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NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1982 to December 31, 1982

vol. 1

New Jersey State Department of Education
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Trenton, New Jersey 08625

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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
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 7761-80
AGENCY DKT. NO. 532-11/80A

RONALD VICTORIA,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,
Respondent.

Record Closed: October 14, 1981
Received by Agency: Nov. 24, 1981

Decided: November 20, 1981
Mailed to Parties: Nov. 30, 1981

APPEARANCES:

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

Stewart M. Hutt, Esq., (Hutt, Berkow, Hollander & Jankowski, attorneys) for Respondent

BEFORE **DANIEL B. MC KEOWN,** AI J:

Ronald Victoria (petitioner) is employed as a teacher by the Woodbridge Township Board of Education (Board). He claims the Board assigns him an excessive number of pupils in respect to the materials it supplies him with which to teach.

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. The Board

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seeks dismissal of the petition on the grounds that: (1) petitioner lacks standing to bring the petition, and/or (2) that subject matter jurisdiction cannot be asserted here, and/or (3) that the petition has been rendered moot. Petitioner opposes the Board's motion and seeks leave to amend the petition of appeal.

The following facts, for purposes of the Board's motion and petitioner's application to amend the petition, are based on the pleadings and affidavits filed in support of the motion.

Petitioner has been employed by the Board as a teacher for a sufficient period of time to have acquired tenure. Since at least 1979-80, petitioner has taught a course at the Board's Avenel Junior High School entitled "Exploring Power Mechanics." Petitioner alleges in the petition filed November 3, 1980, that the course

> 4. . . . is a totally hands-on program, which upon satisfactory completion provides a student with a certification as a qualified and competent repairman of small engines.
>
> 5. [The Board] has equipped [his] classroom with five engines and with sufficient tools for ten students to work at any given time.
>
> 6. Despite the fact that the instructional manual and course outline do not provide for any related instructional work other than the actual "hands-on experience," [the Board] has assigned sixteen (16) and seventeen (17) students to [his] classes. Thus, at any given moment, six or seven students are receiving no instructions.
>
> 7. Despite repeated requests to correct the situation, [the Board] has failed and refused to correct the serious safety hazards that are the result of the extreme overcrowding and failure to provide safety goggles.
>
> 8. As a direct result of the extreme overcrowding, all students in this class will not be able to complete the prescribed curriculum and therefore will not receive appropriate credit or certification.

Petitioner seeks an Order by which the Board would be directed to assign him no more than ten pupils in each of his two classes.

The Board denies the foregoing allegations, with the exception that it admits petitioner was assigned 16 and 17 pupils, respectively, in the two classes. The Board seeks

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dismissal on the grounds of asserted lack of standing by petitioner to maintain the petition and upon the assertion that the gravamen of the matter, the assignment of pupils, is within the Board's managerial prerogative and, as such, the Commissioner has no authority to substitute his judgment in the matter. Moreover, the Board seeks dismissal, by way of summary decision, on the grounds of mootness. The Board points out, in this regard, that due to a reorganization of the Board's school facilities for the 1981-82 year, its Avenel Junior High School, where petitioner taught, is closed to pupil attendance. Petitioner was notified on May 29, 1981, that he would be assigned as of September 1, 1981, to teach industrial arts at the Board's Colonia Middle School. The principal of the Colonia Middle School attests that another teacher, already assigned to that school, was selected by him to teach the course "Exploring Power Mechanics," rather than petitioner, because the other teacher evidenced to the principal an earlier desire to teach the course for 1981-82 than did petitioner. Petitioner is assigned to teach a wood and metal shop course.

Petitioner seeks to amend the petition by adding a second count which alleges that because he filed the petition in the first instance, he was subjected to administrative and supervisory harassment for the remainder of the 1980-81 year and that such harassment culminated in a negative annual report of his performance in May 1981, by his supervisors. Petitioner seeks to allege that the negative report is knowingly false and is intended to intimidate him against seeking redress of his grievance. Should the amendment be allowed, petitioner seeks the following relief:

A. Directing the Board to forthwith cease and desist from harassing him;

B. Directing the Board to expunge all negative comments and evaluations from his personal file placed there as a direct and proximate result of the Petition of Appeal;

C. Such other and further relief as the Commissioner deems just and proper.

Standing

The Board contends petitioner does not have standing to maintain the petition because he is neither a citizen nor a taxpayer of Woodbridge, and because the allegations made have no effect upon him personally nor, it is asserted, does petitioner seek personal relief.

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N.J.A.C. 6:24-1.1 defines an interested party, or one who has standing to bring and maintain a petition before the Commissioner, as one who has "a direct and substantial interest in the subject matter of a controversy . . . and whose rights, status or legal relations will be affected by a determination thereof." No mention is made of any requirement for a person, particularly a teacher in the named-board's employ, as here, to be a citizen and/or a taxpayer of the board's municipality to be an interested party, or a person with standing. Here, petitioner complains, that as a teacher in the Board's employ, the Board has taken action to cause, or not taken action to alleviate, what he perceives to be a remedial wrong inflicted upon him; that is, the assignment of more than ten pupils to his classes. To the extent that petitioner, as the teacher involved, pleads an action taken, or not taken, by the Board causes him a remedial wrong, that pleading is sufficient for him to maintain standing to bring the petition of appeal under N.J.A.C. 6:24-1.1. I so hold.

Subject Matter Jurisdiction

The Board contends that by virtue of its authority to establish class size under its recognized managerial prerogative, the numbers of pupils it assigns to classes is not a controversy which arises under school laws and that, consequently, the Commissioner lacks subject matter jurisdiction.

N.J.S.A. 18A:6-9 vests in the Commissioner the authority to hear and determine all controversies and disputes which arise under school law. This authority has been broadly construed by the New Jersey Supreme Court. See, Piscataway Tp. Bd. of Ed. v. Burke, 158 N.J. Super. 436 (1978); Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514 (1978). To hold as the Board suggests would be to hold that actions of boards of education, in the exercise of their discretionary authority, are not subject to the review of the Commissioner, the State Board, nor to the courts of this State. Nowhere is such unfettered latitude granted boards of education where, as an example, a substantive allegation is made that a board has abused its discretion, in a shocking manner or that it has violated a person's established rights. Boult and Harris v. Passaic Bd. of Ed., 136 N.J.L. 521 (E. & A. 1947).

I find that the mere assertion by the Board that its exercise of its managerial prerogative in respect to the matter herein is insufficient as a matter of law, as a basis to

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defeat the Commissioner's recognized authority to hear and determine controversies and disputes under school law.

Mootness

Generally, an action is considered "moot" when it no longer presents a justiciable controversy because the issues involved have become academic. A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.

Here, petitioner was assigned two class which, he alleges, were over-enrolled. He arrives at that conclusion in his pleading by alleging the Board has ill equipped those classes by providing him with five engines and sufficient tools and materials for ten pupils. Though subject matter jurisdiction was asserted earlier, in light of the Board's argument that the action complained of was within its managerial prerogative, the gravamen of the original complaint (the assignment of 16 and 17 pupils) is answered by the Board in its first affirmative defense, which asserts that petitioner fails to state a cause of action for which relief could be granted.

Petitioner's allegations, seen in the light most favorable to him, that he has been issued five engines and sufficient materials and tools for ten pupils, do not rise to the level of a controversy or dispute before the Commissioner. As noted earlier, the Commissioner has subject matter jurisdiction over disputes when an allegation is made that a board exercised its discretionary authority in a shocking fashion or in a manner which tramples the recognized rights of a complaining party. Here, the assignment of sixteen and seventeen pupils to petitioner's two classes of small engine repair, when considered in light of five available small engines and materials and tools sufficient for ten pupils, is not, in my view, a shocking exercise of the Board's discretionary authority. There is no rule or statute which requires every pupil in a skills class, such as small engine repair, to have all materials, tools and supplies individually available at all times. Petitioner seems to imply that because he considers the course, which it may well be, to be a "hands-on" course, individual instruction is required as the only method of teaching. Such is clearly not the case.

The Board's action here does not trample on any recognizable right of petitioner. Petitioner, as a tenured teacher, has a right to continued employment with

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the Board and he has a right to be assigned within the scope of his certificate. Petitioner does not have a cognizable right to demand the Board assign him no more than ten pupils.

Petitioner, I find, has presented no basis in the original petition upon which relief could be granted. Moreover, the fact that the Board closed the Avenel Junior High School and petitioner, consequently, was transferred and reassigned to another school and another course, does render the original complaint moot. Even if the complaint is justiciable and if the complaint were to be heard, the relief sought could not be granted.

Petitioner's application to amend his original petition is denied, notwithstanding N.J.A.C. 1:1-6.3, which allows for amendments to the first pleading at any time "in the judge's discretion." The amended petition seeks an expungement of negative comments from petitioner's annual evaluation on the grounds that the supervisor's negative comments were motivated by his filing the original complaint herein. Those comments take issue with petitioner's view that because he was assigned 16 and 17 pupils, and sufficient materials tools and supplies for only 10 pupils, he should direct his instruction to only 10 pupils and that he should assign completed grades for only 10 pupils. Other than these comments, the annual evaluation of petitioner's performance is, on the whole, positive. To grant petitioner's application to amend the original pleading would effectively countenance the very issue that has already been declared not to be a controversy or dispute, while the substance of the proposed amended count is insufficient on its face to constitute a justiciable issue. Evaluation of one's performance is a highly subjective process and, to the extent that no real harm to petitioner (salary reduction, termination of employment) follows a negative portion of an otherwise positive evaluation, the subjective analysis of one's performance may not be subjected to the quasi-judicial process of contested case proceedings. Petitioner's attempt to cloak the proposed amended count within the protection of his constitutional right to redress grievances, is, in the total circumstance, misplaced. Mere conclusions stated in a petition, without more, are insufficient to be considered to have pleaded a cause of action.

The Petition of Appeal is dismissed for petitioner's failure to have stated a cause of action and, alternatively, on the grounds of mootness. Petitioner's application to amend the petition is DENIED.

This recommended decision may be affirmed, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE, who by law

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

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

November 20, 1981
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

November 24, 1981
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 30, 1981
DATE

Elizabeth J. Longano, Cl
OFFICE OF ADMINISTRATIVE LAW

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RONALD VICTORIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, 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 pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the determination by the Honorable Daniel B. McKeown, ALJ that the original complaint has been rendered moot. Petitioner complains that Judge McKeown erred in denying his application to amend his original Petition seeking to expunge from his annual evaluation any negative comments. The Board's reply exceptions refute those of petitioner and affirm the initial decision. The Commissioner finds merit in the Board's exceptions.

In the opinion of the Commissioner, petitioner's transfer to another school and reassignment to classes different from his small engines repair course renders his pleadings of excessively large classes assigned to him in that course entirely moot. The Commissioner finds petitioner's belated plea of endangerment to pupils assigned to the course to be without merit.

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

January 5, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1442-81
AGENCY DKT. NO. 30-2/81A

IN THE MATTER OF:

THE BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY.

Record Closed: November 6, 1981
Received by Agency: Nov. 23, 1981

Decided: November 23, 1981
Mailed to Parties: Nov. 30, 1981

APPEARANCES:

Eugene A. Iadanza, Esq., (Gagliano, Tucci & Kennedy, attorneys) for the Petitioner, Board of Education

Jaynee LaVecchia, Deputy Attorney General, (James R. Zazzali, Attorney General of New Jersey) for Respondent, State Department of Education, Division of Finance and Regulatory Services

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

The Eatontown Board of Education (Board) appeals the November 1980 action of Respondent Division of Finances and Regulatory Services (Division) assigning the Board responsibility for tuition charges of $5,067 for a pupil institutionalized in the North Jersey Training School at Totowa, New Jersey, during 1980-81. The Division contends that the Board is responsible under law for the payment of those charges.

When the pleadings were joined, the Commissioner of Education transferred the matter as a contested case to the Office of Administrative Law, pursuant to N.J.S.A.

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52:14F-1 et seq. The matter is ready for determination in the form of the pleadings, Cross-Motions for Summary Decision, a Stipulation of Facts with exhibits and Briefs of Counsel. The record was closed on November 6, on which date petitioner notified the undersigned that no reply brief would be filed.

FACTUAL BASIS OF THE DISPUTE:

No relevant facts are in dispute. The following, all of which are stipulated or admitted in the pleadings, are ADOPTED AS FACT:

On or about November 17, 1980, a State Facilities Tuition Notice was sent to the Board by the Division (Exhibit A). The notice indicated that the Board was responsible for $11,950 for tuition for its resident children in a state facility pursuant to the State Facilities Education Act of 1979. The notice also stated that that amount would be deducted from the district's state aid and would be forwarded directly to the Department of Human Services and/or the Department of Corrections.

The $11,950 figure is for the tuition of two children, C.E. and J.S., in state facilities. C.E., who was born on March 12, 1970, is institutionalized at the North Jersey Training School. J.S. is in the Monmouth County Day Training Center.

Of the $11,950 figure, $5,067 is attributable to tuition expenses for C.E. This amount is determined by adding the State average net current expense budget per pupil figure, which is $2,242, to the appropriate categorical aid figure attributable to this child, which is $2,825.

The tuition expenses for J.S. are $6,883. This amount is determined by adding together the State average net current expense budget per pupil figure, which is $2,242, to the categorical aid figure attributable to this child, which is $4,641.

The $5,067 figure attributable to C.E. and the $6,883 figure attributable to J.S. comprise the $11,950 figure stated in the State Facilities Tuition Notice sent to the Board. It is only the responsibility for the $5,067 tuition for C.E. which is contested herein.

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C.E.'s parents and legal guardians are her mother and her father, who holds the rank of Spec. 4 in the U.S. military forces.

On or about November 9, 1972, C.E.'s parents commenced living in petitioner's district, at 100 Mitchell Drive, Eatontown, New Jersey. On or about February 28, 1973, C.E. was institutionalized at the North Jersey Training School. On or about January 4, 1974, her parents moved from their Eatontown residence to 1000 Clearmont Drive, Datham, Alabama (Exhibit B). Their Eatontown residence was the last known New Jersey residence of C.E. prior to her institutionalization at the North Jersey Training School.

C.E. has never attended a school of the Eatontown School District, nor has she ever been seen or tested by the Child Study Team of the Eatontown School District. Her classification at the North Jersey Training Center is "eligible for day training."

The Board's request during October and December 1980 that the Division rescind its assignment of charges for C.E. was rejected by the Division. Thereupon, the Board filed the instant Petition of Appeal.

DISCUSSION:

Pursuant to the provisions of N.J.S.A. 18A:38-1, C.E. and her parents were residents in the Eatontown School District from November 1972 to January 1974, a period approximating 14 months. During that time, C.E., at three years of age, was institutionalized. Ten months later, her parents moved to Datham, Alabama, where they continue to reside.

The State Facilities Education Act of 1979 was enacted to become effective September 25, 1979. N.J.S.A. 18A:7B-2 specifies that:

> For each child who is resident in a district and in a State facility on the last school day in September of the prebudget year, the Commissioner of Education shall deduct from the State aid payable to such district an amount equal to the State average net current expense budget per pupil plus the appropriate categorical program support.
>
> This amount shall be forwarded to the Department of Human Services if the facility is operated by or under contract with that department, or to the Department of Corrections if the facility is

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> operated by that department, and shall serve as payment by the district of tuition for the child. This amount shall be used solely for the support of educational programs and shall be maintained in a separate account for that purpose. No district shall be responsible for the tuition of any child admitted to a State facility after September 30 of the prebudget year.
>
> [Emphasis supplied.]

The act further specifies at N.J.S.A. 18A:7B-12 the manner of determining responsibility for tuition of pupils in residential placement as follows:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> a. . . . .
>
> b. The district of residence for children who are in residential State facilities . . . shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
>
> If neither can be determined, the district of residence shall be the district in which the child has been placed or the district in which the State facility is located.
>
> c. The Commissioner of Education shall develop appropriate criteria for determining the district of residence for those children whose district cannot be determined according to the criteria contained herein.
>
> [Emphasis supplied.]

The language of these statutes states clearly that for funding purposes, a child's district of residence is the present district of residence of the parent or guardian. It further specifies that if the current residence of a parent or guardian cannot be determined, the place of residence of the child shall be the district where the child resided prior to institutionalization or the district in which the institution is located.

In the instant matter, it is known that the residence of the parents of C.E. since 1974 and to this date has been in Datham, Alabama. Since this is so, the parent's present residence cannot also be within the confines of the Eatontown School District.

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Accordingly, I **CONCLUDE** that C.E., a minor whose residence is established by the residence of her parents, is not a resident of the Eatontown School District.

The Division argues, nevertheless, that its action must be accorded a strong presumption of correctness. Such presumption, however, cannot properly be construed to override the clearly expressed intent of the Legislature which was that funding is the responsibility of the present district of residence of the parent or guardian.

The Division argues further that N.J.S.A. 18A:7B-12 should be interpreted to mean the present New Jersey district of residence, since the State Department of Education is powerless to assess tuition expenses against a governmental entity of another state. This interpretation does not comport with the language of the statute. It must be assumed that if the Legislature had so intended, it would have added the words "New Jersey" to the statute.

It is a fundamental canon of statutory interpretation that the language employed by the adopting body should be given its ordinary meaning, Lane v. Holderman, 23 N.J. 304 (1957). Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms, Duke Power Co. v. Patten, 20 N.J. 42, 49 (1955). It has further been stated by the courts that:

> The purpose of [statutory] construction is to bring the operation of a statute within the apparent intention of the Legislature. [Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 209 (1954)] (citations omitted.)
>
> A statute should not be construed to permit its purpose to be defeated by evasion. [Grogan v. DeSapio, 11 N.J. 308, 332 (1953)] (citations omitted.)
>
> "We are enjoined to interpret and enforce the legislative will as written, and not according to some supposed unexpressed intention." Camden v. Local Government Board, (Hoffman v. Hock, 8 N.J. 397, 409 (1952)) (Emphasis added) (citations omitted.)

A careful reading of N.J.S.A. 18A:7B-12 reveals no intention of the Legislature that a school district should be held responsible for tuition of pupils other than those who are resident within that district or whose parents no longer reside there and cannot be located. Since C.E.'s parents do not reside at present in the Eatontown District, and

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since it is known where they do live, I **CONCLUDE** that the cited statute does not assign responsibility for her tuition to the Board.

I am unable to agree with the Division's assertion that "[i] t has simply been legislated that the district in which the child lived with his or her parents at the time of being admitted to the State facility shall be the one responsible for the child's tuition notwithstanding the fact that the parents admittedly do not continue to live in that district" (Respondent's Brief at p. 7). This assertion, if controlling, would result in a thwarting of the statute which states that the district in which the parents currently reside has responsibility for tuition of an institutionalized pupil.

The issues agreed upon at the prehearing conference in this litigation do not require a determination of who has the responsibility for tuition for a handicapped child whose parents now live in another State. It is noted, however, that Congress in the Education For All Handicapped Children Act of 1975, P.L. 94-142, 89 Stat. 773, dealing with distribution of entitlement funds, fixed the responsibility of all states which receive such funds to meet the educational needs of handicapped pupils.

DETERMINATION:

In consideration of the conclusions set forth above, it is **DETERMINED** that the Board is not responsible for the tuition of C.E. for the 1980-81 school year and that the Division was in error when it reduced the Board's 1981-82 State aid by the amount of C.E.'s 1980-81 tuition of $5,067. Accordingly, it is **ORDERED** that the Division restore state aid to the Board for the 1981-82 school year in the amount of $5,067.

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

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OAL DKT. NO. EDU 1442-81

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

November 21, 1981
DATE

ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

November 23, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 30, 1981
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE BOARD	:	
OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF EATONTOWN, MONMOUTH	:	DECISION
COUNTY.	:	
	:	

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

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

The Division objects to the finding by the Honorable Eric G. Errickson, ALJ that tuition responsibility for the pupil C.E. as assigned to the Board be rejected and that state aid in the amount of $5,067 be restored to the Board. The Division argues that the Board cannot have it both ways by not being held responsible for C.E.'s tuition and still counting C.E. in its pupil enrollment. The Board's reply exceptions affirm the initial decision. The Commissioner finds merit in the Division's arguments.

In the opinion of the Commissioner, tuition responsibility for C.E. must be determined according to N.J.S.A. 18A:7B-12, ante. Therein C.E.'s parents lived within the Eatontown School District at the time of C.E.'s admission to the North Jersey Training School at Totowa, New Jersey. Accordingly, the decision of the Court herein is set aside. Summary Judgment is accorded the Division. The Petition is dismissed.

COMMISSIONER OF EDUCATION

January 6, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION -
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 0280-81
AGENCY DKT. NO. 572-12/80A

THE SCHOOL DISTRICT
OF THE CITY OF NEWARK,
ESSEX COUNTY,
Petitioner
v.
ROSALIND KOPEL,
Respondent.

Record Closed: October 16, 1981
Received by Agency: 11-30-81

Decided: November 25, 1981
Mailed to Parties: 12-2-81

APPEARANCES:

Barbara Bell, Esq., (Cecil J. Banks, Esq., General Counsel) for the Petitioner

Raymond Meisenbacher, Esq., (Liss & Meisenbacher, attorneys) for the Respondent

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

This matter being opened to the Office of Administrative Law (OAL) upon motion by R. Meisenbacher, Esq., on behalf of respondent Rosalind Kopel, and a Cross-Motion for Summary Judgment having been filed by the Board, B. Bell, Esq., appearing, and it appearing that:

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1. On July 9, 1981, at 9:30 a.m., oral argument of counsel was conducted by telephone before the administrative law judge (ALJ) regarding respondent's Motion to Dismiss Tenure Charges and petitioner's Cross-Motion for Summary Judgment seeking dismissal of respondent from the Newark school system on the grounds of incapacity; and

2. The ALJ **DENIED** respondent's Motion to Dismiss the Tenure Charges and **DENIED** petitioner's Cross-Motion for Summary Judgment, by Order dated July 15, 1981; and

3. The ALJ **ORDERED** the tenure hearing to proceed after the determination of a question of law; to wit: "Does accidental disability retirement terminate tenure?" and

4. The litigants thereafter submitted Memoranda of Law and Reply Memoranda concerning this question of law;

Therefore, the issue is now ripe for Summary Decision.

HISTORY

The Board of Education of the City of Newark (Board) filed tenure charges of incapacity, insubordination, A.W.O.L., excessive absenteeism, and other just causes against respondent. Respondent denied the charges, asserting that she is medically unable to teach.

During the course of this developing controversy, respondent applied to the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) and was granted an Accidental Disability retirement under maximum allowance. This disability retirement became effective December 1, 1980, and was approved by the Board of Trustees of the TPAF on May 14, 1981 (Exhibit E attached to petitioner's Memorandum of Law).

Thereafter, respondent filed her Motion to Dismiss the Tenure Charges and petitioner filed a Cross-Motion for Summary Judgment (Decision), both of which, as stated earlier, were denied by the ALJ by Order dated July 15, 1981.

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Thus the sole issue presented for determination is stated as follows:

> Does accidental disability retirement terminate tenure? A decision in the affirmative will be dispositive of the entire case, whereas a decision in the negative will demand the prosecution of the tenure charges.

DISCUSSION

Respondent is a teacher as defined in N.J.S.A. 18A:66-2(p) and all teachers are required to be members of the TPAF. In that regard, N.J.S.A. 18A:66-4 reads in part as follows:

> The membership of the retirement system shall consist of:
>
> . . .
>
> (b) any person becoming a teacher. . . .

Membership in the TPAF ceases upon retirement [N.J.S.A. 18:66-7(d)]. Therefore, previously eligible persons who retire from TPAF can no longer claim the status of teacher for the purpose of employment; consequently, the Board, in the instant matter, has no need to prosecute its tenure charges against respondent who is no longer a teacher as defined in the above statutes.

Support for this conclusion can be found in Lorraine E. Laing v. Board of Education of the Township of Edison, Middlesex County, 1977 S.L.D. 422, aff'd State Board of Education, 1977 S.L.D. 427; aff'd Superior Court of New Jersey (App. Div., September 22, 1978) 1978 S.L.D. 1025.

In that case, the petitioner, in August 1973, applied to the TPAF for accidental disability retirement, effective September 1, 1973. On September 4, 1973, petitioner met with the Superintendent of Schools and the president of the Edison Township Teachers' Association to discuss her employment status. Aware of the conversation at that meeting and having received copies of petitioner's retirement application, the Board approved petitioner's retirement at its meeting on October 8, 1973. Petitioner notified the TPAF on November 28, 1973, that she wished to rescind her application for retirement. She proceeded, however, with a scheduled physical

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examination by a physician appointed by the TPAF and was in fact retired from the TPAF on ordinary disability. The petitioner was thereafter successful in having the TPAF rescind its earlier determination to retire her on ordinary disability effective September 1, 1973, and she was reinstated in the TPAF.

Her reinstatement in TPAF gave rise to the issue of whether the Board was obligated to reinstate the petitioner to a position as a teacher, or whether her retirement, which was effectuated by the TPAF, permanently terminated her employment irrespective of the later decision by TPAF to rescind its earlier determination. The Commissioner determined that the petitioner forfeited her tenure entitlement because of her retirement, and that the determination by the TPAF to reinstate her in its pension fund did not automatically compel the Board to reinstate her as a teacher. 1977 S.L.D. at 426. This decision was affirmed by the State Board of Education. The Commissioner found that there was no distinction between the Board's approval of the petitioner's application for retirement and a letter of resignation. 1977 S.L.D. at 426.

> Petitioner submitted her application for retirement to the TPAF and made this fact known to the Superintendent on September 4, 1973. The Board considered this a fait accompli and approved her retirement from the Edison school district. This act terminated her employment just as effectively as the acceptance of a letter of resignation would have done. Ibid.

The Commissioner's decision was affirmed by the Appellate Division, 1978 S.L.D. 1025.

The present case contains a similar factual situation. The respondent in this case notified the Board that she was seeking an accidental disability retirement from the TPAF. The Board, as required, submitted respondent's Certification of Service and Final Salary to the TPAF (Exhibit B, petitioner's Memorandum of Law). The Board subsequently formally accepted the respondent's application for retirement. Consequently, respondent's employment was terminated just as effectively as if she had submitted a formal letter of resignation.

Respondent argues that N.J.S.A. 18A:66-40(a) mandates that a beneficiary report for duty and that an employer reinstate that employee only after it is determined by competent medical authority that the beneficiary is medically able to return to work (Letter Memorandum On Behalf of Respondent, October 13, 1981, at 2).

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That statute reads as follows:

> Once each year the retirement system may, and upon his application shall, require any disability beneficiary who is under the age of 60 years to undergo medical examination by a physician or physicians designated by the system for a period of 5 years following his retirement in order to determine whether or not the disability which existed at the time he was retired has vanished or has materially diminished. . . .
>
> If the report of the medical board shall show that such beneficiary is able to perform either his former duty or other comparable duty, which his former employer is willing to assign to him, the beneficiary shall report for duty; such a beneficiary shall not suffer any loss of benefits while he awaits his restoration to active service. (Emphasis supplied)

The key interpretative issue in this statute is whether the phrase, "such beneficiary is able to perform either his former duty or other comparable duty which his former employer is willing to assign him," gives the employer the discretion to refuse to hire the beneficiary. Although there is no legislative history available on this point, the word willing in this phrase refers, in my judgment, to the determination of the Board to rehire the respondent, or to assign her to a comparable duty.

Case law holds that the State Department of Education and the Board of Trustees of the TPAF are independent and separate agencies. In Laing, the Appellate Division stated that:

> Petitioner's status as a terminated employee of the Edison Township Board of Education was not altered by the action of the Teacher's Pension and Annuity Fund in rescinding her retirement. The Fund and the Board of Education are separate and independent agencies. In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 33 (App. Div. 1974); Swan v. Bd. of Trustees of Teachers' Pension Fund, 85 N.J. Super. 226, 232 (App. Div. 1964). They function within unrelated areas of responsibility and the determination of the Fund could not effect consequences of policy lying within the authority of the Board of Education. 1977 S.L.D. at 1026.

The Commissioner's determination in Laing acknowledges the determination that the aforementioned agencies are separate and independent. Accordingly, any determination by TPAF that respondent is physically and emotionally capable of returning

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to work cannot affect the prior determination of the Board to accept her retirement. Further, the statute makes it entirely discretionary for the Board to determine whether or not to rehire the retired employee.

Respondent cannot have it both ways. She cannot accept an accidental disability retirement which means she is "permanently and totally disabled," and also maintain that she holds a tenured status with the Board [N.J.S.A. 18A:66-39(c)].

Policy considerations also support this determination. The Board must be able to plan and determine the size and status of its work force in order to operate effectively and efficiently.

Based on the foregoing, I **CONCLUDE** that membership in the TPAF ceases upon an accidental disability retirement. Respondent, therefore, is no longer a teacher and has lost her tenure status.

Respondent remains free to present herself to the Board for employment if, in the future, she overcomes her disability. At that time the Board may, in its discretion, employ respondent [N.J.S.A. 18A:66-40(a)].

For all of the above reasons, the Board's tenure charges are moot and are hereby **DISMISSED WITH PREJUDICE.**

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

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OAL DKT. NO. EDU 0280-81

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

25 November 81
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

November 30, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

12-2-81
DATE

Ronald I. Parker
OFFICE OF ADMINISTRATIVE LAW

ij

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IN THE MATTER OF THE TENURE	:	
HEARING OF ROSALIND KOPEL,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF NEWARK, ESSEX COUNTY.	:	DECISION
_____:		

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

The Commissioner observes that 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 tenure charges filed by the Board are moot and are herewith dismissed with prejudice.

COMMISSIONER OF EDUCATION

January 6, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0455-81
AGENCY DKT. NO. 586-12/80A

ETTA ROONEY AND THE UPPER SADDLE RIVER EDUCATION ASSOC.,
Petitioners

v.

BOARD OF EDUCATION OF THE BOROUGH OF UPPER SADDLE RIVER, BERGEN CO.,
Respondent.

APPEARANCES:

Louis Bucceri, Esq., for Petitioners
(Goldberg & Simon, attorneys)

Robert J. Lenrow, Esq., for Respondent
(Beattie & Padovano, attorneys)

Record Closed October 25, 1981 Decided December 8, 1981

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

Etta Rooney, a tenured school nurse on a preferred eligibility list since 1975 when the Upper Saddle River Borough Board of Education reduced its nursing force by one, alleged the Board in October, 1980 hired two school aides to replace one of two remaining school nurses who retired in August, 1980. She alleged the two uncertificated school aides, who were registered nurses, performed full-time school nursing functions required by N.J.S.A. 18A:40-1, 3.1, et seq., contrary thereto and in derogation of petitioner's tenure

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and seniority rights under N.J.S.A. 18A:28-12. She sought reinstatement as school nurse and back pay. The Upper Saddle River Education Association, exclusive collective negotiations representative of professional non-supervisory staff employed by the Board, alleged violation of its associational rights and sought an order directing the Board to cease and desist from providing school nursing services without use of certified personnel.

In its answer the Board admitted it had once employed three school nurses, one in each of its three schools until June 1975, when petitioner was riffed. From September 1976 through August 1980, the Board said, it employed two nurses to cover the three schools: one nurse covering grades five-eight in one school and the other school nurse covering grades kindergarten-five in two other schools. One of the nurses, the Board said, retired in August 1980, whereupon the Board determined to utilize services of non-certificated school aides to assist the remaining nurse for the three schools. The Board admitted the two school aides from time to time performed these services at the express direction of the school nurse:

1. Dispensation of medical advice and diagnoses of medical problems;

2. Conferences with parents, staff and students;

3. Taking of temperatures;

4. Peformance of first aid procedures; and

5. Sending ill students home, with necessary parent contact and arrangements for transportation.

The Board's answer alleged, nevertheless, that if school aides acted as school nurses, they did so in violation of the Board's specific instructions to the school nurse and school aides and that, in general, any such activity went unreported and was done without the Board's knowledge.

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PROCEDURAL HISTORY

The petition for relief was filed in the Division of Controversies and Disputes of the Department of Education on December 31, 1981. The Board's answer was filed January 26, 1981. Thereupon the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on January 28, 1981 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted in the Office of Administrative Law on April 3, 1981 and an order entered establishing hearing dates on June 15, 16 and 17, 1981. The matter was heard on those dates and on a final hearing date, September 10, 1981, at which time a schedule for filing memoranda of law and written summations was established. They were filed on October 30, 1981, at which time the record was closed.

After prehearing conference, and before hearings began, the Board moved for "an order dismissing the petition," upon the assumption, it said, allegations of the petition were true. The Board thus sought to test the legal sufficiency of petitioners' claims in face of an assumption that since October 1980 two non-certificated school aides had been runnning the school nurses' offices full-time each day, independently and with discretion, and performing the functions listed above. Such functions are comprehended under general duties imposed upon school nurses in N.J.A.C. 18A:40-4, 7, 8 and N.J.A.C. 6:29-1.1 to 4.5 and, presumably, were such as those performed by the retired school nurse.

The question raised by the motion was whether there had been stated claims upon which relief might be granted. The administrative law judge ruled that, quite plainly, there had been. The hypothesis was this: "school nurse" is defined to include any nurse performing school-nursing services in the public schools. N.J.S.A. 18A:1-1. "Teaching staff member" is defined to include school nurse. N.J.S.A. 18A:1-1; N.J.A.C. 6:11-3.4. No teaching-staff member who is a school nurse shall be employed in public schools unless he/she holds a valid certificate to render nursing services to pupils there. N.J.S.A. 18A:26-2; N.J.A.C. 6:11-3.1; and N.J.A.C. 6:11-12.8, 12.9. It followed the Board's uncertificated school aides were unlawfully employed as school nurses.

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It followed, furthermore, ruled the administrative law judge, their employment by the Board in October 1980 to fill the vacated and unabolished position of a school nurse who retired is an abridgment of Rooney's preferred eligibility rights of tenure and seniority under N.J.S.A. 18A:28-12, which requires her reemployment "if and when such vacancy exists." Cf. Scrupski v. Board of Ed. Warren Township, 1977 S.L.D. 1051, 1055-6; and see Viemeister v. Board of Ed. Prospect Park, 5 N.J. 215, 219 (App. Div. 1949); and Catano v. Bd. of Ed. Woodbridge Township, 1971 S.L.D. 448, 458-9, aff'd State Board, 1972 S.L.D. 665.

The Board's motion to dismiss Rooney's petition, therefore, was DENIED. The Board's motion to dismiss the petition as to the Education Association for want of standing was also DENIED. See Winston v. Bd. of Ed. South Plainfield Boro., 125 N.J. Super. 131, 142 (App. Div. 1973), aff'd 64 N.J. 582, 586 (1974). The Order was procedural in nature under N.J.A.C. 1:1-9.7(e); it related solely to conduct and management of the case and was designed to insure full, fair and prompt resolution of it. The matter proceeded to formal hearing.

EVIDENCE AT HEARING

The Upper Saddle River school district comprises three schools, Reynolds K-3rd, Bogert 3-5th and Cavallini 6-8th, all situated on contiguous lots covering some 70 acres.

Etta Rooney is a registered nurse and is certified as a school nurse by the State Board of Examiners. She took her training at St. Mary's Hospital in Passaic. She was formally assistant head nurse in maternity at Ramapo General Hospital, Spring Valley, New York. She has served private patients at St. Mary's Hospital, St. Joseph's Hospital, Valley Hospital, and Passaic Hospital. From September 1969 until June 1975, she was

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employed by the Board of Education of Upper Saddle River as one of its three school nurses. In June 1975 she was riffed. She is tenured and therefore is on a preferred eligibility list for reemploymennt. Most recently during her years with the Board, she was assigned as school nurse to Bogert School. Theodora L. Calderara, another school nurse, was assigned to Reynolds School. The third, Grace Russell, was assigned to Cavallini School.

Since her reduction in force, which she did not challenge, she served the Board as substitute school nurse. From September 3, 1980 until October 20, 1980 she was a substitute school nurse on a day-to-day basis.

She learned in August 1980 that Grace Russell was retiring. She thought she was supposed to get Grace Russell's job and called the Board about it. About a week later, she said, the Superintendent told her the Board was going to hire school aides and not another school nurse. In early October 1980, in fact, she said, the aide position was offered to her. She had seen an advertisement by the Board for the position published in the Ridgewood News. The advertisement specified secretarial skills, training in first aid and "...some nursing experience desirable." J-13.

She wrote a letter to the Superintendent asking what was entailed in the school aide position. His reply was to enclose a formal job description (J-14). She informed the administration she would not take such a position. She said she felt to do so would be professionally and ethically wrong. In a conversation with Principal Robert Franchino, she said, he told her the Board wanted a nurse in each building. He told her the salary for the school-aide job was $9,050 per year. She had been earning $14,140 for the 1974-75 school nurse position in the 13th step of the salary guide. This was at the time she was riffed. She felt, therefore, she should have been placed on the 14th or last step of the salary guide as a school nurse.

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As school nurse, she said, she did all immunizations, weighing and measuring, health insurance examinations, medications and dispensing. She employed the drug Ritalin to administer to children, under doctors' orders, and had insulin on hand for tested diabetic children. She also had on hand certain antibiotics that she dispensed under doctors' prescriptions. She filed forms from students' physicians for permission to administer medicine. She excluded children because of communicable diseases or if in her professional judgment she felt children were too ill to remain in school. Her procedure was to notify the parents, the principal, and the school physician. She treated upset stomachs, flu, poison ivy, conjunctivitis, and impetigo. She examined children for aches and pains. She judged hypochondria. She took temperatures. She examined and treated bruises, scrapes and abrasions. She administered first aid. She examined for child abuse. She had parent contacts; that is, she reported to parents what she observed and why she thought children should be at home instead of at school. She discussed the updating of immunization shots with parents. She explained to them why the rules were necessary. For accidental injuries, she went to the child immediately. If injury seemed severe, she called for an ambulance. She gave emergency treatment and help carry the child or get a litter. She notified parents. She kept records of daily treatment, signed the records, which then went to the principal and to the superintendent. She reviewed all student health records for special health problems of individuals, which she then reported to teachers and librarians. She had full teacher contact for decisions how to place children. She met with the child-study team. She took blood pressures.

She kept daily health reports of individual child visits to the nurse's office at Bogert School from the period September 3, 1980 until October 17, 1980. These reports are part of the records in Exhibit J-23. (There is no recognizable, substantial difference between the functions reported by Rooney as substitute school nurse in that school during that period and functions performed by the two school aides, Karen Bianco and Anne Marrinan in Bogert School and Cavallini, respectively, during the period October 20, 1980 and December 23, 1980.)

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Rooney, a resident of Upper Saddle River, did not look for school-nurse work since her riff in June 1975. Indeed, she testified, she knew of no other school nurse positions available to her in her job area during that time until the present.

Theodora L. Calderara testified she has been employed by the Upper Saddle River Board of Education as a school nurse for 15 years. She is certified. During the school year 1979-80 she was responsible as school nurse for both Reynolds and Bogert Schools. Grace Russell, the retired school nurse, was in charge at Cavallini School. When Russell retired in August 1980, she said, this coverage changed. During the period September 1980 until October 1980 two school nurses were employed by the Board: Etta Rooney and a Mrs. Thabit, who herself was certified as a school nurse. The two were employed during that period as substitutes.

On October 20, 1980, Anne Marrinan and Kathleen Bianco, both of whom are registered nurses, were hired by the Board as "school aides." Neither is certified as school nurse. Calderara was installed at Reynolds School, Bianco at Bogert School and Marrinan at Cavallini School. Bianco, she added, has a B.S. degree in nursing as well as her R.N.

Calderara said she first learned of Board intention to create school aide positions in October 1980. In August 1980, she had a discussion concerning aides with the Superintendent and the possibility of replacing the retiring school nurse, Mrs. Russell, with a school aide. The Superintendent asked her opinion. She wrote him a letter opposing it. (J-25). She heard nothing further from the Superintendent until the day before school opened in September 1980. She had no other discussion with the Superintendent until after the two new aides were hired, about October 17, 1980. For the first six weeks of school, there were substitute school nurses in Bogert and Cavallini Schools. Calderara was in Reynolds School. At that time, although she talked with the substitute school nurses, they were not put under her direction. She helped with her advice when necessary, however. The Superintendent told her the new aides were to be in Bogert and Cavallini Schools. He did not tell her then she was to supervise them. She

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understood that the school principals would supervise. She understood she was to help the aides with her advice and was asked to have a new job description for herself as school nurse with this new capacity. Ultimately, much later, she received the "School Nurse Responsibility" as revised and adopted by the Board in March 1981. (J-23).

