult, if not impossible, to justify.

Corporal Punishment as to T.L.

T.L., who is 14 years old and presently in the seventh grade, testified that when he attended Central School in the fifth and sixth grades, he was hit by Smith approximately nine to ten times. He recalled that in the fifth grade, he was sent by his gym teacher, Mr. Zabriskie, to Dr. Smith's office as a result of being involved in a fight with a girl named H. Smith told him and H. to come into his office, talked to them in his office, telling them that they needed punishment. Told to face and bend over the chair with his arms on it, T.L. stated that he was hit two times with the black end of a pointer, which was three feet long and approximately three-eighths of an inch in diameter, approximately three inches above his buttocks. As a result, he started to cry. He recalled that H., also told to bend over, was hit two times. He stated that Dr. Smith advised them that the next time this occurred they would be suspended. Although on direct examination he testified that after the incident he returned to Mr. Williams' homeroom, on cross-examination, he indicated that he returned to Mr. Devilas' class. In any event, he stated he told nobody about this incident, thinking it was "okay" to get hit.

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T.L. further recalled that in sixth grade when he and A.B. and some other kids were sent to Dr. Smith's office and Dr. Smith asked him if he beat up W.W., he told Dr. Smith that they were all karate kicking each other when a real fight ensued between W.W. and M.E. Although M.E. admitted beating up W.W., it was apparently Smith's conclusion that since all of the boys had bothered W.W. or used their feet, each one had to be punished. Thus, Dr. Smith hit each boy (T.L. believed Smith used the pointer) three times. (On cross-examination, he indicated that he was hit two times.) Although he did not remember the order in which the boys were hit, he did state that he remained in the room after being hit and saw each of the boys hit. Recalling that M.E. cried, he noted that although it hurt him and he was hit hard, he did not cry, inasmuch as he was used to it. He recalled that the door to the secretarial area had been closed by Dr. Smith.

On another occasion, after being warned by Dr. Smith not to get into trouble, he and A.B. proceeded to break up a fight between two girls and take them to the office. In response, Smith said, "Didn't I tell you about getting into fights or becoming involved?" and proceeded to hit the four of them with the pointer. Although the girls cried, T.L. stated that he did not cry because he was used to it. He recalled, however, advising Mr. Williams of this incident and asking him if he knew that Dr. Smith was hitting kids. Williams replied that he did not and that there was nothing that he could do. On another occasion he recalled that he was sent to the office concerning a math problem and hit two times by Dr. Smith while alone with him in the office.

He further recalled that in sixth grade when he was sent to the office by an aide, he was alone with Smith who hit him for playing around. He testified that he always told Mr. Williams about such incidents, asking specifically if he knew that Dr. Smith beat them.

Of particular interest is his testimony that on one occasion Ms. Sunshine called Dr. Smith to her classroom because the students were not doing their homework. In Ms. Sunshine's presence, Dr. Smith asked each student to complete a problem on the board and if the student did not get it right, hit him or her with a pointer. T.L. stated that neither he nor K. was hit at this time and although he could not remember specifically who had

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been hit, he did recall that the remainder of the class of six or seven, including R.J., had been hit. He stated that he advised his mother about this incident.

He recalled that when A.B. complained to Smith that he would tell his father about being hit, Dr. Smith told A.B. that his father had given him permission to hit A. When T.L. stated that he would tell his mother, Smith similarly told him that he had permission from T.L.'s parents. T.L. indicated that he was hit by Dr. Smith, even after he related to Smith that his mother denied having given Smith permission to hit T.L.

On another occasion, T.L. and D. were in the gym when D. hit the gym teacher with a soccer ball and ran out. The teacher, thinking that it was T.L. who hit him, sent him to Dr. Smith. Dr. Smith was angry and said, "I am tired of you." When T.L. refused to bend over as requested by Smith, he was hit by Dr. Smith on the hand. (Apparently, T.L. turned part-way around and was hit in the arm and the hand.) T.L. recalled that Dr. Smith pushed him towards the door and, in addition, hit him all over.

T.L. admitted on cross-examination that Dr. Smith only hit a student if he got into trouble. He admitted that he got into trouble for fighting, not doing homework, talking in line at lunch and acting up in class and admitted that Smith had warned him and A.B. about getting into further trouble.

Although Reginald Thaxton indicated that T.L. had lied to him in the past (it is noteworthy that he did not know T.L.'s reputation for honesty, truth and veracity), T.L.'s statements that he informed his teacher, Mr. Williams, were confirmed in part by the testimony of Mr. Williams.

Mr. Williams testified that, although no students reported that they were hit or came to him crying, he overheard conversations during the 1979-80 (March 1980) school year which caused him to become aware of the hitting. (Apparently, he overheard three to four such conversations from February 1980 to April 1980.) (See prior testimony of Mr. Williams.)

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Williams recalled specifically that during homeroom he heard T.L. say he was hit by Dr. Smith. Apparently, after T.L. returned from the office, Williams heard T.L. talking to L.W., R. and B. about this and he recalled T.L. asking him if Smith was allowed to hit them (swat them). Williams responded by telling T.L. to inform his parents. In addition, he recalled overhearing a conversation T.L. had with other students in which T.L., stating that Dr. Smith was not supposed to do this, advised that he was going to get his sister to straighten out the problem. Williams stated that he did not think the students exaggerated the stories, and, more specifically, believed that T.L. did not seem to fabricate these stories.

In an effort to discount the testimony of T.L., Ms. Tortorello stated that, although T.L. had been sent to Dr. Smith's office, she could not recall his being sent for a problem with Zabriskie or a girl named H., nor did she remember him coming into the office with A.B. and two girls. Moreover, she did not believe that he came out of Dr. Smith's office either crying or claiming to have been hit. She stated, however, that she had heard Dr. Smith scolding T.L. and acknowledged that T.L. was upset when he left the office. Noting that the testimony of Ms. Tortorella neither corroborated nor refuted T.L.'s testimony, the court has further considered the testimony of Ms. Sunshine offered by respondent in refutation of the charge.

It should be noted at the outset that Ms. Sunshine indicated that when she had T.L. as a student in the fifth and sixth grades, he made untruthful statements to her. For example, he indicated that he did his homework when he had not, and, also, said he took a note to his grandmother when he had not. Claiming to have discussed T.L. with the other teachers in the school who had the same problems with T.L. as she had regarding his honesty, she stated that she knows his reputation in the school community for honesty, veracity and truthfulness. In essence, she believed that T.L. was not an honest, truthful child.

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Referring to the math class incident, Ms. Sunshine admitted that she sometimes requested Dr. Smith teach her math class. Specifically, on one occasion, when she was frustrated and having difficulty with the class (and apparently as a deterrent to discipline problems), she wanted Smith to show her what she was doing wrong. Recalling that Dr. Smith took over the class, although she remained, she stated that Dr. Smith never struck a student in the class for not doing his work, although he did advise the students that he would call in their parents if necessary. Although she recalled that Dr. Smith required each of the 17 to 20 pupils to put examples on the board, she did not observe a pointer in the classroom and was positive that Dr. Smith never hit a student at that time. Although she indicated that the help requested of Smith was educational and not to improve the students' behavior, she admitted that she advised the students that if they were not good she would call in Dr. Smith.

Ms. Sunshine acknowledged having a great deal of difficulty during her first year of teaching in Orange. Apparently, she could not maintain discipline. During this time, she found Dr. Smith's assistance to be constructive in terms of his advice regarding discipline and teaching situations. Dr. Smith suggested that she separate disruptive children, give the students less freedom and contact parents. More generally, she noted that Dr. Smith's ability to discipline was excellent, and he was supportive of his teaching staff, helping them out when there was a problem with a parent. In fact, he straightened out a particular problem that she had with a parent. She noted that she never observed Dr. Smith lose his temper with a student or a teacher; he was always cool.

On cross-examination, Ms. Sunshine stated that, although tenured in September 1981, she left the school system in June 1982. Further, she was on a medical leave of absence from January to June 1982 for severe depression, anxiety and emotional problems. Although on questioning, this witness concluded that she taught first grade from January to June 1981, it should be noted that it was difficult for her to make that determination. Interestingly enough, Ms. Sunshine stated that even if she knew that Dr. Smith was administering corporal punishment, she would still feel he was a good principal and, moreover, such knowledge would not alter her feelings as to how he ran the school.

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Despite the fact that she might not approve of his acts, she would not judge him on that basis. Although not in favor of corporal punishment, she claimed that it was sometimes used with good intentions.

In a further effort to attack the credibility of T.L., respondent called Rev. R.J., pastor, Liberty Temple, Universal Church of Christ, Orange, to the stand to testify. He stated that Dr. Smith has a reputation for being an interested, concerned, and capable administrator and principal. In support of this statement, he recalled that when he had problems with his son, R.J., who is disobedient, arrogant and took money from the home, and discussed these problems with Dr. Smith, Smith took an interest in helping R.J..

Referring to T.L., Rev. R.J. indicated that T.L. is dishonest, and unreliable and shared a similar reputation. Rev. R.J. based this conclusion on the fact that his son had told him that T.L. extorted money from him, thus causing R.J. to either steal money from his father or face a beating from T.L.

On cross-examination, he indicated that he had discussed with his son, R.J., whether he had been hit by Dr. Smith. He recalled that at a meeting with Superintendent Zaros and himself, R.J. stated that he had been hit by Dr. Smith five times. Specifically, his son indicated that he had been sent by Ms. Burt to the office and was hit once across his backside because he failed to do his homework. R.J. further revealed that he and J.B. had each been hit two times (he did not cry as a result because F. told him if he held his breath it would not hurt so much). He also recalled his son indicating that on another occasion T.L., A.B., and R. and he were each hit. Although he did not recall his son stating that he looked at his backside and had a red line there, nor that he had been hit with a pointer, he did remember, however, his son mentioning, "a stick of some kind." On questioning, Rev. R.J. candidly admitted that he would not at the time of the meeting let his son sign an affidavit. He stated that this decision was not based on the fact that he had positive feelings for Dr. Smith, but because he lived in the community and approved

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of Dr. Smith, the atmosphere at school and did not want to be part of Dr. Smith's difficulty. On redirect, however, retracting in part from this statement, he stated that he did not want to have his son sign the affidavit because he did not believe his son and recalled that he said, "I don't believe it." In fact, he usually did not believe his son, who he claimed was in therapy for lying (making up stories to cover himself) and stealing. Dr. Smith also confirmed Rev. R.J.'s opinion of R.J. by stating that he believes R.J. to be a liar.

Interestingly enough, Rev. R.J. would not give his son's story any credence and would not investigate it further, despite the fact that he spoke to A.R.'s stepfather, who apparently advised him that A.R. had been hit, and also spoke to Mrs. J. B., who said her son had been hit. He did not feel that these statements corroborated what his son had told him.

In addition, despite Rev. R.J.'s apparent contention that his son is a liar, upon questioning by this judge, Rev. R.J. indicated that he believed his son's statements regarding T.L. (He did acknowledge, however, that his son first stated that he did not take the money and later said he had been threatened by T.L.) He claimed, however, that he did not accept his son's story and form an opinion of T.L. until, in an effort to investigate the matter, he spoke to Dr. Smith.

It is important to note that Rev. R.J. became the leader of the Parent Coalition, formed as the direct result of Smith's firing, whose purpose it was to restore Dr. Smith. In that capacity, he did not advise the members of the coalition that his son R.J. had said he had been hit with a stick. Concerned that Dr. Smith was the fifth black principal to leave the school, he felt that inasmuch as there were allegations of corporal punishment and sexual abuse in regard to other teachers, he did not understand why there was concern as to Dr. Smith and not the other problems.

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Importantly, he indicated, inasmuch as he believes in corporal punishment, even if his son's statements were true, it would make no difference to him. Believing it to have a biblical foundation, he admitted that he gave Smith permission to use corporal punishment earlier that year by advising him that if his son got out of hand he could restrain him. Although he did not tell Dr. Smith to beat R.J., he acknowledged that he would feel "okay" if Dr. Smith did so because it would probably be necessary. In conclusion, this witness indicated that he believes corporal punishment should be in the schools and would support, but would not lie to protect, a black administrator who routinely inflicted corporal punishment.

It should be noted at this juncture that Superintendent Zaros was called to the stand in order to refute the testimony of Rev. R.J. He recalled interviewing Rev. R.J. and his son R.J. and, specifically, recalled Rev. R.J. stating that he did not wish to sign the affidavit because he was a minister in the community and his taking sides against Dr. Smith could cause him problems. Rev. R.J. further advised Zaros that, if forced to testify, he would tell the truth as would his son. Zaros recalled that Rev. R.J. did not tell him that his son was seeing a psychologist or in therapy, nor did he express reservations regarding his son's credibility. More specifically, he did not state that his son was a liar nor did he tell him not to believe R.J.

In a further effort to refute the testimony of T.L., Dr. Smith testified that T.L. has a reputation for being dishonest and untruthful and his opinion of T.L. was the same.

Referring to his encounters with T.L., Dr. Smith stated that he had to use force on T.L. on approximately eight to ten occasions, apparently when T.L. was engaged in fighting with another child. (He seemed to indicate that force was used against T.L. for fighting or bullying other children.)

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Specifically, Dr. Smith indicated that he had to use force when T.L. and five other boys were beating up W.W., who was injured as a result. Dr. Smith stated that he observed this, went into the courtyard and pulled them off W.W. He admitted that he "may have smacked them with a pointer at the time." However, he did recall that he spoke to T.L. and the other boys in his office and further disciplined them by sending command letters to their parents. In addition, he recalled that he used force against T.L. when a number of boys were throwing corn on the cob in the cafeteria. In an effort to restrain them, he grabbed a number of boys in the hallway and, further, spoke to them regarding discipline and eating meals.

Dr. Smith denied the fact that he ever struck T.L. for fighting with H. and considered the scenario testified to by T.L., concerning he and A.B. bringing two girls into the office, to be ridiculous. He further stated that he did not hit T.L. when he was sent to the office by Ms. Sunshine regarding a math problem or talking in the lunchroom. Referring to the math class incident, Dr. Smith, who noted that Ms. Sunshine had difficulty with her students as they were behind grade level and also because she had a fear of the children, recalled that he advised her to restructure the class on a one-to-one basis in order to diminish random movement. In addition, when he went into her class, he stated that he assigned seats to each child, looked at each student's work assignment, and had each child go to the board to do a problem. If a child got the problem wrong, he showed him how to do it correctly, and then gave him a similar problem. He stated that he did not strike a child who got the wrong answer, claiming that such a suggestion was "ludicrous," inasmuch as "children can't always know the right answers and must be helped." He denied that there was a disciplinary aspect to his being in Sunshine's class that day; rather, it was to move them along academically.

When questioned about his relationship with T.L., he described T.L. as resentful of him and authority in general. In particular, T.L. resented him for taking away his position as patrol leader when T.L. got into fights. T.L., who was not progressing in school, made it difficult for others.

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The court has considered the testimony of T.L. and the testimony of Mr. Williams, which supports, at least in part, the statements of T.L., and finds that testimony to be credible. T.L. was able to recall with specificity the incidents of hitting and did not, therefore, seem to be fabricating in any manner what had occurred with respect to him. The court notes, in addition, that the testimony of Rev. R.J., while offered to refute T.L.'s testimony, in essence corroborated what T.L. had said. The court cannot accept the fact that R.J. lied to his father, Superintendent Zaros and Mr. D'Italia when he indicated that he had been hit by Dr. Smith on five occasions. Moreover, while his father made an effort to demonstrate that R.J. is a liar, apparently his father believed, at least to some extent, the statements that his son had made concerning T.L., thus causing him to speak to Dr. Smith about the situation. In any event, Rev. R.J.'s statements that he did not believe his son must be placed in the proper context. Rev. R.J. not only is biased in favor of Dr. Smith, but, in fact, was the leader of the coalition to reinstate him. Further, he admitted quite candidly that he is in favor of corporal punishment. His strong belief in corporal punishment is revealed by the fact that not only did he make no attempt to corroborate R.J.'s statements about being hit by Dr. Smith, but he indicated that even if he knew that Dr. Smith hit his son, it would be "okay." Given his prejudice and bias, his statements concerning the incredible nature of both T.L.'s and R.J.'s allegations, is not accepted as at all persuasive by this court.

Worthy of note at this juncture is the fact that Rev. R.J. stated that he advised Dr. Smith that if his son got out of hand he could restrain him. What he did not testify to, however, was Dr. Smith's response to this suggestion. Rev. R.J. did not say, which the court observes had it occurred would certainly have been meaningful to mention, that Smith advised him at that point that he would not in fact ever hit his son or anybody else. It seems plausible to assume that if Dr. Smith had no intention of inflicting corporal punishment on R.J., he certainly would have made such a statement to Rev. R.J.. Not only was Smith's testimony similarly lacking in that regard, but the court found it simply

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unbelievable. His attempt to create the impression that he used the stick to smack the children in order to stop them from fighting with other children, while not only incredible, does not, in any event, appear to be warranted behavior in response to the situations described by Dr. Smith. In sum, the court, using Dr. Smith's own words, found his testimony to be "ludicrous" and "ridiculous."

Similarly unimpressive was the testimony of Ms. Sunshine, who the court observed to be a very insecure teacher, who was unable to maintain discipline with older children, and was, as a result, grateful to Dr. Smith for his assistance. In evaluating her testimony, the court cannot help but agree with petitioner that Ms. Sunshine's testimony not only demonstrated a lack of insight, but more importantly, bias in favor of corporal punishment, as reflected by her conclusion that the disciplining of children by beating them with a stick on the buttocks would not adversely affect her good opinion of Dr. Smith as a principal. Clearly, Ms. Sunshine and Dr. Smith corroborated T.L.'s testimony in every aspect except the essential detail of hitting the children. The court did not expect that this point would be conceded but acknowledges that such behavior would be consistent with Dr. Smith's own testimony regarding the ready availability of a stick to get attention and discipline the students, as well as Ms. Sunshine's apparent view of corporal punishment. Based upon all of these factors, the court is of the opinion that Sunshine's denial that Dr. Smith hit children at the blackboard on the day of his visit to the class cannot be credited.

Corporal Punishment as to J.R.

Mrs. E.R., who had three children in attendance at Central Elementary School, testified that, for a period of three years, apparently ending six years ago when she was employed by the Lincoln Avenue School, she worked as a lunch aide at Central School. She recalled that when her son J.R. was in the fifth or sixth grade (apparently in 1977-78) he called her one morning from the office of the school crying. He stated that he was

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outside playing in the snow (apparently throwing snowballs) when Smith called him and three other boys inside, pulled his pants tight across his bottom, made him bend over and whacked him a couple of times with a drumstick. When she arrived at the school, J.R. who was still crying, was standing in the hall next to the door to the main office. Apparently, based upon her conversation with J.R., who indicated that he had been struck first of the three boys, she believed the other boys were still in the office when she arrived. As a result of one of the secretaries (whose name she could not recall) advising Dr. Smith that she wanted to see him, Dr. Smith came out of his office and spoke with her. (Although she did not recall anyone hearing the conversation, Mrs. E.R. did indicate that she and Dr. Smith spoke in the proximity of a secretary.) Mrs. E.R. recalled asking Smith if he hit J.R. and Smith stating, "Yes." In response to her question as to whether he was allowed to hit kids, he said, "No." She recalled specifically that Dr. Smith said he hit J.R. because "he was outside throwing snowballs and not allowed to throw snow out there." Mrs. E.R. advised Smith that she would speak to Superintendent Zaros and, in fact, stated that she went directly with J.R. to see Superintendent Zaros who set up an appointment to meet with her the next day. She recalled stating at that meeting with Superintendent Zaros and Dr. Smith that J.R. had been hit by Dr. Smith. To Superintendent Zaros' admonition to Smith that it was brutality, that he could not hit kids and that he did not want it to happen again, Dr. Smith replied that it would not. She recalled that Smith not only failed to deny the accusation, but admitted it was the punishment he gives kids when they do wrong things.

Mrs. E.R., who recalled there were no further complaints from her children after this episode, claimed that she quit her job at Central and transferred to Lincoln when she moved and her kids had to attend a different school. Further, in regard to her employment at Central she did not recall having a discussion with Dr. Smith regarding her failure to attend to other children as she attends to her own, or any indication of displeasure on his part, nor did she acknowledge having had a disagreement with Dr. Smith or having been fired. In regard to her son, she noted that he had been sent home from school for fighting on one occasion for which he was apparently suspended two or three days.

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Corroborative of Mrs. E.R.'s testimony was the testimony of Woodrow Zaros, Superintendent of Schools for the Orange School Board for nine years. Prior thereto, he served as assistant superintendent for five years. Zaros indicated that he received a complaint from Mrs. E.R. in 1975 or 1976 (apparently six weeks after the event), that her son J.R. had been hit by Dr. Smith. Although upon initial contact with Zaros, Dr. Smith denied having done this, inasmuch as Mrs. E.R. was quite upset, Zaros set up a meeting with Smith, Mrs. E.R. and himself in order to clear the air. At that meeting, Mrs. E.R. accused Dr. Smith of striking her son J.R. with a drumstick. Zaros recalled that Dr. Smith said, "Have I hit him since you told me not to." Mrs. E.R. replied that he had not. Zaros then asked Smith if he was aware that this action was against the law and the policies of the Board. When Smith replied, "Yes," Superintendent Zaros said, "Based upon what was said, I believe you struck J.R. and I will not tolerate corporal punishment." It was Zaros' testimony that this was the first time Smith had admitted hitting a child.

Ms. Tortorella, in an effort to refute the testimony of Mrs. E.R., testified regarding her contact with J.R. Although she remembered J.R. coming into the office either alone or with other boys, having been sent by a teacher or a lunch aide, she did not, however, recall that J.R. came out of Dr. Smith's office crying nor did he complain to her that he had been hit by Dr. Smith. Although she stated that children were not allowed to use the telephone in the office, she could not state categorically that J.R. never used that telephone to call home. Further, although familiar with Mrs. E.R., she did not recall her speaking to Dr. Smith in the office area, nor did she hear her claim that Dr. Smith had just struck her son J.R.

Ms. Tortorella's testimony, while clearly not corroborative of Mrs. E.R.'s testimony, does not refute her statements either. As has been discussed earlier, Ms. Tortorello's outline as to what she could not recall does not prove that the events testified to by Mrs. E.R. did not occur. It goes without saying that Ms. Tortorello may not have been working in Dr. Smith's office at the time of the discussion between Mrs. E.R. and Dr. Smith. Thus, her testimony that she did not recall the event is of no moment.

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Of greater import is the testimony of Rose Merritt, employed as a teacher by the Orange Board of Education since 1972. Reassigned to the Central Elementary School in 1974, she indicated that she has never seen Dr. Smith hit an individual, nor had she ever been told that he hit children. She considered him to be a good principal, who treated teachers as professionals, was a strict disciplinarian, and ran a good school. Referring to J.R., she recalled that although she never had him as a student, she did interact with him on several occasions. On one occasion, when she disciplined him for loudness on the staircase, he talked back to her, and she had to advise him that if he did not stop she would send him to the office. Although J.R. indicated that he was not responsible and had been quiet, this witness noted that there was no one else present. On another occasion, she attempted to stop a fight between J.R. and another student. Unable to hold onto J.R. alone, the other teachers came in to help her. On another occasion, when J.R. was challenged for being loud in the hallway, he became disrespectful and had to be disciplined. When he was told to behave, J.R. said it was not he who had been rowdy. Based on these episodes, Merritt concluded that J.R. was not truthful.

The opinion of Rose Merritt as to Dr. Smith was shared by Mabel Ankum, a lunchroom aide at Central School from 1973 to 1980 and a member of the Parent Coalition. She never saw Dr. Smith strike a child nor did a child ever say he had been hit by Dr. Smith. Moreover, prior to 1981 no one ever told her that Dr. Smith had hit students. Noting that Smith is a good principal, who helps kids with their problems, she recalled, specifically, that he helped her son after school for one hour, two or three times a week (she did not pay Dr. Smith for this help) and, in addition, helped her to get her other son into a school which could deal with his problems.

Testifying as to J.R. and his reputation in the community, Ankum, who considered him to be a liar and a fighter, recalled that even after she caught him on many occasions hitting a student, he would deny that he had done so. She recalled also that apparently on occasion when J.R. refused to go to the office, Dr. Smith would calm him

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down and take him upstairs. (When he returned, he never told her that he had been struck by Dr. Smith.) Of further importance was her testimony regarding Mrs. E.R., with whom she was acquainted. She recalled that Mrs. E.R. held students in order to allow her son J.R. to hit them. Ankum, who indicated that the other aides also had a problem, stated that she spoke to Dr. Smith about it. Ms. Ankum did not know why Mrs. E.R. left Central School.

Of particular importance to the court was Dr. Smith's testimony in regard to the R. family. He noted that in his opinion Mrs. E.R. is not truthful or honest and recalled that he fired Mrs. E.R. prior to the snowball incident described herein; she was holding children so that her son J.R. and her daughter A.R. could beat them up. He believed that she testified as she did because he fired her and when J.R. had been in trouble required her to appear. In addition, Dr. Smith testified that J.R. had a reputation in the school for being a dishonest and untruthful person, and his opinion of him was to that effect.

Acknowledging that he used force to restrain J.R. on at least three occasions, Smith, referring specifically to the snowball incident, recalled that J.R. and other boys had placed the snow around rocks. Having received complaints from children who were bleeding as a result of being struck with packed snowballs (Dr. Smith was unsure where he was when he learned of this), Dr. Smith went into the yard with a pointer in his hand. When he observed J.R. still throwing snowballs, he whacked J.R. across his backside with a pointer. J.R. wanted to go home, and Dr. Smith said he would call his mother. After she arrived and he told her what had happened, she indicated that she did not want anyone hitting her children. Dr. Smith recalled attending a meeting with Superintendent Zaros and Mrs. E.R. regarding this incident, and, despite his belief that there had been no violation of law, stating at that time that he would not hit J.R. again. He stated he hit J.R. so that he would not hit another child. It is noteworthy that Smith admitted that when asked in municipal court whether he ever hit J.R. he said, "No, I never did." He claimed that the answer was correct in the context it was used.

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In evaluating the testimony regarding J.R., the court takes cognizance of the fact that Smith, by his own testimony, admitted that he used force against J.R. in order to stop J.R.'s inappropriate behavior. If this court were inclined to accept Smith's version of the facts, at issue would be a consideration of whether the force used under the circumstances was justified. Without suggesting for one instant that J.R.'s behavior, as recounted by Smith, could be deemed anything short of horrendous, it appears to this court, however, that whacking J.R. across his backside with a pointer to stop him from throwing a snowball might still be considered unwarranted and excessive. This observation, however, is of little value herein because the court accepts and finds credible the version of the events recounted by Mrs. E.R., as told to her by her son, to the effect that Dr. Smith disciplined him in his office for his behavior by hitting him with a pointer. Not only was the testimony of Mrs. E.R. both believable and trustworthy, but it was confirmed by Zaros' recollection of the meeting. Moreover, the court was not swayed from this conclusion by the statements of Mabel Ankum, a member of the coalition, or the statements of Merritt whose testimony merely indicated that J.R. would lie on occasion.

Corporal Punishment as to P.R.

Ms. Burt, who had P.R. as a student in the fourth and fifth grades, recalled that on one occasion P.R. came into her room crying. When asked why she was crying, P.R. said she had been hit while in the office. Ms. Burt told her to settle down and forget what happened while in class. Ms. Burt recalled that on another occasion when she and P.R. were in the hallway, P.R. cried and put her arms around her. P.R. said she had been in the office, and, in her mumblings, said, "I got hit again." Ms. Burt, who recalled giving her "sympathy" and sending her to lunch, took no official action regarding P.R.(apparently, for the same reasons that she did not do so with respect to O.G.).

In an effort to rebut the excited utterances of P.R. to the effect that she had been hit, petitioner called Debbie Luckey, a teacher of the neurologically impaired, who had been assigned to Central since 1976 (the date she began her employment in the

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Orange School system) to testify. She stated that she never saw Dr. Smith hit a pupil, despite the fact, that she sent students to Dr. Smith for disciplinary reasons, and never had a pupil tell her that Dr. Smith had hit him. Moreover, she never even heard that Dr. Smith was hitting students. Luckey, who knows P.R., having seen her in the hallways, the playground and at lunchtime, recalled that she had a conversation with P.R. which involved disciplining her and, in addition, observed P.R. fighting on several occasions. Ms. Luckey did not believe P.R. was an honest person inasmuch as she had caught her in lies. For example, oftentimes, if P.R. hit a child, she would claim that she had not done so.

In addition to Luckey's testimony, respondent relied on the testimony of Olivia Pride, who has been employed by respondent since November 1969 as a teacher's aide for the Department of Special Education. As such, she was assigned to Central School in 1973 and 1974 where she continues to work. She stated that she never observed Dr. Smith strike a student nor did a student ever come to her and say he had been hit. In addition, prior to April 1981 she never heard that Smith was hitting children. She further indicated that not only had she sent students to the office but sometimes would take the child to the office. (In fact, one of the teachers would go with the child to the office rather than sending a note.) Stating that she was in the office with Dr. Smith when he talked to the child, she recalled that after she explained the problem, Dr. Smith would listen to the child and then decide what was to be done. The result might be a "talking to," his calling the parents, or simply requiring that the child stay in the office with him. She felt that Dr. Smith, who was always calm and soft-spoken, was a stern and understanding disciplinarian who gave the children another chance. She never saw a drumstick in his office nor did she see him carry it around.

When asked her opinion of Dr. Smith as a principal, she indicated that he was approachable, open-minded, had respect for opinions, and was a terrific administrator, who was supportive of the teaching staff. Moreover, she stated that not only did her students know they could go and talk to Dr. Smith, but Dr. Smith came to her classroom in order to talk to the students and help them.

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Referring to P.R.'s reputation in the school community for honesty, she stated that P.R. did not have a good reputation for honesty in the community. She specifically alleged that P.R. would say that she was not fighting when Ms. Pride had actually seen her fight.

Of further import regarding P.R. was the testimony of Vivian Baxter, the school nurse at Central School for the last 11 years. A member of the child study team, she indicated she has never observed Dr. Smith strike a child (she had seen him discipline children). Moreover, no child has ever come to her and stated that he had been struck by Dr. Smith, nor did she hear prior to April 1981 any such complaints.

Ms. Baxter indicated that when P.R. was in the second through the sixth grades, she had weekly dealings with her. She recalled with specificity not only that she observed P.R. in a fight, which P.R. later denied a part in, but that P.R. physically attempted to fight a teacher, which she also later denied having done. She believed that P.R. is emotionally disturbed and as a result was sometimes unaware of her lying. When asked about P.R.'s reputation for honesty, veracity and truthfulness, she indicated that P.R. is untruthful — her honesty was dependent on her mood and the medication she had taken.

When questioned as to her relationship with Dr. Smith, whom she has known since 1974, she indicated that she has had a good working relationship with him. Smith was always supportive of the staff and defended it to the utmost. In addition, he never lost his temper with the teachers or students. When questioned on cross-examination as to Dr. Smith's reputation, she indicated that his reputation depends on whom you ask. There were those staff members who were very supportive and those who believed he was not a good principal. However, for the most part, Dr. Smith was thought to be a good principal who had a fine working relationship with the staff. Ms. Baxter noted , however, that her opinion of Dr. Smith as a principal did not take into account the incidents of corporal punishment. If she knew that he had, in fact, inflicted corporal punishment, her opinion of Dr. Smith would change for the worse.

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Dr. Smith, testifying as to P.R., testified that P.R. had a reputation for being untruthful and dishonest which matched his opinion of her. Admitting that he used force against P.R. on two or three occasions, he recalled specifically that on one occasion he had to pull her off a teacher, requiring the help of two other teachers; on another occasion had to use force to break up a fight P.R. was having with another girl; and on a third occasion when P.R. fought another girl he had to physically separate them. Of importance herein is the fact that he did not recall ever striking P.R. with a pointer or a drumstick. The opinion of P.R., as testified to by Mrs. Luckey, Ms. Baxter and Dr. Smith, was not, however, shared by Mr. Zabriskie, the gym teacher, who indicated that while he did not know her reputation in the school for honesty, truthfulness and veracity, he could state that P.R. was honest in gym class.

This court has considered the testimony regarding P.R.'s credibility. In so doing, the court has looked to the testimony of Vivian Baxter and found her to be, as conceded by petitioner, both forthright and credible. It was Baxter's opinion that P.R. is untruthful. This assessment of P.R., coupled with Luckey's similar testimony regarding P.R.'s credibility, has caused this court to be wary of the truth and veracity of the statements made by P.R. to Ms. Burt. Given the added factor that P.R. did not testify, this court must conclude that petitioner has failed to prove by a preponderance of the believable and credible evidence that there was corporal punishment as to P.R.

Discussion of Facts Relating to Smith's Defenses

Many of the prior witnesses who were called to the stand to testify as to the credibility of petitioner's witnesses also testified about their relationship to and observations concerning Dr. Smith. More specifically, they stated that they believed Smith was a good administrator and had never seen or heard that Dr. Smith struck students. The court takes note of this testimony, as well as of the following witnesses who testified in regard to Dr. Smith.

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The first of such witnesses called by respondent was Sophie Bonadeo who has been employed by petitioner as a special education teacher for the last 11 years. As such, she was assigned to Central School during her fourth year of teaching and beginning again in her sixth year. She testified that she never saw Dr. Smith hit a student (on cross-examination, this witness indicated that she was limited during the day to dealings with special education pupils, with whom she even ate lunch), nor was she ever told by a student (including those students she had sent to Dr. Smith to be disciplined) that he was hit by Dr. Smith. In addition, prior to April 1981, she was not told by any teacher that Dr. Smith was hitting children. She believed Dr. Smith to be a fine principal; she felt comfortable and had a great deal of latitude working under him. She indicated, moreover, that Dr. Smith had a good relationship with the faculty; he allowed teachers and aides to use their talents and was supportive of the teachers in dealing with parents. She did not know Smith to lose his temper with teachers or students. Rather, she characterized Dr. Smith as having a familiarity and a firmness with the students. She indicated that students were free to run up to him, which they did; moreover, he kept an ongoing report on each class and the students therein.

This testimony was confirmed by Rosa Mills, who was employed by petitioner for the last ten years and who was assigned to Central School in 1974. In her capacity as a teacher's aide for eight years and as a secretary for one year, she never saw Dr. Smith strike a student nor was she told by a student that he had been struck. Moreover, prior to April 1981 she never heard anyone say that Dr. Smith was hitting children. Although she recalled seeing Dr. Smith discipline students, she never saw him lose his temper. She recalled that she usually took the first graders to the office and that Dr. Smith never took one of her students into his private office. Noting that Dr. Smith had a positive reputation as an administrator, she believed him to be an excellent principal.

Further support for Smith came from Detective Reginald Thaxton who is employed by the Orange Police Department in the Juvenile Aide Bureau. Familiar with Dr. Smith, having had dealings with him since Smith became principal and until 1981, he stated that if there was a problem at school, Dr. Smith would call for a detective. Apparently, both he and Dr. Smith had developed and were involved in a program which entailed the supervision of problem youths.

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Testifying in further support of Smith was Willa Mae Whitted, who has three children in attendance at Central School and has been involved in the PTA since 1976. She stated that Dr. Smith has an excellent reputation in the community as a principal. Although conceding that the PTA is one of his duties, she contended that Dr. Smith has been of help to the association. She noted that Dr. Smith personally assisted her son when he was in the second grade and had problems with a teacher in school. Although she indicated on cross-examination that she is a member of the parent coalition run by Rev. R.J., she denied believing in corporal punishment and stated that if she knew Smith was inflicting corporal punishment, she would take action different from seeking to have him reinstated.

Of a similar nature was the testimony of Doris Eaton who had been PTA president for two years. The grandmother of a child attending Central School, she recalled that when her granddaughter was upset at school and afraid of a boy threatening to beat her up, Dr. Smith handled the situation very well. She, too, stated that Dr. Smith worked well with her in terms of the PTA and had a reputation as an excellent principal in the community. Of note is the fact that Ms. Eaton is a member of the parent coalition for Dr. Smith, and is supportive of Dr. Smith getting his job back. She stated that she would want this result even if the charges were true; she saw no problem with Dr. Smith hitting students, inasmuch she would do this to her own children.

In defense of the allegations herein, Dr. Smith assumed the stand on his own behalf. It should be noted at the outset that Dr. Smith did not refute the fact that he had struck certain children on some occasions with a pointer or drumstick. Although he did not always recall whether a pointer or drumstick was used, he did state that each object was apparently 12 to 14 inches long. Recalling that the pointer, although broken, had a smooth edge, he noted that the drumsticks used were standard and were kept in a cupboard with sliding doors in his private office. (He contended that this was a safe place for keeping such instruments.) It is noteworthy that Smith recalled being asked in municipal court whether he had a stick in his office and responded by stating that he "probably did have a bit of stick in the office which had been broken off in some class and which he used to knock the back of the chairs in order to get attention." During the

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hearing in the instant matter, he recanted on this prior testimony and admitted having used it directly on certain students.

Of particular interest to the court was his explanation of his philosophy of discipline. He indicated not only that he does not believe in corporal punishment, but stated that he does not consider the use of a stick to constitute corporal punishment or a disciplinary device. Contending that literature in the field substantiates the fact that the striking of a blow to a child causes an immediate response from the child, because of the attention shown, he considered the stick an extension of his hand used to get attention, to prevent running away and to get a child to refrain from inappropriate behavior. He indicated that he attempted to control noise, movements, food throwing and fighting with the stick. He further explained that to use his hand on a child would elevate that child to an adult and, thus, he would not hit a child with his hand. He recalled, moreover, that after an incident in the yard, he would walk around the schoolyard with a pointer or drumstick. In inclement weather when the children went to the auditorium, he would use the pointer to bang on the chair in order to get their attention. Further, if a child was running he might touch him with the stick to stop him rather than yelling at him. He also took the stick to the cafeteria to ensure that there would be no rowdiness, and to get attention with it. For example, if the students were throwing food, he would hit the table with it. He stated that the stick was essentially used to make noise and not to beat a child as described by the students who testified. Upon further questioning, he indicated that he took the stick to the auditorium with him on the average of three to four times a week and to the lunchroom approximately one to two times a week. He noted that the stick was observable by Ms. Tortorella and the teachers who would see him "rapping." In any event, Dr. Smith alleged that he never intended to hurt a child when he hit him with the stick and that no child ever told him he was hurt and it continued to hurt.

Dr. Smith further explained the layout of his office (apparently the cramped nature of it) in attempting to demonstrate that, while it would be possible to strike a child in the manner testified to by the children, in order to do so, the furniture would have to be moved; the desk, in his eight-foot by seven-foot office, would have to be moved back and the chairs in front of the desk would also have to be moved. He stated that it would be physically impossible to strike a child in the manner testified to unless the furniture were rearranged.

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In addition to the above, there was a considerable amount of testimony regarding Dr. Smith's relationship with the Central Office and his peers. In evaluating this testimony, the court agrees with petitioner that for the most part this testimony did not go to the issue of whether or not the charges against Dr. Smith were true. Thus, whether Dr. Smith had a disagreement with Mr. Zaros regarding his initial salary, or the lack of a parking space for him (contending apparently that Zaros did not like him), whether Smith had an interaction with Mrs. Holmes regarding field trip requests (contending that Holmes was out to get him), whether Smith had an interaction with Mr. Blazy regarding the timeliness of reports (contending that there was administrative overload), or whether Smith believed that he had qualifications superior to those of the members of the administrative council, is of no real consequence and has, thus, not been accorded weight herein.

The court has, however, considered the testimony surrounding Dr. Smith's enrollment in a course for his doctorate as reflective of Smith's honesty. Apparently, Dr. Smith enrolled in a course at Princeton University to complete his doctorate, which was not given at any other time other than Friday mornings from 9:00 a.m. to 11:30 a.m. Smith submitted a request to the then superintendent of schools, Dr. Ross, for course approval and apparently received this approval for reimbursement. However, Zaros became superintendent in October 1974, and discovering that Smith was attending the course, objected to him absenting himself during school hours from the building to attend the course. Apparently, Zaros believed that Smith should have referred in his request to the time of the course. Smith justified his failure to do so on the basis that there was no space on the request form to include the time of the course; moreover, he was not asked the time and, in addition, advised the office on each occasion when he left the school. Claiming that he had received prior written approval from Ross which he believed Zaros was rescinding, Smith appealed to the Board. Apparently, this dispute (during which Smith called Zaros patronizing, supercilious and uncomfortable with blacks) was considered by the Board of Education. (Although Smith testified that he had not had a chance to meet with the Board, documents presented to him on cross-examination refreshed his recollection that he had in fact done so.) The Board supported Zaros' view and docked Smith for his absences.

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Although Smith insisted in testimony before this court that Ross had given him approval, none of the contemporaneous memoranda presented mentioned that Ross had given his approval to Smith's absences. Further, Dr. Zaros testified that Smith had not told him that Dr. Ross had approved his leaving his duties in order to attend the course. In addition, there was nothing presented in writing from Dr. Ross and apparently no oral communication to the administration to that effect. In evaluating this evidence, the court must agree with petitioner that it is difficult to believe that Smith would not have raised in his memoranda the single most significant fact justifying his absences, namely, the permission of the then superintendent. What appears more likely is that Smith received approval for reimbursement for tuition costs, without disclosing the fact that the course would be taken during school time when Smith was supposed to be discharging his duties as principal. Thus, Smith never received prior approval of Ross to leave Central School on Friday mornings to attend that course.

Of significance in evaluating Smith's testimony was the testimony of Superintendent Zaros, who indicated that he did not have a high opinion of Smith's truth, honesty and veracity and believed that most professionals distrust him. In what can only be considered to be honest and forthright manner, Superintendent Zaros admitted that he did not like Dr. Smith. While he would not acknowledge the fact that did not like him in 1974, he claimed that Dr. Smith was "a pain" from an administrative point of view. Specifically, Smith attacked authority, had conflicts with other administrators, made self-serving statements, could not obtain support from the other administrators, and had conflicts with individuals other than subordinates (apparently coordinators). He admitted that he had received a call from a superintendent in another municipality where Smith had applied for a Central Office position. Although when he returned the call to that municipality, a decision had already been made in reference to the hiring of Dr. Smith, he admitted that at that time he did not like Dr. Smith. He recognized, however, that the teachers had a high regard for Dr. Smith and felt he was supportive and a good administrator.

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A review of the testimony in regard to Dr. Smith indicates to this court that Dr. Smith had a lot of fans. Obviously, many teachers and individuals in the community had a great deal of respect for his abilities. Not only was this apparent from their testimony but also from the fact that they formed a coalition on his behalf. He apparently won the respect of a number of the teachers by supporting them in any conflicts they may have had with parents and by his strength and determination in dealing with the students and managing the school. While the court has noted the fact that Smith appeared to be well liked by the community, as well as some of the teachers in the school, this does not mean that Smith did not in fact inflict corporal punishment on those students who testified before this court. The support marshalled for Dr. Smith was simply insufficient to counter the testimony presented by the Board that Smith did, in fact, inflict corporal punishment upon the youngsters who testified, while in his office by hitting them with a stick on their buttocks.

FINDINGS OF FACT

I **FIND** by a preponderance of the believable and credible evidence that:

1. In February 1981, in his office behind closed doors, Dr. Smith hit A.K. with a pointy stick or ruler on his buttocks.

2. During the time O.G. was in kindergarten and through the fourth grade, Dr. Smith hit O.G. on the buttocks with a drumstick while in his office on a number of occasions.

3. O.G. while in the first grade was hit by Dr. Smith two times on his backside with a drumstick, which hurt him and made him to cry.

4. When O.G. was in the fourth grade, he was hit by Dr. Smith three times on his backside with a pointer in Dr. Smith's office with the office door closed.

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5. W.G. was struck on the buttocks with a stick by Dr. Smith in Dr. Smith's office on numerous occasions during his attendance at Central School.

6. W.G. was hit twice with a drumstick by Dr. Smith in Dr. Smith's office for writing on the bathroom wall.

7. While in the fifth or sixth grade, W.G. was hit by Dr. Smith on his buttocks in Dr. Smith's office for fighting with another boy.

8. While in the fourth or fifth grade, W.G. was hit by Dr. Smith two times hard on the palm of his hand with a stick.

9. When an aide brought W.G. to Dr. Smith's office, Dr. Smith hit W.G. on the buttocks with a drumstick, after advising him to get over on the chair.

10. In 1981 Dr. Smith hit A.R. on his buttocks with a stick in Dr. Smith's office, after advising him to bend over the chair in front of his desk.

11. Dr. Smith hit J.B. on several occasions when J.B. was in the sixth grade at Central School.

12. Dr. Smith hit J.B. slightly above his buttocks two to three times with a pointer when J.B. was brought to Smith's office for fighting in the school yard. J.B. was required to face the chair, his hands on the arm of the chair, in order to receive the blow.

13. On another occasion, J.B. was hit with a pointer by Dr. Smith in the hallway one time above his buttocks.

14. Dr. Smith hit J.B. with a stick in his office when J.B. was accused of punching another student.

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15. T.L. was hit by Dr. Smith approximately nine to ten times when he attended Central School in the fifth and sixth grades.

16. When T.L. was in the fifth grade and was sent to Dr. Smith's office, he was told to face and bend over the chair with his arms on it and was hit by Dr. Smith two times with the black end of a pointer, approximately three inches above his buttocks.

17. When T.L. was in the sixth grade, and sent to Dr. Smith's office for an incident in regard to W.W., he was hit by Dr. Smith three times.

18. Dr. Smith hit T.L. with a pointer in Dr. Smith's office for being involved in a fight.

19. Sent to the office concerning a math problem, T.L. was hit two times by Dr. Smith while alone with him in his office.

20. When sent to Dr. Smith's office by an aide, while in the sixth grade, T.L. was hit by Dr. Smith.

21. When T.L. was sent to Dr. Smith's office for an incident in the gym, T.L. refused to bend over as requested by Dr. Smith and was hit by Dr. Smith on his hand.

22. When J.R. was in the fifth or sixth grade, Dr. Smith pulled his pants tight across his bottom, made him bend over and whacked him a couple of times with a drumstick in Dr. Smith's office.

23. Dr. Smith repeatedly and routinely disciplined students from the first through the sixth grades by means of striking them across the buttocks

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with a stick in his office, after first having the students bend over a chair and grasp their arms so that their buttocks would be presented. He struck the students once, twice or three times when disciplining them.

CONCLUSIONS OF LAW

Given the above discussion and findings of fact, at issue is whether Dr. Smith's conduct constitutes corporal punishment. N.J.S.A. 18A:6-1 provides:

> 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. . . .

There is no question that the conduct described by each of the testifying students, and found as fact by this court, clearly amounted to corporal punishment in violation of the above-cited statute. Dr. Smith's repeated and routine administration of discipline to students by means of striking them across the buttocks with a stick, after having each of them bend over a chair in his office, is certainly the very behavior prohibited by the corporal punishment statute. Moreover, it is clear that his actions do not fall within those provisions of the statute which permit reasonable and necessary use

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of force. Based on the fact that this court has determined that the preponderance of the credible evidence established that the charges against Dr. Smith were true, this court need not consider whether Dr. Smith's own version of events, if believed, would contravene the statute. This court notes only, at this juncture, as has been noted in the discussion herein, that Smith's acknowledged "whacking" and "smacking" students in order to protect himself, persons or property, and, in effect, to restrain them, prior to making any effort to physically restrain them in any other fashion, might very well be considered unreasonable and unnecessary behavior amounting to a violation of N.J.S.A. 18A:6-1.

Based on this court's conclusion that Dr. Smith has inflicted corporal punishment, the sole issue to be decided is whether Dr. Smith should be removed from his tenured position or be subject to some other penalty. In answer to petitioner's cry for dismissal, respondent urges the court to take into account the nature of the offenses, any mitigating circumstances and the teacher's performance record. More specifically, respondent cites In the Matter of the Tenure Hearing of William H. Kittell, 1972 S.L.D. 535, 541 and asserts that 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 following factors: (1) the nature and gravity of the offense under all the circumstances involved; (2) any evidence as to provocation, extenuation or aggravation; (3) any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system; (4) the teacher's record of performance; and (5) the prognosis for his continued effective performance and usefulness in the school system.

Evaluating the testimony in light of these factors, respondent argues that he should not be dismissed. Specifically, respondent contends that the record reveals that his performance record is exemplary, that there has been no showing that the allegations, if credited, would influence his effectiveness, that no physical harm was done to the students, that petitioner has not shown there was any intent to inflict pain or suffering,

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and that there is no evidence that any action of respondent was premeditated, cruel or vicious, or that it had an adverse effect on the proper operation of the school, either by influencing pupil's discipline or by impeding the school's administration. Citing In the Matter of the Tenure Hearing of Portia Williams, School District of the Borough of Red Bank, Monmouth County, OAL DKT. NO. EDU 3808-80 (July 10, 1981), aff'd State Board of Education, March 24, 1982, aff'd Superior Court of New Jersey, Appellate Division, Docket No. A-4036-81 (December 15, 1982), wherein respondent was charged with striking pupils in her class with a ruler on several occasions, and was not as a result required to forfeit her tenure rights, respondent asserts that all the factors taken into account in Williams, when applied to the facts and circumstances surrounding the instant case, should produce a result no different from that sustained in Williams.

Petitioner does not argue, and this court does not believe, that petitioner inaccurately sets forth the factors to be taken into account in determining whether a teacher should suffer the penalty of dismissal. However, in taking into account the factors set forth above, as well as the holding in In the Matter of the Tenure Hearing of Portia Williams, supra, this court concludes that the appropriate penalty in the instant matter is dismissal.

In considering the nature and gravity of the offense under all the circumstances involved and, as a subsection thereof, whether the intent of the teacher in the circumstances of the incident of alleged corporal punishment was to inflict pain and suffering on a pupil with possible resulting physical harm, as stated in In the Matter of the Tenure Hearing of Samuel Ivens, 1977 S.L.D. 960, it is clear that Dr. Smith engaged in a pattern and practice of corporal punishment. There is no question that his actions were intentional and there is no doubt that he inflicted pain. The students were not only physically hurt, but his blows left welts. The students cried as a result of this pain. In fact, it is clear that there was no other purpose associated with Dr. Smith's conduct, but to inflict pain and suffering in order to deter future misconduct by so doing. It is to be noted that the actions of respondent were not, as petitioner points out, the light touchings

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which justified returning Portia Williams to the classroom. See In the Matter of the Tenure Hearing of Portia Williams, supra, wherein the administrative law judge found that the teacher had hit various students in her class "lightly on the hand" with a ruler for disciplinary purposes, that none of the students were hurt, and that the teacher "did not intend to inflict any physical pain on her pupils."

A consideration of whether there was evidence of "provocation, extenuation or aggravation" revealed that there was no such evidence: Dr. Smith was not provoked, and there were simply no extenuating or aggravating circumstances to take into account. Dr. Smith, apparently as a punishment, and in order to deter future misconduct, simply elected to inflict corporal punishment on those students who had acted inappropriately.

Regarding the effect which Smith's conduct had on the administration of the system, there is no question that such conduct, although perhaps resulting in a calm and controlled environment, created a regime of fear. Two teachers, who had knowledge of corporal punishment being administered, acknowledged that they were fearful for their positions and remained silent for that reason. It is difficult to believe that many of the other teachers did not also have knowledge as to what was going on. Of greater import to the court, however, is the fact that Dr. Smith's behavior has had an injurious effect on the students who were the subject of his punishment. There is no doubt that the students were angry, bitter and resentful at the pain and humiliation which they were forced to suffer. The court agrees with petitioner that the ritualistic bending over the chair was demeaning and that Dr. Smith was aware that striking the students with a stick added an additional element of humiliation. Without speculating on the long-range effect which his conduct will cause, the court has considered the fact, in addition, that his methods were apparently unsuccessful in accomplishing their purpose. Not only did the children continue to misbehave, but they revealed that his actions made them angry and resentful and caused them to leave school. Apparently, his actions made the students more difficult, in many ways, to control because of the anger they felt as a result of the abuse.

The court, in considering the prognosis for Smith's continued effective performance and usefulness in the school community, opines that it would be impossible

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for the Board or the Superintendent of Schools to maintain proper discipline in administration of the school system if Smith were reinstated. Not only has Dr. Smith failed to come before the Commissioner and acknowledge his wrongdoing, but he has, in fact, sought vindication. Moreover, the testimony before this court revealed that Smith, aware that corporal punishment was illegal, continued to administer it after being admonished for his doing so by the superintendent of schools. His conduct was willful, premeditated, deliberate and continuous. Given his prior actions in this regard, one could not be assured that Smith would not, in fact, continue to inflict corporal punishment upon the students. Moreover, reinstating Smith to his position would not only vindicate his actions, but would create an environment in which no teacher, staff member, parent, or child could be expected to speak out against violent, wrongful conduct. There would be no place for a member of the school community to turn for redress against arrogant and illegal notions of discipline. It should be noted, at this juncture, that even if one were to agree with respondent's contention that his record of performance is exemplary, a conclusion which this court finds difficult to draw based on Smith's dealings with the students, as well as the administration, it would be of no moment to this court. Dr. Smith's violent and wrongful conduct simply cannot be tolerated or condoned.

Based upon the above, I **CONCLUDE** that the conduct of Dr. Smith was unprofessional and unbecoming. It is therefore **ORDERED** that respondent be **DISMISSED** as a tenured employee of petitioner.

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

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

April 28, 1983
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

May 2, 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

May 4, 1983
DATE

Ronald L. Parker Jr.
FOR OFFICE OF ADMINISTRATIVE LAW

js/ms/e

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APPENDIX

List of Exhibits in Evidence

Exhibit No.	Description
P-2	Memo to Mr. Kenneth Smith from Woodrow Zaros regarding J.R. dated January 13, 1976
P-3	Memo to Kenneth Smith from Woodrow Zaros, dated October 29, 1974
P-4	Memo to Kenneth Smith from W. Zaros, dated October 31, 1974
P-5	Memo to Woodrow Zaros from Kenneth Smith, received in Superintendent's Office November 1
P-7	Memo to Kenneth Smith from Woodrow Zaros, dated November 5, 1974
P-8	Memo from Eugene Keller, Acting Secretary, to Mr. Kenneth Smith, dated November 11, 1974
P-9	Memo to Dr. Ken Smith from Erline M. Holmes, dated June 11, 1979
P-10	Memo to Erline M. Holmes from Kenneth S. Smith, dated June 12, 1979
P-11	Memo to Kenneth Smith from Patrick J. Pelosi, dated December 10, 1979
R-10	Memo to Mr. Kenneth Smith from Woodrow Zaros, dated November 3, 1975
R-11	Certification of Armand Massie, dated January 26, 1983 (three pages)
R-12	Portion of transcript of proceedings in municipal court in State v. Kenneth Smith, dated May 26, 1981 (six pages)

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List of Witnesses

For Petitioner:

A.K.
Mrs. A.K.
O.G.
W.G.
J.B.
A.R.
Marjorie Burt
P.L.
Keith Williams
Mrs. E.R.
Woodrow Zaros

For Respondent:

Delia Tortorella
Rose Merritt
Deborah Luckey
Carol Sunshine
Vivian Baxter
Sophie Bonadeo
Olivia Pride
Rosa Mills
Everett Zabriskie
Mabel Ankum
Doris Eaton
Rev. R.J.
Reginald Thaxton
Willa Mae Whitted
Kenneth S. Smith

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IN THE MATTER OF THE TENURE :

HEARING OF KENNETH S. SMITH, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE CITY : DECISION ON REMAND

OF ORANGE, ESSEX COUNTY. :

_____:

The Commissioner has reviewed the record of the instant matter including the initial decision on remand issued by the Office of Administrative Law, Elinor R. Reiner, ALJ.

It is observed that timely exceptions to the initial decision were filed by respondent pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Initially, the Commissioner observes that respondent takes exception to the failure of the ALJ to cause the initial decision to be filed with the agency head within the 45-day period after the record was closed at the Office of Administrative Law. Respondent maintains that, according to the provisions of N.J.S.A. 52:14B-10(c), the initial decision was required to be filed with the Commissioner not later than Friday, April 29, 1983, which was the forty-fifth day from the time the ALJ closed the record of the proceedings (March 15, 1983). Instead, the record discloses that the initial decision was filed with the Commissioner on the following Monday, May 2, 1983. Respondent thereby contends that such statutory violation renders the initial decision a nullity. The Commissioner finds that this exception is correct insofar as the initial decision was, in fact, filed with the Bureau of Controversies and Disputes on the forty-eighth day, May 2, 1983. In the Commissioner's judgment, respondent's reliance on the strict statutory interpretation in the instant matter places form over substance and would lend a construction to the statute which would result in an anomalous conclusion. The Commissioner therefore finds and determines that respondent's exception in this regard is without merit.

Respondent argues that, subsequent to the remand of this matter by the Commissioner, the ALJ displayed bias in these proceedings by demanding that he resign from his position of employment and by attempting to get him to relinquish his certificate.

Additionally, respondent maintains that the ALJ erred in these proceedings by allowing hearsay testimony from certain Board witnesses while excluding other substantive testimony from him and other witnesses who testified on his behalf in response to the tenure charges against him. Respondent further maintains that many of the questions posed by the ALJ to certain witnesses were weighted in favor of the Board's position.

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Respondent argues that the ALJ in reaching her conclusions of law in this matter refused to take into consideration his past performance or his continued usefulness in the school system.

Finally, respondent claims that the ALJ failed to consider the extreme care which must be used in connection with crediting the testimony of those pupils relied upon by the Board in support of its tenure charges against him. In this regard, respondent relies upon the following school law decisions and rulings laid down by the Commissioner:

> "***See In the Matter of the Tenure Hearing of William Simpson, 1978 S.L.D. 368, 374 affirmed by the State Board of Education 1978 S.L.D. 377; In the Matter of the Tenure Hearing of John Birch, 1978 S.L.D. 63, 79; In the Matter of the Tenure Hearing of Edward J. Quinn, 1975 S.L.D. 397, 410-411. The Court stated in the matter of Palmer v. Board of Education of Audubon, 1939-49 S.L.D. 183; 188:
>
> > '***[T]estimony 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 testimony of school children. If such testimony were not admissable (sic), the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.'"
>
> (Respondent's Exceptions, at p. 13)

Respondent notes that the testimony of the pupil witnesses who testified against him was so identical with respect to the manner in which it is alleged that he inflicted corporal punishment upon them in his office, that it should have been discounted by the ALJ for lack of credibility absent any further inquiry into such testimony.

Respondent concludes by excepting to the findings and conclusions reached by the ALJ as follows:

> "***It is clear that the Court was predisposed to find Dr. Smith guilty as charged. It

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> allowed heresay testimony unsupported by credible evidence; it refused to give credit to the testimony of fifteen witnesses, who all testified as to the dishonesty and untruthfulness of petitioner's witnesses; it refused to allow Respondent to elicit testimony in mitigation of sentence and made findings of fact totally unsupported by the testimony. In short, the Court's findings are not supported by a preponderance of the evidence. Clearly, justice mandates that the initial decision of the Office of Administrative Law be overturned.***"
>
> (Respondent's Exceptions, at p. 14)

The Commissioner has carefully considered respondent's exceptions to the initial decision as they pertain to the entire record of the proceedings conducted in the instant matter.

The Commissioner is not, however, persuaded by those exceptions taken by respondent to the alleged procedural bias complained of regarding the ALJ's demands for his resignation including the voluntary relinquishment of his certificate as a teaching staff member. In the Commissioner's judgment it must be concluded that respondent was aware of his right to seek an interlocutory review of the ALJ's actions complained of herein pursuant to the provisions of N.J.A.C. 1:1-9.7. The Commissioner determines that, absent such action by respondent in accordance with the above-cited regulation, such exceptions are untimely and without merit.

Finally, the Commissioner is constrained to observe that the record of this matter does not support respondent's contentions that there is a lack of sufficient credible testimony or evidence to support the Board's charges of corporal punishment against him. The Commissioner finds that the record of this matter including the initial decision presents a detailed and lengthy analysis of the testimony and evidence adduced at his tenure hearing.

The Commissioner has carefully considered the testimony and evidence presented regarding the numerous incidents in which respondent has been charged with corporal punishment. The Commissioner cannot ignore either the sufficiency of the evidence or the credibility of such testimony which has been offered to support the validity of the tenure charges. It is hereby found and determined that the Board's tenure charges of corporal punishment against respondent have been sustained. The Commissioner so holds.

The Commissioner stated In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, 1974 S.L.D. 97 that:

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> "Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and wilfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.***
>
> "The public interest demands the public trust of those teachers entrusted to care for and mold the character and attitudes of the pupils of this State." (Emphasis added.)
> (at 98-99)

The Court stated in Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943); aff'd 131 N.J.L. 326 (E. & A. 1944) that:

> "Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way." (Emphasis added.)

The above findings of fact are sufficiently flagrant to warrant respondent's dismissal from his tenured position. The Commissioner so holds.

In arriving at the above determination the Commissioner relies on those findings and conclusions reached by the ALJ in the initial decision and hereby adopts them as his own.

IT IS ORDERED, therefore that respondent be dismissed from his tenured position as of the date of his suspension by the Board.

COMMISSIONER OF EDUCATION

JUNE 16,1983

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IN THE MATTER OF THE TENURE	:	
HEARING OF KENNETH S. SMITH,	:	
SCHOOL DISTRICT OF THE CITY OF	:	STATE BOARD OF EDUCATION
ORANGE, ESSEX COUNTY.	:	DECISION
	:	

Decided by the Commissioner of Education, June 16, 1983

For the Respondent-Appellant, Stern, Lavinthal & Ackerman (Alan R. Ackerman, Esq., of Counsel)

For the Petitioner-Respondent, Chasan, Leyner, Tarrant & D'Italia (Arthur N. D'Italia, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the modification that Respondent is dismissed from his position as of June 16, 1983, the date of the Commissioner's decision in this matter.

Gustavo A. Mellander opposed.

November 2, 1983

PENDING N.J. SUPERIOR COURT

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6445-82

AGENCY DKT. NO. 188-5/82A

CAMDEN COUNTY VOCATIONAL TECHNICAL SCHOOL, CAMDEN COUNTY,

Petitioner

v.

MARY ALICE O'HARA,

Respondent.

APPEARANCES:

Robert F. Blomquist, Esq., for petitioner (Davis and Reberkenny, attorneys)

Mary Alice O'Hara, respondent, Pro Se

Record Closed: March 28, 1983 Decided: April 26, 1983

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

The Board of Education of the Camden County Vocational Technical School, Camden County (Board), filed tenure charges against Mary Alice O'Hara (respondent). Respondent was suspended without pay.

This matter was joined and thereafter transferred to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted on October 27, 1982, at which time the procedures for disposition of the case were established.

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Hearings were scheduled for ten days in March 1983 (see administrative law judge's (ALJ) letter of November 15, 1982), and proceedings were actually held on two days, March 14 and 15, 1983. The ordinary processing of this matter has been difficult; therefore, set forth below is an on-going accounting of the history of this case as it developed. It is necessary to review this history so that a background may be established for proceeding on May 14 and 15, 1983, which were days scheduled for this tenure hearing, irrespective of the fact that respondent was not in attendance.

HISTORY

1. At the beginning of this tenure matter, Mary Alice O'Hara was represented by an attorney, Richard A. Friedman of the firm Ruhlman, Butrym & Friedman.

2. At the beginning of our prehearing conference on October 27, 1982, Mrs. O'Hara appeared and discharged her attorney, Richard Friedman, and advised me that she was thereafter proceeding Pro Se. She further advised me to disregard all papers previously filed by attorneys who represented her in this matter. The record will show that prior to Richard Friedman's representation of Mrs. O'Hara, she was represented by James Blaney, Esq.

3. Prior to the prehearing conference and after the discharge of Mr. Friedman, Mrs. O'Hara presented an oral motion to dismiss the tenure charges. The motion was argued orally before me by Mrs. O'Hara and Mr. Blomquist and it was denied by written order, dated December 13, 1982.

4. The prehearing conference was conducted, and a time table was set for the completion of discovery.

5. Mr. Blomquist notified me near the end of February 1983 that he was requesting an order to depose Mrs. O'Hara for her failure to answer certain interrogatories. On March 3, 1983, having received no response to the motion for depositions, I signed the order granting the motion to depose Mrs. O'Hara on March 7, 1983.

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6. Mr. Blomquist's messenger service attempted to hand deliver the order for depositions to Mrs. O'Hara on March 3, 1983; however, when Mrs. O'Hara answered her door she closed the door in the messenger's face, refusing to accept the order for depositions. (Affidavit of Thomas Merek)

7. This refusal of Mrs. O'Hara to accept the order for depositions prompted a motion for sanctions filed by Mr. Blomquist on March 8, 1983.

8. On March 7, 1983 at 11:55 a.m., I received a telephone call from a person representing himself as Mr. McCarriston, who stated that he was a law clerk for attorney Beverly K. Thompson. Mr. McCarriston stated that Ms. Thompson was in the intensive care unit of a hospital, and he requested an adjournment of the tenure hearing scheduled to begin on Monday, March 14, 1983. Mr. McCarriston stated that Mr. Blomquist was opposed to his request for an adjournment.

9. On the same day at about 12:10 p.m., I established a three-way telephone conversation with Mr. McCarriston and Mr. Blomquist. Mr. Blomquist opposed any delay in the tenure hearing because of the history of Mrs. O'Hara's hiring and firing of her attorneys, and he asserted that this late request for an adjournment coupled with Mrs. O'Hara's failure to appear for depositions, would again unnecessarily cause a hardship to the Board and cause unreasonable delay in this matter, which had been pending since the October 27, 1982 prehearing conference. The request for an adjournment of the tenure hearing was denied.

10. After several attempts to set up a second three-way telephone conversation with Ms. Thompson herself, that connection was established on March 8, 1983, at 2:48 p.m. In this telephone conversation a person representing herself as Ms. Thompson acknowledged that Mrs. O'Hara had engaged her for this tenure matter on February 1, 1983. However, I was not notified of any possible substitution of attorney until the phone call made by Ms. Thompson's clerk on March 7, 1983, five weeks later. Ms. Thompson stated that she was in the hospital recovering from surgery. Despite Ms. Thompson's further request for an adjournment of

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the tenure hearing to begin Monday, March 14, 1983, her request was denied and she was alerted that the tenure hearing would continue as scheduled.

11. Earlier on the same day, March 8, 1983, at 9:07 a.m., I received a carbon copy of a letter written by Mrs. O'Hara to Mr. Blomquist which stated in part "that the case has been referred to attorney Beverly K. Thompson." I do not consider this notification to Mr. Blomquist as adequate notice to me because of the history of attorney representation in this case. Further, other than Ms. Thompson's assertion on the phone that she would be representing Mrs. O'Hara, Ms. Thompson has filed no substitution of attorney request.

12. On Monday, March 14, 1983, I appeared at the Oaklyn Municipal Building, Oaklyn. Mr. Blomquist appeared with three administrator witnesses from the Camden County Vocational Technical School.

13. At the time of our arrival at about 8:45 a.m., we were notified by the court clerk that a phone call had been made stating that Mrs. O'Hara was in the hospital and that she would be unable to attend that day's hearing (March 14, 1983).

14. I called my office and my secretary notified me that a person representing himself as Mr. McCarriston had called the Office of Administrative Law at 8:20 a.m., on the morning of March 14, 1983, giving the above message and that he had called again some 15 minutes later, confirming the fact that Mrs. O'Hara was in the hospital and would be unable to attend the hearing.

15. On the same morning, a person representing himself as Mr. McCarriston called me at the Oaklyn Municipal Building at my secretary's request, and he informed me that Mr. O'Hara had called very early in the morning stating that he had transported his wife to the hospital, where she was admitted with "severe abdominal pain." Mr. McCarriston represented to me that he did not know to which hospital respondent had been admitted. Mr. McCarriston also stated that he was not sure whether or not

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Ms. Thompson would be representing Mrs. O'Hara or whether Mrs. O'Hara would be appearing Pro Se. Mr. McCarriston also stated that his office and Mrs. O'Hara had a scheduled appointment early that same morning, March 14, 1983, in order to finalize their arrangement as to whether or not Ms. Thompson would be representing Mrs. O'Hara.

16. I asked Mr. McCarriston if Ms. Thompson had been released from the hospital. He stated that she has "not made any appearance yet." I did not know from his statement whether he meant Ms. Thompson had not made any appearance in the O'Hara matter or that she had not made any appearance at her own office. In any event, Ms. Thompson did not appear at the hearing scheduled for March 14, 1983. As stated earlier, I have received no request notifying me that Ms. Thompson is the attorney of record in this matter.

17. Based on the above communications and the record, I must consider that Mrs. O'Hara continues to represent herself Pro Se.

18. At the hearing I communicated the above information to Mr. Blomquist who thereafter made several motions on the record.

19. Mr. Blomquist's motion was granted to suspend Mrs. O'Hara's salary payments beginning March 7, 1983, the date she refused to accept the order for depositions. A second motion was granted to set off the $302.50 in expenses caused by Mrs. O'Hara's failure to appear for the depositions. The record will show that there is an affidavit signed by Mr. Blomquist detailing his expenses totalling $302.50 (C-2).

20. I denied Mr. Blomquist's motion to strike Mrs. O'Hara's defenses to the tenure charges.

21. We agreed, on the record, to convene the next day, March 15, 1983, to continue the tenure hearing procedure, or to decide what next step would be taken.

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22. Mr. Blomquist assured me that he would make every attempt to find out to which hospital Mrs. O'Hara was admitted, her prognosis, and whether or not she would be able to attend any tenure proceeding. Mr. Blomquist further advised me that he would apprise Mrs. O'Hara about the action I had taken granting his motion for suspension of salary payments, and for the payment of the expenses for the deposition hearing that she failed to attend. Mr. Blomquist also stated that he would explain to Mrs. O'Hara that we would continue with the tenure proceeding on Tuesday morning, March 15.

23. I issued a bench order directing Mr. Blomquist to develop a Show Cause Order for Mrs. O'Hara asking why she did not appear at the tenure hearing. This order was to be constructed so that Mrs. O'Hara could explain her absence and her doctor's diagnosis. Mr. Blomquist requested that testimony be taken in absentia if there was no satisfactory explanation offered by Mrs. O'Hara.

24. On the second day of hearing, Tuesday, March 15, 1983, my secretary called me at the Oaklyn Municipal Building, Oaklyn, and notified me that Mrs. O'Hara's son had called my office in Trenton at 8:30 a.m. stating that his mother would "not be able to make it to the hearing today." This call was not in time to prevent my travel to the hearing site. No call or other notification was received from attorney Thompson.

25. At the hearing on March 15, Mr. Blomquist presented a certification signed by two messengers employed by him. The certification states that the messengers attempted to hand deliver to Mrs. O'Hara the motion papers which I ordered from the bench the previous day (See, C-1 and C-2 in evidence). The messengers certified that Mr. O'Hara answered the door and conceded that Mrs. O'Hara was at home; however, she could not be disturbed. The messengers asked Mr. O'Hara to give his wife the moving papers. He responded that they should "mail them." The messengers taped the papers to the front door and left the premises (C-2).

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26. It should be noted at this juncture that I consider Mrs. O'Hara to be representing herself Pro Se and that there will be no further direct communication with Ms. Thompson or her representative unless I receive a substitution of attorney document. As a matter of fact, Mr. Blomquist has certified that in his contact with Ms. Thompson's office he was told that Ms. Thompson would be physically unable to practice law until May 1, 1983 at the earliest (C-1). In an earlier three-way telephone conversation with Mr. Blomquist, on March 8, 1983, Ms. Thompson told me that she was in the hospital recovering from surgery. The record will also show that I mailed to Beverly K. Thompson, a copy of my letter to Mrs. O'Hara, dated March 28, 1983. No reply has been received from Ms. Thompson.

27. At my direction the tenure hearing commenced with the introduction of documents in evidence and the testimony of two witnesses. The first witness was David Morton (D.M.) who is an assistant director for adult education employed by the Board. In his capacity at the school, Mr. Morton supervised Mrs. O'Hara. The second witness was the Superintendent of Schools, Donald Springle (D.S.). The documents admitted in evidence are C-1, C-2, and P-1 through P-78, which are contained in three bound volumes, colored red, white, and blue. Also in evidence is P-79, the superintendent's resume.

28. After the testimony of the two witnesses and the receipt of documents in evidence, the hearing was concluded. No appearance or presentation was made by Mrs. O'Hara or by anyone on her behalf.

29. On March 16, 1983, I notified Mrs. O'Hara by letter that the hearings in her tenure matter had ended. The letter advised Mrs. O'Hara that prior to my disposition of the tenure charges against her, she may wish to respond to several questions (See, March 16, 1983 letter). The letter concluded that Mrs. O'Hara's failure to respond to my concerns in writing by March 25, 1983, would be considered an admission of her intention to abandon her defenses to the tenure charges.

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30. I notified Mr. Blomquist by letter on the same date, that I had mailed this letter of "abandonment" (March 16, 1983) to Mrs. O'Hara.

31. Mrs. O'Hara's son called the Trenton Office of Administrative Law on Tuesday, Wednesday, Thursday, and Friday mornings at 8:30 a.m. (March 15, 16, 17, 18) to state that his mother could "not make the hearing today." As I stated before, an 8:30 a.m. call is not in time to prevent my travel to the hearing site.

32. In any event, the hearings scheduled for March 16 and 17, 1983, had earlier been adjourned by my letter dated November 15, 1982.

33. Nevertheless, because Mrs. O'Hara's son called each morning at 8:30 a.m., my secretary made five phone calls to Mrs. O'Hara's home (which were not answered) on March 15, 16, and 17, to notify Mrs. O'Hara that the hearings had concluded on March 15, 1983. (The telephone log is filed.)

34. In my letter to Mrs. O'Hara, dated March 16, 1983, I asked for specific information concerning her illness on March 14, 1983, and concerning her legal relationship with attorney Beverly K. Thompson.

35. Mrs. O'Hara responded in writing on March 25, 1983, certifying as follows:

    a. Beverly K. Thompson is her legal counsel in this matter.

    b. Respondent was taken ill suddenly on the morning of March 14, 1983 (C-3).

36. Attached to her certification received on March 25, 1983, was respondent's physician's diagnosis and treatment. Respondent was treated for a headache and was directed to see an eye doctor. I was informed by law clerk McCarriston that respondent was admitted to the hospital on March 14, 1983, for "severe abdominal pain" (C-3).

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37. Respondent did not request an adjournment of the hearing scheduled for March 15, 1983. My efforts to notify respondent about the on-going procedures were frustrated because none of my secretary's five afternoon telephone calls to respondent's home was answered. (See, telephone log and notes in file.)

Based on this procedural history, I **CONCLUDE** that respondent is representing herself. There has been no substitution of attorney. Further evidence of this fact is respondent's personal response to my letter dated March 16, 1983, wherein a Notice of Motion and a Certification were filed, Pro Se. This Motion and Certification state that Beverly K. Thompson is the attorney of record for respondent; however, no copies were forwarded to Ms. Thompson and all of the moving papers were signed by Mrs. O'Hara. No written communication has ever been received from Ms. Thompson.

Assuming that respondent was legitimately ill on March 14, 1983, neither Beverly K. Thompson, Esq., nor anyone else appeared on respondent's behalf. Neither has there been any request for an adjournment made by Beverly K. Thompson, Esq., or by respondent.

Respondent's son called on each morning, March 15, 16, and 17, to report that his mother would "not be able to attend the hearing today." Although I tried to confirm these calls, as stated earlier, five telephone calls to respondent were not answered.

RESPONDENT'S NOTICE OF MOTION AND CERTIFICATION

Respondent's Notice of Motion to Suppress all Action Taken in this matter on March 14 and 15, 1983, and to Restore Salary, pursuant to N.J.S.A. 18A:6-14, is supported by her certification in support of the Motion.

In my judgment, respondent has needlessly complicated this tenure proceeding by her failure to communicate directly with me in a timely fashion about her illnesses. At the very least, respondent had an obligation to communicate with me directly when she returned home from the hospital on March 14, 1983, and to state verbally or in writing, that she expected to be incapacitated for a period of time. The record shows that respondent waited each day until we had traveled to the hearing site before notifying my secretary that she would be "unable to make it today." Further, respondent has failed to

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participate in the completion of interrogatories and depositions which I had earlier ordered. Respondent's changing decisions as to her representation have also needlessly confused and complicated the orderly processing of this matter.

Based on this confusion as documented above in the 37 numbered paragraphs, I believe that there is a reasonable basis to conclude that respondent has delayed the processing of this tenure proceeding so that she is no longer entitled to receive her salary. However, if respondent is entitled to have her salary resumed, such entitlement should come through an appeal of this ruling to the Commissioner of Education. Respondent was advised of this procedure by letter dated March 28, 1983.

Respondent has certified in her moving papers at paragraph 11 as follows:

> The files respecting the tenure matter are in the possession of my legal counsel, Beverly K. Thompson, P.A., as I advised you by letter dated March 2, 1983, certified mail No. P-277134586. Both the law firm and Mr. Blomquist have stated that telephone communications have taken place with you and that law firm. As of this date that law firm has the files. I shall advise the parties as soon as I can of any change in this status (sic) occurs.

Irrespective of this certification, the record above shows that I have concluded that Beverly K. Thompson is not the attorney of record in this matter and that respondent is representing herself. Further, it is apparent that respondent has filed this Notice of Motion and Certification along with proof of service and other documents on her own behalf without so much as a carbon copy to her alleged representative, Beverly K. Thompson, Esq. Accordingly, this certification is not credible (C-3).

To support the fact of her illness, respondent attached to her certification evidence of her treatment at the emergency department of the Zurbrugg Memorial Hospital on the morning of March 14, 1983, at 5:50 a.m. That emergency treatment form indicates that respondent was treated for eye problems and backache. The doctor recorded that respondent's eye "hurts." Reference is also made to a problem with respondent's anterior thigh. Although the doctor's diagnosis and recommendations are not fully understood, I **FIND,** no reference to abdominal pain. The doctor concluded with instructions which state: "call eye doctor today for appointment." The doctor issued a prescription for prescription glasses, and he suggested an examination by respondent's family physician if her headaches did not subside (C-3).

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Based on the foregoing procedural irregularities, I **FIND** and **CONCLUDE** that respondent has abandoned her defenses and forfeited her right to participate further in this tenure hearing for the following reasons:

1. Respondent has refused to accept my Order to be deposed dated March 3, 1983, thus frustrating completion of discovery.

2. Respondent has misrepresented to me that Beverly K. Thompson, Esq., is her attorney.

3. Respondent refused to accept my bench Orders from Mr. Blomquist's messengers (C-2).

4. Respondent's certification with attached medical diagnosis differs markedly from the representation that respondent suffered "severe abdominal pain" on March 14, 1983.

5. Respondent has needlessly confused and obstructed any orderly proceeding in this matter.

THE TENURE CHARGES

The tenure charges against respondent are voluminous. Although the Board has organized its case by filing five separate charges, it is very apparent that the charges are intertwined and that they allege multiple instances of conduct unbecoming a teacher and insubordination.

The Board asserts that respondent has issued vile and venomous oral and written statements against the district's administrators and her fellow employees as well as against her own attorneys, the Board attorney, and the State Judiciary. The Board concludes that the endless legal actions which respondent has generated, together with her vile harassing actions and scandalous statements against her fellow teachers make respondent unfit to continue as a teacher.

Evidence supporting these charges was given by two of respondent's supervisors.

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D.M. testified that he is one of the school's administrators and that his title is Assistant Director for Adult Education. In the performance of his duties, D.M. testified that he was obligated to supervise respondent. D.M. gave examples of problems caused by respondent which were upsetting to him and to the district.

One example is in regard to a grievance filed by respondent in which she charged that D.M. promised reprisals against her for filing the grievance and that he further advised her to "forget it" because the superintendent sets salaries and that he would not change her salary. Whatever the import of these allegations as set forth in the grievance (P-3), respondent's allegations are unequivocally denied in D.M.'s written response (P-3a) and by his testimony that he was not even aware of any allegations concerning himself until he was shown respondent's grievance.

A second example testified to by D.M. was the ongoing work of a steering committee for post-secondary self-evaluation, which considered as one of its topics the Library Technical Program Self-Evaluation. D.M. testified that a school pupil advised him that he was asked by respondent to stack boxes in certain areas in the library to make it appear more crowded and to show a need for additional storage space. D.M. testified that when respondent posed the crowded condition, she took a photograph to support her contention that the library was crowded and needed additional storage areas. This photograph, together with a copy of respondent's grievance, was included in her report that was to be sent to the Commissioner of Education and made public. Respondent's report also included a confidential memo concerning a school pupil. D.M. testified that the conditions complained of by respondent simply "did not exist." Support for the posed photograph in the library, and the conclusion by D.M. that respondent's behavior in this regard was irresponsible and vindictive, is shown in P-67, which concluded that respondent was negligent in her assignment, demonstrating poor professional judgment.

As a result of these occurrences, respondent was notified that she would be removed as chairperson of the library technology committee and that she would be replaced by N.A. (P-68, 69, 70).

In a five-page reply to D.M., respondent defended her Program Self-Evaluation insisting that the library did in fact need more storage space and that the photo she took was not posed. In a second memorandum to D.M., respondent complained about her removal as chairperson and suggested that D.M. was part of a secret committee

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responsible for this action which she considered not in her best interest. D.M. testified that he considered this to be an insubordinate comment (P-72).

D.M. testified further that respondent refused to turn in the year-end grades for her pupils and that she objected to receiving an assignment by another teacher (N.A.) and having to take inventory which she considered a technician's job. D.M. testified that this problem did not exist when respondent was the librarian giving the assignments and N.A. was taking the inventory. Finally, D.M. testified that respondent was given a letter on August 24, 1978, detailing her assignment for the coming school year and directing her to report to the public services librarian. The record shows that this assignment could not be carried out because respondent did not report to school during that entire year as a result of her illness (P-73, P-74).

D.M. concluded by expressing his opinion that respondent's retention as a teaching staff member would be detrimental to the school district because she was uncooperative, unreliable, and had a negative impact on the school and its program. D.M. testified that he believed respondent was guilty of insubordination on more than one occasion and that she used a document to discredit the administration and the library program at the school.

The Superintendent testified that he had read through all of the documents in evidence (P-1 through 78). These three volumes in their entirety relate to statements made or actions taken by respondent against the Superintendent personally, the Board of Education, and other school administrators and employees, together with their responses to respondent's allegations.

The Superintendent testified that he prepared the tenure charges and presented them to the Board and that the Board considered the charges against respondent in executive session before referring them to the Commissioner of Education. The Superintendent identified P-78 as a summary of respondent's litigation against the Board and testified that in every instance, the Board has been upheld and that none of the charges by respondent and none of the statements by respondent against any teacher, administrator or the Judiciary have been upheld.

The Superintendent testified about respondent's allegations of his personal hatred for her. He pointed out her accusations that he ignores the law; that he is guilty of

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fomenting fear tactics and committing white collar crimes; that he had offered perjured testimony at an earlier hearing before the Office of Administrative Law; and that he had offered perjured testimony before other forums. The Superintendent also testified that respondent had accused other school employees, the Board solicitor, and other State employees of white collar crimes.

The Superintendent testified that he was angry and shocked, and he registered disbelief that such language should be used in this context by a professional staff member. He stated that in all of his experience that he had never before seen this kind of behavior. The Superintendent testified that respondent made the same charges over and over again in the different forums she utilized and that P-1 through P-78 are a constant rehash of the same problems.

As an example of respondent's behavior which was in part responsible for the tenure charges against her, the Superintendent referred to a document respondent prepared where she referred to herself as a "hostage Title I math teacher." He testified that respondent repeatedly called herself a "hostage" when responding to any administrative memo and that this reference corresponded in time with the Iranian crisis. He testified that respondent tried to put herself in the same situation as the American hostages in Iran. In so doing, he testified that respondent accused the Board of engaging in unlawful terroristic activities.

Another example of respondent's conduct was in regard to a contract she was offered on April 9, 1981, which she refused to sign, but which she later did sign with her added comments. Prior to signing her contract, the Superintendent testified that respondent advised other teachers that they should not sign their contracts. This advice caused some disruption in the school district until the teachers' union officers convinced the membership that respondent's advice should not be followed. Thereafter, the remainder of the teachers signed their contracts.

The Superintendent testified that respondent brought several actions against J.E.J., who was one of her colleagues, asserting that J.E.J. was not certificated or was improperly assigned to the position to which she believed she (respondent) was entitled. The record shows that these allegations by respondent were dismissed. Nevertheless, the Superintendent testified that J.E.J. was very upset, shocked, concerned and angry. He testified that J.E.J.'s morale was hurt for some period of time thereafter, and that

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respondent's charges against a fellow staff member had a chilling effect on other members of the staff who did not want to work with respondent because they were afraid that she might make frivolous allegations against them.

In another incident, the Superintendent testified that respondent charged N.A. with fraud in signing her name as the chairperson of the library technology committee. Respondent labeled this signature as a white collar crime. The Superintendent testified that this statement by respondent was totally false in its context because although N.A. did not chair the library technology committee at that time, she was later appointed in April 1978. The Superintendent testified that respondent's false statements are evidence of her unprofessional conduct. As a result of this harassment by respondent, the Superintendent testified that N.A. resigned her teaching position because of the unfounded, malicious, vicious attacks by respondent. He labeled as scandalous the defamatory statements by respondent.

The Superintendent testified further giving other examples of unfounded, unsupported accusations by respondent as follows. He testified that the Board secretary was accused of white collar crimes by giving false information to D.S., an equal pay investigator; and that a Board solicitor committed a white collar crime for giving untrue statements to an affirmative action officer for the Department of Education and to the Camden County Superintendent of Schools; that counsel for the Board committed a white collar crime for violation of disciplinary rules; and that J.E.J. had removed testimony from a transcript prepared by a certified shorthand reporter of an earlier matter in which respondent was involved in litigation with the Board.

The Superintendent stated that at some point in time he was no longer shocked by respondent's accusations because "there was just too much of it." He recalled that respondent had accused Board counsel and one of her former attorneys of a conspiracy, and that her entire behavior had a chilling effect on the administration because it had become overly cautious, believing that anything it did or said would result in charges and in litigation.

As another example of the impact of respondent's behavior on other staff members, the Superintendent testified that an older teacher, Mrs. W., informed him that she had elected early retirement because of respondent's behavior. He recounted an incident where respondent, having been assigned as a team teacher with Mrs. W., walked

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to the front of the classroom one day, in front of a roomful of pupils, and drew a chalk line down the middle of the chalkboard to the floor, completely through the center of the floor to the rear of the room and up the rear wall and stated, "Mrs. W., this is your side of the room and this is my side. You stay over there and I'll stay over here." Mrs. W. left the district in the middle of the school year.

The Superintendent also testified that other examples of false statements and misrepresentations by respondent are set forth in Charge 3 at p. 10 of the Board's certification, which shows that respondent requested a leave to attend a conference, stating that she did not have a lawyer to represent her. She later admitted that no appearance had ever been entered by an attorney in her behalf (Charge 3).

On another occasion respondent requested personal leave to attend the activity of graduation at Burlington County College beginning at 9:00 a.m. The Superintendent denied the request for leave because respondent possessed an earned bachelor's degree and a master's degree, and he did not understand why respondent would need time during the day for an associate's degree from the county college. The Superintendent testified that at no time did respondent assert that she was requesting time off for graduation practice to be held during the day (as opposed to the actual graduation ceremony at night, which would have been held after school hours). Respondent litigated this denial of her request through binding arbitration which she lost. In her decision, the arbitrator stated that respondent's conduct was such that she believed her to be insincere in her desire to obtain personal leave and that had respondent been genuinely interested in attending the graduation rehearsal, she would have clearly stated and explained to the administrator her desire to attend a graduation rehearsal on the morning of June 24 (P-49, pp. 6-7).

Charge 4 alleges conduct unbecoming a teacher for malicious prosecution actions against the Board of Education, the Superintendent, and fellow teaching staff colleagues without probable cause or justification, causing the school district to spend considerable sums on attorney's fees and to have school administrators and teaching staff personnel respond to the specious charges.

In support of this charge, the Superintendent testified that the litigation actions against the Board have exceeded 20 in number and all of them have been unsuccessful. Nevertheless, they have cost the Board more than $20,000, and the

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Superintendent expressed his belief that respondent was taking this shotgun approach with the hope that someday a pellet might hit.

Charge 5 is a general charge which states that the first four charges in the aggregate are sufficient to give evidence of conduct unbecoming a teacher. The Superintendent testified that in his belief respondent had contributed to a total disruption of the school district by her continuous refusal to cooperate and that her actions had a chilling affect on the faculty. He testified finally that respondent had made unfounded charges against nearly everyone.

From my review of the charges and the testimony and documents in evidence in support of the charges as testified by the supervisor, D.M., and the Superintendent, the charges stand as uncontested and true.

Respondent's behavior in the assignment and discharge of counsel to represent her has contributed to delay, confusion and the circumstance where she had no representation and did not represent herself at the hearing on March 14 and 15, 1983. Further, it should be recalled that respondent never asked for an adjournment of the tenure proceeding.

Based on the foregoing testimony, evidence, the documents in evidence, and the record of this entire proceeding, I **FIND** that respondent has been given adequate and full opportunity to defend herself against the charges levied by the Board. I also **CONCLUDE** that respondent has abandoned her defenses to the charges by her manipulation of her absence from the tenure proceeding on March 15, 1983.

For all of the above reasons, I **CONCLUDE** that respondent's actions in some instances were bizzare, ludicrous and contributed to a substantial disruption in the administration of the school district.

For these reasons, I **CONCLUDE** further that the charges are true in fact and warrant respondent's dismissal as a teaching staff member employed by the Board of Education of the Camden County Vocational Technical School District.

Therefore, respondent has forfeited her tenure protection as provided by the statutes effective on the date of her suspension without pay by the Board.

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

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

26 April 83
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

27 April 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 29, 1983
DATE

Ronald L. Parker/sa
OFFICE OF ADMINISTRATIVE LAW

ml/EE

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DOCUMENTS IN EVIDENCE

C-1	Robert F. Blomquist, Esq. Certification
C-2	Certification of Thomas Merek and Scott Holder
C-3	Notice of Motion and Certification to Suppress
P-1 through P-78	(Volumes I, II & III Red, White and Blue)
P-79	Superintendent's resume

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IN THE MATTER OF THE TENURE :

HEARING OF MARY ALICE O'HARA, :

SCHOOL DISTRICT OF THE CAMDEN : COMMISSIONER OF EDUCATION

COUNTY VOCATIONAL TECHNICAL : DECISION

SCHOOL, CAMDEN COUNTY. :

:

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Before the Commissioner considers the numerous primary exceptions filed by Mary Alice O'Hara, pro se respondent, and the reply exceptions of the Board, he deems it necessary that a background be established for the difficult processing of this case.

During the time span encompassed by the beginnings of this tenure matter, the two hearing days (of ten scheduled) and concluding with an initial decision by Judge Thomas, respondent engaged and terminated the services of four attorneys. The Commissioner notes with approval the lengthy procedural history of 37 items, ante, compiled by Judge Thomas. The Commissioner adopts them by reference and finds no need to repeat them here. In addition to the procedural history and its reference to three of respondent's attorneys, the Commissioner deems it proper to note that she engaged the services of a fourth attorney, Louis B. Youmans, who filed exceptions to the initial decision. For reasons of her own, respondent filed her own exceptions and repudiated those of the fourth attorney, which will not be considered by the Commissioner. Her action buttresses the conclusions, ante, reached by the judge that "respondent is representing herself." The Commissioner so holds.

Respondent's primary exceptions argue that all five charges against her must be dismissed. In support of this contention she relies on a seven point submission of exceptions in multitudinous detail which the Commissioner will encapsulate as follows:

In Exception I, respondent contends that a conflict of interest exists between counsel for the Board and her self warranting withdrawal of that firm from the case. She names in particular William C. Davis, Esq. and Robert F. Blomquist, Esq.,

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accusing them of "white crimes." She charges the judge with error and urges the Commissioner to now attempt to conciliate this matter.

In Exception II, she charges the Board with malicious prosecution, frivolous litigation and defamatory charges.

In Exception III, she seemingly contends that the charges be dismissed because she never had tenure because of her transfer by the Board to a Title I, compensatory mathematics position. She characterizes the decision of the Superior Court, Appellate Division, upholding her transfer by the Board as being arbitrary and unreasonable.

In Exception IV, she alleges that the Board failed to file the tenure charges in a timely fashion.

In Exception V, she charges Donald C. Springle, Superintendent of Schools, as having lied under oath about the retirement of Mrs. W. having been precipitated by respondent's behavior.

In Exception VI, she accuses the judge of improperly giving the Board favored treatment. She contends that the procedural history compiled by him is inaccurate and that it plainly shows favor to Blomquist.

In Exception VII, she contends that counsel for the Board made illegal and improper demands including requiring her deposition in place of interrogatories. She alleges that the judge improperly favored the Board to her detriment.

The Board in its reply exceptions firstly argues that the exceptions filed by respondent should not be considered because she has no standing to assert them.

In reply to Exception I, the law firm of Davis and Reberkenny, contends that it has properly represented the Board in this matter. Further, it states that the Commissioner has no jurisdiction to decide a purported violation of the code of professional responsibility. The Board opposes any suggestion of conciliation by the Commissioner.

The Board denies the allegations in Exception II that it acted to prosecute respondent in a malicious manner. The Board relies on pertinent Commissioner's decisions which, in essence, show a balance between the state's interest and the teacher's interest. In the Matter of the Tenure Hearing of William T. Verost, School District of the Village of Ridgewood, Bergen County, decided October 18, 1982, citing Pickering v. Bd. of Ed. of Tp. H.S. Dist., 391 U.S. 563 (1968); Winston v. So. Plainfield, 64 N.J. 582, 588 (1974); and Pietrunti v. Brick Tp., 128 N.J. Super. 149 (App. Div. 1974), cert. den. 65 N.J. 573 (1974), cert. den. 419 U.S. 1057 (1974)

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Respondent's argument in Exception III that she lacked tenure status and therefore no tenure charges could be filed against her is disputed by the Board, pointing to her employment as a librarian from 1973 through the 1977-78 school year which granted her tenure in the district.

In its refutation of Exception IV that the Board filed the tenure charges out of time, the Board contends that it followed the proper procedure as set down in statute and Commissioner's decisions and relies on In the Matter of the Tenure Hearing of Marilyn Feitel, School District of the City of Newark, 1977 S.L.D. 451, aff'd State Board 458.

In refuting Exception V, the Board argues that respondent is now attempting to testify to the Commissioner when she purposely refused to appear at the scheduled tenure hearing before Judge Thomas in March 1983.

In considering her exceptions in items VI and VII, the Board denies that the judge acted improperly in his conduct of this matter and avers that he properly ruled on the procedural matters before him. In denying her contention that the Board improperly demanded to depose her, the Board contends that respondent had refused to properly answer the interrogatories previously authorized and that the judge properly exercised his discretion in procedural matters. The Commissioner finds merit in the Board's exceptions.

An examination of the voluminous record in this matter reveals to the Commissioner no impropriety on the part of counsel to the Board. The Commissioner disagrees with respondent's recommendation that this matter now be conciliated by him. The matter has been tried, the record closed and an initial decision has been rendered. Nothing in the statutes or case law warrants conciliation by the Commissioner at this time. The Commissioner does not attribute error to the judge because of his allowance of counsel for the Board to continue in this case.

A thorough examination of the charges certified to the Commissioner and the record herein fails to reveal to the Commissioner any proof of malicious prosecution of respondent by the Board. The Commissioner notes that the charges filed are premised on conduct unbecoming and insubordination.

The Commissioner finds no merit in respondent's contention that she had no tenure because of her transfer to a Title I position. In the opinion of the Commissioner, she served the requisite time to achieve tenure in the system and did so by serving as a librarian from 1973 through the 1977-78 school year. N.J.S.A. 18A:28-5

An examination of the record herein convinces the Commissioner that there is no merit in respondent's contention that the Board failed to file the tenure charges in a timely

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fashion. The Commissioner notes with approval the Board's reliance on Feitel, supra, in its argument that it followed the proper procedure and filed the tenure charges within the time prescribed by the statutes and the Commissioner's interpretation thereto.

The Commissioner notes that in Exception V respondent challenges the truthfulness and credibility of the Superintendent, stating that he lied under oath. The Commissioner is constrained to observe that the judge was best suited to observe the demeanor of witnesses and determine their credibility. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). The Commissioner finds no merit in respondent's castigation of the Superintendent.

The Commissioner cannot agree that the judge conducted himself in an improper manner as alleged by respondent because of her claim that he unduly favored the Board. Nothing in the record sustains such allegation. In fact, a thorough examination of the record reveals to the Commissioner that the judge showed significant restraint in his conduct of the case.

Finally, the Commissioner finds no merit in respondent's contention that legal counsel for the Board improperly demanded an Order for Deposition. In the opinion of the Commissioner, the judge properly exercised his discretion in this matter. Further, the record reflects that she failed to appear at these depositions without adequate explanation, justifying the Order for Sanctions which terminated her post-suspension salary payments. The Commissioner is fully aware that such action was not pleasing to her but of itself does not constitute proof that counsel for the Board or the judge acted in collusion or in an improper manner. The Commissioner so holds.

The Commissioner observes that respondent failed to appear, nor was she represented, at the tenure hearings scheduled in March 1983 for reasons unacceptable to the judge, ante. The Commissioner has previously dealt with a number of matters in which respondents have chosen not to appear at a tenure hearing to defend themselves. The Commissioner notes the compilation of such cases by the Board as follows:

> "In the Matter of the Tenure Hearing of Hugh Mullen, School District of Madison Township, Middlesex County, 1968 S.L.D. 51; In the Matter of the Tenure Hearing of William Nagy, School District of Caldwell-West Caldwell, Essex County, 1968 S.L.D. 23; In the Matter of the Tenure Hearing of Mert P. Hyland, School District of the Township of Millburn, Essex County, 1968 S.L.D. 253; In the Matter of the Tenure Hearing of Anthony J. Brennan, School District of the City of Elizabeth,

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Union County, 1973 S.L.D. 235; In the Matter of the Tenure Hearing of Richard Royer, School District of the Township of Brick, Ocean County, 1973 S.L.D. 460; In the Matter of the Tenure Hearing of Daniel T. Carrow, School District of the City of Paterson, Passaic County, 1974 S.L.D. 213. In these decisions, the Commissioner has upheld the charges therein because of the absence of any verbal or written defense. Indeed, the comments of the Commissioner in the decision of In the Matter of the Tenure Hearing of Virginia Caputo, School District of the City of Clifton, Passaic County, 1975 S.L.D. 616, are apposite to the facts of the instant matter:

'Respondent was offered ample opportunity to appear pro se or be represented by counsel at the hearing... This failure to defend at a tenure hearing bears strong resemblance to In the Matter of the Tenure Hearing of Daniel T. Carrow, School District of the City of Paterson, Passaic County, 1974 S.L.D. 213, and In the Matter of the Tenure Hearing of Mary Burns, School District of the Township of Readington, Hunterdon County, 1974 S.L.D. 1307 wherein there was similar failure to defend by respondents. Id. at 619.'***"

(Board's Exceptions, at pp. 2-3)

In the present matter the Commissioner finds and determines that the judge properly refused to grant a continuance of the March 1983 tenure hearing. Respondent's obvious displeasure at this ruling does not obviate the fact that she has received full measure of due process. The Commissioner so holds.

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

The charges, having been proven true in fact, warrant the dismissal of Mary Alice O'Hara as a teaching staff member from her tenured position with the Board, effective as of the date of her suspension without pay.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 22, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4084-82

AGENCY DKT. NO. 94-4/82A

CINNAMINSON TEACHERS ASSOCIATION,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON,

Respondent.

APPEARANCES:

Joel S. Selikoff, Esq., for petitioner (Selikoff & Cohen, attorneys)

John L. Slimm, Esq., for respondent (Orlando & Slimm, attorneys)

Record Closed: March 24, 1983

Decided: May 13, 1983*

*extension from May 9, 1983

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

This petition of appeal addresses the validity of a teachers' dress code (code) adopted by the Cinnaminson Township Board of Education (Board). The Cinnaminson Teachers' Association (Association) allege that the dress code imposes unreasonable restrictions on its members, is vague and overly broad, and bears no substantial relationship to a legitimate objective of the Board which, allegedly, results in the code being an arbitrary exercise of the Board's authority. It seeks an Order to permanently enjoin the Board from enforcing the provisions of the Code. The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Five days of hearing were conducted in the matter at the Mt. Holly Court House after which the parties filed briefs in support of their respective positions. The record closed March 24, 1983, after the Board filed its final reply brief.

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Background

The controverted staff dress code, adopted as Board policy 4184, is reproduced here in full:

> Responsibility for acceptable dress will rest primarily with the employee as a professional individual.
>
> Employees of the Cinnaminson Township School District shall be neatly attired and groomed while discharging their responsibilities to the district.
>
> Grooming and attire shall meet the following criteria:
>
> a. Male staff members shall wear dress shirts and ties with jackets or sweaters.
> b. Males may wear turtleneck shirts or sweaters with jackets in lieu of shirts and ties.
> c. Females may wear skirts and slacks with blouses or sweaters, dresses or slack suits.
>
> Grooming not acceptable:
>
> a. open shirt collars - males
> b. torn or dirty clothing
> c. sneakers
> d. see-through blouses
> e. excessively tight fitting clothing
> f. dungarees or jeans
> g. any dress or grooming which would attract undue attention, or would be potentially unsanitary or dangerous (i.e. certain shoes or sandals).
>
> Physical education teachers may wear uniforms which are conducive to their subject area. Athletic jackets, T-shirts, monogrammed pullover shirts, striped pants of slacks, jogging suits and sneakers are acceptable for physical education teachers only. Smocks for Employment Orientation, shops, etc. may be worn by shop teachers and science teachers working in labs. Related Arts teachers may wear appropriate clothing to accomodate special teaching situations. This policy will apply to all employees, however, transportation, maintenance and custodial staff may wear appropriate clothing to accomodate their working situations.
>
> Exceptions to the above criteria may be permitted with prior approval of the Superintendent.

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Copies of the staff dress code were circulated to the Board's professional staff by its superintendent on or about February 8, 1982. The superintendent attached the following memorandum to the dress code:

> On the back of this memorandum please find a copy of the revised dress code that was approved by the Board of Education on February 2, 1982, and is now official Board Policy.
>
> The Board of Education believes that the interaction between teachers and students is the greatest factor in determining the quality of education in the Cinnaminson Township School District.
>
> There is a plethora of educational literature which supports the fact that teachers exert a lasting influence on their students. The Board of Education is embracing the concept that teachers should be role models, since it is widely accepted that students (even the very youngest) are keen observers of how teachers talk, what they believe in, how they act and how they dress.
>
> I assure you that the code will be implement by the administration with fairness and integrity.
>
> Remember however, that the policy applies to all employees of the district.

The State Board of Education, in Carlstadt Teachers' Association v. Board of Education of the Borough of Carlstadt, 1980 S.L.D. __ (decided November 5, 1980), held

> The law is well established that [a] Board has the right to adopt a reasonable dress code for its faculty, with the objective of creating an atmosphere of respect for teachers and a dignified environment conducive to discipline and learning. [citations omitted] However what is reasonable is of course the problem. In an effort to guide boards of education in developing their policies, we would adopt the following standards for determining reasonableness in any particular case:
>
> 1. The dress code must be substantially clear and concrete; otherwise it will not be enforceable.
> 2. The code should impose no undue financial burden on any individual teachers.
> 3. The code should no unduly limit an individual's right of selection and freedom of expression; several options as to styles or modes of dress should be available to both men and women.

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4. The code should be reviewed periodically, so it will conform from time to time with changing community attitudes.

5. The code should be consistently interpreted and enforced.

In affirming the decision of the State Board, the Appellate Division impliedly approved the five part test for reasonableness when it said:

> With regard to . . . the reasonableness of the code--our careful examination of the record persuades us that the findings and conclusions of the State Board are supported by sufficient credible evidence. (N.J. App. Div., March 26, 1982, Docket No. A-1469-80T4), (unreported).

Accordingly, the issues presented for adjudication here are the reasonableness of the Board's policy, its asserted vagueness, and whether the code was adopted as an arbitrary exercise of the Board's authority.

FACTS

From my review of the testimony and exhibits, I find the following as the facts of the matter. The Board has had a pupil dress code, though not necessarily enforced, for a number of years. Board member Taylor, who won election to Board membership during the 1981 annual school election, ran on the platform that, if elected, he would enforce discipline in the Cinnaminson schools. Taylor perceived a need for "discipline" because of a "few teachers who dressed inappropriately at the high school." Subsequent to his election, Taylor was appointed to the chairman of the Board's policy committee. Taylor instructed the then superintendent that he wanted to implement "discipline" in the schools by instituting a dress code for teachers and by enforcing the dress code for students. Taylor believed a teacher dress code would secure respect for teachers by students, together with placing teachers in the position of role models for students. Taylor explained that though those were his two reasons for wanting a teacher dress code, together with his concern of a small number of teachers dressing poorly at the high school, he disclosed only the latter reason to the superintendent when he instructed the superintendent to draft a teacher dress code.

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The superintendent informed Taylor that the Board had no legal basis upon which to implement a teachers' dress code at that time. However, subsequent to a ruling by the State Board of Education in Cumberland Regional Education Association v. Cumberland Regional Board of Education, 1980 S.L.D. ___ (decided, Nov. 5, 1980) the superintendent reversed his advice to the Board member and informed Taylor that the Board probably had the authority to adopt a dress code. The superintendent, upon informing the Board that it probably had a basis upon which to adopt such a code, was directed by the policy committee, through Taylor, to immediately begin drafting a dress code. The superintendent was instructed to draft the code similar to the Cumberland code which had been approved by the State Board of Education. No other Board member but Taylor spoke with the superintendent in respect of a dress code and Taylor's concern, as expressed to the superintendent, was with the few teachers who dressed inappropriately.

When the superintendent prepared the first draft of the code, he conducted a series of meetings with principals and then with teachers in the elementary and high school. All teachers had the opportunity to make comments on the proposed draft. As the result of comments from staff, the superintendent revised the dress code, which resulted in the code as adopted by the Board on February 2, 1982 and as reproduced earlier. Though the superintendent drafted the code, its creation, adoption and implementation was not of his making as the educational leader of the schools; rather, the genesis for the dress code was with Board member Taylor.

At the conclusion of a November 1981 meeting with Association officers, the superintendent advised the officers he was developing a dress code for teachers because the Board's policy committee felt that a few teachers were not dressing appropriately. No further explication of "not dressing appropriately" was offered by the superintendent. The superintendent did explain, though, that it was his opinion that the proposed dress code would improve discipline in the Cinnaminson schools. The Association does not object to a staff dress code so long as it is limited to the first sentence of the dress code adopted by the Board. That is, the Association would accept a dress code, without challenge, if the code were to provide solely that "Responsibility for acceptable dress will rest primarily with the employee as a professional individual."

When the dress code was adopted by the Board and school principals began to implement its provisions, several teachers were reprimanded for not being "in code". At about the same time, negotiating sessions were occurring between the Association and the

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Board. The issue of the dress code, together with the letters of reprimand that had been issued, were discussed. As a result, the Board agreed to cause the letters of reprimand to be rescinded and to have the superintendent modify and clarify the code. The following clarification was made to the existing dress code:

1. Mock (crew) turtleneck sweaters with jackets will be acceptable.

2. Physical education teachers who also are assigned health classes may wear the appropriate physical education attire indicated in the code.

3. Industrial art teachers are not required to wear ties during those times that they are working near machinery, but should comply with the code at all other times.

4. Corduroy pants (not jeans) are acceptable.

5. Jackets may be removed by staff members when the temperature room surpasses 75.

6. All types of ties, such as bow ties, string tes, are acceptable with an appropriate shirt.

7. The dress code is not in effect for Saturday games, night games, etc. when the staff member is not on duty.

8. The code indicates that Related Arts teachers may wear appropriate clothing to accomodate special teaching situations. This does not permit flagrant violations of the code such as wearing dungrees (sic), sweaters, etc.

9. No written reprimands are to be issued until February 17, 1982.

Remember, however, that the Dress Code is in effect and has been effect since February 2, 1982, when approved by the Board of Education (P-3).

Prior to the items of clarification being issued, at least one principal issued the following kinds of letters of reprimand to teachers who were found dressed "not in code":

Dear_____

On Tuesday, February 9, 1982, your dress was in violation of Cinnaminson School Board policy 4184-Staff Dress Code. Specifically, your dress violated that part of the Code which states: [here states the specific provision of the code which is found to have been violated.]

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> This letter is an official reprimand. For any subsequent violation you will be charged with insubordination and immediately referred to the Superintendent of Schools for further disciplinary action which may result in suspension and loss of pay.
>
> In addition, you will not be permitted to instruct classes until your dress conforms to the Staff Dress Code (P-5).

Though the items of clarification did clear up some of the vague areas with which the Association was concerned, it still questions the necessity of having a dress code at all. This concludes the recitation of basic fact.

In respect of the enforcement of the code, the former vice president of the Association, who is presently the president (O'Malley), testified that the school administrators emphasize that jeans made from denim material are prohibited by the code; yet, shirts made from the same material are acceptable. O'Malley says some male teachers receive reprimands for wearing string ties with open shirts, while others who dress in the same manner are not reprimanded. O'Malley says that in related arts at least one principal requires teachers to secure from him prior approval to dress outside the code, while other principals do not require prior approval. In respect of the standard of 75° necessary before males remove suitcoats or jackets, O'Malley explains that not all the thermostats in the classrooms work properly. The former president of the Association (LeGrando) testified that male elementary school art teachers who do not wear a tie are not reprimanded, while male high school art teachers who dress in the same manner are reprimanded. LeGrando testified that presently he observes on a daily basis inconsistent application of the code in respect of the 75° temperature for the removal of suit coats or jackets, in respect of jeans, ties and open collars.

O'Malley, LeGrando and four other teachers, all testified as to the lack of guidelines in respect of the code's provisions for "neatly attired and groomed", "excessively tight clothing", "see-through blouses", "undue attention" or "flagrant violations". (emphasis supplied) In fact, one teacher, Michelle Gaimoari, testified that when school administrators were asked to explain these provisions, the response received was "you know what we mean." Christine Borget, a teacher with the Board for 13 years, testified that she was allowed subsequent to the Board's adoption of the dress code, to wear corduroy pants by her school principal. She explained that she is not certain if her principal this year, 1982-83, would allow corduroy pants to be worn by teachers. All six teachers testified as to the absence of explanation by either the Board, the superintendent

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or school principals, of how a teachers' dress code is going to improve discipline, or how it shall improve pupil achievement, if indeed those are the purposes for the adoption of the dress code by this Board. To the contrary, the teachers' testimony shows that they feel more restricted in their classrooms as the result of the code, that teachers are reluctant to engage in activities with pupils they otherwise may, such as playing kick ball, taking them on field trips on the Board's property, sitting on the floor with the younger children, cleaning the classroom floor of the results of younger pupils' stomach upsets and, in general, being reluctant to engage in activities which demand informal attire. Further, their testimony shows that they have discerned no improvement in pupil discipline, nor in pupil achievement.

Expert testimony elicted in respect of the relationship between a teachers' dress code and improved pupil discipline and pupil achievement from Dr. Melvin Silberman, Profesor of Education at Temple University and Dr. James Lynch, Professor Emeritos, Glassboro State College, shows that there is an absence of reliable, scentific educational research to establish a nexus between a teachers' dress code and pupil discipline and achievement. In fact, the testimony of both expert witnesses shows that pupil discipline generally depends upon the individual capacity of a teacher to maintain discipline within his or her classroom. Other external influences, of course, affect individual behavioral problems such as the home, the relationship a particular pupil may have with his peers, and physical and emotional factors of the pupil. There is no research, however, which points to a causal nexus between the imposition of a particular dress code upon teaching staff members to pupil discipline and/or achievement. The testimony of four Board members, including Board member Taylor, shows that their reasons for the code, though unexpressed at the time the code was adopted, were their perception that if the teachers were subject to a dress code, pupils would more easily adhere to the student dress code, and that being so, the result would be improved discipline, by the teachers serving as role models for the pupils. There is no evidence to show how any one of the four Board members, nor the superintendent, arrived at that judgment other than their own beliefs, life experiences, and personal preferences. Board member Schall testified that, in his opinion, pupil discipline improved since the teachers' code has been enforced.

In respect of the Board's purposes for the adoption of the dress code, pupil respect for teachers and to improve pupil discipline, together with having the teachers perform as role models for pupils, the high school principal explained that since the teachers' dress code has been in effect, the number of pupils referred to his office for

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disciplinary reasons has been decreasing. The high school principal claims that the code has caused a discernible improvement in the dress of teachers and in the dress of students. His view is that the code has created better pupil and teacher attendance, a more positive attitude among all involved in the school community, and greater participation by pupils in extracurricular activities. The superintendent explained that the real purpose of the code, as he drafted it, was

> To guarantee in some way that the teachers would be appropriately dressed because they are teachers, they are in front of students, we entrust our children to teachers and the Board almost, in fact, unanimously, strongly, felt that the teachers were to be appropriately dressed (5T-37).

An elementary school principal testified that he perceives elementary school pupils receiving the adult teachers with more respect since the teachers have been dressing according to the code. Parents, he says, have had a favorable response to the teachers' dress code. He sees improved pupil behavior in his school because the pupils respect the teachers because of the code. The present Superintendent testified that since he has been in the Board's employ, not one teacher applied to him for an exception to the requirements of the code.

Based on the foregoing testimony, I find the following additional facts to be established by a preponderance of the credible evidence:

1. By the very terminology used by the Board in the "grooming not acceptable" portion of its code ("see-through", "excessively", "undue", "potentially") and its items of clarification ("75°", "flagrant") are by the terms used subject to varying interpretation depending upon whom is implementing those provisions.

2. Though it is clear Taylor, because of his view of a few teachers at the high school dressing inappropriately, is the impetus behind the teachers' dress code, the Board believes there is a relationship between teachers dressing in a fashion dictated by the code and pupil discipline and achievement.

3. Teachers to the contrary feel more restricted as the result of the code being adopted as policy by the Board. There is no evidence to establish that any teacher who requested an exception to the code was denied.

4. There is no reliable, scientific, educational research to establish a nexus between a teachers' dress code and improved pupil discipline and achievement.

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5. The code sets forth essentially the personal preferences of the superintendent and Board of Education members in respect of appropriate styles and modes of dress for teachers in the Cinnaminson public schools.

6. Board members and school administrators perceive improved pupil discipline as the result of the implementation of the teachers' dress code.

7. The code allows for various selection of styles and makes of dress.

This concludes the recitation of the facts of the matter.

Discussion

I

The Board's authority to adopt a dress code is not in issue. Such authority flows to the Board from N.J.S.A. 18A:11-1, its general rule making authority, together with N.J.S.A. 18A:27-4. The Association contends that the threshold issue with respect to any dress code, even prior to a consideration of whether the code meets the five-part test of reasonableness, is to determine whether the code bears a rational and substantial relationship to legitimate educational objectives. The Association in this regard relies upon Angell v. Newark Bd. of Ed., 1960 S.L.D. 141, 143 and Cumberland Regional Education Association v. Board of Education of the Cumberland Regional High School District, N.J. Super. (App. Div. Jan. 8, 1982, Docket No. A-1422-80-T2)(unreported) by which that court remanded for a full evidentiary hearing a dress code adopted by the Cumberland Board of Education for a determination on the reasonableness of that code. The Appellate Division, in its remand order, referred to Angell in respect of the question of reasonableness, and it cited East Hartford Ed. Ass'n. v. Bd. of Ed. of East Hartford, 562 F. 2d 838 (2 Cir. 1977) (en banc). There, Judge Oakes in his dissenting opinion on the petition for rehearing, stated:

> ... I agree fully with the en banc majority that the third and last interest asserted by the board—involving discipline, respect, and decorum in the classroom—is a proper one. The point made by the panel majority was that this interest did not seem furthered in any rational way by the teacher dress code at issue here. The en banc majority opinion makes no attempt whatever to address this critical analytical point. Instead, its logic appears to be: "'the interest is furthered by the dress code because the school board says that it is.'" Whatever argument might be made that the school

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> board's ends are furthered by its means, the en banc majority does not make it, and certainly the essential connection between means and ends is not here self-evident. (562 f. 2d at 864)

Thus, the Association argues that for this Board to have adopted a dress code, it is required first to establish reasonable educational objectives the code is to accomplish, and that the code must bear a rational and substantial relationship to those stated objectives.

It is clear that the code was initiated at the direction of Board member Taylor because of his perception that a few teachers were dressing inappropriately at the high school. It is further established that the code was prepared at Taylor's direction by the superintendent who created the code and its provisions according to his own personal preferences. The superintendent is quite clear that the code was drawn by him based on what he perceived to be the reasonable modes of attire for public school teachers at Cinnaminson. The Board, through its approval of the proposed code, agreed with the superintendent's perceptions of the modes and styles of dress that should exist by the teachers in its schools. Though the superintendent did advise the Association officers some time in December 1981 that he was preparing the code because Taylor felt that some teachers were dressing inappropriately, the superintendent also stated that it was his belief that the code would improve discipline. When the superintendent distributed the code on or about February 8, 1982, the memorandum that was attached thereto clearly states that the code was intended to have teachers dress according to its provisions so that the pupils are influenced in their style of dress, and will themselves dress accordingly, by the way the teachers dress.

The objectives of the Board of Education in respect of the creation and adoption of the controverted code must be seen to be several: first, to correct the few teachers who were dressing inappropriately according to the perceptions of Taylor; to improve pupil discipline; and, to have teachers perform their function of role model, according to the terms of a dress code, in order to influence the dress of pupils. That there is no reliable, scientific educational research which shows a causal nexus between a teachers' dress code and improved pupil discipline and/or achievement does not negative the three objectives that the Board seems to intend the code to achieve. I find nothing inherently wrong with Taylor perceiving a need to create a teachers' dress code the impetus for which is his observation that a few a teachers at the high school were dressing inappropriately. Though there is no explication of what inappropriate is in this record, the

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fact that Taylor at least had that basis to direct the superintendent to create dress code is a sufficient basis in law for Taylor as a Board member to act. Pupil discipline and pupil achievement in our public schools are traditional values recognized to be desirable goals and objectives of our school systems. It is not really possible, at the present stage of educational research, to say with certainty that a teachers' dress code will improve pupil discipline or increase pupil achievement. Such scholarly research, however, is not necessary for a board of education to adopt and implement a teachers' dress code. One must consider that a school setting is place for organized learning. It cannot be gainsaid that a teacher is, in fact, a role model. Pupils attend school in their hope, and the hope of parents and the community at large, of acquiring knowledge, attitudes, skills, values, and it is common knowledge that pupils, as are most persons, are indeed influenced by what they see and by what they hear. It is no secret that, generally speaking, teachers have a great impact upon the pupils with whom they work. To the extent that this Board of Education perceives, on what it considers its needs, some nexus between the way teachers dress and pupil discipline and/or pupil achievement, and to the extent that this Board of Education is the representative body of the citizens and the students of Cinnaminson Township, its action in respect of the adoption of a dress code must be seen to be related to the stated educational goals and objectives it has in mind.

Consequently, this Board does in fact have legitimate goals and objectives to be hopefully achieved through its teachers' dress code and, to the extent that the code, taken as a whole, seems to be related to those goals and objectives, it does, in fact, meet the threshold issue raised by the Association. Accordingly, I **CONCLUDE** that the controverted dress code does bear some substantial relationship to the goals of pupil achievement, pupil discipline and, Taylor's concern of a few teachers dressing inappropriately at the high school level.

Is the code reasonable under the five-part test laid down by the State Board of Education in the Carlstadt case? The code's use of terms such as "see-through", "excessively", "undue", "75%", and "flagrant" are terms the Association contends are inherently unclear and lack specificity. This argument also relates to the Association's contention that the code as a whole is vague and overly broad. At hearing, the question was posed as to what meaning applies to a "see-through" blouse. The following hearing day, the board secretary, upon instruction from counsel, brought to hearing a blouse she purchased at a local store. That blouse (R-2) is transparent. When the State Board says that a dress code must be substantially clear and concrete, the terms clear and concrete mean that the

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code must not be in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Connally v. General Construction Co., 269 U.S. 385, 391 70 L. Ed. 322, 328 (1926), State v. Lashinsky, 81 N.J. (1979). If the terms of the code were to be viewed separately and in a vacuum, as opposed to being viewed within the total context of the code, the Association's argument that the terms as specified above may indeed be valid. However, when seen against the objectives of the Board with respect to the creation of the code, the terms complained of cannot be seen to be unclear nor vague. The terms must be seen to be interrelated to the entire scope of the code. Consequently, the terms "see-through" blouse obviously means females are prohibited from wearing blouses through which the outline, shape and contour of the breasts can be easily seen. In respect of "excessively tight-fitting clothing" that prohibition is seen to be related to the prohibition against wearing denim jeans. Television advertisements of some manufacturers of so-called designer jeans emphasize that because their jeans are cut more to the form of the body, their jeans will demand more attention to be drawn to the wearer. This is not to say that any teacher in the Cinnaminson public schools, has, or intends to, wear such tight fitting jeans. But, the point is to the extent that the Board determined it necessary to adopt and implement a dress code, the provision of excessively tight-fitting clothing must be seen to relate to the whole of the dress code. In respect of any dress or grooming which would attract "undue attention", that provision obviously relates to tight-fitting clothing, see-through blouses, and the like, together with a prohibition against unclean fingernails, unkempt hair, disheveled clothing or makeup that is generally expected to be seen or worn only on a theater stage or behind a television camera. In respect of the 75° standard of heat which must be met before males may remove suitcoats or jackets, it is recognized that the evidence is clear that all thermostats in classrooms do not operate properly. However, it is expected that school principals, in respect of the implementation of the provisions of the code, as directed by the present Superintendent together with the Board, will act in a reasonable fashion. The Association's argument that there is no data which suggests that all individuals are comfortable at 74° misses the thrust of the issue involved. The issue is not whether teachers will be comfortably dressed according to the provisions of the code, though the personal comfort of the person affected by the code must be taken into consideration, the issue is whether the code is unreasonable, unclear or vague on its face.

Consequently, I **CONCLUDE** that the terms of the code, as complained of by the Association, are clear and are as definite as is possible. Absolute specificity in respect of a dress code is virtually impossible. To hold that a Board must adopt a specific

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dress code, setting forth with absolute certainty that which is and is not acceptable, as opposed to dress according to the professional status of the teacher, would impose an insurmountable burden on the Board. The complained of provisions are sufficiently clear and concise. The first test is met.

There is no evidence that the code imposes any undue financial burden on any individual teacher. Accordingly, the second test is met.

The code, on its face, allows for various styles and modes of dress, both by males and females. There is no undue limit on any individual's right of selection and freedom of expression. Thus, the third test is met.

There is no provision on the face of the code, nor on the items of clarification, that there are plans to review the code periodically. However, that failure is insufficient to set aside the code. It is presumed that the Board, the superintendent, and the teachers will from time to time review the code not only for purposes of amendments for it to comform with changing community attitudes, but also to determine its affect upon pupil discipline, achievement and teachers.

In respect of consistent interpretation and enforcement of the code, there is clearly an absence of guidelines. But, there is no evidence that the inconsistent enforcement of the code, as testified to by the six teachers, has resulted in any form of discipline or harm to any teacher. However, the possibility of inconsistent interpretation and enforcement is real; but, absent evidence that inconsistent applications results, or shall result, in a detriment, the absence of guidelines is not sufficient to set aside the code. However, this Board would be well advised to work with its superintendent and its teachers in order to arrive at guidelines for the implementation of the code.

In sum, I **FIND** the controverted teachers' dress code to meet the five-part test of reasonableness as laid down by the State Board of Education.

Though as a matter of fact and of law, the controverted dress code must be seen to be a proper exercise of the Board's discretionary authority based on traditional values recognized to be desirable in our schools, the upset of some members of the

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Association in respect of being subjected to such a code is understandable. No evidence was brought forward by the Board in respect of any of its teachers dressing in a less than appropriate fashion, other than Board member Taylor's observation that a few teachers were dressing inappropriately. The teachers who testified before me were all appropriately dressed and there is no reason to believe that the same people who testified would dress in any other fashion while in school. The evidence suggests that one Board member perceived a need for a dress code, convinced his colleagues on the Board of such a need, and the dress code was created. Though the Board has the discretionary authority to adopt and implement a dress code, there is no evidence which suggests that it was the mode of dress of a majority of teachers that led to its creation. The goals of pupil discipline, achievement, and role model precludes a finding that the action of the Board in adopting the code is arbitrary.

Having found that the controverted dress code is reasonably related to legitimate goals and objectives of the Board, and having found that the dress code as a whole is reasonable, and that its terms are not vague or overly broad, the Association's request for an order to permanently enjoin the Board from enforcing its terms must be and is **DENIED.**

The Petition of Appeal is **DISMISSED.**

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

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OAL DKT. NO. EDU 4 54-82

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

DATE — **DANIEL B. MC KEOWN**, ALJ

Receipt Acknowledged:

DATE — DEPARTMENT OF EDUCATION

Mailed To Parties:

May 18, 1983
DATE — OFFICE OF ADMINISTRATIVE LAW plb

plb

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DOCUMENTS IN EVIDENCE

P-1 Dress Code
P-2 Revised Dress Code
P-3 Items of Clarification
P-4 Petition to Board
P-5 Letter reprimand
P-6 Vitae
P-7 Synopsis - educational research
P-8 Research paper, University of Texas
P-9 Report of testimony before the House of Representatives
P-10 Extract, educational research
P-12 Vitae
P-13 Student Dress Code

R-2 Blouse

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CINNAMINSON TEACHERS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner, in primary exceptions to the initial decision by Judge McKeown contends that the instant dress code violates the Carlstadt standards and was adopted in an arbitrary and capricious manner by the Board. Petitioner argues that the Board must be permanently enjoined from implementing and enforcing it. Petitioner contends that the Board had no reasonable basis, only individual members' personal opinions, to believe that the proposed dress code would improve student discipline or teacher respect. Petitioner relies on Angell, supra, and Cumberland Regional Education Association, supra. Petitioner contends that the instant code is patently vague and unclear and is not enforced in a consistent manner.

The Board, in reply exceptions, refutes those of petitioner and affirms the initial decision. The Board argues that it complied with the requirement set down in Cumberland, supra, and that the record produced at the evidentiary hearing is replete with credible evidence relating the staff dress code to its legitimate educational objectives of increasing discipline, fostering respect for teachers and enhancing the role model of teachers. The Board avers that, as in Carlstadt, supra, the instant dress code promotes teachers as role models for pupils as a legitimate educational objective. The Board affirms the finding by the judge that the staff dress code does not fail for overbreadth or vagueness and that there is no evidence that it has been inconsistently or unfairly enforced. The Commissioner notes there is no provision in law for a reply to reply exceptions, consequently those filed by petitioner were not considered. The Commissioner views with approval the exceptions filed by the Board.

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A thorough examination of the extensive record compiled herein, a close reading of the initial decision by Judge McKeown and the exceptions filed by the parties convinces the Commissioner of the propriety of the Board's action in this matter. Petitioner's protestation that the judge's conclusion warrants reversal as being in violation of the Cumberland rationale has no merit. Judge McKeown appropriately considered both Angell and Cumberland in his decision and properly laid to rest petitioner's allegations thereto. The Commissioner so holds.

The Commissioner finds no merit in petitioner's continuing contention that the Board lacked proper goals and objectives to be achieved by its teacher's dress code. Further, the Commissioner finds the code to be reasonable and not vague or overly broad as alleged by petitioner. The Commissioner has no basis to judge the standards used by petitioner in determining that the terms of the code are unclear and lack specificity. However, the Commissioner could not look with favor on anything approaching a laundry list of checkable items either entirely restrictive or totally exhaustive. The Commissioner so holds.

The Commissioner looks with favor on the admonition by the judge, ante, and stresses its importance by repetition:

> "***[T]his Board would be well advised to work with its superintendent and its teachers in order to arrive at guidelines for implementation of the code."

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

JUNE 27, 1983

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CINNAMINSON TEACHERS ASSOCIATION, PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY, RESPONDENT-RESPONDENT.	:	DECISION

Decided by the Commissioner of Education, June 27, 1983

For the Petitioner-Appellant, Selikoff & Cohen, P.A.
(Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Respondent, Slimm, Dash & Goldberg
(John L. Slimm, Esq., of Counsel)

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

December 7, 1983

PENDING N.J. SUPERIOR COURT

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INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 8213-82
AGENCY DKT. NO. 306-7/82A

MARGO PFEIFFER,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF BELLMAWR, CAMDEN COUNTY,
Respondent,
and
THIRD PARTY,
Petitioner
v.
BARBARA BIELICKI,
Third Party Respondent.

APPEARANCES:

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

John Barbour, Esq., for the respondent-third party petitioner (Barbour and Costa, attorneys)

Steven R. Cohen, Esq., for the third party respondent (Selikoff and Cohen, attorneys)

Record Closed: May 13, 1983 Decided: June 10, 1983

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OAL DKT. NO. EDU 8213-82

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

Petitioner, a teaching staff member formerly employed by the Board of Education of the Borough of Bellmawr (Board), alleges that her termination, through a reduction in force (RIF), is in error. Petitioner seeks reinstatement and her asserted proper placement on the Board's seniority list. The Board interpleaded Third Party Petitioner (Bielicki) as the teacher who would be RIF'ed if petitioner is successful.

The Commissioner of Education transferred this matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Thereafter, the Board filed a Motion to Dismiss with Supporting Brief and Exhibits. Bielicki filed a Brief in Support of the Motion to Dismiss with Exhibits attached. Petitioner did not have time to file her Brief in Opposition to the Motion prior to the first day of hearing, May 3, 1983; therefore, she presented her case. Petitioner filed her Brief in opposition to the motion subsequent to this hearing.

The facts which are not disputed are set forth below:

1. Petitioner ("Pfeiffer") was continuously employed by the ("Board") from September 1, 1966 until November 30, 1969, thereby acquiring tenure pursuant to N.J.S.A. 18A:28-5.

2. By letter dated October 3, 1969, Pfeiffer requested a one year leave of absence from teaching to begin December 1, 1969 for maternity purposes (Exhibit C1).

3. Petitioner's request for a maternity leave of absence without pay was granted at the October 24, 1969 regular meeting of the Board (Exhibit C2).

4. The "Agreement" in force and effect between the Board and the Bellmawr Education Association at the time of Pfeiffer's maternity leave provided in Article XXIII (A-1) that such leave "Shall terminate twelve months after the birth of the child . . ." (See Exhibit C, Bielicki Brief).

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5. In July 1970, Pfeiffer filed an application with the Teacher's Pension and Annuity Fund for withdrawal of her salary contributions. Part I of that application contains the sworn statement of Pfeiffer that she had resigned her position as a teacher and was no longer under contract for further service in the public schools of New Jersey (Exhibits A, B).

6. On March 24, 1974, Pfeiffer filed an application for employment with the Board "for position as teacher of Remedial Reading in the elementary grades of Bellmawr. Pfeiffer stated in her application that she had "2 children, ages 4 and 2-1/2" (Exhibit D).

7. The Board's minutes of its regular meeting of December 21, 1976, page 50, item B.3.h., reflect the passage of a motion by unanimous approval to employ Pfeiffer as a teacher of compensatory education at a salary of "$12,175.00 prorated 12/1/76" (See Exhibit E). An employment contract for the period December 1, 1976 through June 30, 1977 was entered into by Pfeiffer and the Board (See Exhibit F). Pfeiffer served continously as a teacher in the Board's employ until the conclusion of the 1981-82 school year.

8. Third Party Respondent Bielicki was employed by the Board for the 1969-70 school year as a full-time teacher of remedial reading. Since February 1975, she has been continously employed by the Board as a full-time teaching staff member with permanent certification as a teacher of elementary education and as a teacher of reading (See Exhibits H, I attached to Bielicki Brief). By virtue of her continuous service since February 1975, she has acquired a tenure status with the Board pursuant to N.J.S.A. 18A:28-5.

9. By memo dated April 29, 1982, the Board advised Pfeiffer that her service would be terminated at the conclusion of the 1981-82 school year, based upon a reduction in force.

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Pfeiffer's Employment Record

September 1, 1966 through November 30, 1969	
December 1, 1969	Commenced leave of absence.
December 1, 1976	Returned and taught continuously until June 30, 1982
June 30, 1982	RIF

Certificated K-8 elementary all full-time

Bielicki's Employment Record

September 1, 1969	Full-time through June 1970

Returned from leave on February 1, 1975 serving in various capacities as follows:

1969-1970	Remedial reading
1975-1977	Title I
1977-1981	Compensatory Education Reading
1981-1982	Academically talented students

Certificated elementary teacher (1964)

Teacher reading 1981 (July)

Petitioner asserts that it was not her intention to resign her position and that she had not relinquished nor waived her tenure rights. However, the documents in evidence clearly indicate otherwise.

After acquiring a tenured status and being granted a leave of absence for one year, petitioner filed an application for withdrawal from the Teachers' Pension and Annuity fund on July 29, 1970 (Exhibit A). Petitioner testified that it was not her intent to resign from her employment with the Board; neither was it her intent to surrender any seniority rights concerning her employment. However, a review of her pension application shows conclusively that petitioner knew, or she should have known that she was terminating her employment with the Board. That pension application states in its first sentence that petitioner has "resigned my position as teacher and am no longer under contract for further service in the public schools of New Jersey * * *." This application

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was given as a sworn statement before a notary public of New Jersey. Part 2 of that same application, prepared by the Board's secretary, certifies that petitioner resigned from her position and that she is no longer under contract for further service. At the bottom of the application (Exhibit B, which is a blank application form submitted in evidence because the original Exhibit A was not readable) is the instruction "PLEASE READ INSTRUCTIONS ON REVERSE SIDE BEFORE COMPLETION." On the reverse side under the caption "WITHDRAWAL" the following statement is made: "No withdrawal claim will be honored until the member has resigned his position and is no longer under contract for service in the public schools of New Jersey. Withdrawal is not permissable while a member is on a leave of absence."

I **CONCLUDE** from my review of this single document, especially in light of petitioner's formal educational background, that petitioner knew or should have known when she applied for her pension, that a precondition to receiving those funds was her voluntary resignation from service in the public schools of New Jersey. Further N.J.A.C. 17:3-4.11 specifically provides:

> Termination: Withdrawal
>
> a. Under the terms of the statute a member may withdraw from the fund only if he terminates all employment.
>
> b. No application shall be approved, if:
>
> 1. The member is on official leave of absence and his membership is subject to continuance under N.J.S.A. 18A:66.8;
>
> 2. The member certifies that his employment contract has not expired, or that he has executed another contract to work in a position subject to TPAF coverage . . .

Based on the documents in evidence and the statute and code citations, I **FIND** as fact that petitioner resigned her position in the employ of the Board.

Petitioner's intentions, as indicated through her testimony at hearing, cannot overcome her acts which conclusively show that she resigned her teaching position. Petitioner testified that she did not tell anyone that she was leaving her employment with the Board; neither did the Board indicate to her that her employment was finished. Petitioner was thereafter reemployed by the Board in 1976 where she served through the

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end of the 1982 school year when she was RIF'ed. Petitioner testified that she did not know the consequences of her withdrawal from the pension fund, and that irrespective of that withdrawal her actions with the TPAF is not binding on the Board. Petitioner testified that it was always her intention to return to her employment. She testified further that the Board's secretary told her that she could come back after she withdrew her funds from the TPAF but her rate of contribution would be higher. Petitioner testified that she withdrew from the TPAF because she needed the money. Concerning her leave of absence which expired in December 1970, petitioner testified that between that time and the employment she accepted in 1976, she was called on more than one occasion and offered teaching positions with the Board which she declined because "I wasn't ready to come back - by baby was young."

Having found, in fact, that petitioner resigned her position with the Board when she withdrew her funds from the TPAF, the only question remaining is whether or not the time she served prior to that resignation may be added to her reemployment period which began in December 1976 and continued continuously through June 30, 1982. In that regard the decisions of the Commissioner and the courts are clear and conclusive.

In David Misek, petitioner, v. Bd. of Ed. of the Twp. of Willingboro, Burlington County, decided May 7, 1981 by the Superior Court of New Jersey, Appellate Division (A-4913-79) the Court stated as follows:

> We are in full accord with the Commissioner and the State Board of Education that the voluntary resignation of a tenured teacher terminates all previously acquired tenure rights, and no part of a teacher's service prior to the date of such resignation may be counted in calculating the time necessary to attain a new tenured status. Compare, State v. Lamb, 137 N.J.L. 548 (S. Ct. 1948); McGill v. D'Ambrose, 395 N.Y.S. 2nd 234 (App. Div. 1977). We have reviewed the supplementary material presented by appellant subsequent to oral argument, and find it to be completely inapposite. Affirmed.

A petition for certification to the Supreme Court of New Jersey was denied. Consequently, we need look no further than this Appellate Division decision which states conclusively that the voluntary resignation of a tenured teacher terminates all previously acquired tenure rights.

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I **CONCLUDE** that this is precisely what has happened in the matter considered herein. Petitioner resigned her position with the Board upon the voluntary withdrawal of her funds from TPAF. Petitioner's new employment with the Board beginning December 1976 and ending on June 30, 1982 represents the entire period of time she may count in her newly by acquired tenured status for seniority purposes. Consequently, the Board seniority list listing Third Party Respondent Beilicki ahead of petitioner Pfeiffer is accurate insofar as those two litigants are concerned; therefore, Beilicki has greater seniority in her employment with the Board than does petitioner Pfeiffer.

The standard for determining summary judgment motions is set forth in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. Super. 58, 65 (1980):

> A motion for summary judgment is a means for the efficient disposition of a cause of action where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter appropriate caution in deciding issues involving policy considerations. Jackson v. Muhlenberg Hospital, 53 N.J. 138, 142 (1969). However, excessive caution would undercut the means for piercing the allegations of the pleadings to determine whether there are issues requiring disposition at trial. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). If after drawing all inferences of doubt against the movant, a court finds there is no genuine issue of material fact, it should enter summary judgment. Id. at 75.

In the instant matter I **FIND** that there are no disputed facts which could have any bearing on the outcome of this contested matter. All inferences of doubt have been drawn against the movant and I **FIND** that there is no genuine issue of material fact. Therefore, summary judgment is appropriate. I have reviewed petitioner's brief with care, together with the decisions cited therein, and I **CONCLUDE** that they are not on point with the matter here contested.

The Prehearing Order included issues as to petitioner's placement on the seniority list and whether or not her appeal was out of time by reason of laches. However, having decided on the basis of petitioner's resignation and her status between December 1, 1969 and December 1, 1976 when she was reemployed, I **FIND** no need to address the other issues. The Board and Petitioner should be able to work out amicably her proper place on its seniority list which is probably accurately reflected in the June 1982 Seniority Listing (J-2).

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For all of the above reasons the Board's motion to dismiss is **GRANTED** and the petition of appeal is **DISMISSED WITH PREJUDICE.**

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

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

June 10, 1983
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

6/13/83
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 15, 1983
DATE

Ronald L. Parker/jdc
OFFICE OF ADMINISTRATIVE LAW

fms

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Documents in Evidence

Attached to Third Party Respondent's Brief

Exhibit A Application for TPAF

Exhibit B Blank Copy of Exhibit A (front and back)

Exhibit C1 Pfeiffer letter, dated October 3, 1969

Exhibit C2 Board minutes p. 183 (1969)

Exhibit D Application by Mrs. Pfeiffer, dated March 1974

Exhibit E Board minutes, dated December 21, 1976

Exhibit F Employment Contract, dated November 29, 1976

Attached to Bielicki's Brief

Exhibit C Agreement July 1, 1969 - June 1, 1970 (Leaves of Absence)

Stipulations

J-1 Board's seniority list (1981)

J-2 Board's seniority list (1982)

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MARGO PFEIFFER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BELLMAWR AND THIRD PARTY, BARBARA BIELICKI, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner filed primary exceptions objecting to the decision by Judge Thomas contending that this matter should be remanded for plenary hearing. Petitioner relies on the brief previously submitted to the judge. Respondent Board and Third Party Respondent Bielicki in reply exceptions reject petitioner's exceptions and affirm the initial decision by the judge. The Commissioner finds no merit in petitioner's exceptions.

A thorough examination of the record, the arguments of law of the parties and a close reading of the initial decision reveals to the Commissioner that the judge has thoroughly and properly considered petitioner's arguments and laid them to rest. The Commissioner notes that petitioner left teaching on a one year leave of absence for maternity purposes and filed an application with the Teachers' Pension and Annuity Fund for the withdrawal of her salary contributions pursuant to the provisions of N.J.A.C. 17:3-4.11. Such provisions explicitly condition that withdrawal from the Fund may be made only if all employment by the applicant has been terminated. Petitioner by sworn statement complied with that condition and received her money. To now claim otherwise, that at that time, and now, she considered herself still employed by the Board, would mean that she has perjured herself. Petitioner cannot have it both ways. The Commissioner so holds.

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

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

JULY 25, 1983 COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4128-81
AGENCY DKT. NO. 227-6/81A

SCHOOL DISTRICT OF THE TOWNSHIP OF RIDGEWOOD, BERGEN COUNTY,
Petitioner
v.
BARRY F. DEETZ,
Respondent

APPEARANCES:

Peter W. Till, Esq., on behalf of petitioner
(Aron, Till & Salsberg, attorneys)

Emil Oxfeld, Esq., on behalf of respondent
(Rothbard, Harris & Oxfeld, attorneys)

Record Closed: April 19, 1983 Decided: June 3, 1983

BEFORE **ELINOR REINER**, ALJ:

On June 8, 1981, petitioner, Board of Education of the Township of Ridgewood certified charges of unbecoming conduct to the Commissioner of Education against respondent, Barry Deetz.

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On July 1, 1981, the Department of Education, Bureau of Controversies and Disputes, transmitted the dispute to the Office of Administrative Law as a contested case pursuant to N.J.S.A 52:14F-1 et seq. After notice to all parties, a prehearing conference was held on September 18, 1981. Thereafter, the case was heard on April 12, 13, 14, and 15, 1982; June 2, 3, and 4, 1982; August 9, 10, 11, 12, and 13, 1982; October 19 and 28, 1982 and February 25, 1983.

Witnesses who testified and exhibits marked into evidence are listed in the appendix attached hereto.

It is undisputed that respondent (Deetz) has been employed by petitioner as a biology teacher since the spring of 1965. The instant charges against him arose from a complaint lodged with the high school administration on or about April 14, 1981 by Nicola Russo, a parent and resident of the school district. In sum, Nicola Russo charged Deetz with engaging in various marijuana-related transactions, during the 1980-81 school year, with his teenage sons, Stephen and John, students at Ridgewood High School. The students confirmed their involvement in drug transactions with Deetz, both orally and in writing, and thereafter, Deetz was suspended with pay pending the formal certification of charges to the Commissioner.

In an effort to place this controversy in its proper perspective, the court has considered the background of this matter. Mr. and Mrs. Nicola Russo, parents of John and Stephen, were divorced on June 23, 1978. Apparently, the divorce decree did not put an end to the bitter custody battle which ensued between Mr. and Mrs. Russo. Mr. Russo was awarded temporary custody of John and Stephen by Order dated April 14, 1980 and, thereafter, the Morris County Probation Department became involved in conducting a custody investigation to determine final custody (see P-10 in evidence). Both parties continued to vie actively for custody of the children.

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Deetz, who taught John Russo biology in 1979-80 and Stephen Russo in 1980-81, first became socially acquainted with Nicola Russo in February 1980 when he met the three Russos in Puerto Rico where he was vacationing with his daughter Sally. Thereafter, he attended barbecues at the Russo home during the spring of 1980, a tailgate party in October 1980, and a Christmas party at the Russo home in December 1980. In addition, he developed and maintained a close relationship with Stephen Russo who became his lab assistant for the 1980-81 school year.

During the academic year 1980-81 Deetz was referred to Mrs. Russo, who is a lawyer, for legal advice, and became socially involved with her. The relationship between Deetz and Mrs. Russo, which culminated in marriage in April 1981, became known to Nicola Russo and his sons in or about March or April 1981. More to the point, on or about April 13, 1981, Nicola Russo became convinced that respondent was involved with his ex-wife and was helping her to gain custody of Stephen and John. Angered by this perception, he approached the school authorities with the information that forms the basis of these charges.

Respondent contends that the charges, which will be discussed herein, are untrue and, in fact, were fabricated by Mr. Russo, in complicity with his children, in an effort to cause him to lose his job. In support of this position, respondent would have the court consider, in addition to Deetz's denial of the charges, three salient factors— the relationship of the parties, Nicola Russo's untoward lifestyle, and the testimony of John Zatsko.

It is apparently respondent's position that John and Stephen were motivated by anger, resentment, or jealousy toward Deetz due to his relationship with their mother. Thus, as a result of their feelings toward him, and presumably their mother, they

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determined to get back at the duo and fabricated the instant charges. In addition, and of a similar nature, the boys are seen by respondent as siding with their father in his vendetta against Deetz, presumably due to their strong relationship and involvement with him. One aspect of this theory is the contention that Nicola Russo is a powerful man who would take whatever action necessary to get his way. Engaged in a rather "fast" lifestyle, it is alleged that Russo not only involved his sons in that lifestyle but caused them in some way to perjure themselves before this court.

In support of the above attack on John and Stephen's credibility, respondent relies on the testimony of John Zatsko, a "boarder," who resided in the basement of the Russo home at the time the charges were brought. It was Zatsko's testimony that he often heard John and Stephen discussing their mother and Deetz. More specifically, in February or March 1981, he heard John and Stephen allege their hatred for their mother for going out with Deetz and their resolve to do all they could to break up the marriage. Thus, he recalled that they stated they would plant, or had planted, marijuana in the classroom, at their father's behest. (Apparently, Stephen told Zatsko that he had planted the seeds with someone else). Zatsko stated that he saw, but was not allowed by Stephen to read, a seven-page report that Mr. Russo had typed for his sons (although he did not see it typed, Zatsko claimed that it had been prepared by Russo and other men) and recalled being told that it contained things that they said Deetz had asked for. Noting that Stephen copied notes from it, and John read it, he stated that the boys had to write reports to file with the school and the police and were copying from the report in order to prepare them. In support of his contention that the Russos wished to destroy Mr. and Mrs. Deetz, he testified that the boys advised him that they breathed into the phone and hung up on their mother, told the operator they lost her number in order to get the unlisted number, and visited their mother's home in order to "find out things." On questioning by this judge, Zatsko indicated that he saw Stephen call and hang up. Zatsko stated that he finally left the Russo house (where he had paid $50 per week for board) because he could not stand living there and had an argument with Nicola Russo. After he left the house, he met Mrs. Russo (Mrs. Deetz) in the drugstore where he was working, got to talking with her and recounted the above facts.

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On cross-examination, Zatsko admitted that at Nicola Russo's request, he signed an affidavit that he was not a homosexual. Although he did not recall that it was in response to a statement contained in the probation report (P-10) that there was a "gay person" living in the Russo house, he did recall "the talk" that he was the "gay person" living there. He claimed this talk did not bother him. Rather, he stated that he left the house because of an argument he had with Nicola Russo (although he could not seem to recall the specifics, on questioning by this judge, he indicated that the fight with Russo was due to the fact that Russo did not want him to move out), and because he had no privacy since Stephen, John and their friends came to the basement where he was living. Although he acknowledged that Mr. Russo had told his sons that he did not want Zatsko's friend, Drew, on the premises, as he found him to be unacceptable, Zatsko contended that he was not asked to leave because of his friendship with Drew.

Referring to the Russo lifestyle, which he contended became distasteful to him, he alleged that the Russos' parties were wild; joints were passed around and cocaine and prostitutes were available. At the Christmas party in 1980, Stephen and John rolled joints for the guests, joints were passed around, Stephen, John and Nick smoked pot and there were cocaine and prostitutes available. He recalled that Deetz was one of the few people at the party who had a beer but did not smoke. Zatsko denied that his testimony was colored by his hatred of the Russos.

Petitioner characterizes respondent's contentions as an attempt to shift the focus of the record to an examination of Nicola Russo's lifestyle and argues that Nicola Russo's parenting skills, while concedely abysmal, are in no way probative of the truth of the charges against respondent. More specifically, in regard to Zatsko's testimony, petitioner states:

> The record amply reveals that Mr. Zatsko shared respondent's fascination with the Russos' lifestyle. Although he resided in their home, Zatsko remained an outsider. Clearly an impressionable, lonely young man, who was shifting about aimlessly, Zatsko was shocked by the brutality of the Russo boys' behavior toward their mother, and no doubt enlarged this outrageous conduct in his own mind to include plots and schemes against Mrs. Russo and her new boyfriend, Barry Deetz.

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> More importantly, however, is the negative light in which Zatsko's credibility must be viewed considering the circumstances of his departure from the Russo's home. His stay there was an unhappy one, marked by disrespect by his landlord-host for his privacy and possessions and one which culminated in a heated argument with the elder Russo. Thus, the testimony on record that a conversation with Mrs. Russo prompted Zatsko's testimony in aid of respondent is not at all surprising.

Because of the importance of the testimony of Stephen and John, the complaining witnesses herein, the court has been compelled to make a judgment as to their credibility. It is for this reason that the court could not ignore, and felt obliged to weigh, respondent's contention that the allegations herein are simply part of a frame-up, conceived by Nicola Russo and fostered by his anger.

It is essentially undisputed that Nicola Russo was tremendously angry at Deetz for what he perceived to be Deetz's involvement in his ex-wife's attempt to gain custody. Nicola Russo candidly admitted that he told Deetz that he would "blow his job," that Deetz would be sorry if he went near his ex-wife, that he had connections and would blow his head, and that he threatened and called Deetz names. Further, he wanted Deetz to pay back the $1,000 loan he had made to him (see R-7 in evidence), and did not deny that he had been involved in a disturbance on the evening of April 13, 1980, during which he may have received checks from Deetz for money owed to him. While he did not admit that he told respondent that if he stopped seeing his ex-wife, he would keep his job, he did admit that his real motivation to complain about Deetz was due to his ex-wife. It was his contention that the boys told him that they gave baggies to Deetz when they found out on or about April 13, 1981 that Deetz was conspiring with their mother to gain custody. Russo recalled that on his way to school in April to make the charges, he even told Deetz to start looking for a new job.

Although the court is overwhelmed by Russo's apparent hatred of Deetz, presumably conveyed to his sons, who may have adopted it as their own, the court does not feel compelled to draw the inference therefrom that the charges in the instant case were fabricated. While it may be that the charges would not have been brought but for

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Russo's angry determination to "get at" his ex-wife and Deetz, this does not mean that Russo, Stephen and John conspired to fabricate the charges herein and perjured themselves in their unequivocal denial thereof. The court must agree with petitioner that just because the decision to identify the wrongdoing of respondent was prompted by ill-feeling toward him, that does not mean a fortiori that they lied about him.

In determining in the instant case that the charges were not pure fabrications to get at Deetz and that the veracity of each charge is to be weighed by evaluating the testimony attendant thereto, the court has discounted the testimony of Zatsko. Although no conclusion as to the reason Zatsko left the Russo home and thereupon determined to reveal the "plan" to the ex-Mrs. Russo can be drawn from his testimony herein, the court opines that Zatsko's testimony was somewhat exaggerated. In drawing this conclusion, the court has attributed great weight to the fact that Zatsko's relationship with the Russos ended on a bad note and left Zatsko no longer an ally of the Russos. While the substance of the relationship between the Russos and Zatsko and the reasons for its eventual demise were not revealed by Zatsko, certainly his credibility is suspect. In any event, even if Zatsko's testimony can be believed, he did not not see the seven-page document which Stephen and John used and could therefore not comment as to whether it contained Russo's fabrication or simply Stephen's and John's account to their father. In this vein, it is to be noted that even if one believed that a document was used by the boys to formulate their written statements (P-4 and P-5 in evidence), it must be remembered that the boys' allegations were made prior to their formulating written statements. It was petitioner who asked the boys to put their statements in writing. Moreover, these allegations were initially made to the administration separately by each son, with no participation in the discussion by Mr. Russo, who only said at one point, when Steven recounted certain details, "I didn't know that."

Moreover, Zatsko's testimony goes merely to a contention that the boys planted marijuana in Deetz's classroom in order to implicate Deetz which, even if true, does not form the basis of a charge against Deetz (Deetz is not charged with growing marijuana in April 1981) and does not, therefore, mean that all the boys' allegations are untrue.

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In an effort to determine whether the boys did in fact misstate the facts, presumably for the reasons discussed above, the court took great pains to assess the credibility of Stephen and John. It should be noted at the outset that, although it is alleged that Stephen and John lied out of anger toward Deetz and their mother, the court detected no such resentment toward them and agrees with petitioner's assertion that the boys convincingly denied such an implication. In addition, it is to be noted that, during their testimony, their mother as co-counsel to respondent, was present in that capacity in the courtroom. It does not appear unreasonable to assume that if they were in fact lying in toto about the events in question, this set of circumstances would have made it more difficult for them and, perhaps, caused it to become apparent in some manner. Instead, the boys presented a rather clear and concise picture of their interaction with respondent and were not swayed in their testimony. Based upon the demeanor of the witnesses, as well as an assessment of the testimony and evidence presented, this court **FINDS** that both Stephen's and John's testimony was honest, forthright and credible. Quite simply, it had the ring of truth.

The court in drawing this conclusion has had of course to balance and weigh the credibility of the complaining witnesses against the credibility of Deetz. While respondent takes great pains to present a picture of complainants as incredible witnesses, it goes without saying that Deetz, faced with the loss of his employment, had a motivation to deny the charges. Moreover, the essential witnesses on Deetz's behalf, for example, his former girl friend and his daughters, may also be considered self-serving witnesses. Given the allegations by both parties as to the motivation of the other party's witnesses to lie, the court has considered for credibility purposes only, the testimony in regard to a tailgate party in the fall of 1981, which does not form the basis of any of the charges against petitioner.

The testimony concerning this event can be considered to represent a microcosm of the entire trial. For every witness presented who alleged that Deetz was somehow involved with smoking marijuana, respondent presented a witness who disputed this fact. It, thus, became an issue of credibility as to whose testimony was more believeable and, thus, which version of the facts could be found to be true.

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There is presumably no doubt that there was a tailgate party in the fall of 1980 prior to a football game at the Meadowlands and that the party was attended by, among others, Nicola Russo, Mayor Edward Butler, Ms. Judi Ferrara (employees of the Ridgewood School District), Sarah Deetz (respondent's daughter), Ms. Langanella (petitioner's girl friend), Edward Bennett and Barry Deetz. Apparently, the group parked its cars on the edge of the lot and Nicola Russo, who received a ticket for the game from Deetz, started a barbecue. All of the witnesses who testified as to the events of that party stated that marijuana was present and used on that occasion. The major difference in the testimony was whether Deetz, in fact, smoked marijuana on that occasion.

Sarah (Sally), Deetz's youngest daughter, who was graduated from high school in June 1982, recalled that Nicola Russo produced a cigarette of some sort and asked if anyone wanted a "hit." Russo lit up, puffed on it and passed it to Butler and Ferrara who also took puffs. She stated that when it was offered to her father and Ms. Langanella, they refused it. She recalled that her father said, "I don't do that," while Ms. Langanella simply said, "No." Sally stated that she was not offered a puff of the cigarette. On cross-examination, she recalled that she assumed it was marijuana that was being referred to because of the terminology used. Once, sitting in the car to keep warm, she recalled advising her father that she was surprised. Her father responded by saying, "This is ridiculous, I don't believe they're doing this," and Ms. Langanella agreed.

Of interest in regard to Sally's testimony was her statement that subsequent to the charges herein, she was taunted by Stephen Russo in school by being called "sister Sally." Sally responded by advising him not to call her "sister" until he had earned that right.

Deetz, testifying as to this incident, recalled Russo stating he had some "evil" and asking Deetz if he wanted a "hit." He recalled that he replied that he did not use it and said, "No, thank you." He recalled Ms. Ferrara and Nicola Russo using it and the fact that Sally was shocked. Langanella testified that she saw Russo and Butler smoking marijuana and that Russo offered them joints. She stated that Deetz did not smoke on this occasion and never smokes.

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On the other hand, Russo recalled that at the tailgate party, Deetz smoked marijuana. In an effort to corroborate this testimony, petitioner called Edward Bennett to the stand to testify. In attendance at the tailgate party, he recalled standing with a group of people, of which respondent and Langanella were a part, and that respondent smoked marijuana, saying it was "good stuff." Bennett, who admitted that he smoked along with Deetz, Mr. Ferrara, Mr. Ferrara's girl friend, and his own girl friend, contended that he smoked discreetly as he did not want to offend, among others, Mayor Butler. Bennett, who smokes marijuana frequently, admitted being mildly "stoned" at the time of the tailgate party; he smoked prior to leaving his house. Moreover, although he admitted involvement with Nicola Russo in business transactions, having borrowed money from him to buy a car, as well as being involved at the time of trial in purchasing a business from him, he contended that he did not discuss his testimony with Russo, despite the fact that Russo had asked him at the onset of the case to testify.