On October 17, 1980 the Superintendent called and gave her a copy of a job description for school aide, saying the two new school aides would be under her supervision. (J-14). Calderara said in her talk with the Superintendent guidelines for the position of school aide were not made clear to her. Though the discussion involved her responsibilities as school nurse, she informed him she was not certified as a supervisor and thus, she thought, it would be difficult to supervise school aides in other school buildings when they were not in her presence. It was not clear to her what her duties concerning supervision would be and she suggested her own job description as school nurse should be more clearly defined. She said he did not go over with her at that time the job description for school aide (J-14), and she was thus not told what the aides should not do. It was suggested to her, however, that first aid was a responsibility of the new aides. He also suggested to her aides could do audiometric testing and vision screening if she trained them to do so.

Calderara said duties of the nurses/aides were changed by Board action in April 1981 (after suit) because she was told to draft changes in their duties. She was informed by the Superintendent that she had allowed aides to have discretion in functioning as school nurses, but she still felt, she said, it was not her function to supervise them. The changes in the school nurses' function as suggested by Calderara were drafted by Calderara and sent to Marrinan and Bianco, with copies to the Superintendent and the Principals. (J-15). She had a meeting with the aides to discuss the job description in the memo. She said the reaction of the aides was that they had not been told by anyone the limits of their functions before.

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Concerning examinations of children by the school physician, Calderara said the aides would assist in scheduling the examinations and would do preparatory work for dental examinations by the dentist, like hygiene and sterilization. The aides would typically prepare the examination room, weigh and measure the children and take blood pressures. One of the purposes of the examinations was for comparisons to be noted and reported. The reporting would be by the school aides or by the school nurse, depending on which of three schools was concerned.

Concerning matters of speech screening or psychological screening, Calderara said she is a member of the child-study team of the district. She herself refers cases to the child-study team. She said aides had done such referrals to the team before March 1981. She recalled that Anne Marrinan as a school aide had, for example, contacted the child-study team directly about several students before the Christmas break on December 23, 1980.

Calderara said the aides typically sent out referral notices to parents from the health office of each school, such as those appearing in Exhibits J-16, J-17 and J-18.

Calderara said she herself as school nurse and school aides Marrinan and Bianco administered medications in each of their respective schools, according to individual children's physician's orders and prescriptions. Examples were Ritalin, PRN and migraine medications. In addition, she said, each of the three schools has bee-sting kits containing prepared doses of adrenalin for administration by injection, to be given as quickly as possible by qualified persons like registered nurses.

Calderara said the practice of the aides in calling the school nurse before administering medicines, which has obtained since March 1981, was not always the case before then. Calderara felt the aides as R.N.'s could properly administer medicines on orders and prescriptions on their own without having to call her first. She was questioned as follows:

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Q: Now, do any of the children in Upper Saddle River have standing orders to get medication during the school day?

A: Yes.

Q: Who administers the medication?

A: I administer the medication in the Reynolds School, Marrinan in the Cavallini School, and Bianco in the Bogert School.

Q: Has that changed since March of 1981?

A: No.

Q: What does the administration of medication require in terms of function of the person doing it? What do they have to physically do?

A: I think they should be Registered Nurses.

Q: What do they physically have to do?

A: They have to read the prescription as given by the physician and physically take the medication from the bottle and give it to the child. While the child is in front of you, you watch them take the pill. If it's a pill, you watch and make sure he takes the pill. If it's a liquid, you give it to him directly. So he takes it in your presence.

Q: What types of medication have been administering in the three schools this year?

A: Well, in each school — there is one child right now who is on ritalin, which is a medication given to children who are hyperkinetic or who have been diagnosed as such by the physicians.

Q: Anything else?

A: We have some children who have PRN medication, which means whenever necessary.

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Q: PRN is —

A: It's a medication meaning whenever necessary.

THE COURT: Also has something to do with nurses?

THE WITNESS: Yes.

THE COURT: What's that mean?

THE WITNESS: Yes, I guess.

THE COURT: It has a very good connotation.

THE WITNESS: Yes, I think so. PRN means whenever necessary.

Q: In terms of these PRN administered medications, what types of medication are there?

A: Well, we have one child who has been diagnosed as having migraine headaches, for example, and there is a medication for her. That's kept in the health office. She is now in Cavallini School, but this medication — this medication has been going on for a few years now. So when this child has symptoms of her migraines — and she has warning signs. So that she's very well aware that she is to be given the medication by doctor's order.

Q: And who administers that medication?

A: The nurse in the school where she is.

Q: Who is?

A: Marrinan, who is hired as an aide, is an R.N. So she is qualified, I think, to give medication. So she gives it in that building.

Q: Any other types of PRN medication that you currently administer?

A: We have some bee sting kits which are kept in the health offices of the buildings where the children are who have bee sting reactions. I think there might be one in each building.

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Q: And what does a bee sting kit entail for the person who administers it?

A: It contains prepared doses of adrenaline, which should be given immediately if a child has a bee sting reaction.

Q: Is it given orally?

A: No, it's an injection.

Q: And have you had any instances of children having bee stings who had an allergy?

A: Fortunately not. We haven't had occasion to use it.

Q: Is there a standing procedure to utilize in those situations?

A: Yes. I think it should be given as quickly as possible by a qualified person.

Q: What happens to a person who has a bee sting allergy if they don't get that kind of medication?

A: I think you might have difficulty in breathing and probably hard functioning.

Q: Any other types of medication given?

A: Sometimes there are temporary medications prescribed for children who are recuperating from a strep throat, for instance. So there might be antibiotics ordered, and they might need to receive them in school, during school hours; and you get a physician's prescription on a prescription blank defining the time and the dosage.

Q: What would happen to a child who had received an overdose of ritalin?

A: What would happen?

Q: Would anything happen?

A: Yes, possibly.

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Q: What?

A: We have cards in our schools that we send home. We get permission from the parents to send this particular card to the physicians of the children, the physicians who have prescribed the medication. And on the card there is a description of any possible side effects from the medication. There would be no occasion for them to have an overdose in school because they can't get it. We get them the right dosage; but if they might be having a reaction — and those would be defined on the card for whatever medication it is.

Q: All right. But say that a situation occurs. Through some inadvertent error, there was an overdose of ritalin given to a child. Medically what happens?

MR. LENROW: I object to this. From all I've heard, it is totally unlikely to happen in this school system.

MR. BUCCERI: Your Honor, I submit to you that overdoses happen in the home. I don't see why it couldn't happen in a school system.

THE COURT: Well, I think counsel's line of inquiry goes to inquire into general procedures in the event of circumstances at the school or schools which require administration of medication; and obviously, the inquiry is — should acute occasions or occasions of acute illnesses come up, who would be there to do what ought to be done, among other things? I think it's relevant. I'll allow it.

A: We also have other children who don't necessarily receive medication and who are receiving it at home; and if we know that they were, we tried to get this same information so that we know what to watch for. Say a child who's an epileptic and is on dilantin or on phenobarbital, we should be aware that he is on medication and what the symptoms of a reaction or overdose might be. And they're all listed on these cards. The doctors send them and it's very clear.

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Q: Who keeps the cards?

A: They're kept with the health card of each child.

Q: And who would be the person who would be asked to prepare the cards of the children's symptoms to see if there was a problem or not?

A: I would.

Q: In all instances?

A: Well, if one of these children on medication are presented to the health office with any of these signs or symptoms or any unusual signs or symptoms, the aides are supposed to call me and notify me and I would make that comparison.

Q: You say if they appear with any of these signs of symptoms. How would the aides know if they had the signs or symptoms?

A: Well, how would anyone know? If they get to your office, somebody has observed that they are exhibiting some unusual sign.

Q: But how would the aide know which particular signs or symptoms are the ones to look for?

A: They're listed on the cards.

Q: So the aide would look at the card, compare the symptom of the child, and then call you if they felt that you were needed?

A: I hope that they would call me even before they looked at the card if there is any question at all that the child is having unusual symptoms.

Q: Was this practice of calling you in effect prior to March of 1981?

A: I'm not sure. Not at all times. I'm not sure.

Q: But not at all times?

A: Probably not.

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Q: Now, did the aides call you up every day just prior to giving this medication to the children who come in, either the PRN —

A: Of course not. They're standing orders. The PRN medication, yes. The other, no.

Q: PRN, yes?

A: Yes.

Q: They called you up before they gave the medication?

A: Well, that didn't occur at first but now it does.

Q: When did that change take place?

A: I think it was October.

Q: October of what year?

A: Nineteen-eighty.

Q: The aides were put on in October 20, 1980. Is that correct?

A: Well, then maybe it was November. I'm not sure when it happened — and with a migraine headache.

Q: I'm not asking about anything particular. I'm just asking you what the practice in the district was to particular instances in October and November. Was there a particular instance, Mrs. Caldarera?

A: I thought you weren't asking me about that?

Q: Well, I am now.

A: Yes, there was.

Q: What happened in that incident?

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THE COURT: Just a minute. Before we get into that, let me see if I understand something. As far as the administration of medicines, generally, and assuming they're always on the prescription for the orders of the particular physician involved, generally, it would fall under two classes. A PRN situation, which is as necessary, depending upon the judgment of the School Nurse as to what she sees, what symptoms she detects; and the other is on a standing order basis, where there are certain specific dosages at certain specific hours of the day.

THE WITNESS: And those have to be removed every three months. Then there's a third one. The temporary treatment of a child who is recuperating from a strep throat, who is on an antibiotic for a short period of time. They're continuing but they're back in school.

THE COURT: But each of these three instances, at least, before March of 1981, between or among yourself and the other two aides shows medicines could be or were administered without consulting directly with you first?

THE WITNESS: The regular basis. Ones could be given on a regular basis. Ritalin, for instance, is prescribed to be given daily at a specific time. PRN medications, you have to make a judgment on whether the child really needs it since it's written, whenever necessary.

THE COURT: Well, what I'm getting at is, the two school aides, could they have done either one or the other of those two medicine dosage administrations before March of 1981, without having found it necessary to consult you first?

THE WITNESS: They did but that's been changed.

THE COURT: And at that time —

THE WITNESS: And some of it was changed before March of 1981.

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THE COURT: Well, if I understand it, you felt that in the case of these two ladies, since each was an R.N., that this was perfectly — plausibly within the scope of their function?

THE WITNESS: I did think that was so. I think I was a little disenchanted about that. I was told that it was not —

THE COURT: Well, forgetting the legalistic of it. I'm talking about —

THE WITNESS: They're Registered Nurses, and they can read a prescription and follow directions and hopefully understand what they're giving the medication for.

THE COURT: From that standpoint, only you, yourself, had --in fact, had no fears —

THE WITNESS: That's true.

THE COURT: —that they were engaged whereas, if necessary, for that kind of administration of medicine?

THE WITNESS: Right.

THE COURT: All right.

Q: Has a teacher ever, in your experience in the school district, dispensed medication to children?

A: No.

Q: Is there any reason why not, that you're aware of?

A: Well, as far as I know, that's a School Nurse function. They're not trained to recognize and understand the treatment of illness.

(Transcript, I-101/14 to 111/19).

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Concerning immunization records, Calderara said, parents would sometimes call the health offices of the schools and she as school nurse or the aides as R.N.'s would explain the necessities for immunization as well as the risks of exclusion.

Concerning accidents on school grounds, at least as was the practice before March 1981, Calderara said she or the school aides would administer first aid and determine the need for ambulance or parental contact, depending on the severity of the injury. Before March 1981, she said, the aides would handle these cases as would she. Indeed, she said, aides did first aid in their health offices in their schools almost everyday. Each of them prepared accident reports and signed them.

Aides would do urinalysis if certain symptoms were demonstrated in children.

The school aides wore white nurses' uniforms before April 1981. Calderara said Anne Marrinan told her the Superintendent told her not to wear such uniforms. Kathleen Bianco still wears a nurses' uniform, however, she said, because she has another job after school.

Calderara said the children in the schools were never told about a change in function in the aides as differentiated from school nurses. Nor did Calderara believe the teachers in the schools perceived the aides as anything other than school nurses.

Aides routinely examined children for head lice, informed parents if the examinations were positive and excluded children if necessary.

Calderara said there is in the school a secretarial aide for routine typing work for the health offices when necessary. School aides did not do such work.

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Robert A. Hands, Jr., M.D., is the School Physician and Medical Inspector for the district. His medical specialty is pediatrics. Generally, he testified, he directs school medical activities, including physical examinations of students for sports, scoliosis and Tine tests, supervision of school nurses, decisions on parent/nurse interactions, policy decisions for the school, educational activites through P.T.A. functions and lectures, and work with the child study team. He is not empowered to give medical advice for children or specific treatment, except advice to the children and their parents to seek their own physicians. On the other hand, he said, 70 or 80 percent of the children in the district are his own patients. Thus, he said, he sometimes is required to send notes from the school physician to himself as family physician.

He said he was aware of school nurse duties generally. A school nurse administers first aid, keeps records like attendance and health records, assists the school physician, does screening programs for the school physician, monitors infections or contagious diseases, isolates those who she thinks have problems like head-lice infestation and refers to family physicians.

He was also aware of the duties of the school aide. Those duties are similar, he said, except for in-between screening between school nurse and school physician. School aides organize offices, ready children for examinations, and screen children.

He said he was satisfied with performances of the school nurse and school aides this year (1980-81). In the Cavallini School in particular, he said, the performance by school aide Anne Marrinan has been superior to that of the school nurse assigned there before.

He aided the Superintendent in restructuring the school nurse program. He reviewed the school aide job description and felt it seemed appropriate. Accordingly, he approved it. (J-34).

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The circumstance that the two school aides, Marrinan and Bianco, are R.N.s, he said, is a definite asset to the Upper Saddle River district. He was not aware that school aides had exceeded their job description.

On cross-examination by the Board's attorney, Dr. Hands said he saw no difference between a school nurse and a registered nurse medically. He interpreted the phrase "practical nursing experience" in the school aide job description (J-14) to include R.N.s and any others with nursing experience generally. Significantly, he felt school aides should be at least licensed practical nurses. He believed the job description of the school aide (J-14) could be the job description of the school nurse in the Upper Saddle River district. In performance, he said, there is no major difference. He conceded he had not seen the school nurse responsibility description (J-5) before.

Anne Marrinan, R.N., testified for petitioners that she has been employed as a school aide by the Board at Cavallini School since October 20, 1980. Before that she had worked for the Board as a substitute nurse, appearing on a substitute list for two and one-half years. Though not certified as a school nurse in New Jersey, she is a registered nurse certified in New Jersey and New York. She holds a substitute school nurse certificate issued by the Bergen County Superintendent of Schools three years ago.

She received her R.N. in 1959 after nurses' training at Bellevue Hospital, New York City. Afterward, she served one year as a graduate nurse there.

On October 1, 1980, the Board put her on its permanent substitution list for school nurse. When she agreed to be school aide for the Board beginning October 20, 1980, she was told simply to continue the work she had been doing. Her supervisor was to be Theodora Calderara.

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Shown Exhibits J-16, 17 and 18, she identified them as parent referrals that she signed as "school nurse," informing parents of results of scoliosis testing or Tine testing by the school physician. In course of her duties, at least as of the time she was first hired as school aide, she would typically speak to parents concerning the general health of their children or concerning specific matters of health for specific children.

She said she did the same thing in the matter of reports after her hire as school aide on October 20, 1980 as she did before then as a substitute school nurse.

Concerning her abilities to perform clerical or secretarial functions, she said she can type but cannot take shorthand.

On occasions, on her own authority as nurse, she said, she excluded children from school and called their parents in explanation thereof. Beforehand, she said, she did not find it necessary to tell the principal nor to ask direction of the school nurse. Since March 1981, she said, that procedure has changed and she now needs the okay of the school nurse first.

She administered medication to students. She is called by students "nurse" or "Mrs. Nurse."

She calls the school nurse when she feels she needs specific advice or direction, although not for first aid, which she does herself without any direction as her principal work. She takes blood pressures routinely from teachers and students.

Sometime in November 1980, she met with Calderara to go over getting new enrollment health records filled out and updated as to physicals, etc. There was no discussion concerning procedures for accident reports or daily health logs. The procedures were never really clarified to her about when she should call for direction or

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supervision. She simply continued doing what she had done before as a substitute school nurse. No one in the administration ever told her to do anything different. Concerning immunization records, she said the school nurse showed her how to keep them and how to send notices home for completion. She was told she could do that without checking with the school nurse first. The principal of her school was reluctant to give her any direction and when necessary, she said, she would call the school nurse instead.

She said a written policy for first aid procedures by the school physician with help of the school nurse has not been prepared, as required by paragraph six of Calderara's memo of March 12, 1981. (J-15; but see paragraph VII of J-5.)

Kathleen Bianco is a 1980 graduate of Seton Hall University with a Bachelor of Science in Nursing. She is an R.N.. She was employed on October 20, 1980 as a school aide at Bogert School. She does not hold a school nurse's certification.

At her hiring, she said she was told of duties of her job as aide and the job description was discussed with her by building principal Franchino. She was told Mrs. Calderara was her supervisor. No specific job limitations were given to her, but her duties in general were discussed.

In general as she performed her function, she would talk with parents, for example, concerning head-lice problems or first-day absences. Shown Exhibit J-20, a series of accident or incident reports in the health office at Bogert School, she said that all except one were prepared by her. Typically, she signed these reports as "R.N." In reports for October 21 and 22, 1980, she said she performed treatment on children reporting to her health office. She did so also on February 27, 1981, as another example. On January 9, 1981, following an accident to a school employee, she dressed a wound, applied pressure, and sent the employee to hospital, all without consulting the school nurse first.

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After her report of the incident of February 27, 1981, she said, the system of signing accident reports changed. She was told by the Superintendent it was inappropriate for her to sign such reports as "R.N." This was after suit was begun.

Typically, she said, when children came to her health office she did not always call the school nurse first to report the visit, but only when more than a band-aid or an ice pack seemed indicated. Generally, she drew on her experience in first aid to deal with the children.

She said there was a clerical aide assigned to the school general office to type and do attendance records. That employee, however, did no typing for the health office. Students always called Bianco "Nurse," as did the teachers.

Concerning exclusion of children from school, at least prior to March 1981, she said she often called the school nurse but would on occasion exclude children on her own authority and based on her experience when the nurse was unavailable. Such occasions would often involve head-lice infestation or suspected conjunctivitis.

Generally, before March 1981, she said, she did not contact the school nurse on a daily basis. Since March 1981, however, she said, she usually does contact her each day.

Testifying for the Board, Robert Franchino, Principal of Bogert School for 15 years, said that in September or October 1980 he asked petitioner Rooney if she was interested in the position of school aide. At the time, she was doing substitute school nurse work. Franchino said petitioner declined, saying she herself was a certified school nurse and could not accept a position as an uncertified aide. She was furnished a copy of the job description.

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Franchino interviewed Kathleen Bianco for the position of school aide on October 15, 1980. He also interviewed some six other candidates, some of whom were registered nurses. Two of those were not and had neither nursing nor first-aid experience. They were not considered for the position for that reason.

Franchino said he told Mrs. Bianco about the job description and the "lines of communication." He said she would check with the school nurse. They were to communicate frequently by telephone and in person.

Shown Exhibit J-20, an incident report of October 22, 1980 at Bogert School indicating "Nurse Kathleen Bianco" excluded a child following a playground accident, Franchino indicated the school nurse had been given authority in the district to exclude children in his absence.

On cross-examination, Franchino conceded financial concern in the district was the reason for creation of the school aide system. He conceded the two school aides wore white nurses' uniforms, but he did not find it improper because he felt the color white is associated with medical treatment.

Thomas J. Benson, Superintendent in the district since 1974, testified he learned during the 1979-80 school year that school nurse Russell was to retire. During the Spring of 1980, the Board inquired of him whether the district needed two school nurses. His reply, he said, was he thought the district could get along with one school nurse plus coverage by aides for the two other school buildings.

A job title approval form for the school aide position was submitted to the County Superintendent on September 19, 1980. It was approved on September 24, 1980 (J-6).

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In adoption of the school aide system in replacement of the retiring school nurse (see J-14), Benson said, coverage for three full buildings was a motivation. Economy, he said, was another. He conceived the school aides would do "nitty-gritty details" in the health offices like typing, arranging groups for examinations, keeping records, and making phone calls to classrooms and to parents.

The position of Mrs. Russell as the retiring second school nurse, he said, was never filled by the Board in view of the new school aide system. The position was never formally abolished by Board action. The reason for that, he said, was "we don't abolish unless we withdraw the service."

In his judgment, the circumstance that school aides were R.N.s was a "plus" for the district in the sense of their being "over-qualified for the position."

On cross-examination, Benson said he was not sure whether he told the two school aides, Bianco and Marrinan, not to use their nursing skills. He said he told them to follow the school aide job description.

He said in October 1980, when the two school aides were hired, he did not know if the respective building principals told them not to excuse pupils without the okay of the school nurse. He did not know if the principals told the aides to report all accidents to the nurse. Though he observed the school aides wearing white uniforms, he never spoke to them about the practice until after litigation began. He conceived as among the duties of the school aides the giving of "TLC." He thought it likely that nurses are more capable of this than laymen. That Marrinan and Bianco were trained in first aid was the reason for their employment as aides. He felt the aides as well as teachers and himself, if necessary, were capable of administering adrenalin by injection in case of bee-sting emergencies. He thought it proper for aides to conduct Tine tests if properly instructed. Likewise, he thought the aides could do audio-visual tests if properly instructed, as well as take blood pressures.

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Shown a series of letters between Benson and Calderara (J-26 through J-32), Benson was asked as follows:

Q: Isn't it true you wrote these letters to Mrs. Calderara in reaction to the filing of the law suit?

A: I wrote the letters to Mrs. Calderara to be sure that we're clearing up an understanding with an employee of what was supposed to be done and how we were doing it and whether or not the communication between that employee and the employee representative had been made.

Q: In the past, during the course of your time as Superintendent of Schools, have you written letters like this to other employees when you were concerned about them understanding their directions and things like that?

A: In the 20 years of administration I've written many letters to people to clarify the understanding of job procedure, yes.

Q: Ever had a complaint like this over such a period of time?

A: These letters ran from January of 1981 through — the last one from Mrs. Calderara was in April. The last one from you is March 25, back and forth several letters.

Q: Isn't that somewhat unusual?

A: The unusual part of any situation is that its rather unusual for a district to be involved in this kind of litigation.

Q: Mr. Benson, isn't it a fact that you wrote these letters to establish a record to help you with your defense in this case? I remind you you're under oath.

A: I don't understand the question.

Q: In fact, you wrote these letters in order to establish a record to help you to prepare and establish a — establish this case.

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A: Had that — no, to prepare — that's not the same question. Your honor, I don't understand his question.

Q: I'll try to explain it. Didn't you, in fact prepare these letters for the sole purpose of establishing a record upon which the school district might base its defense for this lawsuit?

A: I prepared these letters for the sole purpose of doing my job.

(Transcript, IV-31/25 to 33/11)

DISCUSSION

Hearings in this matter were extended. The proofs, including some thirty-seven-odd multiple exhibits and testimony from seven witnesses, are voluminous. Daily health logs in three schools, for example, covered the entire academic year of 1980-81. A considerable amount of the testimony and proofs covered events and administrative correspondence in the months after the petition for relief was filed with the Commissioner on December 29, 1980. Both parties would seem to have approached their respective problems of proof on the supposition that such post litem evidence is relevant, petitioners perhaps because it revealed admissions supportive of their allegations, and the Board perhaps because it alleged in its "Ninth Affirmative Defense" that if school aides had acted as school nurses they violated their instructions and the Board is not responsible for such administrative delinquency. Philosophically, the law has long recognized that statements ante litem motam are presumptively more likely to be trustworthy because given at a time when no motive to dissemble or distort the truth exists. Conversely, statements and transactions post litem motam are presumptively less likely to inspire credence, or at least the kind of belief reasonable minds might require in resolving disputed assertions and contentions. The exchange of correspondence between Calderara and the Superintendent after suit began, as an example, suggests that underlying the exchange lay the spectre of the suit itself. If its allegations were sustained, would there

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be repercussions reflecting badly upon administration or nurse? One senses, uneasily, the relationship between the two is strained; and one can only hope for its improvement. Calderara in particular seems to have become embroiled in a volley of administrative exculpations.

In any event, as one attempts marshalling and understanding the proofs, there seems profit in narrowing the focus of time and circumstance to events between August 1980, as the Board addressed school nurse Russell's retirement, and December 29, 1980, when suit was begun. As petitioners have put their case, success or failure shall likely depend on what happened in those critical four months.

At prehearing, the issues framed were (a) whether the two school aides, registered nurses but without school nurse certification under N.J.A.C. 6:11-12.9, were performing functions reserved to the school nurse under N.J.S.A. 18A:40-1 et seq.; and (b) if so, whether as against the Board their employment and performance of function is violative of petitioner Rooney's tenure and seniority rights under N.J.S.A. 18A:28-12:

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

Thus, in the critical four months of August-December 1980, as school nurse Russell was retired, did the Board conceive, design and implement in the district a school aide system violative of petitioners' preferred eligibility rights?

In conception, certainly, the school aides were clearly a thrifty answer to retirement of a school nurse and the uncomfortable fiscal prospect of hiring a certificated school nurse at twice the salary of an aide. Rooney was the required first choice as replacement school nurse. She had been riffed in 1975 at step 13 of the salary guide, some

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$14,000. At step 14 of the 1980-81 salary guide she could be expected to have become entitled to a salary of some $20,000. "School aides," on the other hand, might be available at half the cost. The Superintendent was perforce asked euphemistically by the Board "to investigate restructuring of our school nurse staffing." (J-1). The Superintendent and Principal Franchino both testified the motivation was financial. T-104/12 to 106/3; T-78/8-10. With two school aides each at the half the salary of one school nurse, there would be health office coverage in all three schools for the first time since 1975. The goal was full coverage for three schools.

In design, the school aide system invoked procedures of N.J.A.C. 6:11-4.9, calling for paraprofessional approval by the county superintendent. A job description was prepared and approved by him on September 24, 1980 (J-6) and by the Board on September 29, 1980 (J-2). The description specified proficiencies in secretarial skills, first aid training and practical nursing experience. It described duties merely as clerical, secretarial, student services and organizational tasks assigned by the school nurse. Its very generality in describing the duties, as later events suggest, appears studied.

For in implementing the system, the Board promptly hired two uncertified R.N.s at $9,050 a year. Only R.N.s were considered. Two applicants without such qualifications were rejected because they had no such qualifications. T-III 101/21 to 103/14. One of the two hired (Marrinan) did not have far to go since she was already employed as a regular substitute school nurse. She was told to continue as she had done before. Even Rooney herself, who worked as a substitute school nurse in September and early October 1980, was offered a school aide position. That the Board and administration conceived, designed and were attempting to implement a bona fide paraprofessional aide system rather than to continue and thus to expand school nursing coverage is doubtful at best. That Board and administration were instead attempting in the name of economy to increase nurse-to-student ratios in the schools seems far more evident.

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Once in place, each in a school, the two new R.N.-aides, dressed in nurses' white, began work. Reports of monthly health office activities by Calderara to the Board suggest the two R.N.-aides and Calderara individually functioned as if each were a fully invested school nurse (J-7 to J-12). Review and comparison of daily health office logs for the three schools fortifies the inference. Aides' reports were signed as "school nurse" or "R.N." They received calls from parents and discussed their students. They provided such services as application of splints, treatment of lacerations, bruises. They looked for fractures. They dispensed medication PRN or as directed by students' physicians. They administered eye drops, ointments, headache prescriptions and antibiotics. They examined for head lice infestation and conjunctivitis. They excluded children on their own authority and experience. They did urine tests. They wrote their own reports but, significantly, did no other such clerical or secretarial work as the job description specified they be proficient in.

Records of aide activity between October 20, 1980, when they were hired and the end of the year in December, imply no real effort by administration to delimit aide activity or to inhibit their doing whatever was consistent with their R.N. qualification. No cautions were issued that they restrict their functions as "aides." It seems apparent they were free, indeed tacitly expected, to function as R.N.s. Marrinan, who had held a substitute's school nurse certificate issued by the county superintendent three years before, who had been a substitute nurse during that time and who had by October 1980 become a regular, daily substitute nurse, was told "to pretty much continue with what [she] had been doing..." T-II 38/25 to 39/7. The Board even wanted petitioner Rooney to become an aide; one may well wonder why. That the aides were as much in charge of their respective school health offices as if they had been certificated school nurses was compelled by practical circumstances too. In their physical environment it could hardly have been otherwise: Calderara could not reasonably have been expected to "supervise" the aides when for 90% of the time she was out of their presence in a health office in

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another building (J-30). Traffic in health office visits in the three schools from October to December 1980 illustrates the expanded effective nurse coverage achieved in the district (J-7 to J-10):

	REYNOLDS (School Nurse) (Calderara)	CAVALLINI (RN-Aide) (Marrinan)	BOGERT (RN-Aide) (Bianco)
Oct - Nov 1980	334	390	351
Nov 19 - Dec 15	354	391	471
Dec 17 - Jan 20, 1981	365	321	257
Jan 23 - Feb 12	325	376	315

Even after suit was begun, volume of visitation traffic remained substantially constant (J-11, 12).

The Board took no action to abolish the school nurse position left vacant by Russell's retirement. "We do not abolish the position," said the Superintendent confidently, if cryptically, "unless we're going to withdraw the service." T-III 112/21-22.

From the above, one can readily infer, as I do, that in conceiving, designing and implementing a school aide system in the critical first four months of the 1980-81 school year, the Board sought not only to replace the retiring school nurse with one R.N.-aide, but to use a second R.N.-aide to expand and complete full nurse coverage for all three schools. Its purpose was quite apparently to change the overall district nurse-to-student ratio, in the name of economy, from 1/x to 3/x. As put in place, the system accomplished replacement and substitution of certificated positions with uncertificated personnel and was, therefore, abusive of school aide regulations of the State Board of Education in

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N.J.A.C. 6:11-4.9. In Scrupski v. BOE, Warren Township, 1977 SLD 1047, 1051, a Board purported to abolish two of three school nurse positions. It created five new "school health aide" positions in their stead. The new aides were required to be R.N.s and to be expert in first aid. Their assigned duties did not differ significantly from those of the certificated school nurse. The Commissioner found design and implementation of the aide system to be pretextual. It was obvious, he said, the Board did not eliminate the two school nurse positions. Rather, it relegated duties of the two positions to five aide positions staffed by persons not certificated under N.J.A.C. 6:11-12.9. It thus unlawfully and improperly replaced teaching staff members with aides. Ibid, p. 1055. The clear policy of the State Board since 1968 is that "aides shall not be used to relieve teachers of their teaching responsibilities nor to change the overall student-to-teacher ratio in a school." See Regulations for Employment...of School Aides, State Board of Education, February 1968, p. 3.

Recent decisions of the Commissioner rejecting challenges to health aide systems in other districts leave uneroded the holding in Scrupski. The two cases are factually inapposite here and indeed in each one the Commissioner distinguished the kinds of functions performed by the aides from the panoply of substitutionary functions improperly given the aides in Scrupski. In one of the cases, Wyckoff Ed. Assn. v. Wyckoff v. Bd. Ed., 1981 SLD _____ (Comm'r's decision, October 5, 1981) (cross apps. pending, St. Bd.), it appeared the Board had employed four certificated school nurses in its five schools for at least five years before 1978. In the spring of 1978, one of the school nurses died and was not replaced. The Board began utilizing four clerical aides in lieu of the nurse. During the time a nurse was not present, one of the uncertificated clerical aides was in charge of the nursing office and would on those occasions do minor first aid, take temperatures and exclude ill children. The administrative law judge found the aides were not assigned or performing the kinds of substantive obligations expected to be performed exclusively by certificated school nurses under N.J.S.A. 18A:40-1 et seq. Moreover, he said, the aides were not replacements for school aides as was the case in Scrupski. Ibid, Com'r's slip opinion, p. 19; OAL DKT. EDU 5174-80, slip opinion, p. 12.

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In the other case, Bernards Township Ed. Assn. v. Bd. Ed. Bernards Township, 1981 SLD _____ (Com'r's decision, September 29, 1981) (cross apps. pending, St. Bd.), it appeared the Board since 1976 had employed four certificated school nurses and three "medical assistants" in its five schools. Declining enrollments and a projected school closing in 1982 prompted the Board to reduce its school nurse staff by one for 1980-81, at which time, some four years after institution of its medical aide system, the system was challenged by petitioners. But withal, as found by the administrative law judge, though the Board reduced its coverage by certificated school nurses in its three elementary schools from two to one, medical assistant coverage remained constant with one assigned to each elementary school, while school nurse coverage at junior high and high schools remained unaltered. Moreover, he found, the reduction in force did not alter the duties of the medical assistants, whose functions were mainly (60% of their time) clerical in nature; nor were duties reserved exclusively to the certificated school nurses altered in any substantial way, if at all. There was no resulting wholesale reassignment of nurses' duties to the medical assistants of the quality or to the degree that proved fatal in Scrupski. That is to say, the Board had not effectively replaced teaching staff members with aides. Ibid, Com'r's slip opinion, p. 19; OAL DKT. EDU 3524-80, slip opinion, p. 5-13. In affirming the Initial Decision dismissing the petition, however, the Commissioner ordered the Board to resubmit for county superintendent's approval the job description for the medical assistant with deletion of the duty "to dispense medication according to Board policy under direction of the school nurse..." Only a certificated school nurse who is a teaching staff member in the employ of a local board of education, it was held, has appropriate credentials to satisfy requirements of the State Board of Education to administer medications when authorized by the school medical inspector. Ibid, Com'r's slip opinion, p. 20-21. That here R.N.-aides typically administered medications PRN or as directed without proper certification to do so seems less significant for its inherent impropriety perhaps than for what it reveals of Board intent in design, conception and implementation of the aide system itself.

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For here the Board's resort to the form of the paraprofessional system is more than just an abstract abuse of that system or of N.J.S.A. 18A:28-2. It is, as well, an abridgment of the substance of petitioner Rooney's preferred eligibility rights under tenure laws. No requirement of school law under N.J.S.A. 18A:40-1 mandates district employment of more than one school nurse. Whereas here, school nursing services are continued and indeed expanded, however, school law under N.J.S.A. 18A:28-2 mandates provision of such services only through certificated school nurse personnel. Preferred eligibility for such employment lay with petitioner under N.J.S.A. 18A:28-12. Tenure laws, it is said, were designed to aid in establishment of competent and efficient school systems by affording teaching staff members a measure of security in the ranks they hold after years of service. They represent important expressions of legislative policy that should be given liberal support consistent with legitimate demands for governmental economy. If the Board's resort to form over substance here were to prevail, petitioner's tenure and those of teaching staff members generally would indeed rest on frail reeds. See Viemeister, supra, p. 218-19 of 5 N.J. Super. No mere written change in school aide job description will suffice to remedy the wrong done her by the Board in not preferentially re-employing her as school nurse in October, 1980. (Cf. Bernards Township Ed. Assn., supra, (Com'r's slip opinion, p. 21)). She is entitled to reemployment. Viemeister, supra, p. 217, 219 of 5 N.J. Super.; Scrupski, supra, p. 1056 of 1977 SLD. In Scrupski, which involved non-tenured nurses whose employment had been improperly discontinued, it was held their employment should have been continued and they were reinstated even though N.J.S.A. 18A:40-1 does not mandate district employment of more than one school nurse. Ibid, p. 1054, 1056. In Viemeister, which involved a tenured principal whose employment had been improperly terminated, his reinstatement was ordered. Thus, petitioner Rooney, who though not employed since 1975, is nevertheless tenured and preferentially eligible to fill unabolished position vacancies, is as entitled to reemployment as Scrupski and Viemeister were to reinstatement, until or unless in future the Board properly abolishes the vacant position. This Board will not now be heard to say, merely, that it declines to fill such vacancy, in face of Rooney's preferred eligibility for it. In short, Rooney is as entitled to reemployment as school nurse Russell was to continued employment had she not retired.

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Based on the foregoing, having had the opportunity to hear the witnesses in testimony, having reviewed the exhibits and considered arguments of counsel, I hereby **FIND** and **DECLARE:**

1. The above discussion, to the extent of any intermediate conclusions of fact, is adopted herein.

2. Etta Rooney is a tenured, certificated school nurse on a preferred eligibility list since 1975 when her employer, Board of Education of the Borough of Saddle, eliminated one of three school nurse positions for reasons of economy.

3. At the end of the 1979-80 school year, one of two remaining school nurses retired. The position was not abolished.

4. Instead of offering the vacant position to petitioner, the Board, with County Superintendent approval, created a new "school aide" position in September, 1980, ostensibly pursuant to N.J.A.C. 6:11-4.9.

5. On October 20, 1980, the Board hired two R.N.s as school aides, neither of whom was a certificated school nurse, and installed each in health offices in two schools, assigning the last remaining school nurse to the third school health office.

6. In conception and design, the school aide system was pretextual and was intended (a) to substitute uncertificated nursing personnel for costlier certified personnel, (b) to increase the nurse-to-student ratio and thereby (c) to expand coverage in district health offices.

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7. In implementation during the four months from October 1980 until institution of suit, conception and design for increased coverage was effectuated: the aides functioned in substantial independence of each other and of the single school nurse in delivery of nursing services otherwise limited to school nurses under N.J.S.A. 18A:40-4, 7, 8 and N.J.A.C. 6:29-1.1 to 4.5.

8. As conceived, designed and implemented, the Board's school aide system was at once abusive of the paraprofessional regulations of the State Board of Education under N.J.A.C. 6:11-4.9 and violative of petitioner Rooney's preferred eligibility rights of reemployment under N.J.S.A. 18A:28-12.

CONCLUSION

Accordingly, I **CONCLUDE** that the action of the Board by which it created and filled two school aide positions in 1980 should be, and is hereby, set aside as illegal and improper and, further, that such action constituted abridgment of petitioner Rooney's preferred eligibility rights of reemployment as school nurse. The Board is **ORDERED**, therefore, forthwith to reinstate petitioner as school nurse and to compensate her as well by a sum of money equal to what she would have earned as school nurse had she been reemployed from October 20, 1980 to date of reinstatement, less mitigation.

Lastly, noting that on this evidential record the appearance of Upper Saddle River Education Association is that of nominal party, I **ORDER** the petition for relief be **DISMISSED** in respect of it. In like manner, since I find no occasion for interposition of equitable relief enjoining potential future conduct by the Board, the petition for relief is **DISMISSED** in that respect as well.

Judgment is entered accordingly.

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

I hereby **FILE** this Initial Decision with **FRED G. BURKE** for consideration.

December 8, 1981
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

December 9, 1981
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 11, 1981
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

awe

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EXHIBITS MARKED IN EVIDENCE

J-1 Board minutes, July 8, 1981, in which Superintendent advised of impending resignation of one school nurse and his plan to restructure school nurse staffing with only one school nurse position and with nurses' aides to cover two of the schools under supervision of the remaining school nurse."

J-2 Board minutes, September 29, 1980, in which Board authorized Superintendent to hire school aides "in connection with the district's health program" and Board approved job description for the school aide position.

J-3 Board minutes, October 27, 1980, approving employment of two school aides to assist the school nurse, effective October 20, 1980 through June 30, 1981 at $9,050 salary per annum each.

J-4 Board minutes, April 27, 1981, approving adoption of regulation designating school nurse responsibilities "as originally promulgated and reviewed for approval by the Board in September 1980" and regulations designating duties and responsibilities of the elementary teacher in the district. (See J-33.)

J-5 Job description of school nurse, as revised February 19, 1981, as approved by resolution of Board April 27, 1981 (J-4), regulating, inter alia, administration of oral medication (V) and first aid (see definition in VII). (See J-33.)

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J-6 Application by Board to County Superintendent for approval of school aide program; application made September 19, 1980 and approval of County Superintendent given September 24, 1980; showing, inter alia, "types of proficiency needed: secretarial skills, trained in first aid and where possible have had practical nursing experience."

J-7 Health Department Report, October-November 1980 by school nurse, showing, inter alia, blood pressure readings, heights and weights were done by the school aides in Bogert and Cavallini Schools, and by the school nurse in Reynolds School; showing conduct of parent-aide conferences and teacher-aide conferences at Cavallini and Bogert Schools, and reporting 334 health office visits at Reynolds School, 390 at Cavallini and 351 at Bogert.

J-8 Health Department Report by school nurse, November 19, 1980 to December 15, 1980, showing teacher-aide, parent-aide conferences at Cavallini and Bogert Schools and medication administration at Cavallini by aide, and reporting 354 health office visits at Reynolds, 391 at Cavallini and 471 at Bogert.

J-9 Health Department Report by school nurse, December 1980 to January 1981, showing school aide activity at Bogert and Cavallini Schools, which included first aid, daily medication, office visits, teacher-aide and parent-aide conferences, and reporting 365 health office visits at Reynolds, 257 at Bogert and 321 at Cavallini.