In reviewing the testimony surrounding the tailgate party, one can see rather clearly the difficulty encountered in attempting to resolve the issue of credibility. It is, of course, conceivable, that Russo lied as to the events in question and somehow caused his friend Bennett to do so. Equally plausible is the view that Deetz, his daughter and girl friend were motivated to lie because of their loyalty to him. While it is not for this court to determine whether Deetz used marijuana at a tailgate party, and while the court does not accept in all respects the testimony of Bennett, the court must conclude that Bennett was the one witness presented who, despite his dealings and friendship with Russo, was at least out of the mainstream of the dispute and who was, as a result, more reliable. Moreover, as will be discussed herein, in connection with the probation report, Deetz, who attended such parties and also became involved in such a lifestyle, was simply not "the lamb" he claimed to be. With the above discussion as a background, the court has considered whether the truth of the charges against Deetz has been demonstrated by petitioner by a preponderance of the credible evidence.

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CHARGE I- Approximately during the month of October 1980, Barry Deetz asked Ridgewood High School student Stephen Russo for some marijuana seedlings, said action constituting conduct unbecoming a teacher.

Petitioner alleges that this charge is substantiated both by the written statement of Stephen Russo (P-6 in evidence) and his testimony at the hearing. According to Stephen, Deetz sought to obtain marijuana seeds from him, and he complied, giving Deetz the seeds as they passed in the hallway. Deetz accepted the seeds, placing them in his pocket.

Deetz,on the other hand, points out that the charge relates to "seedlings" while the testimony relates to "seeds." In addition, Deetz queries as to why if the plants were growing rampantly in the classroom in the preceding school year, as John Russo's statement indicated, he would need to obtain seeds or seedlings in October 1980. Further, Deetz reminds the court of his denial of the charge.

The court has evaluated the testimony of Stephen Russo and, as discussed above, found it to be credible. While respondent correctly points out that the charge relates to "seedlings" while the evidence pertains to "seeds," this court is of the opinion that the difference in wording is of such a de minimis nature that there would be no violation of respondent's due process rights in amending the charge to read "seeds."

Based upon the above discussion, the court finds that Charge 1 as amended has been substantiated by a preponderance of the credible evidence.

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CHARGE 2- Approximately during the month of October 1980, Barry Deetz was growing marijuana plants in his classroom at Ridgewood High School, said action constituting conduct unbecoming a teacher.

Petitioner argues that this charge is supported by the written statements of Stephen and John Russo, as well as by their testimony on the record. More particularly, petitioner contends that Stephen's testimony was highly credible. As a lab aide, whose responsibility it was to transplant and water plants, Stephen had first-hand knowledge as to what in fact grew in the planters. Furthermore, Stephen alleged that respondent told him that marijuana plants were growing in the classroom and even joked about it. Stephen's testimony is corroborated by the testimony of John Russo, who confirmed the presence of marijuana plants in the classroom and testified that the presence of such plants was common knowledge.

Respondent, in an attempt to refute this charge, avers that it is inconceivable that "the activities which allegedly went on in Deetz's classroom somehow or other were restricted to the knowledge of only Stephen and John and to no other students, members of the faculty or the administration." Moreover, respondent points to the fact that members of the biology department did not see or discover marijuana growing in Deetz's classroom. Specifically, Margaret McCartney, a biology teacher who frequently used the same room and same plants as Deetz, found no such plants. In addition, respondent relies on his denial of the charge.

While petitioner certainly could have presented other student witnesses to support this charge, inasmuch as the charge itself does not refer to other students' knowledge as to Deetz's actions, the negative inference sought by respondent due to petitioner's failure to do so, will not be drawn. Rather, the court has considered only the evidence presented in regard to this charge.

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In so doing, the court must agree with petitioner that the testimony of other biology teachers does not detract from the strength of the evidence supporting the veracity of the charge. Although Paul Steidenbach and Arnie Olsen never observed a marijuana or suspicious plant in Deetz's classroom, they admitted to only rarely having occasion to enter respondent's classroom and not having made an analysis of Deetz's plants. Although Margaret McCartney, who shared respondent's classroom for one 45-minute period four times a week and one 90-minute period one time a week, denied seeing marijuana plants, she admitted that it was not her responsibility to care for the plants and that while she sometimes looked at the plants, she did not make a study of them. Further, she indicated that she would have difficulty identifying a marijuana plant through just an observation. Thus, if a plant was six inches tall, she might or might not know it was marijuana. In fact, all the biology teachers who testified apparently agreed that they would be unable to identify a marijuana plant and, in fact, when there was a suspicious plant, they referred to a textbook for verification and conducted further analysis.

The court is even less impressed with the testimony of Deetz, his daughters, Alison and Sarah, and biology teacher Thomas Rosseau pertaining to a 1978 incident in which Deetz allegedly turned in suspicious plants to the administration and agrees, in essence, with petitioner that even assuming arguendo respondent's alleged proper response to marijuana in 1978, this neither substantiates nor detracts from the proposition that he acted improperly in 1980. Moreover, the court feels compelled to note that Charles Montgomery, the administrator to whom Deetz brought the plants at that time, recollected that he did not believe that Deetz had seriously presented him with the tray of plants. Rather, he felt that it was presented as a "quiz" and to needle the administration, since he was asked by Deetz if he knew what it is was and was not told it was marijuana.

Thus, in determining whether this charge has been substantiated the court has considered and weighed Stephen's and John's testimony. In so doing, the court found their testimony to be believable, especially in light of the close relationship they had with respondent which gave them the opportunity to know first-hand Deetz's actions. Based upon the above discussion, Charge 2 is found to be true by a preponderance of the believable evidence.

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CHARGE 3- Approximately during the month of October 1980, Barry Deetz asked Ridgewood High School student Stephen Russo to transplant some marijuana seedlings growing in his classroom at Ridgewood High School, said action constituting conduct unbecoming a teacher.

Petitioner contends, and this court must agree, that this charge is substantiated by the written statement of Stephen Russo (P-6) as well as his testimony at the hearing. Stephen described being asked by respondent to transplant several plants which had grown to be a few inches tall and to place them in the back of the classroom. This testimony appeared to the court to be believable and not refuted in any meaningful manner by respondent. In fact, the testimony of Ms. McCartney was of little evidentiary value. Although she frequented Deetz's classroom and was unaware of marijuana growing there, she admitted that she was not in the "prep room" continually, did not make a study of the plants, and, more importantly, would be unable to determine from a visual study if the plants were in fact marijuana.

Based upon the above, Charge 3 is held to be true based on a preponderance of the credible evidence.

CHARGE 4- Approximately during the month of October 1980, Barry Deetz told his class at Ridgewood High School about the marijuana seedlings he was growing, said action constituting conduct unbecoming a teacher.

This charge is corroborated by the written statement and testimony of Stephen Russo. Stephen stated that Deetz joked about marijuana to his class and bragged about a marijuana plant he owned which was over a foot high. This is confirmed in part by John Russo who testified that Deetz always joked about marijuana. More particularly, in answer to this judge's question, John stated that it was common knowledge among most of the students that Deetz was growing marijuana in the classroom. Although it was believed a student planted the seeds, he contended that it was known that Deetz knew of this. John did not know, however, how long the plants grew before they were ripped out.

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In an effort to refute this charge, Deetz denied that he ever told his class in October 1980 that he was growing marijuana seedlings. Despite his denial of the charge, he did recount an incident which is of some interest herein. He claimed that he talked about Columbian Gold (a colloquial reference to marijuana) upon his return from Cartogena, Columbia. More specifically, he testified that he brought Columbian Gold Coffee back from the trip, and thus, when his students said, "Did you get anything?" he said, "I got some Columbian Gold." Acknowledging that his students assumed that it was something else, he stated that since his students wanted to see it, he brought it into school. He recalled that when he brought in the coffee, they said, "Boy, it's too bad that it's not something else. You could sell it."

The court must agree with petitioner that the Columbian Gold incident is reflective of respondent's approach to the subject of marijuana. Clearly, respondent joked with his students about marijuana. While this court can understand respondent's desire to "kid around" with his students, the flip attitude of respondent toward his students on such a serious subject is not to be condoned.

While it is conceded that a negative inference can be drawn as to the veracity of this charge based on petitioner's failure to produce another witness to Deetz's "boastful" statement of growing marijuana, this inference was insufficient to refute this charge. Rather, this court accepts the testimony of John and Stephen in regard to this charge as credible and finds, based upon on it, as well as respondent's own statement, that Charge 4 has been proven by a preponderance of the credible evidence. ,

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CHARGE 5 - During a Christmas party in December 1980, at 207 Spencer Place, Ridgewood, Barry Deetz asked for and accepted a marijuana cigarette from Ridgewood High School student Stephen Russo. At the same party, Barry Deetz also asked for and accepted a marijuana cigarette from Rdgewood High School student John Russo, offering payment for same, said action constituting conduct unbecoming a teacher.

Both Stephen and John Russo confirmed the allegations in this charge in their written statements. Moreover, Stephen Russo testified at length about Deetz's actions at the 1980 Christmas party. According to Stephen, Deetz was a little drunk, pulled him aside and requested a marijuana cigarette. Stephen and Deetz proceeded upstairs to Stephen's bedroom where Stephen rolled a marijuana cigarette and gave it to Deetz. According to Stephen, Deetz entered John's bedroom where he requested and received the second cigarette. Stephen testified that these transactions did not seem "like a big thing" to him.

This testimony was confirmed by the testimony of John Russo who stated both on direct and cross-examination that Deetz entered his bedroom on the night of the Christmas party, and requested a marijuana cigarette, which John in turn rolled for him. Deetz then thanked him and went back to the party.

In refutation of this charge, Deetz's girl friend and companion at the party, Anita Langanella, offered testimony in his defense. Claiming that she was with him and knew what he did at the party, she alleged that the charge was unfounded. She admitted, however, that he was in her presence and eyesight "most of the evening" and did wander off "to talk to people," as she did. In addition, although Deetz denied having visited the upstairs of the house that evening, another guest, Jack Sadofsky, confirmed seeing him on the upstairs landing as Sadofsky left the bathroom.

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In order to buttress his refutation of the charge, respondent points to the following problems with petitioner's scenario. First, respondent details the incredible nature of Sadofsky's testimony:

> The purpose of Sadofsky's testifying was to place Deetz on the second floor of the home in the vicinity of Stephen's room, and for that purpose an attempt was made to persuade this court that after a two-year period of silence, he fortuitously contacted Nick Russo the day before trial, and informed him that he had seen Deetz on the second floor of the Russo home. Why their conversation should have turned to this when in a two-year period it had never been discussed before, is difficult to believe, but it is easy to see why Nick Russo, concerned that the story about his sons giving Deetz the two joints was falling apart, believed it required some corroboration. We believe that we have demonstrated the nature of Mr. Sadofsky's testimony, but it also demonstrates the equally mythological character of the two joint stories. At any rate, it is another chapter in the tortured fabric of the fiction created by the Russos.

More particularly, respondent points to alleged inconsistencies between the testimony of Sadofsky, who claimed to meet Ralph Esposito, the butcher, at the Christmas party and that of Ralph Esposito, who claimed he did not attend the party but saw Sadofsky at four or five in the afternoon when he delivered meat to the Russo residence. It is respondent's contention that the meat delivery was fabricated by Esposito in an effort to save Sadofsky's testimony, since Esposito had admitted to Deetz in the presence of witnesses that he had not attended the party. In a further effort to refute Sadofsky's testimony, respondent reminds the court that Sadofsky's allegation that marijuana was not present conflicts with a statement contained in the probation report (P-10) that marijuana baggies were being passed around as gifts.

In response, petitioner contends that no alleged inconsistencies exist between the testimony of Sadofsky and Esposito. While Sadofsky may have confused whether he saw Esposito at the crowded party or earlier that day when Esposito delivered meat is claimed by petitioner to be irrelevant to his testimony that Deetz was upstairs at the Russo house during the Christmas party. Moreover, petitioner argues that it is utterly believable that Sadofsky had visited the house earlier and points out that Sadofsky was not asked when he arrived at the Russo home but rather when he arrived at the party.

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The difficulty in assessing the evidence presented in this matter, as has been discussed herein, is due to the fact that almost all the witnesses presented have some affiliation with one of the principals in this matter. Thus, Sadofsky is a social friend of Nicola Russo's who has been to his house numerous times. However, despite his connection with Nicola Russo and the difficulty this court has in believing that Sadofsky had not discussed the case with Russo prior to the day before his appearance in court, this court does not believe that Sadofsky's testimony was fabricated. Sadofsky's statement that he saw Deetz coming from Stephen's room on the second floor and going into another room, when he used the upstairs bathroom, appeared to this court to have the ring of truth. Moreover, the fact that he may be in error as to the exact time when he saw Esposito, i.e., in the afternoon or in the evening, does not significantly taint his testimony.

Respondent's further effort to refute this charge is based on his allegation that there is a contradiction between the testimony of John and Stephen Russo as to when they advised their father that there was marijuana at the Christmas party. More particularly, respondent cites the testimony of John Russo in which he stated that upon seeing the probation report he lied to his father by denying that there had been any marijuana on the premises during the Christmas party, and the testimony of Stephen that both he and John informed their father that respondent had obtained joints from both brothers prior to their father calling Deetz and Langanella to the Russo home to sign affidavits in response to the probation report. It is, thus, respondent's apparent contention that both John and Stephen are incredible witnesses — the conflicting nature of the testimony indicating that at least one, if not both, lied as to when he advised his father that Deetz had marijuana. Respondent would, thus, have the court accept as true his testimony regarding the events of the Christmas party. Of course, respondent is aware that for the court to accept his testimony as credible, the court would have to give little, if any, credence to the testimony and report of Michael Marconi, the probation officer. He apparently asks the court to so find, contending that he did not see any marijuana baggies being passed among the guests, did not tell Marconi that he had gotten any marijuana and, in fact, told Marconi that he did not get any marijuana and that he does not use it. Deetz alleges that he simply told Marconi that if Mrs. Russo made certain allegations that she was a truthful and honest person. In support of his statements, he points to the fact that his sworn affidavit (R-5 in evidence) denied the presence of marijuana on the premises.

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Nick Russo, testifying as to the issue of the "joints" at the Christmas party, indicated that he learned about Deetz getting two joints from his sons at the party after he received a probation report, which report said a teacher had said boys were passing baggies among the guests. Deetz admitted it was he who had spoken to the Probation Department and advised him, apparently on being summoned to his house, that baggies had not been passed, but he had gotten two marijuana cigarettes from the boys. Nick Russo recalled that when he questioned his sons, they also told him that there was marijuana in the house during the Christmas party. He stated that it was because he knew that Deetz had obtained marijuana from the boys that his own certification referred to the fact there was no "use" of marijuana in the house. Although he acknowledged that Deetz's affidavit, presented to the court in order to answer the probation report, stated that the boys possessed no drugs whatsoever, he claimed that his attorney had spoken to Deetz regarding this and that he had nothing to do with the affidavit. He admitted, however, on cross-examination that he had told his lawyer that Deetz received two joints from his sons and that this information did not find its way into the affidavit. He recalled that although there was an affidavit prepared for Langanella to sign (to the effect that there were no drugs present), she would not sign same as she did not wish to get involved. (According to Russo, it was also contrary to what she heard Deetz tell him.) It is to be noted at this juncture that it was Russo's testimony that he found out about his sons' additional involvement with Deetz regarding marijuana when his sons, after becoming aware of what they believed to be a conspiracy between Deetz and their mother to gain custody, subsequently advised him of the other instances.

Nicola Russo's testimony was confirmed by both Stephen and John. John claimed that prior to the probation report, he probably lied to his father and told him he did not use marijuana. However, after the probation report was received and his father demanded an explanation, he told his father about the joint he gave Deetz and the fact that he used marijuana. He advised his father that he did not pass baggies. Stephen recalled that after his father received the probation report he inquired of him what occurred. Stephen recalled advising his father that Deetz got joints from him and John at the Christmas party. He recalled that Deetz wanted to sign or file, and, apparently, Stephen felt he had signed, an affidavit which stated that no marijuana baggies were passed, not that there was no marijuana present in the house.

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Deetz's, testimony regarding this issue is to the contrary. Deetz recalled receiving a telephone call from Nicola Russo regarding statements contained in the probation report. Russo cursed him out, asking him what the idea was of making those statements. Deetz, claiming to have said "no such things," made arrangements to meet Russo at his home. Once there, Deetz was shown a portion of the probation report and, in response thereto, denied making those statements; he claimed to have only told Marconi that Mrs. Russo was honest, without denying or confirming the charges. Deetz recalled reviewing a rough draft of the affidavit and agreeing to sign it because it was true. When it was typed and brought to school for his signature, he crossed something out, and it had to be redone. Langanella testified that she would not sign the affidavit because she did not wish to get involved and also because she had smelled marijuana at the Christmas party. She confirmed that during that meeting Deetz did not mention to Russo having received joints from Stephen and John at the Christmas party.

A review of the above testimony reveals that respondent's assertion as to the contradictory statements of John and Stephen is inaccurate. More important, however, to this court in evaluating the credibility of the above witnesses in regard to this charge is the fact that Deetz's testimony was refuted by the testimony and report of Michael Marconi.

Michael Marconi, an officer of the court, filed the probation report which prompted Russo's and Deetz's responding affidavits. That report, filed on March 9, 1981, outlined Mrs. Russo's allegations regarding the lifestyle at her ex-husband's home:

> Mr. Russo allowed the boys at Christmas, in the presence of a teacher from their school, to make baggie gifts of marijuana from a larger bag of the drugs. The smaller bags were passed around to the house guests. (See P-10 in evidence).

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Marconi, testifying as to the addendum report he filed with the court (P-20 in evidence), recalled conferring with Deetz regarding Mrs. Russo's allegations shortly before March 9, 1981. He stated that Deetz told him that he had been friends with the Russos and was at the Russo home on one occasion when the Russo boys had marijuana, which they gave out to guests as gifts. He told Marconi he was given a bag of marijuana as a gift and gave it away. Marconi testified that P-20 accurately reflected his conversation with Deetz.

As has been discussed herein, Deetz denied ever telling Marconi he saw bags of marijuana at the Christmas party or got marijuana from the boys and passed it on. He stated that he received no marijuana at the party and saw none passed. Rather, he alleged that he told Marconi that he did not get marijuana and if he had he would have passed it on since he does not use it. When Marconi advised him that Mrs. Russo had said there was marijuana, he said, "Well, if she said so." Deetz admitted signing the certification (R-5 in evidence) after speaking to Marconi.

This court accepts the truth and veracity of Stephen's and John's testimony. Both indicated that they gave Deetz marijuana joints at the Christmas party, which statements were confirmed by the testimony of Nick Russo (his incredible affidavit notwithstanding). Importantly, these statements were confirmed at least to some extent by Marconi's testimony and report recounting what Deetz told him. Based upon the testimony and evidence presented, this court finds that Charge 5 has been proven by a preponderance of the believable and credible evidence.

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CHARGE 6- Some weeks after the December 1980 Christmas party, Barry Deetz offered and provided a 1980 teacher's parking permit to Ridgewood High School student John Russo in the back of his classroom, instructing the student not to divulge this gift, said actions constituting conduct unbecoming a teacher.

This charge is substantiated by the written statement of John Russo (P-7) and by his statement at the hearing. John testified, both on direct and cross-examination, that Deetz gave him a parking decal in compensation for marijuana. According to John, that transaction occurred in the back room of respondent's classroom. Apparently, this decal provided him with a great advantage for parking, as only a limited number of parking spaces were available for students. John admitted to in time being caught with the illegal decal, which was discovered and removed when his car was in the school mechanic's shop.

John's possession of the decal and the subsequent discovery by the administration that he was using it was confirmed by the testimony of Joseph Hood, executive assistant to the high school principal, who attested to receiving a report from Mrs. Osborne, the parking lot attendant, that John had been apprehended with a parking decal. It is noteworthy, however, that Hood recalled Osborne indicating that on or near the auto mechanic's workshop and on Beverly Road, she discovered the Russo boy going into a brown Cadillac that had a parking sticker on it and asked the boy to turn the sticker over to her. John complied with this request.

Despite Hood's statement that Osborne advised him that the decal was found near the auto mechanic's workshop, further credibility is lent to Russo's testimony by Richard McGregor, director of operations for petitioner, who recalled that Osborne had reported to him that a student had a decal on his car which was detected when it was brought to the repair shop. In addition, McGregor, who was responsible for the issuance of decals at the relevant time, confirmed that the decals, kept under lock and key, were issued to teachers on an honor system. The teacher left a license plate number and was

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issued a decal. Since the teacher was responsible for placing the decal on the car, McGregor conceded that it was certainly possible for a teacher to receive a decal and never affix it to his automobile. In fact, McGregor noted the curious fact that Deetz had requested between four and six decals and that no other teacher had requested so many decals.

Respondent attempts to refute this charge by alleging that John Russo was apprehended with the parking decal prior to the December 1980 Christmas party, and thus, the decal could not have been received by him as compensation for the marijuana cigarette allegedly given to Deetz by John at the Christmas party. In support thereof, respondent relies on Hood's testimony that his best approximation as to when Mrs. Osborne reported the incident to him was November or December 1980.

A review of Hood's testimony, upon which respondent so strongly relies, revealed that although Hood recalled that Russo was apprehended with an illegal decal, he made no written record of the incident, verified that the event was not at all significant to him at the time, and stated that he did not recall when it occurred. Only upon further questioning did he say it might have been in December 1980. In addition, it is noted that the weight of the evidence supports the proposition that John Russo was apprehended with the decal in the mechanic's shop and not by Mrs. Osborne, as recalled by Hood.

Apparently, respondent would have this court find, based on the rampant abuse of the decal system, that while the decal originated with a faculty member, either it was stolen from him, picked up in the parking lot, removed in the mechanic's shop or even stolen from the inventory of decals. The problem with this approach is that there is no evidence that John obtained his decal in that manner. Rather, John advised the court as to the manner in which he received the decal and the evidence in support thereof is certainly in conformity with and substantiates his testimony. Based upon the above discussion Charge 6 is found to be true by a preponderance of the believable evidence.

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CHARGE 7 - Approximately during the month of January 1981, Barry Deetz asked Ridgewood High School student Stephen Russo during a fourth period class at the school if he could provide Deetz with a "baggy of pot." Stephen Russo then provided a $5 bag of pot which Barry Deetz accepted in his lab office, said action constituting conduct unbecoming a teacher.

Petitioner concedes that no testimony was taken regarding this charge. Petitioner therefore relies for support of this charge on the written statement of Stephen Russo.

Since no determination will be based strictly on hearsay testimony, this charge has not been proven by preponderance of the evidence. See N.J.A.C. 1:1-15.8(b) which requires that "notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurance of reliability and to avoid the fact or appearance of arbitrariness."

CHARGE 8 - Approximately during the month of February 1981, Barry Deetz asked Ridgewood High School student Stephen Russo to obtain some pot for his daughter and to provide him with a rolling machine and paper along with instructing Deetz how to use the machine. Stephen Russo provided a $5 bag of pot which Deetz directed him to put in the back, under the seat of Deetz's red Renault, said action constituting conduct unbecoming a teacher.

Petitioner contends that the testimony and written statement of Stephen Russo confirm that this charge against respondent is true in fact. Stephen Russo testified that during the last period after school, he came to Deetz's room looking for a ride home and began to talk with Rebecca Deetz. He stated that, "We got to talking and Mr. Deetz asked me if he could . . . if I could get Becky some pot. . . or marijuana before she left

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and she was leaving Thursday. So I had to get it before then." Stephen, who did not allege that he had received a ride home on this occasion, stated that a few days passed and he brought in a $5 bag to Mr. Deetz's lab room. Told by Deetz to put it in his car, he proceeded to put it in the back of Deetz's red Renault. It is to be noted that Stephen's written statement (P-4 in evidence) indicates that he was asked for the marijuana on this occasion without Deetz's daughter Sally knowing.

In an effort to refute Stephen Russo's allegation, Deetz's daughter Becky testified that she was a senior attending college in Texas during the school year 1980-81. She recalled coming home for Christmas vacation and, prior to January 12, 1981 (she was not in the area in February 1981), visiting her old teachers when she came to Ridgewood High School to pick up her father, whom she had dropped at school earlier in the day. She recalled that while she was standing with her father and sister in the hall, she was introduced to Stephen Russo (she only met him on this one occasion) and engaged in polite conversation with him, until leaving with her father and sister. She alleged that she did not hear, and was not present for a request by her father to Stephen for marijuana for her. She claimed that she has never even used it. Moreover, she did not give Stephen Russo a ride home and, in fact, has never been in a car with him.

Becky's testimony was confirmed in part by Sally Deetz, who recalled that on one occasion, after the Christmas holidays in 1980-81, Becky came to her father's classroom and Stephen Russo was there. She stated that she did not hear her father ask Stephen Russo for marijuana for Becky and alleged that Becky does not use marijuana. She too recalled that Stephen Russo was not given a ride home on this occasion.

Since Stephen Russo specifically indicated that Sally Deetz did not know of Deetz's request, and since this request may have been made either prior to or subsequent to Sally's presence in her father's classroom, the court has not considered Sally's testimony probative on the issue of whether or not Stephen was asked by Deetz for marijuana for his daughter Becky. Clearly, however, the testimony of Becky Deetz is at

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odds with Stephen's. Thus, the court is faced with a consideration of credibility. The court has, as discussed above, evaluated Stephen Russo's credibility and found him to be a believable witness. His testimony on this issue in particular had the ring of truth, especially in light of the fact that both Becky Deetz and Sally Deetz seemed to feel it important to note that he did not receive a ride home. Stephen at no time indicated that he received a ride with Becky Deetz. Thus, their attempt to refute his testimony in that regard is of no moment. Moreover, the court is unimpressed with respondent's argument that Stephen's suggestion that this occurred in or around February 1981 means that his testimony in regard to this issue is inaccurate. The court in accepting as credible Stephen Russo's testimony acknowledges that Becky Deetz did in fact have a desire to vindicate both her father and herself which could in fact color her credibility. Based upon the above discussion this court finds Charge 8 to be supported by a preponderance of the credible evidence. However, since there was no testimony by Stephen that the rolling machine which he claimed to have shown Deetz at the Christmas party and subsequently brought into school related in any manner to the above incident, that portion of Charge 8 which refers to the provision of the machine and paper is deleted and Charge 8 is amended to conform with the evidence.

CHARGE 9 - On April 15, 1981 at an 8:30 a.m. meeting in the office of Dr. Samuel Stewart, Ridgewood Superintendent of Schools, Barry Deetz stated that he knew for some substantial period of time that Stephen Russo and John Russo, students at Ridgewood High School, were dealing in marijuana at the school. Barry Deetz had never before reported this information to the Ridgewood High School administration, said failure to report this information constituting conduct unbecoming a teacher.

Clearly, this charge is supported in the first instance by the testimony of Mr. Honsinger, confirming that Deetz stated that the Russo brothers were the biggest drug dealers in the school. Moreover, it was corroborated by Dr. Stewart's certification, as well as his testimony herein, that Deetz said he had known that the Russo boys were dealing in marijuana in the high school for some time.

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While Deetz did not recall the exact words he used in reference to Stephen and John Russo at that meeting, he did state that he did not know and does not know now if the boys were in fact dealing in marijuana at the school. He stated that "because kids said that Steve Russo could sell it and then I had heard, but I had no factual knowledge whatsoever of the Russo boys ever having or dealing in any marijuana." In essence, he stated that when he described to his class the Columbian Gold incident that someone said that Steve Russo could sell it, Deetz, who indicated that he advised his class that it was not fair to someone to spread such rumors, contended that he did not come forth with this information concerning the boys dealing in drugs sooner because he viewed the allegation as a mere rumor.

This court finds the testimony presented by petitioner to the effect that respondent advised the administration at the April 15, 1981 meeting of the Russo brothers involvement with drugs to be credible. It seems reasonable to conclude, and it is amply supported by the record herein, that Deetz was not simply advising the school authorities of gossip; he was attempting to show that allegations coming from such individuals should be taken with a grain of salt. Further, this version of the facts becomes even more compelling when one recalls that Michael Marconi also testified that Deetz advised him that Stephen and John were involved with drugs. Clearly, Deetz never believed that the information about the boys' drug involvement was simple gossip.

Respondent argues that the lack of a board policy regarding the reporting of drug abuse, coupled with the Board's failure to act on the charges against John and Stephen, constitutes a defense to this charge. This contention is wholly without merit. No policy should be needed to insure that teachers will respond in an appropriate and reasonable manner to what can be considered drug abuse or dealings. Further, the Board's action or absence thereof in regard to the Russo boys has no bearing on the appropriateness of respondent's own behavior. This court does not believe that a teacher in the public schools can adopt an ostrich-like approach and withhold information which if learned by the administration might help it deal with possible drug abuse at the high

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school. Not only might such information be important in terms of the other students at the school, but if Deetz believed that Stephen and John were involved with drugs, such information might be of value to the administration in attempting to help the Russo boys change their behavior.

Based upon the above discussion Charge 9 is found to be true by a preponderance of the credible evidence.

CONCLUSION

Based upon the above findings, this court concludes that respondent is guilty of conduct unbecoming a teacher. This conclusion is buttressed by the fact that the Commissioner has stated that involvement with illegal drugs is inimical to a status as a teaching staff member in the public schools. See In the Matter of the Tenure Hearing of Glick, 1980 S.L.D. __ (January 3, 1980); In the Matter of the Tenure Hearing of Wolfe, 1980 S.L.D. 721; In the Matter of the Tenure Hearing of Humphreys, 1978 S.L.D. 689, 690, rev'd on other grounds, 1979 S.L.D. 839. See also, John Gish v. The School District of the Borough of Paramus (N.J. App. Div., December 16, 1982, A-5564-80) (unreported) wherein the court affirmed the State Board's determination that appellant's dismissal was warranted solely on the basis of narcotic charges, holding that the State Board "not only had a valid interest, but also a mandate to insure that its teachers are fit to espouse the public policy and carry out the functions required by the legislature with respect to education concerning narcotics use and abuse." Thus, if a teacher's conduct "evinced an attitude which undermined the goal of the school system" it would not be tolerated. In the instant case, respondent's actions, which involved drug transactions with students both on and off school premises, cultivation of marijuana on school premises, and statements to his class about marijuana seedlings he was growing, certainly rise to the level of conduct

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unbecoming a teaching staff member. Moreover, the additional charges of providing a student with an unauthorized teacher's parking decal, as well as failing to report Stephen's and John's involvement with drugs to the school administration, further support the conclusion that his attitude and his actions are contrary to the goals of the school system and rise to conduct unbecoming a teacher.

PENALTY

Given the determination by this court that the present charges are true in fact and rise to conduct unbecoming a teacher, the court is faced with the question of the appropriate punishment to be imposed. Petitioner urges the court to consider the gravity of respondent's conduct and to dismiss him from his post as a tenured teacher. Petitioner believes the penalty to be so clearly appropriate that it notes that respondent does not even argue that if the charges are found to be true, they would not in fact warrant dismissal.

It is clear that in cases involving abuse of narcotics, in light of the seriousness of the conduct, and the strong social policy against such abuse by school children due to the resulting detriment to their well-being, the Commissioner has consistently ordered the dismissal of the respondent teacher. Glick, supra; Wolfe, supra; Gish, supra. In so doing, what is to be considered is the fact that teachers are public employees and in such positions influence the opinions of their pupils. Thus, "When a teacher deliberately and willfully. . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner." In the Matter of the Tenure Hearing of Tordo, 1974 S.L.D. 97, 98-99. In the instant matter, the court has evaluated respondent's conduct which involved transactions between respondent and students both on and off campus and a pattern of openly joking and encouraging drug use in class, apparently even through the cultivation of marijuana in his classroom. More to the point, the court has considered the effect of his conduct on the students, parents, the community as a whole

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and, more importantly, the public trust placed in respondent. Having done so, it appears to this court that in the instant case a lesser sanction than dismissal is impossible. "Parents must be assured that all professional school employees to whom they entrust the care and education of their children shall rise above the possible taint of drug possession or usage." Humphreys, supra, at 690. Respondent's violation of the trust imposed upon him as evidenced by his conduct is inimical to and at odds with the goals of the school district and the well-being of district pupils. It is therefore **ORDERED** that respondent be dismissed as a tenured employee of petitioner.

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

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

June 3, 1983
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

Seymour Ellis
DEPARTMENT OF EDUCATION

DATE

Mailed To Parties:

June 7, 1983
DATE

Ronald L. Parkinson
FOR OFFICE OF ADMINISTRATIVE LAW

js

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LIST OF WITNESSES

For petitioner:

Dr. Carmen Ciccarelli
Robert W. Honsinger
Theresa Russo
Steven Russo
John Russo
Robert D. Sullivan
Dr. Samuel B. Stewart
Richard A. MacGregor
Edward Bennett
Jack Sadofsky
Michael Marconi

For respondent:

Ralph Esposito
Barry Deetz
Robert Honsinger
Sarah Deetz
Joseph Hood
Rebecca Deetz
Alison Francis Boyer Deetz
Thomas Rosseau
Paul Sidenbach
Arnie Olsen
Marian McGinnis
Robert Olsen
Charles D. Montgomery
John William Zastko

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Annette Langanella
Margaret T. McCartney
Warren Mitchell
Henry P. McNally
Nicola Russo

LIST OF EXHIBITS

P-1	Memo to persons concerned, dated November 25, 1981, from Dr. Ciccaralli
P-2	Affidavit of Dr. Carmen Ciccaralli, dated December 11, 1981
P-3	Photostatic copies of hospital record of Barry Deetz
P-4	Handwritten statement of Stephen Russo, dated April 15, 1981
P-5	Handwritten statement of John Russo
P-6	Typewritten statement of Stephen Russo, dated April 16, 1981
P-7	Typewritten statement of John Russo, dated April 16, 1981
P-8	Certification of Thomas R. Burgin, dated June 2, 1981
P-9	Specific charges of unbecoming conduct (3 pages)
P-10	Probation report of Michael Marconi, dated March 9, 1981 (6 pages)
P-13	Letter to Barry Deetz from Robert D. Sullivan, dated April 27, 1982

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P-14 Letter to Mrs. Friedman from Robert D. Sullivan, dated June 22, 1982

P-15 Record of claim interview and determination, signed June 30, 1982

P-16 Eligibility review questionnaire of Barry Deetz, dated June 30, 1982

P-18 Notice of determination, date mailed June 30, 1982

P-19 Certification of Dr. Stewart, dated April 16, 1981 (2 pages)

P-20 Addendum to Judge's report only from Michael Marconi regarding Russo v. Russo

R-1 Memo to whom it may concern from orthopedic clinic, dated January 13, 1982, signed by Richard Fong, M.D.

R-2 Letter to Mr. Braxton from Barry F. Deetz, dated March 16, 1982

R-5 Certification of Barry Deetz, dated March 23, 1981

R-6 Certification of Nicola S. Russo, dated March 23, 1981 (7 pages)

R-7 Check to Nick Russo from Barry F. Deetz in the amount of $1,000 dated April 13, 1981

R-8 Check to Nick Russo from Barry Deetz in the amount of $100 dated April 13, 1981

R-12 Inter-office communication to Bob Olsen from Bob Honsinger, dated December 10, 1980

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R-13 Pink report to Robert Olsen, subject Paul Rollins, dated June 9, 1981, attached to memo to Barry Deetz from Bob Olsen regarding Paul Rollins, dated January 13, 1981 (2 pages)

R-14 Inter-office communication to Bob Olsen from Bob Honsinger, dated December 30, 1980, and another memo dated December 18, 1980 (1 page)

R-15 Memo to Bob Olsen from Barry Deetz regarding Paul Rollins, dated March 9, 1981

R-17 Interrogatories of Barry Deetz, dated October 7, 1981 (8 pages)

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IN THE MATTER OF THE TENURE	:	
HEARING OF BARRY F. DEETZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
VILLAGE OF RIDGEWOOD, BERGEN	:	
COUNTY.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

After fifteen days of hearing in this difficult case, an initial decision was rendered therein. Respondent filed primary exceptions to the initial decision by Judge Reiner. Much of those exceptions are devoted to a castigation of Judge Reiner involving a series of disparaging and derogatory terms in which she or her conclusions are characterized as inept (Respondent's Exceptions, at p. 5), inconsistent (pp. 7, 29), naive (pp. 8, 9, 24), pathetic (p. 12), insupportable, at variance with the truth, invalid (p. 20). Respondent further charges that Judge Reiner refused to accept testimony interfering with her conclusions (p. 23), makes no negative inferences (pp. 25, 27), and that there exist serious questions of her impartiality. Finally, her statements are preposterous (p. 33), incredible (p. 34), and arrant nonsense (p. 36). In the opinion of the Commissioner, such vituperation exceeds the boundaries of the zealous representation of the client and borders on the undignified or discourteous conduct which is degrading to a tribunal. DR7-106(C)(6); DR8-102(B). While the Commissioner is cognizant that judging professional responsibility is not within his jurisdiction, he believes that respondent's counsel, feeling as strongly as is apparently evidenced, should have used the resources available to him for a different tribunal.

Respondent asks that the decision herein be reversed by the Commissioner in toto (p. 39). The Board's reply exceptions refute those of respondent and request the Commissioner to adopt the judge's finding that the charges against respondent are true in fact and rise to conduct unbecoming a teacher and warrant dismissal from his post as tenured teaching staff member in the Ridgewood School District. The Commissioner looks with favor on the Board's arguments.

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The Commissioner observes that, in addition to respondent's obvious displeasure with the judge's conduct of the trial and his disagreement with her conclusions, respondent contests every determination of the credibility of any witness whose testimony was not supportive of his stance. Claim is made by respondent that the judge ignored the contradictions between the testimony of John and Stephen Russo classed as unmitigated liars by respondent and witnesses such as Bennett and Sadofsky (Respondent's Exceptions, at p. 39), this, notwithstanding respondent's prior characterization that "***[t]he notion that Bennett is somehow reliable is pathetic***" and "***[t]herefore even to the ALJ he [Sadofsky] is an out-and-out liar***." (Respondent's Exceptions, at pp. 12, 16) Respondent cannot have it both ways.

Although administration is not on trial in this case, respondent on one hand castigates administration for not doing a single thing against the Russo boys for their involvement in drugs. Secondly, respondent contends that the only interest manifested by this school administration in connection with marijuana was to attempt to obtain the dismissal of respondent. (Exceptions, at p. 36) Respondent then solicits the support of this same administration by "***the fact that Dr. Stewart, the superintendent, and Mr. Honsinger, the school principal, intrinsically supported respondent in their admission that they knew nothing about the alleged activity of respondent over a period of time in growing plants***." (Respondent's Exceptions, at p. 38) Again respondent cannot have it both ways.

The judge in reaching her conclusions herein had to make a judgment of the credibility of each witness before her. The Commissioner's study of the entire record herein, including the testimony of witnesses, the documents in evidence, the arguments of law of the parties, the initial decision and the exceptions filed thereto has considered "***the 'proofs as a whole' with due regard to the opportunity of the one who heard the witnesses to judge their credibility***." Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)

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

The Commissioner expresses his strong concurrence with the appropriateness of the penalty herein set down. Respondent's involvement with drugs both in and out of school and pupils of the school cannot be minimized or condoned and rises to conduct unbecoming a teacher of the most reprehensible kind. Tordo, supra; Humphreys, supra Accordingly, Barry F. Deetz is and shall be dismissed from his post as a tenured teaching staff member in the Ridgewood School District as of the date of this decision.

IT IS SO DETERMINED.

AUGUST 4, 1983
PENDING STATE BOARD

COMMISSIONER OF EDUCATION

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INITIAL DECISION
OAL DKT. NO. EDU 7948-82
AGENCY DKT. NO. 284-7/82A

JEROME C. SORENSEN,
Petitioner

V.

BOARD OF EDUCATION OF WAYNE TOWNSHIP, PASSAIC COUNTY,
Respondent

APPEARANCES:

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

Stephen R. Fogarty, Esq., for respondent
(Aron, Till & Salsberg, attorneys)

Record closed: May 26, 1983 Decided: June 22, 1983

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

Jerome C. Sorensen was employed by the Board of Education of the Township of Wayne, Passaic County, as director of guidance at Wayne Hills High School from 1975 -78 and was compensated under the supervisors' salary schedule. From 1978-82 he was director of guidance district-wide at both Wayne Hills and Valley High Schools and

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likewise was compensated under the supervisors' salary schedule. For 1982-83, after a school closure and a district-wide reduction in force, petitioner's position of director of guidance at both high schools was abolished and he was transferred to a position of department chairperson of guidance at Wayne Hills High School only and was compensated under the teachers' salary schedule, at a reduction in salary to him of approximately $10,000. Alleging (1) his present duties and functions as department chairperson of guidance at Wayne Hills High School are the same as duties and functions he performed as director of guidance at Wayne Hills High School from 1975-78; and (2) even if there be found no factual similarity of duties and functions, that nevertheless the duties and functions of the departmental chairperson of guidance at Wayne Hills High School are so necessarily and sufficiently supervisory in nature as to require his installment on and compensation from the supervisors' salary schedule, petitioner charged unlawful demotion and reduction in pay, contrary to N.J.S.A. 18A:28-5,6, and demanded restoration to the supervisors' salary schedule. The Board denied his claims.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on July 21, 1982. On August 9, 1982, the Board's answer in general denial was filed in the Bureau, with affirmative defenses contending generally the Board's transfer action, as well as its reduction of petitioner's salary, was lawful and proper within its statutory and discretionary authority under N.J.S.A. 18A:28-9. The Commissioner transmitted the matter to the Office of Administrative Law on August 19, 1982 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. On notice to the parties a prehearing conference was held in the Office of Administrative Law on October 28, 1982 and an order entered establishing, inter alia, that the parties should confer in order to effect stipulations of facts and documentation, in sequential and chronological order, pertaining to history of job duties and functions for comparative analysis for the periods 1975-78 and 1982 to date. Also to be stipulated were same matters pertaining to the position of departmental chairperson of guidance at either Wayne Hills High School or Valley High School. The Board's answer admitted paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of the petition. Stipulation of relevant facts with documentation was filed by the parties, final submission having been on May 26, 1983. The record closed then.

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ADMISSIONS, STIPULATIONS AND FINDINGS OF FACTS

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

A. Chronology of Petitioner Sorensen's Employment Record in Respondent Wayne School District, 1965 to present.

1. Petitioner Sorensen commenced his employment in the respondent Wayne School District as a science teacher in September 1965.

2. From September 1966 to June 1968 Sorensen was a guidance head at the Anthony Wayne Junior High School. Sorensen was remunerated on the teachers' salary guide, plus a stipend.

3. From September 1968 to January 1973 Sorensen was vice-principal at the Anthony Wayne Junior High School and was on the administrators' salary guide.

4. From January 1973 to June 30, 1974 Sorensen was acting principal at the Schuyler-Colfax Junior High School and was on the administrators' salary guide.

5. From July 1, 1974 to June 30, 1975 Sorensen was vice-principal at the Schuyler-Colfax Junior High School. He was paid pursuant to the administrators' salary guide.

6. From July 1, 1975 to April 1976 Sorensen was temporarily assigned as vice-principal in charge of guidance at Wayne Hills High School, one of two high schools in the district, because of the resignation of the previous director of the guidance department at Wayne Hills High School. Each high school had its own director of guidance. Sorensen was paid pursuant to the administrators' salary guide.

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7. From April 1976 to June 1978 Sorensen was director of guidance at the Wayne Hills High School. He was paid on the supervisors' pay scale.

8. From July 1, 1978 until November 8, 1978 Sorensen continued as director of guidance at Wayne Hills High School, but, due to the resignation of the director of guidance in the other high school. Sorensen handled both schools. Sorensen was paid on the supervisors' salary scale.

9. By request of the administration, Sorensen assumed the new position of director of guidance over both high schools from November 9, 1978 to June 30, 1982. This assignment did not include an increase in salary. Sorensen remained on the supervisors' salary scale and received two stipends during the period between November 1978 and June 1982.

10. From September 1982 (and including the summer of 1982) to the present, Sorensen was guidance department chairperson at Wayne Hills High School. He was paid on the teachers' pay scale, with a stipend for being chairperson.

B. Historical Description of Guidance Departments in Wayne's Two High Schools.

11. Until July 1978 the guidance department in each high school was headed by a director of guidance paid on a supervisors' salary scale. There were no chairpersons in the guidance department. Each high school had a staff of six guidance counselors, excluding the director of guidance.

12. From November 1978 to June 1982 there was one director of guidance over both high schools and the position of guidance department chairperson was created, with each high school guidance department having one chairperson and six counselors.

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13. Beginning with the 1982-83 year, the Board abolished the position of district-wide director and retained two chairpersons (one in each high school's guidance department), with six counselors in each school.

14. In the summer of 1982 the guidance department chairpersons were required to work one month to perform scheduling and needed guidance services prior to the opening of school for the 1982-83 year, a function previously performed by the directors of guidance.

C. Description of Job Duties in Guidance Departments

15. At all times prior to November 8, 1978 the directors of guidance in each high school performed the duties listed in paragraph 6 of the Petition (pages 2 to 6).

16. From November 9, 1978 to June 30, 1982 Sorensen, as the district-wide director of guidance, performed the duties listed in paragraph 8 of the Petition (which incorporate those listed in paragraph 6). In November 1978 the position of guidance department chairperson was created. These chairpersons worked under the district-wide director and performed supportive functions. The chairpersons were paid on the teachers' salary guide, plus a stipend.

17. From the summer of 1982 to the present, Sorensen, as guidance department chairperson in Wayne Hills School, has been and is performing the same job duties he performed as director of guidance in Wayne Hills High School from September 1975 to November 1978 (as listed in paragraph 6 of the Petition). In addition to those duties, Sorensen has, since the

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summer of 1982, been performing several of those duties listed in paragraph 8 of the Petition (which had not previously been performed by the directors of guidance in each high school) including the following:

a) Petitioner paragraph 8, section A, (which incorporates the duties in paragraph 6);

b) Petitioner paragraph 8, section B;

c) Petition paragraph 8, section C (except developing schedule of guidance functions);

d) Petition paragraph 8, section E (note, this function did not exist prior to 1978);

e) Petitioner paragraph 8, section N;

f) Petition paragraph 8, secion P.

18. The job duties performed by Sorensen since the summer of 1982 are those listed or referred to above in paragraph 17 of this Stipulation, and the list of duties set forth in Exhibit D of the Petition are to be disregarded.

D. Petitioner's Instructional, Supervisory, Educational Services Certifications.

19. Instructional certificate, grades 7-12, with subject field endorsements of biological science, general science and social studies, dated August 4, 1958.

20. Educational services certificate as counselor assigned full-time in carrying out guidance and student personnel services, dated April 27, 1965.

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21. Educational services certificate as counselor, dated August 1967.

22. Certificate (endorsement) as secondary school principal, dated May 1968.

23. Educational services certificate as director of student personnel services, dated January 1976.

24. Certificates (endorsement) as principal and school administrator dated April 1977.

DISCUSSION

Simply put, petitioner's claim is to be returned to his former level of compensation on the supervisors' salary schedule, from which he was relegated for 1982-83 by Board action to a compensation step on the teachers' salary guide at a loss of $10,000.

From review of stipulations and documentation, certain basic facts stand out. From 1975 to 1978 petitioner was employed by the Board as director of guidance at Wayne Hills High School and paid under the supervisors' salary schedule. According to a job description (Exhibit A), the position required him to hold a director of student personnel services certificate. He was responsible to the school principal for administering and coordinating school guidance and counseling services. From 1978 to 1982, he was employed as director of guidance, district-wide for Wayne Hills and Valley High Schools, and likewise was paid under the supervisors' salary schedule. A job description (Exhibit B) required him, once again, to hold the director of student personnel services certificate. As guidance director he was responsible to the director of secondary education for administering and coordinating a district-wide guidance program.

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Under N.J.A.C. 6:3-1.10(k)(30) it is provided that additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with teachers' certification shall be deemed to be specific categories. Under N.J.A.C. 6:11-11.1 it is provided that New Jersey educational services certificates are issued to applicants who have completed approved education services programs. Under N.J.A.C. 6:11-12.12 (director of student personnel services),(a), it is provided the certificate is required for any person who is assigned as a director, administrator or supervisor of guidance and student personnel services of a school system, including the supervision of educational activities in areas related to and within the guidance program. One requirement for that certificate is a standard New Jersey student personnel services certificate (N.J.A.C. 6:11-12.13).

Under familiar Spiewak[1] criteria, it would seem to follow, petitioner thus achieved transfer or promotional tenure in the district under N.J.S.A. 18A:28-6 as director of guidance either at one high school or district-wide, by merit of his categorical certification therefor as director of student personnel services, his employment in positions described that expressly called for such certification, and his service therein for the requisite number of consecutive academic years. Counting backwards from 1982, moreover, it would seem his seniority in the position dated from, at least, date of issuance of his certificate in the category of director of student personnel services in January 1976. Basic compensation in the positions, however titled, finally, was established by the supervisors' salary schedule in force in the district and, for present purposes, by that guide as it was written at time the cause of action here arose at end of the school year of 1982-83.

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1 Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982); and Epps v. Bd. of Ed., Jersey City, App. Div., unpublished opinion, Jan. 3, 1983 (slip opinion at 6-8), reversing 1980 S.L.D. -- (State Board decision, April 8, 1980).

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Here, the Board defends its position by suggesting abolishment of the position of director of guidance, district-wide, effective for 1982-83, is entirely proper and within its authority under N.J.S.A. 18A:28-9. But petitioner does not challenge the abolishment. The Board urges it was not obligated to continue petitioner's salary under the supervisors' salary schedule when transferring petitioner to "a lesser position after a reduction in force or removal caused by abolishment of a position." But it seems clear, as petitioner argued, that petitioner's transfer for 1982-83 was an intra-categorical transfer, that is, one within and under the scope of his certificate category as director of student personnel services. The Boards appears to agree. See page 10 of Board's brief.

Petitioner's transferred position for 1982-83, entitled department chairperson of guidance at Wayne Valley High School, for which he was given a job description (Exhibit C) as "Department Head", it should be noted, requires petitioner to hold a supervisor's certificate and, among other things, supervise teachers in accordance with school policy and, after discussing teacher's observations with the teachers involved to suggest means of improving and to keep written reports for each classroom observation. See N.J.A.C. 6:3-1.10(k)(11); N.J.A.C. 6:11-10.4(c); N.J.A.C. 6:11-10.9. Supervisory endorsement in that category is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement, the latter of which petitioner, of course, does hold. The supervisor shall be defined as any school officer charged with authority and responsibility for continuing direction and guidance of the work of instructional personnel. Analysis of the job functions assigned petitioner (see Paragraph 17 and 18 of Stipulation and Findings of Fact) and the job description as general supervisor (Exhibit C) suggests petitioner's new transferred position for 1982-83 has not been properly described by the Board, contrary to N.J.A.C. 6:3-1.10(f) and suggests, instead, that a correct description of petitioner's new employment position is more properly construed, as it is argued, as an intra-categorical transfer within the scope of his certificate as director of student personnel services. The rule requires, where doubt exists, that the holder of the employment shall be classified as

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nearly as may be according to duties performed.[2] Here, there seems little difficulty in viewing petitioner's transferred employment as a single-school miniature of his former, abolished district-wide employment position as director of guidance. Similarity of present duties and duties he formerly performed from 1975-78 is apparent.

If petitioner's transfer was intra-categorical within the scope of his certification and category, the question results whether intra-categorical transfer by the Board, such as that here for petitioner in 1982-83, attended as it was by reduction in compensation through petitioner's relegation to compensation under the teachers' salary schedule, abridged petitioner's rights under N.J.S.A. 18A:28-5, which provides:

> The services of all teaching staff members. . . and such other employees. . .which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education. . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause. . .

N.J.A.C. 6:3-1.10(h) provides:

> Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. . . .

---

2 N.J.A.C. 6:3-1.10(f). It should be noted the word "position" includes any office, position or employment. N.J.S.A. 18A:28-1. Every position should have a position title recognized in the administrative code. N.J.A.C. 6:11-3.6(a). The position title should either correspond to one of the enumerated endorsements, for example Director of Student Personnel Services, N.J.A.C. 6:11-12.12, or be specifically approved by the county superintendent in accordance with N.J.A.C. 6:11-3.6(b).

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Petitioner argues that pursuant to N.J.S.A. 18A:16-11, by reason of the similarity between duties performed by him during 1982-83 and those performed by him during 1975-78, when he was compensated under the supervisors' salary schedule, he held de facto office and should, on that reason alone, be compensated at the higher level, both retrospectively and, hereafter, prospectively. For that proposition petitioner invokes the holding in Dandorph v. Bd. of Ed. North Bergen, 1980 S.L.D. — (Commissioner's Decision October 27, 1980). In my view, however, while that similarity is evident from the stipulated facts here, the principle primarily controlling resolution of the issue stems from the circumstance that the Board itself has conceded petitioner was the subject of an intra-categorical transfer within scope of his certification and within his supervisory educational services category. Since that intra-categorical supervisory transfer occurred following abolition of the district-wide Directorship, it nevertheless must be attended by no lessening or reduction in compensation. To the extent it does, it constitutes unlawful reduction in compensation contrary to N.J.S.A. 18A:28-5,6. In Williams v. Plainfield Bd. of Ed., 176 N.J. Super 154, certif. den. 87 N.J. 306 (1981), a tenured high school principal appealed from a State Board of Education determination that a local board could properly transfer her to position of elementary school principal and that such transfer took place in her case without reduction in salary. Her salary in the transferred position was frozen at the amount she was earning as principal of the high school, but she argued her future salary as elementary school principal would be determined by a ratio of 1.4 of base teachers' salary rather that 1.76 thereof for high school principals, the result being, she said, a reduction in salary prohibited by N.J.S.A. 18A:28-5. The Appellate Division affirmed the State Board's determination, which was that her transfer was a proper transfer to a position of equivalent rank and could occur without her consent. As long as her salary was not reduced, the transfer was not a demotion: the certification required was the same, both positions were tenure-eligible, and the duties to be performed were no less important educationally. The State Board noted she suffered no reduction in rank with respect to salary since she retained the same salary in both positions. There was no requirement her salary in future years be paid under the same schedule, however, said the State Board: the only statutory requirement is that there be no reduction in compensation

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and there is no statutory requirement barring reduction in salary expectancy. Id. at 158-64. Although in Williams there was no position abolishment under N.J.S.A. 18A:28-9 as here, the controlling nexus between the cases, it seems to me, lies in N.J.A.C. 6:3-1.10(h) requiring petitioner be given employment, when his position as director of guidance district-wide was abolished, in the same category to which he was entitled by seniority. He was given such employment, albeit in a mis-titled and mis-described position (Exhibit C) but at reduced compensation. Vice of the Board's action lies, in my view, in the transparency of that mis-description. There seems no plausible educational reason why the Board should not have described the position as one requiring an educational services certificate (endorsed for student personnel services) at supervisory rank. That it did not do so suggests its purpose was to deny petitioner the rank - and the compensation he should have earned in fulfilling it. The Board's first economy was proper. The second was not.

CONCLUSION

Accordingly, based on the foregoing, I **CONCLUDE** Board action herein by which petitioner, after abolishment of his tenured position as director of guidance district-wide, was transferred intra-categorically to a supervisory position as chairperson of guidance in Wayne Valley High School for 1982-83 but at a salary $10,000 less than was paid him in his former position was in contravention of petitioner's rights under N.J.S.A. 18A:28-5,6 not to be so reduced in salary. I **ORDER**, as a result, such salary be restored him by the Board.

I **CONCLUDE** further the Board has failed properly to describe the duties of petitioner's transferred position as chairperson of guidance at Wayne Hills High School, as required by N.J.A.C. 6:3-1.10(f) and **ORDER** that it shall forthwith effectuate such proper description as required by N.J.A.C. 6:11-3.6.

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I **ORDER** finally that petitioner shall continue to be compensated at least at his former unreduced level of compensation during future service in such chairpersonship.

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

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

June 22, 1983
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

June 24, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

June 28, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

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JEROME SORENSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the Board in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in primary exceptions to the initial decision by Judge Ospenson contends that the decision should be reversed. The Board argues that Judge Ospensen improperly relied on Williams, supra, which the Board declares is inapposite to the present matter. The Board argues that the judge misunderstood the facts of the instant case and reached an incorrect result. The Commissioner finds no merit in the Board's arguments.

An examination of the record herein and the arguments of law thereto convinces the Commissioner that the judge properly interpreted the facts of this present matter and applied the principles set down in Williams. Further, the Commissioner notes that in Dandorph, supra, it was determined that an employee of the board must be paid according to the duties actually performed rather than the title of the position. In the opinion of the Commissioner, petitioner herein has not been treated according to the principles set down in Dandorph. A close comparative reading of the duties set down in Exhibits A, B and C and those performed by petitioner convinces the Commissioner that this is so. Petitioner should not be at a reduction in compensation. The Commissioner so holds.

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

Accordingly, the Board shall describe the duties of petitioner's position to which he was transferred, as prescribed in N.J.A.C. 6:3-1.10(f) and 6:11-3.6. Further, the Board shall

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remunerate petitioner to his level of compensation prior to his transfer and properly compensate him for future service in his present position.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

AUGUST 8, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8631-82
AGENCY DKT. NO. 292-7/82A

MARJORIE WERNER-CHAMBERLIN,
Petitioner,
v.
WARREN COUNTY VOCATIONAL SCHOOL BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Albert B. Thorp, Esq., for respondent

Stephen E. Klausner, Esq., for petitioner
(Klausner & Hunter, attorneys)

Record Closed: June 10, 1983 Decided: June 24, 1983

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

Marjorie Werner-Chamberlin, a tenured teacher of home economics whose position was abolished on June 30, 1982 filed a petition on July 20, 1982 alleging that the Warren County Vocational School Board violated her tenure and seniority rights held pursuant to

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N.J.S.A. 18A:28-12 and 13 and N.J.A.C. 6:3-1.10 by failing to employ her for the 1982-83 school year to teach Family Life Education, Business Mathematics and Health Occupations. Petitioner asked reinstatement and back pay for 1982-83. On September 16, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Respondent filed a motion for summary decision on May 9, 1983. On May 20, petitioner moved for recusal of the assigned administrative law judge. On May 25, petitioner filed a cross-motion for partial summary decision. In addressing the motion for recusal, it is necessary to set forth a procedural history. I gave notice to the parties that all letters between them and the Office of Administrative Law would become part of the record in this case due to the procedural motions. Thus all documents cited in the procedural history are of record and underlie the findings.

Procedural History

These **FINDINGS** relate to the determination of the matter for recusal. After a prehearing on December 17, the administrative law judge ordered the following schedule: all interrogatories to be answered by January 21; stipulation conference by February 11 and hearing on March 2, 1983. The hearing was adjourned on January 25 due to a scheduling conflict of petitioner's attorney. The hearing was rescheduled for March 28. On February 18, respondent's counsel moved to compel more complete and responsive answers to interrogatories and for a deposition of petitioner. He called me to ascertain a reply date on his motion as a result of which I memorialized the content of the call in the first paragraph of my letter of March 2 to petitioner's counsel. In his affidavit, he recited that, upon receipt of the answers, he called Mr. Klausner asking for responses and wrote to him on January 26, but received no answer.

I included in the letter to petitioner's counsel on March 2 the hope that both parties would come to an agreement and expedite discovery, including a deposition by March 18 because of the March 28 hearing date. Petitioner filed opposing papers on March 8; he objected to a deposition and provided some supplementary answers. On March 14,

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respondent's counsel advised me that the reply of petitioner's counsel did not solve the problem and that deposition had been refused. On March 15, the administrative law judge ordered deposition of petitioner on or before March 28 "since the claim and defense turns, in part, upon her testimony as to the specific work which she performed in past years and the replies to interrogatories were not complete."

On March 22, by telephone, respondent's counsel told me that petitioner's counsel said he couldn't schedule a deposition prior to March 28, that he did not wish to proceed with the hearing of March 28 without the deposition but that he would consent to an adjournment if his opponent would agree to a deposition on the day set aside for a hearing. I requested that Mr. Thorp memorialize this conversation in a letter to comport with N.J.A.C. 1:1-3.8 which says "Where ex parte communications are unavoidable, the judge. . . shall advise all parties of the communications as soon as possible." The same rule implies that "scheduling or other similar purposes" is the kind of subject matter which might result in unavoidable ex parte communication. Respondent's counsel memorialized the conversation accurately in his letter dated March 22.

On Friday, March 25, having received no communication from petitioner's counsel, it became imperative to determine whether or not the hearing in Annandale could take place on Monday the 25th. As I stated in the findings supporting my order of sanctions signed late on Friday afternoon:

> "On the last day (Friday) before the scheduled hearing and discovery compliance date, respondent's counsel telephoned the administrative law judge and reported that he had no reply from petitioner's counsel and that when he called, petitioner's counsel's secretary read him a message to the effect that petitioner intended to proceed by filing a summary judgment motion. Counsel felt compelled to request an adjournment in the absence of discovery needed for defense."

Additionally, I asked respondent's counsel to confirm the telephone conversation in writing which he did that same day, March 25. These actions evidenced exacting compliance with N.J.S.A. 1:1-3.8 by advising Mr. Klausner in writing of the substance of the unavoidable conversation concerning whether or not a hearing could be held on the next working day.

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On March 26, petitioner's counsel filed an interlocutory appeal of my March 15 discovery and deposition order. The Commissioner ruled the filing was out of time under N.J.A.C. 1:1-9.7(b). He then filed an interlocutory appeal of my order for sanctions for ". . . unreasonable failure to comply in an appropriate and timely manner with discovery and deposition orders for failure to request an adjournment so that depositon could be taken no later than the date scheduled for hearing." By that order and again in a letter dated April 7, I advised the parties the new hearing date was May 27.

On May 11, I wrote to Mr. Klausner asking him to file his reply to respondent's summary judgment motion "as soon as possible and in any event no later than May 25 so that I can determine the matter in time to advise you whether or not hearing is required on May 27." Under N.J.A.C. 1:1-9.2(c), respondent had 10 days to serve responsive papers to the motion served on or about May 11. On May 24, petitioner filed a motion to recuse. I immediately caused Mr. Klausner to be advised by telephone that petitioner would default the motion if no response was filed by the next day, May 25. Since it was Tuesday, with the hearing scheduled for Friday and the pending motion to be decided by Thursday, I asked if petitioner would file a response. Mr. Klausner said "No" and then requested an adjournment because of late receipt of the transcript of deposition. Absent at least some time over one working day to study all moving papers filed on the summary judgment issue and to determine the motion, I felt compelled once again to grant an adjournment at the eleventh hour. When advising Mr. Klausner the adjournment was granted, my secretary related he was not then sure of whether or not he would file an answer. In fact, he filed just before 4:00 p.m. on Wednesday, the 25th. See letter of May 25 confirming the telephone messages.

The Motion to Recuse

Petitioner requests recusal on grounds "the Court has been involved in ex parte communications with respondent's attorney. Further, the court has made proposed or recommended decisions without receiving or considering petitioner's position." Petitioner apparently claims that my letter of March 2 urging both parties come to an agreement expediting discovery so that it could be concluded by March 18, including deposition prior

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to a March 28 hearing date, indicated a decision. No order was made until petitioner had an opportunity to reply. Counsel's reply was inadequate. No order would have been necessary had full and complete answers to interrogatories been timely filed prior to its issuance.

The principal grounds of the motion were the alleged improprieties of ex parte communication.

> "The record is clear that throughout the course of these proceedings, on numerous occasions, the administrative law judge was engaged in ex parte communications of a substantive nature with respondent's attorney. The record is replete with instances . . ."

Three instances are cited: they are paragaphs 4, 6 and 12 of the sanctions order. Paragraph 4 says,

> "On January 26, 1983, subsequent to a telephone call on the same subject, respondent's counsel wrote to petitioner's counsel requesting . . . answers to interrogatories . . ."

This item refers to a telephone call between the attorneys as affidavited by Mr. Thorp with his discovery motion; I included this fact in my findings.

Paragraph 6 relates to my letter of March 2, 1983, in which, as is my normal course, I memorialized an ex parte telephone call as explained above.

Paragaph 12 is itself the memorialization of the telephone call with respondent's counsel on the last working day before a scheduled hearing, which call was clearly unavoidable.

My conclusory **FINDINGS** on this motion, based on the procedural history, are that no substantive ex parte discussions occurred; all were related to scheduling and discovery procedures; all resulted from failure of petitioner's counsel to take timely and appropriate action and communications were memorialized deliberately for the purpose of avoiding any suggestion of impropriety pursuant to N.J.A.C. 1:1-3.8.

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The rule is sound, for the inability to communicate with the parties by telephone to ascertain and control scheduling would result in grave inefficiencies. Unlike the courts, the Office of Administrative Law has no backup cases to fill a calendar, and administrative law judges' time is fully scheduled for two months or more in advance. A lost hearing date thus often means a two- to three-month delay. Nor does the administrative law judge have a court clerk who can be given responsibility for rescheduling: administrative law judges have shared secretaries whose function is principally typing. In preheard cases, Office of Administrative Law clerks do not control scheduling beyond the prehearing dates.

> "If the hearing process is to proceed in an orderly and expeditious manner, the administrative law judge must have the ability to control the conduct of the proceedings. This necessarily involves having the power to take such steps as setting reasonable time schedules and imposing sanctions to compel party compliance with his directives." In re Uniform Adm'v Proc. Rules, 90 N.J. 85, 106 (1982).

Furthermore, I feel no prejudice whatsoever toward petitioner and can decide this controversy in an unbiased manner. Indeed, in all the circumstances, petitioner's position engenders sympathy. The procedural findings above leave little doubt that the progress of this case has been dilatory. The motion for recusal, which is without merit, has contributed to that result. It is **DENIED**.

Motion for Summary Judgment

Petitioner was a tenured teaching staff member in the employ of respondent Warren County Vocational Board of Education (Board) for 11 years before her termination at the end of 1981-82 when the Board gave notice that her position was abolished. Petitioner held certification with an endorsement in home economics throughout her employment. The above facts are not disputed and **I FIND** them to be true. Petitioner claims that her seniority and tenure rights were violated when the Board assigned nontenured or less senior employees to teach Business Mathematics, Family Life and Health Careers I. Petitioner does not disagree with respondent upon the justiciability of the present motion as it pertains to the first two courses, but claims that material facts remain controverted with respect to the nature of Health Careers I.

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Business Mathematics and Basic Arithmetic

Petitioner claims that the Board has simply relabeled courses which she and another staff member taught known as Consumer Mathematics, Consumer Education and Consumer Management in the 1979 period. The Board does not dispute the fact that these courses existed in some years prior to 1979 when the school was a two-year high school. Nor does the Board dispute the existence of similarities between the current business mathematics course and Consumer Mathematics for Personal Services and Food Services which was offered in 1973 limited to students in those course areas. Superintendent Gerald Leighty explains in his uncontroverted affidavit, that prior to 1978 students were scheduled according to their major shop areas and staff members taught math related to their shop areas. Thus petitioner taught consumer education or consumer management in 1977-79, during which period she also taught child care, parent education, textiles, cooking and sewing. The Board does not deny that some mathematics was involved such as concepts needed for savings and investment, buying automobiles, shopping and other consumer activities.

Petitioner presents an affidavit by Charles W. Walker, who holds a Masters Degree in Secondary School Administration and a Ph.D. in Education, who was employed for ten years by the N.J.E.A. as Assistant Director of Instruction and who examined the curriculum for the above-mentioned courses. Walker has no direct knowledge of the facts affidavited by Superintendent Leighty concerning the "thrust" of the courses or the changes in the total curriculum of the school. Dr. Walker's affidavit is essentially "expert opinion" based upon a review of written curricula. As such its validity is wholly dependent on the facts upon which it is based. The facts reveal that Dr. Walker based his opinion upon a comparison of the curriculum of Business Mathematics, which is presently taught (1982-83), with the curriculum of one course taught in one year ten years ago (1973) by a home economics teacher considered together with "Math Proficiencies (Consumer Math)" which was not a course curriculum and which listed mathematics proficiencies never taught by any home economics teacher, but taught by a teacher certified in mathematics. Petitioner taught neither of these courses or sections. She taught Consumer Management or Consumer Education and Dr. Walker did not compare the curriculum of

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this course with business mathematics or basic arithmetic. His opinion is therefore of no weight.

Superintendent Leighty stated in his affidavit (and it was not disputed) that Consumer Management taught by petitioner in 1977-78 and Consumer Education taught by her in 1978-79 were the same course. Its curriculum (R-6) and the objectives therein stated are clearly not the same as those of the arithmetic courses reviewed by Dr. Walker (R-2 and R-3 for 1982-83). Walker's concluding opinion is that petitioner "is certified to teach the Business Mathematics course presently being offered by respondent, since same is in reality the Department of Education Division of Vocational Education's Consumer Education Course." As pointed out above, Walker did not review the curriculum of the Consumer Education course taught by petitioner. There is another reason why this opinion is of little weight. The question of whether or not petitioner holds the proper endorsement to teach business mathematics or Basic Arithmetic, once the underlying facts are set forth, is not a matter for expert opinion, but is a matter of law to be determined with reference to the relevant rules, N.J.A.C. 6:11-8.1 et seq. and the Regulations and Standards for Certification Manual. Only a non-specific endorsement such as Teacher of Vocational-Technical Related Subjects might require the application of special expertise, but that expertise would be agency expertise (State Board of Examiners).

Since the parties agree this issue is ripe for summary judgment and since, upon review, I do not find that any fact, as distinguished from opinion, remains in dispute, I make the following **FINDINGS** based on the affidavits. I state a number of these facts for the sake of the record only, since I do not regard them as of any relevance to the legal issue which is whether or not petitioner is properly certified to teach business arithmetic or basic arithmetic. This question is answered by the first finding below.

I FIND:

1. Petitioner is a tenured teaching staff member with 11 years of seniority who holds an endorsement solely in home economics.

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2. Petitioner's college transcripts (R-7) show that she has no course credits in mathematics. The only credit in a remotely related subject area is credit for a statistics course.

3. In the 1981-82 school year petitioner taught Employment Orientation, Child Care, and Singles Cooking, the last two of which were dropped for 1982-83 resulting in the good faith abolishment of petitioner's position and her termination at the end of 1981-82 school year.

4. The curricula submitted for the Business Mathematics and Basic Arithmetic courses (R-2 and R-3) corroborate their titles; they are clearly mathematics courses.

5. In 1973, another home economics teacher taught a course called "Consumer Mathematics for Personal Service and Food Service III" the subject matter of which, as illustrated by its curriculum, was substantially similar to that of Business Mathematics.

6. In 1977-78 and 1978-79 petitioner taught a course called Consumer Management or Consumer Education, which, while having consumer oriented objectives, required the demonstration of mathematical competency in real life problem solving such as comparison shopping, budgeting, credit, insurance purchasing, savings and investments, home and auto financing and the like.

7. The curriculum of the Consumer Management or Consumer Education course (R-6) shows the course to be significantly different from the present mathematics courses and no expert opinion is necessary to discover this fact.

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Conclusions - Business Math

N.J.A.C. 6:8.1 et seq. and particularly N.J.A.C. 6:11-7.27 sets forth endorsement requirements, which are further clarified by the Department's Manual. At page 84, the Manual lists courses which can be taught under endorsement as a Teacher of Home Economics. The list includes consumer education but does not include business mathematics, or basic arithmetic. The intendment is clear and the requirements are specific. For example, courses relevant to this issue which might be taught in a vocational setting by a teacher without a mathematics endorsement are permitted under the following endorsements:

Endorsement	Subject	Manual Page
Teacher of Home Econ.omics	Consumer Education	84
Teacher of Business Education (comprehensive)	Business Math Consumer Education	58
Teacher of Bookkeeping and Accounting	Business Math	60
Teacher of General Business	Consumer Education	63

I **CONCLUDE** petitioner does not hold an endorsement which permits the teaching of business mathematics or basic arithmetic. N.J.A.C. 6:11-7.27. Since N.J.S.A. 18A:26-2 and N.J.A.C. 6:11-3.1(a) provide that no teacher shall be entitled to any salary unless such teacher shall be the holder of an appropriate teacher's certificate and endorsement, I **CONCLUDE** petitioner cannot be employed to teach mathematics courses and failure to employ her thus does not constitute violation of her tenure and seniority rights.

Assuming arguendo that the facts showed that petitioner, having solely a home economics endorsement, taught business mathematics and basic arithmetic for several years in the district, my conclusion would be no different. This is not a case wherein a Board seeks to deny a teacher seniority credit for time taught or tenure on grounds that the staff member's service was illegal. The circumstances here are significantly different from those found in Proebslte v. Bd. of Ed. of Burlington Cty. Voc.

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Tech. H.S. 1982 S.L.D. _____ (October 29, 1982). In that case, petitioner's endorsement as a teacher of Vocational Technical Related Subjects could have covered the teaching of general or vocational mathematics, therefore the Board had an affirmative defense burden of proving illegality of the assignment. In the instant case the Board had no such burden and what petitioner's endorsement covers is clear.

Furthermore, estoppel cannot operate against a governmental entity when its application would result in flouting an explicit statutory mandate. Summer Cottages Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 505 (1955). N.J.S.A. 18A:26-2, 27-2 and 28-4 are explicit mandates and they absolutely prohibit the employment of a home economics teacher to teach mathematics, which is the sole issue here. **I CONCLUDE** that no teaching staff member can, by estoppel, acquire rights to teach subjects for which he or she is uncertified regardless of whether he or she or any other teacher taught such subjects previously. Petitioner's argument is entirely without merit.

Health Careers I

Since petitioner claims this issue is not ripe for summary judgment it is necessary to first determine whether or not any material facts are in dispute. Superintendent Leighty's affidavit and underlying exhibits (R-12, 13, 15, 16, 18, 19) reveal the curriculum for Vocational Health Careers and those for the Personal Services and Child Care courses previously taught by petitioner which she claims are substantially the same as the first year of Health Careers. In opposition to the facts supplied by respondent, petitioner submits two pages of transcript of her deposition in which she states the content of the courses she taught and compares aspects of the curriculum with the first year of the Health Careers course. She then states her opinion that the courses are very similiar, based upon her review of the curriculum of Health Careers, the outline of Personal Services, and certain facts gained from her personal experience in teaching the course. The factual content of the deposition pages is minimal. **I FIND:**

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8. The only relevant facts included in petitioner's sworn testimony on deposition, construed as liberally as possible, are these:

   A. One unit out of five of the survey course called Personal Services taught by petitioner focused on health careers, including such content as care of the elderly and infirm, a type of content which is now included in Health Careers I.

   B. Clerical skills, which are taught in Level I of Health Careers, were taught by petitioner as part of her Child Care course when she had her students actually keep records of preschool letters and similar documents.

   C. Petitioner's Personal Services course (Unit V) covered the concepts or ideas which are now included in Health Careers I such as personal and family health, assisting with basic needs, personal hygiene, exercise, nutrition, individual preferences and age groups and communication skills.

   D. The health career team approach was emphasized throughout the health careers unit of Personal Services.

   E. The legal and ethical aspects of health career work were covered by petitioner in the courses she taught as basic work ethics and employment responsibilities.

The Board does not dispute these facts, but rather, points to the Health Careers curriculum which indicates that the course is a vocational course training students for a vocational career and that a home economics teacher is not certified to teach the program. The facts testified to by petitioner are quite consistent with the evidence presented by the Board. For the purpose of this motion, I **FIND** them to be true. It is not

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at all unusual for course content and cognitive concepts to overlap either on a vertical (K-12) or horizontal (subject field) basis, as is illustrated in the certification rules listing some courses which can be taught under several endorsements. Articulation and cross-field reinforcement are common.

Assuming all the facts presented to be true, there is no genuine issue of material fact remaining which would compel a hearing under the standards of Judson v. Peoples Bank and Trust Co., 171 N.J. 67 (1954). The deposition does illustrate some difference of opinion as between petitioner and the Board as to how similar Health Careers is to the courses taught by petitioner when they are considered together. The opinion is based upon facts and exhibits in this record, for petitioner admitted at deposition that she had no other documents concerning the courses upon which her opinion was based and discovery had been concluded. While opinion testimony on an ultimate fact would not be inadmissible at hearing, opinion testimony on the instant factual issues would have little or no weight since the documents (curricula) presented contain all the facts which are needed by the fact finder, their authenticity and accuracy are not disputed and no expert opinion is required to interpret them. The last statement is not made without due consideration, since the hearer is experienced as a teaching staff member under secondary certification. In any event, the Commissioner has agency expertise which will be directly applied to the underlying facts and expert opinion evidence at hearing is not required for his determination.

I CONCLUDE that there is no genuine issue of material fact and, as will be seen below, the law is clear. There is no bar to determination of summary judgment motion and no need for plenary hearing.

As with the prior issue, I find only two facts to be material to this determination: the fact that petitioner holds only one endorsement, teacher of home economics, on her certificate and the first fact found below. In order to provide a complete context for agency review and to permit petitioner full scope for her arguments of law, additional **FINDINGS** are included.

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9. The Health Careers three-year course of study, which is being taught by a registered nurse with secondary certification in health education, is a vocational program of health education aimed specifically toward preparation of students for employment as medical-dental assistants, aides in long-term care facilities, practical nursing and other health care occupations.

10. As an integral part of vocational preparation, a portion of the first year (Level 1) of the program includes concepts relating to personal, family and community health; basic skills commonly useful to most health care professionals such as assisting with basic needs, modification of needs, communication skills and clerical skills.

11. As the facts listed in finding number eight above and the curricula show, there is a content overlap of concepts and basic skills between Level I of Vocational Health Careers and one unit of the personal services and child care courses taught by petitioner, but the level of difficulty, structuring and depth of the vocational course renders it significantly different from the portions of the home economics courses discussed by petitioner. (See R-18, pages 2-5, especially 2.2.5 and 6, 3.3.2.5 and 6, and 5.1).

I CONCLUDE that pursuant to N.J.A.C. 6:11-7.27 an endorsement in home economics does not permit the holder to teach the health education and vocational health careers courses. **I CONCLUDE** petitioner's seniority and tenure rights were not violated by the Board's failure to offer her employment as a teacher of Level I of Vocational Health Careers.

Family Life Education

The Board concedes that petitioner holds appropriate certification to teach a course in family life education (sex education as required by N.J.A.C. 6:29-7.1; authorization to

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teach same at 7.1(e)(6)(1). The Board argues that it does not offer a separate course in this subject, however; the materials are integrated into a Health and Physical Education Program. The Board does not dispute the fact that of those teachers now assigned to the Health and P.E. Program, petitioner is less senior than one (Morgan) and more senior than two (Baird and Murphy) both of whom were nontenured at the time petitioner was RIFfed. No underlying facts remain in controversy. The Board described its program and the petitioner argued that petitioner can be employed to teach the Family Life segments of the program as scheduled with no disruption or impairment to the program.

Based on the affidavits, exhibits and admissions of the parties, **I FIND:**

12. Petitioner holds appropriate certification to teach family life education, but not health and physical education; she is less senior than one teacher now assigned to Health and P.E. (Morgan) and more senior than Patricia Murphy and Timothy Baird, who were not tenured on June 30, 1982, the date petitioner's employment ceased.

13. The Family Life Curriculum (R-2) is presented as part of the health curriculum. In the freshman year it consists of a five-week unit; in alternate years all juniors or seniors are required to take a five-week unit.

14. The method of presenting the Family Life curriculum was developed through consultation with teachers, administrators, community members, physicians and others; these groups evaluated the existing sex education program which was historically part of the Health and P.E. programs and had been taught by teachers with such endorsement since 1972.

15. After meetings with community persons, the Board and Administration decided it was most important that this Family Life program be continued as an integral part of the Health and P.E. program because

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they were convinced that the students got much more out of the family material it offered by their Health and P.E. teachers upon the theory that such mode of presentation would develop in the students the proper attitude that sexual functions are a part of a healthy mind and body, i.e., related to an overall healthy view of Health and P.E. and that the Health and P.E. teachers would be best able to teach the material openly and without embarrassment because of the rapport with students and close understanding gained through teaching Health and P.E.

16. The documents provided concerning the program of studies in Health and P.E. clearly illustrate the implementation of the above stated reasoning and the complete integration of family life/human sexuality in the Health and P.E. program.

17. The State Department's Curriculum Guidelines for Family Life Education advise that: "The instructor should be, ideally, a regular staff member already employed in the district, in touch with the normal aspects of the school's policies and procedures, interested in teaching the subject, and in position through other contacts with students and staff members to conduct ongoing evaluation." The Guidelines further state that the teacher selected should have certain personality and teaching qualities.

18. The scheduling is carefully aligned so as to place the same students with one teacher for all portions of the program. (See schedules attached to affidavit of Superintendent.)

CONCLUSORY FINDING

19. The Human Sexuality segment of the Health and P.E. curriculum is an integral part of that program and cannot be separated out so as to permit petitioner's assignment to that one segment.

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20. The assignment of a part-time teacher solely to the human sexuality segment of the curriculum would not be educationally sound; it would be detrimental to the program since it would result in the destruction of a vital element of the learning environment carefully planned for this sensitive subject.

21. Since the Family Life/Human Sexuality segment must be taught by health and physical education teachers, there is no position currently held by a nontenured or less senior staff member than petitioner which she is qualified to hold.

Petitioner argues that Klinger v. Cranbury Bd. of Ed., N.J. Superior Court, Appellate Division, Docket A-2227-81T3 (November 10, 1982) (unreported) does not support the Board's position in that it was modified by the State Board in Miller v. Mendham Bd. of Ed., 1983 S.L.D _____ (February 1, 1983). Petitioner's argument is that Klinger turned on the fact that both physical education teachers shared assignment duties and responsibilities for instruction of each and every one of the same physical education classes. This argument mischaracterizes both decisions. The State Board's concern in Miller was with the rights of a tenured employee versus nontenured employees and the mistaken attribution of "seniority" to nontenured personnel. The State Board read Klinger to turn on the fact that no other position was available which Klinger was qualified to teach under the facts of the case, whereas it found that Miller was qualified to teach courses assigned to another teacher who was nontenured.

The instant case is most like Klinger for, on the facts found above, there is no position held by a nontenured or less senior staff member which petitioner is qualified to teach. The State Board held, . . ."if the full-time employment of petitioner [Miller] would have been accomplished without realignment of class schedules or without impairment of the Board's flexibility to reorganize its school program, it was bound to honor petitioner's tenure rights, giving due regard to her qualifications, prior service and abilities." The conditional "if" applies equally to petitioner here. On the facts, the

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employment of petitioner cannot be accomplished without violation of other and more important educational aims fostered by the Board in the exercise of its lawful discretion.

Petitioner cites Prysozny v. Sayreville Bd. of Ed., 1980 S.L.D. _____ (May 7, 1980). This case does tend to support petitioner's position but it is distinguishable on its facts. The Sayreville Board RIFfed a tenured teacher of social studies because it preferred elementary or dual certification for block time teachers in grades 7 and 8; it actually replaced the tenured teacher by distributing her work among six other teachers each teaching one period of social studies per day. In such circumstances, the Commissioner held, based on the administrative law judge's decision, the Board may not be allowed to interpose scheduling inconvenience as a bar to the statutory mandates. In the instant case, petitioner never taught family life, since it was always in the Health and P.E. curriculum and inconvenience of scheduling is not a ground for my determination.

While it is unfortunate that the courses taught by this long-tenured staff member are no longer considered relevant vocational offerings, no other recent case seems more illustrative of the oft-quoted principle that "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." Smith v. Bd. of Ed. of Paramus, 1968 S.L.D. 62, 67.

Since there is no position held by a nontenured or less senior teacher which petitioner is qualified to teach under her home economics endorsement, **I CONCLUDE** that the Board's failure to offer her employment teaching a segment of the Health and Physical Education curriculum is not a violation of her tenure and seniority rights under N.J.S.A. 18A:28-11 and 13 and N.J.A.C. 6:3-1.10.

Having found no violation of petitioner's rights, the case must be dismissed. I would note, however, that even if I had concluded a violation had occurred and ordered the Board to reinstate petitioner part-time for 1983-1984, based upon the procedural history which evidences undue protraction of the case resulting from the actions or omissions of counsel, I would have granted back pay only for the period of September 1982 through

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March 1983, since under the original schedule, the case would have been concluded by that time. The Commissioner has in the past considered the equities in such matters and, for example, denied back pay for a period equivalent to the the delay by petitioner's counsel in filing a brief. Popovich v. Bd. of Ed. of Wharton, 1975 S.L.D. 737, 745 (October 7, 1978).

Having concluded above that petitioner's statutory rights were not violated in any respect, it is hereby **ORDERED** that the petition be **DISMISSED.**

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

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

June 24, 1983
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

Receipt Acknowledged:

6/27/83
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 29, 1983
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

jfp

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MARJORIE WERNER-CHAMBERLIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WARREN COUNTY VOCATIONAL SCHOOL BOARD OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner filed primary exceptions to the initial decision by Judge Dower-LaBastille. Firstly, petitioner urges reversal of Judge Dower-LaBastille's failure to recuse herself in this matter, said Motion for Recusal being based upon an allegedly ex parte conversation between the ALJ and counsel for the Board. Petitioner discounts the judge's finding that "no substantive ex parte discussions occurred***", ante, as being beside the point. Petitioner admits, however, that they were not substantive but alleges nonetheless that they had a severe impact on petitioner. (Petitioner's Exceptions, at p. 2)

Petitioner further objects to a requirement by Judge Dower-LaBastille that a deposition be filed in the instant matter, said deposition being required upon request of counsel for the Board who alleged a lack of responsiveness on petitioner's part in replying to interrogatories. The Commissioner notes that the protracted dispute over such deposition ultimately resulted in sanctions being imposed upon counsel for petitioner by the ALJ.

Petitioner further claims her right to teach courses in mathematics essentially because she said she had done so before this, in spite of her certification exclusively in Home Economics.

The Board in reply exceptions refutes those of petitioner and affirms the initial decision. The Board argues that no ex parte discussions were held covering the merits of the application. The Board avers that telephone calls to the judge were only needed because petitioner's attorney failed to communicate with the court (and adversary) as to his intentions to proceed with the hearing on the merits. The Commissioner looks with favor on the Board's arguments.

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The Commissioner, having reviewed the entire record in this matter, notes petitioner's admission that no substantive ex parte discussions occurred, while still complaining of severe impact on petitioner and her attorney. The Commissioner fails to comprehend how the mere requirement of a deposition caused such travail. He notes that no detail is proffered as to how petitioner and her attorney were disadvantaged. The Commissioner finds no merit in petitioner's arguments and finds the Motion for Recusal was properly denied. The Commissioner further finds that petitioner has failed to demonstrate why she should not be subject to the sanctions imposed by the court.

A search of the record and the documents in evidence reveals to the Commissioner that petitioner is simply not certified to teach mathematics courses; nor does her certification in home economics permit her to teach mathematics courses. Nor does such certification permit her to teach health education and vocational health career courses. N.J.S.A. 18A:26-2 and N.J.A.C. 6:11-3.1(a) The Commissioner so holds.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

AUGUST 11, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 10081-82
AGENCY DKT. NO. 390-10/82A

JERRY M. JOHNSON,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

Stephen E. Klausner, Esq., for petitioner (Klausner and Hunter, attorneys)

David B. Rubin, Esq., for respondent (Rubin, Lerner and Rubin, attorneys)

Record Closed: May 12, 1983 Decided: June 27, 1983

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was commenced on October 25, 1982, with the filing of a Petition seeking a declaratory judgment under the New Jersey School Law, N.J.S.A. 18A:6-9 and N.J.A.C. 6:24-2.1, concerning the appropriateness of the action of the Board of Education of the Township of Piscataway (hereinafter respondent) in requiring Jerry M. Johnson, a tenured teacher in respondent's school system (hereinafter petitioner), to submit to a psychiatric examination pursuant to N.J.S.A. 18A:16-2. The Petition also sought an order requiring respondent to return petitioner to a position within his certification, tenure and seniority. An Answer to the Petition was filed on behalf of respondent on October 29, 1982, and the matter was thereafter transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held in this matter on December 13, 1982, at which time it was agreed that the hearing would take place on March 1, 1983. The Prehearing Order, which was entered on January 7, 1983, described the issue for determination at hearing as follows:

> Should respondent be enjoined from requiring petitioner to submit to a psychiatric examination pursuant to N.J.S.A. 18A:16-2?

The March 1, 1983 hearing date was subsequently adjourned at the request of the parties. The matter was rescheduled and was heard on March 7, 1983, at the North Brunswick Municipal Court, North Brunswick, New Jersey. Following the conclusion of the hearing, it was agreed that the record would remain open for receipt of additional evidence and written submissions by the parties. A letter in lieu of formal brief on behalf of petitioner was received on April 12, 1983, together with a stenographic transcript of Judge Cohen's decision of September 23, 1982, which was marked as P-4 in evidence, and transcripts of the proceedings in Workers' Compensation Court before Judge Skeffington on April 2, 1982, June 4, 1982, and June 25, 1982, which collectively were marked as R-4 in evidence. A post-hearing brief on behalf of respondent was received on April 28, 1983; no reply having been received from petitioner within the time provided, the record closed on May 12, 1983.

FINDINGS OF FACT

The operative facts in this matter are not really in dispute and I, therefore, **FIND** the following as uncontested facts.

In 1979, petitioner experienced a psychotic episode which required hospitalization and an extended period of medical treatment. On October 3, 1980, petitioner and respondent entered into the following written agreement permitting petitioner to return to his regular teaching assignment on certain conditions:

> The following are the terms established by the Piscataway Board of Education as preconditions to Jerry M. Johnson returning to a regular teaching assignment:
>
> a. Confer on a regular basis with Dr. David B. Kassoff, or such other doctor as selected by the Board, for the purpose of

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determining whether he is psychiatrically qualified to continue his employment as provided for in N.J.S.A. 18A:16-4 as interpreted therein.

b. Dr. Kassoff, or such other doctor selected by the Board, will submit to the Superintendent of Schools, Burt Edelchick, written reports indicating that Jerry M. Johnson is psychiatraically qualified to continue his employment as a teacher in the Piscataway Township School District. These reports shall be submitted according to the following schedule:

October 10, 17, 24, 31

November 7, 21

December 5, 12, 19

January 9, 23

February 6, 27

March 20

April 16

May 15

June 12

c. The Board reserves the right to require that he be examined by any other doctor, as provided by N.J.S.A. 18A:16-2, for any reason as provided in such statutes.

d. The Board shall not be bound by any report or recommendation that is issued by Dr. Kassoff or any other doctor.

e. The Board will not assume any cost or expense related to a medical examination or consultation which is in excess of that paid by the group medical and hospital insurance.

f. Failure to contine consultation with Dr. Kassoff, or such other doctor as selected by the Board, and/or failure of Dr. Kassoff or such other doctor as selected by the Board to submit positive verification of Jerry M. Johnson's qualifications to continue his employment, will result in the Board taking action to declare ineligibity for further service as provided for in N.J.S.A. 18A:16-4. (R-1L in evidence)

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Pursuant to this agreement, petitioner returned to his regular teaching assignment where he continued, without incident, until April 1982 when respondent became aware of certain psychiatric reports which had been prepared in connection with a Workers' Compensation proceeding petitioner had commenced with respect to the 1979 period of psychiatric disability. In one of the reports, David J. Flicker, M.D., a psychiatrist retained by Liberty Mutual Insurance Company on behalf of respondent in the Workers' Compensation matter, expressed the following opinion:

> Discussion: From the objective aspect, there are no evidences of any impairments of either the central or the peripheral nervous system; none were anticipated. The patient has been diagnosed by the Fair Oaks Hospital as, "a manic-depressive." I wonder if a better diagnosis might not be schizo-affective, in light of the blatancy of the hallucinatory and delusional material at the time of the hospitalization.
>
> At the present time he is in a partial remission. Regardless of cause, I would appraise his psychiatric disability at 20 percent of the partial total for the episode undergone.
>
> I find myself completely unconvinced that it has anything to do with any outside stimuli, or that it is related to his industrial activity. (R-1Q in evidence)

In the other report, Richard D. Rubin, M.D., a psychiatrist retained by petitioner in the Workers' Compensation proceedings, expressed the following opinion:

> Based on this examination it is my opinion the patient has the above disabilities which were caused or aggravated by the work situation described above.
>
> It is well known that psychosis can be precipitated by stress in the environment. The literature is full of such cases and experiments and I can provide references if needed.
>
> In view of the well documented stresses in the enviroment (sic) subjective evidence such as the public humiliation of being arrested in the school and his picture being placed in the New York newspaper, the context of his employment, and the fact that such events are not part of the ordinary day to day expectation of an educator, it is my opinion that those stresses had a cause and effect relationship between the development of his psycho-neurotic anxiety and the provocation of the florid psychotic episode, of which residuals are still present in terms of persecutory thoughts.
>
> It is my opirion that this man suffers a permanent partial disability of the nervious system which I estimate to be 20% of total for psychoneurotic reaction and 20% of total for paranoid residuals of psychosis.

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> If I can be of any further help to you in this matter, please do not hesitate to call upon me. (R-1T in evidence)

By letter dated April 27, 1982, petitioner was advised that respondent intended to consider these reports of Dr. Flicker and Dr. Rubin, together with previous information in psychiatric reports which had been submitted by Dr. Kassoff, petitioner's treating psychiatrist, and by Dr. Perr, at a closed session of the Board meeting on April 29, 1982, "for the purpose of considering and possibly taking subsequent action on a resolution declaring you ineligible for further service until proof of recovery satisfactory to the Board is furnished." Following a hearing on April 29, 1982, at which petitioner was present but chose not to speak, the Board adopted a resolution declaring petitioner ineligible for further service effective April 30, 1982, and until proof of recovery satisfactory to the Board was furnished pursuant to N.J.S.A. 18A:16-4.*

On August 20, 1982, petitioner commenced a civil action in the Superior Court of New Jersey, Chancery Division, Middlesex County, in which he asserted respondent had discriminated against him for prosecuting his Workers' Compensation claim. His complaint was subsequently amended to include a count under the Civil Rights Act, N.J.S.A. 10:5-4.1, for discrimination based upon handicap. The matter was heard before the Hon. Richard S. Cohen, in September, 1982, who dismissed the claim for discrimination under the Workers' Compensation Act but found for petitioner under the Civil Rights Act. Judge Cohen concluded that the information before the Board on April 29, 1982, was not sufficient to justify the Board's action pursuant to N.J.S.A. 18A:16-4:

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* N.J.S.A. 18A:16-4 provides as follows:

> If the result of any such examination indicates mental abnormality or communicable disease, the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee is under contract or has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, be permitted to complete the term of his contract, if he is under contract, or reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years.

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> It was an action of almost willful ignorance. It was an action taken by the Board members' own reading of reports, which did not address the legal issues involved; it addressed similar issues. It addressed the general subject matter. It was all about Mr. Johnson's mental health, but it simply didn't address either the standards of 16-4 — well, the standards of 16-4 and there was no way for the Board, however reasonably and conscientiously they may have tried to do so, to have made the bridge between what was before them and what they thought they had to do.
>
> It must be apparent that I'm disturbed by the fact that the Board apparently felt it had a yea-nea set of alternatives and that the subject of further investigation or further examination or further evaluation simply was never discussed.
>
> Mr. Edelcheck never discussed it. Mr. Moore doesn't recall anybody talking about it. Mr. Beardsly doesn't recall anybody talking about it. It doesn't appear on the portion of the tape that I heard. I can't imagine why not. It seems to me clear that what was before the Board was sufficient to generate a 16-2 response to require what 16-2 and 3 permitted the Board to require, but that is not what they did. They suspended him. (emphasis added) (T13-1 to T14-3, P-4 in evidence)

Following Judge Cohen's decision, pursuant to an agreement between the parties, the petitioner was assigned duties in the central administrative offices on a temporary basis pending further action by the Board. It was petitioner's understanding that pursuant to this agreement he would be doing some research and evaluation of test scores. Petitioner described the work which he has actually been doing in the administrative offices as clerical type work, transferring test scores and grades onto standardized forms.

By letter dated October 6, 1982, and received by petitioner on October 7, 1982, respondent advised petitioner as follows:

> Please be informed that a closed meeting of the Piscataway Township Board of Education has been scheduled for 9:30 PM on October 14, 1982 in the Administration Building Conference Room.
>
> The purpose of this meeting will be to review and discuss documents with regard to you which may be considered evidence of deviation from normal mental health, to allow you and your representative to be heard regarding this matter, and possibly take action requiring that you submit to a psychiatric examination pursuant to NJSA 18A:16-2.

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The documents to be considered include the following reports, letters and agreement which have previously been supplied to you:

Dr. Perr	Report of August, 1980
Dr. Kassoff	Letter of September, 1980
Dr. Perr	Letter of September, 1980
Dr. Flicker	Report of November, 1980
Dr. Rubin	Report of February, 1982
Dr. Kassoff	Letter of June, 1982
Dr. Rubin	Letter of June, 1982
Agreement of	October 3, 1980

The Board also reserves the right to call the author of any of the above documents.

If you should have any questions concerning the scheduling of this meeting, please feel free to contact me. (R-1A in evidence)

At the hearing on October 14, 1982, petitioner was present and represented by counsel. The documents set forth in the October 6, 1982 letter to petitioner were considered. Dr. Perr's five page August 26, 1980 report reviewed the nature of the psychotic episode which peitioner suffered at school on November 16, 1979, and he discussed his psychiatric observations during a four hour meeting he had with petitioner on August 19, 1980. Dr. Perr concluded that although petitioner's condition had improved, considerable residuals of petitioner's mental disorder were still present, such that it was Dr. Perr's opinion that petitioner should not return to teaching at that time. Dr. Kassoff's two-page September 10, 1980 report addressed to Dr. Perr, reviewed the November 16, 1979 incident and petitioner's hospitalization as a result thereof and discussed his impressions of petitioner from having met with him on a weekly basis from January to April 1980. Dr. Kassoff also noted that he had seen petitioner once in May 1980 and then again in June and thereafter felt that it was no longer necessary to meet with petitioner on a weekly basis. Dr. Kassoff's report concludes:

> I most recently saw Mr. Johnson on September 4. He denied any recurrence of previous psychiatric symptomatology and reported to be doing well, despite financial difficulties. He expressed a strong desire to return to work as a teacher and, from a psychiatric standpoint, I believe he is presently capable of returning to his former employment. Mr. Johnson has no current plans to see me on a regular basis, and my services will be available to him as the need arises.

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> If I can be of further assistance to you, please do not hesitate to contact me. (R-1I in evidence)

Dr. Perr's two-page September 24, 1980 letter submits an addendum to his prior report of Augsut 26, 1980. Dr. Perr commented on Dr. Kassoff's report and concluded, "Based on my own observations which are described at length in my report, I do not believe that Mr. Johnson's condition is stabilized or that he should return to work at this time."

The previously mentioned agreement of October 3, 1980 (R-1L in evidence) followed.

The November 1980 report of Dr. Flicker and the February 1982 report of Dr. Rubin are those reports which have previously been discussed. Dr. Kassoff's letter of June 10, 1982 was provided in response to a request from petitioner's counsel for an update on information concerning petitioner. It provides in pertinent part:

> Mr. Johnson has resumed his sessions with me. I recently met with him on 5-26, 6-1, and 6-8-82. Prior to these contacts, I had last seen him on 6-11-81 .
>
> During his three recent visits, Mr. Johnson presented himself in a polite and cooperative fashion. He was appropriately dressed and well groomed. He appeared well-nourished and in good physical health. His mood was mildly to moderately anxious. There was no indication or any sign of escessive anxiety, depression or inappropriately elevated mood (i.e: no evidence of manic or hypomanic affect). His thoughts were goal directed and coherent, without any evidence of a throught or perceptual disorder. His sensorium was clear. He attributed his anxiety and an associated sleep onset disturbance to concern about his recent suspension from his teaching responsibilities and continued conflicts with his employer.
>
> In sum, Mr. Johnson appears stable and I find essentially no change from his presentation a year ago.
>
> In response to your more specific question, I believe he is presently capable of performing his teaching duties from a psychiatric standpoint. (R-1v in evidence)

The letter from Dr. Rubin which is referred to in respondent's October 6, 1982 letter to petitioner as the letter of June, 1982, is actually dated May 10, 1982. It was also provided in response to a letter from petitioner's counsel which had apparently advised Dr. Rubin that his Workers' Compensation report giving an estimate of disability was used by respondent to suspend petitioner from his duties. It provides in pertinent part:

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> I wish to state for the record that I did not intend to state or imply that Jerry Johnson was unable to perform his job duties. Indeed, he was performing those duties adequately for no criticism, as far as I know, at the time of my examination on February 9, 1982.
>
> I have read acopy (sic) of the letter from the employer to Jerry Johnson which was dated April 30, 1982, and which states "The Piscataway Township Board of Education at its public meeting on the evening April 29, 1982, approved the resolution declaring you ineligible for further service effective April 30, 1982 and until proof of recovery satisfactory to the board is furnished".(sic)
>
> My understanding of this is that Mr. Johnson's medical condition was revealed to the public, which could only cause him more embarassement, pain, and suffering. Medical reports are confidential information and are always treated so. I really can't understand how the employer got my report. (R-1u in evidence)

Petitioner declined to speak at the October 14, 1982, meeting; however, petitioner's counsel indicated that petitioner would not submit voluntarily to any additional psychiatric examination because Dr. Kassoff, who had been providing reports on petitioner's progress to respondent for an extended period of time, had testified on September 23, 1982, in the Workers' Compensation proceedings that in his opinion petitioner did not suffer from any permanent psychiatric impairment. Because of Dr. Kassoff's testimony and report and because no incidents had occurred during the past two years, petitioner's counsel argued that the Board had no evidence of harmful significant deviation from normal mental health affecting petitioner's ability to teach, discipline or associate with children of the middle school age. Several Board members at the meeting expressed concern, however, over the opinions of permanent disability expressed by Dr. Flicker and Dr. Rubin in their reports of November 1980 and February 1982. There was some conversation concerning the prior proceedings before Judge Cohen and the apparent conclusions of some of the Board members therefrom that no expert opinion offered in the context of a Workers' Compensation proceeding could be believed, including Dr. Kassoff's. Several Board members expressed a desire to question Dr. Flicker, who was not then present, concerning the meaning of his report. The majority of the Board, however, voted that it was not necessary to interview Dr. Flicker before proceeding with a determination on the necessity for psychiatric examination pursuant to N.J.S.A. 18A:16-2, and directly thereafter the Board adopted the following resolution:

> WHEREAS This Board of Education has received psychiatric reports with regard to Mr. Jerry M. Johnson which indicate a deviation from normal mental health, and

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> WHEREAS Mr. Johnson and/or his representatives have had an opportunity to present to the Board information pertaining to these reports,
>
> NOW THEREFORE BE IT RESOLVED that, pursuant to NJSA 18A:16-2, Mr. Jerry M. Johnson is hereby required to submit to a psychiatric examination to be performed by a physician designated by this Board or its agent on or before November 8, 1982. (R-2 in evidence)

Petitioner was provided with a copy of the resolution by cover letter dated October 25, 1982. The letter also advised petitioner that an appointment had been made for him with Dr. Joseph Borrus on November 9, at 1 p.m. (R-2 in evidence)

The present litigation before the Commissioner followed. Petitioner continues to refuse to submit to an additional psychiatric examination. He seeks a determination that the Board may not compel him to do so, and he seeks reinstatement in his teaching position in the classroom.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:16-2, the relevant statutory provision in this matter, provides:

> Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.
>
> Any such examination may, if the board so requires, include laboratory tests and fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data. (emphasis added)

The statutory language "in the judgment of the board" is important because it defines the appropriate standard of review of the Board's action in this matter. It is clear that where the issue is one involving the exercise of a local board's discretion, the scope

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of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 296 (App. Div. 1960). The Appellate Division in Gish v. Board of Education of Paramus, 145 N.J. Super. 96 (App. Div. 1976), certif. denied 74 N.J. 251 (1977), recognized that the decision of a local board of education pursuant to N.J.S.A. 18A:16-2 is entitled to this deference. The Court, in upholding the decision of the board of education in Gish, was

> satisfied that the board's determination was a fair and reasonable one - a determination which, as stated by the Commissioner, is "one which could logically be made by reasonable and fair-minded men who have evaluated petitioner's behavior and who are concerned with petitioner's fitness to be a teacher in intimate contact with numbers of impressionable, adolescent pupils." As noted, it was confirmed by two psychiatrists. It was based on credible evidence and did not constitute an abuse of discretion (citation omitted) (145 N.J.Super at 105).

Accordingly, in order to be entitled to the injunction which he seeks, petitioner must establish that respondent's resolution requiring him to submit to a psychiatric examination pursuant to N.J.S.A. 18A:16-2 was an abuse of the board's discretion. Stated another way, petitioner must show that it was unreasonable for respondent to conclude, based upon the facts before it on October 14, 1982, that there was "evidence of deviation from normal, physical or mental health." The burden of proving unreasonableness is unquestionably upon petitioner. Kopera v. West Orange Board of Education, supra, 296-297.

Petitioner argues that respondent never had a basis for invoking N.J.S.A. 18A:16-2, and in support of this contention he cites the Commissioner's determination in Improta v. Weehawken Board of Education, 1982 S.L.D. ____ (May 3, 1982):

> In N.J.S.A. 18A:16-2, the Legislature has delegated to boards of education the power to request a teacher who shows evidence of harmful, significant deviation from normal, physical or mental health, affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district, to submit to a psychiatric examination, Kochman v. Keansburg Bd. of Ed., 124 N.J. Super. 203 (Ch. Div. 19 3); Gish v. Bd. of Ed. of Paramus, 145 N.J. 96 (App. Div. 1978); cert. den. 98 S.Ct. 434, 233 U.S. 879 (1977). (sic)

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> This authority, however, carries with it broad, statutory due process protections for the teacher directed to submit to a mental or physical examination. Among these protections are that before a teacher is ordered to submit to an examination, he is entitled to a statement of reasons for such an examination and to a hearing, Kochman, supra, at 213; Emil Scachetti v. Bd. of Ed. of Rockaway, 1977 S.L.D. 142, aff'd, State Board 153. N.J.S.A. 18A:16-3 further provides the affected teacher with an option to be examined by a physician of his own choosing, as opposed to submitting to examination by board-appointed physicians. Crews v. Bd of Ed. of the Tp. of Bernards, 1975 S.L.D. 382; Scachetti, supra. These due process protections were not followed by the Board.

Petitioner argues that respondent should be enjoined from requiring the psychiatric examination: 1) because the board had no evidence of any incident during the past two years, October 1980 to October 1982, that could be considered evidence of harmful deviation of normal mental health affecting petitioner's ability to teach, discipline or associate with children of middle school age; 2) because the October 6, 1982 letter to petitioner is not an appropriate "statement of reasons" because it does not attempt to explain what conduct of petitioner's was causing the board's concern; and 3) because Dr. Kassoff, petitioner's treating psychiatrist for nearly three years opined in June and September 1982, that petitioner was capable of performing his teaching duties from a psychiatric standpoint:

> No explanation is proffered as to why Dr. Kassoff, whose reports were unqualifiedly accepted from October, 1980 to June, 1981, was no longer acceptable. In view of the Board's long history of accepting Dr. Kassoff's medical opinion, some explanation for rejecting him should have been articulated. The board's resolution and letter accompanying same (R-2) are totally devoid of reasons." Petitioner's letter memorandum, pg. 7.

Respondent argues that there is ample evidence in the record to support the reasonableness of its determination and points to the report of Dr. Rubin, a psychiatrist of petitioner's own choosing who had diagnosed petitioner as having psychoneurosis and a manic depressive illness. "Additionally," respondent points out, "Dr. Flicker, the psychiatrist retained by the Board's Workmen (sic) Compensation carrier, conceded that petitioner has a psychiatric disability of 20% of partial total. Surely a respondent's psychiatrist in a workmen's compensation proceeding has no motivation to unduly maximize the extent of an employee's disability. Thirdly, the board was entitled to infer from petitioner's failure to testify that such testimony on his mental fitness would have reflected adversely on him." Respondent's brief, pp 5-6.

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Having carefully reviewed all of the evidence in this matter, particularly the tape recording of the board meeting on October 14, 1982, and having considered the arguments of petitioner and the arguments of respondent, I am convinced that respondent's resolution of October 14, 1982 was a good faith, reasonable exercise of its discretion. The reports of Dr. Flicker and Dr. Rubin expressing the opinion that petitioner has some permanent psychiatric disability raised a legitimate question concerning the status of petitioner's mental health. The board was not obliged to accept Dr. Kassoff's opinion simply because they had accepted it on previous occasions (although not "unqualifiedly" as petitioner suggests in his brief; petitioner's return to his teaching assignment in 1980 was conditioned upon compliance with the terms of the agreement, R-1L in evidence). Nor was the board obliged to conclude that there was no evidence of deviation from normal physical or mental health simply because there had been two incident-free years. The reports of Dr. Rubin and Flicker were sufficient "evidence of deviation from normal physical or mental health" to require the examination. As the Court explained in Gish, supra, at 104-105:

> School boards are entrusted by our Legislature with the duty of determining the general issue of fitness of teachers. They are sufficiently equipped to conduct a fair and impartial inquiry whenever such issue legitimately comes into question. Laba V. Newark Bd. of Ed. 23 N.J. 364, 384 (1957). Their obligation to determine the fitness of teachers is a reflection of their duties to protect the students from a significant danger of harm, whether it be physical (In re Fulcomer 93 N.J. Super. 404 (App. Div. 1967) or otherwise. See Morrison v. State Bd. of Ed., 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P 2d. 375 (Sup. Ct. 1969). And they need not wait until the harm occurs; a reasonable possiblity of its occurrence warrants such action. (emphasis added)

As respondent points out, the absence of incidents in the classroom during the two years following petitioner's return from leave is not dispositive, because there is no evidence of his having experienced problems in the classroom prior to the 1979 episode either. Respondent was not required to wait until additional harm occurred before acting pursuant to N.J.S.A. 18A:16-2. That the members of the board might have come to a different conclusion from the evidence before it is not relevant. The conclusion which respondent reached is a reasonable conclusion based upon the evidence. Judge Cohen, who reviewed the same evidence, came to the conclusion that it was not sufficient for respondent to act pursuant to N.J.S.A 18A:16-4, but he stated that he had no question in his mind that the evidence was sufficient to act pursuant to N.J.S.A. 18A:16-2.

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Petitioner's argument that the October 6, 1982 letter, R-1A in evidence, is not an appropriate statement of reasons is to totally without merit. Obviously, the statements contained in the various documents were the reason the board wished the examination, and respondent was so advised again by R-2 in evidence.

For all of the foregoing reasons, I **CONCLUDE** that it was reasonable for respondent to require petitioner to submit to an additional psychiatric examination pursuant to N.J.S.A. 18A:16-2. The character of the examination which respondent may require is set forth at N.J.S.A. 18A:16-3 which provides:

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

Accordingly, it is **ORDERED** that petitioner forthwith submit to an examination by a physician designated by the board, or, at his option, by a physician or institution of his own choosing approved by the board, in accordance with statutory procedure.

It is clear from petitioner's testimony that although he had agreed to perform administrative type services in the central office pending the conclusion of this proceeding that he was unhappy with the clerical type work he was being given to do and wished to return to the classroom. Although I believe this arrangement which respondent made with petitioner pending the outcome of this matter reflects respondent's good faith concern in carrying out its responsibilities to students and parents of the school system, evertheless the statute makes no provisions for excluding an employee from performing he duties of his tenured position pending the the results of the required examination. If here were any evidence of a clear and present danger to the students, petitioner's exclusion from the classroom might be ordered as an extraordinary, emergent measure. here is no such evidence in this case, however, and accordingly, unless petitioner agrees o continue providing services in the central administrative offices pending the outcome f this litigation, he must be returned to his tenured teaching position until and unless the examination indicates mental abnormality" pursuant to N.J.S.A 18A:16-4.

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

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

June 27, 1983
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 1, 1983
DATE

Ronald L. Lakewicz
OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS IN EVIDENCE

P-1 Transcript of proceedings before Hon. Donald J. Skeffington, September 23, 1982 (48 pages)

P-2 Letter dated April 27, 1982, from respondent to petitioner

P-3 Letter dated April 30, 1982, from respondent to petitioner (2 pages)

P-4 Order for Judgment, signed by Judge Cohen on September 23, 1982, with transcript of Judge's decision of same date attached (20 pages)

R-1 Letter dated October 6, 1982, from respondent to petitioner with all documents attached which are referred to therein, pages individually marked A through V (22 pages)

R-2 Letter dated October 25, 1982, from respondent to petitioner (2 pages)

R-3 Tape recording of petitioner's hearing before respondent on October 14, 1982

R-4 Transcripts of proceedings before Hon. Donald J. Skeffington, April 4, 1982, and June 25, 1982 (158 pages - pg. 46 of June 4, 1982 transcript missing; pg. 4 of April 2, 1982 transcript missing)

WITNESSES

For petitioner: Jerry M. Johnson

For respondent: None

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JERRY M. JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

Petitioner shall submit to an examination by a physician chosen by the Board or petitioner as mutually agreed, in accordance with statutory procedure. The precautions set down by Judge Duncan pending the conclusion of this case shall be observed.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

AUGUST 11, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 9171-82
AGENCY DKT. NO. 351-9/82A

TRENTON CITY BOARD
OF EDUCATION,
Petitioner
v.
H. EVELYN COHN,
Respondent.

APPEARANCES:

Robert B. Rottkamp, Esq., on behalf of the petitioner (Merlino, Rottkamp & Flacks, attorneys)

Steven R. Cohen, Esq., on behalf of the respondent (Selikoff & Cohen, attorneys)

Record Closed: May 14, 1983 Decided: June 28, 1983

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

The Trenton City Board of Education (Board) certified charges of unbecoming conduct and incapacity against H. Evelyn Cohn (respondent), a tenured teacher in its employ, to the Commissioner of Education for determination. The Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A plenary hearing was conducted in the matter on February 8, 9 and 14, 1983, after which the parties filed briefs in support of their respective positions. Due to a change in counsel for the Board at the close of hearing, it was granted additional time to file.

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The charges are as follows:

CHARGE ONE

Respondent engaged in misbehavior and conduct unbecoming a teacher on or about March 26, 1982, in that:

a. She made numerous threats, in the presence of several persons, that she was going to kill [a secretary] at Junior High School 5.

b. [Respondent] loudly boasted and proclaimed that she had hidden on her person a knife with which she was going to kill [the secretary.]

c. [Respondent] had hidden under her sleeve a knife which she demonstrated to several persons while making threats against the life of [the secretary.]

d. As a consequence of continual harrassment by [respondent] from approximately February 1982 and including the knife/threat incident which occurred on or about March 26, 1982, [the secretary] has suffered "extreme stress: strain, pressure and anxiety" as well as a real fear for her well-being, all of which has impacted adversely upon her daily activities.

CHARGE TWO

[Respondent] is mentally incapable and unfit to teach by reason of the fact that she has exhibited erratic and irrational behavior which is contrary to that required and expected of a teacher. Further, she has been diagnosed as having an impaired ability to function within societal rules and has maintained that she is above any laws. She has also been diagnosed as having the "'inability to control her anger in a proper way.'"

The underlying operative facts, which give rise to the charges, and as established by a preponderance of credible evidence, are these.

The school secretary, who was the subject of the asserted threats by respondent, is assigned the responsibility of maintaining accurate, teacher attendance records. The evidence of record shows that the secretary and respondent had been in disagreement as to the accuracy of respondent's attendance records. On March 26, 1982, respondent met with the school principal and the secretary to discuss the difference of opinion regarding her attendance records. An error made on respondent's attendance

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record was corrected as the result of that meeting. Matters unrelated to respondent's attendance record, such as the relationship between the secretary and respondent, were presented by the secretary which, in turn, further aggravated respondent's perceived problems and resulted in upset and annoyance by respondent.

After the meeting, respondent returned to her regularly scheduled class where she remained for a brief period of time. Respondent was still upset, annoyed, and not feeling well. Respondent left her classroom and proceeded to the student discipline office. There, she informed a vice-principal that she was not feeling well and would like to go home. The vice-principal informed respondent that no substitutes were available and he could not release her to go home. A fellow teacher, Karen Moore, was in the student discipline office. Respondent informed Moore that she was annoyed at the secretary. Respondent left that office, but returned momentarily and showed Moore a knife she had taped to the inside of her coat. Respondent left the student discipline office and entered the women's faculty lounge where she became physically and emotionally upset and began shouting. Maryann Klaus, a teacher, was in the faculty lounge and explained that respondent was screaming she wanted a "section eight," that she "had to get out of here," and was uttering complaints of the school secretary. Respondent showed Klaus a knife she had in the sleeve of her coat after which respondent put it back in her sleeve. Respondent told Klaus she was going to kill "her." In response to the query whom she was going to kill, respondent referred to the secretary with an ethnic slur. It was at that point that respondent showed Klaus the knife. A security officer entered the room and tried to quiet respondent down. Respondent said, "That's it — I'm going to do it now," at which point Klaus took the knife from respondent.

Preston Pierce, the Acting Administrative Assistant on March 26, 1982, was in his office when respondent entered and spoke with other teachers who happened to be there. Though not asserted in a written statement on March 29, 1982 (P-4), Pierce heard respondent use the words, "kill", "the secretary's name" and he observed the knife which was in the respondent's coat sleeve. Pierce observed respondent drop her arm and the knife fall out into her hand; respondent raised her arm upward and the knife slid back into the coat sleeve. Moore, Klaus, and Pierce reported their observations of respondent's behavior to the principal. Those who heard respondent threaten the secretary did not believe respondent intended to carry out the threat. The secretary testified that respondent made no personal threats to her, but that she did hear rumors in respect of respondent's behavior that day. The secretary testified she became ill as a result of what was told her.

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Respondent does not deny her behavior on March 26, 1982 as described above. Respondent was angry with the school secretary because she had spoken with her on three or four prior occasions to resolve her attendance records without success. When respondent returned to her classroom after the meeting with the principal and the secretary, respondent was still angry with the secretary. Respondent entered the faculty lounge for a ciagarette to calm down, but she does not recall making any threats with a knife. The knife, it is noted, was a paring knife commonly used to peel apples, potatoes, and the like. It appears that respondent had possession of the knife to be used as a utensil at lunch.

Respondent presents a host of mitigating factors in her personal life which led to her behavior on March 26. Respondent is approximately 42 years old. She has been employed by the Board since 1971. Her most recent assignment has been that of a basic skills reading specialist, working with small groups of pupils. Respondent has had no prior discipline problems during her employment and her teaching performance has always been adjudged to be satisfactory. Prior to March 26, 1982, respondent enjoyed rapport with the staff.

Respondent is the mother of a 20-year-old son. Sometime during 1972, respondent and her husband were divorced. Respondent has been raising her son since then. In 1975, respondent suffered breast cancer which required her to undergo a radical mastectomy and chemotherapy treatments. Sometime in 1980, respondent's mother, with whom respondent had a very close relationship, passed away. During February 1982, respondent was hospitalized for chest pains, the cause of which was diagnosed as clogged arteries. Respondent's cardiologist recommended that she undergo a heart catheterization. In the meantime, respondent described her relationship with her son as less than satisfactory. Respondent's former husband began injecting himself into their lives after a considerable absence and began telling her son he did not have to obey her. Respondent was concerned that her son was being influenced by a girlfriend to experiment with drugs and to drop out of college. Sometime between February and March 1982, respondent's son informed her he intended to enter the United States Army. Respondent was not favorably disposed to that decision of her son because of his inability to follow rules and regulations. It is noted that respondent's son, against her wishes, did join the Army and within months was given a general discharge.

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The events surrounding the incident of March 26, 1982, from respondent's perspective are these. First, respondent was concerned with having an accurate record of the attendance so that, with her medical problems she was experiencing, she would know how much time she could take off for illness. Respondent explained she had attempted to resolve what she perceived to be the problem of her attendance record with the secretary during February. However, that effort was unsuccessful. Respondent contends she was being charged for having taken two more sick days than her own personal records showed she did. Respondent explained that with the annoyance she felt with the secretary in respect of her attendance records, coupled with her personal concern of her heart ailment, in conjunction with the real likelihood that she may have to take days off, she was left with a sense of frustration. But that sense of frustration was not the sole element which led to the incident of March 26.

Keeping in mind respondent's circumstances in respect of her own physical ailments, her mother's death, her concern in respect of her 20-year-old son, and her former husband's intrustion into their lives, respondent testified that on March 25, 1982, the day before the incident herein, she had borrowed her son's car for work because her's was being repaired. At an earlier time, respondent had given her son money to have his gasoline gauge fixed. He had informed her that he used the funds for that purpose. When she borrowed his car on March 25, she realized that the gasoline gauge was not repaired and when asked why not, the son informed his mother he had given the money to his girlfriend. Nonetheless, her son assured her that the gasoline tank was filled for her use on March 25. However, while respondent was driving home from work that evening, the automobile ran out of gas. When respondent finally arrived home, after receiving assistance from a passerby, there was a scene, as respondent explains, with her son. Respondent directed her son not go out that evening; the son went out that evening. The son went to the father's house in Philadelphia by driving his own car which broke down in his father's driveway. Respondent's husband was to have telephoned her at her home, told her that her son's car broke down in his driveway, and told her to get the car out of the driveway. It is noted that respondent lives in Yardley, Pennsylvania. Finally, at about 2:00 a.m. during the morning of March 26, respondent's husband brought the son home to Yardley. Another argument ensued between respondent and her son, the result of which was respondent received little sleep that night.

Respondent received a ride to work on the morning of March 26, 1982 with a co-worker. When she arrived at school, she requested a meeting with the principal to resolve the discrepancy in respect of her sick days. The principal testified that at that

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meeting respondent was extremely upset. He characterized her behavior and demeanor as irrational and incoherent. The principal was of the view that respondent's behavior was not warranted by a discrepancy in her sick leave. It was during that meeting that respondent informed the principal that she was having problems, that she did not care whether she was fired, and that she did not care whether she lived or died. After this initial meeting with the principal on March 26, 1982, respondent returned to her class, as reported earlier, and the sequence of events in respect of the knife and the threats followed.

When respondent's behavior in respect of the knife and the threats was reported to the principal, he again called respondent to his office. Respondent continued to ramble on in his office, demanding a "section eight", and the principal concluded that she should, in fact, go home. Respondent left school and, because she had received a ride to work that day, began walking home to Yardley. She refused the principal's offer to drive her home. She told the principal she intended to walk from the school to the Calhoun Street Bridge to Pennsylvania. When she left the school, respondent wandered about the city of Trenton and ended up at the Trenton Times Newspaper building which is far removed from the Calhoun Street Bridge. When the respondent arrived home, she contacted her cardiologist and asked to be referred to a psychiatrist. Respondent met with a psychiatrist, Dr. Barbara Spear, on March 29, 1982. In the meantime, respondent received a letter from the Board on March 27, 1982 by which she was directed to report to the personnel office on March 29. Respondent reported as directed and informed an officer of the Board that she had an appointment with a psychiatrist later that day. The Board officer requested respondent to have her psychiatrist submit a report to the Board by April 23, 1982 (R-1).

Dr. Spear did submit her evaluation of respondent to the Board's medical director on April 23, 1982 (J-1). The report begins by reviewing the personal history of respondent, the events of March 29, 1982, in respect of the knife and the threats, and a review of respondent's prior physical and mental difficulties. Dr. Spear noted that respondent ". . . presented [herself] as an overwrought, loudly-speaking, histrionic, agitated, suspicious, agressive, obese white female. . . ." Dr. Spear noted that respondent's ". . . ability to function within sociatal (sic) rules is somewhat impaired in that she perceived the meaning of a given law but maintains that she is 'unique and above any laws'. . . She has a high degree of morality but it is in accordance with her own definitions which are at odds with the general sociatal (sic) norms at times. . . ." (J-1)

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Dr. Spear diagnosed respondent's condition to be that of a borderline personality disorder, atypical impulse disorder, histrionic, and atherosclerotic coronary artery disease, hypertension, obesity, radical mastectomy with metastasis. Dr. Spear, between March 29 through April 23, 1982, saw respondent three times each week. Dr. Spear placed respondent on medication and concluded:

> It is imperative in this examiner's opinion that this individual be given a medical leave of absence with pay on a psychiatric disability basis.

When the assistant superintendent in charge of personnel received Dr. Spear's report, he wrote back to respondent on April 28, 1982 and advised her that "[Dr. Spear's] report indicates that at the present time you are psychiatrically disabled from performing your duties. On the basis of this conclusion, I am recommending that tenure charges not be pursued." (J-2) Respondent was also advised that Dr. Spear's recommendation that she be placed on a paid medical leave of absence is contrary to Board policy and that accordingly, though she would be placed on a medical leave of absence, such absence would be unpaid. When Dr. Spear was informed that respondent was to be placed on an unpaid medical leave of absence, she wrote to the assistant superintendent in charge of personnel, on May 4, 1982, as follows:

> My previous communication to [the medical inspector], at his request, was based on his request for a diagnosis and brief history, current course of treatment, and prognosis at which time the patient was involved in psychological difficulties in resolving intrapsychic conflicts. She was receiving minimum medication. Since that time she has been seen by me for the appropriate psychotherapy.
>
> This regimen has resulted in continuing resolution of some of the above conflicts so as to enable her to evidence in vitro sufficient ego strength at this time to return to work in the capacity of her present job description.
>
> [Respondent] is available as of this date to return to work. Please notify her of precise time and send me a copy of same so I can follow-up with her. . . .

The Board's medical inspector, having acquired knowledge of Dr. Spear's seemingly conflicting judgments, advised the Board's personnel office on May 6, 1982 with respect to his conversations with Dr. Spear. The medical inspector advised that he contacted Dr. Spear on or about May 3, 1982, when he first learned of her recommendation that respondent be placed on medical leave with pay. The medical

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inspector states that when he informed Dr. Spear the Board's policy does not allow medical leave with pay, Dr. Spear was shocked because she had knowledge that school systems in Pennsylvania had such policies. The medical inspector states that he agreed to inquire further into the possibility of respondent securing medical leave with pay and he further agreed to contact Dr. Spear again. Later the same day, when the medical inspector contacted Dr. Spear the second time and informed her that respondent's medical leave would have to be without pay, Dr. Spear advised that under those circumstances she would authorize respondent's return to work. (P-5)

The assistant superintendent, having earlier been advised that respondent should be on a medical leave of absence, but now being advised that she was fit to return to work, informed respondent on May 10, 1982 that it was now necessary to seek independent confirmation of Dr. Spear's judgment that respondent was "'available. . .to return to work.'" (J-5) In the meantime, however, Dr. Spear independently sought a second opinion in respect of respondent's mental capacity. Dr. Spear referred respondent to Dr. Harry G. Markow who, on May 20, 1982, after examining respondent, determined ". . . there are no psychiatric contra indications at present for her return to work." (J-10)

The Board selected Dr. Mojtaba R. Motlagh as the independent psychiatrist to evaluate respondent's fitness to return to work. While waiting for Dr. Motlagh's report, the Board met on May 27, 1982 and determined that respondent be placed on a medical leave of absence, without pay, from May 3, 1982 until such time as it receives Dr. Motlagh's report. The Board took this action notwithstanding its receipt of a written statement from respondent that she ". . . never requested a leave of absence . . .[and] . . . I am able to return to work via my own doctor and the Board doctor." (J-6) Though Dr. Motlagh examined respondent on May 21, 1982 his report was not received by the Board until June 1, 1982. Dr. Motlagh found respondent:

> . . .is not suffering from any major psychiatric illnesses. Her difficulties is (sic) her inability to control her anger (due to her present life situation) in a proper way which needs short time individual psychotherapy. This means that she is able to return to work and teach. Meanwhile, she should see her own psychiatrist or learn how to deal with daily life stresses. I agree with Dr. Spear's diagnosis . . . . (J-5)

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On June 24, 1982, the Board advised respondent that its interim superintendent had filed with it charges of unbecoming conduct and incapacity against her. Subsequent to her filed response to the charges, the Board advised respondent that it determined to certify the charges to the Commissioner for determination.

It was noted earlier that respondent had a very close relationship with her mother and when her mother died respondent found it difficult to discuss personal problems with anyone. When respondent began therapy with Dr. Spear, she eventually got to the point where she felt comfortable discussing her problems with Dr. Spear. Respondent's therapy with Dr. Spear began on a daily basis following the incident of March 26, 1982. That daily therapy lasted for approximately six weeks and the sessions were then reduced to three days a week through August 1982. Between August 1982 and the present, respondent sees Dr. Spear on a weekly basis. At hearing, Dr. Spear was of the view that respondent's behavior on March 26, 1982, was a manifestation of a person crying out for help. Dr. Spear explained that the stresses of respondent's personal life, including her son, her former husband, her mother's death, and her own physical condition, led to the state of depression that respondent experienced on or about that date. Dr. Spear explained that when she first met with respondent, she recommended a medical leave with pay because of the perceived need for respondent to undergo intensive psychotherapy. By the time Dr. Spear learned respondent could not be granted a leave with pay, she had spent many sessions with respondent and concluded, under the circumstances of respondent not being able to be on leave with pay, that the second best alternative would be to return to work while continuing therapy after school hours. Dr. Spear is of the view that had respondent been placed on leave, without pay, such a substantial loss in income would hinder respondent's improvement. Respondent, at hearing, expressed her shame at her behavior on March 26, 1982 and manifested confidence that should she return to her teaching duties such behavior would not be repeated. Respondent would, if returned to her duties, apologize to the secretary and hopefully the incident could be put into the past and she can move on to the future.

The events of March 26, 1982 as described above occurred, insofar as the evidence of record shows, without the knowledge nor involvement of any school pupil. Respondent's threats against the secretary were directed at third parties, not to the secretary herself. It is finally noted that respondent applied for unemployment

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compensation benefits on May 9, 1982. The claim was initially denied by the Division of Unemployment and Disability Insurance. However, on appeal, the original denial was reversed and respondent was declared eligible for benefits on December 8, 1982 retroactive to May 9, 1982 on the grounds that respondent was able to return to work under N.J.S.A. 43:21-4(c). (R-2)

This concludes a recitation of the operative facts of the matter.

ARGUMENTS OF THE PARTIES

The Board contends that within the facts of the matter respondent knew precisely what she was doing on the date in question and that that conduct is not a manifestation of the self-restraint and controlled behavior expected of teachers and as endorsed by the Commissioner in Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302 and in Ernest Tordo, School District of the Township of Jackson, 1974 S.L.D. 97. The Board contends that respondent's threats to kill the secretary, under the condition by which respondent had the instrument on her possession to carry out the threat, does rise to the level of unbecoming conduct and as such respondent should be dismissed from her employment. Furthermore, the Board contends it has, through a preponderance of credible evidence, established that respondent is not mentally competent to continue her teaching duties, based on the evidence given it by respondent's own treating psychiatrist, together with the reports received from Drs. Markow and Motlagh. In this regard, the Board cites Laba v. Newark Board of Education, 23 N.J. 364 (1957) and In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). The Board argues that it is under no obligation to wait until respondent commits actual harm before it moves to terminate her employment; it argues that respondent's presence in the classroom may pose a danger of harm to the students for a reason not related to academic profiency. The Board contends that though incapacity is generally related to fitness to teach, incapacity can also be demonstrated by personal conduct of the teacher herself.

Respondent contends that her behavior on March 26, 1982 does not rise to the level of conduct unbecoming a teacher so as to warrant her dismissal because her mental and physical health of the time at the incident clearly demonstrates she did not have the appropriate mens rea to suffer that consequence. Furthermore, respondent contends she

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is mentally capable of resuming her duties and responsibilities in the Board's employ and with the knowledge that her behavior of March 26, 1982 will not recur in the future. Finally, respondent argues that the Board is collaterally estopped from asserting her incapacity on the grounds the Division of Unemployment and Disability Insurance already determined her capacity to return to work. Respondent contends that in the matter before that agency, the parties were the same as here, the issue litigated before that agency was identical, and the doctrine of collateral estoppel applies because the issue of her capacity to return to work has been fairly and fully litigated.

CONCLUSIONS AND DETERMINATIONS

Respondent's defense of collateral estoppel in respect of the issue of her capacity to return to work does not apply in the instant matter. This is so for the issue of her capacity, as determined by the Division of Unemployment and Disability Insurance, was decided under the provisions of N.J.S.A. 43:21-4(c), not under the provisions of N.J.S.A. 18A:6-10, the Tenure Employee Hearings Law. The latter statute gives to the Commissioner of Education exclusive authority to hear and determine charges against employees with tenure. The issue here is respondent's capacity to perform her duties as a teacher; not her entitlement to disability, or unemployment compensation benefits. The doctrine of collateral estoppel simply does not apply in this case.

Respondent's behavior on March 26, 1982 cannot be characterized as conduct in which society expects teachers to engage. Ideally, those who engage in the profession of teaching are to maintain control of their emotions and of their behavior at all times. That those who heard respondent utter the threats against the secretary did not believe that she intended to carry the threat out does not negate respondent's conduct in respect of the threats. The mere possession of a knife by respondent is not, per se, prohibited conduct so long as the purpose of the knife was legitimate. However, the manner of possession of the knife by respondent, concealed within her sport coat, in conjunction with the voiced threats, aggrevates the nature of the conduct of respondent on that day. Nonetheless, it must be remembered that respondent has been in the Board's employ since 1971 and since that time has been at least a satisfactory teacher in the Board's employ. Respondent has no other disciplinary marks on her record other than the instant matter. Furthermore, one must consider the various levels of stress being experienced by respondent at the time the incident occurred. Respondent had immediately prior to

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March 26, 1982 been informed that she would probably require a heart catheterization; she had gone to work the morning of March 26 after having a series of arguments with her son; respondent's former husband, at least insofar as respondent believed, was interfering with her life and her son's life; respondent, according to Dr. Spear, was still feeling the effects of her mother's death; and, respondent's own personal physical health was less than satisfactory. These considerations, taken as a whole and seen in the light of a continuing dispute with the school secretary over respondent's allowable sick time, must be seen to have created a potentially explosive situation within respondent's mind. Respondent attended a meeting with the principal and the secretary on March 26, 1982 in respect of her sick leave allowable and left that meeting apparently with mixed emotions. Respondent had an error corrected on her attendance record, but respondent apparently perceived the school principal supporting the position taken by the secretary rather than supporting respondent. Respondent, not being in the best of physical or emotional health at that particular time, reacted by verbalizing to selected persons her frustrations with the school secretary. These factors must be taken into consideration when assessing the gravity of the conduct that heretofore has been found unbecoming conduct. The gravity of the conduct, of course, will determine the extent of the discipline to be imposed. And, contrary to the charges, there is no evidence to support a finding that the secretary has a real fear of respondent as the result of the incident. True, the secretary may have been fearful on March 26, 1982 but that fear has long since dissipated.

In respect of the capacity of respondent to return to her duties, it is recognized that Dr. Spear, within a matter of 11 days, changed her diagnosis from an absolute necessity for respondent to be placed on a medical leave to the diagnosis that respondent was of sufficient mind and body to return to work. The sole reason for the change in the diagnosis was not because of an improved mind and body within a period of 11 days; rather, the sole reason for the change in the diagnosis was because Dr. Spear acquired knowledge that the Board had no policy by which respondent could be placed on a sick leave with pay. At first glance, such a basis for a change in a diagnosis by a psychiatrist may seem to be unreasonable. However, under the circumstances which Dr. Spear found respondent on April 1, 1982, it is reasonable to believe that if respondent's source of income was eliminated, the favorable results which could otherwise be obtained by respondent through therapy with Dr. Spear may be significantly lessened. Consequently, I am not persuaded, as the Board urges, that the diagnosis given by

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Dr. Spear to respondent's capacity to return to work should be disregarded. Dr. Spear's diagnosis, in conjunction with the diagnosis of the Board's own selected psychiatrist, Dr. Motlagh, is sufficient evidence upon which to find that respondent is physically and mentally able to return to work.

Having considered all of the evidence brought forward by the Board, together with mitigating factors presented by respondent, and having found that respondent did engage in conduct unbecoming a teacher on March 26, 1982, an appropriate discipline is the loss of one month's salary by respondent. It is presumed that such a discipline equals an amount between $1,500 to $2,000. Such a penalty is a significant sum. The Board is directed to restore to respondent all salary and benefits, other than for 30 days' value, withheld from her either by its placement of respondent on an involuntary leave of absence or under the provisions of N.J.S.A. 18A:6-14. It is believed that the personal difficulties experienced by respondent have been resolved and that when she returns to her teaching duties, respondent will take appropriate steps to ameliorate whatever difficulties may have existed between her and the secretary.

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In summary, it is **ORDERED** that respondent forfeit one month's salary for the unbecoming conduct, found here to be true in fact, and that the Board of Education of the City of Trenton reinstate respondent to her position of employment with it.

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

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

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

June 30, 1983
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF H. EVELYN COHN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The petitioning Board in primary exceptions to the initial decision by Judge McKeown objects to the lack of severity of the penalty imposed therein against respondent. The Board contends that the penalty is not enough to pay the salary of substitute teachers or the legal costs incurred in pursuing this matter and alleges that a more substantial penalty must be imposed.

Respondent in reply exceptions dismisses the Board's arguments "***as nothing more than an emotional appeal which, when weighed against the factual background***must be emphatically rejected.***" (Respondent's Exceptions, p. 3) Respondent stresses that, at the time the Board forwarded its charges, it had received the reports of three psychiatrists that respondent was not suffering from any major psychiatric illness and was of sufficient emotional health to return to work. The Commissioner looks with favor on respondent's arguments.

A close reading of the initial decision and a thorough analysis of the circumstances of the matter presently controverted leads the Commissioner to conclude that the judge set down an appropriate penalty. The Commissioner views with regret the physical and emotional problems faced by respondent herein while recognizing the turmoil and travail such circumstances create in a school environment. The Commissioner cannot condone the highly emotional reactions herein evidenced while being cognizant of the problems involved. In the opinion of the Commissioner, the judge properly considered and weighed the evidence provided by the Board and the mitigating factors offered by respondent.

The Commissioner cannot agree with the Board's novel argument that a monetary penalty against the teacher must be devised that somehow wipes out any financial expenditure by the Board in the trial of this tenure matter. Nothing in prevailing law indicates that such a punishment must be fashioned; the Commissioner finds no merit therein.

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

Accordingly, respondent shall be assessed 30 days' salary by the Board and shall be reinstated to her position of employment therewith.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 88-83
AGENCY DKT. NO. 468-11/82A

THE BOARD OF EDUCATION
OF THE GREATER EGG HARBOR
REGIONAL HIGH SCHOOL DISTRICT,
ATLANTIC COUNTY,
Petitioner
v.
NEW JERSEY STATE
INTERSCHOLASTIC ATHLETIC ASSOCIATION,
Respondent.

APPEARANCES:

Michael A. Donio, Esq., for petitioner (Donio and Greco, attorneys)

Michael J. Herbert, Esq., for respondent (Sterns, Herbert and Weinroth, attorneys)

Record Closed: April 21, 1983 Decided: June 28, 1983

BEFORE **LILLARD E. LAW**, ALJ:

The Greater Egg Harbor Regional High School Board of Education (Board) appeals from an action taken by the New Jersey State Interscholastic Athletic Association (NJSIAA or Association) to require the Board's Oakcrest High School (Oakcrest) to forfeit four interscholastic football games in which an alleged ineligible pupil participated during the 1982 football season. In its seven-count verified Petition of Appeal before the Commissioner of Education, the Board alleges, among other things, that: (1) The penalty

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imposed by the Association was arbitrary, capricious and unreasonable in light of the nonintent of the school district to allow an ineligible pupil to participate in its interscholastic football program; (2) The Association did not follow its own procedures contained in its Constitution, Bylaws, rules and regulations in hearing the matter prior to the imposition of penalty of forfeiture; (3) The Board was denied due process of law in that no hearing or discovery procedure was afforded petitioner prior to the matters having been heard before the Executive Committee of NJSIAA; (4) Petitioner was denied due process of law in that the rules contained in the Association Constitution and Bylaws in regard to hearings and appearances before its Eligibility and/or Executive Committee lack specificity in putting its members on notice as to the exact procedure to be utilized; (5) The Constitution and Bylaws of the NJSIAA are unconstitutional and the decision of the Association denied petitioner due process where its decision in disposing of eligibility cases by forfeiture displays a predisposition of punishment without affording petitioner an opportunity to a hearing contrary to Article 10 of the Association's Bylaws with regard to penalties; and, (7) The Association's Constitution and Bylaws should be declared unconstitutional in that the punishment of forfeiture of football games in eligibility cases without putting a member on notice of automatic forfeiture is contrary to Article 10 of the Bylaws and, therefore, a denial of due process. The Association answers each of petitioner's seven counts, admitting and denying so much set forth therein and sets forth, among other things, six affirmative defenses thereby requesting that the petition be dismissed.

The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on February 2, 1983, at which, among other things, the issues to be determined were agreed upon and set down in a Prehearing Order, which was issued on February 2, 1983. Respondent NJSIAA was granted leave to submit a prehearing memorandum of law setting forth the legal issues under consideration with respect to the instant matter. A hearing was held on March 11 and 17, 1983, at the Trenton Office of Administrative Law. Thereafter, the parties submitted post-hearing memoranda, proposed findings of fact and proposed conclusions of law, with the matter having been closed on April 21, 1983.

The central issue in this matter is the petitioner's alleged violation of the "eight semester rule," however unintentional, and the Association's application of the penalty of forfeiture of the four football games won by Oakcrest in which the alleged

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ineligible pupil participated, thereby denying Oakcrest the opportunity to share in its conference championship and also denied it an invitation to participate in the NJSIAA Group IV Tournament.

FINDINGS OF FACT

Having carefully reviewed and considered the testimony and other evidence offered in this matter (See Inventory of Documents in Evidence attached hereto), and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** the following to be true, in fact:

The respondent, NJSIAA, is a voluntary, nonprofit association of 441 secondary public and private schools in New Jersey, formed and maintained to govern the conduct of interscholastic sports in New Jersey (J-7). Pursuant to N.J.S.A. 18A:11-3, a board of education may join the NJSIAA by the adoption of an annual resolution. Upon adoption of such a resolution the Board, its faculty, and students shall be governed by the rules and regulations of that association, which in turn shall be deemed "the policy of the Board of Education" (N.J.S.A. 18A:11-3)

Oakcrest High School is a secondary school governed by the petitioner, Board of Education of the Greater Egg Harbor Regional High School District in Atlantic County, which has been a member of the NJSIAA for many years. On August 9, 1982, Oakcrest renewed its membership in the NJSIAA and thereby bound itself to the policies of that Association (R-2, p.2). Pursuant to the authority granted to it under Article II, Section 2, of the NJSIAA Constitution, the general membership of the Association has adopted Bylaws governing the eligibility of athletes, as Article V of the NJSIAA Bylaws. Section 4-E(1) sets forth certain academic requirements for pupil eligibility and participation in interscholastic sports programs as follows:

> E. Courses - (1) To be eligible for athletic competition during the first semester (September 1 to January 31), a pupil must have received a passing grade in each of three or more full year courses, or the equivalent in courses of shorter or longer duation, for the preceding school year. A fullyear course is one that meets for an equivalent of a minimum of three (3) class periods per week.
>
> [J-7, p. 33]

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The Bylaws at Article V, Section 4-J, prohibit a pupil to be eligible for such interscholastic sports programs subsequent to the expiration of the eight consecutive semesters, which is commonly referred to as the "eight semester rule," and reads as follows:

> J. Semesters of Eligibility - No student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his/her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated. This rull shall not apply to an honorably discharged serviceman/servicewoman, in which case the Executive Committee may make any adjustments of this rule as it may deem equitable.
>
> [J-7, p. 36]

The Association Bylaws provide at Article V, Section 4-B, that the school Principal is responsible for the school's compliance with the eligibility rules as follows:

> Eligibility Responsibility - The principal of a school is responsible for the observance of the eligibility rules contained in this Article and for the entire program of his member school.
>
> [J-7, p. 32]

On September 29, 1982, the Oakcrest Principal submitted two signed affidavits to the Association, as required, one of which attested that the school's coaching staff members were familiar with the rules and regulations of NJSIAA and agreed to comply with same (R-2). The other affidavit, signed by the Principal, declared and affirmed that all pupils competing in the interscholastic sports program had satisfied all of the Association's eligibility requirements. The Principal's affidavit further certified that the Principal had personally examined the pupil eligibility list and that he was satisfied that all pupils whose names appeared thereon were, in fact, eligible pursuant to the Association's rules and regulations (R-2). This was in compliance with the Association's Rules and Regulations at Rule 2. "Program Regulations," Section 14, which provides as follows:

> Eligibility Lists - Member schools must submit one (1) affidavit of eligibility to the Executive Director of the NJSIAA annually, by October 1. This form, signed by the Principal, will certify that any and all students competing on the interscholastic level for that school meet all eligibility requirements of the NJSIAA. This affidavit should be based on carefully compiled eligibility lists which are on file in each member school and in the event of any

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> question, are available upon request by other member schools and/or appropriate NJSIAA officials.
>
> [J-7, p. 50]

In August 1982, a pupil, identified herein as "A.M.," was enrolled at Oakcrest as a twelfth grade transfer pupil from Lawrence North High School, Indianapolis, Indiana. A.M. presented an unofficial transcript from his former school to the Oakcrest school officials, which demonstrated, among other things, that A.M. had been enrolled in the ninth grade for the 1978-79 academic year and that he had not successfully completed or passed three subjects during the 1981-82 academic year (J-4). Thus, A.M. was ineligible to participate in interscholastic sports by virtue of violations of Article V, Sections 4-E(1) and 4-J of the Association's Bylaws.

In any event, A.M. signed up for and participated in five football games for Oakcrest when it was subsequently discovered by a member of the school's guidance department, and so reported to the school's Supervisor of Athletics that A.M. had been enrolled in Lawrence North High School in the ninth grade for the 1978-79 academic year (J-4, J-2). The facts and circumstances of A.M.'s questionable eligibility were brought to the attention of the Superintendent on October 29, 1982, in the Principal's absence, who immediately telephoned NJSIAA Headquarters to inform its Assistant to the Executive Director of the findings with regard to A.M. The Superintendent, upon the advice of the Association's representative, submitted letters to NJSIAA, dated October 29, 1982 (J-2) and November 5, 1982 (J-3), setting forth the factual context of the matter, together with documents in support of the school's contention that whatever errors of omission or commission that permitted A.M. to participate in its interscholastic football program were neither deliberate nor intentional (J-2, J-3).

Subsequent to receipt of J-2 and J-3, the Association's Executive Director telephoned the Principal of Oakcrest on or about November 8, 1982, to advise him that A.M. was indeed ineligible and that the school would forfeit the four football games it had won while A.M. was a participant. The Executive Director further advised the Principal of the member school's right to appeal this determination to the Association's Executive Committee at its subsequent regularly scheduled meeting on November 15, 1982.

On Sunday, November 14, 1982, the Association formalized the state football championship selections for all sections of the state among the four public school

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groupings and the two parochial school groupings. Prior thereto, on November 11, 1982, counsel for petitioner Board herein, sent a Mailgram to the Association requesting that (1) the tournament team selections scheduled for Sunday, November 14, 1982, be postponed until after the Board's appearance before the Executive Committee on Monday, November 15, 1982, and (2) Oakcrest High School be afforded a formal hearing before the Association's Executive Committee (R-3). The reason given by the Executive Director for the tardy delivery and receipt of Board Counsel's Mailgram was that Thursday, November 11, 1982, was Veterans Day, a holiday observed by the Association with its offices closed and because of the ensuing weekend which, presumably, prevented delivery until Monday, November 15, 1982.

On November 15, 1982, representatives of Oakcrest High School appeared before the Association's Executive Committee including the President of the Board, the Superintendent, the Athletic Director, the Principal, the Football Coach and Board counsel. The Board did not deny the violation of the eight semester rule but, rather, argued, among other things, that the penalty of forfeiture of four games Oakcrest had won was too severe a penalty to impose upon the innocent team players for an inadvertent oversight on the part of the school's administrators and athletic staff. Subsequent to the Board's presentation, the Executive Committee voted by a vote of 26 in favor, none opposed and four abstensions to deny the Board's appeal and to uphold the forfeiture of the four football games won by Oakcrest while A.M. participated.

Because of the lack of personnel, the NJSIAA depends upon its member schools to self-enforce the Association's various rules and regulations, particularly the pupil eligibility rules. A concomitant to membership is, therefore, the attendant self-enforcement and self-regulatory obligation of the member school to immediately report violations or infractions to the Association when it becomes known to the member school, whether such violation and/or infraction was committed knowingly or unknowingly.

The Association has imposed the penalty of forfeiture of games won against member schools which have been found to be in violation of its eligibility rules (R-1).

This concludes the recital of the findings of fact in this matter.

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LEGAL ARGUMENTS OF THE PARTIES

I

Petitioner asserts that the activities of an interscholastic athletic association which sponsors, administers and supervises interscholastic athletics constitute state action within the meaning of the due process clause of the United States Constitution and is, therefore, subject to the limitations of the Fourteenth Amendment therein.

Petitioner contends that it has been held that an action by a private organization such as the NJSIAA shall constitute state action which would subject the Association to the limitations of the Fourteenth Amendment to the Constitution. Kite v. Marshall, 661 F.2d 1027 (5th Cir. 1981), and Duffley v. New Hampshire Interscholastic Association, Inc., 446 A.2d 462 (1982).

Petitioner observes that the Kite case dealt with parents who brought an action challenging the constitutionality of a summer camp rule adopted by the Texas Interscholastic League. The United States District Court for the southern district of Texas held that the rule was unconstitutional. When the Interscholastic League appealed, the Court of Appeals held that the rule of the Texas Interscholastic League, which suspends for one year the varsity athletic's eligibility of any high school student who attends a certain training camp, did not violate either the due process or equal protection clause of the Fourteenth Amendment. However, in coming to that conclusion, the Court of Appeals held that although it was a private organization, the activities of the University Interscholastic League of Texas constituted a state action subject to the limitations of the Fourteenth Amendment to the Constitution.

In the Duffley case, a student was denied athletic eligibility for the second semester of the 1981-82 school year and sought relief. The Supreme Court of the State of New Hampshire hold that the activities of Interscholastic Athletic Association (NHIAA) in sponsoring, administering, regulating and supervising interscholastic athletics in New Hampshire constituted state action within the meaning of the due process clause of the United States Constitution and the State of New Hampshire's State Constitution. See Duffley p. 466.

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Petitioner argues that since it is determined that the activities of the NJSIAA, in this case, are subject to the scrutiny and guidelines under the Fourteenth Amendment of the United States Constitution, the NJSIAA has the burden of showing that it afforded the petitioner in this case all the protections of due process.

The Association counter-argues that the two cases cited by the Board were eligibility cases and have no bearing on the present appeal. It argues that in Duffley, the state athletic association did not conduct any hearing whatsoever, nor were any reasons stated to justify the imposition of a period of one-year ineligibility for a student who had transferred from one school to another, see 466 A.2d 464. In that case, the court noted that minimum due process required that there be "notice and an opportunity to be heard" and that such a requirement was intended only to "make sure that the facts upon which the NHIAA relied in denying the plaintiff an additional semester of basketball eligibility were correctly arrived at, and that its decision was otherwise reasonable" supra at 462. In this case, an extensive hearing was provided to the petitioner before the NJSIAA Executive Committee on November 15, 1982. Petitioner was represented by counsel and was free to submit any documents in support of its position. Further, the petitioner cannot point to any relevant facts which it was not allowed to present before that Committee. In addition, it should be pointed out that within months of its decision in Duffley, the Supreme Court of New Hampshire ruled that it would not interfere with a determination by the NHIAA that a student not be allowed to participate in a postseason track championship. Snow v. New Hampshire Interscholastic Athletic Association, Inc., 449 A.2d 1223.

The Association asserts that its Executive Committee did not act in an arbitrary or capricious manner when it determined that Oakcrest was required to forfeit four football games for its violations of the eligibility rules and regulations.

The Association argues that the Board is under the incorrect interpretation that it was entitled to a "trial type" of hearing on the question of penalty. As such, petitioner ignores the fact that NJSIAA is a voluntary, nonprofit corporation consisting of public as well as private schools. Although its actions are generally reviewable by the Commissioner of Education where public schools are involved, under N.J.S.A. 18A:11-3, that review power does not change the nature of its existence as a voluntary association. Courts have consistently held that they will not apply rigorous standards of due process, as long as an association follows its Constitution and Bylaws. See Higgins v. American

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Society of Clinical Pathologists, 51 N.J. 151 (1968); see also Napolitano v. Princeton University Trustees, 186 N.J. Super. 548, 562-564 (App. Div. 1982).

Respondent asserts that even if one viewed the Association as in the nature of a public entity, rather than a voluntary association, our courts have uniformly held that a petitioner would not be entitled to more than was granted in this case. Indeed, New Jersey courts have held that as long as there has been a "meaningful chance to present facts and arguments to decision makers" and those decision makers were "fair and open-minded," due process would require no more. See very generally In Re North Jersey District Water Supply Commission, 175 N.J. Super. 167 (App. Div. 1980), certif. den., 85 N.J. 460 (1981); Public Interest Research Group v. State, 152 N.J. Super. 191 (App. Div. 1977), certif. den. 75 N.J. 538 (1977). See also East Windsor Regional School Dist. v. State Bd.of Ed., 172 N.J. Super. 574 (App. Div. 1980); In Re Dept. of Environmental Protection, 139 N.J. Super. 514 (App. Div. 1976).

II

Petitioner asserts that the Association's uniform and consistant penalty of forfeiture of games in cases of pupil eligibility violations denies it of procedural and meaningful due process of law under the Fourteenth Amendment of the United States Constitution.

Petitioner observes that it is undisputed and admitted by the respondent, at numerous times during the course of proceedings, that the Association uniformly and consistently imposes the penalty of forfeiture of games to any team that uses an ineligible player. Petitioner contends that this is so, even though the Constitution and Bylaws of the organization afford a petitioner a "hearing" and claim that the discretionary election of punishment is a power vested in the Executive Committee. The Executive Director testified, as well as the Assistant to the Executive Director that the NJSIAA has been imposing the uniform penalty of forfeiture for at least the last 19 years. Petitioner cites the case of Kentucky High School Athletic Association v. Jackson, 569 S.W.2d 185 (Ky. App. 1978), wherein the Court of Appeals of Kentucky held that a judgment enjoining an association from declaring a student athlete ineligible did not constitute an unreasonable interference with the internal affairs of the association. In the Kentucky High School case, the Court of Appeals held that it was unfair and unreasonable for the Athletic

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Association to require that a student's change of school be simultaneous with his custodial parents' change of residence in order to waive the rule providing for ineligibility of students following school transfer. The pertinent part of the decision applicable to the facts of this case is where the Court held that courts will not substitute their interpretation of association bylaws for the interpretation placed upon those bylaws by the association as long as the association's interpretation is fair and reasonable. The petitioner alleges that the NJSIAA's interpretation in applying its own Bylaws was not fair and reasonable in this case.

Petitioner notes that the Kentucky High School Athletic Association had a waiver of the transfer rule provided for in their Bylaws. However, the Commissioner testified at the hearing that in its entire history, the Kentucky High School Athletic Association had never waived the transfer rule, although the Board of Control may have on two or three occasions. This prompted the Trial Court Judge to ask in his opinion: "Why have a waiver provision in your Bylaws if you are never going to exercise it?" This quote of the Trial Judge is directly on point with a question that was asked during the hearing in the case sub judice, that question being: Why are there eight different penalties to be considered for violations of Bylaws when the only penalty that has been uniformly imposed in the past in eligibility cases is that of forfeiture. The Court in the Kentucky case held that under those circumstances, the judgment of the Court did not constitute an unreasonable interference with the internal affairs of the Kentucky High School Athletic Association. It is urged that in this case where the penalty was uniform without regard to the facts or to other penalties, the decision was arbitrary, capricious and unreasonable.

Petitioner observes that another argument that has been raised by the NJSIAA was addressed in the Kentucky High School case. That argument would be that a decision in this case adverse to the NJSIAA would open the floodgates to a torrent of litigation. The Court in the Kentucky case disagreed with that argument at page 188 of the decision. The Court concluded that officials of the Kentucky High School Athletic Association are necessarily vested with substantial discretion in the administration of the interscholastic athletic programs within the State of Kentucky. The Court would not interfere with the exercise of that discretionary power in the absence of a showing that the Association acted arbitrarily or denied the affected parties an opportunity to be heard. The Court went on to indicate that the record in that appeal failed to establish that any proceeding before the Association provided a reasonable basis for declaring the student ineligible.

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The Court went on to indicate that "in fact, the record reflects that there was no exercise of discretion" (at p. 188).

Therefore, argues petitioner, from the facts of this case, along with the facts of the Kentucky Athletic Association case, it can be seen that where the Association exercises no discretion in coming to their decision, and its decision is one that is arbitrary and unreasonable, that a court could substitute its judgment and interpretation of Bylaws for an Association such as the NJSIAA.