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J-10 Health Department Report by school nurse, January 23, 1981 to February 12, 1981 showing school aide activity in Bogert and Cavallini Schools, including office visits, parent-aide and teacher-aide conferences and daily medication administrations, and reporting 324 health office visits at Reynolds, 315 at Bogert and 376 at Cavallini.

J-11 Health Department Report by school nurse, February 13, 1981 to March 19, 1981, showing activities of school aides in Cavallini and Bogert Schools by school aides, including office visits, parent-aide and teacher-aide conferences and administrations of daily medication, and reporting 309 health office visits at Reynolds, 358 at Bogert and 632 at Cavallini.

J-12 Health Department Report by school nurse, March 29, 1981 to April 14, 1981, showing school aide activities at Bogert and Cavallini Schools, including office visits, parent-aide and teacher-aide conferences, and reporting 549 health office visits at Reynolds, 308 at Bogert and 510 at Cavallini.

J-13 Help Wanted Advertisement, Bergen County Record, October 5, 1980, for "School Aide - for health office, elementary schools, secretarial skills, trained in first aide, some nursing experience desirable, 190 working days from 8:00 a.m. to 4:00 p.m."

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J-14 School Aide Job Description, dated October 1980, requiring, inter alia, "the school aide should be trained in first aid where possible, have had practical nursing experience." Also attached to J-6 and adopted by Board resolution in J-2.

J-15 Post-litigation Memorandum, March 12, 1981, from school nurse to school aides.

J-16 Health Report to parent, dated January 21, 1981, concerning Spinal Screening Program and recommending follow-up physical by own doctor, signed by school physician and "Mrs. Marrinan, School Nurse."

J-17 Health Report to parent concerning Tine Tuberculin Skin Testing Program, dated January 22, 1981, signed by school physician and "Anne Marrinan, R.N."

J-18 Health Report to parent concerning Tine Tuberculin Skin Testing Program, dated January 21, 1981, signed by school physician and "Anne Marrinan, R.N."

J-19 Series of accident reports concerning students, all signed by school nurse and one signed "K. Bianco, R.N.," March 4, 1981.

J-20 Series of accident or incident reports during 1980-81, seven signed by R. Bianco, R.N. as "Nurse." Reports indicated first aid administration, parent notifications, pupil excusals and physician notifications.

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J-21 Series of accident reports, 31 in number, showing signatures by school aides as "Nurse," and detailing first aid, parent notification and/or physician notification, including bandaging and wrist splinting in some cases. Also indicating pupils excusals.

J-22 Health Logs and Individual Daily Reports for Reynolds School from September 3, 1980 to May 8, 1981 (most filled out and signed by "T.L. Calderarra, School Nurse").

J-23 Health Logs and Daily Reports for Bogert School, September 3, 1980 to April 14, 1981, signed by K. Bianco.

J-24 Health Logs and Daily Health Reports for Cavallini School, September 3, 1980 to May 8, 1981, signed by Ann Marrinan, school aide.

J-25 Letter from Theodora L. Caldarera, school nurse to superintendent, dated August 28, 1980, referring to meeting on August 19, 1980 when the Superintendent "asked my opinion of the possible hiring of two aides to fill the vacancy created by Mrs. Russell's retirement." [emphasis added]. Letter suggests instead hiring of a certificated school nurse to cover Bogert and Reynolds Schools with Caldarera covering Cavallini School. Letter suggested Superintendent thought school nurse could teach school aides to use audiometer and vision tester.

J-26 Post-litigation letter from Superintendent to school nurse, dated January 26, 1981.

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J-27 Post-litigation letter from school nurse to Superintendent, dated February 24, 1981.

J-28 Post-litigation letter, Superintendent to school nurse, dated March 3, 1981.

J-29 Post-litigation letter, Superintendent to school nurse, dated March 16, 1981.

J-30 Post-litigation letter, school nurse to Superintendent, dated March 19, 1980, saying, inter alia, school aides "have been performing more as school nurses than aides, " and "....I am not in their physical presence over 90% of the time."

J-31 Post-litigation letter, Superintendent to school nurse, dated March 25, 1981.

J-32 Post-litigation letter, school nurse to Superintendent, dated April 3, 1981.

J-33 Job Description "School Nurse Responsibility," as originally promulgated before October 1980. In contrast, J-5 has a new paragraph IV concerning direction and supervision of school aides by the school nurse, which was adopted by the Board subsequent to litigation.

J-34 Letter of school physician to Superintendent, dated September 20, 1980, approving job description of school health aide.

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J-35 "Duties and Responsibilities of the Elementary Teacher," as adopted and revised by the Board August 1980.

R-1 Interrogatories as propounded by Board on petitioners and as answered by petitioners, with annexments.

R-2 Requests for admissions as propounded by Board and as answered by petitioners.

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ETTA ROONEY AND THE UPPER SADDLE RIVER EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF UPPER SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Board excepts to the findings and conclusions by the Honorable James A. Ospenson, ALJ wherein he determines petitioner should be reinstated as school nurse. The Board contends that Judge Ospenson failed to properly address the issues and analyze the facts of the matter presently controverted. The Board seeks to blame tenured Nurse Calderara for the tasks assigned to the aides and their supervision, or lack thereof, claiming that she abdicated a great many of her duties and responsibilities and mislead the Superintendent. (Exceptions, at p. 4) The Board argues that conflicting evidence is offered in the record concerning the promulgation of the nurses/aides' duties. (Exceptions, at p. 7) Finally, the Board claims that its intent was to have but one school nurse, noting the testimony of the Superintendent who stated that the district does not formally abolish positions unless the entire category of service is eliminated. (Exceptions, at p. 9)

Petitioner's reply exceptions refute those of the Board and affirm the initial decision. Petitioner strongly objects to the attempt by the Board to submit new evidence by way of exceptions. Petitioner asserts that the case presented by the Court is a thorough and incisive disposition of this matter. The Commissioner looks with favor on petitioner's exceptions.

The Commissioner notes one determinative factor in the present matter. Petitioner, a tenured school nurse, has been on a preferred eligibility list since 1975. On October 20, 1980 when aides were hired to replace nurses, the position in question had not been abolished and petitioner's placement on the preferred eligibility list cannot be ignored. The Commissioner

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finds no merit in the Board's pleading of its intent to have but one nurse in the district. The fact remains the Board took no action to abolish the position in question. Nor can the Commissioner accept the Board's complaint that Nurse Calderara failed in her duties and responsibilities and mislead the Superintendent. The record is devoid of any action by the Board to bring charges against the school nurse for such serious allegations.

The Commissioner finds no merit in the Board's argument that wrong evidence was presented by Judge Ospenson.

Where conflicting evidence is offered on any issue and there is sufficient evidence contained in the record to reasonably support the findings made, the Commissioner will defer to the judgment of the hearer on questions of credibility since he/she had the opportunity to hear and observe the witnesses and so was in a better position to assess credibility. Cf. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976) In the opinion of the Commissioner the Court herein properly relies on Wyckoff Education Association, supra, and particularly on Scrupski, supra. Here, as in Scrupski, the Board relegated to uncertified school aides full-time nursing functions, N.J.S.A. 18A:40-1 et seq., in violation of petitioner's tenure and seniority rights. The Commissioner confirms herein the integrity of Scrupski.

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

Accordingly, it is determined that the Board's action in creating and staffing two school aides' positions in nursing was in violation of petitioner's preferred eligibility rights as school nurse and is herewith set aside. It is directed that petitioner be reinstated as a school nurse with salary and remuneration as of October 20, 1980 mitigated by any substitute earnings.

COMMISSIONER OF EDUCATION

January 22, 1982

You are viewing an archived copy from the New Jersey State Library.

ETTA ROONEY AND THE UPPER SADDLE RIVER EDUCATION ASSOCIATION,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF UPPER SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, January 22, 1982

For the Petitioners-Respondents, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Appellant, Beattie & Padovano
(Robert J. Lenrow, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

July 7, 1982

Pending N.J. Superior Court

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BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
A.C., in behalf of P.C.,	:	DECISION
RESPONDENT.	:	

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

For the Respondent, Henry J. Daaleman, Esq.

This matter has been opened before the Commissioner by Petition of Appeal filed by the Board of Education of the City of Plainfield (Board) on June 15, 1981 seeking reversal of a decision rendered by the Chief Classification Officer of the Department of Education, dated April 9, 1981, directing that P.C. be considered an educationally handicapped child with a nonspecific classification eligible to receive related services of psychological counseling and resource room placement.

By way of background to the matter herein controverted, the Commissioner notes that P.C. is a pupil from a Spanish-speaking background originally classified as trainable mentally retarded (TMR), reclassified as educable mentally retarded (EMR) and ultimately declassified after her family questioned such classification and she was found to be in the average range of intelligence upon testing on the Escala de Inteligencia Wechsler para Adultos (EIWA). Upon declassification, the parents of P.C. sought psychological counseling and educational support services for her which became the subject matter of the due process proceeding controverted herein. The Commissioner notes that the due process proceeding was originally sought by P.C.'s parents contesting her classification as EMR but was amended to seek the relief herein described after the Board's CST had reevaluated and declassified P.C.

The Board in its brief in support of its Petition argues that the classification officer exceeded his authority in determining P.C. to be a handicapped child without specific classification and therefore eligible to receive psychological counseling and resource room services pursuant to federal and state statutes and regulation. The Board's argument is predicated upon the foundation that both state and Federal regulations (45 C.F.R. Section 121a.5(b) and N.J.A.C. 6:28-1.2)

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define specific handicapping conditions and any child not capable of being classified within one of those conditions is not a handicapped child as defined by such regulations and therefore not eligible to receive services required by law and statute.

Respondent (A.C.), by way of answer to the Petition and motion to amend the classification officer's decision, seeks to amend those findings which held that P.C.'s educational deficits

> "***are based upon conditions in P.C. and not due to omissions in her educational programming***." (Slip Opinion, at p. 9)

Pursuant to such exception, A.C. requests the Commissioner to take official notice of the summary report of the New Jersey State Department of Education entitled, "The Status of Minority Group Representation in Special Education Programs in the State of New Jersey", dated November 1980 which concluded that Hispanic students, among other minorities, are classified as mentally retarded at a higher rate than are children of non-minorities. In view of the above-cited report and the most recent psychological evaluation which found P.C. not to have been mentally retarded, A.C. contends that P.C.'s educational needs require an individualized educational program (IEP) of remedial tutorial assistance to help her overcome her developmental lags.

A.C. likewise takes exception to that portion of the classification officer's decision which denies reimbursement for family therapy while directing counseling as an educationally related service from a person in the Board's employ who is trained in providing psychological counseling and is familiar with the Spanish language and culture. A.C. contends that the social and psychological evaluation reports stress the emotional trauma to P.C. and her family as a result of her misclassification as mentally retarded and, thus, she and the members of her family should be entitled to family therapy at Board expense.

The Commissioner has reviewed the entire record in the instant matter, including the classification's officer's decision and memoranda submitted by the parties. In rendering a determination in the instant matter, the Commissioner finds merit in the argument raised by A.C. relevant to the State Department of Education's summary report, ante, on minority groups representation in special education programs. In so doing, the Commissioner takes particular note that P.C., as will other children declassified as a result of the findings of the report and the administrative procedures undertaken to address and remediate its findings, will require the provision of transitional services designed to assist such children to bridge the gap between their former programs within the confines of special education classes for the mentally retarded and their eventual absorption into the mainstream. The Commissioner, however, likewise finds technical merit in the argument presented by the Board that regulations

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relating to categorical classification of handicapped children pursuant to N.J.A.C. 6:28-1.2 do not provide for classification of P.C. as a handicapped pupil with nonspecific classification as recommended by the decision of the classification officer. Notwithstanding such acknowledgement, the Commissioner does not accept the conclusion implicit in the Board's asserted position, namely that a child formerly classified as handicapped by the Board's CST can be set adrift without access to those services necessary for orderly transition into the educational mainstream. In the Commissioner's view, a child formerly classified as EMR, particularly one who suffers from the added educational disadvantages implicit in coming from a non-English speaking family and cultural milieu, has a right to receive all those services prescribed by the classification officer in his decision of April 9, 1981.

While the Board may be technically correct in its assertion that P.C.'s educational program requirements are no longer governed by the provisions of N.J.A.C. 6:28-1.1 et seq., the Commissioner finds that N.J.A.C. 6:8-1.1 et seq. provides more than ample authority to require the Board to provide those services directed by the Chief Classification Officer. The Commissioner notes that N.J.A.C. 6:8-2.1(c) provides:

> "The public schools in New Jersey shall provide:
>
> ***
>
> 5. Comprehensive guidance facilities and services for each pupil***."

N.J.A.C. 6:8-3.4 provides that:

> "(a) Pupil needs shall be assessed by teaching staff members to determine pupil attainment of educational objectives.***"

N.J.A.C. 6:8-3.8(a) mandates:

> "(a)*** For pupils with identified deficiencies after completion of six academic years of instruction beyond kindergarten, local school districts shall develop procedures for the development and implementation of individual student improvement plans.***" (Emphasis supplied.)

N.J.A.C. 6:8-3.8(b) requires that:

> "(b) Preventive and remedial programs, supplemental to the regular school program, shall be established.***"
>
> (Emphasis supplied.)

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Finally, N.J.A.C. 6:8-4.2(b) provides:

> "1. Pupils who perform below statewide standards on one or more of these statewide tests shall be provided with a comprehensive individualized assessment as specified in N.J.A.C. 6:8-3.4 and, on the basis of this assessment, provided necessary services to remedy those deficiencies identified which shall include but not be limited to the development and implementation of an individual student improvement plan.***"
>
> (Emphasis supplied.)

Accordingly, and for the reasons herein delineated, the Commissioner, while reversing the classification officer's determination that P.C. be considered an educationally handicapped pupil with a nonspecific classification, affirms the determination that the Board shall provide to P.C. all those services required and in the manner prescribed by the decision of April 9, 1981. The Commissioner further directs that the district's CST shall provide to the County Supervisor of Child Study a year-end report as to the services provided to P.C. and an educational assessment as to what further academic and supportive services may be required during the 1982-83 school year to enable P.C. to ultimately function effectively within the regular school environment. Independent family counseling at Board expense as requested herein by the parents of P.C. is denied; however, such denial does not preclude the inclusion of P.C.'s parents in such counseling sessions as may, in the professional judgment of the counselor, assist them in helping P.C. to more effectively adjust to the mainstream. Further, should the district child study team in the future deem such "related service" to be essential to P.C.'s academic success, it is not precluded from making such recommendation within the IEP as herein prescribed.

COMMISSIONER OF EDUCATION

January 27, 1982

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BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
A.C., IN BEHALF OF P.C.,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, January 27, 1982

For the Petitioner-Appellant, King, King & Goldsack (Victor E.D. King, Esq., of Counsel)

For the Respondent-Respondent, Henry J. Daaleman, Esq.

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

May 5, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 4858-81
AGENCY DKT. NO. 283-7/81A

THERESA MULHEARN,
Petitioner
v.
BOARD OF EDUCATION OF STERLING REGIONAL HIGH SCHOOL, CAMDEN COUNTY,
Respondent.

APPEARANCES:

Steven R. Cohen, Esq. for petitioner, (Selikoff & Cohen, P.A.)

William D. Hogan, Esq. for respondent, (Davis & Reberkenny, attorneys)

Record Closed November 18, 1981 Decided December 18, 1981

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

Petitioner appeals the action of the Board of Education of the Sterling Regional High School District (Board) which reduced her teaching position from full time to part time. She alleges that the Board has violated her seniority rights in contravention of the education laws.

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This matter was filed with the Commissioner of Education and thereafter transferred to the Office of Administrative Law as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. After the prehearing conference held on October 9, 1981, the Board filed a Motion for Summary Judgment with Exhibits. It also submitted the Superintendent of School's Affidavit. Petitioner filed a Cross-Motion for Summary Judgment with Exhibits and Affidavit in support thereof, and the Board filed a Reply Brief.

None of the salient facts are in dispute; consequently, the matter is ripe for Summary Decision (Judgment).

STATEMENT OF FACTS

The Board issued petitioner a contract on June 13, 1963, effective for the 1963-64 academic year, to "teach—subject to assignment." At that time, she held a teaching certificate, issued by the Department of Public Instruction of the State of Pennsylvania, which recognized her qualifications as a teacher of English and of French. Petitioner was assigned by the Board as a teacher of French. After application to the New Jersey State Board of Examiners for a teaching certificate, petitioner was issued, on February 3, 1964, a provisional secondary teacher's certificate which authorized her to teach French. This certificate was in force until July 1, 1964. However, on March 5, 1964, petitioner was notified, by the State Board of Examiners, that she had to earn three additional educational credits (neither English nor French credits) in order to qualify for her limited (permanent) secondary teacher's certificate in English and French. Petitioner earned these three credits during the summer of 1964, and on September 24, 1965, two years after her initial employment began, she was issued her permanent certificate showing her qualifications to teach both English and French. At all times, from the date of her initial employment until the present, she has taught only French at the secondary level.

Based on her certificate and her employment record, petitioner claims tenure as well as seniority over all less senior teachers of English and French. This claim is grounded on petitioner's assignment, by the Board, as a part-time teacher of French for the 1981-82 academic year. Petitioner demands full-time employment, asserting that the Board has, in its employ, two non-tenured teachers of English and nine tenured English teachers, all having less seniority than she.

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The Board argues that petitioner holds seniority only in those subject fields which were endorsed on her certificate at the time of her initial employment. It supports this contention citing Morer v. Board of Education of the Twp. of Teaneck, 1976 S.L.D. 963, 968.

The following undisputed discourse is gleaned from the Superintendent's Affidavit and the exhibits in evidence:

From the 1963-64 school year through the 1975-76 school year, petitioner was employed as a full-time French teacher in the school district. However, commencing with the 1976-77 school year, declining enrollment necessitated a reduction of the one French position from a full-time to a part-time position.

Notwithstanding the fact that such declining enrollment had reduced the remaining French position to a part-time position, the Superintendent, from the 1976-77 school year through the 1980-81 school year, attempted to accommodate petitioner by offering to her a number of options which would have allowed her to continue in a full-time position each school year. However, with the sole exception of the 1980-81 school year, petitioner chose to take the part-time French teaching position and declined the offer of a full-time position.

As the Superintendent's Affidavit indicates, a "full-time" teacher in the school district normally has six periods per day plus homeroom. Those six periods normally consist of five teaching class periods and one supervisory period, such as study hall, cafeteria, library, hall duty, or recently, gifted and talented advisorship.

For the 1976-77 school year, the Superintendent offered petitioner two options: namely, a two-thirds French teaching position or a full-time combination French-English teaching assignment (five classes) with one supervisory period and homeroom. Petitioner, however, selected the two-thirds French teaching position and was employed in that exclusive capacity (four French class periods only) for the entire 1976-77 school year.

For the 1977-78 school year, the Superintendent offered petitioner two options: namely, a two-thirds French teaching position or a full-time combination French-English teaching position (five classes) with one supervisory period and homeroom.

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Petitioner, however, selected the two-thirds French teaching position and was employed in that exclusive capacity (four French class periods only) for the entire 1977-78 school year.

For the 1978-79 school year, the Superintendent offered petitioner three options: namely, a two-thirds French teaching position, a five-sixths French teaching position, or a full-time position involving five teaching periods and one supervisory period and a homeroom. Petitioner, however, selected the five-sixths French teaching position and was employed in that exclusive capacity (five French class periods only) for the entire 1978-79 school year.

For the 1979-80 school year, the Superintendent offered petitioner two options: namely, a two-thirds French teaching position or a full-time combination French-English teaching assignment (five classes) with one supervisory period and homeroom. Petitioner, however, selected the two-thirds French teaching position and was employed in that exclusive capacity (four French classes only) for the entire 1979-80 school year.

For the 1980-81 school year, the Superintendent offered petitioner two options: namely, a five-sixths French teaching position or a full-time position involving five teaching periods of French with one supervisory period and homeroom. Petitioner selected the full-time position and was employed in that exclusive capacity (five French class periods only) for the entire 1980-81 school year.

Thus, petitioner's employment history from the 1976-77 school year through the 1980-81 school year may be summarized as follows:

1976-77	2/3 French (4 French classes only)
1977-78	2/3 French (4 French classes only)
1978-79	5/6 French (5 French classes only)
1979-80	2/3 French (4 French classes only)
1980-81	Full time (5 French classes, one supervisory period and homeroom)

As indicated in the Superintendent's Affidavit, with the upcoming 1981-82 school year, he was faced not only with the continued declining enrollment in the Foreign

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Languages Department which dictated that the remaining French position be only a two-thirds position, but also with the constraints of severe budgetary restrictions. This precluded the Superintendent from offering petitioner the "full-time position" option he had been able to offer her in previous years. He found it impossible to add non-teaching duties, such as supervision or homeroom, to the two-thirds French position which would convert the part-time position into a full-time position.

The Superintendent stated that he had been willing, in an effort to accommodate petitioner, to offer her a combination French-English teaching assignment up to and including the 1979-80 school year, but that he had not been willing to do so after that date. He stated that while petitioner's refusal to take such a position in previous years had been a minor factor in this decision, the major factor was his determination that it would not be in the school district's best interest to replace an experienced English teacher with a teacher, such as petitioner who, though qualified by certification to teach English, had never taught English in her entire teaching career in the school district. As the Superintendent indicates in his Affidavit, his existing English teachers, both tenured and non-tenured, are excellent teachers, and he finds it educationally unsound to have to replace an existing English teacher with a teacher who is totally inexperienced in teaching English.

By letter dated April 10, 1981, the Superintendent advised petitioner of her options concerning her employment status for the 1981-82 school year. These options were either a two-thirds French teaching position or a five-sixths French teaching position. The former would involve four teaching periods of French with no supervisory periods nor homeroom, while the latter would include four teaching periods of French with one supervisory period, but no homeroom. By letter dated April 14, 1981, petitioner suggested three options in order of preference, none of which had been offered by the Superintendent:

A. A full-time schedule with five French classes.
B. A full-time schedule with four French classes, a supervisory duty, and a gifted and talented advisorship.
C. A full-time schedule with four French classes and one English class.

On the Superintendent's recommendation, the Board, on April 16, 1981, adopted a resolution establishing the remaining French position as a five-sixths position

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and employing petitioner in that capacity (four French classes plus one supervisory period) for the 1981-82 school year. By letter dated April 22, 1981, the Superintendent informed petitioner of her employment in a five-sixths position as a teacher of French for the 1981-82 school year. Moreover, the Superintendent's letter set forth the following:

> As discussed in our conference, our records indicate that your seniority is only in French since you were not certified in English at the time of employment nor did you teach any English since you are here.

CONCLUSIONS

No teacher may be employed to teach without an appropriate certificate issued by the State Board of Examiners (N.J.S.A. 18A:27-2; 28-14). In this regard the State Board of Examiners has set forth the following rule concerning provisional certificates:

Provisional certificate

> (a) A provisional certificate is a substandard one-year certificate. It may be issued under certain circumstances to an applicant whose preparation does not meet completely the New Jersey requirements for standard certification. It is issued on application of a public school district, submitted after July 1, in which the local board states that the applicant is being offered a contract of employment for which the certificate is required.
>
> (b) A provisional certificate is issued only in fields of teacher shortage, as certified annually by the Commissioner of Education. A list of currently designated fields of shortage for provisional certification is available from the Bureau of Teacher Education and Academic Credentials or the county superintendent of schools. (N.J.A.C. 6:11-4.3)

Consequently, it is clear from a review of this rule that the Board alone was permitted to apply for the certificate it deemed necessary for petitioner's employment, and then only in recognized fields of teacher shortage.

In an earlier decision, the Commissioner quoted the State Board of Examiners' rule which was in existence during the time of petitioner's employment. That rule stated:

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> A provisional certificate is a one-year certificate issued under certain circumstances to applicants whose preparation does not meet completely the New Jersey requirements for the regular certificate. The provisional certificate is issued only upon request by local school authorities stating that the applicant is being offered a position for which the certificate is required.
>
> * * *
>
> Applications for provisional certificates are not accepted from individuals in search of teaching positions. Renewal of these certificates for an additional year is dependent upon the satisfactory completion of four semester-hour credits of additional study toward meeting the requirements. (Based on N.J.A.C. 6:11-4.2)

(Anson, Shimp, and Henderson v. Board of Education of the City of Bridgeton, Cumberland County, 1972 S.L.D. 638-639).

Based on this review, the only certificate to which petitioner was entitled at the time of her initial employment by the Board was the provisional certificate to teach French. No teacher may be issued any provisional certificate except in subject areas where she has been employed to teach.

It has been also established by the Commissioner that a key factor in seniority determinations is eligibility for the issuance of a certificate, not necessarily the actual issuance of same. In Harold Reinish v. Board of Education of the Borough of Cliffside Park in the County of Bergen, 1965 S.L.D. 50, the Commissioner noted that the usual practice is for application for a certificate to be made by a board of education "when employment is obtained and for the particular license needed." It was further noted that one should not be expected to apply for a certificate one does not need - qualification for such a certificate is sufficient. This practice was similarly endorsed in Celina G. David v. Board of Education of the Borough of Cliffside Park in the County of Bergen, 1965 S.L.D. 56.

However, in the instant matter, petitioner was not qualified for English provisional certification at the time of her initial employment because she was assigned to teach French only, and a provisional certificate was issued to cover that subject. Because petitioner's initial employment was solely in French, and the State Board of Examiners determined her eligibility for her certificate solely as a teacher of French, petitioner's seniority is limited to the subject of French. Petitioner's acquisition of a

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standard certificate in September 1965, a certificate for which she probably became eligible some time in the summer or fall of 1964, clearly certified her later as a teacher of English.

However, the fact remains that she did not hold such a New Jersey certificate in English at the time of her initial employment; neither was she eligible for any such certificate absent an assignment by the Board to teach English and its application to the State Board of Examiners for a provisional English certificate. Petitioner was issued a provisional certificate to teach French and no further certificate was required.

The decisions cited by petitioner are distinguished by their fact patterns. In Dedrick v. Board of Education of Hammonton , 1977 S.L.D. 1043, petitioner was hired as a "special assignment teacher." However, he held a certificate issued by the State Board of Examiners as a secondary teacher of social studies at the time of his initial employment. Consequently, when his "special assignment" position was abolished he claimed, and was recognized by the Commissioner, to have acquired five years seniority in his certification. However, he was placed on a seniority list and was found to be the least senior of the social studies teachers employed. The Commissioner held further, in Dedrick, that he had no seniority status as a drivers' education teacher since he acquired that certificate after his initial employment and since he had never taught that subject.

Based on the foregoing facts, statutes and case law, I **CONCLUDE** that petitioner's seniority is solely as a teacher of French. Consequently, she may not demand assignment to teach English to fill out her schedule as a full-time teacher.

Having reached this determination, there is no need to discuss whether or not she waived her right to teach English based on her earlier decisions not to accept English assignments.

The Petition of Appeal is hereby **DISMISSED.**

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

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

12/18/81
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

December 22, 1981
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Dec. 24, 1981
DATE

Ronald L. Parkes/sa
OFFICE OF ADMINISTRATIVE LAW

bm

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Documents in Evidence

1. Respondent's Brief in Support of Motion for Summary Judgment and Dismissal, with attached Exhibits.

2. Respondent's Affidavit in Support of Motion for Summary Judgment and Dismissal.

3. Petitioner's Brief in Support of Cross Motion for Summary Judgment with attached Exhibits.

4. Petitioner's Affidavit in Support of Cross Motion for Summary Judgment.

5. Respondent's Reply Brief.

6. Exhibits attached to Petition of Appeal.

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THERESA MULHEARN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STERLING REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the determination by the Honorable August E. Thomas, ALJ that in the matter presently controverted petitioner's seniority is solely as a teacher of French. Petitioner contends that Judge Thomas failed to accord proper weight to all the pleadings and facts herein. Petitioner cites numerous court cases of long standing relating to the importance of tenure to teachers. Petitioner further relies on Attorney General's Formal Opinion No. 18 (1975). Finally, petitioner contends that if the Board retains any of several nontenured English teachers in lieu of petitioner such retainment is a grant of seniority rights to those nontenured teachers. The Board's reply exceptions affirm the initial decision and refute the exceptions filed by petitioner. The Commissioner finds petitioner's exceptions unconvincing in refuting the findings of the ALJ.

A thorough examination of the record, including the documents in evidence and the conclusions advanced by Judge Thomas, convinces the Commissioner that the Judge properly weighed and evaluated the pleadings and facts herein.

The Commissioner does not denigrate the importance of tenure to teachers but fails to find the relevance of petitioner's protestations to the present facts. Petitioner is not being dismissed because of a reduction in force. Her tenure to the only French position in the school district has been achieved, is not denied and continues to exist whether the position be full-time or part-time. The Commissioner so holds.

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Petitioner's reliance on Attorney General's F.O. No. 18 (1975) is misplaced, involving as it does seniority rights of professors in the State College system not teachers in local public school districts. Petitioner's assertion that nontenured teachers are being vested with seniority rights has no merit.

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

February 2, 1982

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THERESA MULHEARN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE STERLING REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 2, 1982

For the Petitioner-Appellant, Selikoff & Cohen
(Steven R. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Davis & Reberkenny
(William D. Hogan, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

Ruth H. Mancuso opposed in the matter.

June 2, 1982

Pending N.J. Superior Court

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION -
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 5268-80
AGENCY DKT. NO. 349-9/78

STANLEY SIEDLARCZYK,
Petitioner
v.
BOARD OF EDUCATION OF THE
CITY OF GARFIELD, BERGEN COUNTY,
Respondent

APPEARANCES:
Michael J. Mella, Esq., for Petitioner

Daniel J. Gavin, Esq., for the Respondent

Record Closed December 21, 1981 Decided December 31, 1981

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

Petitioner alleges he is due salary from April 20, 1979 through and including August 27, 1981, because of an Order entered in a companion matter (EDU 3095-80) on August 27, 1981, in which respondent's (petitioner here) motion to dismiss all tenure charges was granted. In that matter, it was ordered "that respondent be reinstated as School Board Secretary-Business Manager, with no back-pay, upon affirmation of this Initial Decision by the Commissioner of Education." On September 11, 1981, the Commissioner "determined that he will not review the Decision on Motion." On October 30, 1981, the Commissioner granted a stay of judgment during pendency of an

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appeal before the State Board of Education, conditioned upon respondent's reinstatement of salary as of date of the initial decision.

Upon the Commissioner's determination not to review the initial decision, an order to show cause why the instant matter should not be dismissed was entered on October 8, 1981 and the parties appeared on November 12, 1981 in compliance. They requested court approval to brief the matter in lieu of oral argument. It was granted. The record was closed upon receipt of petitioner's rebuttal memorandum on December 21, 1981.

The Board posits applicability of the doctrines of res judicata and laches, inter alia, in support of the order to show cause and dismissal of the petition in toto.

The doctrine of res judicata will first be addressed. The Board argues: "Notwithstanding that the argument on the issue of back-pay was a limited one at the August 1981 hearing [EDU 3095-80], counsel for both sides did address the issue. The doctrine of res judicata is clearly applicable in this instance. That doctrine is so fundamental to our system of justice that it does not require authority. Counsel has had an opportunity to be heard on the issue and the Court has made its decision. Reargument of that issue is contra to the doctrine."

It cannot be disputed that the principal issue argued in EDU 3095-80 was the Board's alleged procedural violations of the law and respondent's demand for reinstatement. The issue of back-pay was collateral and reference was made in respondent's brief that "no back-pay is requested if his motion [to dismiss tenure charges] is granted." The Administrative Law Judge (ALJ) ruled that "Nevertheless, it must be clearly and emphatically stated that no back salary is warranted as it would be deemed here to be an unjust enrichment for respondent for services not rendered due to the inordinate delay [30 months] in the filing of the motion by respondent."

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Substantive arguments were not heard on the back-pay issue in the initial action. Respondent indeed had a significantly heavier burden of persuasion with respect to his reinstatement issue, and the court briefly addressed the remedy of back-pay in its initial decision as a usual process when an employee is reinstated. The fact that the instant matter was pending provided reason for respondent to believe he would later argue the back-pay issue. These special circumstances did not provide respondent with an adequate opportunity or incentive to obtain a full and fair adjudication of the back-pay issue in the initial action. Res judicata is inapplicable. I SO HOLD. See Restatement (Second) of Judgments §68.1 (tentative draft #3, 1976).

It is undisputed the Board filed certified tenure charges on September 25, 1978, and suspended petitioner without pay beginning April 20, 1979. His salary was reinstated by Order on August 27, 1981, and his claim for back-pay is from the date of suspension, April 20, 1979, to date of salary reinstatement, August 27, 1981.

Petitioner here argues no statute, regulation, or court rule precludes him from filing a motion at any time without prejudice. It is obvious in the initial action, since petitioner prevailed on the substantive issue, that his delayed filing was not precluded by the court nor did the timing of it have a prejudicial bearing on the court's conclusion. It is noted the principal issue there was the Board's violation of N.J.S.A. 18A:6-13.

Petitioner further argues if his motion was filed during hearing at the end of the Board's case, or if the matter was adjudicated at the conclusion of hearing without any such motion, back-pay would have been an entitlement granted with a determination favorable to him. This court cannot agree that such relief is automatic. The issue must be determined on its merits.

Although petitioner does not rely on N.J.S.A. 18A:6-14, reference is necessary here as a matter of law and equity.

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Since the Board suspended petitioner without pay some eight months after it certified tenure charges against him, it is the opinion here that a motion for reinstatement due to an illegal suspension pursuant to N.J.S.A. 18A:6-14 would have been granted. See Board of Education of the Township of North Bergen v. Carmine Pellechio, 1981 S.L.D. _____ (Order entered by ALJ December 15, 1981). In the absence of a communication from the Commissioner relative to a determination to review, the Order was effective December 26, 1981, pursuant to N.J.A.C. 1:1-9.7(a).

Petitioner cites Tenure Hearing of Paula M. Grossman, a/k/a Paul M. Grossman, School District of the Township of Bernards, 127 N.J. Super. 13 (App. Div. 1974), cert denied, 65 N.J. 292 (1974). In that matter the issue addressed by the court and Commissioner centered on construction of the amendment of N.J.S.A. 18A:6-14, which provides for payment of full salary after 120 calendar days following the certification of tenure charges and suspension. The Commisisoner said at 700 In re Tenure Hearing of Windsor, 1978 S.L.D. 696: "The language of the Court is clear, unambiguous and definitive in Grossman wherein it is stated: '... Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight of those affected ...'." (at 36 of 127 N.J. Super.).

In Ott v. Bd. of Ed. of Hamilton Township, 160 N.J. Super. 333 (App. Div. 1978), cert. denied, 78 N.J. 336 (1978), the court said at 342: "Significantly, the provision of reinstatement of salary after 120 days [N.J.S.A. 18A:6-14] excludes in the time computation 'all delays which are granted at the request of such person'. " The Court at 342 reversed "that portion of the judgment which commands the board to continue to pay salary and other benefits pending the disposition of the disciplinary proceedings."

In the Initial Decision in the initial action the ALJ stated at slip 7: "The inordinate delays in disposition of this controverted matter lie at the feet of the Board up to August 8, 1980, and at the feet of the respondent from that time until July 27, 1981."

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In light of the above, the Order of reinstatement with no back-pay entered on August 27, 1981 is modified to the extent that the Board shall compensate petitioner in the amount he would have been paid had he not been suspended from April 20, 1979 to August 8, 1980, mitigated by other earnings during the period. The determination that no back salary is warranted from August 8, 1980 to August 27, 1981 is reaffirmed.

IT IS SO ORDERED.

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

I hereby **FILE** this Initial Decision with **FRED G. BURKE** for consideration.

31 December 1981
DATE

Ward R. Young
WARD R. YOUNG, ALJ
Receipt Acknowledged:

6 January 1982
DATE

Seymour Wiss
DEPARTMENT OF EDUCATION
Mailed To Parties:

January 7, 1982
DATE

Ronald L. Parker/gs
FOR OFFICE OF ADMINISTRATIVE LAW

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

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

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

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

The Board shall compensate petitioner in the manner set down in the initial decision. The Commissioner so holds.

COMMISSIONER OF EDUCATION

February 5, 1982

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STANLEY SIEDLARCZYK,	:	
PETITIONER-CROSS-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, February 5, 1982 and March 24, 1982

For the Petitioner-Cross-Appellant, Michael J. Mella, Esq.

For the Respondent-Appellant, Dennis P. Yackovetsky, Esq.

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

August 4, 1982

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STANLEY SIEDLARCZYK,	:	
PETITIONER-CROSS-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 5, 1982 and March 24, 1982

For the Petitioner-Cross-Appellant, Michael J. Mella, Esq.

For the Respondent-Appellant, Dennis P. Yackovetsky, Esq.

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

August 4, 1982

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STANLEY SIEDLARCZYK,	:	
PETITIONER-CROSS-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, February 5, 1982 and March 24, 1982

For the Petitioner-Cross-Appellant, Michael J. Mella, Esq.

For the Respondent-Appellant, Dennis P. Yackovetsky, Esq.

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

August 4, 1982

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3546-81

AGENCY DKT. NO. 191-5/81A

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,

Petitioner

v.

TOWNSHIP OF MIDDLETOWN,

Respondent.

APPEARANCES:

Peter P. Kalac, Esq. for petitioners (Kalac, Newman & Griffin, attorneys)

Benjamin P. DeSena, Esq. for respondent (Crummy, Del Deo, Dolan & Purcell, attorneys)

Record Closed November 16, 1981 Decided December 31, 1981

BEFORE **BRUCE R. CAMPBELL,** ALJ:

The Middletown Township Board of Education (Board) appeals from the action of the Township Committee of Middletown Township (Committee), taken under N.J.S.A. 18A:22-37, by which the Committee certified to the Monmouth County Board of Taxation a lesser amount to be raised by local taxation for current expense costs for the 1981-82 school year than the amount proposed by the Board to and rejected by the voters at the annual school election held on April 7, 1981.

The Board appealed the Committee's action to the Commissioner of Education. When the matter was joined, it was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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Five days of hearing were held in the matter at Middletown Township Municipal Court concluding on October 8, 1981. Each party submitted timely summations in writing.

I

The proposed Board budget included $20,879,179 to be raised by taxation for current expense purposes for the school year 1981-82. After defeat by the voters, the Board submitted its proposal to the Committee for determination as required by N.J.S.A. 18A:22-37. The Committee, after consultation with the Board, determined to certify the amount of $20,081,395 to the Monmouth County Board of Taxation to be raised by taxation for current expense purposes. That amount is $797,784 less than the amount proposed by the Board to the voters.

The specific reductions recommended by the Committee are:

Account	Description	Amount Proposed by Board	Proposed Reduction by Committee
J210	Contracted Services	$ 10,000	$ 10,000
J211	Principals' Salaries Jr. High School	328,930	109,000
J211	Principals' Salaries High Schools	225,265	75,000
J212	Elementary Supervisors	122,395	35,000
J213	Elementary Teachers	4,838,584	112,000
J213	Elementary Art, Music, Physical Education	619,778	42,000
J213	Bilingual Instruction	113,056	52,000
J213	Curriculum Development Improvement Program	274,979	10,939
J213	Substitutes	250,000	50,000
J213	Home and Supplemental Instruction	195,000	20,000
J214	Two new Guidance Counselors	40,000	40,000
J214	Three new Child Study Team positions	92,000	50,000
J216	Teacher Aides	291,750	26,500
J216	Substitute Callers	5,500	900
J220	Textbooks, Elementary and Jr. High	126,000	6,300

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Account	Description	Amount Proposed by Board	Proposed Reduction by Committee
J230	Library, Elementary and Jr. High	78,000	3,900
J231	Audio-Visual Supplies	61,000	1,500
J240	Instructional Supplies	779,500	22,625
J300	Attendance Services	12,000	3,000
J660	Operation, Car Expense	15,000	10,000
J730	Replacement of Equipment, Elementary	18,000	7,000
J730	Replacement of Equipment, Other Departments	56,784	29,000
J733	New Equipment, Non-Instructional, Administration	51,500	26,500
J820	Insurance, Fidelity	3,500	2,900
J1010	Boys' Athletics	128,220	38,220
J1010	Girls' Athletics	64,280	10,000
J1010	Intramurals, cheerleaders, twirlers	22,500	3,500
	TOTAL RECOMMENDED REDUCTIONS		$797,784

The Board received notice dated February 27, 1981, of a cap waiver approval from the Commissioner of Education in the amount of $403,871 for the 1981-82 school year. The approval document states:

> All programs are specifically approved as a condition of this waiver. County Superintendents will be responsible to monitor all programs and to recommend tax levy adjustments if specifically approved programs are not implemented. They must be maintained in the 1981-82 and all future budgets and cannot be considered for elimination in future cap waiver requests without the express approval of the county superintendent of schools. [Emphasis in text.]
>
> . . .
>
> Any changes made after public hearings or elections would not alter the necessity to operate specifically approved programs.

At hearing, testimony on each reduction was heard.

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II

The Board Secretary-School Business Administrator testified that a State Department of Education Special Audit Team had worked in the district from July through October 1980 and produced a report in late 1980 or early 1981 showing a projected overexpenditure as of June 1981 of $555,000. The team also projected an increase in revenues of $185,700 for a net shortfall of $369,300. The team recommended strict limits on expenditures for the balance of the 1980-81 school year which the district imposed. (See P-16).

The 1980-81 budget was one million dollars below the district's legal budget cap. After adoption of the 1980-81 budget, salary negotiations were concluded with various bargaining units. The average settlement was 9.5% above salaries for the previous year. The budget as adopted, however, anticipated a 7.5% increase. In addition, budget cuts made by the Committee were absorbed, the Board bought additional administrative time and the State Department of Education monitored the shops at High School North, finding and reporting conditions that had to be improved.

The Board had been alerted in September 1980 to budgetary problems by the business administrator (P-17). The imposition of limits on expenditures and the freezing of certain accounts minimized, but did not eliminate the problems. $236,000 was appropriated to the 1981-82 budget, but on June 30, 1981, there was no money available to back up the appropriation. The business administrator also testified that a Public Employees Retirement System pension assessment in the amount of $151,705 was received on June 22, 1981, and that the district had a deficit, considering the pension assessment, of approximately $51,000 on June 30, 1981 (P-18).

J-120 Contracted Services
Reduction - $10,000

The business administrator testified to the effect that the amount budgeted was intended to purchase an independent review of all district insurance coverages; to purchase consultant services for development of the district's facility master plan, mandated by the State; to secure an update of building maintenance studies last done in 1968; to purchase an independent check of physical education and gymnasium equipment

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which is part of an ongoing risk management program, and to cover any architectural fees in connection with roof replacement at the Lincroft School.

The Committee asserts these services can be performed by in-house personnel. Except as to the building maintenance studies, the evidence in the record does not support the reduction. The services sought are directly related to the sound—and safe—management of the district's properties and to the required facility master plan.

I **FIND** the Board has established its need to recover $7,500 of the $10,000 reduction.

J-211 Principals' Salaries
Reduction - $184,000

The assistant superintendent for personnel stated there a are 28 principals and vice-principals assigned to the district's 17 buildings. Each of the two high schools and three junior high schools has one principal and two vice-principals assigned. The reductions made by the Committee translate into the loss of one administrator in each high school and junior high school. The tasks of staff evaluation, mandated by State Board rule, as well as pupil discipline, curriculum committee chairmanship, relations with parents and building supervision would be placed on two persons rather than three in each building. There are approximately 1,500 pupils and 90 staff in each high school, approximately 1,000 pupils and 50 staff in each junior high school. A loss of one administrator in each building would also negate any gains made in programs, now four years old, to strengthen discipline and attendance policies.

It was the assistant superintendent's opinion that mandated evaluations of staff could not be performed properly if the above-mentioned duties had to be assumed by two persons rather than three.

The Committee states that the duties now performed by the present building administrators could be transferred to others with no diminution of efficiency. The Committee states further that the principal and vice-principal category contains excessive personnel.

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A review of the record with particular attention to P-13 and P-14 does not support the Committee's position. The secondary schools of the district are not top heavy with administrators either in relation to districts of similar size or in relation to the duties expected.

I **FIND** the Board has established the need for the entire $184,000 reduced by the Committee.

J-212 Elementary Supervisors
Reduction - $35,000

The assistant superintendent for personnel testified that only one elementary school has a vice-principal. Each of the three elementary supervisors covers four school buildings. Their duties include overseeing development, implementation and review of state and local monitoring systems. These relate directly to the district's state-required educational plan. If two supervisors were lost, quality education with continuous monitoring would suffer. One supervisor could not do the job.

The Committee maintains that elementary enrollment has declined and two of the three supervisors are unnecessary.

I **FIND** that the duties performed by the elementary supervisors are necessary to a thorough and efficient education system in the district's elementary schools while the Committee's stated reasons fail to show that the reduction was made with an understanding of the requirements placed on the Board by the Public School Education Act of 1975, commonly called the T and E law, N.J.S.A. 18A:7A-1 et seq.

Accordingly, need for restoration of the full amount of $35,000 is FOUND.

J-213 Teachers' Salaries,
Home and Supplemental Instruction, Curriculum Development
Reduction - $286,939

The assistant superintendent for personnel stated there has been no increase in elementary teacher positions over the 1980-81 school year. The Committee's reduction of $112,000 in elementary teachers' salaries equates to eight positions. The number of

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elementary pupils declined by approximately 2,000 between 1970 and 1980. The number of elementary teachers declined by 30 in the same period. With these reductions, the district has been able to reduce the average elementary class size by less than three pupils per class. The school year being nearly half over and the teachers having a 60-day notice clause in their contracts, savings would be minimal even if all eight positions were abolished (P-13). Additionally, since elementary classes are self-contained, pupils would have to be reassigned and this, in turn, could lead to rescheduling a large portion of the district's school buses. The additional costs involved could offset any savings. Disruption of established classes cannot be measured in dollars.

The superintendent of schools testified that all reductions made by the Committee, including the reduction in this account, had nothing to do with a thorough and efficient education but with a comparison to last year's figures. The Board established the line item on the basis of its necessity to "T and E."

Upon further examination the assistant superintendent stated that there was not enough information available at the time he testified for the Board to determine if one elementary school could be closed.

The Committee's stated reason for the reduction was that a decline in enrollment calls for a decrease in the number of classes and hence in the number of teachers.

Upon consideration of the evidence presented, I **FIND** that two elementary teacher positions can be eliminated without damage to the thorough and efficient education program. $84,000 is restored accordingly.

As to elementary art, music and physical education teachers, the assistant superintendent testified that the eight persons in each category rotate among the twelve elementary schools. Each elementary class receives one period of instruction per week in each subject. A reduction of even one position would have to reduce this frequency. There is also a contractual consideration. Classroom teachers are guaranteed 200 minutes per week of noninstructional time by contract. Of the 200 minutes, 135 are provided by releasing the teacher from the classroom while the art, music or physical education teacher is with the class. The number in each category has been reduced from nine to

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eight in light of declining enrollments. Any further reduction in personnel would mean the inability to continue instruction at the present level.

The committee again asserts a reduction in enrollment calls for a reduction in staff.

Upon careful consideration of all evidence presented, I **FIND** a reduction in this area would have direct and immediate impact on a thorough and efficient system of education in the elementary department of the district.

I **FIND** that the Board has established the need for restoration of all funds cut from this subline.

Bilingual instruction must be provided to pupils in need of it regardless of whether the district has budgeted for it according to the school officials who testified. The 1981-82 figure of $113,056 represents a reduction from the previous year of approximately $186,000 based on the district's experience.

The Committee's reasons for the reduction are that the need for the program has not been demonstrated and that there is a possibility the program will no longer be mandated under law.

I **FIND** the Board's budgeted figure to be realistic in the circumstances. The mere possibility of the removal of legal mandate to operate the program can not be considered a valid reason for a reduction. The reduction will be restored in full.

The reduction in the curriculum development program of $10,939 would impinge upon continuous curriculum development related to the system-wide "T and E" program in the view of the school officials who testified.

The Committee states the services can be performed by in-house staff. From a review of the full record, there appears to be merit to the Committee's contention. I **FIND** the Board has not made a sufficient showing that this amount is essential to maintenance of a thorough and efficient program in the district. While the goal is desirable, it appears capable of accomplishment through minor reallocations of available resources. The reduction is sustained.

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School officials testified that 7,505 substitute days were purchased in 1979-80 and 7,306 days in 1980-81. The business administrator used 8,000 days as a basis for his calculations because there is an increase in compensation to substitutes who serve on a long-term basis. Additionally, the superintendent is seeking an increase in the daily rate from $28 per day to $32 per day so that the district may compete for substitutes with surrounding districts which do pay $32 per day now, a situation that makes it difficult to secure needed numbers of substitutes on days of high demand. If the Board approves the administration's increase proposal, the budgeted amount would allow for 7000 substitute days, with the attendant risk of shortfall.

The Committee's sole reason for a reduction of $50,000 in this subline is that the increase not justified.

I **FIND** the budgeted amount to be entirely reasonable. A district must be able to secure substitute teachers in order to maintain its programs. The full amount of the $50,000 reduction is restored.

School officials stated home and supplemental instruction must be offered to pupils who qualify regardless of the amount budgeted. The Committee reduction of $20,000 would reduce the budgeted amount to $175,000, an increase of $25,000 over the 1980-81 appropriation. Reference to the Board's unaudited printout of accounts (P-23) indicates that the reduction would not affect the operation of home and supplemental instruction. I **FIND** the reduction of $20,000 reasonable in this area. The reduction is sustained.

In summary, J-213 reductions totalling $58,939 are sustained and $228,000 is restored to the account.

J-214 Other Instructional Salaries
Reduction - $90,000

The assistant superintendent for pupil personnel services testified that the district is under direction from the State Department of Education to bring its pupil services into compliance with state standards. (See P-1 through P-11.) The Board filed an agreement with the Bureau of Pupil Personnel Services, State Department of Education, to bring its programs into compliance in the 1981-82 school year.

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The $90,000 reduction represents one additional Child Study Team of three persons and two additional high school guidance counselors. All of these positions are positions established in response to the Department of Education compliance directive.

The Committee states the positions are unnecessary in light of declining enrollments. I cannot agree. I **FIND** the Board has shown that establishment of the new positions is the minimum action it may take to meet state standards in the pupil personnel services area. The reduction will be restored in full.

J-216 Other Salaries for Instruction
Reduction - $27,400

School officials stated the reduction effected by the Committee would affect regular teacher aides ($26,500) and substitute callers ($900). The aides serve in kindergartens and special education classes that are over state mandated maximum enrollments. They help provide the contracted teacher planning and management time and help provide specific help to pupils who, while not handicapped, have special needs. Additional aide positions were created in 1979-80 and 1980-81 as individually guided education programs and cluster programs were expanded in line with the district's "T and E" plan. The Board's increase of $20,000 over its 1980-81 appropriation reflects only an increase in the hourly rate paid to aides and not an increase in the number of positions.

The Committee states the increase is unjustified in light of declining enrollment. The reduced amount still would allow for an increase over the 1980-81 amount.

I **FIND** the Board's arguments persuasive on this point. It is seeking to maintain an ongoing consonant with its educational goals for children. The increase merely reflects a 25-cent per hour increase in aides' salaries. The reduction of $26,500 will be restored.

School officials testified similarly as to substitute callers. The district employs two and will continue to employ two. The increase in the appropriation equals the amount by which, under contract, their salaries will be increased for 1981-82.

The Committee believes its proposed reduction reflects actual expenditures for 1979-80. While this may be true, it does not take into account contracted obligations.

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I **FIND** the Board's proposed budgetary amount reasonable. Similarly, two substitute callers for a district employing some 500 teachers and nurses is not unreasonable. The reduction of $900 is restored.

J-220 Textbooks
Reduction - $6,300

School officials testified that the district has long been trying to update its textbooks. It did use figures of 6,000 elementary pupils and 3,000 junior high pupils in calculating textbook purchases when actual enrollment was approximately 8,500. In 1975, the Board adopted a five-year program to replace all texts. In 1980, however, because of budget restraints discussed above, the account had to be frozen to help avert a shortfall.

The Committee asserts the appropriation should have been calculated on actual pupil numbers. I agree. As laudable as the Board's efforts to update texts in use may be, actual pupil numbers are the proper basis for calculations.

Accordingly, I **FIND** that this account may be reduced by $6,000 without adverse effect on the educational program. Of the $6,300 reduction, $300 is restored.

J-230 School Libraries and Audio-Visual Materials
Reduction - $3,900

The same facts and arguments apply to this account as to the textbook account. I **FIND** that this account may be reduced by $3,900 without adverse effect on the educational program.

J-231 Audio-Visual Aid Supplies
Reduction - $1,500

The facts and arguments recited as to textbooks and library materials again apply.

I **FIND** that this account may be reduced by $1,500 without serious impact on the education program.

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J-240 Teaching Supplies
Reduction - $22,625

Again, the facts and arguments are the same and an actual enrollment less than the figure used to calculate the appropriate figure is the crux. I **FIND** actual enrollments, as nearly as they may be projected, to be the proper basis for calculation. The amount of $20,000 may be taken from this account without adverse impact on the education program. Of the $22,625 reduction, $2,625 is restored.

J-300 Attendance Services
Reduction - $ 3,000

The business administrator testified that the amount budgeted is the actual salary to be paid plus actual travel computed at 22 cents per mile. Travel had previously been absorbed, but is now being broken out and displayed in this line item.

The Committee states the figure budgeted represents an unwarranted increase over prior years' expenditures. But for the new inclusion of travel reimbursement, the Committee's reason would have merit. I **FIND** the Board's testimony entirely credible. The $3,000 reduction is restored in full.

J-660 Expenses for Operation of Vehicles
Reduction - $10,000

The school officials' testimony regarding account 660b, operation of vehicles, was similar to that regarding attendance services. The expense of operating vehicles for mail, supply and equipment haulage and for transporting plant operation staff had, in prior years, been included in the transportation account. It is now being shown as a separate item as a matter of sound business practice. The business administrator admitted that he had estimated 1981-82 costs although in response to interrogatories he had indicated these were actual costs.

The Committee again asserts it made the reduction to bring the figure into line with actual 1979-80 expenditure information provided to it.

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I **FIND** that the increase in this account is due primarily to an accounting change and does not represent an unwarranted increase in expenditure for the purpose intended. The amount of $10,000 will be restored to the account.

J-730 Purchase of Equipment
Reduction, Elementary - $7,000
Reduction, Other Departments - $29,000

The business administrator testified that replacement of elementary school equipment was one of the accounts frozen in 1980-81, thereby putting the district's replacement program behind schedule. The account shows no increase for the district as a whole. He also testified that a renewed emphasis has been placed on preventive maintenance. 1980-81 was the first full year in which the district had an audio-visual equipment technician. The area has been underbudgeted historically. Repairs are done on a district-wide basis while purchases are made by department or office.

The Committee states budgeted figures bear little relation to amounts actually expended in prior years. From a review of the record, this reasoning appears sound. The reductions made by the Committee are sustained.

J-733 New Equipment, noninstructional - Administration
Reduction - $26,500

The superintendent stated, as did the business administrator, that this appropriation is for a computer to be housed in district administrative offices and to be used primarily for administrative purposes. However, terminals would be located in various school buildings allowing use for instructional purposes as well. Fireproof files also would be purchased from this account.

The Committee believes the expenditure is out of line with past expenditures and the computer is a luxury item.

While a computer offers many obvious advantages, I **FIND** its purchase under the straitened circumstances the Board is experiencing might better be delayed for one year. Fireproof files for securing school records are a reasonable expenditure and one not

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profitably delayed. Of the $26,500 reduction made by the Committee, $25,000 is sustained; $1,500 will be restored to the account.

J-820 Insurance, Fidelity Bond Premium
Reduction - $2,900

School officials state the line item is the actual premium for the fidelity bond. The coverage previously was part of the district's multi-peril insurance.

The Committee asserts the reduction was made to bring the appropriation into line with actual expenditures in prior years.

The district's unaudited year end 1980-81 printout indicates an expenditure of $2,514.89 in the 820d account. In consideration of the amount actually expended and of the advent of an independent study of the district's entire insurance program, I **FIND** the Committee's reduction to be reasonable. The reduction of $2,900 is sustained.

J-1010 Boys' and Girls' Athletics
and Student Body Activities Salaries
Reduction - $51,720

The business administrator stated that extracurricular salaries, other than athletics, previously were shown in J213, teachers' salaries, and are now properly being shown in J1010; that in the process of appeal for a cap waiver the State Department of Education recommended the account be reduced by $30,000 for 1981-82; that the present appropriation represented the athletic director's request less the $30,000 state recommended reduction; that there was no increase in personnel for 1981-82, and that there had been an error of approximately $30,000 in other extracurricular salaries in 1980-81.

The Committee maintains its reductions reasonably reflect actual expenditures for 1979-80 and that the increase in not necessary to the maintenance of an adequate eductional system.

To a point, the Committee's reasons are compelling. Extracurricular salaries are not immune to salary guide and longevity increases and these must be considered. Yet the recommendation of the State Department of Education must be accorded due weight.

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The Department's recommendation to reduce the account by $30,000 for 1981-82, unless the prior year error of $30,000 be considered, appears not to have been followed.

Assuming extracurricular salaries increased at the same rate as other salaries paid by the district, an increase of some $29,000 could be justified between 1979-80 and 1981-82. This would indicate an appropriation of approximately $183,000 would be reasonable for 1981-82. The appropriation adopted by the Board, $215,000, is $32,000 over this figure, however. The district appears to be making up for its 1980-81 error all at once. As desirable as extracurricular activities are, they can not be considered on equal footing with formal educational programs.

While not unmindful of the many benefits to pupils from extracurricular activities, I **FIND** a reduction of $32,000 in this account to be reasonable and of no harm to the overall educational program in the secondary schools of the district. Accordingly, a reduction of $32,000 is sustained; $19,720 is restored.

III

In summary, the amounts restored and the reductions sustained are as follows:

Account	Amount Restored	Amount of Reduction Sustained
J120	$ 7,500	$ 2,500
J211	184,000	--
J212	35,000	--
J213	228,000	58,939
J214	90,000	--
J216	27,400	--
J220	300	6,000
J230	--	3,900
J231	--	1,500
J240	2,625	20,000
J300	3,000	--
J660	10,000	--

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Account	Amount Restored	Amount of Reduction Sustained
J730	--	36,000
J733	1,500	25,000
J820	--	2,900
J1010	19,720	32,000
TOTALS	$609,045	$188,739

The amount of $609,045 is restored to the Board's 1981-82 current expense budget.

Accordingly, it is **ORDERED** that the additional amount of $609,045 be and is certified to the Monmouth County Board of Taxation for current expense school purposes in the Township of Middletown. This amount, when added to the amounts of $20,081,395 for current expense, $343,139 for capital outlay and $915,809 for debt service already certified by the Township Committee increases the total amount to be raised by public taxation for school district use in 1981-82 to $22,138,127, of which $20,879,179 represents the amount to be raised for current expense purposes.

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

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OAL DKT. NO. EDU 3546-81

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

31 DECEMBER 1981
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4 January 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 6, 1982
DATE

Ronald L. Parker/pc
OFFICE OF ADMINISTRATIVE LAW

ms

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DOCUMENTS IN EVIDENCE

P-1 Final copy, 11-5-79 Evaluation of Special Education and Pupil Personnel Services, Middletown Township Public School

P-2 Letter, 8-27-79 Bartholomew to Richardson for purpose of showing sequence only

P-3 Letter, 11-9-79 Richardson and Winkler to Hughes

P-4 Letter, 11-20-79 Hughes to Schneider

P-5 Letter, 1-31-80 Schneider to Hughes

P-6 Letter, 2-29-80 Schneider to Hughes

P-7 Letter, 3-17-80 Hughes to Schneider

P-8 Letter, 4-17-80 Schneider to Hughes with 16 pp. staffing report attached

P-9 State Dept. of Education Evaluation and Classification Status, 8-29-80 Middletown Township School District Interim Approval

P-10 Memorandum, 9-11-80 Bartholomew to Schneider

P-11 Memorandum, 12-23-80 Bartholomew to Schneider

P-12 A Study of New Jersey Staffing Practices, report to the State Board of Education, April 1980

P-13 Staffing Analysis for Middletown Tp. Board of Education, report to the Middletown Tp. Board of Education, November 1980

P-14 N.J.E.A. Report A-79-1, Part I

P-16 Account Monitoring Report, 5-29-81

P-17 Report of Secretary - School Business Administrator on budget concerns, 9-25-80

P-18 (Side 1) Annual report to State Dept. of Education as of 6-30-81

P-18 (Side 2) Report of projected surplus, 6-30-81

P-19 1981-82 School budget as adopted 3-17-81

P-20 1981-82 School budget with Township reduction 4-16-81

P-21 Excerpt, Secretary's report to Board 10-7-80 (page 7)

P-22 Budgetary funds, aides, recapitulation 6-30-81

P-23 Year-end printout of accounts, unaudited, as of 6-30-81

P-24 Report of State Audit Team with cover letter, 3-19-81

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OAL DKT. NO. EDU 3546-81

P-25 Interrogatories responded to by Board Secretary, 9-14-81

R-1 Proposed account limitation to cover pending Township cuts, 6-25-81

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BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the entire record of the matter herein controverted which includes the initial decision rendered by the Office of Administrative Law, Bruce R. Campbell, ALJ.

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

The Commissioner is, however, constrained to comment upon certain economies and proposed expenditures contained in the Board's current expense budget for the 1981-82 school year as they are set forth in the initial decision of this matter.

The Commissioner in this regard will also rely upon the statistical and budgetary information which is available to him through the Department's Division of Finance and Regulatory Services.

Initially, he observes that the first item in the table of specific reductions by the Committee, ante, shows a proposed reduction of $10,000 in line item J210, Contracted Services. It is noted herein that the correct account number for Contracted Services is designated as J120.

The Commissioner further observes that the ALJ has determined in his findings, ante, that $25,000 of the Committee's recommended $26,500 reduction in line item J733, New Equipment, noninstructional-Administration be sustained. Upon review of the Department's records on file in this matter, the Commissioner cannot agree with the reduction in this line item. It is observed from the lease purchase agreement (C-1) effected by the Board that the proposed line item expenditure in account J733 is intended to implement a second year of computer equipment and services which would culminate in the Board's computer purchase over a four-year period. To sustain the reduction of $25,000 in this line item for the 1981-82 school year would, in effect, cause the Board to suffer a loss of payments which it made under the initial year of this agreement. The basic components of the computer program agreement are as follows:

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Computers - 4 Year Lease/Purchase

Lease of Equipment	$ 8,519.64
Maintenance	14,982.00
Computer Software	3,924.00*
Total Yearly Cost	$27,425.64

*Basic Program
Student Records
System Support

In view of the above findings, the Commissioner hereby reverses the determination reached in the initial decision to sustain a reduction of $25,000 in the J733 line item and orders that it be restored to the local tax levy certification.

The Commissioner observes that in line item J1010, Boys' and Girls' Athletics and Student Body Activities Salaries, ante, the ALJ has sustained a partial reduction of $32,000 from the overall recommended reduction of $51,720. While the Commissioner concurs with the stated amount of the reduction, he wishes to emphasize that Judge Campbell's statement that extracurricular activities are not on equal footing with formal educational programs may not be generally construed, but must be determined by factual findings on a case by case basis.

In summary, the amounts to be restored and the reductions to be sustained in the Board's current expense appropriations are as follows:

Account	Amount Restored	Amount Sustained
J120	$ 7,500	$ 2,500
J211	184,000	-0-
J212	35,000	-0-
J213	228,000	58,939
J214	90,000	-0-
J216	27,400	-0-
J220	300	6,000
J230	-0-	3,900
J231	-0-	1,500
J240	2,625	20,000
J300	3,000	-0-
J660	10,000	-0-
J730	-0-	36,000
J733	26,500	-0-
J820	-0-	2,900
J1010	19,720	32,000
TOTALS	$634,045	$163,739

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The Commissioner hereby finds and determines that the initial decision is hereby modified to the extent that a total amount of $634,045 is restored to the Board's 1981-82 current expense budget.

Accordingly, it is ordered that an additional amount of $634,045 be and is certified to the Monmouth County Board of Taxation for current expense school purposes in the Township of Middletown School District for use during the 1981-82 school year. This amount when added to the amount of $20,081,395 for current expenses already certified by the Township Committee increases the total amount of the tax levy for current expense purposes for school district use in 1981-82 to $20,715,440.

Finally, the Commissioner is constrained to observe that the Board had a responsibility to assure him that the balance appropriated for school use in the 1981-82 school year was realized from 1980-81 operating funds. The failure to reduce spending consistent with cap waiver recommendations is a serious matter indicating a spending pattern which assured that funds would not be available to support the 1981-82 school budget.

It must also be noted that the Board has been expending funds in excess of the reduced budget which it filed with the Monmouth County Superintendent of Schools under date of April 16, 1981.

By virtue of the Board's failure to reduce spending in accordance with its revised budget, the Middletown Township School District is faced with a potential deficit during the 1981-82 school year amounting to over $470,000. The impact of this deficit is compounded since appropriate action was not taken by the Board at the commencement of the 1981-82 school year thereby forcing budget adjustment of amounts far greater than the actual deficit.

Accordingly, the Commissioner further orders the Board to immediately file a remedial budget plan for the 1981-82 school year with the Monmouth County Superintendent of Schools which addresses the fiscal and educational concerns for the year in question. The remedial plan must indicate how the Board expects to eliminate the present potential budget deficit by June 30, 1982 and such remedial plan must also indicate how the elimination of the potential budget deficit will impact on the current educational program in operation in the Middletown Township School District.

COMMISSIONER OF EDUCATION

February 2, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6019-80
AGENCY DKT. NO. 444-9/80A

WALL TOWNSHIP SCHOOL DISTRICT
MONMOUTH COUNTY,
Petitioner
v.
STANLEY SAGER,
Respondent.

APPEARANCES:

William C. Nowels, Esq. for petitioner (Magee, Kirschner & Graham, attorneys)

Charles Frankel, Esq. for respondent

Record Closed November 18, 1981 Decided December 30, 1981

BEFORE DANIEL B. MC KEOWN, ALJ:

The Wall Township Board of Education (Board) certified charges of unbecoming conduct to the Commissioner of Education for determination under N.J.S.A. 18A:6-10 et seq., against Stanley Sager, a tenured teacher in its employ.

The Commissioner transferred 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. Though a plenary hearing in the matter was commenced to take relevant testimonial and

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documentary evidence by the parties in support of their respective positions, the hearing was cancelled because of the inability of the Board to produce the complaining witness. It is necessary to set forth background facts so that the Board's inability in this regard is fairly understood.

The Superintendent filed three charges of unbecoming conduct against Sager with the Board, charges which were based wholly on "a copy of a complaint filed with Wall Township Municipal Court [against Sager, who] was arrested and charged by the Wall Township Police Department, with aggravated assault, entering a dwellinghouse, and making harassing telephone calls. . . ." The Board, under its authority of N.J.S.A. 18A:6-11, certified the charges to the Commissioner on August 18, 1980, and, simultaneously suspended Sager from his teaching duties, without pay. A prehearing conference, scheduled for December 3, 1980, was adjourned at Sager's request, as was a second prehearing conference scheduled for March 3, 1981. The prehearing conference was finally conducted on April 16, 1981, after which the matter was scheduled to be heard on September 11, 1981. Sager caused the September 11, 1981 hearing date to be adjourned.

In the meantime, 120 days after August 18, 1980, the day on which Sager had been suspended, the provisions of N.J.S.A. 18A:6-14, by which his salary payments resume if a determination on the charges has not been made, became operative. Thus the Board resumed paying Sager's salary on or about December 17, 1980.

When Sager caused the September 11, 1981 hearing date to be adjourned, the Board moved to suspend his salary payments because of the delay he caused and was continuing to cause in the determination of the charges. Following telephonic oral argument heard, and letter memoranda submitted, I ruled in a letter opinion dated October 1, 1981, that:

> . . . respondent is found to have created a delay in the expeditious determination of the administrative charges by his request for adjournment of the prehearing conferences on December 3, 1980, March 3, 1981, and the hearing scheduled for September 11, 1981. These delays are attributable solely to respondent and as such, the Board's motion to suspend his salary payments pending the institution of the plenary hearing on the merits of the charges is hereby granted. That ruling, it must be noted, was subject to the provisions of N.J.A.C. 1:1-9.7(a) and, by operation of that rule, became final on October 11, 1981.

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A hearing in the matter finally commenced October 28, 1981. Board counsel represented that the Board could not then proceed with its case against Sager because the complaining witness, the same person who filed the criminal charges which form the basis of the administrative charges here, would not willingly testify. It is noted that the criminal charges have since been withdrawn. Board counsel presented to me a statement dated October 27, 1981, and accepted as the court's exhibit (C-1). This statement, from a clinical psychologist, states that the complaining witness, his patient, was in psychotherapy. The psychologist states:

> It is my professional opinion that the repercussions of her being forced to testify in the civil action before the court are potentially very damaging to her condition. Damage, both emotional and psychological to my patient from this direct confrontation could easily impair her further improvement and even cause her to loose ground.
>
> The risk to my patient compells me to recommend that she be excused from appearing.

The Board, under these circumstances, elected not to compel the complaining witness' appearances. Board counsel further represented to me that without that witness' testimony, it cannot prove the truth of the charges by a preponderance of credible evidence, for it has no other credible evidence to offer. Simultaneously, however, the Board has adopted the position that it will not reinstate Sager to his teaching duties without an appropriate Order.

The Board, having failed to prove, by a preponderance of credible evidence, the tenure charges it certified to the Commissioner against Stanley Sager, is hereby Ordered to reinstate Stanley Sager to his teaching duties. The tenure charges are dismissed with prejudice.

The matters of back salary and mitigation remain. Sager was suspended without pay on August 18, 1980. However, Sager was not drawing salary at that time. His salary commenced on or about September 1, 1980, the beginning of the 1980-81 academic year. If the Board, as earlier noted, resumed his salary on or about December 17, 1980, then his salary between September 1 through December 16, 1980, is the salary withheld. It appears that Sager received his salary from December 17, 1980 through June 30, 1981. It is represented to me by the Board counsel that the Board has not issued salary checks to Sager for any period during the 1981-82 academic year, which commenced September 1, 1981.

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Thus Sager, in addition to his claim for salary withheld between September 1, 1980 through December 16, 1980, may also claim salary payments withheld between September 1, 1981 through the present. N.J.S.A. 18A:6-14 and N.J.S.A. 18A:6-30.

On the assumption that salary claims for both periods of time are valid, what of the delay found to have been caused by Sager and of mitigation of any award for back salary otherwise due him?

First, with respect to the delay caused by Sager, the ruling states that because of the delays caused by him on December 3, 1980, March 3 and September 11, 1981, the Board was authorized to cease his salary payments "pending the institution of the plenary hearing on the merits." That ruling, by operation of N.J.A.C. 1:1-9.7(a), became effective as of October 11, 1981. The hearing commenced October 28, 1981. Thus no salary payment need be made by the Board, at least between October 11 and October 27, 1981, the day before the hearing commenced. The terms of ruling of the Board's motion to suspend salary payments are, accordingly, satisfied.

The following periods in respect to salary received and not received, but for which a potentially valid claim exists, are the periods the Board contends are subject to mitigation:

September 1, 1980 through December 16, 1980
(Salary - not received)

December 17, 1980 through June 30, 1981
(Salary - received under N.J.S.A. 18A:6-14)

September 1, 1981 through the present
(Salary - not received)

The concept of mitigation of damages "imposes on [an] injured party the duty to exercise reasonable diligence and ordinary care in attempting to minimize his damages after [the] injury has been inflicted. . . ." Black's Law Dictionary 904 (5th ed. 1979). The doctrine has long been applied to an employee who is injured by his employer's breach of contract or other improper dismissal. "As a general rule compensation which the wrongfully discharged employee may have earned, or by diligence might have earned,

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from other similar employment during the unexpired term goes to mitigate or reduce the damages which he may recover." 56 C.J.S. Master and Servant § 59 (1948) (emphasis added)

Long ago, the New Jersey Supreme Court adopted the above described concept of employee mitigation. In one case, the plaintiff, a gardener, had been improperly discharged under a one-year employment contract. The court held that damages in the amount of the wages agreed to under the contract were appropriate in light of the fact that plaintiff had tried, but had not been able to obtain other employment. Larkin v. Hecksher, 51 N.J.L. 133 (Sup. Ct. 1888); accord, Moore v. Central Foundry Co., 68 N.J.L. 14 (Sup. Ct. 1902). In another case, the wrongfully discharged employee had unsuccessfully attempted self-employment instead of seeking another job. The court held that one did not have to seek to become employed by another person, but did have to make a "bona fide effort to employ his time profitably" in order to be allowed to recover full damages for the breach. Passino v. Brady Brass Co., 83 N.J.L. 419, 422 (Sup. Ct. 1912).

New Jersey courts continue to apply these common law principles in matters dealing with an employer's breach of an employment contract, Roselle v. LaFera Contracting Co., 18 N.J. Super 19 (Ch. Div. 1952); Sandler v. Lawn-A-Mat-Chem. & Equip. Corp., 141 N.J. Super 437 (App. Div. 1976); and Miele v. McGuire, 31 N.J. 339, 350 (1960); White v. North Bergen, 77 N.J. 538 (1978). In Talman v. Bd. of Trustees of Burlington Cty. College, 169 N.J. Super. 535 (App. Div. 1979), the court held:

> So called "mitigation" of damages is really not that at all, but a means for measuring the real net loss of a plaintiff. This being so plaintiff must not contribute to or prolong that loss. So a further rule of law emerges which requires a plaintiff to act reasonably toward "mitigation," i.e., toward insuring that defendant's loss will be minimized. Put another way, "certain acts or failures to act of [the injured party] are taken into account in computing the amount of his recovery." White v. North Bergen Tp., 77 N.J. 538, 546 (1978). [Id. p. 540, 541]

Sager has already been found to have caused delay in the proceedings through his adjournment of the prehearing conference scheduled for December 3, 1980, and an adjournment for the conference scheduled for March 3, 1981. The conference was finally

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held April 16, 1981. Had the conference been held as originally scheduled on December 3, 1980, the matter would have been resolved by at least June 30, 1981. Thus Sager's delay is viewed here to be the period of December 3, 1980 through at least April 16, 1981, a total of four months, thirteen days. The first period of salary withheld, September 1, 1980 through December 16, 1980, is equivalent to three months, fifteen days. I conclude that respondent, by his delay, has forfeited his claim to the salary withheld from him between September 1, 1980 through December 16, 1980.

There still remains a delay of approximately 28 days for which Sager is accountable. The Board, as earlier noted, has not paid respondent since September 1, 1980 to the present. In consideration of the remaining 28-day delay that Sager caused, the Board shall pay to him his salary, otherwise his due under N.J.S.A. 18A:6-14, as of September 29, 1981 to the present, subject to the following condition. If during the periods of time from December 17, 1980 through June 30, 1981, when Sager received his weekly salary check while under suspension, and between September 29, 1981 to the present, for which he now must be paid, Sager was engaged in substitute employment, monies earned from such employment must go towards decreasing the amount the Board now owes him.

What constitutes substitute employment? The Commissioner, in a supplemental letter opinion to the case of In the Matter of the Tenure Hearing of Anthony Polito, School District of the Township of Livingston, Essex County, 1974 S.L.D. 662, addressed substitute employment of a teacher suspended pending a determination of tenure charges. There, and a copy of the letter opinion is attached hereto, the Commissioner ruled as follows:

> Finally, the issue of what constitutes "substitute employment" will be addressed.
>
> In this regard, the Commissioner notes that In the Matter of the Tenure Hearing of David Brody, School District of the Borough of East Paterson, Bergen County, decided by the Commissioner, 1972 S.L.D. 565 (October 16, 1972), a question of mitigation arose between the parties subsequent to the teacher's reinstatement to his position with back salary being ordered by the Commissioner. The teacher, Brody, had, during his suspension, pending the determination of charges preferred by the Board, acquired substitute employment as a substitute teacher, as a referee for athletic contests, and as a bartender. It was determined at that time, through an

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> Order of the Commissioner dated April 4, 1973, that (1) those sums earned during the same period of time he would have been employed at his regular teaching assignment had not been suspended, and that (2) those sums earned by part-time employment at any time of day, which employment began subsequent to the employee's suspension — excluding those sums earned from part-time employment normally held by the employee while performing his duties as a regularly assigned teaching member — would be the basis for mitigation of back salary. Brody's earnings as a referee of athletic contests and as a part-time bartender were not included in the mitigation of back salary due him because he had been engaged in these part-time activities prior to the date of his suspension.
>
> Accordingly, the Commissioner so holds in this matter that the salary of Anthony Polito, to be paid by the Livingston Board of Education, pursuant to the Commissioner's decision on Motion, January 11, 1974, is to be mitigated by (1) those monies earned from outside employment engaged in during the time that he normally would be engaged in his teaching responsibilities subsequent to the certification of charges by the Board, and that (2) those monies earned by Anthony Polito as the result of part-time employment which he had been performing prior to his suspension, and which he continued to perform during his suspension — regardless of the hour of the day — will not be included in mitigation of benefits due him, pursuant to N.J.S.A. 18A:6-14, from the Livingston Board of Education.

The principles articulated there are equally applicable here. Sager has the burden to inform the Board, by way of affidavit or other reasonable manner acceptable to it, whether he engaged in substitute employment between December 17, 1980 and June 30, 1981, or between September 29, 1981 and the present. If Sager was so engaged in substitute employment, the monies earned shall be deducted from the amount owed him by the Board from September 29 to the present.

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

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OAL DKT. NO. EDU 6019-80

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

January 4, 1982
DATE

Seymour Wiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 7, 1982
DATE

Ronald L. Parker/pa
OFFICE OF ADMINISTRATIVE LAW

lj

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IN THE MATTER OF THE TENURE	:	
HEARING OF STANLEY SAGER,	:	
SCHOOL DISTRICT OF THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF WALL, MONMOUTH	:	DECISION
COUNTY.	:	
	:	

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

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

Respondent excepts to the determination by the Honorable Daniel B. McKeown, ALJ that he caused the September 11, 1981 hearing date to be adjourned. Counsel for respondent argues that this delay was not caused by respondent but, instead, by his own involvement in a murder trial. Respondent points to the consent granted for the postponement by counsel for the complainant Board. Respondent objects further to Judge McKeown's inclusion in the record of the reason why the complaining witness could not appear at the trial. The reply exceptions filed by the Board refute those of respondent and affirm the initial decision.

The Board argues that its consent to respondent for the noted postponements was one of custom and that, on any hand, any delay so caused was not prejudicial to the Board. The Commissioner finds merit in the reply exceptions of the Board.

The Commissioner notes that delays were occasioned by requests of respondent or his attorney as set forth in the letter opinion of Judge McKeown dated October 1, 1981 which by the provisions of N.J.A.C. 1:1-9.7(a) became final on October 11, 1981. Such letter memorandum stands unrefuted on the record. The Commissioner so holds.

The Commissioner finds no merit in respondent's exception to the inclusion in the record of the reason why the complaining witness could not appear at the trial. Such inclusion explains the inability of the Board to produce her as a witness; the explanation was based on expert opinion and did not jeopardize the welfare of the complaining witness.

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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The Board has failed to prove the tenure charges it certified to the Commissioner against respondent. Such charges are herewith dismissed with prejudice. Monies owed respondent shall be mitigated by substitute employment of the teacher, if any, and deducted by the Board from any amount it owes him for the periods set down in the initial decision.

It is so determined.

COMMISSIONER OF EDUCATION

February 17, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 3972-81
AGENCY DKT. NO. 214-6/81A

GEORGE HUFF AND THE RAMAPO-INDIAN HILLS EDUCATION ASSOCIATION,
Petitioners
v.
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent

APPEARANCES:

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

Ellen Harrison, Esq., for respondent
(Green & Dzwilewski, attorneys)

Record Closed December 21, 1981 Decided January 6, 1982

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

Petitioner alleges the Board violated his tenure and seniority rights when it acted to reduce his employment from full to part time. The Board denies any impropriety.

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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 June 24, 1981, and a prehearing conference was held on October 1, 1981 at which petitioner declared his intent to file a motion for summary decision. A calendar for briefing was established and adhered to, and the record was closed upon receipt of petitioner's rebuttal on December 21, 1981.

Gravamen of this dispute is whether the Board may reduce the employment of a tenured teacher and assign three classes to be taught by another with allegedly less seniority, who is also the subject supervisor.

The undisputed facts are as follows:

1. Petitioner Huff was employed as a properly certified full-time teacher of social studies from February 11, 1974 through June 30, 1981.

2. Subject supervisor Laufenberg was employed from July 10, 1978 through June 30, 1981, and was properly certified as supervisor and teacher of social studies.

3. Laufenberg was assigned to teach two classes in 1978-79, three in 1979-80, and three in 1980-81.

4. The Board acted on April 13, 1981 to reduce its force (RIF) for the 1981-82 school year, the legality of which is undisputed.

5. Implementation of the RIF resulted in a change of the employment of petitioner from full time to one-tenth part time.

6. Petitioner respectfully requested to decline the one-tenth employment due to financial reasons, and reserve his preferred eligibility right, which was granted by the Board.