The controlling factor in this case, asserts petitioner, is that for the past 19 years the NJSIAA has uniformly imposed the penalty of forfeiture of games based on an ineligibility without taking into account the facts and circumstances of the eligibility question or the different penalties that could have been imposed. This constitutes an arbitrary, capricious and unjust result. Under these circumstances in accordance with the Kentucky High School case, the court can and should substitute its judgment which would not be an unreasonable interference with the internal affairs of the NJSIAA in awarding the Oakcrest High School football team their championship that was earned on the field and providing for another penalty that would punish the people who were responsible for the eligibility problem, namely, the school administration.

Respondent Association, in reliance upon the Kentucky High School case, observes that the Court overturned a ruling by the Kentucky High School Athletic Association declaring the student ineligible merely because he transferred from one school to another with his mother, who had remarried. The court found that the transfer was totally involuntary and there was absolutely no justification whatsoever for the ruling of ineligibility. However, at 569 S.W.2d 198, the court noted that a state statute had been introduced in Kentucky Legislature (similar to N.J.S.A. 18A:11-3), and that if a due process hearing was afforded under that statute, then the "role of the courts will be extremely limited in matters involving interscholastic athletics." In the face of these two decisions, (Kentucky High School and Snow v. New Hampshire, supra.) the overwhelming majority of our courts have ruled that the participation in athletics is not a property right of constitutional dimension.

The Association also relies upon the decision of the Commonwealth Court of Pennsylvania in Adamek v. PA Interscholastic Athletic Association, 426 A.2d 1206 (Com. Ct. 1981). In that case, the Pennsylvania court cited 30 separate decisions from various

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courts and federal circuits throughout the country which found that there was not property right in participating in interscholastic sports, See F/N 1, at 462 A.2d 1207. The facts in Adamek are identical to those in this case. There, the Pennsylvania Court upheld a decision by the Pennsylvania Interscholastic Athletic Association (PIAA) forfeiting three football games in which a school allowed an ineligible player to participate. The Court noted that the player "did not contribute in any effective manner to the victory of each game" and that forfeiture "would have the effect of eliminating the football team from play off competition" supra, at 1207.

Respondent observes that what the petitioner really seeks is to have the Commissioner of Education rule that Oakcrest High School should not forfeit four football games in which it allowed an ineligible player to participate in gross violation of the eligibility standards of the NJSIAA. As noted in the decisions of the Commissioner and Administrative Law Judge Weiss in Bd. of Ed. of the Northern Highlands Reg. H.S. Dist. v. NJSIAA, 1982 S.L.D. _____ (Nov. 18, 1982), and Bd. of Ed. of the Twp. of Old Bridge v. NJSIAA, 1972 S.L.D. _____ (Order Oct. 21, 1982), it has been held that neither the Commissioner nor the courts should substitute their judgment for that of the NJSIAA in imposing penalties, and that the standard of review is confined to determine whether there was substantial evidence in the record to support the penalty, notwithstanding the fact that the Commissioner or the reviewing forum might have reached a different decision. In essence, the petitioner seeks this unwarranted intrusion into the internal affairs of the NJSIAA. Respondent submits that the Commissioner not only should not but legally cannot interfere with this determination.

III

Petitioner asserts that the decision of the Association to impose the penalty upon Oakcrest should be voided since it did not base its decision upon findings of fact, nor did it give reasons for the decision of forfeiture of football games won by Oakcrest.

The Board argues that the decision of the NJSIAA in this case was based simply upon receiving documents from the Oakcrest High School Principal through the mail and a formal or informal appearance, depending upon the interpretation of Mr. Kanaby's testimony, by the NJSIAA (Mr. Kanaby's testimony of 3/17/83). When the Oakcrest High School appeared before the NJSIAA the only discussion that was had before

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a vote was taken was a statement by Dr. Houston, a member of the Executive Committee, that the point made by Oakcrest was well-taken in that the punishment that is imposed in these cases tends to impact the wrong people. (See J-1, NJSIAA transcript at p. 117.) This was followed by a statement from Mrs. Fitchett, a member of the Executive Committee, where she found it difficult to accept the administrative error because there were no grades on the transcript in 1981-82. (See NJSIAA transcript at p. 118 J-1.) Subsequently, there was an off-the-record discussion held where a vote was taken without any other reasons given for the Association's action.

The Board asserts that the letter from the Executive Director of the NJSIAA, Robert Kanaby, dated November 24, 1982, (P-4 in evidence) similarly indicates that:

> The executive committee at their meeting of November 15, 1982, after hearing all testimony relevant to the appeal of forfeited games for use of an ineligible player, denied your request for a waiver of that procedure. Therefore, all games in which the ineligible player participated must be forfeited to the opponents.
>
> Please inform those schools accordingly, and forward a copy of such correspondence to this office.
>
> Thank you for your cooperation and understanding in this matter.

The Board asserts that it can be seen that at no time in the deliberations of the NJSIAA or in its letter to the Oakcrest High School did the Association outline its reasons for giving the uniform penalty of forfeiture based on the facts and circumstances of this case rather than perhaps fining the school as provided for in the Bylaws, Article 10.

Petitioner observes that in Duffley v. New Hampshire Interscholastic Athletic Association, Inc., supra, the Supreme Court of the State of New Hampshire held that interscholastic athletics are an integral and important element of the educational process in the State of New Hampshire and that the right of a student to participate in interscholastic athletics is one that is entitled to the protections of procedural due process under the State Constitution as well as the United States Constitution. The Court went on to further indicate that the minimum procedures required in the context of this case were a notice and an opportunity to be heard. The reasoning of the Supreme Court of New Hampshire was that the Court wanted to make sure that the facts upon which the (NHIAA) relied upon in denying the plaintiff in this case an additional semester of

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basketball eligibility, were correctly arrived at and that its decision was otherwise reasonable. Duffley, supra at 467. The Court concluded that due process was required in addition to the traditional requirements of notice and hearing; for the NHIAA specifically referring to its rules should have made findings of fact based upon evidence properly before it to support its decision. See Wheeler v. State, 115 N.H. p. 335.

Petitioner argues that the New Hampshire Athletic Association did not give its reasons or facts based upon evidence before deciding the eligibility question, the Court, therefore, held that the plaintiff's rights to procedural due process were violated. It should be noted that in the Duffley case, the first time the plaintiff learned of the facts and circumstances surrounding the eligibility decision was at the time the plaintiff received the defendant's answers to interrogatories, which happened to be on the day before the hearing on the merits in the Superior Court. At this time he learned that the reason he was denied his second semester of eligibility was that the NHIAA did not believe the medical evidence he had offered in support of his request for eligibility. The Court in the Duffley case remanded the matter to the Superior Court for dispositon consistent with the opinion that the plaintiff was denied his procedural due process.

The Board argues that in the case before this court, it is uncontroverted and has not been shown in any way, shape or form that the NJSIAA gave reasons, conclusions or facts upon which they can justify the uniform penalty of forfeiture on the Oakcrest High School football team for an administrative oversight. As had been testified to by the Superintendent, perhaps the more appropriate penalty in this case would have been a substantial and heavy fine placed upon the school district, which is provided for under Article 10, Section 8 of the Bylaws (J-7). However, since the NJSIAA has always imposed the uniform penalty of forfeiture, it has shown in a very clear sense that the petitioner's procedural due process was denied and that the action of the NJSIAA should be voided and that Oakcrest High School should be awarded their conference championship.

The Association refutes petitioner's contention that the "only discussion" before the Executive Committee's vote to penalize Oakcrest was a statement by the Executive Director, which in itself was misportrayed, and a comment by Mrs. Fitchard concerning administrative errors. A review of the transcript shows that that was simply not the case. There was an extensive presentation by counsel for Oakcrest and a prolonged exchange of questions and answers before the Executive Committee. This colloquy included questions of member Mr. King concerning the nature of the eligibility

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violation; a lengthy presentation by the Principal of the school; questions of member Mr. Clements about the nature of the inquiry undertaken by Oakcrest; and a question from member Mr. Panciello about the review that had to be given to the transcript and the comments of the Executive Director. (See Ex. J-1.) Further, the Executive Director testified at the Administrative Law hearing on March 17 about the legal guidance that was provided by the NJSIAA attorney and the fact that he did indeed believe that the decision made was a correct one, which had been universally applied and known to NJSIAA member schools (Tr. 3/17/83 p. 27-7 to 14).

Thus, respondent asserts, to argue that the November 15 Executive Committee meeting was cursory is squarely belied by the official transcript of that proceeding.

The Association rebuts petitioner's contention that "it is uncontroverted and has not been shown in any way, shape or form that the NJSIAA gave reasons, conclusions or facts upon which they can justify the uniform penalty of forfeiture. . . ." Instead, the petitioner argues that a fine of $5,000 would be a more appropriate penalty (Tr. 3/11/83, 49-11 to 50-6). During both days of the hearing, the Executive Director provided extensive reasons why forfeiture and not a fine would be and is the most appropriate penalty. It prevents a school from benefiting by violating the rules; it is more appropriate than the imposition of fines in that public funds are not utilized and would not allow a more wealthy district to "buy its way out" of a violation, as opposed to a poorer district; and it is a sufficient deterrent so that schools will carry out their responsibilities for making certain that there is compliance with the eligibility standards of the Association (Tr. 3/11/83, 121-3 to 123-3).

IV

Petitioner argues that it was denied meaningful due process as a result of the Executive Director imposing the penalty of forfeiture before the Executive Committee had given consideration of a penalty, in accordance with the Association's Bylaws, Article 10. Petitioner asserts that it is undisputed from the testimony in this case that the Executive Director, Robert Kanaby, imposed a penalty of forfeiture of football games prior to any appearance by the petitioner before the Executive Committee on November 15, 1982. As such, even though Article 10 of the Bylaws indicates that penalties shall be assessed by the Executive Committee, the Executive Director predetermined the penalty

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to be imposed in this case. Therefore, even though the petitioner was given an opportunity to appear before the Executive Committee in a formal or informal nature, the predisposition and imposition of penalty by the executive director put the Executive Committee in the untenable position of overruling their Executive Director in regard to the penalty. As can be seen from the testimony and the 17 separate eligibility cases over the last three years, the uniform penalty of forfeiture has always been upheld by the Executive Committee.

Petitioner argues that the NJSIAA violated its Bylaws in that the Executive Director exceeded his authority in imposing the penalty of forfeiture; therefore, the procedural due process rights of the petitioner were violated in that even though it was given an opportunity to appear before the Executive Committee, it went into the Executive Committee asking them to overturn a decision already made that should not have been made.

Petitioner notes that from comments of the Executive Director during the Executive Committee's deliberations, (J-1, p. 118) there were some concerns about the wrong people being punished by the penalty imposed. If, on the other hand, the Bylaws of the NJSIAA were followed and only the initial determination that the student was ineligible was determined, and the penalty was imposed by the Executive Committee, the petitioner's comments would have had much more meaning and validity to the Executive Committee. However, since the Executive Director went beyond his authority in assessing the penalty in accordance with his determination of being able to do so under the authority of Article 1, Section 3(n) under interpretations, the petitioner was put in a precarious position of asking the Executive Committee to overturn a decision made by their Executive Director. Furthermore, petitioner points out that Webster's Dictionary defines interpretation as "to translate or explain," and the Executive Director had no authority to impose a penalty under the aforementioned Bylaw or any other Bylaw. Because of the violation of its own Bylaws and of procedural due process of the petitioner, the decision of the Executive Committee should be overturned and Oakcrest High School should be awarded their conference championship.

The Association denies petitioner's allegations that petitioner was denied meaningful due process, asserting that within one week of being notified by Oakcrest that it had utilized an ineligible student, the Executive Director reviewed all of the pertinent materials and made an initial interpretation of the Constitution and Bylaws, and the rules

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governing forfeiture, consistent with Article I, Section 3-N of the Bylaws. The petitioner was advised that the matter would be reviewed by the Executive Committee on November 15, 1982, pursuant to that Bylaws provision. Thereafter, a hearing was held pursuant to Article XIII of the Bylaws, at which time all of the materials submitted by the petitioner were carefully reviewed by the decision-makers, and full argument was presented by the petitioner's counsel. Finally, after this deliberative process was completed, there was a vote made to impose the penalty of forfeiture of the four games that Oakcrest won, consistent with the powers of the Executive Committee granted by Article X of the Bylaws.

V

Petitioner asserts that a review of the totality of the facts and circumstances in this matter would suggest that petitioner was denied a meaningful due process procedure and, as such, the decision of the Association should be reversed. Petitioner argues that by an examination of the Association's transcript (J-1 in evidence, pp. 117 through 118) it can seen that the actual motion made by a member of the NJSIAA was that the Oakcrest appeal be denied and that "the games they have lost [be] forfeited." Because of the summary treatment in which this matter was given before the Executive Committee and the fact that during arguments, many NJSIAA members were not paying attention (testimony of James Finnagan on 3/11/83), we can see that some 40 members did not pick up the fact that the motion that was voted upon and passed provided for forfeiture of the game lost only. Therefore, the records of the NJSIAA meeting of November 15, 1982, show that the Body's action was in reality misstated in the Executive Director's letter to Oakcrest High School, subsequent to the Executive Committee meeting (P-4 in evidence). Therefore, the petitioner asserts that the NJSIAA should be ordered to take corrective action to show that Oakcrest High School had a record of eight wins and one forfeiture in accordance with the motion that was voted upon and even discussed by the Executive Committee on November 15, 1982.

Furthermore, the petitioner argues that the comments of the Executive Director, where he indicated that it was a welltaken point that the punishment given out in these cases impacts the wrong people, after which time there was a conference held off-the-record, suggests that the NJSIAA decided to go behind doors or cut off any further discussion of the penalty to be imposed. This, coupled with the Executive

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Director's testimony of March 17, 1983, in regard to the off-the-record discussions that dealt with past cases, would indicate in a direct manner that the off-the-record discussion may very well have dealt with following past performance in this case, which would show that the petitioner was denied meaningful due process in not giving reasons or facts surrounding the decision of the NJSIAA contrary to the Duffley case cited hereinbefore.

Petitioner contends that when examining the totality of the circumstances in this case, even assuming arguendo that there was a time factor involved, one can readily see that the petitioner was denied a meaningful due process and that the decision of the NJSIAA was arbitrary, capricious and unreasonable. As such, the decision of the NJSIAA should be reversed, and the Oakcrest High School football team should be awarded its conference championship that was earned on the field. The fact that the Oakcrest High School football team was not allowed to participate in the state tournament is now a moot issue and sufficient punishment; however, justice under the facts and circumstances of this case warrant the awarding of the conference championship to Oakcrest High School.

DISCUSSION

The facts adduced at hearing clearly demonstrate that the Board of Education of the Greater Egg Harbor Regional High School District, in behalf of its Oakcrest High School, is a member of the NJSIAA. As such, the Board, its faculty and pupils are governed by the rules and regulations of the Association and further "said rules and regulations shall be deemed the policy of the Board . . . " N.J.S.A. 18A:11-3. It is further evident that the Board's agents violated its own policy and the rules and regulations of the Association by allowing and permitting an ineligible pupil to participate in its interscholastic athletic programs. The Board admits that it violated its own policies and the rules and regulations of the Association but avers that it was a mistake, an oversight. This averment was made despite the Principal's admission that he had, in fact, falsified a sworn affidavit attesting to the truth of his personally having ascertained that all pupils engaged in the school's athletic program were qualified and eligible to participate (R-2). While the Board attempts to minimize this aspect of the matter by suggesting that the Principal's actions were inadvertent and unintentional, this court views it otherwise. The Association Bylaws clearly place the responsibility for the observance of the eligibility

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rules squarely upon the Principal (Art. V. § 4-B; J-7 at 32). It was the Principal's dereliction of duty which placed the Oakcrest football program in jeopardy. This is supported by the evidence, wherein the Principal executed an affidavit that he had personally examined the eligibility requirements of all pupils and was satisfied that each and every pupil had met the requirements when, in fact and in truth, he not done so. His excuse that he delegated the observance of the eligibility rules to his subordinates is unsatisfactory and in no manner mitigates his breach of the policy, rules and regulations. The ultimate responsibility was his, and he not only failed to perform but, moreover, falsified to the fact that he had performed as required. Any penalty imposed upon his school, faculty, pupils and community rests squarely upon the Principal for his lack of diligence and honest dealing.

It is without doubt that the Board, through its agents, violated its own policies, rules and regulations of the Association. It contests, however, the penalty of forfeiture of football games won while permitting one ineligible pupil to participate. It contends that it has standing to bring the herein action against the Association by virtue of the Association's actions constituting state action and subject to the limitations of the due process guarantees of the Fourtenth Amendment of the Federal Cons itution. Petitioner cites Duffley v. New Hampshire Interscholastic Athletic Association, supra, where the New Hampshire Supreme Court held that the activities of interscholastic athletic associations or similar organizations constituted state or governmental action within the meaning of the due process clause of the United States Constitution. Id. 466. This court observes that other jurisdictions have similarly held. Kelly v. Metropolitan County Bd. of Ed. of Nashville and Davidson County, Tenn. 293 F. Supp. 485 (D.C. Tenn. 1968); St. Augustine High School v. Louisiana High School Athletic Ass'n, 270 F. Supp. 767 (D.C. La. 1967), aff'd 396 F. 2d. 224.

It is further noted by this court that our State Legislature has granted statutory authority for local boards of education to join such associations (N.J.S.A. 18A:11-3) and also provided the Commissioner of Education with oversight to disapprove of amendments to the association's charter, constitution, bylaws, rules or regulations which are contrary to the public interest or the intent of the Legislature (N.J.S.A. 18A:11-4, N.J.S.A. 18A:11-5). Thus, it is apparent that the activities of the NJSIAA in sponsoring, administering, regulating and supervising interscholastic athletics in New Jersey constitute state action within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution.

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A threshold issue in this matter is whether participation in interscholastic sports activities is a property right which each pupil enjoys and, concomitantly, whether the penalty imposed by NJSIAA is a deprivation of that property right in contravention of procedural due process. As noted by the parties herein, the attachment of a protected property right to participation in high school athletic programs by the courts is mixed and varied with the majority of the jurisdictions rejecting the notion that such participation is a property right. In Adamek v. Pa. Interscholastic Athletic Ass'n, supra, f.n. at p. 1207, the Commonwealth Court of Pennsylvania provides a list of some 30 cases noting such rejection. That court observed that one jurisdiction recognized the general rule that participation did not give rise to a property right; however, it suggested that total exclusion from participation in sports for a lengthy period of time might give rise to a due process claim. Pegram v. Nelson, 469 F. Supp. 1134 (M.D.N.C. 1979). Other courts have avoided the property interest/due process issue by holding that the individual pupil or student had been afforded due process. Howard Univ. v. NCAA, 510 F. 2d 213 (D.C. Cir. 1975); Davis v. Central Dauphin School Dist. School Bd., 466 F. Supp. 1259 (M.D. Pa. 1979).

In those jurisdictions representing the minority view that participation in athletics is a property right giving rise to due process protection, the analysis and determination has been made on a variety of grounds, including, among others, evidence of racial discrimination; statutory and regulatory provisions; and present and future educational and economic benefits which may accrue to the participating pupil. Kelly v. Metropolitan County Bd. of Ed. of Nashville, supra; St. Augustine High School v. Louisiana, supra, Duffley, supra.

The standards for procedural due process guaranteeing hearing rights to those engaged in a variety of relations with government have been set forth by the United States Supreme Court in the matters of Goldberg v. Kelly, 397 U.S. 254 (1970), 25 L. Ed. 2d 287; Bell v. Burson, 402 U.S. 535 (1971), 29 L. Ed. 2d. 90; Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d. 548 (1972). The Court in Roth stated that: "To have a property interest in a benefit, (protected by procedural due process) a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it" Id. at 501. The Court observed that property interests are not created by the Constitution

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but rather "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" Id. at 561.

The determination herein that pupils have a protected property interest in interscholastic athletics is grounded, in part, upon the statutory provisions cited hereinbefore and the regulatory pronouncements by the New Jersey State Board of Education at N.J.A.C. 6:4-1.5(f) 1 and 2; N.J.A.C. 6:8-3.5(a) 2 and 9; and, N.J.A.C. 6:11-3.12. Specifically, the regulations each provide are as follows:

> N.J.A.C. 6:4-1.5
>
> (f) The athletic program, including but not limited to intramural, extramural, and inter-scholastic sports, shall be available on an equal basis to all students regardless of race, color, creed, religion, sex, ancestry, national origin or social or economic status. The athletic program as a whole shall be planned to insure that there are sufficient activities so that the program does not deny the participation of large numbers of students of either sex.
>
> 1. The activities comprising such athletic program shall receive equitable treatment, including but not limited to staff salaries, purchase and maintenance of equipment, quality and availability of facilities, scheduling of practice and game time, length of season and all other related areas or matters.
>
> 2. A school may choose to operate separate teams for the two sexes in one or more sports and/or single teams open competitively to members of both sexes, so long as the athletic program as a whole provides equal opportunities for students of both sexes to participate in sports at comparable levels of difficulty and competency.
>
> N.J.A.C. 6:8-3.5
>
> (a) The educational program (curriculum) for each district and school shall be developed in consultation with the teaching staff members, under the direction of the chief school administrator, shall be adopted annually by each district board of education and shall:
>
> . . . .
>
> 2. Develop individual talents and interests and serve diverse learning styles to motivate pupil achievement;

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. . . .

9. Provide all pupils equal educational opportunity, pursuant to law and regulation;

and,

N.J.A.C. 6:11-3.12 Athletic Coaches

(a) No person not certified as a teacher and not in the employ of a board of education shall be permitted to organize public school pupils during school time or during any recess in the school day for puposes of instruction; or coaching or for conducting games, events or contests in physical education or athletics.

(b) Every person appointed subsequent to June 1, 1960, to coach, teach, or train individual pupils or school teams for interschool athletic competition shall be a certificated member of a school faculty in that same school district and shall be employed full time during the regular school day when classes are in session. He/she shall be officially designated by the district board of education for the duties for which he/she is to be held responsible, except as expressly provided in subsections (c), (d) and (e) or this section.

(c) School districts shall be permitted to employ certified, full-time employees of their constituent or sending districts, or of a vocational school within the same county as designated by N.J.S.A. 18A:54-11, to work on a part-time basis in the interscholastic program, providing the superintendent of schools of the receiving district certifies as emergency exists to the county superintendent, upon whose approval the individual may be employed for one year.

(d) School districts shall be permitted to employ certified and qualified, full-time teaching staff members of other New Jersey school districts to work on a part-time basis in the co-curricular interscholastic athletic program, provided that:

1. The employing district can demonstrate annually to the county superintendent that an emergency situation exists;

2. The part-time position has been properly advertised within the district;

3. Both local boards of education are in agreement regarding such part-time employment;

4. Approval of the count superintendent shall be obtained prior to such employment by the local board of education.

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(e) In addition, school districts shall also be permitted to employ holders of New Jersey certification not presently employed in a school district, provided that:

1. The employing district can demonstrate annually to the county superintendent that an emergency situation exists;

2. The the part-time position has been properly advertised within the district;

3. The district superintendent will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport which he/she will coach;

4. Approval of the county superintendent shall be obtained prior to such employment by the local board of education.

Thus, it is apparent that interscholastic athletics is extant as an integral and important element of the educational process in this state. It is equally apparent, based upon the State Board of Education's rules and regulations, that the right to participate in interscholastic sports programs rises above that of a mere privilege.

Having so concluded, the issue to be considered at this juncture is what procedures are due. The Supreme Court in Bell v. Burson, at 29 L. Ed. 2d. p. 96, set forth the minimum requirements for the hearing required by the Due Process Clause as "meaningful" and with "notice and opportunity for hearing appropriate to the nature of the case" Armstrong v. Manzo, 14 L. Ed. 2d. 62, 66. Also, the requirements of due process vary with the interests and circumstances involved in a particular matter, Kelly v. Metropolitan County Bd. of Ed. of Nashville, supra, and, further, whether the NJSIAA must adopt and follow the formal rules required in a judicial proceeding.

In the context of this case, the Association's bylaws, at Article XIII, provides for a hearing procedure (J-7 at 42-44), which are characterized as (a) informal or (b) formal, with all disputes and controversies subject to review by its Executive Committee (Art. XIII, s 3). The Association's bylaws provide options for its Executive Committee to make determination of controversies and disputes arising before it as to whether:

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(a) It will summarily decide the matter based on the information filed with it.

(b) Whether it will designate a hearing officer or a panel of the Executive Committee to hear the matter.

(c) Whether the entire Executive Committee will hear the matter.

(d) Whether the matter shall be referred to a Conference for action. [J-7 at 44]

In the instant matter, and due to the time constraints upon the Association, the entire Executive Committee heard petitioner's appeal as to the penalty imposed by the Association's Executive Director. The Board complains that the hearing before the Executive Committee was not "meaningful" because of the Executive Director's unilateral predisposition of imposing a penalty of forefeiture; the uniform and consistent penalty of forfeiture for eligibility violations as applied by the Association; the Executive Committee failed to base its decision of forfeiture on findings of fact; the Executive Committee failed to give petitioner reasons for its decision of forfeiture; and, the inattentiveness of the Executive Committee members during the proceedings at which the Board set forth its case. The Board argues that the penalty imposed was arbitrary, capricious and unreasonable.

The Association counters the Board's arguments and assertions by declaring that its appearance before the Executive Committee was informal at which an adversary "trial type" hearing was not required. The Association asserts that the Board was put on notice of the penalty of forfeiture, with the opportunity to appear before its Executive Committee on appeal. The Board failed to request a formal hearing in a timely manner, therefore, an informal appearance before the Executive Committee was had.

Our Supreme Court has addressed this issue in several cases, Cunningham v. Dept. of Civil Service, 69 N.J. 13 (1975), being one of its more recent decisions. It makes the distinction between the right to a hearing where the proposed action will affect the rights, duties, powers or privileges of, and is directed at, a specific person and when a

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hearing is not required when an agency's action constituted "purely a legislative function." Id. at pp. 19-20. Where the agency's function is quasi-judicial, a hearing is required and the agency is obligated to consider the evidence and apply the law to the facts as found. Id. at p. 21. The Court continued, at page 22, and stated:

> The crucial questions are whether the fact finding involves a certain person or persons whose rights will be directly affected, and whether the subject matter at issue is susceptible to the receipt of evidence. The nature of the factual inquiries may be dispositive or assist in the disposition of the issue. A question posed in terms of general policy may clearly fall in the "no hearing" category. Facts involved in resolution of a question of that type have sometimes been designated as legislative. Professor Davis distinguishes adjudicative and legislative facts in this matter:
> *** Adjudicative facts are facts about the parties and their activities, businesses, and properties, usually answering the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion. "The Requirement of a Trial-Type Hearing," 70 Harv. L. Rev. 193, 199 (1965).

Thus, it is found that the Association herein was functioning in a quasi-judicial capacity rather than in a "purely legislative function," when the Board appeared before it to present its evidence in opposition to the penalty of forfeiture. It is apparent that the actions of the Executive Committee were more ministerial than judicial in affirming the Executive Director's predisposed forfeiture penalty. Notwithstanding the uncontroverted fact that the Board, through its agents, was culpable of the violation of rules and regulations; the Executive Committee had the obligation to sift and weigh the facts before it, to consider the alternative penalties available to it, and to make its determination as to the appropriateness of the penalty imposed. The Executive Committee has the further obligation of giving its reasons for the penalty imposed to the party breaching the rules and regulations.

CONCLUSIONS

Based upon the facts adduced at hearing together with the arguments of counsel, I **CONCLUDE** that under the circumstances, the penalty of forfeiture of games won by the Oakcrest High School as imposed by NJSIAA must stand and not be disturbed.

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This is grounded upon the factual finding that the Board's agents were derelict in their duties and obligations to permit an ineligible pupil to participate in its interscholastic athletic program and subsequently falsify an affidavit attesting to the eligibility of the ineligible pupil. In addition, the penalty of forfeiture had been uniformly assessed against member schools capable of committing such similar infractions and was well-known to petitioner and other members of the Association.

Notwithstanding the exposition of the issues herein, I do not conclude that the Association's actions were arbitrary or capricious, under the circumstances set forth hereinbefore. The Association may, however, wish to consider and entertain a more substantial due process procedure pursuant to its quasi-judicial function, to avoid or, at least, minimize future de novo litigation in similar or like matters.

There being no relief to be afforded, I **CONCLUDE** that the Egg Harbor Regional Board of Education's Petition of Appeal is without merit and is hereby **DISMISSED.**

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

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OAL DKT. NO. EDU 88-83

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

28 June 1983
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

1/28/83
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 30, 1983
DATE

Ronald L. Rukenstein
OFFICE OF ADMINISTRATIVE LAW

j/ee

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EXHIBITS

Joint Exhibits:

J-1 Transcript of proceedings, Executive Committee Meeting. In the Matter of NJSIAA, November 15, 1982 (Attached to respondent's brief)

J-2 Letter, dated October 2, 1982, to NJSIAA from John W. Harmon (Attached to respondent's brief)

J-3 Letter, dated November 5, 1982 to NJSIAA from John W. Harmon

J-4 Transcript - Lawrence North H.S., Marion County, Indiana (3 pgs.)

J-5 Transcript - Lawrence North H.S., Marion County, Indiana

J-6 Letter, dated November 9, 1982, to Johnson W. Harmon from Robert Kanaby, Exec. Director NJSIAA

J-7 NJSIAA Constitution, Bylaws and Rules and Regulations/

For the Respondent:

R-1 1981/82 School Year - Penalties Imposed

R-2 Affidavit signed Johnson Harmon September 29, 1982, Membership Resolution attached

R-3 Mailgram, dated November 11, 1982 - Date stamped "received November 15, 1982."

R-4 Letter from Mr. Growney to Mr. Zampello, dated November 21, 1978

R-5 Report of the Athletic Policy Review Committee, dated April 25, 1979

R-6 Letter, dated November 21, 1980, Madison Public Schools to Robert F. Kanaby

Petitioner's Exhibits:

P-1 Mailgram, dated November 11, 1982, 0438 p.m. EST

P-2 Oakcrest Tribune, March 1983

P-3 Letter, dated November 22, 1982 to Mr. Robert Ponsett, from Richard P. Saxer

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P-4 Letter, dated November 24, 1982, to John E. Dugan from Robert Kanaby

P-5 Original Interrogatories (13 questions and answers)

P-6 Supplemental Interrogatories (five questions and answers)

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THE BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTER-SCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board filed primary exceptions to the initial decision by Judge Law in which objection is raised to the term "falsified" being used in reference to an affidavit filed by the Oakcrest High School Principal. The Board, relying on Kentucky High School Athletic Association, supra, argues that intervention should be made in this case to impose an alternative remedy to that of forfeiture of games won by Oakcrest High School. The Board contends that Judge Law erred by his suggestion that the Association might wish to consider a more substantial due process procedure to minimize future de novo litigation and that such error warrants reversal of the entire decision by the Commissioner who should substitute an alternative penalty. NJSIAA in reply exceptions refutes those filed by the Board and affirms the initial decision. The Commissioner finds merit in the Association's arguments.

An inspection of the record herein including the testimony of witnesses, the documents submitted in evidence and the arguments of law advanced by the parties, convinces the Commissioner that the judge's determination herein is a proper one. The Commissioner attributes no relevance to the Board's "objection" to the use by the judge of the term "falsification" as applied to an improper affidavit filed by the high school principal. No criminal motives are attributed to the principal. Nor, in the opinion of the Commissioner, does such terminology affect the validity of the initial decision. No argument advanced herein leads the Commissioner to conclude that he should set aside the penalty of the forfeiture of games herein set down

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for one of monetary retribution. The Commissioner finds the penalty of game forfeiture entirely appropriate as spelled out in the Bylaws of NJSIAA and used consistently over the years in like circumstances. The Commissioner so holds.

The Commissioner is constrained to observe that, whereas compliance with eligibility standards is accomplished by voluntary assent, participating members must exercise every caution that eligibility standards are determined on a fully accurate basis.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

AUGUST 12, 1983

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7601-81
AGENCY DKT. NO. 403-10/81A

DOMINICK DE CESARE,
Petitioner

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF NORTH BERGEN,
HUDSON COUNTY,
Respondent

APPEARANCES:
Louis P. Bucceri, Esq., for petitioner
(Bucceri and Pincus, attorneys)

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

Record Closed: June 2, 1983 Decided: June 29, 1983

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

Dominick DeCesare, a tenured teaching staff member who undertook a language department chairpersonship in 1964, who was certified as supervisor (N.J.A.C. 6:11-9.1 et seq. and N.J.A.C. 6:11-10.1 et seq.) in 1977, and who served as both teacher and language department chairperson until 1981 when the Board of Education of the Township of North

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Bergen, Hudson County, terminated his chairpersonship and for 1981-82 appointed another without tenure or seniority in the position, alleged such action abridged tenure and seniority rights he had acquired under and by virtue of his certification and all his years of service, contrary to N.J.S.A. 18A:28-5, 6. Petitioner sought reinstatement and back pay. The Board denied impropriety, contending (1) chairperson tenure accrual in petitioner's case did not commence until less than 2 years before his termination as chairperson, that is, in October 1979 when the then new title department chairperson/supervisor, which required supervisor's certification, was adopted by the Board; and (2) contending, as a consequence, that petitioner was not tenured under criteria in N.J.S.A. 18A:28-6(b) or (c).

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on October 5, 1981. The Board's answer was filed there on October 22, 1981. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on November 2, 1981 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On notice to the parties, prehearing conference was set down in the Office of Administrative Law on April 1, 1982 but was adjourned because of illness of the Board's attorney. Thereafter, the matter was set down for prehearing conference on June 15, 1982 and a prehearing order entered establishing inter alia, hearing date for September 24, 1982. That hearing date was adjourned with consent of the parties because of a change in attorneys for the Board. A continued hearing date for November 15, 1982 was adjourned at request and/or with consent of the parties for completion of discovery. A continued hearing date for February 7, 1983 was adjourned because of snow. The matter was finally heard on the continued date of April 26, 1983. Post-hearing memoranda of law and proposed findings of fact having been filed by the parties on June 2, 1983, the record closed then.

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ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The Board admitted paragraphs 1 through 8 of the petition of appeal, which are adopted herein as findings of fact as follows:

1. Petitioner was initially employed by respondent as a teacher of Russian and history in 1962.

2. Commencing in 1964 petitioner was appointed by respondent to the position of chairperson of its high school language department, in addition to performing teaching duties on a reduced basis.

3. Petitioner was certified as a supervisor in May 1977 in addition to his previously obtained teaching certifications.

4. Respondent duly adopted a job description for the position of department chairperson (see J-7 and P-6), which assigned performance of supervisory duties, including, but not limited to, teacher observation, to individuals, such as petitioner, who hold such positions. Date of adoption was November 15, 1979.

5. Petitioner served continuously in the position of language department chairperson from 1964 through June 30, 1981, and performed supervisory duties including, but not limited to, teacher observation.

6. Respondent adopted a resolution on July 28, 1981, assigning Guillermo Ayerbe as high school language department chairperson in place of petitioner.

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7. Petitioner has never received formal written notification as to respondent's decision. (see finding no. 6 herein below)

8. Guillermo Ayerbe has no tenure or seniority in the position of department chairperson/supervisor.

Petitioner submitted proposed findings of fact at conclusion of hearing herein, which I shall hereby adopt as further findings of fact herein:

1. Dominick DeCesare (petitioner) was initially hired by the Board of Education of North Bergen as a teaching staff member effective September, 1962. (T-7)*

2. At the time of hiring petitioner was certified as a teacher of Social Studies and as a teacher of Russian. (T-13)

3. During his first year petitioner taught 5 classes within the scope of his certificates. (T-7)(T-82-83)

4. Beginning in 1963-64 petitioner was assigned as foreign laguage department chairperson at the respondent's high school. His class load was reduced to two teaching periods due to this assignment. (T-7)(T-21) The Board did not require or request that he obtain a supervisory certificate at that time. (T-18)

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* The transcript reference T-7 means transcript of the hearing of April 26, 1983 at Page 7. T-7/3-6 refers to Page 7, lines 3-6. T-82-83 means transcript pages 82 through 83.

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5. From 1963-64 through June, 1981 and since September, 1982, petitioner has served as foreign language department chairperson with Board authorized duties as follows:

   a. Primary responsibility for the observation and evaluation of teachers. (P-8)(T-28-29)(T-47)(T-48)(T-49)(118)(T-95)(T-99)(T-104-105)(P-10)

   b. Recommendations regarding termination, transfer and hiring of teachers, including the conducting of employee interviews. (T-28)(T-30)(T-33)(T-34-35)(T-118-119)(T-119-120)(T-121)(T-95)(P-8)(P-9)

   c. The screening of new employees to the extent that an applicant rejected by petitioner would not be given further consideration by other administrators or the Board. (T-33-34)(P-9)

   d. Recommendations to the Superintendent and, at times, members of the Board personnel committee, at meetings held each Spring, regarding the rehiring or termination of teachers who were on the verge of attaining tenure. (T-29)(T-30)(T-31)(T-96)(T-98)(T-99)

   e. Submission of written evaluation and observation reports for use by the principal, Superintendent and members of the Board of Education. (T-32)(T-119-121)(T-95)(T-96)

   f. Attendance at weekly or more frequent meetings with the high school principal to discuss problems and concerns regarding the administration of the district. (T-35-36)

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g. Responsibility for all departmental equipment, departmental library resources and chairperson's personal office. (T-36-37)(P-10)

h. Initial administrative contact with student discipline problems prior to contact with Vice Principal or other administrators, if such further contact is necessary. (T-37)

i. Constant overseeing of physical plant and facilities for department with responsibility for reporting problems to higher authority. (T-38)(T-73-74)(T-111)(T-95)(P-10)(P-14)

j. Assigning teachers to respective classes based on number of students and relative abilities of teachers. (T-38-39)(T-72)(T-111-112)(T-122)(P-8)(P-11)

k. Grouping of students according to abilities and interests for class assignments. (T-39)(T-122)

l. Creation and updating of curriculum. (T-39-40)(T-48)(T-79-81)(P-17)

m. Motivational programs to attract students to the study of language. (T-40)

n. Conducting regular teaching staff meetings on all areas of departmental business and functioning. (T-41)(P-10)

o. Keeping abreast of new developments in language education, informing staff of new developments and serving as a resource person for teachers. (T-40-41)

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p. Community involvement including work with the local parent-teacher-student associations. (T-42-43)

q. Preparation of proposed budget and staff requirements and proposed allocation of funds among departmental budget areas. (T-43-44)(T-49-50)(T-109)(T-95)(T-98)(P-8)

r. Ordering and recommendations on the selection of text books, equipment and supplies. (T-44)(T-54-55)(T-112)(T-95-97)

s. Distribution and iventory of supplies. (T-45)

t. Organizing and initial approval of class trips. (T-45-46) (P-17)

u. Post-observation meetings with teachers to discuss weak and strong points and ways of improving. (T-47)

v. Evaluation of teacher performance in non-instructional capacities. (T-47-48)

w. Creation of the teaching schedule. (T-51)(T-122)

x. Assigning teachers to cover for absent staff when no outside substitute is available, as well as keeping track of additional salary due to such teachers for the extra work. (T-50)(T-77)(T-78)(P-15)

y. Placing newspaper ads, at Board expense, to secure new employees. (T-51-52)

z. Teacher orientation. (T-52-53)(T-54)

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aa. Service on administrative committees. (T-55-56)

bb. Professional improvement plan development with staff members in compliance with the thorough and efficient education statutes and regulations. (T-56-57)

cc. Monthly reports on the status of all aspects of his department and its functioning. (T-65-66)(P-10)(P-15)

dd. Enforcement of district and building rules for teacher conduct. (P-16)(T-70-72)

ee. Creation of proposals for obtaining federal and state funding of new programs and pursuing of that funding process. (T-109-111)

ff. Day-to-day supervision of the functioning of his department. (T-67)(T-95)(T-102-103)(P-10)(P-11)(P-12)(P-13)

6. Petitioner was not assigned as department chairperson for 1981-82. No formal notice of this fact was given to petitioner until February, 1982. (P-1)(T-8-9) No reason was given to petitioner except that the Board's personnel committee chose another person. (P-1)

7. The individual assigned as language department chairperson for 1981-82 had no tenure or seniority as a supervisor. (T-10-11)

8. Throughout his career as department chairperson petitioner was paid a salary stipend for his chairperson work which was in addition to his teaching salary. (T-19-20)

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9. If petitioner had been employed as chairperson for 1981-82 his salary stipend would have been $1,650. (T-20)

10. For 1982-83 petitioner was again assigned as foreign language department chairperson. (T-11)

11. Petitioner worked as a teacher full time for 1981-82. (T-7-8)

12. Each year all chairpersons were given a list of their duties by the high school principal. Vice principals and other administrators also received such lists. This was done by order of the Superintendent, which was reported to the Board. (T-16-18)(T-113-114)

13. For 1973-74 Principal James Nolan issued a list (P-4) of chairperson duties which included the duty to take required courses for a supervisor's certificate. This was the first directive received by petitioner regarding the need for supervisory certification. (T-18)

14. The principal verbally informed all of the high school chairpeople that P-4's requirement to take courses toward certification was the result of a directive from the Board and Superintendent. (T-115)(T-21-23)

15. As of 1973 approximately half of the department chairpeople were not certified as supervisors. (T-23)

16. The directive to take credits toward supervisory certification resulted from interpretations by the Department of Education to this effect and as part of the preparation for an independent

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evaluation of the high school by Middle States Evaluators. (T-114-115)(T-116-117)

17. Petitioner performed all of the duties listed on P-4 in each year served as department chairperson, except that the directive to obtain certification first appeared in 1973. (T-24)(T-117)

18. In January 1975 the Board adopted a job description for the position of department chairperson which included supervisory duties. (P-7)(T-99)(T-57-58)

19. Copies of P-7 were distributed by the high school administration to all chairpeople at the time it was adopted. (T-57-58)

20. Petitioner continued to receive a detailed list of job duties, as did all other chairpeople, each year after 1975. (P-5)(T-113)

21. In 1979-80 the Board adopted another job description for the position of department chairperson which expressly included a requirement for supervisory certification. (P-6)(J-7)

22. Petitioner began to take courses toward his supervisory certificate upon receipt of the 1973 directive to this effect contained in P-4. His supervisory certificate was issued on May 13, 1977. (P-3)(T-15-18)

23. Petitioner performed all of the duties listed in P-4, P-5, P-6 and P-7 in every year when he was employed as department chairperson. (T-24)(T-25)(26)(T-27-28)(T-57-59)(T-117)(T-121-122)(T-21)

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24. The Board of Education was at all times fully aware that petitioner's duties as department chairperson were supervisory in nature, including teacher observation and evaluation, recommendations regarding hiring, dismissal and transfer and other forms of supervisory work. Such duties were assigned without any objection by the Board and were within the responsibilities which the Board intended to be performed under that job title as set forth in P-7. (T-95-99)(T-100-105)(T-17)(T-31-32)

25. The number of teachers in petitioner's department is currently 10. The number has varied in the past going at least as high as 14. (T-82)

26. In each year during which he served as department chairman petitioner was appointed by Board resolution to that position. (J-1, J-2, J-3, J-5, J-6)(T-5-6)

DISCUSSION

At issue in the cause are the following:

a. Is petitioner tenured as departmental chairperson?

b. If so, was he unlawfully terminated therefrom for 1981-82?

c. If so, what remedies are due him?

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It was held in Spiewak v. Rutherford Bd. of Ed. 90 N.J. 63 (1982), generally, that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years are eligible for tenure under N.J.S.A. 18A:28-5. 90 N.J. at 81. Those criteria have likewise been applied by the court to matters involving transfer or promotional tenure for supervisors under N.J.S.A. 18A:28-6. In Epps v. Bd. of Ed., Jersey City, 1979 S.L.D. 627; aff'd State Board, 1980 S.L.D. — (April 8, 1980); reversed, (N.J. App. Div., January 3, 1983) (unreported) , the court applied Spiewak criteria generally to Epps' claim for supervisory tenure under N.J.S.A. 18A:28-6. The court observed Epps served in the questioned supervisory position from 1972-77. Two Board members and a director of the program testified to the Board's intention that supervisory personnel within Title 1 in the affected period should have supervisory and evaluative duties and qualifications commensurate with those of supervisory personnel employed as "regular" staff members elsewhere in the district (Id., at 3-4). In 1977, when Epps was given a new title as coordinator of math, his job description changed and all supervisory and evaluative functions ended (Id., 3). Since Epps was certified as supervisor, since for five years he had acted as such, and since his job specifications prior to 1977 set forth both supervisory and evaluative functions, the court concluded (Id., 6), Spiewak criteria mandated he was promotionally tenured under N.J.S.A. 18A:28-6 (Id., 7).

Here, it should be noted petitioner has held supervisory certification since May 1977, from at least which date he also served as department chairperson of languages until June 30, 1981. The Board argued, however, that it was not until November 15, 1979 (P-6 and J-7) that the Board recognized the departmental chairperson as one requiring supervisory certification and that, therefore, no part of petitioner's service in the position before that date may be counted toward his tenure eligibility as of June 30, 1981. Such fore-shortened period being less than the period prescribed by N.J.S.A. 18A:28-6(b) or (c), said the Board, petitioner never became promotionally tenured as supervisor or department chairperson. Finding of fact no. 24, however, hereinabove, negates the argument. As in Epps, there was testimony here by a former member and president of the

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North Bergen Board and by a vice-principal of the high school. Dr. Nino Falcone, presently a Professor of English at Jersey City State College and a member of the Board of Higher Education of New Jersey, testified he was a member of the North Bergen Board from 1971-78 and was its president for five years during that time. He said he knew petitioner as department chairperson of language and that he knew generally the duties of department chairpersons. Among them, he said, was supervision and evaluation of all teaching staff members of each department. He was aware, he said, as required in N.J.A.C. 6:11-10.4, that petitioner here was "the school officer charged with authority and responsibility for continuing direction and guidance of work of instructional personnel" of the high school language department. Joseph Lepore, vice-principal of the high school from 1962-78, and presently so employed, said he knew and understood that petitioner performed all the duties required by job descriptions in P-6, P-7 and P-4 from the period 1963-79.

And so here as in Epps, since petitioner was certified as supervisor since May 1977, since for the years from then until June 30, 1981 he performed and was paid as such, and since his job specifications expressly since November 15, 1979 as well as tacitly and by implication before then set forth both supervisory and evaluative functions, he too, in my view, was promotionally tenured under N.J.S.A. 18A:28-6 when on June 30, 1981 he was not reappointed by the Board as the department chairperson for 1981-82. There having been in his case no abolishment of position, reduction in force or change in administrative or supervisory organization of the district, within the meaning of N.J.S.A. 18A:28-9, he was presumptively entitled to that position employment during good behavior and efficiency without dismissal in the manner prescribed under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

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CONCLUSION

Accordingly, based on the foregoing, I hereby **CONCLUDE** (1) petitioner is tenured as departmental chairperson of language under N.J.S.A. 18A:28-5, 6 and criteria in Spiewak; (2) his non-reemployment by the Board in that position for 1981-82 was an unlawful dismissal in abridgement of his rights thereunder; and (3) he is hereby **ORDERED REINSTATED** thereto with such back pay and emoluments as would have been his had he not been so dismissed. It has been stipulated by the parties petitioner was re-employed by the Board in the position for 1982-83 and, in effect, has been so reinstated. It has likewise been stipulated the amount of back salary or chairperson stipend unlawfully withheld from petitioner for 1981-82 is the sum of $1,650. I **ORDER**, therefore, finally, that such sum be paid to petitioner.

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

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OAL DKT. NO. EDU 7601-81

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

June 29, 1983
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

July 1, 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 6, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

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LIST OF EXHIBITS

P-1 Letter to petitioner from Superintendent of Schools, dated February 25, 1982, informing that reason for petitioner's not being reappointed as chairperson of modern languages department was decision of Personnel Committe to recommend Dr. Ayerbe

P-2 Letter of petitioner to Superintendent of Schools, dated May 6, 1982, requesting reappointment to position of chairperson of modern languages department, without prejudice to pending litigation

P-3 Supervisor Certificiate (endorsement) of petitioner by State Board of Examiners, issued May 1977 (see N.J.A.C. 6:11-10.4(c))

P-4 Notice to department chairman from Principal of High School, dated September 1973 listing 17 duties ascribed to Department Chairman

P-5 Notice of Principal of High School to department chairman for year 1978-79, listing 22 duties assigned to department chairman

P-6 Job description of departmental chairperson's and/or supervisor of instruction, listing functions, responsibilities and duties, including, inter alia, No. 18 - observe classroom instruction and counsel with teachers for their improvement; No. 19 - evaluate performances of department members; No. 24 - aide in selection of new personnel; and No. 26. - supervise substitute and student teachers. The job description contained a requirement that departmental chairpersons hold a valid supervisor's certificate. The job description was adopted by the Board by action taken at a Board meeting on November 15, 1979. See J-7

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P-7 Policies and procedures, including duties and responsibilites of department chairman, as approved by Board at its regular meeting in January 1975

P-8 Memorandum from petitioner to administration, North Bergen High School, concerning teaching assignments in 1976-77, dated March 31, 1976 petitioner shown as chairman, language department

P-9 Memorandum from petitioner as chairman language department to Superintendent of Schools, dated May 22, 1972, concerning employment applications

P-10 Monthly report by petitioner to administration, for April 1972, concerning petitioner's summaries for teacher evaluations submitted to main office

P-11 Bulletin to department chairmen from Superintendent's office, dated September 11, 1968

P-12 Letter to petitioner from assistant to superintendent, dated September 13, 1967 asking petitioner to check his teachers for those interested in becoming bedside and private tutors

P-13 Notice to department chairmen, dated January 3, 1972, concerning notification of teachers in their department about Parents' Night

P-14 Notice to department chairmen from principal, dated October 28, 1968, asking each chairman to check classrooms assigned to teachers in his department for problems requiring repairs

P-15 Notice to department chairman from principal of high school, dated May 4, 1971, concerning submission of monthly report

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P-16 Notice from principal to department chairmen, dated May 7, 1976 requiring chairmen to notify their teachers concerning card playing

P-17 Memorandum from petitioner as chairman, language department, to principal of high school, dated February 20, 1975, concerning curriculum innovations over last three years

J-1 Minutes of Board meeting of September 3, 1974, containing resolution appointing petitioner as department chairman, language, for 1974-75 school year

J-2 Minutes of Board meeting of September 2, 1975, containing resolution appointing petitioner department chairman for language, to be effective September 1, 1975 and terminating December 31, 1975

J-3 Minutes of Board meeting of September 15, 1977, containing resolution of appointing petitioner department chairman, foreign language for 1977-78

J-4 Minutes of Board meeting of July 28, 1981, containing resolution appointing Dr. Guillermo Ayerbe as language department chairperson, for 1981-82

J-5 Minutes of Board meeting of September 3, 1979, containing resolution appointing petitioner department chairperson, foreign language, for year 1979-80

J-6 Minutes of Board meeting of September 24, 1980, containing resolution appointing petitioner department chairperson, language, for 1980-81

J-7 Minutes of Board meeting of November 15, 1979, containing resolution of Board adopting certain policies and procedure for evaluation of tenured teaching staff members and adopting job descriptions. See P-6, job description of department chairpersons

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DOMINICK DE CESARE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

Petitioner, being tenured as departmental chairperson, shall be accorded that position. The Commissioner notes that petitioner was reinstated in the position for 1982-83 and by stipulation is owed the sum of $1,650 for 1981-82 which the Board shall pay to petitioner.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

AUGUST 15, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7719-82
AGENCY DKT. NO. 282-7/82A

FRANCES W. HYMAN, IRENE SKULNIK, SONDRA GREENSTEIN, AND ALL TEANECK SCHOOL DISTRICT AUXILIARY TEACHERS AS A CLASS,
Petitioners,
v.
TEANECK BOARD OF EDUCATION, BERGEN COUNTY,
Respondent.

APPEARANCES:

Louis P. Bucceri, Esq. and **Gregory T. Syrek**, Esq., for petitioners
(Bucceri & Pincus, attorneys)

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

Record Closed: May 5, 1983 Decided: May 18, 1983

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OAL DKT. NO. EDU 7719-82

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

On July 19, 1982 the above-named three individual auxiliary teachers (petitioners) filed with the Commissioner of Education, pursuant to N.J.S.A. 18A:6-9, a petition claiming that respondent Board improperly terminated them contrary to their tenured status and requested a declaration of their tenure rights and seniority; reemployment; back pay and prospective compensation at the contract rate and conditions applicable to regular classroom teachers. The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At the prehearing on October 26, 1982, the three individual petitioners moved to amend, since each had been rehired. With respect to the rehiring issue, the only remaining question after amendment was whether or not petitioner Greenstein was entitled to a four-hour position (she was hired for three in 1982-83). The individual petitioners seek a declaration of tenure and seniority status. Counsel also was granted amendment to include as petitioners all auxiliary teachers employed by the Teaneck Board who claim parity of salary and benefits with regular classroom teachers as a matter of law. These teachers claim they are entitled to placement on steps on the classroom teachers' salary guide in accordance with time served as auxiliary teachers both in Teaneck and all prior employments, since the negotiated contract provides for such employment credits for classroom teachers. Auxiliary teachers total 37.

Testimony was taken from the three individual petitioners on February 14, 1983 on facts relevant to their tenure status. All other facts were submitted by stipulation or by uncontroverted affidavits. Petitioners filed a partial summary judgment motion on the salary and benefits issue in accordance with the prehearing order, but I reserved decision since insufficient facts were available at the time of filing of the motion in January. Time for filing of the stipulation was extended several times due to the difficulty of the parties in ascertaining the employment history of the 37 teachers from Board records going back to school years as early as 1960-61 and to the time needed to obtain affidavits

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in the absence of dispositive records. No issue of tenure or seniority is involved for teachers other than the three individual petitioners.

Frances Hyman

Petitioner Hyman claims that periods during which she served as a home instruction teacher should be credited as tenurable time.

Petitioner described the nature of her work in her testimony taken on February 14, 1983. **I FIND:**

1. Home instruction is given at home or in a hospital when a child is unable to attend school.

2. Home instructors must have appropriate teaching certification.

3. Hyman holds secondary certification (7-12) with endorsements in English and Speech and Theater Arts.

4. From March to June 1963-64, Hyman worked three hours each school day in the classroom as a supplemental teacher.

5. During the same period, except for a week or two longer in June, Hyman worked from two to four hours a day as a home instructor on days when such work was available.

6. Availability of home instruction work varied widely: on some days or even weeks, none was assigned to her. On other days, Hyman worked up to four hours.

7. Some students needed only a week, others as much as six weeks of home instruction.

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8. In one year, 1978-79, petitioner supplied five hours a day of home instruction to two students from September through January 14 and did not work any hours as a supplemental teacher in the classroom.

9. For the rest of 1978-79, the two students were assigned to another teacher and petitioner continued in the same pattern of work as in prior years, except that in 1979-80 and 1980-81, the average time spent was reduced to two hours per day.

10. Petitioner was unable to recall the average number of days per week she provided home instruction as compared to in-school supplementary work (T47:8-22).

11. Petitioner was assigned variable periods of home instruction on an hourly payment basis from 1964 through 1982, but in the last two years, time spent in that work was negligible; for example, she only worked ten such hours between September 1982 and February 1983.

12. The student's regular classroom teacher assigned his or her work, including textbook work although in one instance petitioner was assigned the total curriculum work for a seriously impaired student.

13. If the student were homebound for an extended period, the home instruction teacher might be called upon to provide a grade, but ordinarily the home instructor would discuss the work accomplished with the classroom teacher and might occasionally discuss problems with special service personnel.

14. Since the students were at home, parental contact was frequent, particularly in making appointments for the sessions.

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43. Since the date in 1978 when Skulnik received her certification as a teacher for the handicapped is not of record, it is not possible to determine the number of months and weeks she should be credited with for service in one-half of a six-hour position in 1977-78.

44. Since a six and 3/4 or seven-hour position encompasses a six-hour position, on the first day of the 1981-82 school year, Skulnik had served more than three academic years in a six-hour supplementary position as a teacher for the handicapped.

Respondent correctly argues that petitioner Skulnik attained tenure in a part-time supplemental position and supplies a recent unpublished appellate case on point. In Carlson v. Bd. of Ed. of Cranford (N.J. App. Div., March 24, 1982, A-4433-80-T3), the Court held:

> The administrative law judge correctly ruled that appellant acquired tenure as a half-time teacher only. It is the length of service in a single position, not length of service in the district in any capacity, which determines tenure in that position . . . the Commisioner of Education has consistently held that tenure in a part-time position does not entitle a teacher to a full-time position.

Furthermore, Mirabello v. Bd. of Ed. of Rochelle Park, 1982 S.L.D. ____ (September 20, 1982) is still good law. In it the Commissioner found part-time tenure in a supplemental teaching position. Mirabello is not contrary to Hamilton Tp. Supp. T.A. v. Bd. of Ed., 180 N.J. Super. 321 (App. Div. 1981), aff'd 90 N.J. 63 (1982) and, in fact, the administrative law judge's opinion (EDU 5126-81) which was adopted by the Commissioner, discussed the applicability of the Spiewak cases to Mirabello. The facts show that a Teaneck supplementary position was a 6/7 part-time position. It is not necessary to go further to **CONCLUDE**, as I do, that petitioner has acquired tenure in a six-hour supplementary position as a teacher for the handicapped and has not as yet acquired tenure in a seven hour position as a full-time classroom teacher.

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18. Hyman began employment with respondent sometime in March 1964, but very little of her time was spent in supplemental teaching (most of the work was home instruction), the time varied from day to day and any supplemental work she did, which did not exceed three hours per day, "probably" concluded by the second week in June 1964 (T35:18 to T36:5; T37:2-14; T37:23 to T38:1).

19. In 1964-65, her work was the same as in 1963-64 and she "probably" worked three hours a day as a supplemental teacher "probably" beginning in the third week of September and ending the second week in June (T38:16 to 39:3 - 39:22 to 40:5).

20. In years 1965-66 and 1966-67, petitioner's work was the same as in 1964-65 (T40:6015; T41:4-13).

21. In years 1967-68 to 1977-78, petitioner served in a three-hour per day position except for several years when the work increased to four hours a day and in one year to five hours during the course of the school year (T43:11 - 44:11), which for petitioner, was always about five weeks shorter than it was for classroom teachers.

22. In year 1978-79, from the first day of school until January 14, 1979, Hyman either was not offered a supplemental teaching position or agreed to pursue only home instruction work (T44:14-19).

23. In January 1979, Hyman was offered a contract for a three-hour per day supplemental position at the high school and worked from January 16, 1979 to June 30, 1979 (T45:2-8 and T45:24 to 26:4).

24. In all years from 1979-80 to date, petitioner's supplemental work was under contract for the same academic year as regular classroom teachers.

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25. In years 1979-80 and 1980-81, petitioner served in a four-hour per day position (T48:15 to 49:13).

26. In 1981-82, petitioner accepted a three-hour per day position in an elementary school resource room although she held only a secondary certification (T49:14 to 19; T50:10 to 16).

27. For 1982-83 Hyman accepted a contract for a three hour per day position in the high school. (T49:23-25).

28. Petitioner was offered full-time employment in years prior to 1979, but at the time she did not want full-time work and she has never requested that more hours of work be assigned to her other than in the context of the instant petition (T75:13 to T76:5).

CONCLUSORY FINDINGS

29. Petitioner Hyman has not proved service in any regularly assigned part-time supplementary position prior to the 1967-78 academic year, for in all prior years supplemental work was irregular (Finding #18) and testimony that she "probably" worked about three hours per day is insufficient evidence of tenurable service.

30. From year 1967-68 to 1977-78, petitioner proved service in a three-hour per day supplemental position.

31. Since in each of these years she worked five weeks less than a full academic year, she did not attain tenure until she worked 15 weeks and a day in the fourth year which was 1970-71.

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32. Even though petitioner accepted nontenurable service from September through January 14, 1979, she at all times subsequent to attaining tenure worked more than three academic years in every four in tenurable service three hours per day.

Petitioner argues that Hyman attained tenure in or about March 1967 under section c of N.J.S.A. 18A:28-5(c), at which time it is argued that she was employed for the equivalent of more than three academic years within a period of four consecutive academic years. I assume petitioner concedes that section (b) is not applicable because none of petitioners were under a ten month or academic year contract prior to 1979-80 and in most years their work did not begin when school opened. An academic year is "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." See N.J.S.A. 18A:1-1 and 29-5, which eliminate the ten-day grace period at N.J.S.A. 18A:29-6 with respect to minimum salaries of teaching staff members who are not covered by the salary schedule, that is, those who are not full-time. "Member" is defined as a full-time teaching staff member under the salary statutes, N.J.S.A. 18A:29-6 et seq.

The academic year for each relevant year is the period between the day schools open and the day schools close as set forth on the school calendar adopted by the Board, McGovern v. Bd. of Ed. of Elmwood Park, 1978 S.L.D. (Nov. 16, 1968). In the relevant years, this period is never shorter than nine months plus two weeks nor longer than nine months plus three weeks. Considering the fact that classroom teachers must report a day or so earlier and later than pupils, a rounded period of nine months three weeks is a good measure. The length of an academic year may have significance in the event seniority must be determined in a RIF since prior to 1979-80, auxiliary teachers recall their service in terms of how many weeks shorter it was than the full academic year.

I CONCLUDE petitioner Frances Hyman is tenured in a three-hour per day auxiliary position. Although she worked outside her certification in 1981-82, neither party has

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raised any issue concerning credit for that academic year. Nor did either party raise an issue with respect to the effect of her acceptance of a nontenurable employment in 1978-79 on tenure previously attained. The only issues raised concerned the tenurability of home instruction and the extent of the part-time position held, namely, whether it was a three-hour or four-hour position.

Irene Skulnik

Petitioner Skulnik is in her second year as a full-time classroom teacher of the handicapped (P.I.). She claims tenure in that position on grounds that her prior experience as a full-time supplemental teacher should be counted.

I FIND:

33. Skulnik in all academic years from the first one, 1977-78, worked the entire academic year from the first to the last day of school, but worked about two days longer when she became a classroom teacher.

34. Throughout her employment, Skulnik held elementary certification which she obtained in 1972 and certification as a teacher of the handicapped, except for a period during the first year when she held only elementary certification.

35. In her first year of employment, Skulnik held a three hour per day supplementary position in a P.I. room in a junior high school.

36. In academic years 1978-79, 1979-80, and 1980-81, Skulnik worked six hours per day in the same supplementary position in the junior high school P.I. room.

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37. Teaneck had a contract in 1980-81 and 1981-82 under which "full-time" for a supplementary teacher was six hours and full-time for a regular classroom teacher in secondary schools was seven hours on four days and six and 1/2 on the fifth plus 40 hours annually for administrative meetings (Contract, pages 51 and 85).

38. Skulnik testified that the head teacher whom she assisted worked about six and 3/4 hours each day.

39. In 1981-82, Skulnik became the "head teacher," that is, a full-time classroom teacher, and was placed on the salary guide at a step which gave her credit for eight years of elementary experience in New York City schools, since the negotiated contract provided that such credit be given to all classroom teachers.

40. In 1981-82, when Skulnik was placed on the classroom teachers' guide, she did not request credit for her supplementary service because she was eager to get the job and very happy to get eight years of credit.

41. Skulnik continues to be employed in the same full-time classroom teaching position in the present year as she held in 1981-82.

CONCLUSORY FINDINGS

41. Since a six hour position necessarily encompasses one-half of a six-hour position, Skulnik had served more than three academic years in a three-hour position as a supplemental teacher of the handicapped by the end of the fourth academic year, 1980-81.

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CONCLUSORY FINDINGS

15. Since home instructors do not know from day to day and week to week whether or not or for how long they will be scheduled for such assignments and how many hours a month may be required, their work bears even less similarity to that of a regular teaching staff member than that of a substitute teacher.

16. A home instructor is a substitute for a regular classroom teacher where substitution is necessitated by inability of the student to attend class at school.

17. Home instruction is intermittent, temporary and unscheduled employment (T60 to 62).

I CONCLUDE that home instructors are not teaching staff members pursuant to N.J.S.A. 18A:28-5 and their time is not tenurable time under the rationale articulated in Driscoll v. Bd. of Ed. of Clifton, 165 N.J. Super. 241 (App. Div. 1977) aff'd 79 N.J. 126 (1979) and Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175 (App. Div. 1976), aff'd o.b. 73 N.J. 37 (1977). Home instructors have no specific expectation of employment duration; they have full knowledge of the variability of the assignments and hourly rate of payment. The Commissioner has held that it is valid to make a distinction between those employed on a regular part-time basis and those whose services are intermittent, temporary or unscheduled. TPAF also makes the distinction. DeSimone v. Bd. of Ed. of Fairview, 1966 S.L.D. 43, 45. I note with interest that in Driscoll, Justice Pashman's concurring opinion, in the last sentence, implicitly recognizes the authority of boards to distinguish, in compensation offered, between employees in different categories and with different duties up to and including full-time teachers.

There remains the question of the tenure status of petitioner Hyman. The following **FINDINGS** are relevant to petitioner Hyman's tenure claims:

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Sondra Greenstein

Petitioner Greenstein claims a violation in her tenure rights as a result of respondent's assignment to her of a three-hour supplementary position in 1982-83. She contends she has a right to a four-hour position. The following **FINDINGS** are relevant to this issue:

45. Greenstein was first employed in academic year 1977-78 as a two-hour per day supplemental teacher on the elementary level with service one month short of the academic year.

46. During the next succeeding academic years, Greenstein's service as a five day a week supplementary teacher in the elementary schools was as follows:

1978-79	2 hours per day full year
1979-80	2 hours per day full year
1980-81	2 hours per day except for one month full year
	3 hours per day except for one month full year
1981-82	2 hours per day 1/2 of full year
	4 hours per day 1/2 of full year
	(from about January 11, 1982 to June 30)
1982-83	3 hours per day from October

47. Greenstein held the required elementary certification throughout her employment.

CONCLUSORY FINDINGS

48. On or about the time Greenstein was assigned a three-hour per day position, a month and a day after the beginning of her fourth academic year, 1980-81, she had served more than three academic years in a two-hour position.

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49. In 1980-81, Greenstein served one month short of the academic year in a three-hour position; in 1981-82, she served one half of an academic year in a three-hour position (included within the four-hour position).

Based upon the discussions of law concerning the prior two petitioners, I **CONCLUDE** petitioner Greenstein had acquired tenure only in a two-hour supplementary or Comp. Ed. position in elementary service at the time she was assigned to a three-hour position for year 1982-83. She acquired tenure in the two-hour position at the beginning of October 1980 under N.J.S.A. 18A:28-5(c). Since Greenstein retains a three-hour position whereas she holds tenure only in a two-hour position, no RIF has affected her tenured position and it is unnecessary to compare her seniority to that of Schlakman and Marseglia, who are admittedly nontenured.

The Board is not required to establish another and different position or abolish other part-time positions so as to create full-time or longer part-time hours for tenured teaching staff. A Board may reorganize positions and make transfers in its discretion in the absence of bad faith and unreasonableness. It is precluded only from dismissing or reducing salaries of tenured teachers without cause. DeSimone v. Bd. of Ed. of Fairview, 1966 S.L.D. 43. The fact that petitioner Greenstein is tenured in a two-hour position gives her no right to transfer to a three or four-hour position. A change from a full-time to a part-time position has been held to be a transfer. Oxfeld v. Bd. of Ed. of S.O.-Maplewood, 1975 S.L.D. 574, 577. Surely the reverse is also true. The only difference in the effect of a transfer of a full-time tenured teacher from full-time to part-time is that it must occur in a good faith RIF at which time the seniority rule must be applied. **I CONCLUDE** that petitioner Greenstein, who is tenured in a two-hour per day part-time supplementary or Compensatory Education position, has no right to a transfer to a three or four-hour position.

SENIORITY OF THE THREE INDIVIDUAL PETITIONERS

While my decision above will obviously have some effect upon the crediting of

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seniority time to the individual petitioners, I have declined to make specific seniority calculations in the absence of a RIF affecting petitioners. If petitioner Greenstein had acquired tenure in a four-hour per day auxiliary position and subsequently been reduced to a three-hour position, such determination might have become justiciable. Such was not the case.

Outside of the context of a case or controversy arising from a RIF or reemployment, the Commissioner is not required to declare seniority standings for tenured teaching staff members. **I CONCLUDE** such determination would be premature for several reasons. First, the present seniority rule, N.J.A.C. 6:3-1.10, has been in effect since the 1950s, whereas prior to June 23, 1982, when our Supreme Court settled the legal issue, the Commissioner and State Board had no definitive knowledge that Title I, Comp. Ed. and supplementary teachers must be considered teaching staff members. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). Thus, the authorized rule-making body had no opportunity to consider the effect of the holding upon seniority of those having regular full-time classroom teaching positions versus supplementary teachers in the event of a RIF. Indeed, the State Board proposed seniority rule changes for consideration of the State Board only a month or so prior to the time of this writing. The proposed amended rule includes the provision that it will apply "prospectively to all future seniority determinations as of the effective date of the rule." It may well be that seniority rules will change once or more prior to the time when a future RIF in Teaneck requires the application of then current rules.

Secondly, the Commissioner, in past cases, has made it very clear that a present board cannot bind future boards. Blake v. Bd. of Ed. of Bridgeton, 1982 S.L.D ____ (December 30, 1982). At such future time as a RIF may occur in Teaneck, in the absence of a rule clarifying the law, the board then in office may or may not certify a seniority list wherein supplementary teachers and classroom teachers are considered to hold different positions. Indeed, the contract hours may also change in the future and they may affect the results. What a future board may do in a RIF is purely speculative at this time. Some of these petitioners may not be affected by a future RIF by reason of their resignation or change of position.

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Thirdly, since there has been no RIF and, since all tenured petitioners are presently employed, there is no party in interest in this case to advocate the rights of full-time classroom teachers who arguably might be displaced by teachers whose service was accrued in a supplementary category. The existence of such party or parties cannot be known until a RIF occurs. An advisory opinion on seniority would have no effect until a future RIF and the Commissioner noted it is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally from functioning in the abstract. The Commissioner's policy has been to decide only concrete contested issues conclusively affecting adversary parties in interest. McPhee v. Bd. of Ed. of Borough of Emerson, 1966 S.L.D. 213; Bonner v. N. Haledon Bd. of Ed., EDU 1100-82, 1982 S.L.D ____ (May 4, 1982).

I CONCLUDE the issue of petitioners' seniority is moot and that there is no concrete contested issue before me with respect to it at this time.

SALARIES - ALL PETITIONERS

Petitioners as a class including the individual petitioners whose status has been determined above claim that all auxiliary teachers must be paid the same salary and benefits as classroom teachers as a matter of law. They base this claim upon an interpretation of Spiewak, supra, and the existence of N.J.S.A. 18A:16-11, which provides de facto school employees with a means to recover compensation in a court of competent jurisdiction.

The following facts affecting the salary issue for all auxiliary teachers can be found in the stipulation and contract or are admitted and are not in dispute:

50. At the present time, auxiliary teachers are paid on a separate salary guide which contains fewer steps and a lower salary rate than the guide for full-time classroom teachers.

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51. As the 1980-81 through 1981-82 negotiated contract shows, full-time classroom teachers have a seven-hour day and various additional duties whereas full-time auxiliary teachers have a six-hour day and do not receive credit for some of their educational background, teaching experience in other school districts, military service and certain other forms of public service and business experience.

52. After a strike in September 1982, a negotiated contract for 1982-83 was approved which contained the following language:

> As to the auxiliary staff, the parties shall be free to litigate, in the forum of their choice, the question of whether said auxiliary staff shall receive the same salary, benefits and other emoluments as "regular teachers" of the Teaneck school systems. In the interim said auxiliary staff shall receive salary and benefit increases in accordance with the terms of this memorandum on the existing salary guide for auxiliary staff. Acceptance of any salary increases or benefits under this agreement shall be without prejudice to the rights of the parties.

53. In 1982-82, for example, the maximum payment for auxiliary teachers on their guideline after six years was $14,000 (B.A.), $14,400 (M.A.) and $14,600 (M.A. plus 32); whereas the maximum for full-time classroom teachers after 12 or more years was $22,632 (B.A.), $27,554 (five- year level), $30,836 (six-year level) and $32,946 (doctorate level after 16 years).

54. The approximate cost of placing all auxiliary teachers on the regular classroom teachers' guide for 1982-83 alone would be approximately $170,000, but this figure does not include crediting auxiliary teachers with any out-of-district experience or the cost of additional benefits claimed, so that the total value of the instant claims of all 37 petitioners must be considerably higher.

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DISCUSSION OF LAW

Petitioners have not cited any statute, rule or constitutional provision which mandates that six or less hour per day auxiliary position holders be paid at the same rate and in the same manner as seven-hour per day regular classroom teachers. Petitioners cite only N.J.S.A. 18A:16-11:

> A person who holds de facto any office, position or employment in a school district and who performs the duties thereof shall be entitled to the emoluments and compensation appropriate thereto for the time the same is so held in fact and may recover therefor in any court of competent jurisdiction.

Petitioners claim that since they are teaching staff members the cited statute mandates equal payment with all other teaching staff members. They cite Dandorph v. Bd. of Ed. of North Bergen, 1980 S.L.D. ____ (October 27, 1980) for the proposition that the Legislature in adopting N.J.S.A. 18A:16-11 gave the Commissioner jurisdiction to order compensation for de facto employment. Dandorph is not precedent for the proposition argued by petitioners. In Dandorph, the Commissioner directed a board to pay a salary differential upon finding a petitioner was a de facto principal while under title of vice principal. The law on that question was never set forth by the administrative law judge: he barred consideration of the issue as out of time. Thus the Commissioner did not have before him a full record on the issue.

No policy question is involved. The issue here is purely one of statutory interpretation. Hayes v. Gulli, 175 N.J. Super. 294 (Ch. Div. 1980) interpreted the language "a court" in N.J.S.A. 30:4-24.3 and held that an administrative law judge was not a court, which is a body in the judicial branch of government. "Administrative agencies are not judicial tribunals." In re Uniform Adm'v Procedure Rules, 90 N.J. 85 (1982). No administrative agency has ever been held to be "a court of competent jurisdiction," and such was not the intendment of the Legislature in enacting N.J.S.A. 18A:16-11. This conclusion is not vitiated by the holding in Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979) wherein the Commissioner was held to have jurisdiction to determine issues arising under the Open Public Meetings Act as they

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related to controversies under school law. That case interpreted the language "reviewable in the Superior Court" and noted that the Commissioner's incidental jurisdiction allowed him to decide subsidiary legal issues, which could, in fact, be reviewed thereafter in the Appellate Division of the Superior Court consistent with statute.

N.J.S.A. 18A:16-11 was not intended to be applied to this kind of case at all. In the instant case, petitioners have a legal contract of employment for a specific salary. Research into the origin of the statute, its antecedents and the case law interpreting it shows very clearly that it was intended to permit recovery by a government employee or officer when the individual is directed under apparent authority to perform the duties of an office, has assumed those duties without fraud or dishonesty and where it is later judicially determined that the employee was not legally employed. The original statute, L. 1925, c.239, covered all government employees. After recodification, the statute was referenced at N.J.S.A. 18A:16-11 (then R.S. 18:5-50) for school employees, at N.J.S.A. 40:11-7 for municipal and county employees and at N.J.S.A. 52:14-16 for State employees. The statutory action for de facto employees was intended to remove the bar of sovereign immunity to contract actions sounding in assumpsit indebitatus and quantum meruit consistent with prior case law. See Bd. of Ed. of Bayonne v. Flood, 22 N.J. Misc. 131, 36 A. 2d 596 (Sup. Ct. 1944) and Freudenreich v. Mayor and Council of Fairview, 14 N.J. Misc. 804, 187 A. 555 (Sup. Ct. 1936). The statute grants a right to an action at law, hence the language "any court of competent jurisdiction." It is only applicable as a remedy when the employee is not paid at a statutory level or has no legal contract and has assumed the duties of an office upon the honest belief there was a legal (de jure) contract for the office or employment. Such are not the facts of this case.

After the first year of employment, it can be found as a matter of law that petitioners knew the duties, the terms of the contract and the compensation. This is not a case where the employee entered into the duties, contract and compensation of a vice principal and subsequently found he or she was to perform the duties of a principal, for example. Dandorph, supra. Nor is the instant case one wherein a petitioner was demoted from a position in which he was later found to be tenured, resulting in restoration of the

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tenured position and the emoluments thereof from the date of demotion. Peter Fischback v. B.O.E. of North Bergen, 1980 S.L.D. _____ (#115-80, April 14, 1980). Thus N.J.S.A. 18A:16-11 and the cited Commissioner's decisions provide no basis for petitioners' arguments to set aside their contractual payment.

Petitioners next rest their argument upon the holding in Spiewak; wherein the court said, "The statute makes tenure a mandatory term and condition of employment. It therefore supersedes contractual terms," id. at 72, and ". . . the court in Point Pleasant overlooked the authority which holds that tenure is a legal right governed by statute rather than contract." Id. at 76. I have carefully read Spiewak several times. Nowhere in it can I find any suggestion that the court was making a determination that supplemental teachers should be paid any different salaries from those which they contracted for. In fact, the court expressly stated at Note 3 as to even the teachers before the court, "We do not decide what, if any, additional benefits the teachers in these cases are entitled to either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record." The Spiewak court spoke of back pay in the context of teachers before the court who had been improperly terminated, such as Anderson. Having found Anderson tenured, it ordered her reinstated and given "all salary and other benefits that were rightfully due her from February 26, 1979 to the present time . . . ." Thus it considered salary to be included within the term "benefits." "Teachers not before the court will therefore not be entitled to any back pay award." Note 2. This language appears unambiguous. **I CONCLUDE** that the Spiewak court did not hold that the salary and benefits of both classes of teachers must be equal, but held that the salary and benefits of different categories of teachers are primarily controlled by contract in the absence of a statutory mandate. Thus the court remanded to determine benefits after a consideration of the relevant contracts. **I CONCLUDE** that salary is a matter for negotiation within statutory guidelines.

The negotiated contract effective for 1982 through 1985 provides that petitioners are free to litigate, as they have done here, the question of salary parity, and can accept the contract increases without prejudice. The next issue is whether or not, in contracting to pay auxiliary teachers different salaries and benefits from those paid to full-time

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classroom teachers, the board has contravened any statute. The Legislature has authorized local boards to determine, fix and alter the compensation of teachers subject to other statutory provisions. N.J.S.A. 18A:16-1. The other statutory provisions affecting compensation are principally found in N.J.S.A. 18A:29-1 et seq. These salary statutes, N.J.S.A. 18A:29-6 et seq., are applicable to "members."