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7. Laufenberg was assigned to teach three social studies classes in 1981-82.

8. On September 21, 1981, the Board abolished the one-tenth teaching position and created an eight-tenths position; the Board offered it to petitioner, who accepted and was reemployed as of October 1, 1981.

9. Petitioner acquired tenure as a teacher of social studies on or about February 11, 1977.

10. Laufenberg acquired tenure as a social studies supervisor and teacher on or about July 10, 1981.

The above are adopted as **FINDINGS OF FACT.**

It is necessary to address Board arguments the matter is not ripe for summary decision. The Board contends that disputed questions of material fact exist, namely, whether teaching duties are an integral and necessary part of the duties of a subject supervisor; and whether educational policy reasons justified the decision to reduce Huff's position rather than that of Laufenberg. It further contends that summary judgment should not be granted when a question of first impression of general public importance is presented.

The authority of the Board to reduce its force, establish policy, and generally perform all acts necessary for the conduct of its schools is not at issue here. At issue is whether its actions are consistent with law or the rules of the State Board. See N.J.S.A. 18A:11-1. The issue, with agreement by both parties, was memorialized in the Prehearing Order entered on October 1, 1981: "Did the Board violate petitioner's tenure and seniority rights when it reduced his employment from full to part time?"

After review of the findings of fact as adopted herein, as well as arguments of the parties in briefs, with reliance on Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954), I **FIND** petitioner has sustained his burden of showing clearly the absence of

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a genuine issue of material fact; the arguments of the Board lack merit; and CONCLUDE that the matter is ripe for summary decision.

ARGUMENTS OF COUNSEL

Accepting the authority of the Board to RIF, petitioner contends it must act within statutory constraints, and cites N.J.S.A. 18A:28-10 and N.J.A.C. 6:3-10.1 He correctly posits "The burden of determining seniority rights rests squarely on the Board ...." Popovich v. Bd. of Ed., Borough of Wharton, 1975 S.L.D. 737 (at 745). In this instance he argues the Board made no attempt to determine or measure his seniority against that of Laufenberg, and in fact exempted Laufenberg from a seniority determination because of his employment as a subject supervisor.

It is undisputed, as a matter of educational policy, that the Board has chosen to require all subject supervisors to engage in classroom teaching as an integral part of their duties. The Board posits it is under no obligation to realign its work force so as to maximize petitioner's opportunities for reemployment. It contends Laufenberg's seniority or nontenure status is irrelevant to continuation of petitioner's employment because he served the district in a different category for seniority purposes.

DISCUSSION OF LAW

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

> Dismissals resulting from any such reduction shall not be made by reason of . . . but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board. [emphasis supplied]

The authority of a Board to assign its teaching staff members within areas of their certification is entirely within its managerial discretion. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978).

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A discussion here of N.J.A.C. 6:3-1.10 would be a needless exercise. It is undisputed petitioner had acquired seven years and five months of seniority as a teacher of social studies. Laufenberg unquestionably has acquired lesser seniority regardless of how one may choose to compute it.

Nor is there need to address the abundant case law cited by the parties, as each was determined on specific fact patterns that are distinguishable.

CONCLUSIONS OF LAW

Although the Board may indeed act to reduce its force and may assign its teaching staff members as it determines best pursuant to N.J.S.A. 18A:11-1, it may not do so inconsistent with other statutory provisions. Here, the Board's actions were in violation of N.J.S.A. 18A:28-10.

The Honorable Eric Errickson stated it succinctly in Klinger v. Bd. of Ed., Township of Cranbury, 1981 S.L.D. _____ (decided January 8, 1981):

> [T]he Board's action abolishing [petitioner's] full time position, while it may have been an act resulting from nescience, was within this factual context improper. To hold otherwise would subvert the expressed intent of the Legislature and the State Board to insure that, when effecting a reduction in force, the more senior tenured teaching staff members will continue, without reduction in time and salary, as others with less seniority or without tenure or seniority are released. [slip opinion at 6]

It is obvious the action of the Board in reducing petitioner's employment while assigning three classes to less senior Laufenberg effectually circumvented the intent of the Legislature. The Board is not barred from implementing its policy of assigning teaching classes to its supervisors, but it may not do so and deprive this senior petitioner of employment and salary.

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The record indicated that if petitioner had been assigned all classes taught by Laufenberg in September 1981, the Board legally could have reduced his employment to eight-tenths. The Board is therefore **ORDERED** to compensate petitioner in the amount of eight-tenths of the salary he would have received for September 1981 had there not been an illegal RIF, less mitigation, if any.

As of October 1, 1981 when petitioner was reemployed at eight-tenths, it is presumed here that Laufenberg continued to teach at least one class in compliance with Board policy, and the petitioner was in fact entitled to full-time employment. The Board is further **ORDERED** to pay petitioner as a full-time teacher, forthwith, and compensate him in the amount of two-tenths his full-time salary from October 1, 1981 to the effective date his full-time salary status is restored, less mitigation, if any.

Summary decision is **GRANTED** to petitioner Huff with relief accorded to him as **ORDERED**. In view thereof, the claim of Ramapo-Indian Hills Education Association, being derivative and representational, is **DISMISSED**.

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

I hereby **FILE** this Initial Decision with **FRED G. BURKE** for consideration.

1-6-82
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

January 8, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN. 11, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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GEORGE HUFF AND THE RAMAPO-INDIAN HILLS EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the instant matter including the initial decision rendered by the Office of Administrative Law, Ward R. Young, ALJ.

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

The Board's exceptions to the initial decision are made on the following grounds:

1. The Court erred in finding as an undisputed fact that Mr. Laufenberg acquired tenure as a teacher.

2. The Court erred in granting summary decision where disputed questions of material fact existed.

3. Resolution of the matter by summary decision was particularly unwarranted where, as here, a question of first impression of general importance was presented.

4. The Court erred in finding that Mr. Laufenberg had acquired seniority as a classroom teacher.

Petitioners in their reply exceptions reject the position taken by the Board essentially for those reasons set forth in the initial decision by Judge Young.

The Commissioner has reviewed the exceptions of the parties in the instant matter. In reaching a final determination herein the Commissioner makes the following observations and findings with respect to the facts set forth in the initial decision:

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1. There is no challenge by petitioners of the Board's determination to cause a reduction in force of one full-time social studies teaching position as of the 1981-82 school year.

2. During the 1978-79, 1979-80 and 1980-81 school years both Petitioner Huff and Mr. Laufenberg enjoyed full-time employment by the Board. Petitioner Huff was a tenured teacher employed in the secondary category while Mr. Laufenberg by virtue of his full-time employment under the job description of subject supervisor, actually served in two categories, namely that of subject supervisor and in the secondary category as social studies teacher.

3. At the time the Board's reduction in force was to be implemented commencing September 1, 1981 for the 1981-82 school year, Mr. Laufenberg had acquired tenure status as a teaching staff member under the certificates which he held as a teacher and a subject supervisor as of July 10, 1981.

4. Mr. Laufenberg's full-time seniority however accrues in the category of subject supervisor by virtue of the controlling provisions of N.J.A.C. 6:3-1.10(e) which reads as follows:

> "Not more than one year of employment may be counted toward seniority in any one academic or calendar year. Whenever a person shall hold employment simultaneously in two or more categories, seniority shall be counted in the category in which he spends the greatest percentage of his time. If the percentage of time spent in two or more categories shall be equal, the person shall be permitted to elect in which category his seniority shall be counted. Notwithstanding the provisions of this Section, the seniority of a principal who teaches shall be counted in the appropriate principal's category."

In view of the above, the Commissioner finds no merit in petitioner's contention that the Board was required by law or regulation to consider Mr. Laufenberg's seniority in whole or in part that of a social studies teacher when it abolished petitioner's full-time teaching position and offered him a part-time social studies teaching position which he ultimately accepted. The Commissioner cannot agree that Mr. Laufenberg's full-time employment must be bifurcated into two part-time positions, notwithstanding the fact that he was assigned to teach social studies as part of his duties as a subject supervisor.

The Commissioner in reaching these findings and determination relies on Klinger, supra, wherein the decision he

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rendered in that matter was reversed by the State Board of Education. See Richard Klinger v. Board of Education of the Township of Cranbury, Middlesex County, decided January 8, 1981, rev'd State Board January 6, 1982. In rendering its decision, the State Board held in pertinent part:

> "***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 or the Courts. Boult and Harris v. Board of Education of Passaic, 1939 S.L.D. 7, 13, affirmed State Board of Education 15, affirmed 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E. & A. 1948); Bierman v. Board of Education of the Borough of Glen Rock, 1980 S.L.D. ____ (decided July 17, 1980). ***The tenure and seniority rights of an 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 program differently.***
>
> "We also deem it appropriate to repeat here 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 et al. v. Board of Education of Paramus et al., 1968 S.L.D. 62, 67.***"

Accordingly, for the foregoing reasons the Commissioner hereby reverses the entry of Summary Judgment granted by Judge Young on petitioners' behalf.

The instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 22, 1982

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GEORGE HUFF AND THE RAMAPO-INDIAN HILLS EDUCATION ASSOCIATION,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education February 22, 1982

For the Petitioners-Appellants, Bucceri & Pincus
(Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Respondent, Greene & Dzwilewski
(Ellen Harrison, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

Ruth H. Mancuso opposed in the matter.

July 7, 1982

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 0978-81

AGENCY DKT. NO. 24-1/81A

IN THE MATTER OF:

THE TENURE HEARING OF THOMAS TIEFENBACHER, SCHOOL DISTRICT OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE

APPEARANCES:

Melvin Randall, Esq. for petitioner (Love & Randall, attorneys)

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

Record Closed December 2, 1981 Decided January 6, 1982

BEFORE DANIEL B. MC KEOWN, ALJ:

The East Orange Board of Education (Board) certified a charge of conduct unbecoming to the Commissioner of Education for determination, N.J.S.A. 18A:6-11, against Thomas Tiefenbacher (respondent), a teacher with a tenure status in its employ. Respondent denies the allegations.

The Commissioner transferred 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 plenary hearing was conducted, after which the parties filed briefs in support of their respective positions.

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The basic uncontroverted facts are these:

The substance of the charge against respondent is in an affidavit filed with the Board on or about December 18, 1980, by the mother of D.H., a pupil assigned to respondent for health class. In which she attests:

...

2. On December 8, 1980, my son, D.H., came home from school with a bruised neck and back.

3. D. informed me that his physical education teacher, Mr. Thomas Tiefenbacher, had jumped on him and pushed him against a chalkboard and cabinet in the rear of the room during health class.

4. D. also informed me that after his regular teacher, Mrs. Marsha Wong, returned to the class, Mr. Tiefenbacher again cam [sic] back and took him into the hall where he proceeded to twist his neck while holding him against the wall. Mrs. Wong had to pull D. away from Mr. Tiefenbacher, to save him from further harm.

5. D. had to get an ice pack and apply it to his neck in order to reduce the swelling.

6. Upon his return home, I took D. to East Orange General Hospital Emergency room where x-rays were taken and he we [sic] referred to Dr. Siedenstein in West Orange, New Jersey.

7. As a result of this incident, D. has been suffering from pain in both the back and neck area and has been unable to return to school. In addition, the incident has made him very nervous and concerned about his return to school.

8. I reported this incident to Mrs. Gladys Calhoun, the principal of Jackson Academy/Ashland School and Dr. King, Superintendent of Personnel of the East Orange Board of Education.

9. I hereby make this affidavit in support of my complaint filed with the East Orange Board of Education.

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Respondent has been employed by the Board as a teacher of health/physical education since September 1966. He is properly certificated for that position, and in addition, he possesses five other separate certificates issued by the State Board of Examiners. From September 1966 through June 1977, respondent was assigned to the Board's high school. Between September 1977 and the present, he has been assigned to the Board's Ashland elementary school. During his employment, he received each annual salary increment to which all other teachers in the Board's employ became entitled.

Respondent's assignment on or about December 8, 1980, was to teach health to the Ashland elementary pupils. He was not assigned a permanent classroom; consequently, he would travel from regular classroom to regular classroom and teach health to the respective pupils. While he was teaching health, the classroom teachers otherwise assigned to the pupils would take their leave from the room and attend to other duties or responsibilities.

On the date and time of the incident here, respondent was teaching health to the fifth grade pupils in Mrs. Wong's, classroom. Mrs. Wong was the regular fifth grade teacher. When respondent began the class at 12:55 p.m., Mrs. Wong took her leave. She did return prior to respondent departing for his next assigned class. In the meantime, however, the alleged incident, as described above, occurred.

There followed a meeting between Mrs. Wong and the school principal, a report prepared by Mrs. Wong and submitted to the principal, a meeting between the principal and the respondent, and a meeting between the principal and the mother of D.H. Thereafter, D.H.'s mother filed a letter complaint against respondent with the school principal on December 9, 1980, (P-2) and, in fact, she filed a complaint in East Orange Municipal Court against respondent in which she alleged he violated N.J.S.A. 2C:12-1(a)(1) with respect to the same incident cited here. That charge was heard January 19, 1981, and after hearing, the court ruled the proofs to be insufficient to establish respondent's guilt beyond a reasonable doubt. The charge, accordingly, was dismissed.

On January 19, 1981, the Board, after due deliberation of the complaint filed with it by D.H.'s mother, found probable cause to credit the evidence in support of the charge, and simultaneously determined to certify the charge to the Commissioner for determination.

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Proofs of the Parties

D.H., a ten year old boy who stands five feet, six inches tall and weighs 129 pounds, was at the time in the fifth grade class, under the supervision of Mrs. Wong, his regular classroom teacher. He testified that on December 8, 1980, he was "fussing," that is; arguing with a classmate during respondent's health class. D.H. stated that respondent became angry with him and told him to stand. D.H. explained that as he was getting up, respondent stated that he, D., needed a little help and grabbed him by the arms, pulled him up, and threw him against a nearby cabinet. D. testified that respondent wrapped his arm around his, D's neck, clasped him by his other hand, in the form of a hammerlock, and then threw or shoved him against a table located in the back of the room. D. stated that it was at this point that his back was injured. D.H. denied that he fought back with respondent at any time; he denied that he punched respondent at any time; and, he denied that he hit anyone with a pencil at any time. D.H. testified that when he finally was pushed or shoved to the back of the room by respondent, he began to cry. D.H. testified that respondent called him "a B", defined by D. as a "curse word" (1T. 74). D.H. explained that he was crying when Mrs. Wong entered the classroom. She asked what was wrong, and he stated that he told her.

D.H. testified that Mrs. Wong and respondent conversed, after which respondent left the classroom, returned, and told him he wanted to speak with him in the corridor outside the classroom. D.H. testified that he proceeded to the corridor outside the classroom, whereupon respondent grabbed and squeezed his neck, and told him not to tell anyone that he, respondent, had hit him. D.H. stated that Mrs. Wong came into the corridor and told him, D.H., to go back to the classroom. Later, D.H. placed, or had placed, ice on his neck to reduce the swelling caused by the grabbing of his neck. The ice was to have been secured by D.H. from the teachers' room at Mrs. Wong's direction. It is noted that another teacher, who testified she was in the teachers' room a few minutes between 1:15 and 1:55 on December 8, 1980, testified that D.H. was not in the teachers' room the few minutes she was (1T-156).

That evening, D.H. informed his mother of the incident. The next day, she took him to a hospital where his back was x-rayed. D.H. missed one month of school following the incident because he had to have treatments for his back (1T-83).

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Mrs. Wong testified that when she returned to her classroom, D.H. was crying. Respondent was in the front of the classroom teaching. D.H. told Mrs. Wong of the incident and said that he was crying because his neck and back hurt. Respondent, Mrs. Wong testified, asked what D.H. said, and after she repeated what D.H. said, respondent denied the occurrence. Mrs. Wong testified that she turned to the class to quiet the pupils, and that when she turned around, respondent had taken D.H. to the corridor. She proceeded to the corridor and observed that respondent and D.H. were in a "small cranny, a small little area that two people could go in" (1T-100). Respondent, Mrs. Wong testified, had one hand on D.H's chin and was twisting D.H's chin. Mrs. Wong separated D.H. from respondent and told respondent she would take care of the matter. She took D.H. back into her classroom. Mrs. Wong held the classroom door closed from the inside as respondent, who was still in the corridor, attempted to gain entrance. Mrs. Wong testified that when respondent ceased his attempt to get in, she noticed D.H's neck was red. She testified D.H's neck was not red at the commencement of respondent's health class. Mrs. Wong sent D.H. to get ice to apply to his neck.

Thereafter, respondent, after completing his next assigned class, returned to Mrs. Wong's classroom. Mrs. Wong testified that respondent asked if he could speak with D.H., and after she responded in the negative, he talked with D.H. anyway.

Mrs. Wong prepared and submitted to the school principal, on that day, a report of the incident (P-1). When D.H's mother reported to the school the next day to inquire about the incident, Mrs. Wong testified that she informed her of the events as she saw them.

D.H's mother testified that when D.H. returned home from school December 8, 1980, he informed her that respondent had choked and pushed him and, as a result, he, D.H., hit himself against a desk. D.H. complained that his lower back hurt, and his mother observed that his neck was swollen.

D.H.'s mother did nothing right away, but because he woke from his sleep that night complaining of pain in his back and neck, she took him to the hospital the following day. D.H. was x-rayed, and his mother then took him to the family physician. The family physician treated D.H's back twice a week for three to four months.

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D.H.'s mother went to school to see his regular classroom teacher, Mrs. Wong, to determine what had occurred the previous day. The mother also sent a letter complaint to the school principal in respect to the asserted physical abuse inflicted upon D.H. by respondent (P-2).

D.H.'s mother testified that while he is big for his age, he is a mild-mannered and sensitive person, and although he may clown around in class, he would not attempt to strike any teacher.

Two pupils who were present during the incident on December 8, 1980, testified as to their recollections of the event. One, W.B., testified that he recalled seeing respondent push D.H. into a chalkboard and grab him by his arms (2T-103). The other, A.B., testified respondent told D.H. to behave; D.H. ignored that request; respondent told D.H. to go to the back of the room; D.H. refused; respondent took D.H. by his arm to the back of the room; D.H. pushed respondent (1T-130, 131).

Respondent, who is five foot, ten inches tall, and weighs 205 pounds, testified that on December 8, 1980, shortly after he began teaching health to the class, D.H. began throwing pencils across the classroom and bothering other pupils in the class. Respondent testified that the disturbance was interfering with his conduct of the class, and he began to fear for the safety of other pupils in the room. Respondent testified that on three occasions he requested D.H. go to the back of the room, and that on each occasion, D.H. simply continued his disturbing behavior. Respondent explained that because D.H.'s continuing behavior was interfering with his teaching, he walked to D.H.'s desk and told him "D. if you have a problem, would you please go to the back of the room" (2T-17). Respondent stated that, in response, D.H. got up from his desk and lunged at him, making physical contact. Respondent testified he caught D. in his arms, then walked D. to the back of the room while holding his arms. Respondent stated that he immediately returned to the front of the class, resumed his teaching, and that D. remained standing in the back of the room the rest of the period, without further disturbance. Respondent testified he did not shove D. into a chalkboard, nor was D. crying at that time. Respondent stated he has no knowledge concerning any back injury from which D. may be suffering.

Respondent testified that Mrs. Wong returned prior to the conclusion of the class. D., respondent states, spoke with Mrs. Wong. Respondent explained that at the conclusion of the class, he wished to speak with D. in the corridor outside the classroom

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because he was concerned about D. lunging at him earlier. Respondent testified that while standing in the doorway, he called D. to join him in the corridor. Respondent stated that as D. was making his exit from the classroom, he, D., punched respondent on the right side of his body. Respondent admitted he did not feel physically threatened by D., but he stated he did see a need to restrain D. by cupping his hand under D's chin while they were both in the corridor. Respondent testified that D. then apologized, ostensibly, it is noted, for punching him, immediately after which respondent released D's chin.

Respondent admitted that Mrs. Wong, who had followed D. into the corridor, said to him, "Stop manhandling D." (2T-23). Respondent testified that Mrs. Wong "had not seen the entire situation" (2T-23). In any case, Mrs. Wong returned to the classroom with D., while respondent proceeded to his next regularly scheduled class.

Respondent states that after he completed that next class, he returned to Mrs. Wong's classroom. He testified in this regard, "I practically ran to Mrs. Wong's room, primarily because I was concerned that she did not understand fully what had happened (2T-25). Respondent testified that Mrs. Wong informed him that ice had to be put on D's neck and that she, Mrs. Wong, was upset over the incident. Respondent states that D. denied "anything" was wrong with him.

Respondent testified that at the end of the day he prepared a written statement of the incident and left it on the principal's desk. The principal was not available at the time, and respondent failed to keep a copy of the purported statement.

The former curriculum director testified on behalf of respondent that he, respondent, freely gave of his time after school to work on curriculum committees, and that he organized, in conjunction with the Elks, a basketball contest for pupils. A guidance counselor still employed by the Board testified in respect to respondent's interest in his pupils and the ways he tried to assist them.

Discussion

The resolution of this matter depends in large measure upon the credibility of the witnesses who testified before me and the weight to be attached thereto. On the one hand, respondent testified that D.H. caused a disruption during his class to the extent that he could not teach the class because of the disruption, and after directing, without

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success, D.H. to the back of the room on three occasions, and after D.H. lunged at him, only then did he walk D.H. to the back of the room while holding his arms. If respondent is to be believed, when he successfully got D.H. to the back of the room, that event concluded the incident. And, if that event concluded the incident, then there was no need for respondent to take D.H. to the corridor to talk to him about the earlier lunge; there was no rational need for respondent to have practically run back to Mrs. Wong's classroom to explain the situation more fully to her; and, there was surely no need for Mrs. Wong to direct respondent, as respondent admits he was directed, to stop manhandling D.H. Finally, if the incident in question occurred as respondent stated, whereby a pupil causes a disturbance and the pupil refuses to comply with a command after being directed to do so on three occasions and then lunges at a teacher, the incident surely would demand more affirmative action by that teacher in respect to his supervisors besides merely leaving an unattended report, without a copy, on the principal's desk.

It is recognized that respondent is facing serious tenure charges. D.H., on the other hand, has little to gain other than vindication of his right to be free from physical harm. Mrs. Wong no longer is a teacher in the Board's employ so she has nothing personal to gain from the Board or from the principal. There is no evidence before me to show that respondent and Mrs. Wong did not get along, so Mrs. Wong is not seen to have a personal desire to do harm to respondent.

Respondent's testimony in respect to the incident does not have the ring of truth. His testimony that D.H. lunged at him and punched him in the side is improbable. Respondent is a husky man, over 200 pounds in weight; D.H. is slim, though tall. D.H. impressed me as a shy, retiring boy who would not be apt to assert himself in a physical way, rightly or wrongly, with an adult.

Findings and Conclusions

I find the testimony of D.H. and Mrs. Wong to be more credible than that of respondent and I place more weight on their testimony than on that of respondent. I further find that respondent pulled D.H. from his chair, pushed him so that he hit a cabinet, and grabbed him by his neck, and threw him by his neck to the back of the room where D.H. hit a table.

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I further find that respondent did threaten D.H. in the corridor and that he cupped D.H.'s chin with his hand. I further find that D.H. suffered physical pain as the result of respondent's behavior.

In In Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, Somerset County, 1966 S.L.D. 185 it was stated at 187,

> The Commissioner cannot condone punching, pushing, slapping or buffeting of pupils by their teachers as a means of punishment. 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. (Citation omitted).

In In re Fulcomer, 1961-62 S.L.D. 160, remanded 93 N.J. Super. 404 (App. Div. 1967), the Commissioner held at 162:

> . . . an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another although no actual physical harm be done. (1961-62)

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, it was held, at 321, that:

> . . . teachers . . . are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of selfrestraint 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. . . .

Here, it is found that respondent committed the acts as described by D.H. I find that such acts constitute conduct unbecoming a teacher. N.J.S.A. 18A:6-10. I **CONCLUDE** that that conduct is so gross so as to impose the most severe penalty allowed under N.J.S.A. 18A:6-10, the forfeiture of tenure rights.

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Accordingly, it is found and determined that by virtue of respondent having been found by a preponderance of credible evidence to have committed the acts as alleged, and that such acts are found to institute conduct unbecoming a teacher, respondent has forfeited his tenure and employment in the Board's employ. Respondent's employment with the Board is terminated as of the date of this decision.

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

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

January 6, 1982
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

January 7, 1982
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 11, 1982
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

ij

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DOCUMENTS IN EVIDENCE

P-1 Report - Teacher to Principal

P-2 Note - Parent to Principal

P-3 Memorandum - Principal to Supervisor

P-4 Memorandum - Principal to Supervisor

P-5 Affidavit of Parent

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IN THE MATTER OF THE TENURE :

HEARING OF THOMAS TIEFENBACHER, :

SCHOOL DISTRICT OF THE CITY : COMMISSIONER OF EDUCATION

OF EAST ORANGE, ESSEX COUNTY. : DECISION

_____:

The Commissioner has reviewed the entire record giving rise to the tenure charge against respondent which includes the initial decision rendered by the Office of Administrative Law, Daniel B. McKeown, 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 and are grounded on two points of argument addressed below:

1. Respondent argues that even if the findings of fact and conclusions reached by Judge McKeown were determined to be credible by the Commissioner in his final decision of the instant matter, the recommended penalty of dismissal from the Board's employ is grossly excessive and must be rejected by the Commissioner.

In this regard respondent relies on a number of prior decisions, incorporated herein by reference, rendered by the Commissioner and the courts wherein the penalties imposed against tenured teaching staff members who were adjudged to have been guilty of corporal punishment resulting from tenure charges filed against them were less than dismissal from employment.

Moreover, respondent argues that Judge McKeown, in his initial decision of this matter, ignores several pertinent facts established in the record which are brought to the Commissioner's attention, namely, that respondent's record of fifteen years' prior teaching experience while in the Board's employ is unblemished. Respondent also points out that the record of this matter reveals that he has frequently volunteered his own time for the benefit of pupils through service on curriculum committees and extracurricular activities or events which he initiated to encourage pupils to achieve in school.

Finally, respondent maintains that there is no credible evidence to factually support the Board's contention that D.H. sustained a back injury as a result of the incident which occurred in his health class on December 8, 1980. Respondent also points out that the charge of aggravated assault, lodged against him by D.H.'s mother in Municipal Court, was dismissed for lack of sufficient evidence to support such charge.

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2. Respondent excepts to the factual findings of the ALJ as set forth in the Initial Decision because he claims they fly in the face of the evidence presented at the hearing. He argues that the facts of this matter clearly reveal that D.H. admitted causing a disturbance in respondent's health class on December 8, 1980, and that D.H. was disobedient on three separate occasions during that class period. Respondent further maintains that the facts in the record support his contention that he did touch D.H. in a nonpunitive effort at that time to quell the disturbance he was creating and to prevent D.H. from causing physical injury to himself and other pupils.

Respondent rejects the findings of fact which hold that he physically abused D.H. in the classroom or shortly thereafter in the hallway where he escorted D.H. to pursue the matter of his disturbing behavior in the health class. He further rejects Mrs. Wong's characterization of his conduct with D.H. in regard to both of these incidents and maintains that D.H. lunged at him during the incident in the classroom and at the time he escorted him into the hallway. Respondent relies on his own testimony and that of another pupil witness, A.B., to support his contention that D.H. did exhibit aggressive behavior toward him during the classroom incident.

Finally, respondent argues that the weight of the credible testimony and documentary evidence produced at the hearing fails to support a finding of fact that he inflicted physical injury upon D.H. causing a redness or swelling on his neck or that he caused D.H. to sustain an injury to his back as a result of the incident which occurred on December 8, 1980.

The Commissioner has carefully reviewed the entire record taking into consideration respondent's exceptions. The Commissioner is constrained to observe that the record is devoid of any documentation or testimony from the school nurse, the school medical inspector or the physician who allegedly treated D.H. for the back injury he claims to have sustained on December 8, 1980. Consequently, the Commissioner cannot accept the Board's view that respondent did, in fact, inflict such injury upon D.H.

Moreover, further examination of the transcript of the testimony produced at the hearing in this matter is inconclusive by way of competent credible evidence by the Board's witnesses that respondent's confrontation with D.H. in class did not result from the disruptive behavior which he exhibited in health class.

What comes into question, however, is respondent's action, subsequent to the classroom incident, when he escorted D.H. into the hallway outside the classroom toward the end of the class period. The Commissioner views the evidence presented in this matter as sufficient to establish that respondent's action was totally unwarranted and resulted from his overreaction to the discussion he and Mrs. Wong had concerning D.H.

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The Commissioner finds that the evidence is credible in support of the facts which establish that he physically abused D.H. in the hallway by placing his hands on or about D.H.'s chin or neck and twisting his face and thereby constitute unbecoming conduct. Further, the Commissioner does not condone respondent's subsequent attempt to return to Mrs. Wong's classroom uninvited. The Commissioner considers such action untimely and professionally unwise in view of the highly charged emotional atmosphere which was attendant to the incidents involving himself and D.H. a short time before.

The Commissioner finds no evidence in the record to indicate that respondent, under such circumstances as described herein, took the appropriate steps to immediately notify the principal of the incidents in which he and D.H. became involved. The Commissioner is also convinced that respondent was remiss in failing to formally report the incidents in writing to the principal by the end of the school day. It is observed from the record that respondent claims to have hurriedly made such a written report to the principal; however, there is no factual evidence to support his claim.

In summary, the Commissioner, for the reasons set forth above which are based in part on the findings of fact set forth in the Initial Decision of this matter, finds and determines that respondent is guilty of conduct unbecoming a teacher as charged by the Board. What remains for the Commissioner to decide is the penalty to be imposed upon respondent as a result of this determination.

In this regard, the Commissioner cannot ignore the serious nature of respondent's actions inasmuch as the physical well-being of a pupil in his charge was jeopardized and, to a limited extent, compromised by respondent. In determining the penalty to be imposed upon respondent herein, the Commissioner relies on a prior school law decision, In the Matter of the Tenure Hearing of Frederick Ostergren, School District of Franklin Township, 1966 S.L.D. 185, wherein he stated:

> "***As has been his practice in other cases*** brought before him, the Commissioner has taken into account the nature and circumstances of the incident, the teacher's prior record and present attitude***and the likelihood of such behavior recurring in determining appropriate penalties***.
>
> "***The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases.***"
>
> (at 187, 188)

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The Commissioner concludes that summary dismissal of respondent for a single offense is unwarranted in light of his prior unblemished record of teaching experience in the Board's employ, his past voluntary efforts on behalf of other pupils outside of the school day, the anguish he has undergone over possible loss of livelihood and the damage he has sustained to his professional reputation.

Accordingly, the conclusions and determination in the Initial Decision are hereby set aside. The Commissioner finds and determines that respondent shall forfeit the 120 days' pay which has been withheld from him by the Board upon certification of tenure charges. The Board is hereby directed to reinstate respondent in his tenured teaching position forthwith.

COMMISSIONER OF EDUCATION

February 22, 1982

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IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS TIEFENBACHER,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

Decided by the Commissioner of Education, February 22, 1982

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld
(Arnold S. Cohen, Esq., of Counsel)

For the Respondent-Cross Appellant, Love & Randall
(Melvin Randall, Esq., of Counsel)

The State Board of Education affirms the Commissioner's determination, with the modification that the Commissioner's penalty be vacated and the penalty of the Administrative Law Judge be reinstated for the reasons expressed in the initial decision.

Ruth H. Mancuso, S. David Brandt and Jack Bagan opposed in the matter.

August 4, 1982

Pending N.J. Superior Court

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7189-80
AGENCY DKT. NO. 546-11/80A

BOARD OF EDUCATION OF THE BORDENTOWN REGIONAL HIGH SCHOOL, BURLINGTON COUNTY,
Petitioner
v.
PAUL H. WELLS,
Respondent.

APPEARANCES:

David D. Gladfelter, Esq. for petitioner (Kessler, Tutek, Futey & Gladfelter)

John E. Collins, Esq. for respondent (Selikoff & Cohen)

Record Closed November 30, 1981 Decided January 11, 1982

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

The Board of Education of the Bordentown Regional High School (Board), Burlington County, filed three tenure charges with the Commissioner of Education against Paul H. Wells (respondent), a school psychologist.

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. After a prehearing conference, hearings were conducted on July 27, 28, 29 and September 10, 1981. Twenty-four documents were admitted in evidence and briefs were filed after the hearing.

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The three tenure charges as preferred by the Superintendent of Schools are quoted in full as follows:

> 1. That [Paul H. Wells] exhibited conduct flagrantly unbecoming to the sensitive position of school psychologist on Wednesday, June 18, 1980, by being under the influence of intoxicating liquor while at work to such a severe extent that he was unable to function in his job and was sent home.
>
> 2. That he exhibited conduct unbecoming to the sensitive position of school psychologist on Thursday, April 3, 1980, by emitting a heavy smell of alcohol on his breath while at work.
>
> 3. That he exhibited a pattern of conduct with respect to the consumption of alcohol such as to adversely affect his work and to constitute conduct unbecoming to the sensitive position of school psychologist.

The events leading to these charges are set forth in a letter to respondent from the Superintendent of Schools. That letter reads in pertinent, but edited form as follows:

> * * *
>
> On Thursday, April 3, 1980, in the presence of the . . . President of the Board of Education . . . and myself the smell of alcohol appeared to be heavy on your breath. . . . [N]o action was taken until the matter could be discussed with the Coordinator of the Child Study Team [CST] . . . [O]n May 13, 1980 . . . (the) Coordinator of the [CST], you and I had a meeting, at which time I asked you if you had been drinking on school time or immediately before school time that would have caused the odor of alcohol to be on your breath April 3rd. You denied any such involvement and appeared to be shocked at the allegation. I said to you that I would not record the incident in your personal file because although you appeared to have recently consumed alcohol, I had no proof that you had done so on school time.
>
> On June 18, 1980 I . . . consult[ed] with you regarding the proposed realignment of the special education program at Bordentown Regional High School. During . . . our conversation I noticed that you were slurring your words, that you were obviously not in control of yourself, that your face was extremely flushed, that your pupils were dilated and the odor of alcohol was prevalent. I asked you once again if you had been drinking. You replied that you had not had a drink since Monday (June 18th was a Wednesday). After considerable discussion, . . . appealing to you to be honest with me, I asked Dr. Black [Superintendent of Bordentown Township Public Schools] to join us because I wanted him to also observe your condition. After taking a close look at you, and

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watching your response to questions Dr. Black told me he agreed with my judgment about your condition.

After Dr. Black and I spoke to you for approximately 40 minutes, during which time we tried to appeal to your sense of reason, to be honest with us so that we could get help for you, you revised your estimate of when you had your last drink and said it was about midnight the previous evening. Judging from your condition which seemed to be getting worse, we decided that you could not be allowed to function for the remainder of that day as a Psychologist for our (CST), and that you had forced us at this point to provide proof of our contention that you were under the influence of alcohol. We at that point informed you of your rights in this matter, and asked that you submit to a breathalyzer test. You said you were sure that you could pass such a test and that you had no fear of taking it. Dr. Black arranged for such a test to be taken with the Bordentown Township police, where we immediately proceeded by automobile.

After arrival at the Bordentown Township police station [the Police] Chief spoke to you for approximately 20 minutes during which time he also made an appeal for you to be honest about your involvement with alcohol that day. At the conclusion of this meeting you were administered the breathalyzer test and according to police authorities had to have consumed alcohol later than the previous midnight. The report showed that the second reading was higher than the first which meant that the absorption of alcohol into the blood stream had not yet peaked. Enclosed is a copy of the breathalyzer test taken by the Bordentown Township police which will be used as evidence in this case. (P-4)

You will recall that arrangements were made for you to be transported to your home, and a meeting was held with the combined administrators Friday morning, during which time you made an appearance. That morning you asked me to meet privately with you, at which time you apologized for your conduct and advised this officer that you had already become involved in an alcoholic rehabilitation program. At that point, I verbally admonished you for your behavior and told you that I thought you had made a grievous error in judgment.

The matter was subsequently brought to the attention of the combined boards at separate meetings in executive sessions. [Respondent is a Regional High School psychologist and a member of the CST which serves four sending local school districts.] (P-5)

The salient facts in this matter are not in dispute. Respondent testified that he had consumed alcohol excessively between October 1978 and June 18, 1980. However, he denied that his work performance was less than satisfactory and supported this contention with copies of his evaluations (P-2 and 3; R-8, 9, 10 and 11). A review of these

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documents, prepared by his several supervisors, shows that each evaluation is generally favorable.

It appears to me that a critical question is whether or not sufficient evidence of rehabilitation on respondent's part has been demonstrated so as to reinstate him in his tenured position, and further, whether or not he should suffer a reduction in salary.

An examination of respondent's activities after June 18, 1980, follows: after being driven home from the breathalyzer test on June 18 by one of his superiors, respondent engaged him in an open discussion regarding his drinking problem. While his supervisor was still in his home, respondent testified that he called the "hot-line number" of Alcoholics Anonymous and attended his first A.A. meeting that same night. The record shows that he still continues to attend meetings of Alcoholics Anonymous in order to further his personal growth (R-7). On June 20, 1980, respondent returned to the school where he spoke with the chief administrators of the four school districts participating in the CST arrangement. Regarding that meeting, respondent testified as follows:

> I apologized for my behavior on that Wednesday. Said I regretted that the unfortunate incident occurred. I admitted I was wrong the way I conducted myself. And I said that I recognized that I did, in fact, have a problem with alcohol and that I was taking steps to remedy, solve that problem ... [and that] I had contacted Alcoholics Anonymous and met with people in the fellowship in Alcoholics Anonymous . . .

This meeting and apology was corroborated by the Superintendent (P-5).

At the same meeting, the Superintendent also informed respondent of his suspension from his duties for the month of July 1980 (P-5). At a second meeting on June 30, 1980, the Board adopted a resolution approving and continuing respondent's suspension until its August 1980 meeting (R-11). The resolution also stated, inter alia:

> Paul H. Wells is granted a second hearing before this Board at the August, 1980, regular meeting, on the same terms and with the same rights as he had at the June 30, 1980, meeting. At said second hearing, Paul H. Wells may present evidence by personal testimony and in writing of his satisfactory progress in the alcoholism rehabilitation program, and of this prognosis for recovery and future job performance. This Board shall give substantial weight to such evidence in making its decision as to restoration or removal of Paul H. Wells. The burden of production of such evidence shall be on Paul H. Wells. Additionally, Paul H.

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> Wells shall be examined by a psychiatrist of the Board's choice and the report of that psychiatrist shall be presented at the hearing. (R-1) (Emphasis added.)

Thus despite the assertions to the contrary by the Board at the hearing, it is clear that the Board itself, early in the proceedings, identified the paramount issue as whether Mr. Wells has shown satisfactory rehabilitative progress and a favorable prognosis for recovery.

In accordance with this resolution, respondent was later directed to appear at the office of Dr. Ira L. Fox, the Board's designated psychiatrist, for an evaluation (R-3). In that evaluation it is noted that Dr. Fox recommended to the Board as follows:

> In view of the above information, it is our considered medical opinion that Mr. Wells be allowed to return to work without reservations [sic] in the capacity of school psychologist for the Bordentown School System. Should there, however, be any further observations, or discussions, or knowledge of additional incidences of intempered [sic] uses of alcohol, the situation should be dealt with more aggressively, and treatment more intense. We feel that he is perfectly capable to continue to carry out his duties, and will do so in a most conscientious manner. (R-3)

At that second meeting on August 20, 1980, the Board was presented with evidence of respondent's fitness to return to his duties. In addition to Dr. Fox's favorable report of respondent's rehabilitation, it also considered a very favorable report by a certified alcoholism counselor and Supervisor of the Department of Alcoholism Services at the Burlington County Memorial Hospital (R-4). In his report to the Board, the A.A. counselor stated that "I feel [Mr. Wells] is ready to resume his duties and expect that he shall maintain his sobriety." (R-4)

In addition to the reports of Dr. Fox and the A.A. counselor, the Board was presented with personal testimony by respondent at its meeting of August 20, 1980. There, respondent outlined in detail the steps he had taken since June 18, 1980, to attack his alcohol problem (P-7, pp. 3 to 5). He also documented, in affidavit form, the dates of his attendance at meetings of A.A. (P-7, p. 5). Finally, another A.A. counselor presented first-hand testimony of the progress that respondent had made in the A.A. program (P-7, pp. 6-7).

Despite the fact that respondent has complied with every demand made upon him by the Board after June 18, 1980, and irrespective of the evidence presented

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regarding his fitness to return to his duties, the Board subsequently certified the above three charges to the Commissioner.

At the hearing, further evidence of respondent's rehabilitation was presented. Respondent's uncontroverted testimony on July 28, 1981, was that he had not consumed alcohol since June 18, 1980. Furthermore, he received a second evaluation from Dr. Fox on July 31, 1981. Dr. Fox thereafter stated, inter alia, "Once again, after reviewing all the enclosures and my report of August 7, 1980, I stand even more firmly convinced that Mr. Paul Wells is psychologically and psychiatrically competent to return to his post as a school psychologist for the Bordentown School System" (R-14). Finally, the A.A. counselor reinforced at hearing his previous recommendation that respondent be permitted to return to his duties, stating that in light of his recovery from alcoholism, he would be an "asset" to the students and staff in dealing with similar problems.

As pointed out earlier, all of respondent's performance evaluations ranged from adequate to superior (P-2, and 3; R-8, 9, 10 and 11). As noted by the Director of the CST in respondent's Performance Evaluation for 1978-79:

> An area for which you should be particularly commended is the expertise with which you handle parent conferences. It is felt that this is an area of your greatest professional growth. Your contributions are valuable and you have acquired the skill of disseminating information to parents in a language which is professional and at the same time understood by them. (P-2)

As recently as June 13, 1980, just five days before the incident triggering this litigation, the Director stated, "as mentioned in previous evaluations, your participation in parent conferences continues to be commendable" (P-3).

In the face of this uncontroverted evidence presented by respondent, the Board argues that his performance has deteriorated and that he has displayed a pattern of conduct which is unbecoming a teacher. The Board attacked respondent's truthfulness in his answers to their questions about his alcoholism leading to the June 18, 1980 incident. However, it was noted that Dr. Fox testified that denial of a drinking problem is common among alcoholics:

> [A]lcoholics basically lie, they say they're not alcoholics. They don't recognize the problem. They deny it's in existence as a problem. And that is what Mr. Wells did when he was drinking, he denied he had a problem with alcohol. After his year with

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Alcoholics Anonymous he, in fact, restructured his thinking and recognized it was a problem in the past.

The record, also, does not support the Board's contention that respondent's performance has deteriorated, except that it did on the date of his suspension for being under the influence of alcohol.

Based on the foregoing testimony, and evidence I **FIND** as follows:

1. That respondent was properly suspended from his duties for being under the influence of alcohol on, and prior to, June 18, 1980.

2. That tenure charges one and two have been adequately supported by the Board.

3. That respondent has recovered from alcoholism as far as it can reasonably be determined by the examining physician and counselors from A.A.

4. That no pattern of conduct unbecoming a teacher has been established by the Board (Charge three); and

5. That respondent's performance had not deteriorated except on June 18, 1980.

CONCLUSIONS OF LAW

Of the several cases cited by petitioner and respondent, none is precisely on point. Nevertheless, in Schroeder v. Board of Ed. of the Twp. of Lakewood, 1960 S.L.D. 37 rev'd State Board of Education, 1961-62 S.L.D. 136; aff'd Appellate Division 1961-62 S.L.D. 240, the Appellate Division established the parameters of that dispute which I believe are closely related to those of the instant dispute.

In his decision in Schroeder, the Commissioner outlined a series of facts which were very similar to those herein. Schroeder, a tenured teacher, exhibited episodic signs of alcohol-related behavior over a four-year period between 1952 and 1956. The Board then required her to take a leave of absence (here, respondent was suspended from his

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duties during the summer of 1980) and to submit to physical and psychiatric examinations by Board-designated physicians before returning to her duties. This was the same procedure followed when this Board ordered that respondent submit to a psychiatric evaluation by Dr. Fox. In Schroeder, the Commissioner noted that the psychiatrist's prognosis was "guardedly favorable" concerning the teacher's fitness to return to her duties. Nevertheless, the Commissioner framed the issue in terms of "whether she was unfit for duty" on the dates she was alleged to have been intoxicated, citing Redcay v. State Board of Education, 130 N.J.L. 369. This is the same proposition alluded to by this Board, that is: "Unfitness for a position is best evidenced by a series of incidents" (Redcay, supra).

However, in reversing the Commissioner, the State Board clearly indicated that the Redcay standard was not appropriate:

> There is a fundamental lack of fairness in Miss Schroeder's being dismissed under the circumstances here. Although we are satisfied that the Lakewood Board acted with complete good faith in the performance of its duties, it placed Miss Schroeder in a most unenviable position. As things worked out, there was no way she could win. Had she failed to take the leave of absence in 1956, she would undoubtedly have faced disciplinary proceedings. When she passed the physical examinations she nonetheless found herself subject to the very proceedings she had good reason to believe she had avoided. (Schroeder, at 239)

In its review of the case, the Appellate Division was even more explicit. In affirming the State Board's decision, the Appellate Division considered the factual context of the case and concluded that the only issue properly before the board of education was whether Schroeder was "fit to resume teaching" after her required leave of absence (Schroeder, at 244).

It is further noted that the Schroeder case originally commenced in 1958, prior to the effective date (1960) of the Tenure Employees Hearing Law (N.J.S.A. 18A:6-10 et seq). According to statutory prescription prior to 1960, the Commissioner applied a limited appellate scope of review to decisions of local boards of education regarding the dismissal of tenured personnel (Schroeder, at 39).

Based on the foregoing and the Findings of Fact stated above, I **CONCLUDE** that the decision in Schroeder is controlling in the instant dispute. Respondent has clearly

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demonstrated that he is a reformed alcoholic. Accordingly, his penalty will not be dismissal from his teaching position.

Determination of the appropriate penalty applicable to a teaching staff member, pursuant to statute, is a matter to be determined within the sound discretion of the Commissioner. The standard is that set forth in In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967), which determined that the Commissioner had the duty of fixing the penalty, if any, in Tenure Employees Hearing Act matters:

> Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration 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.

Accord, In re Kittell, supra, 1972 S.L.D. 535, 541, wherein the Commissioner added:

> Also to be considered are the teacher's record of performance and the prognosis for his continued effective performance and usefulness in the school system. In each case previously decided by the Commissioner, all of these factors have varied materially. In the Commissioner's opinion each such matter must be judged in the light of its particular circumstances. The kind and degree of penalty will necessarily vary according to the specific problem.

See also, In re Ostergren, 1966 S.L.D. at 188.

In regard to the factual circumstances in this case and with due respect for the decisions of the Commissioner, the State Board, and the Courts cited by both litigants, I determine that the appropriate penalty for respondent's conduct on and before June 18, 1980, shall be as follows:

1. Respondent shall be reinstated immediately to his former position.

2. Respondent will forfeit his salary withheld by the Board for the first 120 days, pursuant to N.J.S.A. 18A:6-14.

3. A copy of this decision shall be permanently included in his personnel file for future reference, if needed.

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Respondent had been, at all times prior to the 1979-80 school year, a ten-month employee, September 1 to June 30. He was employed additionally for one month during the summer in each of his years of employment. However, for the 1979-80 school year he was offered a "contract" to teach for eleven months, September 1, 1979 through July 31, 1980. It is noted that this contract encompasses two school years and that respondent was not paid after June 30, 1980.

It is also noted that according to the facts presented, the Board had sufficient reason to believe respondent would be unable to perform his duties during July 1980 because of his now admitted alcoholism; consequently, it would be absurd to award a public employee salary for duties the Board believed he would have been unable to perform.

Having found that respondent was ineligible for salary for July 1980, it follows that no salary is due payable to him for July 1981. At the time, he was suspended without pay (but receiving full salary after the 120th day, pursuant to N.J.S.A. 18A:6-14); however, no summer position had been offered to him. Consequently, respondent is not entitled to salary for the summer of 1981.

The relief **ORDERED** is that enumerated above, which is limited to reinstatement, the withholding of 120 days' salary, and the filing of this decision in respondent's personnel file.

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

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OAL DKT. NO. EDU 7189-80

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

11 January 82
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

13 January 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 18, 1982
DATE

Elizabeth L. Logan, Cs
OFFICE OF ADMINISTRATIVE LAW

plb

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DOCUMENTS IN EVIDENCE

R-1 Board Resolution, dated June 30, 1980

R-2 Board Resolution, dated August 27, 1980

R-3 Dr. Fox's report, dated August 7, 1980

R-4 Cannova letter, dated August 18, 1980

R-5 Response to R-3 Evaluation

R-6 Cover letter enclosing R-3 Evaluation

R-7 Attendance record, A.A. meetings

R-8 Wells' Evaluation, 1975-76

R-9 Wells' Evaluation, dated Janaury 9, 1978

R-10 Wells' Evaluation. dated February 27, 1978

R-11 Wells' Evaluation, dated April 12, 1978

R-12 Wells' Contract, 1979-80

R-13 Dr. Ira Fox - Vitae

R-14 Dr. Fox's report, dated August 14, 1981

P-1 Letter, dated May 8, 1980, from Director to Wells

P-2 Evaluation, 1978-79 school year

P-3 Evaluation, 1979-80 school year

P-4 Breathalyzer report

P-5 Letter from Dr. Caton to Wells

P-6 June 26, 1980 - Acknowledged receipt of letter

P-7 Transcript, Wells' hearing before Board

P-8 Vitae, Irwin Hyman

P-9 Hyman, report to Board, dated March 2, 1981

P-10 Feldstein, Vitae

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IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL H. WELLS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF BORDENTOWN	:	DECISION
REGIONAL, BURLINGTON COUNTY.	:	

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

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

Respondent excepts to the determination by the Honorable August E. Thomas, ALJ that tenure charges one and two were adequately supported by the Board wherein respondent was said to be under the influence of intoxicating liquor on June 18, 1980 to the extent that he was unable to function in his job and was sent home. Further, regarding the incident on April 3, 1980 when respondent's breath exuded a heavy odor of alcohol while at work, respondent contends that such conduct was not unbecoming because of his admitted illness, alcoholism. Respondent argues that alcoholism must be treated like any other illness and accordingly no penalty under such circumstances should be imposed.

Complainant Board firstly excepts to portions of the initial decision and, secondly, replies to the exceptions filed by respondent. The Board contends that Judge Thomas erred in not sustaining tenure charge three. Further, the Board argues that Judge Thomas erred in not ordering respondent's dismissal from his tenured position. Respondent's reply exceptions affirm Judge Thomas' finding that the Board failed to prove charge three, reasserts the applicability of Schroeder, supra, and argues that the forfeiture of 120 days' compensation is excessive. The Commissioner cannot agree in entirety with the exceptions filed herein by either party.

A thorough examination of the record, including the documents in evidence, convinces the Commissioner that Judge Thomas' decisions herein are adequately supported by the record. Further, the Commissioner finds no merit in respondent's argument that admitting to being an alcoholic entitles him to go unscathed by any punishment because alcoholism must be considered an illness. The Commissioner has previously considered such argument in In the Matter of the Tenure Hearing of Peter Canzonier, School District of the Township of East Brunswick, Middlesex County, decided April 24, 1981.

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In that case the Commissioner affirmed the report of the hearing examiner wherein was said:

> "***Respondent argues that he may not be released by the Board solely because he admits that he is an alcoholic. 29 U.S.C. Sec. 794 This section, entitled 'Nondiscrimination on Federal grants and programs', states in its entirety:
>
> > 'No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 USCS § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978 [Act Nov. 6, 1978; see Amendment note]. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.
> >
> > 'As amended Nov. 6, 1978, P.L. 95-602, Title I, §§ 119, 122(d)(2), 92 Stat. 2982, 2987.)'
>
> "Under the 'Interpretive Notes and Decisions' the following paragraph is noted:
>
> > 'Handicapped individuals' for purposes of 29 USCS § 794 include alcoholics and drug addicts; while § 794 prohibits discrimination solely on basis of status as

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> alcoholic or drug addict, such persons may be required to comply with reasonable rules of conduct and need not be hired or permitted to participate in federally assisted programs if manifestations of these conditions would prevent their effective performance on job or adequate participation in program, or if employment or participation would be unduly disruptive to others. (1977) 43 Op Atty Gen Opinion NO. 12.***' (at 249)

> "The hearing examiner finds the words 'effective performance on job or adequate participation in program' of great significance.***"
>
> (Slip Opinion, at pp. 10-11)

In the present case the Commissioner finds markedly similar circumstances to Canzonier. Respondent's behavior, because he was unable to function in his job, certainly falls within the purview of Section 7(7) (29 USCS § 706(7)) setting down "***effective performance on job or adequate participation in program." The Commissioner so determines.

However, just as the Commissioner finds respondent's arguments that he should go unscathed to be meritless, the Commissioner finds no merit in the Board's contention that respondent should be detenured. Such action would be an excessive punishment for the two charges proven in fact to be so, involving only two discrete days. The Commissioner finds respondent's evaluations to be favorable. (P-2-3; R-8-11) Further, the Commissioner notes with approval Judge Thomas' determination, ante, "***that respondent has complied with every demand made upon him by the Board after June 18, 1980***." The Commissioner finds that respondent has presented the Board with evidence supporting his fitness to return to his duties. In the judgment of the Commissioner, respondent has clearly shown that he is a reformed alcoholic. Such a category does not automatically entitle respondent to go without punishment, but, by the same token, in the Commissioner's opinion such effort and improvement on the part of respondent makes the withholding of the first 120 days' salary an excessively harsh action. Accordingly, the Commissioner finds and determines that the forfeiture of one month's pay be appropriate. The relief in the present matter may now be enumerated as reinstatement, the withholding of one month's salary and the filing of this decision in respondent's personnel file.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 25, 1982

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IN THE MATTER OF THE TENURE :

HEARING OF PAUL H. WELLS, : STATE BOARD OF EDUCATION

SCHOOL DISTRICT OF BORDENTOWN : DECISION

REGIONAL, BURLINGTON COUNTY. :

_____:

Decided by the Commissioner of Education, February 25, 1982.

For the Petitioner-Respondent, Kessler, Tutek, Futey & Gladfelter (David D. Gladfelter, Esq., of Counsel)

For the Respondent-Appellant, Selikoff & Cohn (John E. Collins, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

Ms. Betty Dean opposed in the matter.

July 7, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 384-81
AGENCY DKT. NO. 16-1/81A

THE ARCHWAY SCHOOL, A NONPROFIT CORPORATION,
Petitioner
v.
STATE OF NEW JERSEY, DIVISION OF FINANCE AND REGULATORY SERVICES OF THE NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

APPEARANCES:

Marie E. Lihotz, Esq. and **David F. Norcross,** Esq. for petitioner (Myers, Matteo, Rabil and Norcross)

M. Kathleen Duncan, Deputy Attorney General for respondent (James R. Zazzali, Attorney General of New Jersey)

Record Closed November 13, 1981 Decided December 28, 1981

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

The Archway School is a nonprofit corporation which provides educational services for handicapped, special education pupils from New Jersey public schools. Tuition for these pupils is paid by each participating local board of education.

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The Department of Education, through its Division of Finance and Regulatory Services (respondent), conducted an audit of the Archway School (petitioner) covering the years 1975-76 and 1976-77. The audit began in March 1979 and was completed about six months later. As a result of this audit, respondent determined that petitioner had charged tuition rates to local school districts in excess of allowable tuition rates assigned by the respondent.

Consequently, respondent prepared a letter of notification regarding its audit of these tuition charges, which it intended to send to all boards of education who utilized petitioner's services during this audit period. Petitioner appealed this proposed notification to Superior Court and later to the Commissioner of Education. Thereafter, the matter was transferred to the Office of Administrative Law (OAL) as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Hearings were conducted on April 23, 24, June 25 and 26, 1981, in the OAL, Trenton. Twelve documents were admitted in evidence, and post-hearing briefs were filed. Respondent thereafter filed a Motion, with supporting brief, to suppress petitioner's post-hearing brief; that Motion was denied by Order dated November 13, 1981, after receipt of petitioner's brief in opposition to the Motion.

Prior to the scheduled hearings, oral argument on interim restraint was conducted on January 28, 1981. On February 2, 1981, the administrative law judge (ALJ) entered a Restraining Order temporarily barring release of the respondent's contested notification letter pending this Initial Decision. Following a second oral argument on petitioner's Motion for Summary Judgment, an Order denying same was entered orally on March 11 and in writing on March 31, 1981. A hearing was thereafter held on March 30, 1981, in which further procedural matters were discussed in mutual efforts to streamline the hearing.

THE COMMISSIONER'S AUTHORITY

The issues to be decided in this case are set forth clearly in the Prehearing Order dated March 31, 1981, as follows:

A. Whether or not the computation of tuition using actual cost as a basis is a legal basis for determining tuition. . . .

B. Which of the disallowed costs given to Archway on September 8, 1980 were inappropriately disallowed or miscalculated?

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Although petitioner filed no objection to this Prehearing Order, after the issues were framed (in accordance with N.J.A.C. 1:1-10.1[d]), petitioner continuously challenged the Commissioner's authority to audit its records and to take remedial action. Therefore, although the question of the Commissioner's authority in this matter has not been presented, technically, I find that it is vital as an issue to be determined in reaching the ultimate decision; consequently, it will be addressed.

Chapter 46 of Title 18A (commonly referred to as the Beadleston Act) imposes upon local school districts the responsibility of identifying and ascertaining which children, because of handicaps, cannot be properly accommodated through the usual school facilities. N.J.S.A. 18A:46-13 specifically imposes upon local school boards an affirmative duty: ". . . to provide suitable facilities and programs of education for all children who are classified as handicapped under this chapter. . . ." A local school district is not relieved of its responsibilities under the Beadleston Act by the absence or unavailability of special class facilities within its system. Districts may properly meet the statutory obligations by sending students capable of benefitting from a day school instructional program to privately operated day classes, the services of which are non-sectarian (N.J.S.A. 18A:46-14[g]). Petitioner's school offers such day classes.

By letter dated September 8, 1980, the Assistant Commissioner of Education, Division of Finance and Regulatory Services, forwarded to the petitioner, a private school approved pursuant to N.J.A.C. 6:28-4.1 et seq. to provide educational programs to educate handicapped pupils under contractual arrangements with local boards of education, a copy of the respondent's final audit report of tuition costs for the school years 1975-76 and 1976-77. The record shows that prior to forwarding this audit report, on April 18, 1980, two of the respondent's auditors indicated to the Assistant Commissioner that they felt that certain salaries which they had previously disallowed as permissible expenditures should be honored as allowable; the Assistant Commissioner agreed, and modifications were made in the report prior to its issuance to petitioner on September 8, 1980, to reflect this allowance.

Following receipt of the aforementioned audit report, petitioner requested and was afforded a second opportunity to discuss the findings of the audit report with the respondent's auditor. As the record shows, in or about October 1980, the auditor further discussed the report with petitioner's representatives and provided copies of his work papers. The audit is now in dispute.

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At an earlier time, an Assistant Commissioner of Education requested of the Attorney General an opinion as to whether or not the Department of Education was authorized to audit educational costs in nonpublic schools for the handicapped which received tuition fees from public funds for the instruction of public school pupils.

The audit here in question was conducted pursuant to the authority of that Attorney General's opinion, dated January 30, 1975, and N.J.A.C. 6:28-3.32, effective at the time of the audited period, which provided:

> The non public school or organization shall make available to each sending board of education and the Commissioner of Education such financial and other records as are required for the computation of tuition costs. Instructional or day school costs must be listed separately from the costs of room, board, treatment and other services where provided. Capital improvement shall not be included in determining such tuition costs. Records shall be available to the Commissioner of Education or his representatives for review.

A 1978 amendment to the code recodified the provision in substantially the same language at N.J.A.C. 6:28-4.2(i):

> The eligible private school or organization shall make available to the Bureau of Special Education and Pupil Personnel Services such records as are required for the computation of tuition costs. Instructional or day costs must be listed separately from the costs of room, board or treatment. Capital improvement shall not be included in determining tuition costs.

In addition, to N.J.A.C. 6:20-4.2, effective July 2, 1975, which provision describes the formula for calculation of tuition rates for nonpublic schools, states in subsection (d), "Nonpublic schools will be required to provide information related to educational costs to determine their individual school's tuition rate."

Based on the foregoing statutes, regulations, and the fact that these tuition monies are public funds for the education of handicapped pupils, I **FIND** that the Commissioner has the unfettered authority to audit petitioner's books to determine the authenticity of petitioner's projected cost figures used in setting tuition rates, as compared to the actual costs determined as a result of the audit.

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Thus having determined that the Commissioner has the authority to audit the petitioner, pursuant to the rules embodied in the administrative code as interpreted by an Attorney General's opinion, the two issues set forth in the Prehearing Order may now be addressed.

ISSUE A

With respect to the first issue, there is no dispute concerning how tuition rates for handicapped public school students sent to privately operated day classes are actually calculated. The method for setting such rates is set forth in N.J.S.A. 18A:46-21 and the rules and regulations promulgated thereunder. Pursuant to N.J.S.A. 18A:46-21, any private school which receives pupils from a public school:

> . . . shall determine a tuition rate to be paid by the sending board of education, but in no case shall the tuition rate in a nonpublic school exceed the maximum day class cost of education per pupil of children in similar special education classes in New Jersey public schools as determined according to a formula prescribed by the Commissioner with the approval of the state board.

This standard has been somewhat refined by regulation, N.J.A.C. 6:20-4.2, entitled "Formula for calculation of tuition rate," which provides in its entirety:

> (a) The 85th percentile of the ranked per pupil cost for each class program in New Jersey public schools in each category of handicap, shall be obtained from the figures reported to the Division of Business and Finance.
>
> (b) The amount obtained under (a) above shall be adjusted by an incremental difference to be determined by the Commissioner of Education for each year to which this formula is applied which is beyond the year of actual costs used in calculation.
>
> (c) The maximum tuition rate for each category of handicap shall be the amount which applies under (b) above.
>
> (d) Nonpublic schools will be required to provide information related to educational costs to determine their individual school's tuition rate.
>
> (e) If the educational tuition rate is at the tuition rate determined by (b) above, it will become the tuition rate; if below, the lower rate governs. If their educational tuition rate exceeds the maximum as determined by (b) above, the

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school will be required to adhere to the established tuition rate.

Accordingly, based upon projected tuition costs submitted by petitioner, respondent assigned the tuition rates to be charged by petitioner for 1975-76 and for 1976-77.

Petitioner conceded at the hearing that there should be some reasonable relationship between the actual tuition cost and the estimated or projected tuition cost, and for the purpose of determining whether, in fact, there was such a reasonable relationship, respondent conducted an audit for the school years 1975-76 and 1976-77. In making this tuition determination, respondent's auditor measured petitioner's costs against those costs which are allowable tuition costs for public school children attending public school in another school district.

I **CONCLUDE** that respondent's use of public school standards to check the accuracy of petitioner's tuition costs was reasonable and was the only proper method for conducting the audit since the tuition charges were established at the 85th percentile of the ranked per pupil cost for each category of handicap, pursuant to N.J.A.C. 6:20-4.2. In the absence of separate rules and regulations for setting and measuring private school tuition costs, there were no other audit standards which could reasonably be used.

Having determined the right of the Commissioner to audit petitioner's tuition programs, I **CONCLUDE** further that it would be unreasonable, in the absence of separate specific rules and regulations for private schools' tuition, to withhold the information regarding the relationship between estimated costs and the actual costs assessed. The record shows that public schools who accept tuition students from other public schools are treated exactly the same with respect to audit procedures and standards. Petitioner's argument that the purpose for the public school audit is different from the purpose for the private school audit is irrelevant in the context of the present case. The record indicates that petitioner has approximately $2,000,000 in surplus funds, and although petitioner is not funded in the same manner as a public school, its receipt of public funds must be reported to local boards of education utilizing petitioner's services so that they may see how petitioner's projected costs related to the actual costs for the years in question.

Having determined that it was reasonable to use public school audit standards in the present matter, I **CONCLUDE** further, that respondent has a sound legal basis for determining tuition costs, as previously explained.

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ISSUE B

In its audit of petitioner's school operation, respondent would not allow certain expenses, labeled by petitioner as educational expenses. Obviously, if these expenditures were allowed they would have the effect of justifying a higher tuition rate as set by petitioner.

However, expenditures by petitioner, originally disallowed, have been modified so that the monetary differences expressed by respondent are not as great as they were at the outset of this litigation. These differences were modified through the efforts of the litigants and the ALJ's oral directive to the litigants to attempt resolution of their differences.

The remainder of the expenditures which respondent would not accept as educational expenditures were set forth in one of each of the following six categories:

A) Missing Invoices
B) Insufficient Detail
C) Questionable Entertainment
D) Car Expense
E) Fringe Benefits
F) Mortgage Interest and Depreciation

A. MISSING INVOICES

Petitioner asserts that those costs for which invoices are missing should be allowed because: 1) cancelled checks or check stubs exist to prove such expenditures; 2) in some cases invoices exist for similar payments to the same vendor and should serve as proof in lieu of the missing invoices; 3) only a few invoices are missing; 4) the invoices originally existed but were lost as a result of a previous audit conducted by Wolf and Company for the Division of Human Services; and 5) the petitioner attempted to satisfy the respondent's request by attempting to secure original invoices from each vendor.

Respondent's audit procedures require an invoice for each allowable expenditure. Petitioner's expert witness, a certified public accountant, testified that it was standard operating procedure for accountants, when doing audits, to require invoices

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as documentary backup for deductions and allowances. This expert viewed missing invoices, in a public board of education audit, as a breach of the internal control system.

I **FIND** it not only reasonable, but necessary, to have invoices as documentary backup, and I **FIND** further that petitioner's offer of cancelled checks is insufficient as proof of expenditures as required by the respondent.

The second argument is rejected for the same reason: an invoice must be presented for each expenditure. Petitioner's characterization, that only a few invoices were missing, is not supported by the record which shows 147 missing invoices for the two-year period. I find that this is not an insignificant number of invoices and that they may not simply be disregarded. Petitioner's assertion that many of these invoices were lost through a previous audit by Wolf & Company for the Division of Human Services is also rejected. The fact that the result of that audit did not disclose any missing invoices is not proof that an invoice existed. Further, it is petitioner's responsibility to maintain and protect its own records. Finally, petitioner's attempts to supply original invoices, retrieved from each of its vendors, is likewise rejected where these efforts have failed.

B. INSUFFICIENT DETAIL

An auditor for respondent testified that even though invoices were presented in some cases (19), those expenditures were rejected if the invoices lacked sufficient detail explaining the expenditure. Respondent argues, reasonably, that an invoice without detail is like having no invoice.

The record shows that when an audit of the public schools is for purposes of determining actual tuition costs, that audit is exactly the same as for a private school; undocumented or insufficiently documented costs are disallowed. Consequently, the costs represented by these 19 invoices were appropriately disallowed.

C. QUESTIONABLE ENTERTAINMENT

A review of the items disallowed under the entertainment category discloses gifts of flowers and fruit for employees, miscellaneous employee travel and lunches and liquor for parties. None of these expenses relate to the education of handicapped children. Petitioner argues that these tokens were offered in an attempt to maintain

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morale among the employees to compensate for salaries which are 20 percent lower than those in the public sector. Because public monies may only be spent for public purposes, I **CONCLUDE** that these expenses were appropriately disallowed.

D. CAR EXPENSES

Respondent has disallowed, as a cost against tuition, the purchase price of a new car as well as expenses related to this car and also expenses related to an older car. Respondent's reason for this disallowance is that there is no possible way to verify whether these vehicles were used solely for personal needs of the staff or whether any of the costs were educationally related. Petitioner's expert, the certified public accountant, testified that it is an auditing requirement, both in the public sector and the private sector, to keep a record of mileage, where the car travelled and for what purpose. He also testified that there were no adequate logs available to determine which of the car expenses were personal car expenses and which are business expenses.

Based on the foregoing, I **CONCLUDE** that these expenditures were properly disallowed by respondent.

E. FRINGE BENEFITS

Petitioner argues that the fringe benefits which were disallowed by respondent should be allowed even though they were only given to a few selected staff members because they were, in fact, paid "in lieu" of salary. In support of this contention, attached as "Exhibit C" to petitioner's brief, is a letter dated January 22, 1974. This letter is not in evidence; it was not offered at the hearing; respondent's counsel had no opportunity to cross-examine on its preparation or authenticity; it has been improperly submitted and will not be considered.

An examination of the Assistant Commissioner's testimony on this issue shows that only if the cost of the benefits had been paid to employees, not in lieu of salary, but as additional salary, would some of these fringe benefits have been allowed.

The Assistant Commissioner also testified that some of the "fringe benefits" exceptions would not be allowed even if they had been for the whole staff.

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I **CONCLUDE** that these costs also were appropriately disallowed by respondent.

F. MORTGAGE INTEREST AND DEPRECIATION

Respondent asserts that it utilized public school audit standards for the audit in general and that the same standards support its treatment of depreciation and mortgage interest in this audit. Respondent has shown that that level was set at or below the 85th percentile of public school costs; and that those public school costs reflect a five percent of cost per year, ad infinitum, across the board deduction in lieu of depreciation and mortgage interest. Respondent argues that no good reason exists for treating private school allowable tuition costs any differently.

Petitioner's primary argument to support its claim of allowability relates to P-6, which was admitted into evidence over respondent's objection. P-6 is a letter from the Bureau of Special Education, dated October 27, 1978, to the executive director of petitioner's school, in which policy for the 1978-79 school year is confirmed. That letter has no applicability to the audit years in question. There is no competent evidence in the record to show that the Bureau of Special Education had agreed to an arrangement for the 1975-76 or 1976-77 years similar to that described in P-6.

Petitioner asserts that a predetermined per square footage of "rent" is allowable if mortgage interest and depreciation costs were not used. Based on this assertion, and bolstered by P-6, petitioner calculated this expenditure, which was disallowed by respondent.

The testimony and the evidence show that respondent has reasonably applied a common standard to be used in establishing costs for determining tuition rates. Petitioner's costs for this expenditure were appropriately disallowed, according to respondent's standards.

The respondent has stated that the purpose of its audit was to provide a means of verifying the accuracy of the tuition rate charged by petitioner during the years in question.

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However, petitioner asserts that absent guidelines and regulations, respondent cannot retroactively impose a nondefined method of computing tuition rates without notice to the school and without giving the school the opportunity of showing that its method is in conformance with existing law.

I **FIND** this argument to be without merit. As discussed in full above, public school accounting standards were used to assign tuition rates for petitioner for the 1975-76 and 1976-77 school years. The only reasonable method for verifying the accuracy of those tuition rates was to use public school audit standards in conducting the audit. Consequently, the final audit, as it now stands adjusted, accurately reflects what actual tuition costs were for the years in question.

In reaching the conclusions incorporated throughout this decision, it was necessary to review carefully the entire record. In so doing, I found several submissions by petitioner which are not evidentiary and which respondent attempted to shield from my view. Nevertheless, I found it necessary to review the contested documents before deciding their relevance, admissability or their innocuous nature. For whatever support these posthearing submissions might have been to petitioner's case, they should have been offered at the hearing. The submission of documents as "evidence" attached to briefs is highly improper and should be avoided in future litigation before the OAL.

The Order restraining the release of respondent's notification letter to public schools is rescinded. That notification letter may now be revised and forwarded, as planned, to the appropriate public schools.

For all of the above reasons, the petition of appeal is **DISMISSED.**

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

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OAL DKT. NO. EDU 0384-81

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

28 December 81
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

12/28/81
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 5, 1982
DATE

Ronald L. Parker /ab
OFFICE OF ADMINISTRATIVE LAW

fms

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DOCUMENTS IN EVIDENCE

P-1 Nonpublic School Educational Costs
P-2 Summary of Proposed Changes
P-3 I.D.
P-4 I.D.
P-5 Depreciation Schedule
P-6 Letter, J.W. Richardson, dated October 27, 1978
P-7 Letter, Lihotz, Esq. to Duncan, DAG incorporating Steves' Affidavit and Exhibits
P-8 Rosner Affidavit

R-1 Post Audit Conference Report
R-2 Rehab. Vocational Income, 1975-76
R-3 Rehab. Vocational Income, 1976-77
R-4 Letter with attached schedules Kent to Culbertson, dated June 1, 1981

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THE ARCHWAY SCHOOL, A NON-PROFIT CORPORATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DIVISION OF FINANCE AND REGULATORY SERVICES OF THE NEW JERSEY DEPARTMENT 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 pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes that in the above-captioned matter pursuant to L. 1978, c. 67§8 (N.J.S.A. 52:14B-10(c)) an Order of Extension was executed on February 2, 1982 extending the time limit for the filing of the Commissioner's determination until February 25, 1982.

Petitioner's lengthy exceptions to Judge Thomas' initial decision were filed in a timely fashion.

The Commissioner notes petitioner's continuous challenge to the Commissioner's authority to audit its records complaining that the standards applied in making the audit are those for public schools. Petitioner contends that Judge Thomas relied on erroneous facts in arriving at his findings and conclusions. Petitioner protests the application of public school standards to the audit of nonpublic school expenditures. (Petitioner's exceptions, at pp. 19-22)

Petitioner in a surprising shift of argument at this juncture does not challenge the right of the State to review the books and records of the Archway School but challenges the right of the State to allegedly define rules and regulations outside the rulemaking process with retroactive application. Petitioner seems to now admit to the relevance of an audit by the State of the books of nonpublic schools but suggests that the standards applied to the audit be some undefined but different set of rules from those applied to the public schools. (Exceptions, at pp. 36-38)

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The Commissioner cannot agree with the logic or relevance of petitioner's arguments against the application of audit standards for public schools to those for nonpublic schools. Such authority clearly derives from N.J.A.C. 6:20-4.2, recited in its entirety, ante.

Petitioner's attempt to justify the propriety of invoices determined by the audit to be missing is without merit. The Commissioner so holds. The Commissioner cannot agree that the presentation of cancelled checks will suffice. (Exceptions, at p. 43) Nor can the Commissioner agree with petitioner's assertion that circumstantial evidence coupled with the testimony of individuals paying the bills constitutes ample proof that the invoices at one time existed. (Exceptions, at p. 45)

The Commissioner finds no merit in petitioner's exceptions alleging that Judge Thomas failed to consider all the evidence presented. A thorough search of the record herein including the documents properly submitted and the testimony of witnesses convinces the Commissioner of the completeness of Judge Thomas' consideration. (Exceptions, at p. 47)

Petitioner in its exceptions argues that providing transportation to its employees by purchased or rental automobiles is an ordinary and necessary expenditure. No proof of such allegation is presented. The Commissioner finds no merit therein nor can he agree with the conjecture by petitioner that because the State had not promulgated a requirement that a detailed travel log must be maintained for transportation expenses, such expenses must be allowed. (Exceptions, at pp. 51-52)

The Commissioner finds petitioner's exception meritless wherein is argued that all costs classified as fringe benefits be allowed in the audit as legitimate expenses. Nothing in the record convinces the Commissioner that the random basis on which such benefits were accorded made them allowable as additional salary. Nor can the Commissioner agree that in conducting the audit some undefined standard other than that for the public school audit be applied.

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

The Order of Restraint previously intended for the notification letter is herewith set aside; that letter may now be distributed to the appropriate school districts as planned.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 25, 1982

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THE ARCHWAY SCHOOL, A NONPROFIT CORPORATION,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
STATE OF NEW JERSEY, DIVISION OF FINANCE AND REGULATORY SERVICES OF THE NEW JERSEY DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 25, 1982 and March 25, 1982

Decided by the State Board of Education, May 5, 1982

For the Petitioner-Appellant, Myers, Matteo, Rabil & Norcross (Marie E. Lihotz and David F. Norcross, Esqs., of Counsel)

For the Respondent-Respondent, Jaynee LaVecchia, Deputy Attorney General

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

June 2, 1982

Pending N.J. Superior Court

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5260-80
AGENCY DKT. NO. 316-6/80A

SAMUEL S. JANUS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,
Respondent.

APPEARANCES:

John R. Hogan, Esq., for petitioner, Samuel S. Janus

James R. Freeswick, Esq., for respondent, Board of Education of the Borough of Maywood (Gladstone, Hart & Rathe, attorneys)

Record Closed January 20, 1982 Decided January 21, 1982

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter was commenced in June 1980 by the petitioner, Samuel S. Janus, pursuant to the authority of the Commissioner of Education to hear and determine controversies under the school laws, pursuant to N.J.S.A. 18A:6-9. The petitioner contested the respondent's actions in reducing his working hours and salary and in eliminating his health insurance benefits. The Commissioner of Education transmitted the matter to the Office of Administrative Law for a 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 November 1980. The parties engaged in pretrial discovery, and several motions relating thereto were filed and argued. Three days of hearing were held on May 12, 13, and 14, 1981. Thereafter, in August 1981, the respondent moved to dismiss the petition based upon the affirmative defense of untimely filing, beyond the 90-day time limitation of N.J.A.C. 6:24-1.2.

The above motion was decided on October 23, 1981. In a partial summary decision, the petition was dismissed insofar as it related to the issue of Dr. Janus' reduced working hours and salary. However, the issue of his loss of health insurance benefits was not barred by the 90-day time limit, and that question was preserved for further hearing. The Substantive Order and Partial Summary Decision is part of the record in this case.

Three additional days of hearing, November 16, 17, and 20, 1981, were held on the remaining question of whether or not the respondent's cancellation of the petitioner's health insurance coverage was proper and justified under the circumstances.

The respondent cancelled the petitioner's health insurance benefits, beginning in September 1979, at the same time his weekly hours were reduced from 25 to 18. The petitioner has since remained employed with the respondent, for 18 hours per week, without enjoyment of the health insurance benefits he possessed when he was employed for 25 hours a week. The reason given by the respondent for elimination of petitioner's health insurance coverage was that it was routinely done in accordance with the board's personnel policy that states, "employee privileges and benefits apply to all employees under contract for at least 20 hours per week." That written policy, entitled "445. Part-time Personnel Benefits" (Exhibit R-47) was first adopted by the respondent in 1970 and is still in effect. The petitioner did not contest the facial validity of the policy and the right of the board to enact and enforce it.

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There is no doubt that the board also reduced the petitioner's hours to "3 days per week, 18 hours maximum" by resolution adopted at a public meeting in August 1979 (Exhibit R-43).

The issue of respondent's justification for terminating petitioner's health insurance benefits was preserved for hearing because Dr. Janus had indicated, in earlier testimony and in papers filed by him in this action, that despite the board's 20 hour limit on employee privileges and benefits, he was given benefits in earlier years when he worked less than 20 hours per week; and that the board was discriminating against him and being vindictive by cancelling such benefits in accordance with its policy, when they had not strictly applied the policy to him previously.

Before resuming the plenary hearing on the health insurance question, respondent moved to dismiss the matter in its entirety, based upon the doctrine of res judicata. In August 1980, several months after the instant action was filed, the petitioner filed a complaint against the respondent and against several of its individual board members and employees in the United States District Court for the District of New Jersey, claiming that he was deprived of certain rights by the respondents in 1978 and 1979. The factual allegations of that complaint relate to various acts and incidents connected with the plaintiff's (petitioner's) disclosure to local newspapers of his dispute with the board concerning a child molestation problem. The plaintiff claimed that, because of the events involved in the dispute, and because he caused public disclosure of the situation by the newspaper, the board retaliated against him by reducing his working hours, salary, and benefits. Dr. Janus also charged that certain individual defendants defamed him. The federal complaint sought a redress of rights guaranteed by the due process and equal protection guarantees contained the Constitution of the United States and Title 42 of the United States Code (pertaining to civil rights). In greater detail, the plaintiff (petitioner) alleged that the defendants violated his rights under the First and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 1, 5, 6, and 18 of the New Jersey Constitution. Separate allegations charged that the respondent, by its actions, violated N.J.S.A. 18A:28-5, which pertains to the state education laws and Doctor Janus' rights

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as a tenured employee. Allegations were also included in the complaint indicating that the board interfered with the plaintiff's rights to cooperate with law enforcement and governmental authorities, and to adhere to the ethical standards of his profession. Dr. Janus sought relief in the form of compensatory and punitive damages.

The allegations of the petition filed with the Commissioner of Education were not nearly as broadly based as the complaint in the federal action. In the instant petition, Dr. Janus recited the board's reduction of his working hours and salary and the elimination of his related benefits. The petitioner related these actions to an alleged violation of his rights as a tenured employee under the education laws of the State of New Jersey. He also indicated that the same actions constituted deprivation of federal and state constitutional privileges. By way of relief, he sought restitution of his salary and other benefits. Dr. Janus also asked for an order enjoining the board from taking any further reprisals against him.

In September 1981 the federal action was dismissed for failure of the plaintiff (petitioner) to comply with an order of the court directing him to provide pretrial discovery. The plaintiff did not appeal the Order of Dismissal and it became final. That is the basis for respondent's motion to dismiss the untried portion of the instant petition, claiming that it is now barred by the doctrines of res judicata or collateral estoppel.

To support this application, respondent indicated that dismissal of the federal action was a final judgment, specifically stated to be "with prejudice as to all defendants." Such a dismissal (for failure to comply with a discovery order of the court pursuant to F.R.C.P. 37(b)(2)(c)) "operates as an adjudication upon the merits." F.R.C.P. 41(b).