"Member" is defined as a "full-time teaching staff member as defined in this title . . . N.J.S.A. 18A:29-6 (emphasis added). Teaching staff member is defined in N.J.S.A. 18A:1-1, the statute interpreted by the Spiewak court and applicable to the acquisition of tenure. Since the salary statutes apply only to full-time members, the salary acts are not in pari materia with the Tenure Act in that respect. I have found above, and, indeed, it is undisputed under the negotiated contract, that a seven-hour a day position is full-time, whereas auxiliary teachers serve in a six-hour per day position, defined as full-time only as to them. The local board is empowered to determine the definition of full-time under N.J.A.C. 6:3-1.13 (so long as it is more than four hours), having been given that authority by the State Board under authority of N.J.S.A. 18A:29-6 under the definition of full-time. Even if petitioners were working full-time, annual payment of $11,500 would not controvert minimum salary requirements of N.J.S.A. 18A:29-7 and 8. All the salary statutues, N.J.S.A. 18A:29-6 et seq., are applicable only to full-time members under the definition of "member" therein. Persons who are not full-time but work an entire academic year, except for day to day substitutes, are subject to minimum salaries of only $2,500. N.J.S.A. 18A:29-5. In his concurring opinion in Driscoll v. Bd. of Ed. of Clifton, 79 N.J. 126 (1979), affirming 165 N.J. Super. 241 (App. Div. 1977), Justice Pashman noted the unfairness of the application of the salary statutes to such persons as long-term substitutes who perform all the duties of full-time teachers, but stated that redress must be sought from local boards or the State Legislature. The court clearly recognized the statutory benefits accorded to full-time versus part-time teachers and substitutes. Justice Pashman also authored the Spiewak cases, wherein he alluded to the unfairness of differential payments and benefits (at 80). In finding tenurable employment, his Spiewak holding did not touch salary inequities but rather noted that salary was principally controlled by contract. The salary statutes, in pertinent part, have not been changed since Driscoll.

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Under the above-cited statutes, even if 6/7 positions were found to be full-time by an unusual reading of the contract definition or a change in the rules of the State Board, any positions requiring less than six hours per day would still be part-time and would not be controlled by N.J.S.A. 18A;29-6 et seq. There would be no pro rata mandate, since only the N.J.S.A. 18A:29-5 minimum of $2,500 would be applicable.

Petitioners' relief request for salary parity encompasses an alleged right to step placement other than that articulated in the negotiated contract for six-hour per day auxiliary staff. Mandating placement at a particular step on the full-time teachers guide absent a contractual agreement to that effect would clearly controvert N.J.S.A. 18A:29-9:

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

An interpretation of the Tenure Act resulting in mandated step placement would not give weight to this enactment. Even N.J.S.A. 18A:29-4.1, under which adoption of salary guides is authorized applies only to full-time staff. In the instant case, the Board has not agreed to place these part-time petitioners on any step on the full-time classroom teachers' salary guide, let alone a step above step one on that guide. **I CONCLUDE** the Board has acted lawfully within its discretion in agreeing to the present contract salaries of petitioners.

BENEFITS FOR AUXILIARY TEACHERS

There are only a few statutorily mandated benefits: sick leave, accumulated sick days, employment related disability (N.J.S.A. 18A:30-1 et seq.) and military service credit (N.J.S.A. 18A:29-11). All other benefits are a matter of contract. **I FIND** that all petitioners herein receive not only statutory sick leave benefits, but in addition (stipluations 10 and 11) receive most of the contract benefits of regular classroom teachers including child rearing leave, bereavement leave, family illness leave, personal days, disability, health and dental insurance, tuition payments and pension. For the

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reasons stated above concerning salary, **I CONCLUDE** that any benefits other than those mandated by statute are within the discretion of the Board to grant in a negotiated contract and cannot be required as a matter of law. Carlson, supra.

The only statutory benefit not received by petitioners is military credit pursuant to N.J.S.A. 18A:9-11. I note that such credit is mandated only for members. The discussion under salary above is again applicable. Members means full-time teaching staff members only. In reviewing the stipulation, I do not find that any petitioner is specifically claiming denial of military credit. I decline to entertain the issue here, since there is no party in interest.

It is, therefore, **ORDERED** that the Board of Education of Teaneck accord tenure status to Frances Hyman in a three-hour per day auxiliary position in the secondary schools; to Irene Skulnik in a six-hour per day auxiliary position as a teacher of the handicapped and to Sondra Greenstein in a two-hour per day auxiliary position in the elementary schools. For the purposes of this Order, an auxiliary position is 6/7ths of a full-time position; and further

ORDERED that in all other respects the petition is **DISMISSED**.

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

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OAL DKT. NO. EDU 7719-82

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

May 18, 1983
DATE

Naomi Dower LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

Receipt Acknowledged:

May 19 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

May 24, 1983
DATE

Ronald L. Parker/pkb
FOR OFFICE OF ADMINISTRATIVE LAW

rp

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FRANCES W. HYMAN ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of the instant matter including the initial decision rendered by the Office of Administrative Law, Naomi Dower-LaBastille, ALJ.

The Commissioner observes that exceptions to the initial decision were filed by petitioners and that reply exceptions were filed by the Board in compliance with the provisions of N.J.A.C. 1:1-16.4a, b and c.

The following points of exceptions are taken by petitioners to the initial decision:

> "EXCEPTION I
>
> The initial decision improperly determines that home instruction is not tenurable employment."
> (Petitioners' Exceptions, at p. 1).
>
> "EXCEPTION II
>
> The initial decision erroneously sets the tenure acquisition date for Hyman."
> (Petitioners' Exceptions, at p. 5)
>
> "EXCEPTION III
>
> The initial decision improperly sets the tenure of Skulnik."
> (Petitioners' Exceptions, at p. 8)
>
> "EXCEPTION IV
>
> The initial decision incorrectly determines the tenure status of Greenstein."
> (Petitioners' Exceptions, at p. 14)
>
> "EXCEPTION V
>
> The initial decision improperly categorizes the tenure category of Hyman, Skulnik and Greenstein."
> (Petitioners' Exceptions, at p. 15)

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"EXCEPTION VI

The initial decision fails to recognize the seniority status of the Petitioners."
(Petitioners' Exceptions, at p. 18)

"EXCEPTION VII

The initial decision improperly rules that Greenstein's tenure and seniority rights were not violated."
(Petitioners' Exceptions, at p. 30)

"EXCEPTION VIII

The initial decision's failure to award proper salary guide placement is contrary to law."

***

"A. The right to proper salary guide placement

***

"B. The flawed analysis underlying the rejection of Petitioners' claims"
(Petitioners' Exceptions, at pp. 34, 35, 42)

"EXCEPTION IX

The initial decision failed to make a decision as to the request of Skulnik, Baron and Schenck for inclusion of prior service for present guide placement."
(Petitioners' Exceptions, at p. 45)

It is observed further that the detailed arguments advanced by petitioners to the initial decision are set forth in their written exceptions of forty-six pages which is part of the record of this matter and are hereby incorporated by reference.

Having carefully reviewed the exceptions filed by the parties in the instant matter the Commissioner finds and determines the following:

1. Based upon the fact that Petitioners Hyman, Skulnik and Greenstein were reemployed by the Board at the commencement of the 1982-83 school year and, further, that such action by the Board did not result in a reduction in force, any issue which may have been previously raised by petitioners herein regarding their seniority status in the Board's employ is no longer the proper subject matter requiring a determination herein by the Commissioner. The Commissioner so holds.

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2. It is further found and determined that the specific part of the initial decision which addresses the tenure status of Petitioners Hyman, Skulnik and Greenstein is of no moment insofar as it attempts to arrive at findings and conclusions which reach beyond those facts which establish they have acquired a tenure status in accordance with N.J.S.A. 18A:28-5 by virtue of the valid teaching certificates they possess while serving in part-time teaching positions.

3. The Commissioner finds and determines that the ALJ correctly concluded that Petitioner Hyman's years of employment as a home instruction teacher do not attach to those years of service to be counted toward her acquistion of tenure as a teaching staff member. The Commissioner adopts those findings and conclusions of the ALJ in the initial decision as his own in reaching this determination.

4. The Commissioner concurs with that determination of the ALJ which holds that the determination of the tenure status of Petitioners Hyman, Skulnik and Greenstein, as well as all other petitioners herein, is controlled by the recent ruling handed down by the New Jersey Supreme Court in Spiewak, supra. The Commissioner finds and determines that the relief to be accorded petitioners is placement on the appropriate step of the existing salary schedule, establishing the rates of compensation for regular teaching staff members. All other benefits and emoluments to be accorded petitioners must also be implemented on the same basis. In arriving at the above determination the Commissioner does not, however, construe the language of the Court in Spiewak, supra, to grant retroactive salary benefits to petitioners as regular teaching staff members. This is so by virtue of the fact that formal litigation before the Commissioner was instituted by petitioners subsequent to the New Jersey Supreme Court's decision in Spiewak, issued on June 23, 1982.

In the Commissioner's judgment, the above determination is not intended to preclude the Board from negotiating differences in salary compensation between supplemental or auxiliary teachers and regular teachers. However, the Board is free to do so when there is a clear recognition and acceptance on both sides in the negotiating process that auxiliary teachers are by law teaching staff members eligible to obtain tenure.

In the instant matter, the auxiliary teachers were not recognized as tenure eligible prior to or at the time the current negotiated agreement became effective. They are therefore entitled to the rights of salary and benefits accorded to all other regular teaching staff members who are tenure eligible.

Should the auxiliary teachers and the Teaneck Board of Education now seek to negotiate an agreement which would provide a different salary scale for auxiliary teachers than for regular teaching staff members, they are free to do so.

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In effect, to accept the ALJ's reasoning that the Board may continue to pay auxiliary teachers on the separate salary guide now included in the negotiated agreement would mean that the auxiliary teachers were forced to accept an inferior status by virtue of the Board's failure to recognize them as tenure eligible employees in the first instance.

The Commissioner cannot interpret the Court's ruling in Spiewak, supra, to require local boards of education to recognize such teaching staff members as tenure eligible, as a matter of law and without the same status and rights attached thereto.

Accordingly, the initial decision in the instant matter is hereby modified to reflect those findings and determinations rendered herein by the Commissioner.

The Board is hereby directed to recognize its auxiliary teachers as tenure eligible employees and to thereby grant them the same rights and benefits afforded all other teaching staff members in accordance with those determinations set forth in this decision.

Such relief granted to petitioners herein shall be deemed to have become effective as of the 1982-83 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 15, 1983

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6001-82
(OAL DKT. NO. EDU 1846-81 ON REMAND)
AGENCY DKT. NO. 549-11/80A

GLEN ROCK EDUCATION ASSOCIATION,
SARAH BROWN AND N. MILES LEONARD,
Petitioners
v.
GLEN ROCK BOARD OF EDUCATION,
Respondent

APPEARANCES:

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

Martin R. Pachman, Esq., for respondent

Record Closed: June 6, 1983 Decided: June 14, 1983

BEFORE **ROBERT P. GLICKMAN**, ALJ:

An Initial Decision was filed in the within matter on April 26, 1982. The Commissioner of Education remanded the matter on June 14, 1982 for reasons hereinafter set forth. The Board appealed the decision of the Commissioner of Education to the State Board of Education on July 2, 1982. On October 6, 1982, the State Board affirmed the decision of the Commissioner of Education without comment.

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The matter on remand was transmitted to the Office of Administrative Law on June 17, 1982 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The matter was scheduled for trial on May 6, 1983. Counsel agreed that the Acting Commissioner of Education, in his remand of June 14, 1982, failed to read the transcript of the trial of March 1, 1982 which contained a complete record of the duties of the Educational Media Specialist and the Assistant to the Librarian. By agreement of counsel, and with approval of the court, it was decided that no further testimony would be required. Briefs were submitted on June 6, 1983 amplifying and highlighting those facts contained in the record of March 1, 1982.

The record is hereby deemed to be closed on June 6, 1983. The Initial Decision filed on April 26, 1982 is attached hereto as Appendix A and made a part of this Initial Decision.

In remanding this matter to me, the Acting Commissioner of Education stated:

> An examination of the record herein fails to reveal to the Commissioner evidence, by exhibit and direct testimony, of the exact duties of the educational media specialist (Library Media Manager) and the assistant to the librarian. The Commissioner deems it important that the precise duties of each position must be clearly established. The Commissioner so holds.

In compliance with the direction of the Acting Commissioner of Education, and based on the record in the trial of March 1, 1982, I **FIND** the following uncontroverted facts:

1. Eileen Colyer, Assistant to Librarian, has been assigned to the work station in the senior high school library.

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2. Eileen Colyer selects print materials for purchase based on her reading of professional journals. She receives input from Christine Fiocchi, Library Media Manager, as to what she feels should be in the library.

3. Teachers desiring to place a purchase for specific items for the library may go to either Ms. Colyer or Ms. Fiocchi with such a request.

4. Ms. Colyer is in charge of maintaining the senior high school library collections, which involves the acquisition of materials.

5. Ms. Colyer is responsible for cataloging materials and classifying them and making sure that they are processed in order to be made available for student and faculty use.

6. Ms. Colyer has some input into the senior high school library budget in that she suggests to Ms. Fiocchi what equipment or books are needed. This includes costing out materials which she suggests should be purchased.

7. A separate book is kept which indicates how much money is in the book account and periodical account. Ms. Colyer checks that book to see what money is left in the different accounts.

8. Although Ms. Colyer does not do it on her own, she gives input to Ms. Fiocchi with regard to any reorganization of the senior library, any physical change, or any future planning.

9. Ms. Colyer instructs "student aides" who are high school students who help around the library. Although Ms. Fiocchi actually gives a grade to each of the student aides for their help, Ms. Colyer suggests the grade to Ms. Fiocchi.

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10. Ms. Colyer suggests books which would be appropriate for students to read. She also aids teachers who come in and ask for a book on a certain specific subject.

11. Ms. Colyer provides a reference service to both faculty and students.

12. Ms. Colyer assists Ms. Fiocchi in library orientation given to ninth graders in October of each year. She will tell each class what materials are available in the library, what are the hours, and what are the overdue policies.

13. Ms. Colyer prepares and maintains a class use schedule in the senior library. Whenever a teacher wants to bring a class to the library, Ms. Colyer will mark down the time on a calendar and reserve the library for that particular class. She feels that she has the authority to do this without securing the approval of Ms. Fiocchi.

13. Ms. Colyer prepares bibliography and new acquisition lists when books are received. If a teacher wants a bibliography on a given topic to give to students, Ms. Colyer will prepare it for the teacher.

14. When teachers request certain library materials from Ms. Colyer, it is her responsibility to get the books ready. The bulletin boards and book displays in the senior high school library are maintained by Ms. Colyer.

15. Ms. Colyer attends faculty meetings and workshops whenever possible even though she was never told she had to attend same.

16. On occasions, Ms. Colyer has initiated purchase orders for materials, equipment and supplies. If it is a large purchase, however, involving a lot of money, Ms. Colyer will confer with Ms. Fiocchi first.

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17. Ms. Colyer is involved in informing the school community about library services.

18. Although most policies involving the libraries originate with Ms. Fiocchi, there have been occasions when Ms. Colyer has suggested a policy to Ms. Fiocchi which was ultimately adopted.

19. Ms. Fiocchi operates under a job description promulgated by the Board (P-4) and possesses the required certificate as an educational medical specialist.

20. Ms. Fiocchi is responsible for the library program in the school; however, she basically operates from the junior high school library and audio visual center.

21. Ms. Colyer is Ms. Fiocchi's assistant. There are many days when Ms. Fiocchi has no contact with Ms. Colyer.

22. Ms. Fiocchi is responsible for acquiring new print and nonprint materials for the library. Any acquisitions for the senior high school library are made after conferring with Ms. Colyer.

23. Ms. Fiocchi is responsible for the organization of materials, the physical processing of the materials, classification of the materials, and circulation of the materials.

24. Ms. Fiocchi maintains and organizes the collection at the junior high school library.

25. Ms. Fiocchi ultimately is responsible for the entire library budget, but Ms. Colyer provides input as to the needs of the senior high school library. Ms. Fiocchi is responsible for training, supervising and grading student library aides used in both libraries. However, Ms. Colyer is responsible for training and supervising the senior high school library aides on an independent basis.

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26. Ms. Fiocchi, as manager of the library program, is responsible for long and short term planning, reorganization of the library, instituting new programs, and initiating new projects. Ms. Colyer assists Ms. Fiocchi in these areas.

29. With regard to reading guidance, Ms. Fiocchi carries this out in the junior high school library by recommending books and providing bibliographies. Ms. Colyer has similar responsibilities in the senior high school library.

30. Ms. Fiocchi is responsible for the library instructional program which consists of a library orientation for seventh and ninth graders dealing with research skills needed in the library. Ms. Colyer assists her.

31. A class use schedule is prepared by Ms. Fiocchi for the junior high school library. She has ultimate responsibility for all scheduling, although she leaves the day to day activities in the senior high school library up to Ms. Colyer.

32. Ms. Fiocchi prepares bibliography and new acquisition lists, when new materials are received by the library, in order to inform the school community of such materials. The materials listed by Ms. Fiocchi are not limited to the junior high school library. She also requests that Ms. Colyer prepare bibliographies in certain areas.

33. Ms. Fiocchi provides assistance to teachers in preparing instructional units and resources. Ms. Colyer has similar responsibilities.

34. Ms. Fiocchi is responsible for maintaining the bulletin boards and book displays in the junior high school library. She also maintains a periodical collection.

35. Ms. Fiocchi attends faculty meetings and workshops.

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36. Ms. Fiocchi initiates the purchase of materials, equipment and supplies for the library. All items are previewed prior to purchase. Once materials are acquired, they must be processed, cataloged and then put in circulation. Ms. Colyer has similar responsibilities.

37. All library items are inventoried by Ms. Fiocchi, with Ms. Colyer's assistance.

38. Ms. Fiocchi has the responsibility in the area of formulating and implementing library policy.

39. Ms. Fiocchi has the sole responsibility for the direct instruction of pupils. Ms. Colyer has no responsibility for instruction of pupils nor does she teach any pupils.

CONCLUSIONS OF LAW

Having set forth the exact duties of the educational media specialist (Library Media Manager) and the Assistant to the Librarian, this decision is in compliance with the Commissioner's remand.

Based on the foregoing, and based on what has been previously set forth in my Initial Decision filed on April 26, 1982, I **CONCLUDE** that the Assistant to the Librarian performs services which are sufficiently different from the Library Media Manager, based on her nonteaching responsibilities, as to warrant the Board's establishment of this position without requiring certification.

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

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

6-17-83
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

6/21/83
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

June 20, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

md/E

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GLEN ROCK EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

The Commissioner observes that timely exceptions to the initial decision on remand were filed by petitioners pursuant to N.J.A.C. 1:1-16.4a, b and c.

Initially, the Commissioner is constrained to observe that the ALJ states, ante, that counsel for the parties "***agreed that the Acting Commissioner of Education, in his remand of June 14, 1982, failed to read the transcript of the trial of March 1, 1982 which contained a complete record of the duties of the Educational Media Specialist and the Assistant to the Librarian.***"

While the Commissioner is somewhat puzzled at the import of this statement made by the ALJ inasmuch as it does not indicate with whom counsel were in agreement, nevertheless counsel for petitioners has denied that such agreement had been reached in his exceptions to the initial decision on remand. (Petitioners' Exceptions, at p. 3)

Moreover, the Commissioner notes that the remand was predicated upon the premise that the ALJ failed to incorporate the appropriate findings of fact with respect to the specific issue in this matter in accordance with N.J.A.C. 1:1-16.3(c) which reads in pertinent part:

> "The initial decision shall contain:
>
> ***
>
> 7. Specific findings of contested fact which shall be designated as such and which shall not be set forth in statutory or conclusionary language***."
>
> (Emphasis supplied.)

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Petitioners except to the findings and conclusions of the ALJ on the following grounds:

1. The facts of this matter clearly reveal that the Assistant to the Librarian performs functions which require certification as an Educational Media Specialist (N.J.A.C. 6:11-12.21) or in the alternative as an Associate Educational Media Specialist (N.J.A.C.6:11-12.22). (Petitioners' Exceptions, at pp. 2-3)

2. Contrary to determination and views rendered by the Bergen County Superintendent of Schools to the Superintendent of the Glen Rock School District on September 20, 1980 (P-3) pertaining to the Assistant to the Librarian's job description (P-2), the removal of the requirement of a Masters Degree in Library Science does not automatically allow the position to be designated as a non-certificated position.

In this regard, petitioners maintain that the job description for the position of Assistant to the Librarian should have been examined as to the duties assigned to that position and not just the title of the position. (N.J.A.C. 6:11-3.6; N.J.A.C. 6:11-4.9)

3. The testimony adduced at the hearing from the Bergen Superintendent, which supports his determination to approve the job description of Assistant to the Librarian as a non-certificated position by virtue of the fact that it is non-instructional, is incorrect both factually and as a matter of law.

Petitioners maintain that the Regulations and Standards for Certification identify those positions requiring Educational Service Certificates as opposed to Instructional Certificates. These regulations and standards indicate that persons serving as educational services personnel are not primarily expected to teach; in fact, many of such positions so categorized do not require the holding of an Educational Services Certificate to teach at all.

Finally, petitioners state the following regarding their exceptions to the initial decision:

> "***Further support for petitioners' position is found in the regulations implicated herein. (N.J.A.C. 6:11-12.21; N.J.A.C. 6:11-12.22) There is no language in these regulations from which anyone can possibly conclude that they are required only if the instruction of pupils is included among employment responsibilities. To the contrary, they are necessary if an individual

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> provides 'educational media services.' Indeed, the requirements for obtaining an Associate Educational Media Specialist certificate do not contain any obligation for prior teaching experience. There simply is no relationship between these certificates and the conclusion drawn by Dr. Adler that they are not needed because the individual does not 'teach.'***"
>
> (Petitioners' Exceptions, at p. 5)

The Commissioner has reviewed the job description (P-2) which was subsequently approved with revisions by the Bergen County Superintendent. He has also reviewed those uncontroverted findings of fact set forth in the initial decision regarding the actual duties performed by the Assistant to the Librarian. In both instances the Commissioner finds and determines that the expressed duties or functions of the Assistant to the Librarian are sufficient in scope and responsibility to require the person employed in such position to possess an appropriate Educational Services Certificate issued by the State Board of Examiners. The reasons for the above determination are those set forth in petitioners' exceptions herein which the Commissioner hereby adopts as his own.

The Commissioner further finds and determines that the duties of the position Assistant to the Librarian require such person so employed to qualify for an endorsement on the Educational Services Certificate as an Associate Educational Media Specialist.

Accordingly, the conclusions and recommendations rendered by the ALJ in this initial decision on remand are hereby reversed and the Board is directed to immediately comply with the final determination of the Commissioner herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 15, 1983

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3487-81
AGENCY DKT. NO. 206-5/81A

TRENTON EDUCATION ASSOCIATION,
Petitioner
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

APPEARANCES:

Arnold M. Mellk, Esq., for petitioner (Katzenbach, Gildea and Rudner, attorneys; substitution for Greenberg and Mellk, attorneys)

Robert B. Rottkamp, Jr., Esq., for respondent and on the brief (Merlino, Rottkamp and Flacks, attorneys; substitution for Paul D. McLemore, Esq.)

Record Closed: May 24, 1983 Decided: July 11, 1983

BEFORE **LILLARD E. LAW,** ALJ:

Petitioner, by way of verified Petition of Appeal and amended petition, alleges that the Board of Education of the City of Trenton (Board) is in violation of N.J.A.C. 6:28-3.2 by allowing and permitting: more than one category of educationally handicapped pupils to be serviced in a single classroom; pupil class sizes for specific categories to exceed the regulatory limits without advanced written approval of the County Superintendent of Schools; and, the dispersement of special education handicapped pupils into regular, mainstream classrooms without providing adequate or substitute

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teachers for the handicapped pupils when the special education teacher is absent from duty. The Board, by way of Answer, denies the allegations and leaves petitioner to its proofs of the matters asserted. The Board also sets forth three affirmative defenses asserting that: petitioner fails to state a cause of action upon which relief may be granted, the cause of action is barred by the equitable doctrine of laches and, the allegations relate to the 1980-81 and 1981-82 school years and, therefore, are rendered moot.

The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 9, 1981, at which the issues to be determined were agreed upon and set forth by the parties. Thereafter, the parties engaged in settlement discussions, which were unsuccessful, and the matter proceeded to hearing on February 28 and March 10, 1983, at the Trenton Office of Administrative Law. The parties submitted post-hearing briefs and memoranda of law, and the case was considered closed on May 24, 1983.

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education by petitioner's verified petition of appeal on May 21, 1981. On June 4, 1981, subsequent to receipt of the Board's Answer, the Commissioner transmitted it to the Office of Administrative Law. Thereafter, a prehearing conference scheduled for August 25, 1981, was adjourned and rescheduled for October 9, 1981, when it was held. Pursuant to the Prehearing Order, dated October 14, 1981, hearing dates were set down for January 12 and 13, 1982. Between the dates of October 9, 1981 and January 12, 1982, the parties, with Mr. Rottkamp representing the Board, agreed to certain settlement terms of the matters in dispute and also agreed to submit a consent order and stipulation of dismissal to this court for its review and consideration. The hearing scheduled for Janauary 12 and 13, 1982, was, therefore, adjourned. On March 5, 1982, this court was in receipt of substitution of attorney, dated February 24, 1982, with Mr. Paul McLemore, Esq. substituting for Mr. Rottkamp for the respondent Board.

On March 25, 1982, this court requested the parties to advise the court as to the status of the matter, within ten days of the above date. On March 27, 1982,

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Mr. Mellk, counsel for petitioner, advised the court that petitioner was preparing the report agreed to by the parties; however, the delay in its preparation and submission was caused by the Board's change of counsel. On April 20, 1982, counsel for petitioner forwarded to the court a Proposal on Behalf of the Trenton Education Association in accordance with the agreement reached between the parties. On May 5, 1982, counsel for the Board advised the court, among other things, that it was his belief that an amicable resolution of the matter could be reached. Mr. McLemore, however, requested and was granted an extension to consider the terms and conditions of petitioner's proposal. The parties were informed, on May 7, 1982, that the court should be advised as to a resolution of the matter on or about June 1, 1982. No resolution of the matter having been brought before the court on June 1, 1982, a hearing date of June 24, 1982, was, therefore, set down for a plenary hearing of the issues.

On June 17, 1982, counsel for petitioner advised the court that the matter was close to settlement and that the parties expected to provide the undersigned with a consent order shortly thereafter. Counsel requested, therefore, that the matter be placed on the inactive list in order that finalization be had of the consent agreement. The court's, not having been advised of a settlement, on September 28, 1982, did request the parties to respond in writing as to the then current status of the matter, and if no settlement had been reached, a peremptory hearing date was to be set. Petitioner answered the undersigned's request on September 30, agreeing to the scheduling of a peremptory hearing date. No response was received from the Board. The date of February 9, 1983, was, therefore, set aside as the hearing date; however, the counsel for the Board, Mr. McLemore, was also scheduled to appear at hearing before another administrative law judge. Accordingly, February 28, 1983, was set down and was the first day of hearing. The matter was continued on March 10, 1983. Subsequent to hearing, Mr. McLemore was replaced as the Board's counsel by Mr. Rottkamp. Although Mr. Rottkamp had represented the Board in the early stages of this litigation, he had not represented the Board at hearing. He therefore requested an extension for the submission of post-hearing brief, which was granted.

ISSUES TO BE DETERMINED

Pursuant to the Prehearing Order, the issues in this matter are two, as follow:

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1. whether the Board is in violation of N.J.A.C. 6:28-3.1 by combining categories of special education pupils in a single classroom;

2. whether the Board is in violation of N.J.A.C. 6:28-3.2 by assigning more pupils for special education classes than permitted by regulation.

TESTIMONIAL EVIDENCE

A summary of the testimony proffered by petitioner demonstrates that teachers of handicapped pupils have voiced their concerns to the Board's administration about the Board's special education programs since the early 1970's. In the recent past, during the 1979-80 school year, the petitioner Association processed a grievance to an award of arbitration effective March 24, 1980, wherein the Board "... agrees to make the procurement of qualified substitutes [teachers] for absent Special Education Teachers a first priority at all times. To this end, the Board agrees to first offer Special Education vacancies to all substitutes until all such vacancies are filled" (P-1).

The arbitration award was the consequence of petitioner's allegation that substitute teachers were not being provided to special education classes by the Board when a teacher of the handicapped pupils was absent from duty. The petitioner alleged that such special education pupils were systematically dispersed into regular (mainstream) classrooms upon the absence of the special education teacher and were therefore denied their appropriate Identified Educational Program (IEP) as set forth by the Child Study Team (CST). Further, the handicapped pupils were also denied the benefit of their IEP, pursuant to N.J.A.C. 6:28-1.8.

The arbitration award was subsequently confirmed by the Honorable George Y. Schock, J.S.C., Law Division, Mercer County, by an Order and Judgment on Award, dated June 13, 1980, wherein the court ordered the Board to conform to the terms of the award (P-2). The Board, in compliance with the arbitration award and the court's order (P-1, P-2), commenced a pilot program by which it enhanced the per diem substitute teacher pay over and above that per diem pay offered to regular classroom substitute teachers. Petitioner asserts that during the period of the Board's pilot program, the dates were not set forth with any degree of certainty, the special education classes were covered with substitute teachers when the regular special education teacher was absent from duty.

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However, at the conclusion of the Board's pilot program of awarding an enhanced per diem pay to special education classroom substitutes, petitioner asserts that the situation reverted to the preexisting problem with few substitutes available for the special education classes and the pupils again dispersed to classrooms other than those specified in each pupil's classification. In some instances, petitioner asserts, the special education pupils were assigned to other special education classrooms creating a two-fold problem: (1) the special education pupils so assigned were not instructed pursuant to their individual classification or IEP and, (2) the classes to which these pupils were assigned resulted in an overloaded capacity of the receiving classroom, exceeding the class size by category, pursuant to N.J.A.C. 6:28-3.2(d)1 et seq.

Ms. Sandra Heckelman and Mr. Carl E. Brown, special education teachers in the employ of the Board, testified on behalf of petitioner with regard to a Special Education Questionnaire the Association employed in order to collect data from special education teachers for the 1981-82 school year (P-3), and the 1982-83 school year (P-4, P-5). Ms. Heckelman testified, among other things, as to the results of the survey instrument (P-3) which purportedly reported the observations, reactions and concerns of the special education teachers in the school district. She asserted that the concerns of the special education teachers who answered the questionnaire included, but were not limited to, the training and use of teacher aides, class size, the age span of the classes, mixing of pupils with different classifications as determined by the CST, problems with pupils, IEPs not up to date or late in arrival to the special education teacher and Instructional Guides (IGs) for individual pupils not current, among other things.

Ms. Heckelman testified as to her own experiences, asserting that upon her transfer from Columbus as a teacher of Emotionally Disturbed (ED) to Jefferson School as a teacher of the Perceptually Impaired (PI) for the 1982-83 school year, she arrived to a classroom with 12 chairs and desks, but no instructional materials, supplies, textbooks, workbooks or equipment. She stated that as of the date of her appearance at the herein hearing (February 28, 1983), she had not been in receipt of any textbooks or workbooks for the pupils assigned to her classroom.

She contended that there existed a problem with two pupils assigned to her classroom who were classified as (PI) with the CST agreeing to change the pupil classification to (ED). As of the date of hearing, the change in classification for the two pupils had not taken place. She asserted that a pupil's permanent record did not

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follow the pupil in a timely fashion when he or she was transferred from one school to another. She related that she received one pupil in her classroom in November 1982, and the permanent record still had not been transferred as of the date of hearing. A similar experience existed with a pupil transferred to her classroom in October 1982. During the 1982-83 school year, she asserted that the pupils IEPs were not forwarded to her prior to the pupils' admission to her classroom, therefore denying her an adequate opportunity to prepare for the pupils' individualized instructional program. On another occasion, a transfer pupil from Nevada who had been classified as a learning disability pupil in that State was placed into her classroom without the benefit of respondent Board's CST classification or IEP.

With regard to the scheduling of her pupils when it was necessary for her to be absent from duty, Ms. Heckelman testified that a substitute teacher had been provided for her absence during the 1982-83 school year. Prior thereto, however, the pupils in her classroom had been split up and placed in instructional settings not pursuant to their individual classification or IEPs. She contended that during the 1981-81 school year, between 30 and 40 times other special education pupils were assigned to her classroom when special education teachers were absent. She asserted that substitute teachers were readily available during the period of the Board's pilot program; however, the substitutes were not as readily available when the pilot program was discontinued.

Mr. Brown, employed by the Board as a teacher of handicapped pupils for 19 years, testified he aided in the correlation of data and the tabulation of the results of the Association's survey of the Board's special education teachers for the 1981-82 school year (P-1). During the school years 1980-81 and 1981-82, he taught ED pupils at the Board's Columbus School. In 1981-82 he was assigned to instruct nine pupils where the regulation (N.J.A.C. 6:28-3.2(d)1iv) provides for a maximum of eight pupils. He admitted that the regulation provides for an increase in class size by no more than one-third when a teacher aide is supplied to the special education teacher (N.J.A.C. 6:28-3.2(d)2). He contended, however, that this provision was violated on two counts: (1) the Board failed to procure advanced written approval from the county superintendent of schools before the pupil was admitted to his classroom and, (2) the teacher aide was incapable of performing her assigned duties. In this regard, Mr. Brown testified that the teacher aide assigned to his classroom was under medication and appeared to be over-sedated. His aide slept on the job or was ill when reporting for duty and was absent an inordinate number of days. As a consequence of the aide's behavior and lack of performance, Mr. Brown filed a

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grievance requesting that the assigned aide be removed and that he be assigned an aide who would perform the required duties. The grievance went through the various steps as provided by the procedure in the negotiated contract and ultimately reached Level III, which included two members of the Board and an agent of the Board. It was determined by the Board that the aide would remain with Mr. Brown, which she did for the remainder of the school year. He asserted that the aide's former behavior and conduct continued throughout her assignment with him. With regard to the additional pupil assigned to his classroom, Mr. Brown testified that he was not provided with supplies for the pupil subsequent to the pupil's assignment to his classroom, nor were the pupil's records supplied to the teacher.

Mr. Brown testified, on direct and cross-examination, that during the 1981-82 school year he did not receive supplies or materials for five pupils assigned to his classroom for the entire year. He asserted that during the same year, pupils were assigned to his classroom when a special education teacher was absent therefore exceeding the per pupil classroom limits, pursuant to the Administrative Code. On those days when he was absent and a substitute teacher was not available, his pupils were dispersed to other special education classrooms.

Ms. Kathleen Eckert, a teacher of ED pupils, testified, among other things, that special education classes had been used for purposes other than for instructing handicapped pupils. She contended that the school administrator sent unclassified pupils to special education classroom for in-school suspension and other disciplinary purposes.

Ms. Eckert testified that pupil IEPs and IGs were not provided to the special education teachers in a timely fashion. She asserted that she did not have either an IEP or an IG for a pupil assigned to her classroom for the 1982-83 school year.

Ms. Eckert asserted that in 1981-82, she was assigned ten pupils for her classroom of ED pupils and, because of the number assigned having exceeded the per pupil limit of eight pupils, she was provided with a teacher aide. A problem is created, however, when the teacher aide is absent from duty because the Board makes no provision for supplying substitute teacher aides.

She also contends that some pupils were not receiving the services as set forth in the IEP. She provided an example of a pupil, "M.B.," who was to receive speech

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correction instruction, pursuant to his IEP; however, none had been provided while the pupil was assigned to her classroom.

Other teachers similarly testified on behalf of petitioner. Their concerns of alleged violation of the administrative rules and regulations were confined, for the most part, to the 1980-81 school year. Their observations with respect to the 1982-83 school year dealt with pupil IEPs not forwarded to the special education teacher after the pupil had been assigned and arrived in the classroom; ordered instructional materials and equipment not received; and misclassification of handicapped pupils. With regard to the misclassification of pupils, Ms. Diane Korpita, a teacher of the Neurologically Impaired (NI), testified that during 1982-83, two pupils identified and classified as Communication Handicapped (CH) were assigned to her classroom for NI pupils. She asserted that she is neither certificated nor qualified to instruct CH pupils but, nonetheless, the pupils remained in her classroom even after she advised the Board's CST of the misassignment.

Four school administrators testified on behalf of the Board, each setting forth, among other things, their various and specific roles and responsibilities with regard to special education in the school district. Dr. Thomas Brooks, coordinator of the child study team services, explained that he supervised the operation of the school district's 14 CST's. His major responsibility was to oversee the pupil referrals, identification, classification and ultimate placement in one of the district's special education programs. He is not responsible for the delivery of instructional or educational services to the pupils, but rather, for monitoring, the CST's "paperwork"; i.e., IEPs, IGs, appropriate placement of the pupils, etc. The responsibility of providing educational services to the special education classes was left to another administrator.

Dr. Brooks rebutted the testimony proffered by petitioner with regard to complaints from special education teachers concerning the misclassification of pupils. He asserted that such assertions and complaints were not supported by diagnostic data. He contended that teachers of the handicapped pupil are not certificated to make the determination of the classification of a pupil. Such classification is made by the CST, a team of specialists reviewing all of the relevant data prior to determining the classification of the individual pupil.

Dr. Brooks counters the petitioner's assertion that certain special education classes exceeded the pupil maxima by indicating that in all situations, a teacher aide was

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provided the special education teacher pursuant to the Administrative Code. He was unaware of the problem of the teacher aide assigned to Mr. Brown's classroom or of the grievance alleging that the teacher aide was over-sedated, slept on the job or was excessively absent from duty.

Dr. Brooks denied having any information that special education classrooms were used for disciplinary purposes for "mainstream" pupils in the schools. He testified that he had heard complaints that supplies and materials were not delivered to special education classrooms in a timely manner during the 1982-83 school year. He asserted, however, that those classrooms he had personally visited had sufficient supplies and materials to conduct the instructional program.

On cross-examination, Dr. Brooks contradicted his earlier testimony that R-1, a series of computer print-outs in evidence, reflected that Ms. Heckelman's PI class consisted of ten pupils when, in fact, there were twelve pupils enrolled in her classroom. Similarly, Ms. Heckelman asserted that two pupils assigned to her classroom were ED pupils rather than PI. The record demonstrates that one pupil, "M.B.," whom Ms. Heckelman had identified as ED rather than as PI, had been processed and reclassified as ED three days prior to the second hearing in this matter and was to be transferred out of Ms. Heckelman's classroom on March 14, 1983. The record further demonstrates that a reevaluation of the second pupil identified by Ms. Heckelman as ED had begun during the preceding school year; however, R-1 made no reference to or indication of such a reevaluation.

Dr. Brooks also admitted on cross-examination of a significant time lag in providing special education teachers with the pupils' IEP subsequent to the pupil's assignment to a particular classroom teacher. He asserted, however, that it was his belief that the Board was in compliance with the Administrative Code with respect to its special education programs.

Mr. Eugene Gadson, Director of Special Pupil Services, whose major duty and responsibility is to develop an annual budget and to oversee the general operation of the four coordinators of Special Education, CST services (Dr. Brooks), Home Supplementory Instruction and the Gifted and Talented Program testified on behalf of the Board. The Director asserted, with qualifications, that the CST does not misclassify special education pupils. When a pupil has been classified and it is subsequently revealed, through

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observations and other empirical da.a, that the pupil is assigned to a class to which he does not belong, the CST will undertake to reevaluate the pupil for a proper placement. Notwithstanding the Director's emphatic denial of misclassification of special education pupils during the school years 1980-81 through 1982-83, he disclosed a dramatic example of a misclassification, summarized as follows: A pupil had been classified as trainable and had undergone three examinations conducted by the Mercer Hearing Clinic, all of which determined that the pupil had no hearing problem. Subsequently, a visiting teacher observed that the pupil would only respond when the teacher and pupil were in a face-to-face position. The visiting teacher opined that the pupil had a hearing problem and a subsequent reexamination was conducted upon the pupil. The reexamination discovered a severe hearing problem. Thereafter, the pupil was fitted with a hearing aid and, after a ten-year placement in the trainable class, he was removed and was making progress in his new educational setting.

The Director asserted that he had no knowledge of the special education classes being used for in-school suspensions or other disciplinary purpose of mainstreamed or regular classroom pupils. He testified that the principal of each of the schools in which special education classes were housed was the instructional leader of the school and had immediate supervisory authority over all the teachers and pupils. The Director asserted that he had no direct authority over the principal, only advisory or indirect authority so far as special education problems were concerned. The Director's development of the budget for special education programs throughout the district is based, in major part, upon the recommendations of the individual building principals to him. In theory, the building principal is required to survey the special education teachers, under his direction and control, to determine their individual budgetary needs for the subsequent year and transmit those needs to the Director. In practice, it appears that the principal and special education teachers negotiate as to what supplies, textbooks and materials are to be allocated for the subsequent school year based upon a dollar allotment determined by the Board and/or its central office administrators.

The Director testified as to his understanding of N.J.A.C. 6:28-3.2(d) et seq., with regard to exceeding the classroom pupil enrollment in the various categories. He understood that in order to exceed the maximum pupil class size enrollment that "advance written approval from the Office of the County Superintendent" was to be had (N.J.A.C. 6:28-3.2(d)2). He testified, however, that he had received oral approval from the Mercer County Superintendent to exceed the class size on five occasions in the 1980-81 school

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year and for approximately nine times during the 1981-82 school year. The written approval from the County Superintendent followed each of the oral approvals. During the three-year period, between 1980-81 and 1982-83, the Director was required to seek class size approvals from the County Superintendent on 15 or 20 occasions. The Director asserted that the verbal approval was necessary in order to immediately place the special education pupil in the appropriate classroom for the continuance of his/her educational program. He also stated that there were occasions when the County Superintendent would not verbally authorize the district to exceed the maximum for a special education class.

The Director testified that he had heard of complaints voiced by special education teachers that their classes were not always provided substitute teachers during the absence of a teacher and that the pupils were dispersed to other special education classes on such occasions. He stated that it is the building principal's responsibility, operating through the Board's personnel office, to provide for substitute teachers when special education instructors are absent from duty. In the event the building principal is unable to provide a substitut · teacher, it is the building principal who makes the decision to "collapse" the class of the absent teacher and disperse the pupils to other special education classrooms. The Director is not advised of such daily practices, nor does he involve himself in the special education substitute teacher problem.

Between the approximate dates of November 1979 and March 31, 1982, the Commissioner of Education had assigned a Monitor General to the school district to monitor and oversee the Board's entire operation to assure that the Board was in compliance with all aspects of Title 18A of the Laws of New Jersey and the Administrative Code, Title 6. Pursuant thereto, the Board's special education program was monitored for compliance with N.J.S.A. 18A:46-1 et seq. and N.J.A.C. 6:28-1 et seq. The Director testified that prior to the assignment of the Monitor General to the district, the Board was not in compliance with statutory or regulatory provisions concerned with the education of the handicapped pupil. During the three-year term the Monitor General was in the district, representatives from the State Department of Education, Division of School Programs, Branch of Special Education, worked with the Board's special education administrators to remediate the areas found to be in noncompliance. The Director testified that the school district was found to be in compliance with the regulatory provisions upon the conclusion of the Monitor General's term.

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As a consequence of the Monitor General's oversight of the Board's operations, the Director was caused to compile and submit a monthly compliance report to the Board's Executive Director of Curriculum Services (R-2, R-3). Each month the building principals were sent a survey instrument consisting of seven items to which the individual principal was required to respond as to whether the school was in compliance or noncompliance with the special education regulations. Where a principal indicated the school was not in compliance with the regulations, the survey instruments provided a section for the principal to make comments with regard to an item in noncompliance. Thereafter, the Director compiled the information and submitted a single monthly compliance report to the Executive Director (R-2, R-3).

The Director testified that he relied entirely upon the individual building principal in order to report accurately as to those items which were categorized as noncompliance. When or if a principal failed or neglected to indicate an item that was not in compliance, neither the Director nor his staff conducted any follow-up with the principal, and the Director's compliance report transmitted to the Executive Director would contain the omission.

The Director testified in reference to a series of compliance reports for the 1981-82 school year (R-2) and the 1982-83 school year (R-3). The record demonstrates that there was a recurring problem of noncompliance with regard to the IGs being forwarded to the special education teachers subsequent to the handicapped pupil's assignment to a classroom (R-2, R-3, Item No. 2). The other major noncompliance item was the submission, from the CST to the building's central office, of the pupil's IEP (R-2 and R-3, Item No. 3). From September 1981 through May 1982, individual principals reported they had not been in receipt of all classified pupils' IEPs (R-2). In addition, the principal of the Stokes School reported, from September 1981 through April 1982, that eight pupils' IEPs required supplemental instruction five days per week; however, the pupils were provided such service only three days per week, in violation of the regulations (R-2). The principal of Columbus School reported that the school did not have the services of an occupational therapist, physical therapist or a teacher of the deaf, as required by certain of its pupils' IEPs. For the 1982-83 school year, the principal of the Parker School reported, from September 1982 through December 1982, the lack of a special teacher for pupils whose IEPs required such services (R-3). The Director asserted that improvements had been made with the items in noncompliance, and it was his belief and opinion that the Board was, in fact, in compliance with the regulations.

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Ms. Kathleen L. Fitton, Director of "C" Certified Personnel for the Board, testified, among other things, with regard to teacher absenteeism and the provisions for substitute teachers. She asserted that teacher absence ran from approximately 100 to 110 per day or about ten percent of the teaching staff, which included special education teachers. The Board has a substitute teacher list of approximately 500; however, only 95 to 100 will agree to substitute on a given day. The special education teachers average 12 to 15 absences per day and, the Director testified, the substitutes are reluctant to accept an assignment to a special education class. She asserted that the Board is able to provide approximately 88 percent coverage per day for absent teachers. No substitutes are supplied for absent supplemental or auxiliary teachers, even though the services are required by a pupil's IEPs.

FINDINGS OF FACT

Having carefully reviewed and considered the testimony and other evidence offered in this matter and having given fair weight thereto, and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** the following to be the facts herein:

MAXIMUM CLASS SIZE

The record demonstrates that the County Superintendent authorizes the Board to exceed the maximum class size in the various classifications on the average of 12 to 15 times per year on an oral representation by the Board's agents. Such authorization is in direct contravention of the regulation, N.J.A.C. 6:28-3.2(d)2—written approval. The regulation is mandatory rather than permissive and, therefore, the intent of the State Board of Education must be complied with by the Board and by the Office of the County Superintendent of Schools.

The Board is in violation of the regulation when, upon the occasion of the absence of a special education teacher and no substitute teacher is provided, the pupils are divided and dispersed to other special education classrooms.

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ABSENTEEISM

The Board experiences an absenteeism rate of approximately ten percent per day of its total teaching staff members and provides for approximately 88 percent classroom coverage by way of substitute teachers. Between 12 and 15 special education teachers are absent per day. The record demonstrates that substitute teachers are reluctant to assume the assignment for an absent special education teacher. There was no showing, however, that the Board failed to provide special education substitute teachers for the 1982-83 school year. The board does not provide substitute teachers for absent supplemental or auxiliary teaching staff members.

PUPIL IEP AND INSTRUCTIONAL GUIDES

It is apparent that a chronic problem exists in the delivery of the pupils' IEPs to the building to which the pupil is assigned and the IG to the special education teacher responsible for the pupils' daily instruction, as evidenced by the documents in the record (R-2, R-3). It is also apparent that all the educational and instructional services required by certain pupils' IEPs have not been provided by the Board (R-2, R-3).

CLASSIFICATION OF HANDICAPPED PUPILS

The document, R-1, indicates an inordinate delay between the CST's testing, identification, classification and placement of some handicapped pupils in the appropriate classroom.

Although minimal, the record shows that some pupils have been misclassified, necessitating a reevaluation by the CST for the proper classification and placement.

TEXTBOOKS, WORKBOOKS AND INSTRUCTIONAL SUPPLIES

Petitioner's witnesses are found to be credible wherein their testimony revealed that textbooks, workbooks and instructional supplies were late in arriving for the teachers' use or, alternatively, were not delivered at all.

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It is further found that special education teachers must negotiate with their building principal for the necessary instructional tools and supplies to be used in the subsequent school year.

TEACHER AIDES

The Board has, at all times, supplied teacher aides to the special education classrooms when the pupil enrollment exceeds the maximum members allowed by regulation, pursuant to N.J.A.C. 6:28-3.2(d)2.

The Board offers no special training or instruction to the teacher aides it employs for the special education classes.

The Board does not provide for substitute teacher aides when a teacher aide is absent from the special education classroom.

DISCUSSION

It is apparent from the facts adduced at hearing that the Board has made strides to improve its services for its classified handicapped pupils and to be in compliance with the Administrative Code--Special Education rules and regulations; particularly, during and subsequent to the Monitor General's appointed term to the school district. It is equally apparent that the Board has not achieved full compliance with the regulations. N.J.A.C. 6:28-1.1 et seq.

Petitioner argues that the present matter gives rise to issues of Constitutional dimensions and urges this court to so find and determine. Having carefully considered the arguments of the parties with respect to petitioner's argument and having reviewed our State's case law dealing with the issue Levine v. Institutions & Agencies, Dept. of N.J., 84 N.J. 234 (1980), I FIND and determine that petitioner's assertions and arguments are without merit. There has been no showing by petitioner that the handicapped pupils under the Board's direction and control have been deprived or denied of the right of a "free public education," as set forth in the New Jersey Constitution, Art. VIII, § 4, Para. 1 and as codified at N.J.S.A. 18A:7A-1 et seq. and N.J.S.A. 18A:46-1 et seq. Accordingly, that issue raised by petitioner in his post-hearing brief is hereby **DISMISSED.**

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Many of the concerns addressed by the special education teachers and faced by the Board may be assessed as the consequence of the various levels of the institutional bureaucracy. The line-staff distinction, as it relates to special education, appears to frustrate rather than to fulfill the desired goals and purposes. This has been amply demonstrated on the record by the division of authority and control over the special education classes with respect to the roles, sometimes conflicting, and responsibilities of the building principal and the Director of Special Pupil Services and his subordinates. These divided roles and responsibilities are evidenced by the fact that the Director: (1) assigns classified pupils to the building principal of the school in which the appropriate category of special education class is housed; (2) secures the necessary advanced written approval of the County Superintendent of Schools to exceed the mandatory class size and assigns the pupil to the building principal and the special education class; (3) provides the mandatory additional teacher aide to the special education classroom which is approved to exceed the class size limitation; (4) prepares the overall or system-wide budget for special education for the Board's consideration and adoption; and (5) administers the CSTs, through subordinates, to assure that current pupil IEPs are submitted to the building principal and that IGs are in place with the special education teachers. The building principal, moreover, is responsible for: (1) the direct supervision and administration of the special education classroom teachers and pupils assigned to his/her building; (2) providing for substitute teachers occasioned by the absence of the regular special education teacher; (3) the assignment of the special education pupils to other classrooms in the event a substitute cannot be provided for the absent special education teacher; (4) the requisition and ordering of textbooks, workbooks, supplies and other educational materials for the special education classes assigned to his/her building; and (5) negotiating directly with the special education teachers with regard to the Director's adopted special education budget and the subsequent dollar allotment granted to the building principal for such purposes.

The major conflicts between the roles and responsibilities appear to arise in four areas; namely, the delivery of the pupils' IEPs and IGs to the building principal and special education teacher, the assignment of additional pupils to a special education classroom which has reached its maximum class size and the concomitant addition of a teacher aide, the provision for substitute teachers for absent special education staff members or, alternatively, the dispersement of the absent teacher's pupils to other special education classrooms and annual budgetary allocations.

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Once a pupil has been classified and assigned to a classroom, the Director disavows any responsibility for the supervision of the pupil or special education teacher, leaving such tasks to the building principal. Nor does the Director engage in budget discussions at the building level, in support of his own budget proposals to the Board, in order to advise the building principal as to the necessary components for a sound special educational program. While the Director is held to the responsibility of oversight to make certain the school district in in complinace with the Administrative Code, he is removed from the day-to-day operation of the special education program.

The principal, on the other hand, is held responsible for compliance within the confines of his/her building, along with the other administration and supervisory duties and obligations attendant to the leadership position. The principal must insist that the CST forward the classified pupils' IEPs and IGs to the schoolhouse when the CST has failed to do so (R-2, R-3). The principal must insist of the Director to provide the required pupil services, pursuant to the pupils' IEP, when the district has failed or neglected to provide such required services (R-2, R-3). The principal is required to provide substitute teachers for absent special education teachers or, alternatively, to provide for a custodial arrangement when a substitute is unavailable, without the aid and assistance of the Director or his subordinates. Finally, the principal is required to negotiate with the special education teachers an annual dollar allotment for future educational expenditures, absent guidance or direction from the Director as to the composition of the class, the number of pupils expected to be instructed, including transfers in and out, which require additional textbooks, workbooks, materials and supplies.

Thus, while the Director is concerned with the school district's compliance with the provisions of the Special Education regulations, the major responsibility for complance falls to the building principal. The Director affords no direct supervisory or administrative support to the principal or teachers of the special education classes. The teachers and pupils of special education ultimately suffer as a consequence of this division of authority and responsibility.

CONCLUSIONS AND ORDER

I **CONCLUDE,** therefore, that petitioner has carried its burden by a preponderance of the reliable and credible evidence that the Board has been in violation

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of N.J.A.C. 6:28-3.1 by combining categories of special education pupils in a single classroom. Such combination of pupils has been occasioned by the absence of a teacher of special education and the failure of the building principal, to which the special education class was assigned, to acquire a substitute teacher for the absent special education teacher. Further, on such occasions when special education classes are combined, the Board is in violation of N.J.A.C. 6:28-3.2 by assigning more pupils to a special education class than permitted by regulation. As a consequence of such action, all pupils so affected are deprived of the educational and instructional benefits intended, pursuant to N.J.S.A. 18A:46-1 et seq. and N.J.A.C. 6:28-1.1 et seq.

Accordingly, I **CONCLUDE** and **ORDER** that the Trenton Board of Education submit to the Commissioner of Education, within 60 days of receipt of this Initial Decision, a detailed and comprehensive plan of remediation for such violations, for the Commissioner's adoption and approval.

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

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OAL DKT. NO. EDU 3487-81

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

11 July 1983
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 13, 1983
DATE

Ronald L. Parkinson
OFFICE OF ADMINISTRATIVE LAW

fms/ee

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DOCUMENTS IN EVIDENCE

P-1 Award of Arbitration

P-2 Judgment on Award

P-3 Chart

P-4 Special Ed. Questionnaire by S. Heckelman, dated 2/10/83

P-5 Special Ed. Questionnaire by Mr. Brown

R-1 Computer Print-out 3/1/83

R-2 Compliance Reports Special Ed. and Team Services 1981-82

R-3 Compliance Reports Special Ed. and Team Services 1982-83

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TRENTON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that no exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes that the Board has filed a "Plan of Remediation in Special Education," herein incorporated by reference to comply with the Order of Judge Law in this matter. An examination of this plan reveals to the Commissioner a good faith effort to provide solutions to the problems and concerns brought forth in the initial decision. Such proposed solutions include, but are not limited to, the thorough dissemination of all information to involved administrators and teachers, the creation of a pool of properly-certificated substitute teachers with appropriate remuneration, with provision for informational and training sessions. In the opinion of the Commissioner, such a plan constitutes a proper approach to providing an adequate solution to the expressed problems. However, the Commissioner is aware that this cannot be a one-shot effort but must be an on-going process to cope appropriately with any continuing problems. Consequently, the Commissioner charges the County Superintendent of Schools to review the plan in consultation with the Department's Division of Special Education and to monitor its implementation.

The Board is hereby directed to approve and comply with the specifications of the plan and any modification that may develop as a consequence of this review by the County Superintendent in consultation with the aforesaid Division of Special Education. The Commissioner retains jurisdiction.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

AUGUST 26, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 8628-82
AGENCY DKT. NO. 340-8/82A

CINNAMINSON TEACHERS' ASSOCIATION, et al,
Petitioners
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,
Respondent.

APPEARANCES:

John E. Collins, Esq., for the petitioners (Selikoff & Cohen, attorneys)

John L. Slimm, Esq, for the respondent (Slimm, Dash & Goldberg, attorneys)

Record Closed: May 20, 1983 Decided:

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

The petitioners alleged that the Board of Education of the Township of Cinnaminson (hereinafter referred to as "Board") improperly and unlawfully reduced the work period of certain guidance counselors, Frank Killino, Robert Naugle, J. Peter Croud and Joanne Leasure. The respondent denied the allegation and the matter was referred on September 16, 1982, to the Office of Administrative Law for a decision as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held in this matter by Judge Campbell on December 13, 1982, and at that time, the petitioners were granted leave to amend the petition. By this amendment, received by the Office of Administrative Law on December 21, 1982, the petitioners raised as an issue the deletion of the position of Guidance Director, formerly held by Frank Killino.

The matter was transferred to me prior to the hearing on February 16, 1983. Before the start of the hearing, the petition was further amended by the petitioners. Briefs were filed and the record in this matter closed on May 20, 1983.

I **FIND** that the undisputed facts are:

(1) There has been an ongoing decline in the student enrollment at the Cinnaminson High School since 1978 (T 231, Exhibit D).

(2) During the 1981-82 school year, the guidance department at the Cinnaminson High School was comprised of Mr. Killino, Director of Guidance, and Mr. Naugle, J. Peter Croud, Joanne Leasure and Charles Black as guidance counselors. Since Mr. Croud also served as coordinator of the school's research center, he was considered to be a half-time counselor (T 46-48).

(3) Mr. Black's position was abolished during the 1981-82 school year (T 61).

(4) Frank Killino was initially hired by the Board as a teacher in 1960 (T 19).

(5) Since 1960, Mr. Killino has been certified as an elementary school teacher, director of pupil personnel services and teacher/counselor (T 19).

(6) On or about July 1, 1965, Mr. Killino became a full-time, 12 months, guidance counselor (T 20-1), and in the spring of 1969 he was appointed to the full-time, 12 months, position of Director of Guidance (T 21-22).

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(7) In his position as Director of Guidance, Mr. Killino supervised and evaluated the members of the department; was responsible for the student records, student course selection procedure, distribution of grades, student testing program; and personally counseled 80% of the number of students served by the other full-time counselors (T 26-45).

(8) Robert Naugle was initially hired by the Board as a teacher in 1961 (T 100). He became a ten-month guidance counselor in September 1964 (T 101), and a twelve-month guidance counselor in 1966 or 1967 and served in this capacity through June 1982 (T 102). Mr. Naugle is certified as a teacher and guidance counselor (T 100).

(9) J. Peter Croud has been employed by the Board as a guidance counselor since October 1968 (T 131), and he holds a certification in student personnel services (T 132).

(10) Joanne Leasure has been employed by the Board as a guidance counselor since 1971 and holds a certificate in student personnel services (T 144).

(11) Prior to June 1982, Mr. Croud and Ms. Leasure served in ten and one-half month positions. They were required to report to work one week prior to the regular teachers in the fall and remained one week after the close of school in June (T 53, T 133, T 145).

(12) Prior to June 1982, Mr. Killino and Mr. Naugle, in the summer, would purge files, check homeroom assignments, check student transfers, prepare class ranks, correct errors in grades, review student scheduling, handle student scheduling conflicts, counsel students, etc. (T 61-71, T 106-7).

(13) Prior to June 1982, Mr. Killino and Mr. Naugle were each given a paid one-month vacation, which they took during the summer or at other times during the school year (T 71).

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(14) On January 19, 1982, the Board adopted a resolution which stated:

> The Board of Education, beginning with the 1981/82 school year will abolish all positions of:
>
> a. Department Chairpersons
>
> b. Lead Teachers
>
> c. Middle School Subject Coordinators
>
> d. Grade Level Chairpersons where said department contains fewer than six (6) members (all inclusive). [Exhibit A]

(15) A report of the adoption of this resolution was contained in the Cinnaminson Education Newsletter which is distributed to all employees of the Board (T 233-4).

(16) A resolution was adopted by the Board on March 2, 1982, which stated:

> The Board of Education has approved a resolution to abolish all positions such as Department Chairpersons, Lead Teachers, Middle School Subject Coordinators, Grade Level Chairpersons where said departments contained fewer than six (6) members, now
>
> Be It Resolved that the Board of Education will abolish the position of the Director of Guidance at the High School for the same reasons, and
>
> Be It Further Resolved that the responsibilities of said position will be assumed by the Principal of the High School to be effective the 1982/83 school year. [Exhibit B]

(17) Mr. Killino received no personal notice prior to or after the abolishment by the Board of his Director of Guidance position (T 23).

(18) Notice of the abolishment of the position of Director of Guidance appeared in the Cinnaminson Education Newsletter, dated April 2, 1982 (R-5).

(19) The job description for the position of High School principal was revised (R-4).

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(20) Robert Wisor, the principal of the Cinnaminson High School holds a teacher certificate, a student personnel services certificate (R-1), a principal certificate (R-3) and a school administrator certificate (R-2, T 215-217).

(21) During the 1982-83 school year, Mr. Wisor has and will supervise the work of the guidance counselors but will not counsel any students (R-4, T 218).

(22) On March 30, 1982, the Board adopted a resolution which stated:

> Whereas the Board of Education on March 30, 1982 abolished the two 12 month guidance counselor positions to 10 month positions, and
>
> Whereas, on March 2, 1982 the Board abolished the position of Director of Guidance, and
>
> Whereas on January 19, 1982 the Board abolished Department Chairperson, Lead Teachers, Middle School Subject Coordinators and Grade Level Chairpersons where said departments contain fewer than six members, now, therefore
>
> Be It Resolved, that the Board of Education clarify its intent to return all guidance counselors who are now on a ratio for working extra days to a regular standard teachers' contract with their salary based on the teachers' contract and teachers' work day, for the 1982/83 school year. [Exhibit C, p. 4]

(23) Mr. Killino, Mr. Naugle, Ms. Leasure and Mr. Croud had achieved tenure in their respective positions and each of them received a letter, dated May 24, 1982, informing them that their positions would be reduced to a ten-month position with an appropriate reduction in salary (P-1, P-5, T 52, T 103-5, T-134, T 145-7).

(24) A notice of the change of the work period for the guidance counselors appeared in the Cinnaminson Education Newsletter, dated May 24, 1982 (R-6).

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(25) It was stipulated, that Mr. Killino's salary for the 1981-82 school year was $32,340 in a 12-month position and that his salary in 1982-83 was $29,667 in a ten-month position (P-2).

(26) It was stipulated that Mr. Naugle's salary for the 1981-82 school year was $29,801 in a 12-month position and that his salary in 1982-83 was $27,350 in a ten-month position (P-6).

(27) Mr. Naugle was present at a board meeting when concern was expressed regarding the availability of guidance counselors during the summer months. The Board assured the public that counseling services would be available (T 108).

(28) In June 1982, a job notice was posted for "One (1) Guidance Counselor or Teacher certified in Guidance to do summer work for approximately three weeks at the High School with the salary to be based on the individual's rate of pay" (P-3). No one applied for this position (T 74-5).

(29) In the later part of June, another notice was posted for the three-week summer job, and the position was opened to persons who did not have a guidance certificate (R-7). No one accepted the position (T 240).

(30) Mr. Lukis and Mr. Zank, both high school vice principals, worked during the summer of 1982 and the Board authorized, at its November 2, 1982 meeting, an additional 15 days' compensation for Mr. Zank and 11 extra days' compensation for Mr. Lukis for duties performed during the summer of 1982 during what would otherwise have been their vacation time (P-4 at p. 3).

(31) During the summer of 1982, Mr. Lukis and Mr. Zank performed some of these duties formerly performed by Mr. Killino and Mr. Naugle during the summer months (T 75, T 109-111, T 121, T 181). Additional work was created by the fact that the computer runs were late and had errors (T 178, T 202, T 220).

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(32) Prior to June 1982, the duties of Mr. Lukis and Mr. Zank in the summer included the preparation of the master schedule of teachers, courses and rooms, and various administrative responsibilities (T 167-8).

(33) After June 1982, the Board authorized an additional 20 days of work for guidance counselors during the summer of 1982 (T 77, T 185). Ms. Leasure was unable to work because of previous commitments (T 147); however, Mr. Killino, Mr. Naugle and Mr. Croud divided the 20 days among themselves (T 83, T 111, T 182, T 186). Mr. Croud worked seven days, Mr. Killino worked six and one-half days and Mr. Naugle worked six and one-half days (T 84, T 111-12, T 135- 7).

(34) The student scheduling process at the high school begins in February of the preceding year (T 221). The students select the courses they want, a master student schedule is prepared and then conflicts in scheduling have to be worked out.

(35) Sysco Co. was used for the first time in 1982 to develop the Master Student Schedule for the 1982-83 school year (T 168). The company had computer problems, was late in providing the various runs of this schedule (T 124, T 171-3) and there were errors in the schedule (T 178, T 222).

(36) Sysco Co. was selected because it had a superior computer system and could handle student selected alternative courses, thereby reducing the number of student scheduling conflicts that had to be manually resolved (T 193-4).

(37) All four counselors testified that they encountered problems in September 1982 which normally would have been handled by Mr. Killino and Mr. Naugle during the summer or in the week before school started (T 77-79, T 110, T 137, T 147).

(38) It was estimated that the Board saved about $6,000 by making the changes in the guidance department (T 174-5, T 205-7, T 236-7).

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(39) Mr. Wisor hopes that the Board will select a new computer company for the 1983-84 school year with the capacity to handle student selected alternative courses (T 224).

(40) Mr. Wisor admits that in the future some student scheduling work has to be done in the summer but that the amount of this work will vary depending on the computer company selected by the Board (T 224, T 228-9, T 243).

There is in this matter a factual dispute as to what motivated the Board to reduce from twelve months to ten months the work periods of Mr. Killino and Mr. Naugle. Based on their conversations with Mr. Groff, a union representative, Mr. Wisor and Mr. Zank (T 55-6, 103-4), Mr. Killino and Mr. Naugle felt that their work periods were reduced because the Board considered their salaries to be too high and too visible. Mr. Jaggard, assistant superintendent of schools, testified that the Board's sole motivation was to achieve economies in view of the declining enrollment (T 258-9). Based on the testimony, I **FIND** that the petitioners have not shown that the Board had any improper motivation for changing the work periods of Mr. Killino and Mr. Naugle and that its action was motivated by reasons of economy.

At the hearing, there was a great deal of discussion as to what took place during the summer of 1982. After reviewing all of the testimony, I **FIND** that the Board determined that the work formerly done by Mr. Killino and Mr. Naugle during the summer and by the other two counselors during the week before and after the high school was open, could be handled by an improved computer system and by the two vice principals during the summer months with the assistance of a guidance counselor who would work for a part of the summer. Also, I **FIND** that because of the problems created by the lateness and errors in the computer runs and the fact that the advertised summer position was not filled (P-3, R-7), the two vice principals had to give up part of their summer vacations in 1982 and the Board authorized the twenty working days for the guidance counselors.

The first issue in this matter is whether the Board acted improperly when it abolished the position of Director of Guidance and transferred Mr. Killino to the position of guidance counselor without giving him personal notice. Mr. Collins argued that pursuant to N.J.S.A. 18A:27-10 and 18A:27-11, the Board should have given personal

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notice to Mr. Killino prior to the abolishment of his position as Director of Guidance and that notice by an article in the Cinnaminson Education Newsletter was inadequate. Mr. Collins cited in support of his position, the Commissioner's opinion in Page v. Trenton Bd. of Ed., 1973 S.L.D. 704.

Mr. Slimm argued that the abolishment of the position of Director of Guidance was a reduction in force, pursuant to N.J.S.A. 18A:28-9, and that there is no statutory requirement for notice to a tenured staff member prior to a reduction in force. It is Mr. Slimm's position that Mr. Killino did in fact receive notice of the Board's general policy as to the need for a director of departments having less than six members and of the Board's deletion of the position of Director of Guidance by the articles in the Newsletter.

Mr. Slimm questioned Mr. Collins' reliance on the Commissioner's 1973 opinion in Page since the matter was remanded by the State Bd. of Ed., 1974 S.L.D. 1416 and the Commission rendered another decision in the matter, 1975 S.L.D. 644, which was affirmed by the State Bd. of Ed., 1976 S.L.D. 1158, and since, in latter cases, the Commissioner has rejected the reasoning set forth in the 1973 opinion. In support of his argument, Mr. Slimm cited the Commissioner's decisions in Outslay v. Midland Park Bd. of Ed., 1977 S.L.D. 1033; Wexler v. Hawthorne Bd. of Ed., 1976 S.L.D. 309, aff'd, by State Bd. of Ed., 1976 S.L.D. 314; Metygen v. Willingboro Bd. of Ed., 1979 S.L.D. 598; Dore v. Bedminister Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982); Polaski v. Bd. of Ed. of Burlington Cty. Vocational Technical High School, 1977 S.L.D. 346.

I agree with Mr. Slimm and I **CONCLUDE** that the Board did not have to give personal notice to Mr. Killino as to the abolishment of his former position of Director of Guidance.

The second issue in this matter is whether the Board acted improperly when it transferred the responsibilities of the Director of Guidance to the principal. Mr. Collins argued that the abolishment of the position of Director of Guidance must be declared null and void since the principal, Mr. Wisor, does not hold the appropriate certificate to serve as Director of Guidance, N.J.A.C. 6:11-12.12(a).

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On behalf of the Board, Mr. Slimm did not dispute the fact that Mr. Wisor does not have the appropriate certificate to be Director of Guidance but argued that this position was abolished, that the administrative and supervisory responsibilities of the Director of Guidance were transferred to the principal and that Mr. Wisor's certification as principal permitted him to assume these responsibilities. According to Mr. Slimm, when a position is eliminated because of economy and declining enrollment, it is not unusual for certain responsibilities of that former position to remain and for these responsibilities to be transferred and consolidated with the duties and responsibilities of another position, Jablonski v. Emerson Bd. of Ed., OAL DKT. EDU 6812-82 (April 18, 1983). Mr. Slimm argued that this matter is distinguishable from the cases cited by Mr. Collins which relate to cases where a board abolished a position as a subterfuge for the creation of a new position, or to give another employee a more favorable positon or to get rid of a certain employee, Catano v. Woodbridge Bd. of Ed., 1971 S.L.D. 448, aff'd, by the State Bd. of Ed., 1972 S.L.D. 665; Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215 (App. Div. 1949); Boeshore v. North Bergen Bd. of Ed., 1974 S.L.D. 805. Lastly, Mr. Slimm argued that the petitioners have not shown that the Board acted in bad faith or that Mr. Wisor has used the title of Director of Guidance.

Based on the facts and legal arguments, I **CONCLUDE** that the Board did not violate the tenure rights of Mr. Killino when it abolished the position of Director of Guidance, and that, pursuant to N.J.S.A. 18A:28-9, the Board had the right to transfer the administrative and supervisory functions formerly performed by the Director of Guidance to the principal. Further, I **CONCLUDE** that Mr. Wisor can perform these additional functions within the scope of his current certifications. I recognize that the language used by the Board when it transferred the responsibilities of the position of Director of Guidance to the principal created an ambiguity as to what responsibilities would be in fact exercised by Mr. Wisor. However, the facts clearly show that the Board intended to abolish the position because of the decline in enrollment and that Mr. Wisor was not to become Director of Guidance or assume all of the responsibilities and duties of that position. Although the tenure law clearly protects a person from having his job abolished and having his former responsibilities performed by another person in a different title, this protection does not cover the situation where, because of economy and declining enrollment, a Board decides to abolish a position and reassigns certain functions of that position to existing staff members as part of a reorganization of job responsibilities. In this matter, the Board's action is reasonable and logical in light of the circumstances.

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The next issue is whether the Board acted improperly when it reduced the work periods of Mr. Killino, Mr. Naugle, Mr. Croud and Ms. Leasure. The review of the Board's action must be based on what the Board anticipated would be the workload during the summer of 1982 and in future summers.

As has been stated, the Board decided that the summer guidance duties formerly performed by the four named persons could be handled by the combination of an improved computer system, by giving the two vice principals additional summer duties and by having a guidance counselor work for three weeks during the summer of 1982. The Board in making its decision had no reason to know that there would be computer problems or that no one would take the three-week job.

Mr. Collins argued that the Board violated the tenure rights of the four named petitioners when it reduced their work periods, since the summer duties they had performed still existed. In support of his argument, Mr. Collins cited the decisions in Catano, supra, Viemeister, supra, and Boeshore, supra.

Mr. Slimm argued that there are numerous school law decisions holding that a board has the power to reduce staff hours for purposes of economy and because of the reduction in the number of pupils pursuant to N.J.S.A. 18A:28-9; East Brunswick Ed. Assn. v. East Brunswick Bd. of Ed., OAL DKT. EDU 4144-80 (Oct. 2, 1981); Williams v. Plainfield Bd. of Ed., 1980 S.L.D. _____ (decided Jan. 9, 1980), aff'd, 176 N.J. Super. 154 (App. Div. 1980); Nazario v. Bridgeton Bd. of Ed., OAL DKT. EDU 4996-79 (April 7, 1982); Messick v. Haddonfield Bd. of Ed., OAL DKT. EDU 5175-80 (April 19, 1982). Also, Mr. Slimm argued that the cases cited by Mr. Collins are not applicable here since the Board acted in good faith and its action was motivated by economy and declining student enrollment.

Based on the facts and legal arguments, I **CONCLUDE** that the Board did not violate the tenure rights of Mr. Killino, Mr. Naugle, Mr. Croud and Ms. Leasure when it reduced their work periods, and transferred some of the duties performed by the guidance counselors during the summer to the two vice principals who already worked during the summer months and established a precedent of having a limited summer position available to a guidance counselor.

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The last issue in this matter is whether the Board violated the seniority provisions in N.J.S.A. 18A:28-10 and N.J.A.C. 6:3-1.10 by not assigning the extra work days in the summer of 1982, namely the 26 days allowed to the two vice principals and the 20 days allowed to the three guidance counselors, on the basis of seniority. In his reply brief, Mr. Slimm argued that this issue should not be considered since it was first raised by the petitioners in their post-hearing brief. Also, Mr. Slimm argued that the petitioners had waived any claim to seniority when none of the petitioners had applied for the three-week summer position and when the guidance counselors agreed to split among themselves the later authorized 20 working days, Boguszewski v. Demarest Bd. of Ed., 1979 S.L.D. 232, Vexler v. Red Brook Bd. of Ed., 1977 S.L.D. 625; DeSimone v. Fairview Bd. of Ed., 1966 S.L.D. 43.

I agree with Mr. Slimm and I **CONCLUDE** that the question of seniority is not an appropriate issue in this matter, and if it were an appropriate issue, the petitioners had waived any rights of seniority they may have had as to summer employment in 1982.

Lastly, Mr. Collins argued that the Board should have projected the level of guidance service it would need during the summer and structured its staff time reduction according to seniority. Although, I agree that the Board could have taken this approach, I **CONCLUDE** that there is no legal basis for requiring the Board to do so. Further, I **CONCLUDE** that the Board's decision to annually create a summer guidance position and to have the duration of this position vary from year to year based on the anticipated workload is not unreasonable.

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Therefore, I **ORDER** that the decisions of the Board as to the deletion of the position of Director of Guidance and the reduction of the work periods of the four named petitioners be **AFFIRMED** and that this matter be **DISMISSED WITH PREJUDICE.**

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

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

July 11, 1983
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 13, 1983
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

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APPENDIX

EXHIBITS ADMITTED INTO EVIDENCE:

JOINT EXHIBITS:

A. Part of the Minutes of the meeting of the Board of Education of Cinnaminson on January 19, 1982

B. Part of the Minutes of the meeting of the Board of Education of Cinnaminson on March 2, 1982

C. Part of the Minutes of the meeting of the Board of Education of Cinnaminson on March 30, 1982

D. Chart showing student enrollment in the Cinnaminson High School from 1978-79 through 1982-83

FOR THE PETITIONER:

P-1 - Letter from Frank B. Jaggerd to Frank Killino, dated May 24, 1982

P-2 - Memorandum from Joan B. Snyder to Frank Killino, dated July 21, 1982

P-3 - Job notice, dated June 3, 1982

P-4 - Minutes of the November 2, 1982 meeting of the Cinnaminson Township Board of Education

P-5 - Letter from Frank B. Jaggerd to Bob Naugle, dated May 24, 1982

P-6 - Memorandum from Joan B. Snyder to Robert Naugle, dated July 21, 1982

FOR THE RESPONDENT:

R-1 - New Jersey Department of Education Certificate for Student Personnel Services issued to Robert Wisor, dated July 1970

R-2 - New Jersey Department of Education Certificate, for School Administrator issued to Robert L. Wisor, dated February 1975

R-3 - New Jersey Department of Education Certificate, for Principal issued to Robert Wisor, dated March 1974

R-4 - Job Description of High School Principal

R-5 - Cinnaminson Education Newsletter, dated April 6, 1982

R-6 - Cinnaminson Education Newsletter, dated May 24, 1982

R-7 - Job Notice, dated June 17, 1982

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WITNESSES

FOR THE PETITIONER:

Frank Killino
Robert Naugle
John Lukis
J. Peter Croud
Joanne Leasure

FOR THE RESPONDENT:

Michael Zank
Robert Wisor
Frank Jaggard

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CINNAMINSON TEACHERS' ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners in primary exceptions to the initial decision by Judge Tylutki contend that error was made by the judge by the conclusion that the Board did not violate petitioners' tenure rights. Petitioners assert that the judge improperly refused to consider seniority as an appropriate issue in this matter. Petitioners argue that the high school principal is not appropriately certified to supervise the guidance department. Finally, Petitioner Killino contends that he was entitled to personal notice of the proposed action of the Board to abolish his position. In support of the various arguments advanced, petitioners cite Viemeister, supra, Catano, supra, and Boeshore, supra.

The Board in reply exceptions refutes those of petitioners and affirms the initial decision. The Board notes with approval the finding of fact by Judge Tylutki that the Board did not act in bad faith and, further, that the Board attempted a valid restructuring of its guidance department. The Board avers that the afore-named cases cited by petitioners are inapplicable to the present matter because the rulings therein were premised upon a showing of bad faith. The Board argues that the restructuring of the guidance function in the high school by the Board was undertaken for reasons of economy and declining enrollment. The Board contends that the judge properly concluded that seniority questions had not been appropriately raised as issues in this matter. The Board states that the high school principal, certified as a principal and administrator, held sufficient certification to exercise his role in guidance and supervision and to evaluate the teachers in the guidance department accordingly. The Board argues that there is no statutory or

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regulatory authority for the proposition that tenured teachers must be noticed prior to a reduction in force. The Commissioner looks with favor on the arguments advanced by the Board and adopts them as his own.