Decision on respondent's motion for dismissal was reserved pending conclusion of the plenary hearing.

> Res judicata is an ancient judicial doctrine which contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to relitigation.... it rests

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> upon policy considerations which seek to guard the individual against vexatious repetitious litigation and the public against the serious burdens which such litigation imposes on the community. Lubliner v. Bd. of Alcoholic Beverage Control, Paterson, 33 N.J. 428, 435, (1960).
>
> The doctrine of res judicata is plain and intelligible and amounts simply to this, that a cause of action once finally determined without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by a new proceeding either before the same or any other tribunal.... Where the matter is res judicata, there must be a concurrence of four conditions: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and of parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made. Constant v. Pacific Nat'l. Ins. Co., 84 N.J. Super. 211, 216, (Law Div. 1964).

See also, City of Hackensack v. Winner, 162 N.J. Super. 1, (App. Div. 1978); modified and affirmed 82 N.J. 1, (1980).

> A cause of action once finally determined between parties on the merits by a tribunal having jurisdiction cannot be relitigatged by those parties, or their privies, in a new proceeding. Roberts v. Goldner, 79 N.J. 82, 85, (1979).

The principle of collateral estoppel (estoppel by judgment) differs from res judicata in that it deals with a question of fact that has been litigated and determinated by a valid and final judgment, rather than a cause of action that has earlier been determined. Brick Tp. v. Vannell, 55 N.J. Super. 583, 590, (App. Div. 1959).

> It is well settled that where a court of competent jurisdiction directly determines a right, question or fact, distinctly put in issue, such judgment estops the parties or their privies from thereafter relitigating the same issue in a subsequent proceeding between them, regardless of its nature or form. Washington Tp. v. Gould, 39 N.J. 527, 533, (1963).

See also, Plainfield v. Public Service Electric and Gas Co., 82 N.J. 245, 258, (1980).

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The foregoing principles clearly have also been applied to administrative proceedings. Holly vs. Bates, 7 N.J., 191, (1951); City of Hackensack v. Winner, supra, at pages 24, 25.

In the case at hand, it is obvious that there never was, in fact, a consideration, trial, or true finding on the merits of the petitioner's causes of action in the United States District Court. The dismissal was based upon procedural defects and no substantive findings or conclusions were ever approached. Only the device of a Rule of Court caused the procedural dismissal to "operate as an adjudication upon the merits," "with prejudice," despite the fact that the merits were never truly adjudicated.

Since the individual questions of fact and law involved in the litigation were never considered in the federal action, it logically follows that the doctrine of collateral estoppel is inapplicable. In support of such reasoning, petitioner appropriately suggests the use of the following maxim: "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck" (George Warwick Deeping).

The question of res judicata differs from the above. Assuming that the four tests set forth in Constant v. Pacific Nat'l Ins. Co., supra, are met, the doctrine of res judicata could bar the subject action. The United States District Court entered a final judgment of dismissal, specifically directing that it be with prejudice. The applicable Rule of Court indicates that such a dismissal operates as an adjudication on the merits. FRCP 41(b). The effect of such an involuntary dismissal has been held to support the preclusion of a second attempt to relitigate the same matter: Freedman v. American Export Isbrandtsen Lines, Inc., 451 F.2d, 157 (3rd Cir. 1971), cert. denied 405 U.S. 52 (1972); Molinaro v. American Tel & Tel Co., 460 F. Supp. 673 (E.D. Pa. 1978), aff'd 620 F.2d 288 (3rd Cir. 1980); Bierman v. Tampa Electric Co., 604 F.2d 929 (5th Cir. 1979); Papilsky v. Burndt, 466 F.2d 251 (2nd Cir.), cert. denied 409 U.S. 1077 (1972). Henderson v. Consolidated Merchandising Corp, 286 F. Supp. 697 (D. Ga. 1968); Glick v. Ballentine Produce, Inc., 397 F.2d 590 (8th Cir. 1968); Slotkin v. Brookdale Hospital Center, 337 F. Supp. 275 (E.D.N.Y. 1974).

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Most, but not all, of the conditions required for application of the doctrine of res judicata have been met in this case. The dismissal was rendered by a competent tribunal and, as indicated above, it operated as an adjudication on the merits. Although additional parties defendant were named in the federal action, the Board of Education of the Borough of Maywood, the only respondent in the case at hand, was a party defendant in the District Court. The relief sought in the federal action - damages - is also a component part of the petitioner's demand in the subject action.

However, although there is some overlapping, there is no identity with the cause of action that is the subject matter of this proceeding.

Any doubt as to the identity of the causes of action in the two suits must be resolved in favor of the party against whom the plea of res judicata (or estoppel by judgment) is asserted. 50 C.S.J. Judgments, §648, p. 88; Northern Oil Co., Inc. v. Socony Mobil Oil Co., Inc., 368 F.2d 384 (2nd. Cir. 1966). This tribunal is a state administrative forum, with jurisdiction over the petitioner's rights as a tenured employee under the School Laws of the State of New Jersey, N.J.S.A. 18A-1 et seq. In his pleadings, petitioner has identified his rights to be contained in N.J.S.A. 18A:28-5. His cause of action here is exclusively based upon these rights and their alleged violation by the respondent.

The jurisdiction of the New Jersey State Commissioner of Education over all controversies and disputes arising under the school laws is clearly delineated in N.J.S.A. 18A:6-9. The exclusivity of this administrative avenue of review has been consistently affirmed in the courts. See Hinfey v. Matawan Regional Board of Education, 77 N.J. 514, (1978); Board of Education v. Englewood Teacher's Association, 150 N.J. Super. 265, (App. Div. 1977); Gish v. Board of Education of Borough of Paramus of Bergen County, 145 N.J. Super. 96, (App. Div. 1976), Cert. Denied 434 U.S. 879 (1977).

It is obvious that the United States District Court has jurisdiction over the causes of action pleaded by the plaintiff that are based upon constitutional violations.

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However, it is doubtful that the Federal Court would have exercised jurisdiction over a determination of petitioner's rights under the State education laws. There is a substantial difference between the grounds for liability of the respondent under the School Laws and grounds under the other laws pleaded by the petitioner. The fact that petitioner has sought enforcement of the New Jersey School Laws by the federal courts (by virtue of a recital to that effect in the federal complaint) does not compel the federal court to accept such jurisdiction. In fact, a review of the applicable federal case law indicates that the United States District Court, if it had been given the opportunity, would most likely have abstained from deciding that portion of the complaint which arose out of the state laws pertaining to education.

The "abstention doctrine" arose out of federal civil rights statutes, 42 USCA §1983, and has most recently been discussed in Portia Williams v. The Red Bank Board of Education, et als., 502 F.Supp. 1366 (D.N.J. 1980) 508 F. Supp. 1366 (D.N.J. 1981), 662 F.2d 1008 (3rd Cir. 1981). That action arose from a tenure charge against a teacher by her employer board of education under the New Jersey State Education Law, N.J.S.A. 18A:6-11, which specifies the procedures required in order to suspend, remove or otherwise discipline a tenured teacher. The plaintiff contended that the charges leveled against her violated her first and fourteenth amendment rights. She sought dismissal of the tenure charges, compensatory and punitive damages, costs, and attorney's fees. The Federal District Court dismissed the complaint on defendant's motion, applying the abstention doctrine. Referring to the State Education Laws, the Court stated that

> These regulations, which contain ample procedural safeguards to insure the teacher's interest in obtaining a fair hearing, demonstrate the significance of the the state's interest in the regulation of public education. If this Court were to grant the relief requested by the federal plaintiff, that is, enjoining the prosecution of the tenure termination proceeding and declaring it to be in violation of plaintiff's First Amendment rights, such action would clearly interfere with the state's attempt to forward its interest in education. Williams v. Red Bank, supra, 502 F. Supp. at p. 1369.

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When the plaintiff, Williams, then moved for an injunction staying state administrative proceedings, pending resolution of an appeal from the above judgment of dismissal, the court, in denying such an injunction, affirmed the validity of the abstention doctrine insofar as it permits the federal courts to abstain in favor of pending proceedings in the New Jersey Office of Administrative Law. Williams v. Red Bank, supra, 508 F.Supp 1366.

The United States Court of Appeals for the Third Circuit affirmed the district court's decision to abstain, and also affirmed the application of the abstention doctrine in favor of the state administrative proceedings. However, the court of appeals vacated the dismissal and remanded the matter to the district court for purposes of deciding those matters that could not be adjudicated in the state proceedings. Interestingly, the court of appeals stated that "any res judicata effects which may stem from state administrative proceedings or from any review thereof by the New Jersey State Courts, are simply not relevant to a determination as to whether the administrative proceeding is adequate to vindicate federal constitutional claims." Williams v. Red Bank, supra, 662 F.2d at 1022. The court separated the component parts of the complaint for purposes of res judicata. See also Fanning v. School Board of Independent School District #23, etc, 395 F.Supp. 18, 22 (WD Okla. 1975); 42 U.S.C.A. 1983.

The case at hand closely parallels the Williams case. The U.S. District Court, in the instant matter, would undoubtedly abstain from considering the causes of action pleaded by the petitioner that involve rights, liability, and alleged violations of the state education laws; and the dismissal, with prejudice, in the district court could not have contemplated a dismissal of the pending cause of action in this forum. Therefore, the doctrine of res judicata would be inapplicable to the remaining cause of action in this case, and the motion for dismissal on grounds of res judicata should be denied.

The matter then proceeded to a hearing on the merits of the petitioner's remaining (health insurance benefits) claim.

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The petitioner testified on his own behalf. He indicated that he was first employed by the respondent in the 1965-66 school year, and his employment at that time was for approximately 10 hours per week. According to Dr. Janus, these hours of employment varied between 10 hours per week and 18 hours per week until approximately 1968, at which time his annual contracts specified that his weekly hours were not to exceed 20 hours or were to be for a minimum of 20 hours per week. (See testimony of Samuel S. Janus, 11/18/81, pp. 54 and 55.) Beginning in the 1976-77 school year, the board increased the petitioner's contractual weekly work hours to 25. (Exhibit R-37). This continued until the 1979-80 school year, when the board reduced Dr. Janus' hours to 18 per week.

The petitioner was first enrolled in the board's health insurance plans in November or December, 1968. This coincided with the increase in his contractual hours to 20 hours per week. The insurance coverage continued until 1979-80, when it was terminated because of the reduction in his contractual hours to 18.

The above information is consistent with the exhibits introduced into evidence. These documents show that, beginning in the 1968-69 school year, the respondent adopted appropriate resolutions and entered into contracts with the petitioner specifying that his employment was to be for a minimum of 20 hours per week, although in 1969 through 1971 the board resolved that his employment should be for "up to but not more than 20 hours per week." It is obvious that 20 hours per week was the cut-off point. Differences between "20 hours per week," "up to but not more than 20 hours per week," or "at least 20 hours per week," as these phrases were used in the annual contracts of employment, are not deemed to be material.

The petitioner claimed that there were some years during the above period of time when he actually worked less than 20 hours per week in selected weeks, although his contract may have been for a minimum of 20 hours. During these weeks he remained covered by the respondent's health insurance policies. The contractual arrangements between the parties relating to hours of employment per week should govern in determining application of the board's 20-hour-per week benefits policy. If, in actual

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practice, the petitioner worked more or less than the assigned 20 hours in some weeks, when he was more or less busy than usual, it would be impractical and unreasonable for such deviations to determine his status under the personnel policy.

The petitioner was aware of the board policy limiting benefits to employees under contract "for at least 20 hours per week" (Exhibit R-47). That policy was in force from 1970 and has been unchanged to date. (Exhibit R-49). The petitioner did not contest the existence or validity of the policy.

He also acknowledged that he became ineligible for the insurance coverage and other benefits when the board voted to lower his hours to 18 per week. (See testimony of Samuel S. Janus, 11/20/81, p. 14). The nexus of the petitioner's original complaint was that the reduction in hours was improper. However, that issue was previously eliminated by the summary decision referred to above.

The petitioner also testified that in 1978 through 1980, he performed some extra work at two local parochial schools, outside of his regular employment with the board. He was paid by the board, on separate vouchers, out of a federal or state special title program. However, even if these extra hours were added to his contractual 18 hours per week, the total number of such extra hours, averaged over the entire school year, would not approach 20 hours per week. In any event, this special work was not performed within the scope of his contractual employment with the Maywood Board of Education, and the most time he gave to this special assignment was 30 hours a year.

In order to contradict the petitioner's allegation that the removal of his insurance coverage was a deliberate and discriminatory act by the board, Inez Bisconti, a secretary in the Board of Education office, testified that she routinely determined that Dr. Janus' insurance coverage should be eliminated, because his weekly hours of employment dropped below 20 for the 1979-80 school year. Part of Ms. Bisconti's duties are to determine, at the beginning of each school year, who is entitled to coverage under the benefits plan. When the insurance bill arrived for September 1979, she crossed off the petitioner's name. This deletion was later routinely approved by the board, without specific reference to Dr. Janus' identity.

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Ms. Bisconti acknowledged that she checked prior payroll and Board of Education records and found that since 1972 no one employed for less than 20 hours per week was given health insurance benefits. She indicated, however, that none of the applicable contracts that she reviewed specified work hours per week except for Dr. Janus. Other employee's contracts are for a particular number of hours per day.

Ms. Bisconti stated that no one told her to delete Dr. Janus from coverage. She did it on her own because it is her job, although she does not recall anyone else employed by the board who had ever been reduced in hours in this manner, thereby causing insurance coverage to be dropped. However, she pointed out that the terms of the petitioner's employment, as school psychologist, were different from anyone else's.

Rose Malone, bookkeeper/secretary for the Maywood Board of Education, also testified. As Ms. Bisconti, she also determined that Dr. Janus' eligibility under the New Jersey State Health Benefits program had ceased when his contractual hours of work per week were reduced to 18. Ms. Malone routinely reported the reduction in hours and acted accordingly, submitting a form to delete him from the benefits program. She did this on September 5, 1979.

Dr. Janus offered some testimony on the subject of his out-of-pocket expenditures during the years after his health insurance coverage was removed. However, completion of such testimony was deferred pending determination of whether or not the termination of the petitioner's insurance coverage by the board was improper. This decision is limited to that question. Completion of testimony regarding damages is not necessary unless the respondent is first found to be liable.

Having heard the testimony, having observed and evaluated the witnesses, having reviewed the exhibits, and having considered the briefs, memoranda, and argument of counsel, the court **FINDS** the following **FACTS:**

1. The foregoing discussion and the uncontroverted facts stated therein are incorporated herein by reference.

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2. The respondent's policy, limiting the availability of benefits, such as the subject health insurance coverage, to employees under contract for more than 20 hours a week, is reasonable and valid.

3. Health insurance benefits were first made available to the petitioner, as an employee of the respondent, at the time his contract of employment initially provided for 20 or more hours of work per week. Prior to that time, when the petitioner's contractual employment was for less than 20 hours per week, he did not have those benefits, nor were they offered to him.

4. The petitioner retained the health insurance from 1968 through 1979, during which time he was constantly under contract for at least 20 hours per week.

5. The petitioner's health insurance benefits were terminated only after his contractual weekly employment was reduced to 18 hours, clearly less than the required 20 hours per week.

6. The termination of petitioner's health insurance benefits was routinely and administratively accomplished, based solely upon the fact his weekly hours of employment dropped below the number of hours required for such coverage.

7. The respondent did not discriminate against the petitioner and did not single him out, by applying the above policy to him.

8. During all previous years when the petitioner was given health insurance benefits, he was entitled thereto by virtue of the operation of the 20-hour policy.

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9. At no time in the past did the appellant possess the health insurance coverage as an exception from the board's policy, if he was not entitled thereto.

10. Petitioner produced no evidence to indicate that the board had ever excepted other employees from the operation of the same policy.

The New Jersey State Health Benefits program, N.J.A.C. 17:9-1 et seq., defines an ineligible employee as "any person whose services are not full-time." N.J.A.C. 17:9-4.3(a)6.

For purposes of local coverage, "full-time" means "employment of any eligible employees who appear on a regular payroll and who receive a salary or wages for a minimum of 20 hours per week", N.J.A.C. 17:9-4.6(a)1.

While, not necessarily obligatory on the question of whether or not boards of education may vary the above definitions in fixing their own personnel policies, the foregoing, nevertheless, demonstrates that classification of the dividing line between part-time and full-time, or eligibility and ineligibility, is not unreasonable when fixed at 20 hours per week.

Based upon all of the foregoing, it is CONCLUDED that:

A. The respondent's termination of petitioner's health insurance coverage was not unreasonable, arbitrary, capricious or illegal under the circumstances, and the board's personnel policy was not applied to the petitioner in a discriminatory manner.

B. The petitioner has not proven that the action of the respondent in terminating said benefits was improper or unjustified.

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C. Under the circumstances, the respondent was justified in applying its personnel policy to the petitioner and in terminating his benefits, as an employee for less than 20 hours per week.

It is, therefore, **ORDERED** that the respondent's action in terminating the petitioner's health insurance coverage, be **AFFIRMED** and, there being no further substantive issues to be decided, the appeal is **DISMISSED.**

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

I hereby **FILE** this Initial Decision with **FRED G. BURKE** for consideration.

January 21, 1982
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

January 25, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

January 26, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF EXHIBITS

P-1 Memo to Buffington from Janus, 4/1/74
P-2 Memo to Cirangle from Buffington, 3/19/75
P-3 Memo to Cirangle from Buffington, 5/76
P-4 Memo to Cirangle form Janus, 9/16/76
P-5 Confidential memo to Cirangle and Ferro from Janus, re DeVita
P-6 Indictment #S-803-77, 7/5/77
P-7 Judgment of Conviction and sentence, 3/22/78
P-8 Accusation #A-11-79, 2/7/79
P-9 Judgment of Conviction and sentence, 5/11/79
P-10 Maywood Child Study Team Confidential Memo, 11/8/78
P-11 Urgent memo to Child Study Team and Board of Education from Janus, 11/29/78
P-12 Memo to Board of Education from Child Study Team, 1/11/79
P-13 Confidential report to Maywood Board of Education from Janus, 2/78
P-14 Letter to Board of Education from Janus, 5/3/79
P-15 Newspaper clippings, The Record, 3/22/79
P-16 Newspaper clippings, The Record, 3/23/79
P-18 Letter to Campesi from Cirangle, 3/15/79
P-19 Letter to Cirangle from Campesi, 3/19/79
P-20 Teacher appraisal, 1974-75
P-21 Teacher appraisal, 1975-76
P-22 Tenure report February 1976
P-23 Evaluation report, 2/77
P-24 Letter with photographs attached, 3/23/79
P-25 Tentative budget worksheet, 1979-80
P-26 Total performance evaluation, 1979-80
P-27 Letter to Cirangle from Janus, 9/4/79
P-28 Employment contract, 1968-69
P-30 Employment contract, 1979-80

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P-31 Letter to Janus from Cirangle, 10/31/79

R-1 Handwritten compilation by years
R-4 Excerpt from regular monthly meeting tape of 8/13/79, Minute Book page 2270
R-5 Letter to Janus from Cirangle, 12/8/72
R-6 Letter to Janus from Cirangle, 10/29/73
R-7 Letter to Janus from Cirangle, 4/15/75
R-8 Letter to Santelli from Cirangle, 7/22/75
R-9 Teacher application form, 9/23/66
R-12 Form W-4, Employees Withholding Exemption Certificate, 10/13/66
R-13 Page from minutes, 10/10/66
R-14 Employment contract, 1966-67
R-15 Page from minutes, 9/25/67
R-16 Agreement, 9/26/67
R-17 Copies of New Jersey State Health Benefit program enrollment and authorization cards
R-18 Page from minutes, 7/8/68
R-19 Page from minutes, 4/28/69
R-20 Employment contract, 1969-70
R-21 Page from minutes, 5/11/70
R-22 Employment contract, 1970-71
R-23 Page from minutes, 5/10/71
R-24 Form letter to Janus form secretary, Board of Education
R-25 Page from minutes, 4/10/72
R-26 Employment contract, 1972-73
R-27 Page from minutes, 4/11/73
R-28 Employment contract, 1973-74
R-29 Page from minutes, 5/22/74
R-30 Employment contract, 1974-75
R-31 Page from minutes, 5/12/75

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R-32 Employment contract, 1975-76
R-33 Letter from Cirangle to Janus, 5/13/75
R-34 Page from minutes, 6/14/76
R-35 Letter from Cirangle to Janus, 6/15/76
R-36 Employment contract, 1976-77
R-37 Page from minutes, 9/27/76
R-38 Letter from Cirangle to Janus, 10/1/76
R-39 Page from minutes, 6/29/77
R-40 Letter from Cirangle to Janus, 7/5/77, countersigned by Janus, Board President and Board Secretary/Business Administrator
R-41 Page from minutes, 12/11/78
R-42 Employment contract, 1978-79
R-43 Page from minutes, 8/13/79
R-44 Letter from Cirangle to Janus, 8/21/79
R-45 Page from minutes, 5/12/80
R-46 Letter from Ferro to Janus, 5/13/80, with form of recommended motion reproduced at top
R-47 Personnel policy entitled: 445 Part-time personnel benefits, date adopted 10/12/70, date revised, 5/12/75
R-48 Eight (8) pages from minutes, 5/12/75
R-49 Personnel policy entitled: 4147 Part-time Professional Personnel Benefits, adopted 10/12/70
R-50 Two (2) pages from minutes, 10/12/70
R-52 New Jersey Dental Service Plan membership enrollment card, 3/12/75
R-53 Letter from Janus to Cirangle, 9/4/79, copies of 1968-69 employment contract and Blue Cross/Blue Shield membership card attached
R-55 Sixteen (16) pages from minutes, 11/12/79
R-56 Letter from New Jersey Dental Service Plan, Inc. to Bisconti, 9/4/79, with monthly dues billing sheets attached
R-57 Purchase order #L-469
R-58 Purchase order #L-469 (billing voucher)
R-59 Purchase order #L-470

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R-60 Purchase order #L-471

R-61 State Health Benefits (Division of Pensions) deletion sheet with change summary

R-62 Memorandum to employers participating in the State Health Benefits program from Gaius B. Mount, Health Benefits Bureau, 10.19/79, with change lists and billing transmittal sheets attached

R-64 Employment contract, 1980-81, John Drewnowski

R-65 Employment contract, 1980-81, Carol Schmidt

R-66 Employment contract, 1980-81, Brian Rodak

R-67 Purchase orders Nos. 869, 822, 712, 643, 551, with handwritten memo attached

R-68 Payroll history, 5/31/68, p. 67

R-69 Teacher's pension and annuity fund enrollment application, 11/4/68

R-70 Payroll history, 4/30/69, p. 55

R-71 Payroll history, 6/30/70, p. 49

R-72 Payroll history, 6/30/71, p. 43

R-73 Payroll history, 6/30/72, p. 42

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SAMUEL S. JANUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the finding by the Honorable Arnold Samuels, ALJ that the Board properly terminated his health benefits. Petitioner argues that the Board policy cut-off of twenty hours per week employment had not previously been applied to him. Petitioner alleges that in the 1968-69 school year, although he did not work a twenty-hour minimum week, he was still in receipt of medical benefits. The Board's reply exceptions refute those of petitioner and affirm the initial decision. The Commissioner finds merit in the Board's arguments.

The Board contests the relevance of petitioner's receipt of health benefits during the 1968-69 and 1969-70 school years. The Board points to Board Policy #445 which provides that:

> "Employee privileges and benefits apply to all employees under contract for at least twenty (20) hours per week."
> (Board's Exceptions, at p. 2)

This was adopted on October 12, 1970 and has continuously been in operation.

A thorough examination of the record herein, including the documents in evidence and the testimony of witnesses, fails to reveal to the Commissioner any deviation by the Board from its policy for personnel benefits for part-time employees. 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.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

March 8, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 6760-81
AGENCY DKT. NO. 331-7/81A

IN THE MATTER OF THE TENURE HEARING OF CAROLYN EDWARDS, SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY

APPEARANCES:

Melvin Randall, Esq., for Board of Education of East Orange
(Love & Randall, attorneys)

William S. Greenberg, Esq., for Carolyn Edwards, respondent
(Greenberg, Kelley & Prior, attorneys)

Record Closed December 11, 1981 Decided January 22, 1982

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

In this case the Board of Education of the City of East Orange has filed charges against a tenured teaching staff member alleging that she was incompetent, insubordinate and conducted herself in an unbecoming manner in her capacity as a school nurse. Following the forwarding of these charges to the Commissioner of Education, the respondent moved to dismiss them upon a variety of grounds. At that juncture, the matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq.

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Upon referral of the file to the undersigned, I noted that the pending motion by respondent to dismiss, which had been accompanied by a supporting brief, had not been answered by the Board. Accordingly, I informed the Board that in order to address myself to the motion, I would appreciate the receipt of a response, or some other written indication of the Board's position in the matter. In response to that communication, a reply brief ultimately was filed and the matter is now ripe for determination.

In support of her motion the respondent maintains that there are certain fatal procedural defects surrounding the Board's action which compel a dismissal. Specifically, she points to the fact that there is no particularized "statement of charges." Rather, there is simply a letter informing her that she is alleged to have been incompetent, insubordinate and conducted herself in a manner unbecoming a teacher. Further, respondent notes that the so-called statement of evidence in support of the alleged charges does not comport with the statutory requirements of N.J.S.A. 18A:6-11, since they are not in the form anticipated by the statute and do not inform her of the particular facts which are said to underlay the categorization of the charges against her. In respondent's view, there is no way to tell from the material served upon her in what specific ways she was allegedly incompetent, insubordinate or had conducted herself in a manner unbecoming a tenured staff member. Thus, absent the receipt of such a specified list of charges, respondent claims she has been unlawfully deprived of an opportunity to prepare an appropriate defense.

N.J.S.A. 18A:6-11 requires that where a charge is made against a tenured employee it must be supported by "a written statement of evidence under oath." Thus, respondent also insists that the charges in this case must be dismissed since there is no indication from the file as to what facts the principal, Mr. Rathjens, is even stating or attesting to under oath. Rather, there is merely a jurat and signature of a notary public stamped upon some of the documents which were forwarded to the Board as allegedly constituting the charges. See Teacher Evaluation Form, p.4, dated March 1981; Memorandum of March 26, 1981; Memorandum dated May 26, 1981, page 2. According to respondent, the signature on some disconnected documents does not constitute the statutory requirement of an oath—an act which connotes swearing to the truth of facts contained in a recognizable document.

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In its reply, the Board concedes that although there might be some variance between its action and the literal requirements of the statute, a dismissal of the charges would merely serve to exalt form over substance. According to the Board, the protections of the statute are designed to prevent the filing of frivolous charges, and that a review of the documentation in this case clearly establishes that the action against respondent is based upon her poor performance as articulated in the evaluation, and by other deficiencies noted in the two memoranda, all of which was served upon her. In other words, the Board maintains that its intention was clear, and that the procedure which it followed was consistent with the spirit of the statute. The Board further points out that the absence of a specific certification is not fatal since the minutes of the meetings of the Board, together with the transmittal letter to the Commissioner, make plain that it did consider charges of incompetence, insubordination and conduct unbecoming a tenured employee and that its intent clearly was to have the Commissioner conduct a hearing to determine the truth or falsity of those charges.

The Board further argues that even if the court determines that certain procedural requirements were not faithfully adhered to, nonetheless, the Board should be allowed time to amend its pleadings in order to correct any such deficiencies.

Finally, the Board argues that respondent should be estopped from seeking to have the charges dismissed since the evidence upon which the Board relies was made known to her during the course of the evaluation process, and thus she is in no position now to complain that they are so vague and unclear as to be incapable of being understood and responded to. To put it another way, the Board insists respondent has not been prejudiced by the fact that it may not have fully complied with all procedural niceties.

The pertinent documents reveal the following. By letter dated June 17, 1981, respondent was advised by the Board secretary that, pursuant to the appropriate statute, charges of incompetence, insubordination and conduct unbecoming a teacher had been made against her and that a copy of the charges as well as a copy of the statements of evidence to support the charges were being sent to her with that letter. Respondent further was advised that she would have an opportunity, if she cared, to submit a written statement of her position and a written statement of evidence under oath, together with

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supporting evidence, within 15 days of her receipt of the charges filed against her by the Board. Attached to the letter sent to respondent were: (1) a copy of her evaluation conducted in March 1981 and signed by her evaluator, Mr. Donald J. Rathjens, and by respondent herself; (2) a copy of a memorandum to respondent from Mr. Rathjens, dated March 26, 1981; and (3) a copy of a memorandum to her from Mr. Rathjens, dated May 26, 1981. Apparently, respondent did not submit any reply documents to the Board of Education.

At its meeting of July 21, 1981, the Board took up the matter and determined to certify charges against Mrs. Edwards. According to the Board's minutes, the evidence against her, "takes form of numerous memoranda as well as performance evaluations of 1980-81. Essentially, it is a matter of poor attendance and poor punctuality (as of March 1, she has been late 43 days); poor record keeping of medical files and timeliness of submitting reports as well as concerns we have about her personal appearance from the standpoint of relationship with staff, students and parents." On the same evening the Board determined to suspend Mrs. Edwards without pay, effective September 1, 1981.*

DISCUSSION

I quite agree with the Board that, where possible, form should not be exalted over substance, and that as a general proposition the actions of boards of education are deemed to have a presumption of correctness, thereby requiring one who challenges their actions to demonstrate that they have been arbitrary, capricious, unreasonable or otherwise inconsistent with statutory or constitutional requirements. Nevertheless, my review and consideration of the entire file in this case leads me inexorably to the conclusion that the East Orange Board has not complied with its statutory duty and, in failing to so comply, has deprived respondent of a fair and adequate opportunity to be made aware of the specific charges against her and to be able to respond in an appropriate fashion.

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* I previously directed, on motion of respondent, that since 120 calendar days had passed since the "certification" of charges by the Board, pursuant to N.J.S.A. 18A:6-14, she was to be restored to a pay status effective November 20, 1981. The various documents have also been separately marked as Court Exhibits for convenience of reference.

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As the decision in the case of In the matter of Tenure Hearing of Marilyn Feitel, 1977 S.L.D. 451, aff'd 458, relied upon by the Board, reveals, there are certain procedural requirements that a board must follow under N.J.S.A. 18A:6-11. Thus, a charge must be in writing and accompanied by a written statement of evidence, under oath, to support it. It is not enough simply to allege, as here, in a palpably conclusory fashion that one has been incompetent, insubordinate or conducted oneself in a manner unbecoming a tenured employee. Rather, a specific allegation which sets forth, in writing, the facts upon which the Board intends to rely must be served upon the employee, and be under oath. The file in this case reveals a woeful absence of any such construct. Rather, respondent has to guess as to which of the statements contained in her evaluation, and in the memoranda, are tantamount to the tenure charges and which are not. For example, the performance evaluation indicates that between September 2, 1980 and March 11, 1981 she was absent 14 times. So too, during the same period she was alleged not to have not been punctual a total of 43 times. There is no indication to the respondent that she is charged specifically within the context of the tenure law with being late or being absent—she must guess at this.* So too, the remark that her alleged poor attendance has had a negative impact on the health program does not tell her a thing in this context. How is the respondent to know whether her alleged poor attendance and its consequential "negative impact" is alleged to constitute incompetence, insubordination or unbecoming conduct? How is her alleged lack of punctuality and its negative impact to be construed? The Board, in short, owed respondent a clear statutory duty to fairly and comprehensively articulate in written charges just what specific conduct is alleged to give rise to the tenure allegations. This it failed to do.

Furthermore, what is respondent to make of the comments on page 2 of the evaluation regarding Mr. Rathjens' dissatisfaction with the condition of the health records? Is that criticism included among the charges against her and, if so, what does it

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* While the Board minutes reflect some specifics, they are not part of the charges and cannot lend respectability to inadequate charges.

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allege? The same observation can be made with respect to the statements which appear in paragraphs 4 and 5 on page 2 of the evaluation. The reference to Mrs. Edwards's need to modify and improve her attitude and behavior as it relates to her interpersonal relationships with students, parents and staff members may very well be an appropriate criticism by her evaluator. What, however, does it charge her with in the tenure context? Is her alleged lack of adequacy in this area "incompetence?" Is it "insubordination?" Is it "conduct unbecoming a teacher?" Is it "inefficiency?" She simply isn't told.

Similar criticisms can be made with regard to the remaining paragraphs of the evaluation. While I agree with the Board that respondent was aware of the contents of that evaluation in March 1981, the context at that time had to do with whether or not her performance justified a salary increase. There is certainly nothing within the document itself to show that she was put on notice that these same alleged deficiencies also raised the prospect of tenure charges. Indeed, even if references had been made to that possibility within the document itself, or orally at a conference, the Board still is obliged to reduce them to proper written form.

Equally deficient is the memorandum of March 26, 1981. In that memorandum Mr. Rathjens placed six obligations upon Mrs. Edwards with respect to medical records, etc. There is no indication in any of the documentation whether or not she complied with the directives and, if not, whether any such noncompliance, in whole or in part, is meant to be included in any of the charges against her. So too, the memorandum of May 26, 1981 also is sadly lacking in such specificity. Indeed, a comment in that memorandum by Mr. Rathjens raises yet another problem. In particular, he maintains that he sees no reason for "your lack of efficiency" and that the consequences of her alleged laxity are known to Mrs. Edwards. That sort of language gives rise to a potential charge that her performance is one marked by inefficiency, rather than incompetence, insubordination or something else. If that be the case, then there are certain statutory requirements that the Board had to have met in order to include such conduct in tenure charges. See N.J.S.A. 18A:6-14. The point, of course, is that respondent must guess not only at what the specifics of the charges against her are, but also what the charge itself is.

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The problem with the so-called oath is also troubling. The mere placement on some of the pages of the documents of a jurat, together with a notary stamp and signature, surely is not the sort of compliance which the Legislature had in mind in the statute.

Thus, to overlook or excuse the serious lack of compliance with the normal procedures that are followed in cases of this sort would only serve to encourage such laxity in the future. The court does not believe that these gross deficiencies ought to be tolerated, particularly where they involve the serious question of one's right further to pursue her chosen profession as a certified school nurse. Of course, the court should not be interpreted as making any findings with regard to the truth of the contents of the evaluation or of the memoranda. Rather, the court's sole concern in this matter is with the fatal deficiencies which marked the procedures that the Board followed in seeking to pursue tenure charges against Mrs. Edwards.

Having found that the Board has failed substantially to comply with its statutory obligations, the court will now consider the Board's request that it now be permitted to amend the charges in order to bring them into conformity with the requirements of the statute. This request must be rejected. The Legislature has articulated the route that boards must follow in order to put into motion charges against a tenured employee. The Commissioner has amplified upon those requirements in several cases and none of them support the proposition advanced here that the Board should now be permitted to fill in these gaping holes by way of amendment. Rather, the petition will be dismissed, but without prejudice to the right of the Board to attempt to pursue charges in a manner that complies with the statute. Of course, any defenses that the respondent may have with regard to the attempt to reinstitute charges certainly will continue to be available to her, and she would not be barred from raising them in an appropriate fashion as circumstances might dictate.

For the reasons contained herein, it is hereby **ORDERED** that the tenure charges lodged against the respondent be **DISMISSED**, without prejudice, and that she forthwith be restored to her position as a school nurse with all salary and emoluments to which she would be entitled had charges not been made against her.

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

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

January 22, 1982
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

January 26, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 27, 1982
DATE

Elizabeth Kingman, Sec
FOR OFFICE OF ADMINISTRATIVE LAW

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EXHIBIT LIST

EXHIBIT NO.	DESCRIPTION
C-1	Letter of June 17, 1981 from Board Secretary to Carolyn Edwards
C-2	Memorandum of June 16, 1981 from Kenneth D. King to Board Secretary and attached Teacher Evaluation, dated March 1981
C-3	Memorandum, dated March 26, 1981, from D. Rathjens to Carolyn Edwards
C-4	Memorandum, dated May 26, 1981, from D. Rathjens to Carolyn Edwards

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IN THE MATTER OF THE TENURE :

HEARING OF CAROLYN EDWARDS, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE CITY : DECISION

OF EAST ORANGE, ESSEX COUNTY. :

:

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

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 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 tenure charges are hereby dismissed without prejudice.

COMMISSIONER OF EDUCATION

March 9, 1982

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4349-81

AGENCY DKT. NO. 219-6/81A

JANE M. WILLIAMS,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,

Respondent.

APPEARANCES:

John E. Collins, Esq. for petitioner (Selikoff & Cohen, attorneys)

Alan R. Schmoll, Esq. for respondent (Capehart & Scatchard, attorneys)

Record Closed January 6, 1982 Decided January 29, 1982

BEFORE **LILLARD E. LAW,** ALJ:

Petitioner, a special education teacher with a tenure status in the employ of the Board of Education of the Township of Deptford (Board), alleges that the Board, in violation of N.J.S.A. 18A:30-2.1, improperly and illegally withheld salary payments due to her and, further, deducted accumulated sick leave days from her. She alleges, further, that these sick leave days were the result of her absences caused by a personal injury arising out of and in the course of her employment. The Board denies the allegations and asserts, by way of a separate defense, that it is under no legal obligation to continue to pay petitioner's salary for any absence of more than one year subsequent to the date of the original work-related injury, pursuant to N.J.S.A. 18A:30-2.1.

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This matter was transmitted, by the Commissioner of Education, to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

The parties filed cross-motions for summary judgment on the pleadings and briefs of counsel.

STATEMENT OF FACTS

Petitioner is a special education teacher employed by the Board since on or about September 1, 1972. On or about November 11, 1977, petitioner sustained injuries while she was attempting to restrain an unruly student during school hours and on school property. As such, said injuries were caused by an accident arising out of and in the course of petitioner's employment.

As a result of said injuries, petitioner was absent from her post of duty for approximately one week in December 1977. During that period, the Board paid petitioner her full salary without charging said absences to petitioner's annual or accumulated sick leave, pursuant to N.J.S.A. 18A:30-2.1. Again as a result of said injuries, petitioner was absent from her post of duty for approximately six weeks in October and November 1979. During said period, the Board paid petitioner her full salary, without charging said absences to petitioner's annual or accumulated sick leave, pursuant to N.J.S.A. 18A:302.1.

From on or about January 12, 1981 through the end of the 1980-81 school year, petitioner was again absent from her post of duty as a result of the aforementioned injuries. Petitioner received workers' compensation temporary disability benefits during that period, pursuant to N.J.S.A. 34:15-1 et seq. From January 12, 1981 to on or about January 30, 1981, the Board paid petitioner her full salary. However, petitioner received notice on or about March 4, 1981, from Donald LeVan, the Board's Secretary, that said salary payments had been made by charging petitioner's absences to her annual and accumulated sick leave. Mr. LeVan further informed petitioner that the Board would not pay her salary, pursuant to N.J.S.A. 18A:30-2.1, during the period of absence beginning January 12, 1981, and therefore, upon the exhaustion of petitioner's annual and accumulated sick leave, she would receive no further salary payments from the Board during her absence.

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ISSUE TO BE DETERMINED

Since there are no material facts in dispute and the issue is solely one of law, a motion for summary judgment is appropriate. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954). The issue, as set forth by the parties, is whether the petitioner is entitled to full salary, under N.J.S.A. 18A:30-2.1, less the amount she received in workers' compensation temporary disability benefits, for absences due to a work-related injury when said absences occurred more than a year from the date of the injury and when the total number of absences resulting from said injury amounted to less than one year.

LEGAL ARGUMENTS OF THE PARTIES

Petitioner asserts that she is entitled to receive her full-salary payments less temporary disability payments, under the New Jersey Workers' Compensation Act (N.J.S.A. 34:15-1 et seq.), pursuant to N.J.S.A. 18A:30-2.1, since the total number of her absences amounted to less than one year. Petitioner cites N.J.S.A 18A:30-2.1, which provides:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability. [Emphasis added.]

Petitioner asserts that an exhaustive search has revealed no cases dealing with how the phrase "for the period of such absence for up to one calendar year." is to be interpreted. Thus she contends that one must look to the New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., the statutory scheme with which N.J.S.A. 18A:30-2.1 is inextricably entwined. The "arising out of and in the course of his employment" standard contained in N.J.S.A. 18A:30-2.1 is identical to the standard

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provided for at N.J.S.A. 34:15-7. Petitioner notes that N.J.S.A 18A:30-2.1 specifically refers to the receipt of or eligibility for temporary disability benefits under workers' compensation law as a measure of time for the period during which an employee can receive salary payments, pursuant to N.J.S.A. 18A:30-2.1. Accordingly, petitioner argues, N.J.S.A. 18A:30-2.1 and N.J.S.A. 34:15-1 et seq. must be construed in a similar manner. As noted by the Court in Mimkon v. Ford, 66 N.J. 426, 433 (1975):

> ... statutes which deal with the same matter or subject ... and which seek to achieve the same overall legislative purpose ... should and must be read in pari materia. 2A Sutherland, Statutory Construction (Sands ed. 1973), § 51.03 at 298. [further citations omitted]

Moreover, in Giles v. Gassert, 23 N.J. 22, 33-34 (1956), the Court opined:

> The sense of a law is to be collected from its object and the nature of the subject matter, the contextual setting, and the statutes in pari materia; and the import of a particular word or phrase is controlled accordingly. Isolated terms cannot be invoked to defeat a "reasonable construction." [Emphasis added.]