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

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

COMMISSIONER OF EDUCATION

AUGUST 26, 1983

PENDING STATE BOARD

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IN THE MATTER OF THE JOINT	:	
APPLICATION OF KATHLEEN	:	COMMISSIONER OF EDUCATION
GRIGAS AND THE BOARD OF	:	DECISION
EDUCATION OF THE EAST WINDSOR	:	
REGIONAL SCHOOL DISTRICT,	:	
MERCER COUNTY.	:	
	:	

This matter has been opened before the Commissioner of Education by counsel for Kathleen Grigas and the Board of Education of the East Windsor Regional High School District, hereinafter "Board," jointly seeking Declaratory Judgment from the Commissioner pursuant to N.J.S.A. 52:14B-8 and N.J.A.C. 6:24-2.1. The stipulated facts as presented by the parties are set forth below:

> "1. Petitioner, Kathleen Grigas (hereinafter designated Grigas), is a tenured teaching staff member who has been employed by Petitioner, East Windsor Regional School District (hereinafter designated the Board) for eight years.
>
> 2. The Board is charged by the laws of the State of New Jersey with the responsibility for educating those pupils residing in the municipalities of Hightstown and East Windsor.
>
> 3. The purpose of this Petition is to obtain a declaratory ruling as to the issues set forth at page 2 of the Agreement annexed hereto as Exhibit A (incorporated by reference).
>
> 4. During October of 1982, the Board, through its employees, requested that Grigas participate in the Mantoux testing program. Said requests were made under authority of N.J.A.C. 6:29-4.2.
>
> 5. Grigas refused to participate in said testing on the basis that she considered herself to be exempt from taking the test in that she considered herself to be a conscientious objector.

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6. The Superintendent of the district based upon Grigas' refusal, presented a Petition to the Board seeking filing of and certification of tenure charges against Grigas with the Commissioner of Education.

7. Grigas, through counsel, stated that she could be excused from the Mantoux test based upon her conscientious objection, that the Board has authority to excuse her as requested and further that the Board could excuse her based upon a writing contained within a publication entitled School Tuberculin Testing in New Jersey, April, 1982, published by the State Department of Health (annexed as Exhibit B) and based upon correspondence received from an employee of the Department of Education (see Exhibit C annexed).

8. Based upon said materials, Grigas requested that she be excused from the Mantoux test as a conscientious objector and that the Board not certify tenure charges.

9. The Board, after reviewing N.J.A.C. 6:29-4.2 and the annexed materials (Exhibits B & C), was unable to ascertain whether it had the legal authority to grant Grigas' request to be classified as a conscientious objector. The Board was also uncertain as to whether if Grigas was classified as a conscientious objector, she could be excused by the Board on that basis from taking the Mantoux test. Because of the Board's uncertainty as to its authority and powers in the matter presented to it and because Grigas did not desire to be viewed as insubordinate or face tenure charges the parties executed Exhibit A and seek this declaratory judgment.

10. Both Petitioners recognize that the issues presented are novel and deem it to be in their best interests to seek a Declaratory Ruling from the Commissioner as to the scope of the Board's authority and responsibilities, specifically with respect to the issues set forth at page 2, paragraph b of the Agreement designated Exhibit A herein.

11. On January 6, 1983, Exhibit A was executed and duly approved by both Petitioners.

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> 12. The Board is desirous of fulfilling its responsibilities under state law. The Board also does not wish to violate any right Grigas might have to conscientious objection status or exemption from the requirement of taking the Mantoux test as a result of said status.
>
> 13. As a consequence of the above facts, whereby the Petitioners are uncertain of their rights and responsibilities and whereby neither Petitioner wants to violate the law, the Petitioners jointly request that the Commissioner issue a Declaratory Ruling addressing the issues set forth herein."
>
> (Joint Petition for Declaratory Ruling, at pp. 2-5)

The Commissioner has reviewed the application submitted by the parties, as well as the various schedules and exhibits attached thereto. The Commissioner has also carefully examined the pertinent statutory authority, regulations and guidelines affecting his ruling in the instant matter.

Initially, the Commissioner observes that the provisions of N.J.S.A. 18A:16-2 authorize local boards of education to conduct annual physical examinations of their employees. The above-cited statute reads as follows:

> "Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal physical or mental health.
>
> "Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data."

N.J.A.C. 6:29-4.2, promulgated by the State Board of Education with respect to testing for tuberculosis infection, reads in pertinent part as follows:

> "(a) The following are rules of the State Department of Education concerning testing for tuberculosis infection by boards of education for implementation of N.J.S.A. 18A:16-2 and 40-16.

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1. The Mantoux intradermal tuberculin test using five T.U. (Tuberculin Units) of PPD tuberculin shall be the only skin test used to detect evidence of tuberculosis infection in pupils and employees.

***

3. In every school district a Mantoux intradermal tuberculin test shall be given to all employees (full-time and part-time), all student teachers, and other persons who have contact with pupils. If the Mantoux intradermal tuberculin test shows less than 10 mm. of induration, the above persons shall be retested with a Mantoux intradermal tuberculin test every three years.

4. Any pupil or employee shall be exempt from these requirements upon presentation of documentation of a prior significant reaction evidenced by vesiculation following the administration of a multiple puncture tuberculin test or a significant reaction (that is, 10 mm. or more of induration) following a Mantoux intradermal tuberculin test with five tuberculin units of stabilized PPD tuberculin. Any other exemption from these requirements shall be because of medical contraindications subject to review by the medical inspector.

5. All tuberculin reactors as defined in (a) 4. above shall be referred to the family physician and appropriate official health agency for necessary follow-up. The following shall constitute standards for referral:

i. If there is documentation showing that vesiculation resulted from a previous multiple puncture test, the individual shall be recorded as a tuberculin reactor, and no further tuberculin testing is required;

ii.***If the result of the Mantoux test shows 10 or more mm. of induration, the individual shall be recorded as a tuberculin reactor, and no further tuberculin testing is required.

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> 6. A chest X-ray shall be administered to all pupils, employees and other personnel who have a significant reaction to a Mantoux intradermal tuberculin test as defined in (a) 4. above.
>
> 7. All pupils, employees and other personnel required to have a chest X-ray shall be referred to their family physician or other medical facility for the necessary medical evaluation, including a chest X-ray. If the physician's report is not received by the school physician within four weeks, or if the school physician is unwilling to accept the findings, the pupil, employee or other persons who have contact with pupils shall have a chest X-ray examination in the manner prescribed by the district board of education.
>
> ***
>
> 10. Employees and pupils who have a significant reaction to the Mantoux intradermal tuberculin test and an initial chest X-ray that was negative, or who present a medical certificate showing a significant tuberculin reaction and a subsequent negative chest X-ray, shall require no further testing for tuberculosis infection.***"
>
> (Emphasis supplied.)

The provisions of N.J.S.A. 26:1A-7 related to the Sanitary Code administered by the Department of Health through the Public Health Council read in part as follows:

> "The Public Health Council shall have power, by the affirmative vote of a majority of all its members, to establish, and from time to time amend and repeal, such reasonable sanitary regulations not inconsistent with the provisions of this act or the provisions of any other law of this State as may be necessary properly to preserve and improve the public health in this State. The regulations so established shall be called the State Sanitary Code.
>
> "The State Sanitary Code may cover any subject affecting public health, or the preservation and improvement of public health and the prevention of disease in the State of New Jersey, including the immunization

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> against disease of all school children in the State of New Jersey. In addition thereto, and not in limitation thereof, said State Sanitary Code may contain sanitary regulations:***(f) regulating the detection, reporting, prevention and control of communicable and preventable diseases***."

With regard to "Communicable Diseases" and the reporting of such diseases, the applicable provisions of N.J.S.A. 26:4.1 et seq. read as follows:

> "As used in this chapter 'communicable disease' means any infectious or contagious disease so declared or defined by law or which has been or may hereafter be declared a 'communicable disease' by the state department of health."

and,

> "Any body having control of a school may, on account of the prevalence of any communicable disease, or to prevent the spread of communicable diseases, prohibit the attendance of any teacher or pupil of any school under their control and specify the time during which the teacher or scholar shall remain away from school."

The reporting of communicable diseases under the provisions of N.J.S.A. 26:4-15 makes reference to the Sanitary Code provisions of N.J.A.C. 8:57-1.2 which read in pertinent part:

> "(a) Every physician attending any person ill with or infected with any of the diseases listed in Section 1 (Reportable diseases) of this Subchapter within 12 hours after such disease has been diagnosed, shall report such disease to the officer designated to receive these reports by the local board of health of the jurisdiction wherein diagnosis is made, excepting cases of venereal diseases, which are to be reported directly to the Department of Health.
>
> (b) The report shall include the name of the reporting physician, the name of the disease, the name, age, sex, exact location of the person ill or infected with such disease, and such other information as may be requested by the Department of Health."

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The Commissioner observes that tuberculosis infection is among the mandated reportable diseases pursuant to N.J.A.C. 8:57-1.1(31).

Moreover, it is further observed from the "Notes of Decisions" appearing in the annotated supplement of N.J.S.A. 26:4-15 that one of the case law decisions interpreting the above-referenced statute reads as follows:

> "New Jersey recognizes general rule that a person who negligently exposes another to a contagious disease, which other contracts, is liable in damages; specifically, a physician has duty to warn third persons against possible exposure to contagious or infectious diseases, e.g., tuberculosis, venereal diseases, and so forth, and that duty extends to instances where physician should have known of infectious disease. McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (L.1979)" (at p. 215) (Emphasis supplied.)

Finally, the Commissioner observes that the statutory provisions of N.J.S.A. 26:1A-9.1 address the exemptions of certain pupils from those mandatory requirements of the State Sanitary Code for immunization on the following grounds:

> "Provisions in the State Sanitary Code in implementation of this act shall provide for exemption for pupils from mandatory immunization if the parent or guardian of the pupil objects thereto in a written statement signed by the parent or guardian upon the ground that the proposed immunization interferes with the free exercise of the pupil's religious rights. This exemption may be suspended by the State Commissioner of Health during the existence of an emergency as determined by the State Commissioner of Health." (Emphasis supplied.)

Similarly, the State Sanitary Code (N.J.A.C. 8:57-4.4) deals with the exemptions of certain pupils from mandatory immunization as follows:

> "(a) A pupil shall be exempted from mandatory immunization if the parent or guardian of the pupil objects thereto in a written statement signed by the parent or guardian upon the ground that the proposed immunization interferes with the free exercise of the pupil's religious rights.

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(b) This statement will be kept by the school as part of the pupil's immunization record.

(c) This exemption may be suspended by the State Commissioner of Health during the existence of an emergency as determined by the State Commissioner of Health."

It is clear that the provisions of N.J.S.A. 26:1A-9.1 and N.J.A.C. 8:57-4.4) speak to the exemption of pupils from mandatory immunization and not employees of a local governing body such as a public school district.

The only reference to exemptions of teachers and other public school district employees appears in the "Reference Guide for Physicians and Nurses" entitled School Tuberculin Testing in New Jersey, April 1982 (Exhibit B) disseminated by the New Jersey State Department of Health through Hugh D. Palmer, M.D., Director of Tuberculosis Services. Significantly, under "Section VIII-Other Considerations" at page 5, the status of "Conscientious Objectors" is addressed as follows:

"C. Conscientious Objectors - These individuals may be referred to the Board of Education for a decision. Tuberculin tests do not constitute treatment of the individual, but are carried out as part of a program to protect the pupils, teachers and employees against the development of tuberculosis disease." (Emphasis supplied.)

While the above statement from the Director of Tuberculosis Services is not embodied in State law or the regulations promulgated by the Department of Health, nevertheless the Commissioner cannot ignore the impact of such statement insofar as it clearly distinguishes the requirements of the aforecited statutory provisions and regulations which deal primarily with exemptions from mandatory immunization rather than the various tests for evidence of a communicable disease.

In the instant matter Grigas is seeking the exemption from taking the Mantoux test which identifies both employees and pupils who may or may not show a positive reaction as evidence of the tuberculosis organisms present within their bodies.

In the Commissioner's judgment the Mantoux test does not fall within the statutory or regulatory reasons for exemptions for conscientious objectors whether they are pupils or Board employees.

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Local public school district boards of education are required to comply with those laws and regulations of both the Department of Education and the Department of Health in an effort to determine whether or not there is evidence of communicable disease among their employees as well as the pupils in the public school districts of this State.

Without the authority to at least require both Board employees and pupils of a public school district to be screened through a preliminary testing program for evidence of communicable diseases, the laws and regulations administered by the Department of Education, as well as the Department of Health, would be severely compromised to the detriment of the pupils attending our public schools as well as those board employees with whom they come in daily contact.

In conclusion, therefore, the Commissioner finds and declares that mandatory immunization is not at issue herein. Such appeals properly come under the jurisdiction of the Department of Health. However, it is clear from a reading of both bodies of law, N.J.S.A. 18A:1-1 et seq. and N.J.S.A. 26:1 and 26:1A et seq., as well as the regulations pertinent thereto, in pari materia, Grigas may not claim exemption as a conscientious objector to the Mantoux test for tuberculosis since it is a screening test for evidence of a communicable disease. The Board is within its lawful authority to require that Grigas submit to the Mantoux Test for evidence of tuberculosis as a condition for her continued employment as a teaching staff member in the East Windsor Regional High School District. The Commissioner so holds.

Accordingly, this Declaratory Ruling is hereby issued affirming the Board's authority to deny exemption to Grigas from taking the Mantoux Test for Tuberculosis on the grounds that she claims to be a conscientious objector.

IT IS SO ORDERED this 29th day of August 1983.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8566-82

AGENCY DKT. NO. 325-8/82A

GERTRUDE LENNON,

Petitioner

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,

Respondent.

APPEARANCES:

Philip Shore, Esq., and **John B. Wolf,** Esq., for the petitioning Board of Education (Golden, Shore, Zahn & Richmond, attorneys)

Nancy Iris Oxfeld, Esq., for respondent Lennon (Rothbard, Harris & Oxfeld, attorneys)

Record Closed: May 31, 1983 Decided: July 14, 1983

BEFORE **ERIC G. ERRICKSON,** ALJ:

The Spotswood Board of Education (Board), on August 11, 1982, certified charges of inefficiency and suspended the respondent without pay, pursuant to the provisions of N.J.S.A. 18A:6-9 et seq.

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When the cerfified charges were received by the Commissioner of Education, he transferred the matter for processing to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Respondent, on November 30, 1982, filed a Notice of Motion for Summary Judgment. After briefing on the Motion was completed, an Order denying the Motion for Summary Judgment was issued on January 13, 1983. That interlocutory order is incorporated herein by reference. Therein, it was ordered that one charge be modified by the deletion of the phrase "but is not limited to" to remedy a nebulous and imprecise wording. Therein, it was also determined that the 120 days in N.J.S.A. 18A:6-11 began to run on August 11, 1982, when charges were certified by the Board, rather than 20 days later, on September 9, 1982, when school began for the 1982-83 school year, as the Board had erroneously interpreted the statute. It was also determined in that order that the Board's actions constituted insufficient reason, either separately or collectively, to grant Summary Judgment and dismiss the tenure charges.

Thereafter, a tenure hearing of seven days' duration was conducted at Spotswood, New Jersey, and was concluded on May 3, 1983.

Application of respondent to admit a post-hearing written statement of a witness who failed to appear prior to the close of the hearing was denied in an interlocutory order mailed to the parties on May 31, 1983. That order is incorporated herein by reference. Post-hearing briefing having been completed, the record was declared closed as of May 31, 1983, the date of issuance of the above-mentioned interlocutory order from the Office of Administrative Law.

UNDISPUTED FACTS:

GERTRUDE LENNON is a certified teacher who, after prior employment in other school districts, was hired by the Spotswood Board as a classroom teacher for the 1963-64 school year. Her service as a teaching staff member for the Board may be summarized as follows:

1963-75	Classroom teacher, grades 4, 5
1975-80	Reading Laboratory teacher

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1980-81 Permanent substitute
1981-82 Classroom teacher, grade 5

When aid funds supporting the reading laboratory became unavailable to the Spotswood schools, Lennon was reassigned as a permanent substitute during the 1980-81 school year. She asserted in a case before the Commissioner that this assignment violated her rights under education law. As a result of that litigation, Lennon was reinstated to a regular classroom teacher position in which the Board assigned her to teach a fifth grade class during the 1981-82 school year. Tenure charges of inefficiency were preferred against Lennon by Superintendent Christine Conover on March 10, 1982 (J-1,B). The Board on that date notified her that she had 98 days to correct the inefficiency (J-1,D,E,F). On June 16, 1982 and on August 11, 1982, the Board again considered those charges and relevant reports from its supervisors and Lennon's response to the charges of inefficiency wherein she denied the charges (J-1,G,H,I,J,K). After it did so, the Board, on August 11, 1982, determined that Lennon had not corrected the inefficiencies with which she was charged, certified the charges and suspended Lennon without pay, effective September 1, 1982 (J-1,L,M,N).

The inefficiencies with which Lennon was charged (as modified by the aforementioned order dated January 13, 1983), and the statement of evidence in support thereof are as follows:

CHARGES

Said inefficiency includes failure to maintain order and discipline in the classroom, insufficient time spent on actual instruction, inefficient and improper allocation of time in the classroom, failure to maintain self-control in the classroom, poor planning and organization within the classroom, inability to implement lesson plans and achieve educational goals.

[J-1,B]

STATEMENT OF EVIDENCE

The evidence against Gertrude (Trudy) Lennon in support of said tenure charges consists of reports, evaluations, profiles, assessments, and observations of her made by administrative personnel in the Spotswood school system. Said reports are a part of Mrs. Lennon's file and are available for her inspection.

4. Further, the evidence against Mrs. Lennon consists of letters, reports, and complaints of parents of children who are in or who have been in her class, which have been made available

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to Mrs. Lennon, as well as accounts of former students of Mrs. Lennon.

[J-1,B]

TESTIMONY OF WITNESSES:

CHRISTINE CONOVER, the Board's Superintendent since 1979, testified that she was the district reading coordinator when she first supervised and evaluated petitioner during September 1975 through June 1978, while Lennon was in charge of the Board's reading laboratory. She testified that Lennon had been purposely assigned to the reading laboratory which was highly structured with sequential processes which relieved Lennon of many aspects of the teaching process normally found in a regular classroom. Conover testified that in conducting the reading laboratory, Lennon was required to maintain audiovisual and other materials and records on pupils, to determine the reading level of entering pupils and to administer the prescribed materials as individual pupils progressed from stage to stage of reading ability. Conover testified that the reading laboratory was discontinued at the end of the 1974-75 school year when federal funding "dried up."

Conover testified that during 1975-76, the first year Lennon was in the reading laboratory, she rated her in a summative evaluation as successful but that from the second year on, she criticized Lennon for her classroom control, organization and maintenance of materials and reporting of pupil progress. Conover testified that she attributed this drop in unsatisfactory ratings during her later years in the reading laboratory to the fact that Lennon departed from the prescribed system of instruction which she had followed faithfully during 1975-76. Conover testified that the reason for Lennon's assignment to the reading laboratory was that it offered an assignment which was virtually "teacher proof" because of the highly structured procedures inherent therein.

Conover testified that her assignment of Lennon as a permanent substitute at the high school during 1980-81, was to fulfill a need for a permanent substitute and was also an attempt to limit her prolonged contact with pupils on a regular basis. She testified that the reason Lennon was not so reassigned in 1981-82 was that a determination was handed down at the end of litigation initiated by Lennon, directing that Lennon be reinstated as a regular classroom teacher.

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Conover testified that although Lennon in 1981-82 was assigned the lowest ability fifth grade class in that district, she had available the assistance of a resource room teacher and prepared IEPs for those among her pupils who had been classified. She also testified that during most of the time, Lennon's class had only about eight pupils present of the fifteen class members, since pupils were frequently out of the room for specialized help from other teaching staff members.

Conover testified that although Lennon during 1981-82 was authorized to visit classrooms of other teachers and was counseled in regular weekly meetings by her principal and the supervisor of special education, she concluded that her progress was minimal and not sufficient to overcome the inefficiencies with which she was charged.

MALCOLM CONNER, who was a principal in the district during 1969-70 and principal and Acting Superintendent in 1970-71, testified that he observed Lennon both formally and informally as she taught at the Appleby School during 1970-71. He testified that he conveyed to Lennon his impressions that her teaching was disorganized, poorly planned, lacking in discipline and pupil control, and not conducive to the educative process (P-13). Conner testified that when he reached a conclusion that "school was being kept but that there was very little teaching," he advised the Board of his impressions of Lennon, recommended orally to the Board that she be closely observed in the ensuing school year, and that future consideration be given to withholding of increment or filing of tenure charges.

Conner testified on cross-examination that after his written evaluation of Lennon, Lennon improved somewhat in classroom control and pupil discipline.

MARION THOMPSON, school nurse, testified that on request of the Superintendent, she had compiled charts showing the number of referrals to the nurse's office from individual classes (P-14, 15). Those charts show that referrals to the nurse from Lennon's class of 15 during 1981-82 ranged from 28 per month to 70 per month and averaged 46 per month. She testified that the one other teacher who had a similar average had a class that was half again as large as Lennon's class. She also testitified that the vast majority of teachers' referrals to the nurse were far fewer in number. On cross-examination, Thompson testified that her figures are reported regardless of whether the pupils were sent to her office by Lennon or by others who were in charge of playgrounds or other areas of the school.

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NEIL MAROTTA, the Board's supervisor of buildings and grounds, testified that on two successive days in February 1982, while he was conferring with principal Orlick at the Appleby School, he heard loud and unusual screaming coming from a classroom which Orlick identified as respondent's classroom.

DAVID SIDEL, an elementary principal in the district for 18 years, testified that, after formally and informally observing respondent during 1972-73, he prepared a summary evaluation (P-16). He testified that although he evaluated Lennon's teacher performance as adequate, he made suggestions that she modify the loudness of her voice, improve in the areas of classroom organization and discipline, involve pupils to a greater degree in classroom activities, maintain a greater degree of classroom control, and make improvement in planning.

FAY PERLMUTTER, school psychologist in the Appleby Elementary School during 1981-82, testified that from her occasional informal observations of respondent's classroom during 1981-82, she concluded that Lennon was having problems in the area of pupil control and keeping pupils at their assigned tasks. She also testified that a parent of a pupil who called her complained that Lennon's class was chaotic and refused to allow her child to return to school unless the child was reassigned to another class.

JULIA RHODES, a certified supervisor of the Board's 15-member Communication Arts Department at Spotswood High School, testified that during 1980-81, she formally observed Lennon's first period class. She testified that her observation caused her to be concerned with Lennon's classroom organization and ability to keep pupils at their tasks. She testified that as the result of her formal and informal observations and her weekly contacts with Lennon, as ordered by the principal, she concluded that, although Lennon was a committed, kind and intelligent person, she could not recommend reassignment at the high school because respondent, as an experienced teacher, "did not have the organizational and implementational skills she should have had to continue in our department."

Rhodes testified that when, as the result of litigation, it was directed that Lennon be assigned to a regular teaching position rather than as a permanent substitute, she became concerned that Lennon would be even less able to cope with the normal sized classes of 26 to 28 junior high school age pupils. When asked whether she considered the problems Lennon had adjusting her teaching needs of low achievers to be unusual, Rhodes

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testified that she felt they were unusual for a teacher with Lennon's years of teaching experience.

WILLIAM DUNIGAN, currently the Board's director of student personnel services, testified that when, as principal, he had observed respondent during 1973-74, both formally and informally, he concluded that among Lennon's problems in the education process were disorganization, lack of classroom control, and failure to keep pupils working on assigned tasks.

Dunigan testified that when Lennon was in charge of the reading lab during 1976-78, she "didn't do a bad job" as long as she followed the prescribed plan of the program. He testified that when Lennon deviated from the prescribed plan during 1977-78, the reading lab became disorganized and disorderly with pupils not busy at assigned tasks, and that breakage of expensive controlled reader machines occurred. He testified also that on several occasions, he observed respondent shouting and screaming at pupils in her classroom. Dunigan also testified that despite frequent counseling, Lennon's lesson plan books were inadequate and sometimes unavailable in the school. When asked his opinion of Lennon's teaching at Appleby School, Dunigan testified that he perceived her as the poorest teacher providing the poorest instruction in the school.

Dunigan testified that when he was director of pupil personnel services, two parents contacted him complaining about the noise, lack of control, disruption and disorganization in Lennon's class in which their children were enrolled (P-26). He also testified that the California Achievement Test (CAT) scores of Lennon's pupils in March 1982 showed either little growth or negative growth when compared to their CAT test scores of March 1981 (P-27). He testified that the overall scores of Lennon's pupils in March 1982 on the CAT battery of tests showed an average regression of two months when compared to their scores of one year earlier in 1981.

JOHN MC VEY, principal of the Spotswood Junior-Senior High School from 1979-81, testified that he assigned Lennon, who was assigned that year as a permanent substitute at the high school, to teach a small seventh grade reading class, one period daily. He testified that as the result of his observations of that reading class, he criticized her for failing to procure books necessary to the lesson, for handing back and reviewing with pupils a test which had already been handed back and reviewed with them on an earlier date, and for failing to speak to a number of pupils about their tardiness.

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McVey testified that these concerns and other concerns he had about Lennon's choice of classroom activities and lack of advance planning caused him to direct that Lennon confer with her department chairman, Julia Rhodes, on a weekly basis.

McVey testified that as the result of his evaluation of Lennon during 1980-81, he concluded that, if Lennon were assigned to the high school during the ensuing year, he would not have assigned her to teach any regular class of pupils. He testified that he believed Lennon "was not able to improve to a level which would be acceptable to him," and that her performance was "in the ability range of a brand new teacher."

THOMAS MARCELLO, who as a principal supervised Lennon as a sixth grade teacher during the 1974-75 school year, testified that after being alerted by his superiors to past problems in Lennon's performance, he assigned Lennon to the classroom immediately across the hall from his office. He testified that in this proximity, where he was able to observe Lennon informally from eight to ten times daily, he frequently had to enter her room to maintain order. He testified that on the basis of both these informal observations and two formal observations, he concluded that she did not meet the goals they had agreed upon prior to the 1974-75 academic year, that she did not monitor activities in her classroom well, that the high volume of her voice was a distracting element, that her pupils did not achieve well, that her classroom control was ineffective, and that there were an inordinate number of complaints about her performance from both parents and teacher colleagues.

JOHN ORLICK, who was Lennon's principal at Appleby School during 1981-82, testified that his review of Lennon's Professional Improvement Plan (PIP) prepared in the prior year by McVey and Rhodes alerted him to possible problems that she might encounter at Appleby School. Orlick testified that at a formal observation of Lennon's fifth grade class in November 1981, he concluded that the reading lesson had too many loose ends and was not well planned, that pupils were "not with it," that pupils doing seat work frequently called out to other pupils asking what they were supposed to do, thus interrupting Lennon, who was actively instructing one of her reading groups. Orlick also testified that he concluded that Lennon spent too little time in active instruction of her class as compared to the time pupils spent doing "seat work."

When asked what his conclusion about Lennon's teaching performance was, Orlick testified that "as a person, they don't come any better than Mrs. Lennon," but that

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he had seen many first year teachers perform more acceptably than she performed. Orlick testified that problems he encountered in 1981-82 stemming from Lennon's classroom included the following:

1. complaints from other teachers;

2. complaints from parents of pupils in her class;

3. anonymous phone calls threatening him if the child was placed in Lennon's class;

4. necessity to visit Lennon's class too frequently because of the general chaotic conditions which prevailed there;

5. three embarrassing incidents when attempts to make contact over the school intercom were futile because of chaotic noise from her classroom which was fully audible to visitors in the school office as feedback over the intercom system;

6. refusal of one parent after one such incident (5, above) to allow a pupil to continue in Lennon's class;

7. a number of incidents in which Lennon was shouting at her pupils and they were shouting back at her or otherwise speaking to her in a discourteous manner;

8. three incidents when Orlick was compelled to leave while observing teachers in other nearby classrooms to quiet the noise coming from Lennon's classroom;

9. Lennon's generally disorderly and unattractive classroom;

10. inability of Lennon to control her pupils as they passed through the halls;

11. over-reliance by Lennon on ditto work for her pupils.

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Orlick testified that beginning in October 1981, he and another staff member held weekly conferences with Lennon wherein they commended her for desirable facets and counseled her on how to improve unsatifactory aspects of her teaching (P-32 through P-38). Orlick testified that although Lennon improved in planning and performance after receiving her formal evaluations and the tenure charges of inefficiency in March 1982, her teaching performance was still not minimally acceptable.

When asked to characterize the pupils in Lennon's fifth grade class in 1981-82, Orlick testified that her 16 pupils were "just run-of-the-mill." He also testified that in the ensuing 1982-83 school year, the pupils who had been in her class have not been disciplinary problems in the school.

Orlick testified that he had prepared charts (P-43,44,45) which summarized his evaluation of Lennon's performance during the 1981-82 school year as follows:

	Sept. 1981	March 1982	June 1982
Time on task	Poor	Poor	Less than Fair
Classroom Control	Poor	Poor	Less than Fair
Instruction Technique	Poor	Poor	Fair
Self Control	Poor	Poor	Less than Fair
Planning			
Individualization	Poor	Poor	Poor
Enrichment	Poor	Poor	Poor
Objectives in Sequence	Poor	Poor	Good
Daily Preparation	Poor	Poor	Less than Fair
Organization of Materials	Poor	Poor	Poor

Note: The above are plotted on a five level range of poor, fair, good, very good and excellent

When questioned on rebuttal concerning the number of pupils who left Lennon's class daily for specialized instruction by other teachers, Orlick testified that such scheduling was not unique to Lennon's classes and that the coming and going of pupils to and from other classrooms did not cause in other classrooms the same noisy disruptions that Lennon's pupils did.

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LENORE KOPELOVICH, the Board's supervisor of special education, testified that as part of her regular duties, she gave consultative advice to classroom teachers in the district. She testified that on the basis of a number of visits to Lennon's class during 1981-82 and the post-visitation conferences, she concluded that Lennon showed little evidence of twenty years of experience. In her testimony, Kopelovich characterized Lennon's classroom as a disaster for the following reasons:

1. messy disarray of the classroom;

2. an atmosphere of tension and angry confrontations;

3. pupils constantly trooping in and out to rest rooms and the nurse's office;

4. Lennon's forgetting to send pupils for supplemental instruction or to call all members of one of her own reading groups forward for instruction;

5. inadequate plans in Lennon's plan book for her own use or for the use of a substitute;

6. Lennon's failure to compel pupils to complete homework or to follow through on that homework;

7. Lennon's propensity to allow pupils to "stumble along" by themselves with too little active and effective instruction;

8. constant fluctuation in Lennon's classroom moods from normal, open, friendly and supportive manner to one characterized by tantrums, yelling and threats;

9. Lennon's failure to carry out suggestions such as the use of the pupil "contract" technique made to Lennon in her weekly sessions with Orlick and Kopelovich;

10. Lennon's discontinuance of social studies and science for a lengthy period of several weeks;

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11. Lennon's failure to compel pupils to obey the classroom rule that pupils be recognized before reciting;

12. a classroom of boredom, drudgery and lack of spontaneity.

Kopelovich testified that as the result of her weekly sessions with Lennon and Orlick, she concluded that Lennon recognized intellectually what was needed to improve her instruction but was incapable of effecting the necessary changes in her classroom. In regard to Lennon's attitude toward Orlick and herself during the weekly sessions, Kopelovich testified that although Lennon was friendly, receptive and agreeable, she believed she did not take seriously the severity of her problems.

When questioned about the performance of Lennon's fifth grade pupils during the ensuing 1982-83 school year, Kopelovich testified that she has observed that they have regained a positive self-image, developed good work habits and exhibited courtesy and respect for their teachers. In regard to one pupil whom Lennon found to be a severe disciplinary problem, she testified that he is now well-behaved and recently had to be told to cease working on a school project during his lunch time. Kopelovich testified that she attributes this transformation to the leadership of teachers who, as positive role models, have successfully motivated the same pupils Lennon had during 1981-82 to higher levels of expectation.

GEMMA PHILCOX, a Board member from 1968-1971, testified that during those years, there were no complaints from administrators about Lennon's teaching performance and that the comments they made about her were that she was a good, imaginative, well-liked teacher. She also testified that the then Superintendent had considered her for head of a foreign language department he contemplated organizing. In regard to Lennon's speech pattern, Philcox testified that Lennon's accent was a problem but that she nevetheless had a good command of the English language.

WILLIAM BEEGLE, a guidance counselor and current president of the Spotswood Education Association, testified that Lennon has given oral and written reports to the Association, that she was well organized and handled detail in a competent manner. He also testified that none of Lennon's pupils had ever been sent to him with problems.

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BARBARA TONKIN, a second grade teacher in Appleby School, testified that the passing of Lennon's classes through the hallway caused no more commotion than did any other class. She testified that she never had complained to a principal about noise made by Lennon's pupils. WILLIAM DUNIGAN, however, testified on rebuttal that Tonkin had complained to him on at least two occasions about the yelling and noise coming from Lennon's room and that Tonkin had asked him to take action to control it.

BARBARA KRAJCECK, whose two children were taught by Lennon, testified that her children had no problems in Lennon's classes. She testified that when her younger daughter had problems with reading, Lennon showed her concern by calling her on the telephone, sending notes to her at home, and making suggestions as to how she could help her daughter at home.

WILLIAM SIGLE, a sixth and seventh grade teacher employed by the Board, testified that during 1969-1971, he had pupils in his classes who had been in Lennon's classes the prior year. He testified that those pupils would often refer him to Lennon as an authority when questions arose in the areas of history and political science and that invariably Lennon gave him the correct answers to those questions. Sigle also testified that when in 1980-81 Lennon taught in his classroom one period a day, he was not aware, on the basis of his incidental observations, of any problems. Sigle also testified that he feels that teachers of low ability classes have to spend up to three-quarters of their time just controlling their classes.

RICHARD PEROSA, an eighth grade science teacher, testified that from his experience with homogeneous grouping he has concluded that low ability groups typically have a number of pupils who cause disturbances. He also testified that he noticed no unusual behavior problems in Lennon's classes when he taught for a two-year period during the 1960's in a room which he and Lennon shared.

JAMIE CANCRO, a speech therapist who knows Lennon, testified that four of Lennon's pupils were taken from Lennon's class for speech therapy at various times during the week in 1981-82. She testified that the behavior of Lennon's pupils and their progress in speech class were neither better nor worse than those of any other pupils. She also testified that some teachers who utilize the technique of pupil "contracts" allow their pupils to fill out the "contract" whereas other teachers fill out the "contracts" themselves.

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MANFRED PEIL, an English teacher who has worked with Lennon on Association activities, testified that in Association activities, Lennon is knowledgeable, a good organizer and an effective speaker to groups in the organized teaching profession. It was stipulated by the parties that LOUIS HODE and MARCIA WEBER would have given testimony under oath, corroborating that which was testified by Manfred Peil. Hode, a teacher of the Handicapped at East Brunswick called to testify on one other aspect, testified that during the ten years he has been associated with Lennon on state and county associations activities, he has found her to be a moral, well-informed, inquisitive person, who tries her best to help pupils.

ANGELA GEISU, an art teacher in Appebly School who has been on disability pension since 1979, testified that she believes that behavior problems worsened when homogeneous grouping was instituted. She testified that the higher concentration of pupils who create discipline problems in lower ability groups makes it nearly impossible to conduct educational programs which are successful in classes with pupils of higher ability.

CHRISTINE CHRISTENSEN, a teacher employed in the East Brunswick School District who knows Lennon through activities in the organized teaching profession, testified that Lennon has been an effective presenter at legislative seminars, committee meetings and workshops. She testified that Lennon is recognized as a well-informed person who has an uncanny ability to organize data, to clarify issues and to speak effectively without notes.

GERTRUDE LENNON testified that she recognizes that she has an accent and that the volume of her voice sometimes rises to higher levels than she intends when she attempts to be stern. She testified that her principal, David Sidel, and other principals had worked with her in 1972-73 to help her control this facet of her teaching. She testified that after she had learned from another teacher that Conner, her principal from 1969-71, had made a comment that if he wanted to harass her (Lennon) he would be there to observe her on Monday morning, she was observed for the first time in her teaching career.

Lennon testified that with the exception of the reading laboratory, she structured her class less rigidly than some teachers do and did not require that all pupils do the same things at a given time. In regard to her transfer to the reading laboratory, Lennon testified that no one told her that the transfer was the result of unsatisfactory

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teaching performance. She also testified that she did not consider the reading laboratory process to be "teacher proof," since frequent breakdowns of equipment required alternative techniques and her principals asked that she incorporate both mathematics and more phonics in the program of instruction. Lennon testified that Conover did not criticize her performance in the reading laboratory and that principal Eddy had said to her that he was told to be "tough" when evaluating her. She testified that Eddy had criticized her unjustly for having too few materials when she had been furnished only 80 filmstrips and 80 tapes for use in the "cubbyhole" in which the reading laboratory was located.

In regard to principal Marcello's criticisms, Lennon testified that he had told her in an "icy manner" that she should apply to teach German in the high school and that he was assembling (his) own young staff. She also testified that the class assigned to her by Marcello was particularly difficult because of two "fighters" in the class, and the discontent expressed to the principal by certain parents.

In regard to criticism by principal McVey and principal Orlick concerning the availability of her plan book, Lennon testified that she lost her plan book during 1981-82 but found it after a two-week period and that after a classroom visit in a prior year by McVey, she had shown him the plan book within five minutes after he left the class. In regard to the one class she taught regularly at the junior high school under McVey during 1980-81 while she was assigned as a permanent substitute, she testified that she was assigned to teach it in an inappropriate science room in which she had only a bookcase, thus necessitating that most of her teaching materials be taken from place to place on a cart each day.

Lennon testified that when Orlick advised her that she would be assigned to teach a low ability group of fifth graders for 1981-82, she expressed her regret at being assigned for the seventh year in a row to teach a low ability class but, nevertheless, prepared herself over the summer for the assignment. She testified that during the early part of the year, the class behaved well but later lapsed into numerous instances of pushing, pulling and hysterical behavior. She admitted that she may have been too lax in not nipping these problems in the bud. Lennon attributed some of the problems to the constant disruption occasioned by comings and goings of pupils to instruction by others outside her classroom. Lennon testified that although the classified pupils in her group were generally well-behaved, those not classified caused most of the problems.

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In regard to the delay of implementing pupil "contract," of which her superiors complained, she testified that the delay of a few weeks was attributable to her reading about the proper implementation of the technique which was new to her.

Concerning her superior's criticism of not teaching science and social studies and placing those plans in her plan book, Lennon testified that this was occasioned, and only for a short time, by her response to her superiors' suggestions to concentrate on essentials and regain class control, suggestions which also prompted her to suspend the three groups in reading for a three-day period.

In regard to complaints from her superiors that she was too free in allowing pupils to go to the rest rooms and the nurse's office, Lennon testified that she felt that this was not excessive and that if one was allowed to go, fairness demanded that others be granted the same privilege.

Lennon testified that she attempted to implement suggestions of Orlick and Kopelovich by visiting other teachers' classes, and by complimenting pupils for good behavior, giving "sticker" rewards for good work, letting pupils choose their "chore of the week," by studying materials on behavior modification, by issuing student "contracts," displaying pupil work on bulletin boards, using nonverbal reminders to pupils, revising and expanding her lesson plan format (R-9), increasing pupil homework assigned, and taping special schedules to pupils' desks.

Concerning the educational progress of her pupils during 1981-82, Lennon testified that she does not consider the California Achievement Test results to be a reliable measure of a pupil's progress.

FINDINGS OF FACT:

On the basis of a preponderance of credible evidence within the record, I **FIND** the following to be additional relevant facts to be considered when reaching a determination:

1. Because of specialized instruction they received elsewhere in the school, only about 50% of the 15 pupils enrolled in Lennon's class during 1981-82

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were present at any one time during the average school day. All of her pupils were present during somewhat less than one hour during the week. Since the classified and unclassified pupils were assigned to special instruction so frequently, Lennon's class was the scene of many comings and goings during each day. In this respect, Lennon's class was not unique in the district. These coming and goings were increased by the frequent visits of her pupils to the nurse and the school rest rooms.

2. Lennon's classroom was frequently the scene of unusually loud voices and shouting by both pupils and teacher. Although Lennon was frequently cautioned over the years about her loud strident manner of speaking, she had not been able to control the loudness of her voice. This, as well as the loudness of her pupils' voices was both a disrupting factor to other teachers in nearby rooms and an embarrassment to her principals. The problem continued throughout the 1981-82 school year.

3. Lennon's classroom control was ineffective as shown not only by the noise level in her classroom but by her inability to keep pupils on task.

4. Lennon was counseled in special sessions on a weekly basis during part of the 1980-81 school year by Julia Rhodes, head of the Communications Arts Department. She was also counseled in special sessions on a weekly basis by Kopelovich and/or Orlick during most of 1981-82. In those sessions, Lennon showed herself to be a cooperative, well-mannered person who was agreeable to the suggestions of Orlick and Kopelovich. She was, however, unsuccessful in putting into practice the kind of classroom control, planning and educational techniques which she agreed to in those weekly counseling sessions. While she did put into practice such techniques as the pupil "contracts," observing other teachers, establishing pupil "chore of the week" plans, bulletin board displays, revising of lesson plan format, and complimenting pupils for good work, her overall classroom organization, discipline and teaching performance remained unacceptable to her supervisors.

5. Lennon, as a person, has the respect of both her fellow teachers and her supervisors. By contrast, her supervisors, especially in recent years,

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formed the unanimous opinion that her teaching performance was not minimally acceptable. It was for that reason that she was assigned to the reading laboratory and later as a permanent substitute. When she was ordered reinstated as a classroom teacher for 1981-82, both her principal and Kopelovich evaluated her teaching performance as not minimally acceptable. While both testified that Lennon, a veteran teacher, made some minimal improvement after the tenure charges of inefficiency were filed in March, they were unanimous in their opinion that her performance had not improved to an acceptable level by the end of the 1981-82 school year.

DISCUSSION AND CONCLUSIONS:

I have considered and balanced the arguments of respective counsel at the conclusion of the hearing and in their post-hearing memoranda. I have similarly considered and balanced the extensive documentation in evidence and the testimony of witnesses and the facts set forth above. The issues here presented are whether the charges of inefficiency against Gertrude Lennon have been proven and, if so, what penalty, if any, should be imposed.

The tenure charges of inefficiency were certified in March 1982 and the period of time she had to correct those charges was from March through June 1982. Hence, greatest weight must be placed on that period of time. While Lennon's teaching performance before the 1981-82 school year is helpful to establish the contextual setting of the dispute, she was neither charged with inefficiency during those years nor given the required 90 days to overcome inefficiencies in those years, as required by N.J.S.A. 18A:6-11, as revised by the Legislature, effective February 7, 1976. Lennon's record in prior years is also helpful to the extent that it enabled me to **CONCLUDE** that her problems are not of recent origin and that the Board's decision to certify tenure charges was not motivated by a single act or by frivolous or short-term problems.

Set forth below, seriatim, is each of the six charges of inefficiency and the conclusion reached as to whether that charge has been proven:

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Charge 1. Failure To Maintain Order And Discipline In The Classroom.

I **CONCLUDE** that the Board has, by a preponderance of credible evidence, proven this charge. This conclusion is grounded on the forthright and convincing testimony of Orlick and Kopelovich, who observed Lennon frequently throughout the 1981-82 school year, met with and counseled her on a weekly basis from March to June 1982 and formally and informally evaluated her teaching performances during that period. It is further grounded on the testimony of Orlick of incidents in which shouting matches between pupils and teacher occurred. The occurrence of such unacceptable incidents is indicative that Lennon failed to maintain proper discipline in the classroom.

Charge 2. Insufficient Time Spent On Actual Instruction.

I **CONCLUDE** that the Board has proven this charge. This conclusion is grounded on the convincing testimony of Kopelovich who testified of constant trooping in and out of her pupils to rest rooms and the nurse's office, Lennon's failure to send pupils to supplemental instruction teachers, Lennon's failure to call pupils forward to join their reading group in her class, and Lennon's discontinuance, without authorization, of instruction in science and social studies for several weeks. The conclusion is also grounded on Orlick's thoroughly credible testimony about disciplinary incidents of such nature that pupils could not have been giving attention to their studies and the teacher could not actively have been engaged in instructing pupils.

Charge 3. Inefficient And Improper Allocation Of Time In The Classroom.

I **CONCLUDE** that this charge has been proven by the Board. This conclusion is grounded on Orlick's testimony of chaotic conditions which he observed in Lennon's classroom. Those conditions do not coexist with efficient and proper use of time in the classroom. The conclusion is further grounded on Kopelovich's testimony that Lennon, without authorization, suspended the teaching of social studies and science for a few weeks. It is also grounded on Kopelovich's convincing testimony that Lennon allowed pupils to "stumble along" by themselves with too little active and effective instruction, and her testimony that Lennon failed to compel pupils to be recognized before reciting.

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Charge 4. Failure To Maintain Self-control In The Classroom

I **CONCLUDE** that the Board has proven this charge. In so concluding, I rely on the testimony of Kopelovich who testified that Lennon constantly fluctuated in her classroom moods between friendly support and tantrums, yelling and threats. I further rely on the testimony of Orlick in which he told of the necessity to visit her class frequently because of chaotic conditions and of embarrassing incidents when Lennon's outbursts were audible to visitors in the office as the outbursts were fed back over the intercom system.

Charge 5. Poor Planning And Organization Within The Classroom.

I **CONCLUDE** that the Board has also proven this charge. Both Orlick and Kopelovich testified that they found Lennon's plan book unacceptable. They testified that early in the 1981-82 school year, it was so sketchy as to be unusable by a substitute. They also testified that, when so advised, Lennon switched to plans in her plan book that were more appropriate. Classroom planning, however, consists of more than can be placed in the limited space of a plan book or on the pages of a looseleaf notebook. It is clear that when pupils are not sent for supplemental instruction and a pupil present in the classroom is not called to join his reading group, both planning and organization are inadequate. It is also clear that planning and organization are inadequate when a supervisor finds that requisite studies are discontinued for weeks without authorization and when a qualified observer such as Kopelovich characterizes the classroom as one of boredom, drudgery and lacking in spontaneity.

Charge 6. Inability To Implement Lesson Plans And Achieve Educational Goals.

I **CONCLUDE** that the Board has proven this charge also. One cannot efficiently implement lesson plans and achieve educational goals in a classroom in which order and discipline are not maintained, and in which insufficient time is spent on instruction, in which there is insufficient and improper allocation of time, in which the teacher does not plan and organize well. The absence of these essentials is cumulative and can only result in inability to implement lesson plans and achieve educational goals. That those goals were not achieved is evident from the lack of demonstrated progress in

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grade equivalent scores by Lennon's pupils in 1982 as compared to their scores in the same California Achievement Tests one year earlier. While insufficient data was placed in evidence to make a comprehensive analysis, the number of students who regressed from 1981 to 1982 in basic skills tests is, to say the least, alarming.

Many of the conclusions, above, are grounded on the testimony of Orlick and Kopelovich, who impressed me as experienced and thoroughly qualified supervisors whose numerous evaluations of Lennon were unbiased and objective. Those evaluations and the minutes of their weekly meetings with Lennon from March through June 1982 are thoroughly documented in the exhibits in evidence as P-30, 31, 36, 38, 39, 42, 43, 44, 45, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65. While their earlier evaluations and minutes of counseling sessions are corroborative of the ones issued after March 1982, the latter must, in view of the thrust of N.J.S.A. 18A:6-11, in a case involving inefficiency charges, be given greater weight. In such matters, the supervisors' evaluations are crucial and must be given proper weight by the reviewing authority. As was said by the Commissioner in The Tenure Hearing of Francis M. Starego, 1967 S.L.D. 271 at 273:

> Evaluation of a teacher's competency is generally a matter of total impression resulting from a synthesis of observations made over a period of time. . . .

DETERMINATION:

In consideration of the facts and conclusions set forth above, it is **DETERMINED** that the Board has proven the six charges of inefficiency against respondent Lennon. Apropos to the consideration of what penalty is appropriate in this instance is that which was stated by the Commissioner in Starego, supra, and cited with approval by the Commissioner in The Tenure Hearing of Michael E. Secula, West Morris Regional School District, 1977 S.L.D. 967, aff'd State Board of Education, 1977 S.L.D. 975:

> The paramount purpose of the public schools is to provide a thorough and efficient education for the children of the district. That purpose would be vitiated by protection in their employment of teachers who are proven to be inept and incompetent. The teacher in this case has had more than sufficient opportunity to rectify his patent shortcomings and to prove his capacity to discharge effectively the responsibilities of a teacher in the public schools.
>
> [at p. 975]

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Lennon, despite the great efforts of the district to assist her prior to and after the certification of charges, failed to correct her deficiencies. Accordingly, it is **DETERMINED** that her right to continue in employment in the district is forfeited. Effective as of the date of a final decision in this matter, it is **ORDERED** that petitioner be **DISMISSED** from employment with the Board as a teaching staff member, retroactive to the date of her suspension by the Board on August 11, 1982.

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

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

July 14, 1983
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

July 15, 1983
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 15, 1983
DATE

OFFICE OF ADMINISTRATIVE LAW

fms/ee

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DOCUMENTS IN EVIDENCE:

P-1 Teaching application of Lennon with attachments, August 17, 1962
P-2 Staff Performance Evaluation of Lennon, March 17, 1976
P-3 Summative Evaluation of Lennon, June 23, 1976
P-4 Rice's Observation of Lennon, April 29, 1965
P-5 Marcello's Observation of Lennon, September 25, 1974
P-6 Marcello's Evaluation of Lennon, October 31, 1974
P-7 Eddey's Evaluation of Lennon, March 21, 1979
P-8 Eddey's Evaluation of Lennon with Rebuttal, April 11, 1979
P-9 Eddey's Evaluation of Lennon, May 25, 1979
P-10 McVey's Evaluation of Lennon, February 9, 1981
P-11 Tenure Charges preferred by Conover, March 10, 1982
P-12 Chart compiled by Conover
P-13 Conner to Lennon, November 30, 1970
P-14 Referrals to Nurse's Office, 1981-82
P-15 Referrals to Nurse's Office, 1982-83
P-16 Sidel's Evaluation of Lennon, 1972-73
P-17 Perlmutter's Progress Notes on D.K.
P-18 Staff Performance Evaluation, February 20, 1981
P-19 Summative Evaluation, March 1981
P-20 Lennon's Professional Improvement Plan, March 20, 1981
P-21 Dunigan's Evaluation of Lennon, February 4, 1974
P-22 Dunigan's Evaluation of Lennon, February 28, 1977
P-23 Dunigan's Evaluation of Lennon, June 1977
P-24 Dunigan's Evaluation of Lennon, March 10, 1978
P-25 Dunigan's Evaluation of Lennon, June 1978
P-26 Dunigan to Orlick, November 23, 1981
P-27 CAT Score Comparison, March 1981, 1982
P-28 Marcello to Lennon, December 16, 1974
P-29 Marcello to Lennon, December 18, 1974
P-30 Summary Evaluation of Lennon, March 31, 1982
P-31 Staff Performance Evaluation of Lennon, May 3, 1982
P-32 Orlick to Lennon, October 7, 1981
P-33 Orlick to Lennon, October 13, 1981
P-34 Orlick to Lennon, October 21, 1981

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P-35 Orlick to Lennon, November 25, 1981
P-36 Orlick to Lennon, December 3, 1981
P-37 Minutes of Meeting with Lennon, January 5, 1981
P-38 Orlick to Lennon, April 22, 1982
P-39 Professional Improvement Plan, May 10, 1982
P-40 Student Contract
P-41 Lennon's Strengths and Weaknesses, January 1982
P-42 Lennon's Strengths and Weaknesses, June 1982
P-43 Chart of Lennon's Progress, 1981-82
P-44 Chart of Lennon's Progress, 1981-82
P-45 Chart of Lennon's Progress, 1981-82
P-46 Kopelovich to Conover
P-47 Conover to Kopelovich, October 22, 1981
P-48 Kopelovich's observation of Lennon, October 5, 1981
P-49 Kopelovich's observation of Lennon, October 19, 1981
P-50 Kopelovich's conference notes, November 10, 1981
P-51 Kopelovich's observation, December 11, 1981
P-52 Kopelovich to Lennon, December 8, 1981
P-53 Kopelovich to Lennon, December 15, 1982
P-54 Kopelovich to Lennon, February 2, 1983
P-55 Kopelovich to Lennon, February 9, 1983
P-56 Kopelovich to Lennon, March 17, 1983
P-57 Kopelovich to Lennon, March 24, 1982
P-58 Kopelovich to Lennon, April 16, 1982
P-59 Kopelovich to Lennon, May 3, 1982
P-60 Kopelovich to Lennon, May 4, 1982
P-61 Kopelovich to Lennon, May 11, 1982
P-62 Kopelovich to Lennon, May 24, 1982
P-63 Kopelovich to Lennon, May 24, 1982
P-64 Kopelovich to Lennon, June 8, 1982
P-65 Classroom Observation Report, June 1982
P-66 Summary of Pupil Progress Data
P-67 Norms Tables for CAT

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R-1 Conover to Gleim, June 16, 1978
R-2 Conover to Lennon, May 29, 1980
R-3 Conover to Lennon, August 26, 1980
R-4 Rhodes' Evaluation of Lennon with Rebuttal, February 20, 1981
R-5 Orlick's Evaluation of Lennon with Rebuttal, November 11, 1981
R-6 Lennon to Orlick
R-7 Evaluation of Lennon, November 7, 1980
R-8 Lennon's Plan Book, September to April 1981-82
R-9 Lennon's Plan Book
R-10 Donlin to Lennon, June 21, 1974
R-11 Grouping Chart, Appleby School
R-12 Schedule of Students Leaving Lennon's Classroom
R-13 Orlick to Staff, May 25, 1982
R-14 Student Contract Data

J-1A Notice of Tenure Charges, March 10, 1982
J-1B Tenure Charges
J-1C Statement of Evidence
J-1D Board Resolution, March 10, 1982
J-1E Nemeth to Lennon, March 26, 1982
J-1F Nemeth to Lennon, June 14, 1982
J-1G Notice of Failure to Correct Inefficiencies, June 17, 1982
J-1H Board Resolution, June 17, 1982
J-1I Oxfeld to Nemeth, June 29, 1982
J-1J Lennon's Response to J-1G
J-1K Notice of Consideration of Tenure Charges, August 10, 1982
J-1L Notice of Certification of Tenure Charges, August 11, 1982
J-1M Certification of Determination of Tenure Charges, August 11, 1982
J-1N Board Resolution Re: Tenure Charges, August 11, 1982

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IN THE MATTER OF THE TENURE	:	
HEARING OF GERTRUDE (TRUDY)	:	COMMISSIONER OF EDUCATION
LENNON, SCHOOL DISTRICT OF	:	DECISION
THE BOROUGH OF SPOTSWOOD,	:	
MIDDLESEX COUNTY.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent filed voluminous primary exceptions to the initial decision by Judge Errickson. Respondent contends that the judge erred by not dismissing the charges herein for lack of specificity, citing In the Matter of the Tenure Hearing of Consuelo Garcia, 1970 S.L.D. 335 and In the Matter of the Tenure Hearing of Carolyn Edwards, decided by the Commissioner March 9, 1982. Respondent argues that upon expiration of the 90-day improvement period, the procedure set down in In the Matter of the Tenure Hearing of Marilyn Feitel, 1977 S.L.D. 451 must be followed. Respondent states that the Board's failure to conform specifically to the requisite procedures in Feitel compels dismissal of the charges with full back pay and all emoluments. Further, respondent alleges error on the part of the judge concerning the suspension of respondent without pay. Respondent avers that the judge improperly determined the time interval for the suspension of pay, citing In the Matter of the Tenure Hearing of Robert Beam, 1973 S.L.D. 157. In closing arguments respondent contends that Judge Errickson erred in determining that the Board of Education proved charges of inefficiency on the part of respondent. She contends that no specific factual incidents are set forth to support such conclusions.

The Board in reply exceptions refutes those of respondent and generally affirms the initial decision. The Board contends that the specific nature of the inefficiency charges fell into six categories well known to respondent and that the exhibit P-12 set forth precisely which witnesses and documents would be used in support of each area of inefficiency. The Board argues that the concern expressed in Garcia, supra, for that board's failure to assist or guide the employee in overcoming the alleged inefficiency does not prevail in the present matter. The Board points to the efforts of its supervisors to be in contact with the teacher and provide her with specific assistance and

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guidance, both verbally and in writing, in an attempt to assist her in overcoming the inefficiency. The Board contends that respondent's argument that Feitel requires a board to submit a second statement of evidence at the conclusion of the improvement period is simply not so. The Board argues that a board must only give the employee an opportunity to respond to its conclusion that the inefficiency was not overcome.

The Board, in answering respondent's contention that the judge erred in determining that the tenure charges were proven by the evidence submitted by the Board, notes that nine of the twelve Board witnesses were educational experts with administrative and supervisory certificates. Further, it is noted that these experts were trained, qualified and experienced in evaluating teacher performance. The Board argues that the evidence submitted to the Court was overwhelming and unrefuted by respondent. The Commissioner finds merit in the Board's arguments and adopts them as his own.

An examination of the extensive record herein, the multiplicity of documents in evidence and the testimony of witnesses convinces the Commissioner that respondent knew of her inefficiency and was accorded regular verbal and written suggestions and assistance in an attempt to overcome her problems. See P-30, 31, 36, 38, 39, 42-45, 56-65. In the opinion of the Commissioner these evaluations and records clearly show the intent and effort of those who, by position, certification, qualification and experience, attempted to assist respondent to resolve her deficiencies. The Commissioner so holds.

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

Accordingly, respondent teacher is and shall be dismissed from employment with the Board as a teaching staff member as of the date of her suspension on August 11, 1982.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 29, 1983

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 5346-83
AGENCY DKT. NO. 229-7/83A

TODD LAUSTER,
Petitioner
v.
NEW JERSEY STATE INTER-SCHOLASTIC ATHLETIC ASSOCIATION AND WESTFIELD SENIOR HIGH SCHOOL, WESTFIELD SCHOOL DISTRICT, UNION COUNTY,
Respondents.

APPEARANCES:

Richard Collier, Esq., for petitioner (Norris, McLaughlin & Marcus, attorneys)

Michael J. Herbert, Esq., for respondent, New Jersey State Interscholastic Athletic Association (Sterns, Herbert & Weinroth, attorneys)

William Peek, Esq., for respondent Westfield Senior High School, Westfield School District (Nichols, Thompson, Peek & Myers, attorneys)

Record Closed: August 3, 1983 Decided: August 11, 1983

BEFORE **ERIC G. ERRICKSON,** ALJ:

Petitioner, a pupil enrolled in Westfield High School, on July 11, 1983, filed a petition of appeal wherein he contests a ruling of the New Jersey State Interscholastic Association (NJSIAA) that he may not compete in interscholastic soccer during the fall

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1983 season. Respondent NJSIAA, in its answer filed July 14, 1983, contends that its ruling is correct, reasonable and consistent with its constitution, bylaws and regulations.

When the pleadings were joined, the Commissioner, on July 15, 1983, transferred the matter as a contested case to the Office of Administrative Law, pursuant to N.J.S.A. 52:14F-1 et seq. On July 19, 1983, a notice of motion for immediate emergency relief and/or for summary judgment was filed by petitioner together with supporting brief. Thereafter, on August 1, 1983, respondent NJSIAA filed a notice of cross motion for summary judgment with supporting brief. Oral Argument was ordered and conducted before the undersigned at the Office of Administrative Law on August 3, 1983. Participating in the oral argument were counsel for petitioner and counsel for respondent NJSIAA. Counsel for respondent Westfield Board of Education (Board) did not participate in the oral argument but gave notice in advance that the Board's position is that it agrees to abide by whatever decision is issued in the dispute and that it chose not to participate actively in the proceeding on August 3, 1983.

FACTS:

The essential facts for the determination of this dispute are not in contest. Accordingly, I CONCLUDE that the matter is ready for a determination as a matter for summary decision.

Todd Lauster's enrollment as a pupil in Westfield High School is as follows:

1979-80	Freshman
1980-81	Sophomore
1981-82	Junior
1982-83	Junior (Repeat)
1983-84	Senior

Lauster participated in freshman interscholastic soccer during his freshman year. He again tried out for and practiced for soccer as a sophomore in September 1980. On or about the tenth day of the 91-day season, his leg was injured in the first junior varsity preseason scrimmage. Severe complications and acute pain resulted from the injury. After spending October and the first three weeks of November in two different hospitals and undergoing three weeks of therapy during December, Lauster was also diagnosed and

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hospitalized as diabetic in January 1981. He was unable to resume attending classes until March 1981. With the assistance of his teachers and tutors, he completed his sophomore year with commendable grades.

Lauster played varsity soccer in the fall of his junior year but, in March 1982, was again hospitalized for complications stemming from his diabetes. Because of time lost from school, it was decided that Lauster would repeat his junior year, which he did during the 1982-83 school year. During that year, he played on the varsity soccer team but was not a regular starter.

When Lauster learned that he would not be able to play soccer and other interscholastic sports during his senior year by reason of Article V, Section 4.J., of the bylaws of NJSIAA, he requested permission of NJSIAA to be allowed to participate in interscholastic athletics during his senior year. He was supported in his request by letters from his principal, his guidance director and his physician, who asserted that participation in varsity soccer during the fall of his senior year would be in Lauster's best interests physically, emotionally, and academically (Petition of Appeal, Exhibit A).

Lauster's appeal was heard by the NJSIAA Eligibility Committee, which rejected his appeal. Lauster then appealed to the NJSIAA Executive Committee, which, like the Eligibility Committee, conducted a hearing before rendering its decision. That decision is embodied in the following letter dated June 14, 1983, from NJSIAA Executive Director Robert F. Kanaby to the principal of Westfield High School:

> On June 1, 1983, the NJSIAA Eligibility Committee declared the above student ineligible to participate in interscholastic sports for the 1983-84 school year. An appeal was thereafter made to the NJSIAA Executive Committee which conducted a complete hearing of this case on June 8th.
>
> I wish to inform you that, on the basis of the testimony and documents presented, the Executive Committee voted to affirm but modify the Eligibility Committee. Specifically, the Executive Committee determined to rule Todd Lauster ineligible only for the Fall, 1983 semester so that he may participate in the Winter and Spring athletic programs at Westfield Senior High School next year if he is otherwise eligible.
>
> The Executive Committee has determined to grant a limited waiver to Todd Lauster since his diabetic condition apparently prevented him from successfully completing his Junior year of secondary school. However, prior to his extensive absences during

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> his Junior year, this student did participate in soccer and therefore, has already participated in a secondary school soccer program for four years. Even in the limited instances where a waiver has been granted to a student, the Executive Committee has never allowed a student to participate in an interscholastic sport for more than four years. Therefore, since Todd has not participated for more than three years in either a Winter or Spring sport, the period of ineligiblity imposed by the Eligibility Committee will be modified so as only to include the Fall, 1983 sports program.
>
> We wish to thank your for your cooperation. A copy of this letter is being sent to Mr. and Mrs. Robert J. Lauster, who appeared before the Executive Committee on June 8th. Both the school and the student's parents are advised that if they wish to appeal this decision, they may do so by filing a petition with the Commissioner of Education within 90 days from the receipt of this decision. [Petition of Appeal, Exhibit B]

It is this decision of the NJSIAA Executive Committee which petitioner appeals to the Commissioner seeking an order directing that he be permitted to participate in the Board's interscholastic soccer program during the 1983 season.

ARGUMENTS OF THE PARTIES:

The issue posed is essentially whether Lauster's participation in soccer for approximately ten days during his sophomore year in 1980, together with his participation in soccer during 1979, 1981 and 1982, renders him ineligible to participate in soccer during his fifth year at Westfield Senior High School during the fall of 1983.

Petitioner argues that he has not played soccer for four seasons and that NJSIAA's finding that he has and its ruling that he is ineligible are arbitrary, capricious and based on error. In support of his charge of arbitrariness, petitioner asserts that NJSIAA's decision was essentially an ad hoc decision which, he contends, is inherently arbitrary. In support of this contention, petitioner cites Smith v. NJSIAA, OAL DKT. NO. EDU 7753-80, (June 24, 1981) aff'd by the Commissioner, DKT. No. 556-12/80A (August 13, 1981), wherein the following was stated by the administrative law judge:

> At an absolute minimum, petitioner may properly expect the NJSIAA will apply established standards in a predictable way. On its face, the eight-semester rule would appear to admit of only a single exception for honorably discharged servicemen and women. In actual practice, the NJSIAA has historically recognized a variety of different exceptions which have never been adequately

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> publicized so that all those who potentially qualify may take advantage of the same opportunity afforded to others. Criteria used to determine entitlement to a waiver do not fit into any readily-ascertainable pattern, but appear to depend to a large extent on the personal attitudes of decision-makers. For the sake of basic fairness, the NJSIAA has an obligation to ". . . let the standard be generally known as to assure that it is being applied consistently and so as to avoid both the reality and appearance of arbitrary denial of benefits to potential beneficiaries." Morton v. Ruiz, 415 U.S. 199, 231 (1973). Our State's highest court has cautioned that ad hoc determinations made without "pre-existing, properly published and adequately defined standards" are inherently arbitrary. Robinson v. Cahill, 69 N.J. 449, 520 (1976). Uncertainty as to the appropriate standard increases the likelihood . . . of inconsistent decisions reached in comparable situations. Opposite results obtained under identical circumstances are the essence of "capriciousness." See, 2 Cooper, State Administrative Law, § 762 (1965). . . . The NJSIAA remains free to adopt whatever reasonable policy it considers desirable to accomplish its legitimate objectives. All this decision requires is that the NJSIAA articulate clearcut standards for the exercise of its broad regulatory powers and apply such standards evenhandedly to everyone falling within the same category. [Slip op. at 11]

Petitioner asserts that NJSIAA's failure to publish the written standards called for in Smith, supra, two years ago is tantamount to a denial of due process and an attempt to keep people from using the appeal process by keeping them unaware that an appeal process exists or how they may avail themselves of it.

Petitioner argues that fairness demands that since his injuries limited his participation to only ten days of the 1980 season, he should be allowed to participate in soccer in 1983 for at least a period equal to a full season less ten days, and thus be allowed to participate in the equivalent of four full seasons of soccer during the five years of his high school career.

NJSIAA contends that the decision of its Executive Committee was neither unreasonable, unfair, arbitrary nor capricious but wholly consistent with that portion of its eligibility standards for athletes as set forth in its bylaws at Article V, Section 4.J., as follows:

> J. Semesters of Eligibility - No student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his/her entrance into the 9th grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated.

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> This rule shall not apply to an honorably discharged serviceman/servicewoman, in which case the Executive Committee may make any adjustments of this rule as it may deem equitable. [NJSIAA bylaws at, p.36]

NJSIAA also contends that petitioner was not deprived of due process since Article XIII of the bylaws clearly states that disputes over eligibility are to be heard first by an eligibility committee whose decision is appealable to the executive committee (Exhibit C at pp. 42-43). NJSIAA argues further that each month it sends its minutes to each of its 441 member schools and that contained therein are summaries of all rulings on requests for eligibility waivers. It is noted that one such contained a summary of petitioner's case, wherein the following words appear:

> Representing said student in the appeal of the Eligibility Committee's decision in ruling said student ineligible for participation in interscholastic athletics after June 30, 1983 as provided for in the NJSIAA Bylaws, Article V, Section 4.J were: Mr. & Mrs. Robert J. Lauster, parents of Todd, and Todd Lauster, student.
>
> A motion by Dr. Volpe, seconded by Mrs. Burch to grant a waiver of Section 4.J due to illness causing a prolonged absence from school was defeated by a vote of 4 yes, 19 no, 1 abstention.
>
> A subsequent motion by Mr. Saxer, seconded by Mr. Ginsburg to permit said student to participate in interscholastic athletics during the Winter and Spring seasons of 1983/84 but to be ineligible for the Fall 1983 sports season due to his having participated in interscholastic soccer for four (4) years.
>
> The motion passed: 19 yes, 5 no. [Respondent's Answer, Exhibit A at p. 5]

NJSIAA argues further that although waivers have sometimes been granted, they have never been granted to allow a pupil to compete in one sport for more than four seasons. NJSIAA argues that Lauster's active participation in ten days of practice and a scrimmage game in 1980, and in three full seasons in 1979, 1981 and 1982, constituted participation in four seasons of soccer, thus exhausting his eligibility.

NJSIAA, contending that it has been consistent in its application of the rule, charts 58 disputes since 1981 wherein its Eligibility Committee or Executive Committee has handed down rulings on eligibility arising under the eight-semester rule which has been in existence since 1922 (Respondent's Exhibit A). NJSIAA further relies on the affidavit of Executive Director Kanaby wherein he states, inter alia, that:

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> The NJSIAA has never allowed a student who was granted a waiver to participate in any interscholastic sport for more than four seasons.
>
> . . . .
>
> The NJSIAA has always viewed participation in an interscholastic sport to include practice and participation in preseason scrimmages. In other words, should a student discontinue participating in an interscholastic sport for any reason after participating in practice whether that be during practice, during preseason scrimmage or at any time prior to the end of a regular season, he or she would be viewed as having participated in that sport for purposes of the "four year rule." [Kanaby's affidavit at pp. 4, 5, nos. 10, 13]

CONCLUSIONS AND DETERMINATION:

Having considered and balanced these and all other arguments of the respective parties, I **CONCLUDE** that NJSIAA must prevail in this dispute. Petitioner alleges that in at least three instances NJSIAA has granted waivers which allowed pupils to participate actively in more than four seasons in an interscholastic sport. However, no case titles or names of pupils or schools were presented in affidavit form to support that allegation. Such naked, unsubstantiated allegations, in the face of the Executive Director's sworn statements, are insufficient reason in this proceeding to base a conclusion that NJSIAA acted capriciously or arbitrarily.

I also **CONCLUDE** that petitioner has not been deprived of due process to which he is entitled. He has made timely application for the waiver he seeks. The bylaws of NJSIAA detail that the Eligibility Committee will hear eligibility appeals and that the Eligibility Committee's decision may be appealed to the Executive Committee. These bylaws are reasonably accessible to pupils and members of the general public. Petitioner was accorded the right to a hearing with representation before both committees. He was granted a waiver for the winter and spring sports seasons of 1983-84, but was denied a waiver to participate in the soccer season of 1983 on grounds that he had already participated in four seasons of soccer.

Petitioner's contention that he has been improperly prevented from participating in four seasons of soccer does not comport with the facts of the case. I **CONCLUDE** that he has already participated in four soccer seasons, although in only a portion of one season prior to his unfortunate injury. Because of factors beyond his

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control, he was able to participate in only approximately ten days of that season. The fact remains, however, that he did participate in that season. I **CONCLUDE** that the waiver that he now seeks to allow him to participate in 1983 in a period at least equivalent to the part of the season he was injured should be denied.

To hold otherwise would be to set a dangerous precedent that could lead to an anomalous result. The plethora of record keeping which would devolve on coaches and athletic directors responsible for allowing injured athletes to complete the equivalent periods during fifth years of enrollment would be staggering. It would also open the door to the evil of "red shirting," which NJSIAA has assiduously guarded against over the years.

I further **CONCLUDE** that NJSIAA has dealt reasonably with petitioner. The fact that the Executive Committee overruled its Eligibility Committee and granted him the right to participate in winter and spring sports of his choosing speaks eloquently of the fairness and reasonableness with which he has been treated.

NJSIAA would be well-advised to bring together in one written document a set of standards applicable to the appeal process available in eligibility cases. These documents would assist those who have reason to appeal eligibility rulings and would vitiate charges of operating on an ad hoc basis, as herein. I am unable to **CONCLUDE,** herein, however, that within this factual context, NJSIAA's decision in this case should be set aside for lack of additional written standards and procedures applicable to the eligibility appeal process. The test of the eight-semester rule is reasonably available to members of the public as are summaries of NJSIAA's actions on appeals regarding eligibility. The desirability of the eight-semester rule needs no further elaboration. In this regard, see the Commissioner's decision in Gordon F. Van Note v. NJSIAA, 1983 S.L.D. ____ (decided April 22, 1983).

Absent a finding that NJSIAA's action in this case was arbitrary, capricious or unreasonable, it is **DETERMINED** that petitioner has not established entitlement to the relief he seeks in the form of an order of the Commissioner directing the Board to allow him to participate in interscholastic soccer during the 1983 fall season. Accordingly, it is **ORDERED** that the action of NJSIAA be **AFFIRMED** and that the relief sought by petitioner be **DENIED.** NJSIAA's motion for summary decision is **GRANTED.** Petitioner's cross motion for summary decision is **DENIED.**

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In conclusion, it is **ORDERED** that this initial decision denying emergency interim relief and entering summary decision in favor of NJSIAA be read to the parties, at their request, no later than August 10, 1983, written decision to follow.

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

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

August 11, 1983
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

DATE

Seymour G. Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 10, 1983
DATE

Elizabeth J. Longua, Cg.
OFFICE OF ADMINISTRATIVE LAW

ml/E

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TODD LAUSTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTER-SCHOLASTIC ATHLETIC ASSOCIATION AND BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENTS.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes that petitioner excepts to the finding by Judge Errickson that he had failed to provide, in affidavit form, case titles or names of pupils illustrative of NJSIAA's having granted waivers for participation in athletics beyond eight semesters. Petitioner contends that he was unaware that such omission would become an issue and, in any event, he contends such names were provided in oral argument and cites Smith v. NJSIAA, decided by the Commissioner August 13, 1981. Petitioner further contends that the question of whether he participated in four years of soccer would be irrelevant if the NJSIAA had carried out the Commissioner's mandate in Smith to establish clear, written guidelines defining the circumstances under which exceptions may be granted.

Petitioner further takes exception to the judge's conclusion that he had already participated in four soccer seasons. He contends that it is undisputed that his injury occurred during the practice-tryout portion of his sophomore year and, therefore, his participation was limited solely to the first period of the first pre-season scrimmage. Consequently, petitioner contends that it is erroneous to conclude that he participated in soccer during his sophomore year.

Petitioner's exceptions further dispute the judge's contention that the matter controverted herein could set a precedent and make it possible for school districts to "red shirt" athletes. Petitioner contends such danger does not exist in the case at hand nor need it be a problem if the NJSIAA would establish and publish written guidelines for granting exceptions to the eight-semester rule.

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Further, petitioner objects to the judge's characterization of the waiver granted by NJSIAA, permitting him to participate in winter and spring sports, as being a demonstration of the Association's "***fairness and reasonableness." Petitioner contends that the aforesaid waiver merely serves to underscore the arbitrary and capricious nature of the NJSIAA's decision in this matter.

Finally, petitioner takes exception to the position of the judge that "[t]he test of the eight-semester rule is reasonably available to members of the public as are summaries of NJSIAA's actions on appeals regarding eligibility. Petitioner argues that NJSIAA publications provide only summaries of the result of appeals but not the reasoning and factual circumstances of cases. By affidavit incorporated herein by reference, petitioner seeks to demonstrate that not only are such bulletins not as a matter of practice kept and maintained by local school districts, but also they do not provide a means whereby local districts are able to determine what standards are applied in granting or withholding waivers of the eight-semester rule.

The Association's exceptions essentially uphold the determinations of the judge and urge affirmance of the initial decision.

The Commissioner observes in reviewing the matter herein controverted and the exceptions entered to the initial decision that petitioner makes a persuasive argument that NJSIAA has failed to carry out the Commissioner's admonition in Smith, supra, to provide written guidelines or regulations to more specifically define the kinds of circumstances under which waivers will be granted. The absence of such specific guidelines, in the Commissioner's view, is a contributory factor to the number of appeals for determination of the NJSIAA in regard to said "eight-semester rule." Consequently, the Commissioner hereby directs the NJSIAA to establish specific standards for determining eligibility for the granting of waivers of the eight-semester rule. Such standards would not only benefit potential applicants before NJSIAA but would also provide assistance to those within NJSIAA responsible for making such determinations.

Notwithstanding his position stated above, the Commissioner is constrained to observe that the judge's conclusion that "[t]he test of the eight-semester rule is reasonably available to members of the public***" is not without merit albeit not in the form of NJSIAA's publications. Since Smith, supra, the Commissioner has ruled in a sufficient number of appeals of NJSIAA's determinations regarding the eight-semester rule to have laid down a series of decisions whereby potential petitioners and the NJSIAA may take guidance. (See Board of Education of the Sterling Regional High School District and Michael J. McKinney, Camden County v. NJSIAA, decided April 11, 1983 and Gorden F. Van Note v. NJSIAA, decided April 22, 1983.) Consequently, while

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the Commissioner agrees with petitioner's assertion that NJSIAA has failed to develop the clear-cut guidelines called for in Smith and directed herein, he cannot accept the view of petitioner that there exists no guidance as to the circumstances under which exceptions to the eight-semester rule may be made.

Having dealt with the matter relating to the existence of guidelines and their availability to the public, the Commissioner must address the merits of the matter herein controverted. In the Commissioner's view, petitioner's exception to the judge's determination relative to his having participated in four separate soccer seasons is without merit. Upon examination of the circumstances herein, the Commissioner finds the NJSIAA's ruling that petitioner, notwithstanding his having been injured during the early practice phase of the season of his sophomore year, is ineligible to participate further in soccer was a reasonable determination. In the absence of evidence to demonstrate that such determination was arbitrary or capricious or that the NJSIAA has determined differently in similar cases, the Commissioner will not substitute his judgment for that of the Eligibility Committee, as well as the Executive Committee of the NJSIAA. The Commissioner further agrees with the judge that the determination by the Executive Committee of NJSIAA to permit petitioner herein to participate in winter and spring sports during his senior year due to his physical incapacity during a major portion of his junior year is, under the circumstances, altogether reasonable and consistent with his determination in Sterling Regional, supra. Petitioner in that case was permitted a waiver of the eight-semester rule in that he was physically incapacitated and thus repeated his ninth-grade year due to such physical incapacity. In the instant matter, petitioner likewise repeated an academic year due to physical incapacity, however, the incapacity which caused petitioner to miss sufficient schooling to require him to repeat his previous year did not occur until March 1982, a school year in which he had fully participated in the fall soccer program.

The year for which petitioner claims the right to a waiver due to physical incapacity is the sophomore year (September 1980) in which he was injured during the course of a soccer season but which he did not repeat because of the injury. While the Commissioner regrets the injury to petitioner herein and sympathizes with the regrettable circumstances of the injury which precluded petitioner's further participation during that season, the fact remains that petitioner did, if only briefly, participate in soccer during that academic year. The Commissioner so holds.

In summary, therefore, the Commissioner affirms the findings of the judge and makes them his own. Summary decision herein is granted to the respondent NJSIAA whose determination in the instant matter is affirmed. Petitioner's cross-motion for

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summary decision is denied. The Commissioner by way of emphasis further directs the NJSIAA to develop and publish specific guidelines and/or rules which shall define the basis upon which waivers to the eight-semester rule shall be granted.

COMMISSIONER OF EDUCATION

SEPTEMBER 7, 1983

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8956-82
AGENCY REF. NO. 6-1/77

RITA SPIEWAK, PEGGY DABINETT,
PATRICIA O'REILLY and THE
RUTHERFORD EDUCATION ASSOCIATION,
Petitioner

v.

BOARD OF EDUCATION OF THE
BOROUGH OF RUTHERFORD,
BERGEN COUNTY,
Respondent

APPEARANCES:

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

H. Ronald Levine, Esq., for respondent

Record Closed: July 20, 1983 Decided: July 26, 1983

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

This matter was initially opened by the filing of a Petition of Appeal with the Commissioner of Education on January 7, 1977, wherein petitioners, Supplemental or Title I teachers, claimed a status as tenured teaching staff members, as well as the emoluments and benefits received by regular classroom teachers.

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The litigation process was presumably concluded as a matter of law with the decision of the New Jersey Supreme Court, rendered on June 23, 1982, wherein the Court held for petitioners and remanded the matter to the Commissioner for a determination of when tenure accrued and the benefits due petitioners.

The Commissioner transmitted the matter to the Office of Administrative Law on September 28, 1982 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A Prehearing Order was entered on January 4, 1983, wherein the issues on remand were framed as the result of conference on that same date as follows:

1. When did tenure accrue for teacher respondents [petitioners herein] ?

2. What retrospective and/or prospective salary and/or benefits are the entitlement of respondents [petitioners herein] ?

The matter was submitted for Summary Decision and briefed by the parties as well as the New Jersey School Boards Association, amicus curiae. An Order-Partial Summary Decision was entered on April 28, 1983 (hereinafter the Order), wherein the issue of tenure accrual was determined and Summary Decision was denied on the issue of salary and benefit entitlements due to a finding of relevant facts in dispute. The parties were ordered to hearing. Said Order outlined the standards and process for determining entitlements and is incorporated herein by reference.

Hearings were held on June 9 and June 30, 1983 at the Office of Administrative Law in Newark. At the June 30 hearing, the parties represented that good faith efforts would be put forth to file a Stipulation of Facts pursuant to the standards incorporated in the April 28, 1983 Order. The parties were unable to agree to a stipulation of facts, and the court advised the parties that it intended to resolve the matter at hearing on July 20, 1983.

At hearing, it became evident that the parties disagreed on proration of the school year worked as well as a proration of the school day worked by petitioners in many instances. The parties submitted their work products as evidentiary documents. A review

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of same immediately revealed the disputed prorations; an erroneous salary base for Spiewak; and the exclusion of holidays and vacations from the work year as computed in the Board's work product, which were negated in the Order when petitioners were placed on the teachers salary guide.

Counsel for the parties, agents of the Board, and the undersigned then proceeded to settlement conference to arrive at a stipulation of entitlements pursuant to the Order. The only dispute of substance arose when the Board argued that home instruction time assigned to Dabinett should not be calculated in the proration. The court determined that said instruction required an appropriate certificate; Dabinett held the appropriate certificate; and such time would be incorporated in the proration. The instructional environment at home was the only significant difference with such instruction given in school, which was deemed by the court to be a distinction without a difference.

The parties stipulated that the following calculations are correct and acceptable pursuant to the Order, but were reserved the right to file timely exceptions to the Order with the Commissioner upon receipt of this Intitial Decision.

The calculations are presented in columnar form. Each column is identified as follows:

Column 1: The school year
Column 2: Step and annual salary per the guide
Column 3: School year proration (in months)
Column 4: Adjusted salary
Column 5: School day proration (in per cent or fraction)
Column 6: Adjusted salary
Column 7: Sick day mitigation
Column 8: Adjusted salary
Column 9: Mitigation of earnings
Column 10: Amount due

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RITA SPIEWAK

1	2	3	4	5	6	7	8	9	10
1972-73	1 - $ 8,925	9	$ 8,033	3/7	$ 3,443	-	$ 3,443	$ 2,853	$ 590
1973-74	ON "CONTRACT" - NO CLAIM								
1974-75	3 - 10,350	91/4	9,574	70%	6,702	-	6,702	4,294	2,408
1975-76	4 - 11,650	93/4	11,359	6/7	9,736	486	9,250	4,008	5,242
1976-77	5 - 12,233	9	11,010	97%	10,680	-	10,680	5,688	4,992
1977-78	6 - 13,675	93/4	13,333	6/7	11,428	-	11,428	5,348	6,080
1978-79	7 - 14,875	93/4	14,503	97%	14,068	-	14,068	7,072	6,996
1979-80	8 - 16,236	93/4	15,830	98%	15,513	2094	13,419	4,863	8,556
1980-81	9 - 17,695	93/4	17,253	100%	17,253	-	17,253	7,806	9,447
1981-82	10 - 19,570	93/4	19,081	100%	19,081	286	18,795	7,508	11,287
1982-83	11 - 21,819	10	21,819	100%	21,819	-	21,819	9,383	12,436
							Total Entitlement		$68,034

The parties stipulated that Spiewak has seven accumulated sick days as of June 30, 1983.

It is presumed that, pursuant to the Order, Spiewak shall be compensated at Step 12 of the 1983-84 salary guide (BA + 15 level) if employed in Rutherford at that time, and in the absence of a collective bargaining agreement to the contrary.

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PEGGY DABINETT

1	2	3	4	5	6	7	8	9	10
1972-73	1 - $9,350	81/2	$7,948	30%	$2,384	-	$ 2,384	$1,896	$ 488
1973-74	2 - 10,235	81/2	8,700	37%	3,219	-	3,219	2,703	516
1974-75	3 - 10,950	91/2	10,403	65%	6,762	-	6,762	4,291	2,471
1975-76	4 - 12,150	91/2	11,543	90%	10,389	-	10,389	5,483	4,906
1976-77	5 - 12,758	91/4	11,801	98%	11,565	-	11,565	5,815	5,750
1977-78	6 - 14,225	93/4	13,869	100%	13,869	-	13,869	5,302	8,567
1978-79	7 - 15,500	91/2	14,725	100%	14,725	-	14,725	6,941	7,784
					Total Entitlement				$30,482

No accumulated sick day claim was made here due to Dabinett's non-employment since June 30, 1979.

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PATRICIA O'REILLY

1	2	3	4	5	6	7	8	9	10
1972-73	1 - $8,500	91/2	$8,075	65 %	$5,249	-	$ 5,249	$3,895	$1,354
1973-74	2 - 9,345	(combined 62% proration stipulated due to absence of record)					5,794	4,332	1,462
1974-75	3 - 9,990	91/4	9,241	85.7%	7,921	-	7,921	4,968	2,953
1975-76	4 - 11,050	9	9,945	85.7%	8,524	-	8,524	4,719	3,805
1976-77	5 - 11,602	9	10,442	85.7%	8,950	-	8,950	5,070	3,880
1977-78	6 - 13,000	10	13,000	85.7%	11,143	-	11,143	6,361	4,782
1978-79	7 - 14,150	10	14,150	85.7%	12,129	-	12,129	6,437	5,692
1979-80	8 - 15,424	10	15,424	85.7%	13,221	-	13,221	6,388	6,833
1980-81	9 - 16,816	10	16,816	85.7%	14,414	-	14,414	6,978	7,436
1981-82	10 - 18,634	10	18,634	85.7%	15,972	-	15,972	7,116	8,856
1982-83	11 - 20,780	10	20,780	85.7%	17,811	-	17,811	7,974	9,837
						Total Entitlement			$56,890

The parties stipulated that O'Reilly has 88 accumulated sick days as of June 30, 1983.

It is presumed that, pursuant to the Order, O'Reilly shall be compensated at Step 12 of the 1983-84 salary guide if employed in Rutherford at that time, and in the absence of a collective bargaining agreement to the contrary.

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DENTAL AND HEALTH BENEFITS

Petitioners have withdrawn claims for dental and health benefits due to the standards incorporated for same in the Order, but are reserved the right to file timely exceptions to those standards with the Commissioner upon receipt of this Initial Decision.

TEACHERS PENSION AND ANNUITY FUND (TPAF)

Pursuant to the Order, I **FIND** that petitioners have met the 20-hour employment standard for eligibility for the filing of applications with TPAF consistent with the Supreme Court holding, with the exceptions of Spiewak for 1972-73 and Dabinett for 1972-73 and 1973-74.

I **CONCLUDE** that petitioners are entitled to the salary compensations and benefits determined herein consistent with the Supreme Court holding in Spiewak and the subsequent Order entered on April 28, 1983.

The Board is hereby **ORDERED** to compensate petitioners and credit them for non-monetary benefits accordingly. The schedule and method of payments are left to the Commissioner, who has access to the fiscal status of the school district in the Department of Education's Division of Finance, and can best determine same to avoid any undue hardship on the district.

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

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OAL DKT. NO. EDU 8956-82

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

26 July 1983
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

28 July 1983
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

August 1, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

WITNESSES

For Petitioners:

Thomas Slezak, REA president

Patricia O'Reilly, petitioner

Rita R. Spiewak, petitioner

Peggy W. Dabinett, petitioner

For the Board:

Luke A. Sarsfield, Superintendent of Schools

Leon B. Auger Board secretary/school business administrator

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EVIDENTIARY DOCUMENTS:

RP-1 Dental Insurance Plan

RP-2 1971-83 negotiated agreements (a-f)

RP-3 1972-83 salary guides (a-k)

RP-4 O'Reilly vouchers, 1972-1983

RP-5 O'Reilly sick leave data summary

RP-6 Spiewak vouchers, 1972-83 (except 1973-74)

RP-7 1973-74 Spiewak contract

RP-8 Dabinett vouchers, 1972-1979 (except 1973-74)

RP-9 1972-83 school calendars

RP-10 Board calculations of salary entitlements

RP-11 Petitioners calculations of salary entitlements

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RITA SPIEWAK ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in primary exceptions to the initial decision by Judge Young contends that the assertion that Spiewak, supra, upholds any decision whatsoever as to any benefits due petitioners is clearly in error. The Board argues that petitioners are barred from any retroactive compensation by the statute of limitations and the doctrine of laches citing Fair Lawn, supra, and Lavin, supra. The Board argues further that the language of the Supreme Court in Spiewak and a PERC decision in East Orange, 7 NJPER 12304 makes it evident that the only benefit to be extended petitioners is sick leave provided by N.J.S.A. 18A:30-2. The Board contends that the decision herein provides no authority for offering them retroactive benefits. Lastly, the Board avers that the instant salary compensations are entirely incorrect because petitioners have already been paid the amounts due them. Petitioners in reply exceptions refute those filed by the Board stating:

> "***The remand in question was and is simply to allow for the calculation of what the provision of equal benefits means in actual dollars. It is a remand to calculate damages. It has nothing to do with determining the right to obtain such damages, which has already been established."
> (Petitioners' Exceptions, at p. 4)

Petitioners state that the Board's attempt to assert the statute of limitations, doctrine of laches and N.J.A.C. 6:24-1.2 are not part of the issues to be determined by the court on remand. Petitioners argue that the Board's prior inaction on these issues results in a waiver of all three defenses. Further,

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petitioners state that the defense of laches and N.J.A.C. 6:24-1.2 were raised before the Supreme Court and rejected. Petitioners spurn the Board's argument that they are not entitled to any remedy because they did not file before PERC. Petitioners state that in this matter the Supreme Court has held that, as a matter of law, remedial teachers are entitled to the same salary and benefits as other teachers negating any need to file before PERC. Petitioners affirm the decision of Judge Young, so too does the Commissioner. The arguments advanced by petitioners have merit and are adopted by reference by the Commissioner.

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

An examination of his own records reveals to the Commissioner that the Board of Education of the Borough of Rutherford has a current expense budget for the school year 1983-84 of $8,860,615 and the district's estimate of cash surplus on June 30, 1984 in this account is $160,505. In the opinion of the Commissioner, no undue hardship would be worked on the Board to make payment of the amounts of money due and owing petitioners in the school year 1983-84 in this matter under litigation since January 7, 1977. However, in the event that a sizable expenditure of an unforeseen nature occurred, the Commissioner would consider the merits of the situation and therefore retains jurisdiction herein.

COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6244-82
AGENCY DKT. NO. 207-6/82A

IN THE MATTER OF THE TENURE HEARING OF ALAN S. TENNEY, SCHOOL DISTRICT OF THE BOROUGH OF PALISADES PARK

APPEARANCES:

Jack F. Govan, Esq., for petitioner
(Eisenstein & Govan, attorneys)

Sheldon H. Pincus, Esq., for respondent
(Bucceri and Pincus, attorneys)

Record Closed: June 20, 1983 Decided: July 25, 1983

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, Palisades Park Board of Education, seeks to terminate respondent's employment based on certain tenure charges filed with the Commissioner of Education based on claims of insubordination and conduct unbecoming a teacher in violation of N.J.S.A. 18A:6-10 et seq. Respondent denies the truth of any of the charges, argues that many of the charges are for inefficiency and, therefore, petitioner failed to comply with the 90-day notice provision of N.J.S.A. 18A:6-11, and contends that the alleged actions of respondent are deminibus and should not result in his dismissal.

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On June 1, 1982, petitioner certified tenure charges against respondent. The Board suspended respondent effective July 1, 1982. Pursuant to a letter decision dated April 6, 1982, respondent's salary payments were to be resumed as of September 30, 1982 pursuant to N.J.S.A. 18A:6-14. On June 24, 1982, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On August 31, 1982, a prehearing conference was held before me, on which date the following issues were identified:

A) Did respondent's alleged conduct constitute insubordination and/or conduct unbecoming a teacher in violation of N.J.S.A. 18A:6-10?

B) Is insubordination a cause for dismissal or reduction in compensation pursuant to N.J.S.A. 18A:6-10?

C) Are the charges based on inefficiency? If so, should they be dismissed for petitioner's failure to comply with the 90-day notice provision of N.J.S.A 18A:6-11? Does the withholding of an increment constitute statutory notice of inefficiency pursuant to N.J.S.A. 18A:6-11?

D) Should the charges be dismissed as being barred by laches?

E) If the charges are sustained, what should be the appropriate penalty?

A trial was held in this matter on May 16 and 17, 1983 at the Office of Administrative Law, Newark, New Jersey. The witnesses who testified and the exhibits marked into evidence are set forth in the attached appendix.

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On February 17, 1983, respondent moved for an order dismissing the tenure charges based upon the Board's failure to provide respondent with 90 days' written notice prior to the certification of charges as required by N.J.S.A. 18A:6-11. Respondent's contention was that the charges are based on inefficiency rather than insubordination or unbecoming conduct. The court reserved decision on respondent's motion pending the outcome of the trial. After hearing the testimony and evidence at trial, the court **CONCLUDES** that the evidence establishes that the basis for the charges was not inefficiency. Accordingly, respondent's motion shall be **DISMISSED WITH PREJUDICE.**

Interestingly, most of the material facts testified to by petitioner and respondent are not in dispute. Respondent did not deny those facts testified to by petitioner, but rather contended that they were so minor so as not to constitute conduct unbecoming a teacher or insubordination and, furthermore, that even if such conduct should form the basis for the sustaining of the tenure charges, because of their minor nature, dismissal would be unwarranted. During the trial, the attorney for petitioner voluntarily dismissed all of the particulars of the statement of charges except for four incidents which he relied upon to support the charges against respondent. Additionally, petitioner relies upon the administrative law judge's decision in the increment withholding case decided by Administrative Law Judge Bruce R. Campbell, Tenney v. Palisades Park Bd. of Ed., Bergen County, OAL DKT. NO. EDU 6156-81 (October 13, 1982), dismissed Comm. of Education (November 24, 1982), to factually buttress petitioner's allegations concerning an incident on March 26, 1981.

FINDINGS OF FACT

Based on a careful consideration of the testimony and evidence, I **FIND:**

1. In March 1982, respondent ordered one of his students, R.M., to sit outside of his classroom, No. 319, at a desk because of disruptive behavior.

2. While the student (R.M.) was seated in the hall outside of respondent's classroom, the superintendent of schools, George Fasciano, while walking through the hallways with two members of the Board of Education from Ridgefield, observed R.M. in the hall unsupervised.

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3. According to the Palisades Park Faculty Handbook (P-11), it is clear that "classes must be supervised at all times" (at 19).

4. I **FIND** by a preponderance of the credible evidence that R.M., seated in the hall outside of respondent's classroom, No. 319, having been put there for disciplinary purposes, was not properly and adequately supervised.

5. Alan S. Tenney admitted that he requested R.M. to leave his classroom in March 1982 because of R.M.'s improper and disruptive behavior.

6. On March 26, 1981, during what is called "Teacher for a Day," respondent left his class unattended for 23 minutes from 2:10 p.m. until 2:33 p.m.

9. While a student was conducting the "Teacher for a Day" class period, respondent remained in the science office adjacent to his class.

10. David Roden, the principal of the Junior-Senior High School, entered respondent's classroom and remained for 23 minutes while respondent was not present in the class.

11. The facts and circumstances surrounding the incident of March 26, 1981 are additionally set forth in Judge Bruce R. Campbell's decision dated October 13, 1982, Tenney v. Palisades Park Bd. of Ed., Bergen County, OAL DKT. NO. EDU 6156-81, at 2 and 3 (P-1).

12. I find as a fact by a preponderance of the credible evidence that respondent left his class unattended for 23 minutes and thus left his class unsupervised.

13. On April 6, 1981, respondent and Mr. Bernardini conducted a combined class in which a movie was shown. During the course of said class, respondent left the class and went to the library where he received a personal telephone call.

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14. While Tenney was absent from his class, Mr. Roden, the school principal, went to the class looking for him and when Mr. Roden was unable to find Tenney, he went to the library where he observed Tenney on the telephone.

15. Tenney admitted that he was absent from the combined class with Mr. Bernardini on April 16, 1981 and had gone to the library when he was notified that there was a personal telephone call for him.

16. Respondent's use of the library telephone for personal business was in violation of Mr. Roden's memorandum dated April 6, 1981 which emphasizes that faculty members must not use telephones for personal reasons.

17. Subsequent to February 9, 1982, when an evaluation was made of respondent by Mr. Roden and Mr. Meyer, Tenney, in order to cause a shock effect on board of education members, sent his evaluation, unsigned by Mr. Meyer (P-19), to board of education members.

18. The evaluation was sent in school envelopes and school postage was used.

19. Tenney admitted that he sent the evaluation to board members, using school envelopes and postage in order to create a shock effect on them.

20. Respondent's submission of his unsigned evaluation to the Board of Education violated the teacher evaluation procedure established in the collective bargaining agreement under Article XIX (P-2)) and in the Faculty Handbook following page 63 (P-11).

21. Tenney had his increment withheld for the 1981-82 school year. No other increments have been withheld from respondent (P-1).

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CONCLUSIONS OF LAW

It is my judgment that respondent's actions constitute conduct unbecoming a teacher. It is my further conclusion that dismissal of respondent would be an unduly harsh penalty which is not warranted under the existing circumstances. In no way do I condone the actions of Mr. Tenney. I feel that his conduct was inappropriate and demonstrated a lack of judgment. By allowing R.M. to sit outside the classroom, by leaving his class unattended for 23 minutes on March 26, 1981, by going to the library and receiving a telephone call, and by using school envelopes and school postage, Tenney demonstrated a lack of professionalism.

However, in the hierachy of wrongdoings in which a teacher may be involved, certainly the conduct of Tenney is relatively minor. For part of his conduct, he already received an increment withholding (see the decision of the Judge Bruce R. Campbell dated October 13, 1982). To some extent, he has already suffered a penalty and punishment for his actions.

I must comment in passing that I have a serious problem with a board of education initially denying a teacher an increment and subsequently bringing tenure charges based on the same conduct for which the increment was withheld. Although I am not deciding it herein, I think the reasonable rule of law should be that a board is collaterally estopped from relitigating previously adjudicated issues. See City of Hackensack v. Winner, 82 N.J. 1 (1980).

The Commissioner of Education has recognized situations where a teacher, upon being convicted of tenure charges, receives a penalty less than dismissal. See In the Matter of the Tenure Hearing of Genevieve Rinaldi, 1976 S.L.D. 344, where the Commissioner imposed a penalty of forfeiture of one month's salary; and In re Tenure Hearing of William Lee Johnson, 1979 S.L.D. 267, where the Commissioner imposed a penalty of forfeiture of four month's salary.

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In the instant case, it is clear that the Board proved the remaining charges against respondent by a preponderance of the credible evidence. Respondent's actions constitute insubordination and conduct unbecoming a teacher in violation of N.J.S.A. 18A:6-10. Some penalty short of dismissal is appropriate.

Respondent has been an exemplary teacher over his teaching career. The only blemish on his record was the prior increment withholding. The respondent readily admitted his conduct and involvement during the trial before me. It is hoped that respondent adheres to the policies of the Board of Education in all future matters.

Accordingly, having found that respondent's conduct constituted insubordination and conduct unbecoming a teacher, it is **CONCLUDED** and **ORDERED** that the respondent be reinstated forthwith to his tenure position and that he be provided with any emoluments and salary which he otherwise would have received less three months of his salary, which is the punishment that I impose.

All other issues set forth in the Prehearing Order are deemed to be without merit.

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

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OAL DKT. NO. EDU 6244-82

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

7-27-83
DATE

12-1-83
ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 29, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

md/E

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APPENDIX

WITNESSES

Peter Jamgochian
George Fasciano
David Roden
R. M.
Alan S. Tenney

EXHIBITS

P-1	Opinion of Judge Bruce R. Campbell
P-2	Opinion of Commissioner of Education
P-3	Decision by State Board
P-4	Photograph at High School
P-5	Photograph at High School
P-6	Photograph at High School
P-7	Photograph at High School
P-8	Photograph at High School
P-9	Photograph at High School
P-10	Photograph at High School
P-11	Faculty Handbook
P-12	Memorandum from Roden to Tenney
P-13	Third Floor Plan
P-14	Memorandum by Roden dated April 16, 1981
P-15	Memorandum dated April 6, 1981
P-16	Memorandum dated March 26, 1981
P-17	Memorandum dated April 2, 1982
P-18	Evaluation of Tenney dated February 9, 1982
P-19	Evaluation sent to Board
P-20	Collective Bargaining Agreement
R-1	Envelope

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IN THE MATTER OF THE TENURE	:	
HEARING OF ALAN S. TENNEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF PALISADES PARK,	:	
BERGEN COUNTY.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in primary exceptions to the initial decision by Judge Glickman argues that respondent's actions in violation of administrative regulations demonstrate his contempt for the Board and its policies and belie the notion that Tenney was an exemplary teacher. The Board pleads for termination of the teacher.

Respondent contends that the penalty of three months' forfeiture of pay imposed by Judge Glickman was unduly harsh. Respondent argues that the penalty should be limited to the mental anguish and humiliation suffered by him as such feelings are generated by the tenure hearing process, noting further that he has already suffered an increment withholding. Respondent argues that the charges as submitted by the Board do not rise to the level of conduct unbecoming a teacher and are not sufficiently flagrant to warrant penalty. The Commissioner cannot agree with respondent's arguments.

It cannot be argued that respondent did not know of a previous case involving the withholding of his increment for the 1981-82 school year. Tenney v. Palisades Park, supra To now claim that his entire previous career was exemplary is to simply ignore the facts of the matter.

An examination of the circumstances of this case convinces the Commissioner that the penalty devised by the judge, far short of the termination sought by the Board, is an appropriate one. The Commissioner so holds.

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

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Respondent shall be reinstated to his tenured position with appropriate remuneration, less three months of his salary, as herein determined.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1983

PENDING STATE BOARD

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INITIAL DECISION
OAL DKT. NO. EDU 10685-82
AGENCY DKT. NO. 301-7/82A

CORNELIA FREEMAN,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF BOONTON,
Respondent.

APPEARANCES:

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

Ralph Porzio, Esq., for respondent
(Porzio, Bromberg & Newman, attorneys)

Record Closed: April 27, 1983 Decided: July 29, 1983

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

Procedural History

This case involves the determination of a tenured elementary school teacher's seniority rights under N.J.S.A. 18A:28-9 et seq. and the corresponding regulations,

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N.J.A.C. 6:3-1.10. As a result of a reduction in force of its staff, the Boonton Township Board of Education (Board) reduced petitioner Cornelia Freeman (Freeman) from a full to a part-time teaching position for the 1981-82 school year and dismissed her from its employment for the 1982-83 school year. On July 26, 1982, Freeman filed a petition with the Commissioner of Education alleging that the Board's actions were improper. She contends, in the alternative: (1) that she had greater seniority than a teacher of seventh and eighth grade science and should never have been reduced to a part-time position in 1981-82; or (2) that her service in the part-time position of "oralographic aide" during 1981-82 counts toward calculation of her seniority and entitled her to preference over the science teacher at least for 1982-83; or, in any event, (3) that her seniority entitled her to preference over two untenured teachers for a half-time position as a music or physical education teacher in 1982-83. Since the filing of her petition, Freeman has been rehired by the Board as a full-time elementary teacher. Nonetheless, she still seeks back pay and other lost benefits during the period of her reduced employment and temporary dismissal. For its part, the Board denies any violation of her seniority rights and raises the affirmative defense of mitigation of damages.

Subsequently, the Commissioner of Education transmitted this matter to the Office of Administrative Law for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Hearings were held on February 25 and March 4, 1983. Witnesses who testified and documents considered in deciding this case are listed in the appendix. Upon receipt of briefs submitted on behalf of the parties, the record closed on April 27, 1983. Time for preparation of the initial decision has been extended to July 29, 1983. N.J.S.A. 52:14B-10(c).

Undisputed Facts

Most of the material facts are undisputed. Boonton Township is a small district which has only a single elementary school and no secondary school. Grades kindergarten through fifth are organized as "self-contained classrooms" where the same teacher teaches all basic subjects to a group of students. Grades sixth through eighth are "departmentalized," which means that a class is taught for 45-minute periods by different

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teachers who specialize in a particular subject area.[1] It is stipulated that the Board's decision to reduce its teaching staff was made in good faith. Over the seven years from 1976 to 1982, enrollment in the district dropped by 36% from 438 to 280 students. Thus the issue is not whether a reduction in force is necessary, but rather who must bear the burden of such reduction.

Although her prior teaching experience dates back to 1940, Freeman joined the district in February 1978. At the time of her employment, she held an instructional certificate endorsed as an elementary school teacher which had been issued by the State Board of Examiners in February 1969. For the five months between February 1 and June 30, 1978 and the three academic years 1978-79, 1979-80 and 1980-81, Freeman taught first grade. In that capacity, she taught various subjects including a first-grade science curriculum. According to Freeman, however, the "main subject" in first grade is reading. She also supervised games at recess and taught songs for assembly programs, although her students went regularly to gym class taught by another teacher and were visited regularly in their classroom by a separate music teacher who taught them music.

In early April 1981, the Board notified Freeman that "due to a budget defeat, reorganization of staff and declining enrollment" her full-time teaching contract could "not be renewed at this time." Instead, the Board offered her a half-time position as a kindergarten teacher for the 1981-82 school year. Additionally, the Board offered her a part-time job during the 1981-82 year as an "oralographic aide." Much of the present controversy centers on whether her service in that job title should be considered in the computation of Freeman's seniority. Originally, Freeman questioned the reduction of her working hours. She complained to James Bolan, the Superintendent of Schools, that others with less seniority in the school system, specifically Robert Fordyce, a science teacher,

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[1]Generally, the district has required teachers at the departmentalized level to possess a certificate endorsed for the subject area which they teach. There has been at least one exception, however, to this long-standing Board policy. One Joseph Dinola has been allowed to teach seventh and eighth grade mathematics in the district, even though his instructional certificate is endorsed only for elementary education.

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had escaped any reduction in hours. When informed by Bolan that she lacked the proper certification to teach science at the departmentalized level, Freeman did not pursue the matter any further.[2] By the end of April, she had indicated in writing her "acceptance" of the half-time teaching position at a proportionally lower salary and, at around the same time, she agreed to accept the aide's position at an hourly rate. During the 1981-82 school year, Freeman devoted approximately three and a quarter hours of each day to her kindergarten duties and approximately two and a half hours each day to her duties as an oralographic aide.

Just a few weeks after the commencement of the 1981-82 school year, Freeman had an opportunity to return to a full-time elementary teaching position in the district. As the result of an unexpected resignation, an opening suddenly arose effective October 15, 1981 for a fifth-grade teacher. Before offering the job to anyone else, on September 16, 1981 Bolan asked Freeman, who was fully qualified and "first in line," if she wanted the position. Since kindergarten had already begun for the year, Freeman was reluctant to disrupt her existing class. Bolan told her that the Board was pleased with the job she was doing and wanted her to stay with the kindergarten class. After thinking it over for a few days, Freeman declined the offer of a full-time fifth-grade position for the remainder of the 1981-82 year. While realizing that her salary as a half-time kindergarten teacher would be much less, she felt at the time that salary was not the most important consideration. Apparently, she did not give serious thought to the effect of her decision on her seniority ranking. Rather, her sole concern was for the well-being of her kindergarten class and the Board's satisfaction with her handling of the situation. As she herself put it, "[I] f you're happy with what you're doing ...., sometimes that makes a difference, too."

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[2]Bolan denied that Freeman expressed any objection to the reduction in hours at the time of its occurrence in April 1981. He recollects that Freeman did not challenge her 1981-82 assignment until after her dismissal for the 1982-83 school year.

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Her choice seemed less satisfactory one year later when it again became necessary for the Board to make cuts of its teaching staff for 1982-83. In his computation of seniority, Bolan credited Freeman with only five months (i.e., half of a full academic year of ten months) for her service in the half-time position of kindergarten teacher. This method of calculation placed Freeman behind Robert Fordyce in years of service, even though she had started working for the Board more than three months earlier than he did. On April 1, 1982, the Board notified Freeman that her services would no longer be needed for the 1982-83 school year. Fortunately for Freeman, another vacancy occurred in the district within four months after the start of the 1982-83 school year, and she was rehired as of January 10, 1983 to replace a fourth-grade teacher who left the system. Freeman was out-of-work between September and December 1982, during which time she took care of her grandchildren at home because she was unable to find other employment in the teaching profession.

Robert Fordyce, Freeman's chief rival for employment, began working for the district as a science teacher on May 15, 1978. Unlike Freeman, Fordyce held an instructional certificate endorsed specifically as a "teacher of science." Throughout his career in the district, Fordyce had been assigned to teaching science exclusively on the sixth, seventh and eighth grade levels. Assuming that Freeman was equally qualified to teach upper level science and that her service was comparable to Fordyce's service (conclusions which the Board vigorously disputes), her relative standing in terms of seniority depends upon whether she is entitled to count the time served as an oralographic aide. If not, a comparison of seniority at the commencement of the 1982-83 school year looks like this:

Freeman		Fordyce	
2/1-6/30/78	1st grade - 05 months	5/15-6/30/78	Science - 1-1/2 months
1978-79	1st grade - 10 months	1978-79	Science - 10 months
1979-80	1st grade - 10 months	1979-80	Science - 10 months
1980-81	1st grade - 10 months	1980-81	Science - 10 months
1981-82	Kindergarten - 05 months	1981-82	Science - 10 months
	Total 40 months	Total	41-1/2 months

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If, on the other hand, Freeman can include the time spent as an oralographic aide, she could add another five months. Then her total of 45 months would exceed the 41-1/2 months attributable to Fordyce.

Furthermore, the district in 1982-83 employed two other teachers over whom Freeman claimed seniority. Nancy Heide held instructional certificates endorsed as "teacher of physical education" and "teacher of health education" which authorized her to conduct classes in those subjects. Carolyn Miller held an instructional certificate endorsed as a "teacher of music." Both teachers were admittedly untenured, although the record is vague as to the date of their initial employment. Freeman contends that her own elementary endorsement allows her to teach physical education, health and music in grades kindergarten through eighth for up to one-half of her time.

Summary of Disputed Testimony

As we have seen, the outcome of this case may turn on whether Freeman's service as an oralographic aide constitutes service in the category of elementary teacher for seniority purposes. In accordance with a job description adopted by the Board in October 1979, the function of the oralographic aide is to assist the remedial reading teacher by conducting a "preventive and remedial language arts program on [an] oralographic machine." Such a device is a so-called "talking machine" developed by Prentice Hall to guide children at their own pace through a programmed series of language lessons. The only qualifications for the job are a "high school diploma and experience working with children." Indeed, the job description expressly states that, "No certification is required." And, in fact, the person occupying the same position before Freeman was a non-teacher, who did not possess any certification.

Prior to establishing the position of oralographic aide, the Board submitted the job description to the County Superintendent and obtained his written approval for the creation of the new title. When applying for approval of the County Superintendent, the Board certified that the aide's duties would be performed under the supervision of the certified remedial reading teacher. Freeman's compensation for her work as oralographic

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aide was paid at an hourly rate of $10 rather than under the negotiated salary guide for teachers. Her rate was substantially higher than the previous aide who had been paid only $6.75 per hour for the same type of work. Funds used to pay for the aide's time came from a federal grant which Boonton Township shared with another district.

In actual practice, the remedial reading teacher was almost always present while the oralographic aide was helping children on the machine. Freeman estimated that Judy Panteleo, the reading teacher, was in the same room with her "about 90% of the time." Occasionally, Panteleo would take a lunch break or visit the library, in which event Freeman alone would be temporarily in charge of the room. Children who might benefit from the use of oralographic equipment were selected by Panteleo on the basis of their grade level performance and their individual reading problems. Freeman had no direct involvement in the selection process.

Once the children were enrolled in the program, it was Freeman's job to introduce them to the operation of the oralographic machine. According to Panteleo, the machine was so simple that a second grader could teach another child how to run it. Following step-by-step instructions given by the machine itself, the child progresses through a structured series of lessons, each lesson building on learning acquired during the prior lessons. Meanwhile, Freeman would sit alongside the child in the learning booth and check to make sure he was completing the lesson correctly. As soon as the child finished a lesson, Freeman would circle any mistakes on the paper and decide if the child should repeat the lesson or proceed to the next level. In Panteleo's opinion, Freeman was not engaged in teaching because "the instruction is supposed to come from the machine" and "no new instruction should be given by anyone else." Panteleo characterized Freeman's interaction with the children as "reinforcement" or "practice" of skills the machine had already demonstrated.

Among Freeman's other duties, she would refer the student to oral readings, exts and workbooks from supplementary materials available in the reading room. While 'reeman did not need Panteleo's permission to make supplementary assignments, the aterials themselves were provided by Panteleo. Thus, in Panteleo's view, Freeman's

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discretion in this area was largely limited to matching the preselected material to the particular lesson on the machine. Whenever necessary, Freeman would provide extra help by explaining concepts on the blackboard or by playing word games such as hangman. All of Freeman's work as an oralographic aide was done under the general supervision of Panteleo. As a practical matter, however, Panteleo did not keep close tabs on Freeman's activities and Freeman was "pretty much on her own." But Panteleo made a conscious effort to observe Freeman's performance at least once each week, reviewed Freeman's written records, and sometimes offered suggestions to Freeman on possible improvements. Panteleo was responsible for preparation of the quarterly report cards which were sent to the parents of every child in the program. At the end of each marking period, Panteleo would confer with Freeman, and together they would fill out the report cards.

Starting in October 1982, after Freeman had been dismissed, the Board resolved to upgrade the oralographic aide position into a teaching position in order to save the jobs of as many remaining teachers as it possibly could. Without changing any of the duties, the Board now pays a regular teacher's salary to the certified teacher currently performing the same function. Moreover, Freeman's successor considers herself to be accruing seniority credit for her service. Although the Board apparently intended that result for 1982-83, it never amended the job qualifications to require certification.

Findings of Fact

From the proofs presented at the hearing, I **FIND** that Freeman functioned in the capacity of a school aide.

Several factors support the finding that Freeman's position was that of school aide. First, the job qualification, which had been approved by the County Superintendent, did not require the holder to be certified as a teacher. Second, the duties were performed under the direct supervision and control of the certified reading teacher. She, rather than Freeman, was ultimately responsible for selecting the students, choosing the materials overseeing the program, and issuing final grades. Third, Freeman had very little actual participation in the teaching process; the objectives, content and method of each lesson

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followed a preprogrammed pattern. The simple task of monitoring a student's progress on the machine does not call for academic proficiency or the exercise of professional judgment. Fourth, Freeman was compensated at an hourly rate and not on the negotiated salary guide.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Freeman has less seniority than the incumbent to the position of science teacher, but that she has superior rights than untenured teachers to a half-time position as a teacher of music or physical education.

Under N.J.S.A. 18A:28-10, dismissals from a reduction in force "shall be made on the basis of seniority according to standards to be established by the commissioner, with the approval of the state board." N.J.S.A. 18A:28-13 directs the Commissioner to establish seniority standards "upon the basis of years of service and experience within ... fields or categories of service." Pursuant to this statutory authority, the Commissioner with the approval of the State Board of Education, has promulgated N.J.A.C. 6:3-1.10, which provides for the determination of seniority based on the number of years of employment "in specific categories." Howley v. Ewing Twp. Bd. of Ed., OAL DKT. NO. EDU 3664-82 (Oct. 21, 1982), adopted, Comm'r of Ed. (Dec. 20, 1982), aff'd, St. Bd. (June 1, 1983). These "specific categories" are enumerated in the seniority regulation, and include "elementary" and "secondary."

Some overlap presently exists among the categories. The elementary category extends from kindergarten to "grades 7-8 with or without departmental instruction." N.J.A.C. 6:3-10.1(k)(28). Both Freeman's and Fordyce's service clearly falls within this category. In addition, the secondary category also covers "grades 7-8 in elementary schools having departmental instruction." N.J.A.C. 6:3-10.1(27). Therefore, Fordyce's service can be seen as falling within this category as well. Furthermore, Freeman's elementary endorsement only authorizes her to teach "the common branch subjects, such as reading, writing, arithmetic, and spelling" at any of the upper levels beyond sixth grade. N.J.A.C. 6:11-6.2(b). Nowhere is the term "common branch subjects" defined in

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the regulations. Unless science is one of the common branch subjects, it is questionable whether Freeman is even authorized to teach science to seventh and eighth graders. Since the case can be decided on other grounds, however, it is unnecessary to reach this issue.[3]

With respect to the 1981-82 school year, it is too late for Freeman to challenge retroactively the validity of actions taken by the Board in April 1981. While the Board raises the issue in terms of mitigation of damages, it is more appropriate to consider the issue in terms of timeliness of the litigation. N.J.A.C. 6:24-1.2 provides that a petitioner must file an appeal from any action taken by a school board "within 90 days after receipt of notice by the petitioner of the order, ruling, or other action concerning which the hearing is requested." Here Freeman received written notice of the Board's action by letter dated April 27, 1981. Yet she did not file her petition with the Commissioner of Education until July 26, 1982, after the lapse of more than one year. In the interim, the Board had substantially changed its position by allowing Fordyce to continue in the position now claimed by Freeman. Clearly the petition was out of time. Riely v. Hunterdon Central H. S. Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980).

Alternately, the circumstances can be viewed as an appropriate situation in which to apply the equitable doctrine of laches. Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982). Undeniably, in October 1981 the Board offered Freeman a full-time fifth grade teaching position for the remainder of the 1981-82 term. Had she accepted the offer, any damages for violation of her seniority rights would have stopped accruing. No showing has been made that the Board intentionally misled Freeman or exerted undue influence to persuade her to reject the offer. Whether or not Freeman understood the full legal

[3]New seniority rules scheduled to become operative on September 1, 1983 go a long way toward clarifying these apparent ambiguities. 15 N.J.R. 1017. Henceforth, the secondary category will still include "grades 7-8 in elementary schools having departmental instruction." However, the elementary category will be redefined to exclude grades 7-8 with departmental instruction. A teacher will accrue seniority in the secondary category "only in such subject area endorsement(s) under which he or she has actually served." I the new rules were applicable, Fordyce would be entitled to credit in the secondar category for each year he taught science in a departmentalized setting. Freeman woul not earn any credit in the same category.

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ramifications of her decision, she certainly appreciated that she was giving up a full-time teaching position and accepting a half-time teaching position in return. For whatever personal reasons, she made the decision because at the time it appeared to her to be the best thing to do. Now that others have in good faith relied on her decision, she cannot go back and collect salary for services she never performed and seniority credit for time she never served.

Turning to the 1982-83 school year, Freeman's claim to the science position rests on the assumption that her service as oralographic aide counts toward her accumulation of seniority in the elementary category. Otherwise, as previously noted, her length of service would be shorter than Fordyce's. In support of her contention, Freeman makes an analogy between her case and the status of part-time teachers who provide remedial and supplemental instruction to educationally handicapped children. Recently, in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), the New Jersey Supreme Court held that such teachers could acquire tenure, and presumably seniority as well, provided that they met all the statutory requirements. One obvious distinguishing feature is that the successful litigants in Spiewak were required to hold a valid certificate. By definition, a "teaching staff member" is someone employed by a school board in a position for which the qualifications "require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment." N.J.S.A. 18A:1-1. Under this definition, Freeman was not a teaching staff member, insofar as her oralographic duties were concerned, because the approved job description did not require the oralographic aide to be certified.

Local boards may employ noncertified personnel to provide assistance in the supervision of pupil activities under the direction of a certified teacher, subject to review and approval of the job description by the County Superintendent. N.J.A.C. 6:11-4.9. Details of the job description depend on the particular needs of the community. N.J.A.C. 6:11-4.9(b) expressly provides:

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> Current regulations require school districts employing aides to develop job descriptions and standards for appointment. These descriptions and standards should be based on study of local needs. The nature of the job descriptions will dictate the qualifications to be met, the proficiency standards needed, and the pay to be received.

Of course, a local board is prohibited from employing an aide to do a job for which certification is required by law. N.J.S.A. 18A:26-2. Plainfield Ed. Ass'n v. Plainfield Bd. of Ed., OAL DKT. NO. EDU 0278-81 (Nov. 9, 1982), adopted, Comm'r of Ed. (Dec. 27, 1982). Freeman points out that noncertified classroom aides are not permitted to engage "in the direct instruction of pupils." Consequently, she insists that the duties of oralographic aide could only be properly performed by a certified teacher. She relies on Broida v. Englewood Cliffs Bd. of Ed., OAL DKT. NO. EDU 0067-81 (April 16, 1982), adopted, Comm'r of Ed. (May 28, 1982), aff'd St. Bd. (Dec. 3, 1982), where, on the particular facts, the Commissioner found that a teacher designated a "math lab aide" was actually performing the duties of a certified teacher. In Broida, the teacher was said to be functioning "independently" of supervision by a certified teacher and her duties consisted of providing what amounted to "individualized instruction." In contrast, Freeman, who performed her duties under the watchful eye of the remedial reading teacher, had virtually no independence. Her narrow limits of responsibility were fixed by the nature of the programmed instructional material she was administering. Hence, the County Superintendent was correct in his assessment that the creation of the position of oralographic aide was an appropriate exercise of the Board's discretionary authority to hire noncertificated persons to assist the teacher in charge of a classroom. There has been no proof here that the Board transferred Freeman to the aide position in an effort to punish her or obtain her teaching services for less than what they were worth. To the contrary, the evidence shows that the Board was faced with a genuine need to reduce its teaching staff and that the transfer was motivated by a well-intentioned desire to provide a reduced teacher with a source of extra income. The Board could just as well have reduced Freeman to a half-time teaching position and hired someone else to perform the duties of oralographic aide.

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Finally, Freeman's right to preference for employment during the 1982-83 school year must be considered in relation to the rights, if any, enjoyed by the untenured music and physical education teachers. It is axiomatic that a board of education may not replace a tenured teacher with an untenured teacher. Seidel v. Ventnor City Bd. of Ed., 110 N.J.L. 31 (Sup. Ct. 1933), aff'd 111 N.J.L. 240 (E. & A. 1933); Kearny Bd. of Ed. v. Horan, 11 N.J. Misc. 751 (Sup. Ct. 1933). Only last month, the New Jersey Supreme Court decided that a part-time tenured teacher with proper certification has seniority rights as against a nontenured teacher in seeking appointment to a full-time position within the specific categories covered by the certification. Lichtman v. Ridgewood Bd. of Ed., ___ N.J. ___ (1983). A board of education is free to reduce the working hours of tenured and untenured teachers in equal measure, but it cannot give better treatment to an untenured teacher than to a tenured one. Klinger v. Cranbury Bd. of Ed., ___ N.J. Super. ____ (App. Div. 1983) (slip op. at 4), certif. den. 93 N.J. 277 (1983). Accordingly, if music or physical education is within the scope of Freeman's certification, she is entitled to at least the same treatment as received by similarly qualified teachers who have not yet acquired tenure.

On the issue of certification, the Board urges that teachers with specific subject endorsements in music or physical education are more qualified by training to teach these subjects than is a teacher with only a general elementary endorsement. Perhaps this is so. Compare N.J.A.C. 6:11-7.33 and N.J.A.C. 6:11-7.35 with N.J.A.C. 6:11-7.3(e). Nevertheless, the uniform standards governing certification are set by the responsible state administrative agencies through the rule-making power, not by individual local boards of education on a case-by-case approach. Lichtman, slip op. at 10-11. The local board lacks the power to adopt its own policy which contravenes the controlling educational policy. Current regulations authorize a teacher with an elementary endorsement to devote no more than "one-half time to teaching ... music, health...or physical education in the elementary grades." N.J.A.C. 6:11-6.2(b). Conversely, a teacher with an elementary endorsement may teach music or physical education for up to half of his course load. It follows that Freeman was properly certified to fill a half-time position as a teacher of music or physical education at the elementary level. Therefore, under the rationale of the Klinger case, the Board was obligated to offer Freeman a half-time position in either

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of those subjects rather than dismissing her. To do otherwise would be to treat an untenured teacher more favorably than a tenured teacher.

Order

It is hereby **ORDERED** that the Board pay to Freeman her salary at the appropriate step on the guide together with any other benefits she would have received as a half-time teacher for the period from the commencement of the 1982-83 school year to January 9, 1983. The Board has failed to prove that Freeman earned or reasonably could have earned any amounts in mitigation of damages during this period.

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

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

July 29, 1983
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

7-1-83
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 3, 1983
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

al

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APPENDIX

List of Witnesses

1. Cornelia Freeman
2. Joan LaPlaca
3. James A. Bolan
4. Janice C. Elliott
5. Judith Pantaleo

List of Exhibits

No.		Description
J-1		Copy of Certificate of Cornelia Freeman, issued February 1969
J-2		Copy of Certificate of Robert A. Fordyce, issued February 1978
J-3	(a)	Copy of Employment Contract of Cornelia Freeman, dated January 12, 1978
	(b)	Copy of Employment Contract of Cornelia Freeman, dated April 14, 1978
	(c)	Copy of Employment Contract of Cornelia Freeman, dated April 5, 1979

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(d) Copy of Employment Contract of Cornelia Freeman, dated July 10, 1980

(e) Copy of Acceptance of Employment, dated April 27, 1981

J-4 Job Description of Oralographic Aide, dated October 1979

J-5 (a) Copy of Certificate of Nancy Heide, issued September 1980

(b) Copy of Certificate of Nancy Heide, issued September 1981

J-6 Copy of Certificate of Carolyn Miller, issued December 1980

J-7 Copy of 1980-81 Application for Approval of School Aide Position

J-8 (a) Copy of Employment Contract of Robert Fordyce, dated May 15, 1978

(b) Copy of Employment Contract of Robert Fordyce, dated July 15, 1978

(c) Copy of Employment Contract of Robert Fordyce, dated April 5, 1979

(d) Copy of Employment Contract of Robert Fordyce, dated July 10, 1980

J-9 (a) Copy of Letter to Cornelia Freeman from James A. Bolan, dated April 27, 1981

(b) Copy of a Letter to Cornelia Freeman from Gene Gallo, dated April 1, 1982

J-10 Copy of a Letter to Ralph Porzio, Esq. from the Department of Education, dated February 2, 1983

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P-1 for id. Copy of Professional Improvement Plan for 1979-80

R-1 Copy of Memorandum prepared by James A. Bolan, dated September 16, 1981

R-2 (a) Copy of a Portion of Minutes of the Board of Education, dated September 13, 1973

(b) Copy of a Portion of Minutes of the Board of Education, dated July 29, 1977

(c) Copy of a Portion of Minutes of the Board of Education, dated May 18, 1978

R-3 Copy of Enrollment Figures from 1976-77 to the present

R-4 for id. Copy of Job Description of Remedial Reading Specialist

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CORNELIA FREEMAN,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY, : DECISION

RESPONDENT. :

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes that each party, in turn, filed primary exceptions and reply exceptions all in a timely fashion. Each party relies not only on the exceptions filed but on the prior submission of briefs or arguments of law. A reply to reply exceptions was submitted but there being no provision for such in law, it was not considered.

Petitioner in primary exceptions concurs with the initial decision but asks for a modification to accord her seniority rights as a concomitant to the determination that she was entitled to a half-time position in the 1982-83 school year to January 9, 1983.

The Board in reply exceptions denies that petitioner is entitled to any such credit. The Commissioner agrees with the Board for reasons other than those stated in its exceptions. The Commissioner determines that seniority, like tenure, is a benefit earned by actual service in a position in which the teacher is entitled to serve by proper certification. The teacher herein can be made whole by appropriate financial remuneration for a position denied to her but to which she was entitled but such remuneration does not add to seniority time, the Commissioner so holds.

The Board objects to the finding by the judge that the amount of damages not be reduced by mitigation. Respondent points to the full-time yearly contract in a 5th grade position offered petitioner for the previous 1981-82 school year which she declined for reasons of her own. Petitioner in reply exceptions refutes such argument by noting that there is nothing by way of evidence in the record to show that such full-time position would

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have continued to be available in September, 1982 and, if indeed it existed, why was she not offered such position. The Commissioner looks with favor on such argument by petitioner.

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

The Commissioner determines that petitioner shall be appropriately remunerated for what she would have earned as a half-time teacher from September 1982 and January 9, 1983 of the 1982-83 school year without mitigation.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1983

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 991-83
AGENCY DKT. NO. 8-1/83A

UPPER FREEHOLD REGIONAL BOARD OF EDUCATION, MONMOUTH COUNTY,
Petitioner
v.
WASHINGTON TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

APPEARANCES:

Peter P. Kalac, Esq., for petitioner (Kalac, Newman and Griffin, attorneys)

John A. Selecky, Esq., for respondent

Record Closed: June 1, 1983 Decided: July 14, 1983

BEFORE **LILLARD E. LAW,** ALJ:

Petitioner, the Upper Freehold Regional Board of Education alleges, among other things, that the respondent Board of Education of the Township of Washington, a sending district in a sending-receiving relationship with petitioner, has discontinued its after-school hours' transportation service for respondent's pupils, thereby denying sai pupils the opportunity to engage in after-school hours' cocurricular and extracurricula activities and, further, hampering petitioner from imposing after-school detention upo respondent's pupils who have committed violations of petitioner's school regulations an

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policies. Petitioner requests that the Commissioner of Education issue an order requiring respondent to provide after-school transportation service to respondent's pupils or, in the alternative, to permit petitioner to provide such after-school transportation and pass on such charges and expenses to respondent for reimbursement to petitioner. Respondent denies and admits to so much of petitioner's allegations and sets forth two separate defenses asserting that it provide adequate transportation to and from petitioner's high school for its pupils, pursuant to N.J.S.A. 18A:39-1 et seq. and N.J.A.C. 6:21-1.1 et seq.; that there exists no statutory or regulatory requirement that mandates after-school transportation to be provided by respondent; and, that the Commissioner is without authority to order respondent to provide pupil transportation beyond that authorized by statute and/or regulation.

The matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on April 11, 1983, at which the parties agreed to a single issue and, also, requested and were granted leave to propound cross-motions for summary disposition of the issue.

The matter is submitted to this tribunal for a determination on the pleadings, affidavits and briefs of law.

ISSUE TO BE DETERMINED

The single issue for determination, as framed by the parties, is:

> In a sending-receiving relationship between two boards of education, is the sending school district required to provide transportation to its pupils for after-school hours, cocurricular, extracurricular and/or pupil disciplinary activities sponsored by the receiving school district?

UNCONTESTED FACTS

There being no facts in dispute, the following relevant facts are material to the herein dispute:

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1. Petitioner is a K-12 regional district consisting of the Borough of Allentown and the Township of Freehold.

2. Petitioner maintains a sending-receiving relationship with Washington Township, Millstone Township and Plumsted Township Boards of Education at the high school level. Said sending-receiving relationship with the Washington Township Board of Education has been in existence for over one-half century.

3. Busing of pupils to and from school has remained the obligation of the sending districts.

4. Each of the sending districts until the school year 1981-82 had provided an after-school transportation to accommodate those pupils who are engaged in cocurricular and extracurricular activities following the pupil school day, as well as those pupils who for disciplinary reasons have been assigned after-school detention.

5. Said after-school transportation is currently provided by the Regional School District, as well as by the Millstone Township Board of Education and the Plumsted Township Board of Education for their pupils.

6. Commencing with the school year 1981-82, Washington Township discontinued its after-school bus. The school administrators at Upper Freehold Regional have requested the Washington Township School District to continue to provide said after-school transportation inasmuch as certain pupils, without that accommodation, are being precluded from engaging in cocurricular and extracurricular activities. Additionally, the Upper Freehold Regional School District has been hampered in imposing after-school detention for Washington Township pupils who are not being provided with after-school transportation.

7. The Washington Township Board of Education has refused to provide the after-school transportation.

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8. The Upper Freehold Regional School District covers an area of 50 square miles and pupils from Washington Township must be transported beyond the regional high school limits to their own municipality.

9. The Washington Township puplis are being offered a program of cocurricular and extracurricular activities which is different from that offered other pupils attending Allentown High School. The impact of the disciplinary procedures as they apply to Washington Township pupils differs from that of other pupils at Allentown High School.

10. There is no current provision in the law or the Administrative Code that allows for a receiving district to provide after-school transportation to its sending district pupils and to charge the sending district for that service.

11. The Washington Township Board of Education did provide a late bus from Allentown High School; however, the respondent has not provided a late bus since the school year 1980-81.

12. The after-school activities of pupils vary greatly. As a result, an after-school activity-late bus is very often under utilized. Some of the factors that affect the utilization of this bus are: (1) the sport or activity, (2) the time of the year, and (3) the location of the sport or activity, e.g., when there is an away game, the players often return to the school after the bus has departed. Consequently, most pupils use private transportation to get home; many pupils have their own vehicles or arrange with their parents to be met at an appointed time.

13. The Washington Township Board of Education owns no buses or pupil transportation vehicles; rather, all transportation for its pupils is contracted out in accordance with the applicable state statutes and codes.

14. The cost to respondent for late bus service during the last two years this service was provided was as follows:

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1979-80 - $6,001.00, Rich Bus Service
1980-81 - $6,000.00, Lockwood Bus Service

15. Millstone Township and the Plumsted Boards of Education own their own transportation vehicles and are thus able to provide a late bus service at a cheaper cost.

LEGAL ARGUMENTS OF THE PARTIES

At its Point I, respondent asserts that the applicable Administrative Code N.J.A.C. 6:21-3.1, states that "Transportation of pupils attending public schools is furnished, pursuant to N.J.S.A. 18A:39." The statute, at N.J.S.A. 18A:39-1, deals with the transportation of pupils to schools remote from the pupil's home. (What is meant by remote is set forth in N.J.A.C. 6:21-1.3.) State Aid for Transportation is paid to local districts for providing said transportation for elementary and secondary pupils who live a distance remote from the school of attendance. N.J.S.A. 18A:58-7. No State Transportation Aid is provided for transporting pupils under any other circumstances N.J.S.A. 18A:39-1.1. In compliance with these statutes and regulations, the Washington Township Board of Education provides transportation to those pupils who attend Allentown High School. The Washington Township pupils arrive at Allentown High in time for the commencement of classes, and the Washington pupils have transportation back home at the conclusion of the daily class schedule. The respondent Board is thus fulfilling the mandate set forth in the cited statutes and regulations. West Morris Regional Bd. of Ed. v. Sills, 58 N.J. 464, 279 A2d 609 (1971), cert. den., 404 U.S. 986.

Respondent contends that there is no requirement in any statute, regulation or decision that a sending district be required to provide a late bus for pupils who participate in after-class activities. In the case of Richard H. Kelly v. Bd. of Ed. of the Tp. of Hamilton, Mercer County, 1968 S.L.D. 131, the pupil attending a private school was required by that school to partake of an afternoon athletic program as a basic part of the educational program. The Commissioner held that the local district must provide transportation for this pupil from the school to his home at the conclusion of the daily schedule of classes, which included the required athletic program. Respondent points out that the key to this decision is that transportation be provided at the conclusion of the daily schedule of classes. The respondent Board in this case provides this transportation to its pupils.

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At Point II, respondent contends that the sole purpose of after-school detention is to impress upon that pupil that his conduct that gave rise to the disciplinary action will cause him inconvenience. This inconvenience takes the form of time, i.e., denying the pupil his freedom of action after school for whatever period of time he is detained; it also creates the problem of how to get home. The pupil usually makes a call to his/her parents. It is an inconvenience, and the parents will most likely reprimand the pupil for his conduct. A reading of N.J.S.A. 18A:25-2 reveals similar considerations taken by the legislature in dealing with rowdyism on the school buses. This statute reads in part:

> . . . a pupil may be excluded from the bus for disciplinary reasons by the principal and his parents shall provide for his transportation to and from school during the period of such exclusion.

Respondent argues that the same situation applies to a pupil kept after classes for disciplinary reasons; there cannot be two standards. If the pupil is to be kept after school for disciplinary purposes, then he must find his own transportation home. This fact should not dissuade Allentown High from imposing such disciplinary action as the situation demands.

At Point III, respondent argues that there is no basis in law for petitioner to provide after-school transportation for respondent's pupils and thereafter charge respondent for the cost thereto. Respondent contends that if the sending district is not required to provide the late bus, it would be totally illogical to hold that the receiving district could provide the service and charge the sending district for the costs. Under current law, the receiving district can only charge a tuition fee to be calculated in accordance with the code N.J.A.C. 6:20-3.1, which does not include transportation costs.

Further, there are no State funds by way of state aid to the local district for providing this late bus service and if a late bus were mandated, then the total cost would have to be borne by the taxpayers of the sending district. The Board of Education of Washington Township, representing the community, has decided that this expenditure is not one of the competing demands made upon the spending of public monies. While Millstone and Plumsted Township may provide a late bus service, this does not require that a similar service be instituted by Washington Township. When the providing of a service is within the discretion of the school district, as is a late bus, then the School Board establishes its priorities and no state official or court can second-guess the Board in

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the allocation of limited funds. See, West Morris, supra, 58 N.J. at 480. The Court in West Morris also stated " . . . there is no constitutionial fiat that educational expenditures be identical for all students throughout the state. Benefits may indeed depend upon the district of a student's residence." 58 N.J. at 478.

Respondent observes that a summary judgment procedure, "is designed to provide a prompt, business-like and inexpensive method of disposing of any cause which a discriminating search of the merits of the pleadings, dispositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at trial." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 110 A2d 24, 27 (1954). There are no issues on the facts in this case. As a matter of law, the respondent is entitled to a dismissal of the petition, because the petition is not based on any legal right recognized in law. Respondent asserts that since there is no law to provide a foundation for the petitioner's claim and its arguments, the petition must be dismissed.

In summary, respondent contends that it is meeting its required duty in regard to pupil transportation. The issue of a late bus is completely discretionary with the local board. Washington Township is not the only district in Mercer County that does not provide a late bus; if this service were required, there would not be such a large number of districts without this service.

Respondent argues that petitioner cites no statutory or code requirements for its several propositions. Rather, the petitioner is appealing to the Commissioner to mandate a service where there are no standards provided for such a service.

Petitioner contends that it should not be necessary to argue that every child in the public school setting is entitled to be treated even-handedly. Certainly, a public school should not be permitted to discriminate between students as to cocurricular and extracurricular offerings. The geographic location of the residence of a pupil who is attending a high school receiving district should not determine whether that pupil can be on the staff of a student newspaper, be a member of a club, be a cheerleader, engage in interscholastic sports or obtain the benefits of detention when that very important aspect of the educational process is warranted. Petitioner asserts that the educational aspects of this controversy and dispute seem to be lost on the respondent.

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The petitioner agrees that neither the statute nor the Code specifically mandates the providing of a late bus. But neither does the statute nor Code specifically mandate the purchasing of textbooks, or the providing of the myriad of the other items necessary for the delivery of a thorough and efficient educational process. N.J.S.A. 18A:11-1 sets out the general mandatory powers and duties of a board of education. It reads in pertinent part:

> The Board shall . . .
>
> . . . .
>
> 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.

Petitioner asserts that there is much that is implicit in that language.

Respondent cites N.J.S.A. 18A:39-1 in support of its argument that a late bus is not mandated. It is respectfully submitted that the statute has absolutely no application, even remotely, to the issue here presented. The statute addresses the funding aspect of pupil transportation.

Petitioner cites the matter in Smith v. Paramus Bd. of Ed., 1968 S.L.D. 62, wherein the Commissioner of Education, although addressing teachers' responsibilities in supervising extracurricular pupil activities, did consider the importance of these activities. He relied on an earlier decision issuing from his office in concluding:

> [S]chool affairs such as dances, concerts, dramatic productions, athletic events, and the like, although generally referred to as 'extra-curricular' were better designated 'extra-classroom' and are certainly part of the total curriculum. See Willett v. Colts Neck Bd. of Ed., 1966 S.L.D. 202, 206.
>
> [emphasis added]

This conclusion was reaffirmed in Bd. of Ed. of Asbury Park v. Asbury Park Ed. Assoc., 145 N.J. Super., 495, 505, judgment in part affirmed and appeal in part dismissed, 155 N.J. Super. 76 (App. Div. 1977):

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> Realistically, the term 'extra-curricular' activity is a misnomer; it is not an 'extra' in the life of the student, nor has it traditionally been considered an 'extra' for teachers. Such activities are an essential part of a child's overall education. [emphasis added]

Accordingly, declares petitioner, if these activities are considered a "part of the total curriculum" by the Commissioner of Education, and "an essential part of the child's overall education" by our courts, then obviously they must be made available to the pupils of Washington Township Board of Education.

Petitioner refers to respondent's concept of detention, as set forth in Point II of its Brief, and opines that although not enlightening, it is certainly amusing. It reads in pertinent part:

> The sole purpose of after-school detention is to impress upon that student that his conduct that gave rise to the disciplinary action will cause him inconvenience. This inconvenience takes the form of time, i.e. denying the student his freedom of action after school for whatever period of time he is detained and also the problem of how to get home. A call to the parents is the usual answer. Is this a trememdous burden to be borne by the student and his parents? It certainly is inconvenient and the parents will admonish the student for his conduct.

Petitioner contends that the last sentence quoted above sounds more like a 1930's social scientist's statement expressing confidence in parents, rather than the argument that an enlightened board of education would make in 1983. Petitioner argues that today, the parent of a child who is left stranded following a detention class at a school 20 miles from home, during the month of January when darkness comes early and the temperature is below freezing, may very well resort to the courts naming the school district as a defendant, rather than admonish the child.

Further, observes petitioner, respondent argues in Point III of its Brief that tuition can only be calculated in accordance with the provisions of N.J.A.C. 6:20-3. If that argument is intended by extension to mean that the Commissioner of Education cannot permit the cost of an after-school bus provided by a receiving district to be ultimately charged to a sending district, it misses the mark.

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Petitioner argues that the Commissioner of Education can order a board of education to issue long-term bonds, the proceeds of which are to be used for a capital project, despite the fact that a referendum seeking such authority from the voters had been defeated on two occasions. Petitioner further argues that the Commissioner can exercise his authority to order districts to regionalize, and even though the districts may prefer not to, then certainly he can order that a tuition rate be adjusted to include the cost of a late bus. See In the Matter of the Application of the Bd. of Education of Upper Freehold Regional School District, Monmouth Co., 86 N.J. 265 (1981) and Jenkins v. Tp. of Morris School District, 58 N.J. 483 (1971).

In conclusion, petitioner asserts that based upon the above analysis of the law and facts, it is submitted that it be ordered that an after-school bus be provided the students of Washington Township who attend the Allentown High School. This can be done by the Washington Township Board of Education providing said bus as it had in the past or by permitting the Upper Freehold Regional Board of Education to provide the transportation and ultimately charge the cost of same to the Washington Township Board of Education.

DISCUSSION

Having considered the uncontested facts set forth hereinbefore and having fairly weighed the opposing positions of the parties with respect to the central issue, it is apparent that a basic conflict emerges as to the authority extant and exercised by local boards of education engaged in a pupil sending-receiving relationship. It is well-settled that a sending-receiving relationship is a contractual arrangement between two or more boards of education expressly approved and under the authority of the Commissioner of Education N.J.S.A. 18A:38-19 et seq. Neither the marriage nor the divorce of such relationship shall be sanctioned without the considered judgment and imprimatur of the Commissioner. Thus, by way of statute, decisional and case law, the Commissioner has wide discretion and authority over the educational enterprise and, in particular, our sending-receiving relationships in this State. See: Jenkins v. Tp. of Morris School Dist., supra.

In the instant matter, the conflict arises out of the authority of the sending board of education and the receiving board of education. The sending district, in order to

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economize under rigid budget constraints, has opted to eliminate the program of providing after-school transportation to its students attending the receiving school district. The respondent Washington Township Board argues, persuasively, that it is not mandated by statute or administrative regulation to provide after-school hours transportation to its pupils for any purpose. In the absence of a statutory or regulatory mandate, the respondent Board has eliminated an expensive and, according to the Superintendent's certification, a seldom used program.

Petitioner, on the other hand, argues, without an affirmative showing, that respondent's pupils will be deprived of extracurricular and cocurricular opportunities without the after-school hours' transportation. Petitioner argues that this gives rise to disparate treatment of respondent's pupils as compared with other pupils attending petitioner's high school. This argument is rebutted by the Superintendent's certification wherein it is stated that most pupils engaged in after-school hours activities use private transportation in that they have access to their own vehicles or their parents arrange for such transportation.

Petitioner's underlying concern appears to be, at least to this court, the manner in which it may impose after-school detention upon errant pupils from respondent's school district in the absence of after-school transportation. This poses an administrative dilemma to petitioner's school officials. Where they may impose after-school detention upon those pupils afforded after-school transportation, they will now have to consider alternative and, perhaps, more creative modes of discipline for respondent's pupils.

While the Commissioner and the courts of this State have addressed the importance of extracurricular and cocurricular activities for a pupil's total educational development, Bd. of Ed. of Asbury Pk. v. Asbury Pk. Ed. Assoc., supra, the Commissioner has distinguised between those activities which are a direct expense to a local board of education and those which are not. In the Matter of Melvin C. Willett v. Bd. of Ed. of the Tp. of Colts Neck, Monmouth County, 1966 S.L.D. 202, the Commissioner said at 206 that:

> . . . [It] should be clearly understoner's determination herein that pupils cannot be required to bear the costs of school programs is limited to field trips and such other activities as are part of the regular classroom program of instruction or course study. It does not extend to and is not applicable to such other school affairs as dances, concerts,

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> dramatic productions, athletic events and the like, for which admission charges are ordinarily made. Such activities, while certainly part of the total school curriculum, are not part of the classroom teaching program. They occur after normal school hours and attendance at them is voluntary. A field trip is scheduled during normal school hours and attendance is not optional. It is the classroom made mobile. Such is not true in the case of those activities which although generally referred to as 'extra-curricular' are actually curricular but are 'extra-classroom.' The distinction made here is between procedures which, like field trips, use of the library, assembly programs, gymnasium-playground activities, etc., are an integral part of the classroom teaching-learning process, which occur during regular school hours and in which all pupils in a class automatically participate as contrasted with other activities which are not directly related to the classroom program, which take place outside of the normal school day, and which pupils elect to attend. The expenses of these latter elective activities are often underwritten by charging participants or spectators a fee. The Commissioner finds no infirmity in such practice although he would prefer, as would most public school educators, that all such events could be made free. . . .

Thus, the Commissioner has held that those activities which occur during regular school hours are an integral part of the classroom teaching-learning process while such other programs not directly related to the classroom activities and occurring after the regular school day are elective and not mandatory for pupil participation.

The courts and the Commissioner have also held that local boards of education have broad authority and discretion with regard to the transportation of the pupils under its direction and control. Beggans v. Bd. of Ed. of West Orange, 1974 S.L.D. 829, aff'd State Bd. of Ed., 1975 S.L.D. 1071, aff'd New Jersey Superior Court, App. Div. 1975 S.L.D. 1071. It is further well-established that the Commissioner of Education will not substitute his judgment or intervene in the determination of a local board of education which has exercised its discretionary authority, unless there has been a clear showing of abuse of such discretion. Pepe v. Bd. of Ed. of Livingston, 1969 S.L.D. 47.

Under the facts and circumstances of the herein controversy, I do not find that the respondent Board abused its discretion when it eliminated, for reasons of economy, its after-school transportation service for its pupils attending petitioner high school under a sending-receiving relationship. I **FIND** that respondent Board is not mandated by statute, administrative regulation or case law to provide such after-school transportation service. Nor do I **FIND** any provision which would allow petitioner Board to provide such service without the express consent and approval of the respondent Board.

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CONCLUSIONS

I **CONCLUDE,** therefore, that the Board of Education of the Township of Washington acted within the scope of its authority when it determined to eliminate its after-school transportation program for its pupils attending the Allentown High School under the direction and control of the Board of Education of the Upper Freehold Regional School District.

Accordingly, summary judgment is hereby entered for respondent Washington Township Board of Education and, therefore, Upper Freehold Regional Board of Education's Petition of Appeal is hereby **DISMISSED.**

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

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

14 July 1983
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

July 15, 1983
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 18, 1983
DATE

Ronald L. Lakey
OFFICE OF ADMINISTRATIVE LAW

fms/ee

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BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by petitioner in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c. The Commissioner notes that the exceptions entered herein by petitioner were identical to those submitted in petitioner's brief in support of summary judgment.

In the Commissioner's view the arguments presented therein were more than amply analyzed and considered by the judge and therefore require no further analysis on his part.

The finding and determination of the judge are hereby affirmed by the Commissioner and adopted as his own.

COMMISSIONER OF EDUCATION

SEPTEMBER 19, 1983

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INITIAL DECISION
OAL DKT. NO. EDU 2537-83
ON REMAND - EDU 7587-82
AGENCY DKT. NO. 265-7/82A

WALTER LIGGETT,
Petitioner,
v.
BOARD OF EDUCATION OF
TOWNSHIP OF WAYNE,
Respondent.

APPEARANCES:

Louis P. Bucceri, Esq., and **Gregory T. Syrek**, Esq., for petitioner
(Bucceri and Pincus, attorneys)
Stephen R. Pogarty, Esq., for respondent
(Aron, Till & Salsberg, attorneys)

Record Closed: July 6, 1983 Decided: August 5, 1983

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

Walter Liggett, tenured as an elementary teacher, vice principal and principal, contended that the Wayne Township Board had incorrectly calculated his seniority and that of three others with whom he contended for an administrative position. The Commissioner determined that matter, under Docket EDU 7587-82 on March 31, 1983, and

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remanded for findings of fact on whether or not the Board had received State approval to operate a junior high school in the years that the schools listed on Exhibit C contained a 7-8-9 grade configuration (Commissioner's decision at pages 21, 22).

> "If it were assumed that the Board did operate an approved junior high school during the years when the grade levels of those school(s) were organized or reorganized to accomodate grades 7-9 inclusive, then it is without question that a secondary principal's certificate was required prior to 1969. In all other instances, however, any other grade level configurations of the schools in question by virtue of reorganization would deem them to be organized as elementary schools."

At a prehearing on May 3, 1983, the parties and court came to an agreement as to what legal effect the Commissioner's determination would have on the seniority count of the four administrators in issue under each of the two possible factual circumstances, namely, if the 7-8-9 schools were approved as junior high schools in the relevant years and if they were not. All agreed that petitioner's count of seniority time would not change, since he never served in a school with a 7-8-9 grade configuration. Similarly, all agreed that there would be no change in James Simon's seniority. Under the Commissioner's decision he had no junior high school vice principal seniority since he never served in a school including only grades 7-8-9. Thus only William Megnin's and William Ginter's seniority would be affected by a finding that a school including only grades 7-8-9 had not been officially approved as a junior high school.

Due to the age of the records, which included years 1957-58 through 1965-66, respondent's task of producing evidence of approvals proved quite difficult: On June 30, 1983, respondent filed an affidavit concerning counsel's search for records and attached numerous documents. On July 6, 1983, counsel for petitioner advised me that he would not be filing any additional material since petitioner had no knowledge sufficient either to confirm or deny the affidavited facts.

Appendix D (Megnin) and E (Ginter) of my prior determination show that approvals of the following schools are in issue since in each year they contained grades 7-8-9:

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S-C 1957-58
1965-66

A-W 1962-63
1963-64
1964-65
1965-66

Based on the affidavits, **I FIND** the following undisputed facts:

1. A-W (Anthony Wayne) was constructed in 1937 and designated as a secondary junior high school in Board records and in all records of the Passaic County Superintendent of Schools. On appendix C of the prior decision, the "Junior High School" listed is Anthony Wayne.

2. S-C (Schuyler-Colfax) was constructed in 1960 to house grades 7-8-9. The application on file with the Division of Facility Planning Services in Trenton designated the school as "New Wayne Junior High School" and it was subsequently dedicated as Schuyler-Colfax Junior High School.

3. In its first year of operation, 1960-61, notwithstanding junior high school designation, S-C housed grades 6-7-8.

4. In 1967-68, all sixth grade classes were housed in A-W and S-C pursuant to a Board approved reorganization plan during completion of construction of George Washington Middle School (then called Orange Place). G-W's construction approval filed in Trenton designated G-W as a "new junior high school" but it was subsequently dedicated as a middle school and remained such thereafter.

5. Subsequent to year 1965-66, all three schools were middle schools (6-7-8), occasionally housing ninth grades through year 1971-72.

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6. Despite the grade configuration (6-7-8) of G-W, the Passaic County Superintendent's records designated G-W as a junior high school.

7. In year 1968-69 and in all subsequent years, although the Board records show formal approval of the grade reorganizations which occurred, the Board did not seek prior approval to operate the three schools as junior high schools and, in fact, none of them ever included only grades 7-8-9 after year 1965-66.

8. Based upon the construction approvals in Trenton for all three schools as junior high schools and the designation of all as junior high schools in the Passaic County Superintendent's records, all three schools were approved junior high schools and remained such in years in which they housed grades 7-8-9.

9. S-C was a junior high school in 1957-58 and 1965-66; A-W was a junior high school in years 1962-63, 1963-64, 1964-65 and 1965-66.

10. No further information on the facts in issue is available to the parties other than those in the affidavit and its attachments.

CONCLUSIONS OF LAW

Based on the Commissioner's decision dated March 31, 1983 in EDU 7587-82, the facts on remand show no change in petitioner Liggett's or Megnin's seniority counts. In the prior case it was held that Simon had no seniority in any junior high school position. The facts on remand have no impact on his elementary vice principal seniority. In accordance with the prior decision **I CONCLUDE** that if a school was approved as a junior high school and, pursuant to N.J.A.C. 6:27-1.2, included only grades 7-8-9, service therein

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can be counted as junior high school service. Having found service in the six school years in question to be junior high school service, Ginter has 22 years seniority as an elementary vice principal and 20 as a junior high vice principal. This represents a slight change from the count shown on Appendix E in the prior docket due to his service in 1960-61 and in 1971-72 being counted as elementary in those years when the schools in question contained grades 6 through 9. Despite a similar designation of years 1961 (5 months) and 1971-72 as elementary service, there is no change in the resulting count on Appendix D for Megnin.

I CONCLUDE that the seniority standings pursuant to N.J.A.C. 6:3-1.10, 6:11-3.24 and 6:27-1.2 and the Commissioner's decision in EDU 7587-82 are as follows:

	Liggett	Megnin	Ginter	Simon
Elem. Vice Principal	6	22	22	15
Elem. Principal	10	18.5		
Jr. High Vice Principal		23	20	
Jr. High Principal		18		

It is therefore **ORDERED** that the Board revise its seniority standings in accordance with this decision and in all other respects the petition be **DISMISSED.**

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

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OAL DKT. NO. EDU 2537-83

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

August 5, 1983
DATE

Naomi Dower LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

Receipt Acknowledged:

8/5/83
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Aug. 9, 1983
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

jrp

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WALTER LIGGETT,	:	
PETITIONER,	:	
V	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The Commissioner has reviewed the entire record in this matter as well as the initial decision rendered by the ALJ. The Commissioner notes that petitioner has filed initial exceptions in a timely manner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c. The Board likewise has filed timely reply exceptions.

Petitioner's exceptions dispute the findings of the judge in the instant matter that the Board did, in fact, operate approved junior high schools during the academic years 1957-58, 1962-63, 1963-64, 1964-65 and 1965-66. Petitioner contends that the Board in this matter was not able to provide documentation that the junior high schools sought and obtained actual approval from the State Department of Education.

The Board's reply exceptions take issue with the contention of petitioner that N.J.A.C. 6:27-1.1 et seq. requires specific approval by the Commissioner for operation of a junior high school. The Board further argues that the records produced by the Board, as well as those maintained by the Passaic County Superintendent of Schools, provide substantial credible evidence to validate the ALJ's finding of fact that the Board did indeed operate junior high schools during the years in question.

Upon review, the Commissioner finds merit in the Board's argument. The Commissioner notes no provision within N.J.A.C. 6:27-1.1 et seq. which specifically requires that a local board of education obtain approval from the Commissioner in order to organize its grades so as to provide for a junior high school as defined by such regulations. Rather, the Commissioner notes that N.J.A.C. 6:27-1.1 et seq. provided for a process of approving existing high schools every seven years through an evaluation process conducted by authorized representatives of the Commissioner (N.J.A.C. 6:27-1.1a, b and c. Even assuming arguendo that the approval process in 6:27-1.1 et seq. included junior high schools, the Commissioner notes that the County Superintendent whose office was responsible in practice for the evaluation process which resulted in high school approvals categorized the schools in question as junior high schools.

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In light of the above, the Commissioner affirms the findings of the judge in the initial decision and makes them his own. The Petition is hereby dismissed.

COMMISSIONER OF EDUCATION

SEPTEMBER 22, 1986

New Jersey State Department of Education
225 West State Street
Trenton, New Jersey 08625

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