See also, State v. Green, 62 N.J. 547, 554-555 (1973), wherein the Court observed:

> It is basic in the construction of legislation that every effort should be made to harmonize the law relating to the same subject matter. Statutes in pari materia are to be construed together when helpful in resolving doubts or uncertainties and the ascertainment of legislative intent. Such enactments are to be considered "as a homogeneous and consistent whole, giving effect to all their provisions." [citations omitted]

Petitioner contends that the Workers' Compensation Act is to be liberally construed to bring as many cases as possible within its coverage. Hannigan v. Goldfarb, 53 N.J. Super. 190 (App. Div. 1958). New Jersey courts have been mindful that the Workers' Comepensation Act is remedial social legislation and should be given liberal construction in order that its beneficent purposes may be accomplished. Torres v. Trenton Times Newspaper, 64 N.J. 458 (1974); Panzino v. Continental Can Company, 71 N.J. 298 (1976). This same element of liberal construction must be applied to N.J.S.A. 18A:30-2.1, also a form of remedial social legislation, which is inextricably entwined with the Workers' Compensation Act.

Petitioner asserts that the key issue in the instant case is whether or not the term "period" as used in N.J.S.A. 18A:30-2.1 refers to a single or disjunctive segment of

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time. It is instructive to note that the term "period" as used for temporary disability purposes specifically encompasses disjunctive periods of disability. See N.J.S.A 34:15-38; Colbert v. Consolidated Laundry, 31 N.J. Super. 588 (App. Div. 1954). In the Colbert case, the petitioner was injured in February 1950 and suffered a relapse in 1952. The court concluded that "compensation for intermittent periods or for recurrent intervals of temporary disability may be recovered under the Workmen's Compensation Act." Id. 31 N.J. Super. at 596. That temporary disability benefits for the same injury are available at different times is also evident from the very facts of the instant case in that the petitioner herein has received temporary disability benefits on all the occasions when she was absent due to her work-related injury. These benefits were paid in December 1977, in October and November 1979 and from January 1981. Even though petitioner's injuries necessitated absences during three different school years, the total number of her absences has still not exceeded the one-year total period established in N.J.S.A. 18A:30-2.1.

In analyzing N.J.S.A. 18A:30-2.1, petitioner argues that it is evident that the salary and wage payments to be provided by a board of education are due for "the waiting period [as provided in the Workers' Compensation Act] and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes." Petitioner herein "received" such temporary disability benefits from January 12, 1981 through June 1981. Thus, petitioner contends, the time frame intended by N.J.S.A 18A:30-2.1 cannot be determined without reference to the workers' compensation temporary disability benefit statutory provisions. Since the term "period" under temporary disability law is not limited to a single period, the same definition must be applied with respect to N.J.S.A. 18A:30-2.1. Petitioner argues that where a word or phrase occurs more than once in a statute, it should have the same meaning throughout, unless there is a clear indication to the contrary. Petition of Byron, 165 N.J. Super. 468 (Law Div. 1978), aff'd, 170 N.J. Super. 410 (App. Div. 1979); Keith Machinery Corp. v. South Plainfield, 89 N.J. Super. 584, 590-91 (Law Div. 1965), aff'd, 91 N.J. Super. 469 (App. Div. 1966).

Petitioner notes that the very interpretation it advocates herein was followed by the Board herein until January 1981. As admitted in paragraph five of the Board's Answer, petitioner's absences in 1979 were compensated, pursuant to N.J.S.A. 18A:30-2.1, although the accident had occurred two years previously. Thus, petitioner submits, the

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Board has waived any right to allege that the statute covers only a period up to one year from the actual date the injury was initially incurred. Petitioner asserts that the Board's attempt to emasculate N.J.S.A 18A:30-2.1 can be viewed only as an effort to save money at the expense of the statutory rights of its employees.

The Board asserts that petitioner is incorrect to interpret N.J.S.A. 18A:30-2.1 in light of the Workers' Compensation statute of Title 34, Chapter 15, merely because N.J.S.A. 18A:30-2.1 makes reference to workers' compensation. The New Jersey Education and Workers' Compensation statutes are two distinct statutory systems which have totally different purposes, the one to govern public elementary and secondary education and its many aspects, and the other to provide relief for injured workers generally. The fact that the two systems may occasionally refer to one another does not render them "intertwined" or make workers' compensation a "measuring stick" for N.J.S.A. 18A:30-2.1, as petitioner suggests. The Board argues that the purpose of the final two sentences in N.J.S.A. 18A:30-2.1, which gives salary or wage payments "during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit" reduced by the amount any such workers' compensation award made, is to adjust for a certain overlap of two otherwise distinct systems. That N.J.S.A. 18A:30-2.1 must be deemed paramount to the Workers' Compensation statute is evident from the requirement that payment under the former's provisions must be made immediately, without regard to the waiting period or eligibility requirements of workers' compensation.

Respondent Board argues that contrary to the assertion of petitioner, the cases cited for the rule that statutes in para materia are to be construed together do not compel the conclusion set forth. In Mimkon v. Ford, 66 N.J. 426 (1975), State v. Green, 62 N.J. 547 (1973), and Giles v. Gassert, 23 N.J. 22 (1956), the two statutes in light of each other were both in the same title and, with the exception of Giles, were all in the same chapter as well. Petitioner also cites cases for the proposition that the Workers' Compensation Act "is to be liberally construed to bring as many cases as possible within its coverage." However, petitioner is claiming not under workers' compensation in the present action, but under the education statute, N.J.S.A. 18A:30-2.1. Petitioner is covered by workers' compensation regardless of the outcome of this case, and, therefore, the liberal construction rule of workers' compensation cases does not apply.

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The Board notes, as does petitioner, that an issue in the instant case is whether or not the term "period," as used in N.J.S.A. 18A:30-2.1, refers to a single or disjunctive segment of time. The Board asserts that this is not the key issue, but, rather, of far greater significance is the term "calendar year." The statute gives sick-leave pay for work-related disability "for the period of such absence for up to one calendar year. . . ." The Board contends that from such context, "calendar year" and not "period" is the more significant term of time limitation. Period as defined in the Random House College Dictionary, Fourth Edition, 1968, is "a rather large interval of time that is meaningful in the life of a person, in history, etc., because of its particular characteristics" or "any specified division or portion of time." Thus it has a general and rather indefinite meaning absent given beginning and end points. In contrast, calendar year is defined as "a period of 365 or 366 days, now commonly divided into twelve calendar months and reckoned as beginning January 1 and ending December 31." Thus "calendar year" has built-in specificity in the common sense, as well as the legal definition discussed below. "Period," however, is not without significance. As revealed by a careful reading of Colbert v. Consolidated Laundry, 31 N.J. Super. 588 (App. Div. 1954), "A period is generally but not always a continuous period of time." Id. at 595 (citations omitted). The court went on to find an exception to the general rule in the particular statute concerned. In reviewing N.J.S.A. 34:15-12(a), which gave workers' compensation for "a period of such disability, not, however, beyond 300 weeks," the court said that "period" was to be defined in accordance with N.J.S.A. 34:15-38, which specifically provides that the period runs "to the first working day that the employee is able to resume work and continue permanently thereat," minus "any days and fractions thereof the employee was able to work during this time." Note, however, that the court properly read one statute in light of another in the same title and same chapter. Another example of the general rule is National Labor Relations Board v. Hudson Motor Car Company, 136 F. 2d 385 (6th Cir. 1943), wherein the Court stated that "[t] he general definition of the word 'period' in reference to time is to refer to a continuous period."

The Board asserts that the definition of "calendar year" is consistent with the legal definition of the same term as well. This is clear from the cases of American Woolen Company v. Edwards, Comptroller, 90 N.J.L. 69 (Sup. Ct. 1916), aff'd, 90 N.J.L. 293 (E. & A. 1917), and Newman v. Fair Lawn, 31 N.J. 279 (1960). The American Woolen case indicates that a "calendar year" begins on January 1 of each year, while the Newman case, at pages 283-284, states that "a calendar year runs from January 1 to December 31. . . ." This is also the meaning of "calendar year" in N.J.S.A 1:1-2. Newman

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v. Fair Lawn, supra, goes on to indicate that the phrase "calendar year" should be construed to mean January 1 to December 31 unless convincing grounds are advanced to show that some other interpretation was the legislative intent. Here, petitioner falls short of demonstrating any legislative intent contrary to common usage of said phrase. No legislative history of N.J.S.A. 18A:30-2.1 has been advanced by the petitioner. Even assuming, arguendo, that "calendar year" is not limited to the period from January 1 to December 31; nevertheless, it appears that the only other reasonable interpretation is that it refers to a 12-month period of time occurring from a specified event. Bd. of Ed. v. Raubinger, 78 N.J. Super. 90 (App. Div. 1963). In the context of this case, that would mean a continuous 12-month period from the date of illness or injury related to the employment.

The Board observes that petitioner, in her amended Brief in support of motion for summary judgment, argues that respondent Board, by having compensated petitioner for absences more than a year from date of injury, has waived any right to allege that N.J.S.A. 18A:30-2.1 gives payment only up to one year from date of injury. The Board contends that such an assertion is incorrect. In Bd. of Ed. of Passaic v. Bd. of Ed. of Wayne, 120 N.J. Super. 155 (Law Div. 1972), one board successfully recovered on summary judgment certain tuition payments paid to the other board under a mistake of law. The court made a survey of important treatises and the law of other jurisdictions, and held as follows:

> The issue not having been previously decided in this jurisdiction, this court will adopt the majority view and hold that municipalities may recover payments made under mistaken law. The reasoning behind such a decision is that this court does not feel that a municipality or subdivision thereof, as the instrument of the people, should be bound by a misinterpretation of the law by the authorities in charge. [Id. at 163 - 164]

The Board argues that the court defined "mistake of law" as was done in Flammia v. Maller, 66 N.J. Super. 440, 449 (App. Div. 1961). "[M]istake of law occurs where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant of or comes to an erroneous conclusion as to their legal effect." Id. at 164. This describes the instant case, where respondent, knowing full well the particulars of petitioner's absence, extended payment under an erroneous view of N.J.S.A. 18A:30-2.1, and now seeks to recover according to proper legal interpretation.

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Petitioner, in response to the Board's argument that N.J.S.A. 18A:30-2.1 should not be read in para materia with the New Jersey Workers' Compensation statute, asserts that N.J.S.A. 18A:30-2.1, by its very terms, makes reference to the Workers' Compensation statute and, therefore, does not establish two distinct systems. Petitioner observes that while it is true that the Commissioner of Education enjoys independent jurisdiction, under N.J.S.A. 18A:30-2.1, to determine whether an injury "arises out of and in the course of one's employment, Masino v. Bd. of Ed. of the Twp. of West Deptford, 1981 S.L.D. _____ (decision of State Board, July 1, 1981), this does not mean that the Commissioner can ignore the references to workers' compensation law in N.J.S.A. 18A:30-2.1 when he seeks to determine the substantive meaning of that statute. An award by the Commissioner must be mitigated by the temporary disability benefits received by the injured employee; thus N.J.S.A. 18A:30-2.1 must be construed in a manner which is harmonious with the Workers' Compensation statutes with which it is intertwined.

Petitioner argues that the fact that N.J.S.A. 18A:30-2.1 is located in a different title of the New Jersey statute than the Workers' Compensation statutes is not sufficient to defeat the argument that the statutes should be read in pari materia. The Appellate Division of Superior Court has held that the statutory provisions governing municipalities and counties in Title 40A must be considered "in conjunction with and subject to the Civil Service laws" in Title 11. Fletcher v. Newark, 155 N.J. Super. 5, at 9 (App. Div. 1978). Also, in Vedutis v. Tesi, 135 N.J. Super. 337 (Law Div. 1975), aff'd, 142 N.J. Super. 492 (App. Div. 1976), an action against a board of education, the courts held that the provisions of the New Jersey Tort Claims Act found in Title 59 must be read in para materia with the general tort statute of limitations provisions in Title 2A. Petitioner argues that in the instant matter, N.J.S.A. 18A:30-2.1 should be read in pari materia with the New Jersey Workers' Compensation statutes which were construed to provide for disjunctive periods of temporary disability. Colbert v. Consolidated Laundry, 31 N.J. Super. 588 (App. Div. 1954)

Petitioner argues that the ultimate inquiry in the instant matter does not involve a mechanical and rigid construction of the phrase "up to one calendar year," but rather an interpretation of N.J.S.A. 18A:30-2.1 in light of the beneficent and remedial purposes underlying the statute. The liberal legislative policy expressed in N.J.S.A. 18A:30-2.1 is that an employee injured in the line of duty should not be penalized by loss of salary and accumulated sick leave for a specified period of time. Petitioner contends that it would be inconsistent with the legislative policy to grant salary benefits to an

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injured employee who is absent from his duties for a continuous year, while denying such benefits to the employee who returns to duty and later suffers a relapse after a year has passed. Such a construction of the statute would reward the employee who remains off the job for a full year and penalize the employee who returns to duty before that time, despite the lingering effects of the injury. Petitioner argues that the phrase "up to one calendar year" must be construed to provide benefits to the employee whose work-injury-related absences constitute a year in the aggregate.

Petitioner argues further that it would be unfair to award a year's salary to a teacher who is absent for a continuous year following an injury, while compensating another teacher for 365 individual sporadic and disjunctive absences. Petitioner suggests that this result may be avoided by reference to another statute in the same article, chapter and title as N.J.S.A. 18A:30-2.1. Petitioner contends that there is a legislative presumption in N.J.S.A. 18A:30-6 that a teacher's work year constitutes 200 days. Thus the statutes provide a ceiling on the number of absences for which an employee suffering a relapse of a work-related injury may be compensated, pursuant to N.J.S.A. 18A:30-2.1. Alternatively, a board of education may defeat the presumption of a 200-day work year by presenting evidence of a shorter work year for teachers in its school district. Petitioner argues that the measure of benefits under N.J.S.A. 18A:30-2.1 for a teacher suffering a relapse more than a year after the work-related accident would be the number of teacher work days in the school year in which the accident occurred. Petitioner suggests that this construction of the statute is the one which gives greatest meaning to the legislative intent underlying N.J.S.A. 18A:30-2.1.

FINDINGS OF FACT

The Statement of Facts set forth hereinbefore are hereby adopted, by reference, as **FINDINGS OF FACT.**

SUBISSUES TO BE DETERMINED

Having carefully considered the arguments of the parties with regard to their respective positions, it appears to this court that the single issue agreed upon by the litigants is one of first impression and must be further distinguished in order to arrive at a determination of that issue, as follows:

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(1) Should N.J.S.A. 18A:30-2.1 and N.J.S.A 34:15-1 et seq. be construed as in pari materia?

(2) What is the correct time measure to use in determining the period during which payment for sick leave will be made, pursuant to N.J.S.A. 18A:30-2.1?

(3) Does a board of education waive its right to claim that N.J.S.A. 18A:30-2.1 authorizes payment only during one calendar year from the date of injury, when the board has already compensated the petitioner for a greater period of time?

BRIEF HISTORICAL NOTE, N.J.S.A. 18A:30-2.1

In conjunction thereto, it is necessary at this juncture to set forth a brief historical note with respect to N.J.S.A. 18A:30-2.1, as follows:

Prior to 1959, no provisions were in effect in the Education Law for a compensable accident with regard to a teaching staff member's sick leave. On November 30, 1959, the legislature enacted N.J.S.A. 18A:13-23.17 (now; N.J.S.A. 18A:30-2.1), which provided that:

> Whenever any employee. included in the act of which this act is a supplement, is absent from his post of duty as a result of a personal injury, caused by an accident arising out of and in the course of his employment, his employer may pay to such employee up to the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in Section 1 of the act of which this act is supplemented. Salary or wage payment provided in this Section shall be made for absence during the period the employee received or was eligible to receive a temporary disability benefit under Chapter 15, Title 34 of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this Section shall be reduced by the amount of any Workmens' Compensation award made for temporary disability. [L. 1959 c. 175]

Upon its introduction to the New Jersey Assembly, the following legislative statement of the purpose of the bill was attached:

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> The purpose of this bill is to clarify the sick leave law applying to teachers and certain other employees of boards of education in the event of an injury arising out of and in the course of employment. It provides that the employer may pay up to full salary for a period of absence caused by such on-the-job injury for up to one calendar year without having such leave charged to the annual sick leave or the accumulated sick leave of the employee. Any amount of salary payable to the employee pursuant to this supplement shall be reduced by the amount of Workmens' Compensation award for temporary disability.

Subsequently, on July 25, 1967, the act was amended by Chapter 168, Laws of 1967, which eliminated the employer's discretionary authority and provided that the employer shall pay the employee his full wages for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave.

DISCUSSION AND CONCLUSION, SUBISSUE # 1

With regard to the issue as to whether N.J.S.A. 18A:30-2.1 and N.J.S.A. 34:15-1 et seq. should be construed as in pari materia, it has been held that statutes may be considered to pertain to the same subject matter if they:

> . . . relate to the same person or thing, or to the same class of persons or things or have the same purpose or object. As between characterization of the subject matter with which a statute deals and characterization of its object or purpose, the latter appears to be the most important factor in determining whether different statutes are closely enough related to justify interpreting one in light of the other. [2A Sutherland, Statutory Construction, § 51.03, p. 298 (4th ed. 1973)].

This rule of statutory construction is most applicable to statutes which relate to the same subject matter and were passed at the same session of the Legislature or where the later of two statutes relating to the same subject matter refers to the earlier. Id.

N.J.S.A. 18A:30-2.1 states that "salary or wage payments provided in this section shall be for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under Chapter 15 of Title 34. . . ."

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Petitioner argues that this reference to the Workmens' Compensation Statute indicates that the statutes should be construed together. In a 1975 case, the New Jersey Supreme Court noted that "it is identity or similarity of purpose or object that most convincingly justifies resort to the rule of in pari materia as an aid in statutory construction." State v. DiCarlo, 67 N.J. 321, 325 (1975). In the DiCarlo case, the issue before the Court was whether the Controlled Dangerous Substance Act was in pari materia with N.J.S.A. 39:4-50(a), which provided for imposition of a fine or prison sentence, as well as temporary forfeiture of driving privileges, in the event a person was found to have been operating a motor vehicle while under the influence of liquor or a narcotic drug. In particular, the question was whether the definition of narcotic drug found in the Controlled Dangerous Substance Act should be applied to the same term as it appeared in N.J.S.A. 39:4-50(a). The Court ruled that the statutes were not in pari materia, stating that the "adventitious occurrence of like or similar phrases, or even of similar subject matter, in laws enacted for wholly different ends will normally not justify applying the rule [of in pari materia]." Id. at 325. The Court found that the object of the Controlled Dangerous Substance Act was "suppression of illegal traffic in narcotic drugs." Id. at 325. However, the purpose of N.J.S.A. 39:4-50 was found to be to "prevent the operation of motor vehicles by those whose faculties are so impaired as to present a danger to the safety of others as well as themselves." Id. at 325. See also International Broth. of Elec. Workers v. Gillen, 174 N.J. Super. 326 (App. Div. 1980).

The purpose of the Workmen's Compensation Act, N.J.S.A. 34:15-1 et seq., has been widely held to be to provide security for employees who are injured in the course of their employment. DeMonaco v. Benton, 18 N.J. 352 (1955). See Bollinger v. Wagaraw Bldg. Supply Co., 18 N.J. Misc. 1 (1940), Nagy v. Ford Motor Co., 8 N.J. Super. 387 (1950). There is no New Jersey case law construing N.J.S.A. 18A:30-2.1. However, the purpose of this statute would appear to be specifically to provide for the administration of public elementary and secondary education. The statutes were not enacted during the same legislative session. N.J.S.A. 34:15-1 et seq. was originally enacted in 1921, while N.J.S.A. 18A:30.2 was passed in 1959. In this case, the later of these two statutes, N.J.S.A. 18A:30.2, makes reference to the earlier, lending support to petitioner's argument. However, the cases cited by petitioner in support of the in pari materia construction are distinguishable from the present situation.

In Mimkon v. Ford, 66 N.J. 426 (1975), the issue before the Court was whether the rule of in pari materia construction should be applied to two statutes. One statute

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provided for visitation rights of grandparents when a parent has died and the other protected the adopting parents from disturbance to their relationship with their child by the natural parents. The Court found that the purpose of both statutes was the same, i.e., to "provide substitute parental relationships for children . . . who have been deprived . . . of a healthy relationship with one or both natural parents." Id. at 433. In that case, both statutes were in the same title and chapter. In addition, the particular facts of that case appeared to influence the Court greatly. A similar argument may be made with regard to the cases of Giles v. Gassert, 22 N.J. 22 (1956), and State v. Green, 62 N.J. 547 (1973).

Judge Lora dissenting In re Bergwall, 173 N.J. Super. 431, subsequently adopted by the Supreme Court at 85 N.J. 382, 383, stated, "the courts will interpret and enforce the legislative will as written and not according to some supposed unexpressed intention." [citations omitted] 173 N.J. Super. 431, 437.

Based upon the foregoing, I **CONCLUDE** that N.J.S.A. 34:15-1 et seq. and N.J.S.A. 18A:30-2.1 should not be construed as in pari materia. The legislative objectives of the statutes are sufficiently dissimilar to render an in pari materia construction invalid. The reference to the Workmen's Compensation Statute should be interpreted as meaning that payments will be made under N.J.S.A. 18A:30-2.1 in addition to any received under N.J.S.A. 34:15-1 et seq.

DISCUSSION AND CONCLUSION, SUBISSUE # 2

With regard to the issue of what is the correct time measure to determine the period during which payment for sick leave will be made, N.J.S.A. 18A:30-2.1 states that sick leave pay for work-related disability will be given "for the period of such absence up to one calendar year. . . ." Thus an issue arises as to whether the term "period" refers to a continuous period of time. Another issue is which time measure, "period" or "calendar year," is controlling.

In Colbert, supra, the issue before the court was whether the Workmen's Compensation Act authorized compensation for intermittent periods of temporary disability. The court noted that "a period is generally, but not always, a continous period of time." Id. at 595. The Appellate Division found that the Workmen's Compensation Act does not limit compensation for temporary disability from a particular injury to a single period of temporary disability, "whether the days of disability immediately follow the

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accident or whether they be consecutive or not." Id. at 596. The court based this ruling upon a construction of N.J.S.A. 34:15-14 and 34:15-38, relying upon language in N.J.S.A. 34:15-14; N.J.S.A. 34:15-38 provided that the period runs "to the first working day that the employee is able to resume work and continue permanently thereat," minus "any days and fractions thereof the employee was able to work during this period."

The term "calendar year" has been defined as the period between January 1 and December 31. Newman v. Fair Lawn, 31 N.J. 279, 283 (1960). See American Woolen Company v. Edwards, 90 N.J.L. 69 (Sup. Ct. 1916). In Newman, the issue before the court was the construction of a statute which provided that the terms of one class of municipal planning board members would expire at the end of each year. The court construed "year" to mean "calendar year," noting that in the absence of an obviously contrary legislative intent, "year" is taken to mean the period between January 1 and December 31, unless strong reasons compel a contrary conclusion. Id. at 95.

In Bd. of Ed. of Manchester Twp. v. Raubinger, supra, the court held that the teacher tenure statute, N.J.S.A. 18:13-16, providing for tenure after "three consecutive calendar years," encompassed a full continuous year beginning at a point in time other than January 1. In Manchester, the court found that the legislative history of the tenure statute indicated that "calendar year" need not mean only January 1 to December 31.

The terms "period" and "calendar year" generally indicate a continuous period of time. Thus if the language is literally construed, the term "calendar year" becomes the controlling term. "Where there is no showing of a bizarre or anomalous result, a court should not diversify the plain meaning of statutory language." State v. Roma, 143 N.J. Super. 504, 508 (Law Div. 1976).

Accordingly, I **CONCLUDE** that the terms "period" and "calendar year" are not in conflict. The term "period" generally indicates a continuous time period, as does the term "calendar year." Thus the term "calendar year" offers a specific structure with which to determine the period benefits will be payable.

DISCUSSION AND CONCLUSION, SUBISSUE # 3

With respect to the third issue, it is established that municipalities may recover payments made under a mistake of law. Bd. of Ed. of Passaic v. Bd. of Ed. of

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Wayne, 120 N.J. Super. 155 (Law Div. 1972). A mistake of law occurs "where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant or comes to an erroneous conclusion as to their legal effect." Id. at 164. In the Passaic case, the plaintiff school board made tuition payments under protest to a local children's shelter. The court found that: (1)the plaintiff school boards had no legal obligation to pay the tuition costs; (2) the boards were entitled to recover the money previously paid. Id. at 162. The fact that the payments were made under protest did not affect the court's finding that the payments would not have been made if the plaintiffs had realized that the charges were invalid.

Having made such determination, I **CONCLUDE** that the Board herein is entitled to recover the excess payments made if it is determined that they were made under a mistake of law. This is not an inequitable result because the petitioner is still entitled to workmen's compensation, pursuant to N.J.S.A. 34:15-1 et seq.

For the foregoing determinations and conclusions, summary judgment is hereby entered on behalf of the Board of Education of the Township of Deptford and the herein Petition of Appeal is **DISMISSED.**

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

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OAL DKT. NO. EDU 4349-81

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

29 January 1982
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

2 February 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 4, 1982
DATE

Ronald L. Parker /pe
OFFICE OF ADMINISTRATIVE LAW

plb

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JANE M. WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the determination herein by the Honorable Lillard E. Law, ALJ of the meaning of the phrase "up to one calendar year" as applied to the time in which to provide benefits to an employee for work injury-related absences. Petitioner contends that such phraseology indicates not a continuous twelve-month period but rather constitutes a year in the aggregate. Petitioner protests Judge Law's determination that the Board is entitled to recover excess payments since this is a relief which the Board had not initially sought. The Commissioner finds no merit in petitioner's exceptions.

An examination of definitions set down in law as well as in Court dicta does not support petitioner's contention that it was intended by the Legislature that "up to one calendar year" constitutes a year in the aggregate. (Exceptions, at p. 9) Alternatively, the Commissioner notes that in N.J.S.A. 43:10-18.64a, Definitions:

> ***
>
> "d. 'Calendar year' means the 12-month period beginning January 1 and ending December 31."

In N.J.S.A. 1:1-2, Words and phrases defined:

> "***the word 'year' means a calendar year."

The Commissioner sets down in full the supplementary notes therein for "year":

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> "3. Year
>
> In determining the meaning of the words two 'full years' in § 19:23-45, providing that a voter would be deemed a member of party in whose primary he voted for two 'full years' thereafter, the court, in In re Stoebling, 196 A. 423, 16 N.J. Misc. 34, said: 'Since the revision of our statutes in the year 1877 there has continued as the law of this state a statutory definition of the word 'year.' In volume 4, Compiled Statutes of 1910, p. 4973, § 10, it is provided as follows: 'Construction of words "month" and "year." - That the word "month," when used in any statute, shall be construed to mean a calendar month, and the words "a year," shall be construed to mean a calendar "year."' Our courts have followed this statutory construction in the case of Eatontown v. Shrewsbury, 49 N.J.L. 188, at page 190, 6 A. 319; a case involving the legal settlement of a pauper in which it was held that the words 'one full year' will only be satisfied by a dwelling for the full space of one year continuously and without interruption. To a like effect is the decision in the case of Carroll v. State Board of Education, 152 A. 339, 340, 8 N.J. Misc. 859, 863; wherein it was held that the term three years in the school teachers' tenure of office act meant calendar and not school years. In this case the court referred to the statute of construction above mentioned and said it 'is a legislative guide given for the purpose of construing the language of the lawmaking body.'"

The Commissioner notes further that the Supreme Court of New Jersey 1960 in Newman v. Fair Lawn, 31 N.J. 279 said that a "calendar year" runs from January 1 to December 31. The Commissioner notes further amplification of "calendar year" by the Superior Court of New Jersey in Board of Education of Manchester v. Raubinger, 78 N.J. Super. 90 (App. Div. 1963) in which it was determined that a "calendar year" is not limited to a period from January 1 to December 31 but embraces within such term a full year commencing at another time.

The Commissioner finds nothing in the above determinations to support petitioner's contention that one calendar year constitutes a year in the aggregate nor is there any evidence in support of this view of legislative intent of such. If the Legislature had intended such a definition to prevail, it would have said so. No legislative history has been offered by petitioner to substantiate her claims. The Commissioner so holds.

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The Commissioner has previously determined the meaning of "calendar year" in Cornelius T. McGlynn v. Board of Education of the Township of Lumberton, 1973 S.L.D. 28 wherein it was said that two whole calendar years extended from the first day of July 1969 to the 30th day of June 1970 and from the first day of July 1970 to the 30th day of June 1971.

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

Accordingly, it is determined that the Board herein may recover excess payments made under a mistake of law. Board of Education of Passaic v. Board of Education of Wayne, supra Summary judgment herein is accorded the Board. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

March 12, 1982

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JANE M. WILLIAMS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 12, 1982.

For the Petitioner-Appellant, Selikoff & Cohen (John E. Collins, Esq., of Counsel)

For the Respondent-Respondent, Capehart & Scatchard (H. Louise Orth, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

S. David Brandt, Betty Dean, Jack Bagan and Ruth H. Mancuso opposed in the matter.

July 7, 1982

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 0109-81
AGENCY DKT. NO. 3-1/81A

LILLIAN FOX,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, COUNTY OF BURLINGTON; DELORES MITROTZ; MARIE TRANOVISH; MICHAEL VITTESE; AND JOAN BORGER; AS MEMBERS OF THE BOARD OF EDUCATION AND INDIVIDUALLY,
Respondents.

APPEARANCES:

John T. Barbour, Esq. for petitioner (Barbour and Costa, attorneys)

Frederick W. Hardt, Esq. for respondent (Sever and Hardt, attorneys)

Record Closed January 4, 1982 Decided February 8, 1982

BEFORE AUGUST E. THOMAS, ALJ:

The above matter having been opened to the Commissioner of Education by John T. Barbour, Esq., of Barbour and Costa, attorneys for petitioner, Lillian Fox, by Petition of Appeal and Amended Petition of Appeal and respondents having answered; with the said John T. Barbour, Esq., having moved for Summary Decision on July 10, 1981, said motion being supported by the pleadings, a brief and reply brief on behalf of

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petitioner and the interrogatories answered by the respondents; with the defendants, Frederick W. Hardt, Esq., Sever & Hardt, attorneys for respondents, having filed a notice of motion and brief in opposition to the Board's motion for summary decision on December 17, 1981; and

It appearing from the pleadings, affidavits, briefs and answers to interrogatories filed in connection with said cross motions for summary decision that partial summary decision should be granted in favor of petitioner:

It is hereby **FOUND** that respondents' attempts to remove petitioner as president of the Cinnaminson Board of Education were unlawful and voidable under Title 18A of the laws of New Jersey; and therefore:

It is **ORDERED** that the relief granted in the Interim Order, dated January 13, 1981, reinstating petitioner as president of the Cinnaminson Board of Education for the completion of her term of office, be made permanent; and

Further **ORDERED** that the costs of defense of this action be the responsibility of the Cinnaminson Board of Education; and

Petitioner's term as president of the Board having expired by law at the organizational meeting of the Board in the spring of 1981, relief sought in regard to alleged violations of the Open Public Meetings Act is declared moot; and

Regarding the costs of defense of this matter, it is noted that the six individual respondent Board members acted as the Board when petitioner was removed as its president, and the Board believed its action was within its statutory authority (N.J.S.A. 18A:10-1; 11-1; 12-20); and

It has been determined that the Board's action in removing petitioner was voidable; therefore, that defect was cured by the January 13, 1981 Order reinstating petitioner as Board president; however, when petitioner pressed her suit, the Board at that time had a Hobson's choice: either to defend against the suit, or to submit, without challenge, to all the relief sought by petitioner.

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Since the six named Board members acted as the Board, they have no responsibility for the legal costs incurred in defending this suit (N.J.S.A. 18A:12-20).

The defense of the suit is a direct result of the operative events triggering this litigation; therefore, the six respondent Board members are indemnified for all costs incurred.

The present Board, by resolution, has elected not to participate in this matter; nevertheless, it is bound by the holdings in this decision; therefore,

It is further **ORDERED** that the Board will pay all reasonable counsel fees arising from the defense of this suit. (N.J.S.A. 18A:12-20)

Except for the relief granted, the Petition of Appeal is **DISMISSED** in all other respects.

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

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I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

8 February 82
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

16 February 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 17, 1982
DATE

Ronald L. Parker /sh
OFFICE OF ADMINISTRATIVE LAW

ms

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LILLIAN FOX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON ET AL., BURLINGTON COUNTY,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the Substantive Order rendered by the Office of Administrative Law concluding the case.

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 Substantive Order in this matter and adopts them as his own.

Accordingly, the costs and fees arising from this suit shall be paid by the Board pursuant to N.J.S.A. 18A:12-20. Otherwise, the Petition of Appeal is dismissed.

It is so determined.

COMMISSIONER OF EDUCATION

March 23, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0611-81
AGENCY DKT. NO. 5-1/81A

CHERYL DORRINGTON,
Petitioner,
v.
NORTH BERGEN BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Bruce D. Leder, Esq., for petitioner
(Schneider, Cohen, Solomon & DiMarzio, attorneys)

Frank R. Gioia, Esq., for respondent
(Carroll, Panepinto, Pachman, Williamson & Paolino, attorneys)

Record Closed December 31, 1981 Decided February 11, 1982

BEFORE **BRUCE R. CAMPBELL**, ALJ:

This is an action for salary schedule adjustment based on prior teaching experience and alleged representations of an administrator and board members as to the adjustment.

The matter was joined before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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Hearing was held on August 10, 1981, at the Office of Administrative Law, Newark, and continued to December 14. On that date, the parties represented that they chose to rest. The record was closed on December 31, 1981, and the matter is ready for disposition.

I

Certain facts are stipulated or uncontroverted. Cheryl Dorrington (petitioner) was hired by the North Bergen Board of Education (Board) in October 1977 as a permanent substitute for a first grade teacher on maternity leave of absence. She had served as a daily substitute in September 1977. Petitioner is, and was at all times in question, certificated to teach in elementary schools and to teach the handicapped. She previously had taught the handicapped in the Hasbrouck Heights Public Schools for six continuous years until her resignation on June 30, 1974. (P-2).

Petitioner served the balance of the 1977-78 school year. She received the salary of a first year teacher, sick leave, and medical insurance benefits but was not enrolled in the Teachers Pension and Annuity Fund. She received notices in February and April 1978 that she would not be employed for the 1978-79 school year because of reductions in positions due to cutbacks in funding.

Early on September 5, 1978, she received a telephone call from an administrator telling her to report to the preschool faculty meeting. She did so at 9 a.m. She taught under her certificates for the entire 1978-79 school year and was paid at the second year teacher salary rate as set forth in the agreement between the majority representative and the Board. Again, she received layoff notices in February and April of the school year.

On Labor Day night, September 4, 1979, petitioner attended a Board meeting and learned she had been offered employment as a teacher of the perceptually impaired. Salary for the position was not stated. She taught the entire 1979-80 school year and was paid at the third year teacher salary rate set forth in the collective bargaining agreement.

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Petitioner was rehired for and taught the 1980-81 school year and was paid at the fourth year teacher salary rate set forth in the collective bargaining agreement.

During the period October 1977-June 1978, no employment contract was in effect between petitioner and the Board. On or about October 1, 1978, a contract between the parties was signed. The contract covered the period September 1, 1978-June 30, 1979. The salary is stated as "per negotiated contract." (J-5). On or about October 18, 1979, a similar contract, likewise worded, was signed covering the period September 1, 1979-June 30, 1980. (J-6).

II

Petitioner contends she was promised by an administrator and at least one Board member that her prior teaching experience would be recognized when she gained tenure status.

Petitioner testified that she was hired as a daily substitute in September 1977. In October, she met with the then superintendent of schools and was offered employment as a permanent substitute for a teacher taking a maternity leave of absence through June 1978. She says she was told she would be paid at the rate of a first year teacher, the time would count toward accrual of tenure and she would receive all benefits except membership in the Teachers Pension and Annuity Fund.

Petitioner also testified, as set forth above, that she received two layoff notices during the 1977-78 school year and was rehired in early September for the 1978-79 school year. She also testified that after receiving her first pay check for the 1978-79 school year she again contacted the superintendent. He told her to wait until she achieved tenure before pressing a claim for salary adjustment based on prior teaching experience.

During the 1978-79 school year, petitioner again received two layoff notices. On Labor Day night, September 4, 1979, she learned she was hired for the 1979-80 school year to teach a class of perceptually impaired pupils. She called the Board office concerning

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salary and was told to go through her building principal. The principal told her to write a letter to a Dr. Klein who had become superintendent. She did so.

Petitioner states that she had a conversation in her home with a Board member in May 1979. The Board member was, at the time, serving as Board president. Petitioner testified that the Board member told her she would be rehired for 1979-80 and "the discussion of salary would be taken up with the Board of Education."

In May 1980, petitioner says, she spoke to another Board member at a dinner. She testified that she asked him if she would be "getting her job" for 1980-81 and that he said she would have it and be so notified by June 30.

She also testified that she asked the Board member about credit for prior teaching experience and that he said he would take care of it as of September. Her rate of pay in 1980-81, however, was at the fourth year teacher rate. She then wrote and sent by certified mail a letter to the superintendent. Upon receiving no reply concerning prior teaching service credit, she went to her union representative. This action followed.

Petitioner argues that the promises made to her by Board members should be upheld on the grounds of estoppel. The application of equitable principals of estoppel against governmental subdivisions is precedented. Hankin v. Hamilton Tp. Bd. of Ed., 44 N.J. Super. 70 (App. Div. 1957).

While the defense of ultra vires is applicable to a municipal corporation, Spoerl v. Pennsauken Tp., 14 N.J. 186 (1954), the defense has its limitations. In Summer Cottagers' Ass'n of Cape May v. Cape May, 19 N.J. 493 (1955) it was pointed out that:

> There is a distinction between an act utterly beyond the jurisdiction of a municipal corporation and the irregular exercise of a basic power under the legislative grant in matters not in themselves jurisdictional. The former is an ultra vires in the primary sense and void; the latter, ultra vires only in a secondary sense which does not preclude ratification or the application of the doctrine of estoppel in the interest of equity and essential justice. (at 504).

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In this matter, the ultra vires act would exist if there were no statutory authority for agreement as to starting salary. N.J.S.A. 18A:29-9. At best, the facts here indicate an "irregular exercise of basic power under a legislative grant." The Board argues that it had authority to grant placement on the salary guide. Petitioner quickly adds, "But not as it did here." The Board exercised its authority irregularly and is now equitably estopped from reneging on the exercise of authority it took pursuant to N.J.S.A. 18A:29-9.

Petitioner also cites precedent allowing payment of public monies owing, but not yet paid, under a funding scheme later adjudged illegal, in order to avoid a manifest injustice. If petitioner were not given credit for her prior teaching service, a manifest injustice would result.

III

The Board argues that petitioner knowingly and voluntarily accepted placement on the first step of the then current salary guide and entered into employment with no prior service credit. The Board was aware of prior experience in another district at the time of employment. No prior service credit was negotiated at the time of employment. Further, petitioner testified to all of the above facts.

Petitioner also testified that she relied on assurances of Board members that credit would be given when tenure was attained. An individual Board member, however, cannot bind the Board as an entity to a particular course of action. Woodsum v. Pemberton Tp., 172 N.J. Super. 489 (Law Div. 1980).

All of the promises petitioner mentions were made after agreement had been reached as to petitioner's starting salary. There is no allegation that the Board as a body took any other action either in resolution form or in documentary form concerning her employment that would supplement the terms and conditions of the initial employment.

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Even if the 1977-78 Board had taken such an action, it would have been ultra vires in that it would have usurped the authority of a successor Board. A board of education is a noncontinuous body and, with a few exceptions carefully enumerated in statute, cannot bind its successors.

Petitioner, a professional teacher with prior experience at the time of initial employment by the Board, knew her placement on the salary guide. Once employment is offered and accepted, the actions of the parties effectively create a contractual relationship. The proper time for negotiating the terms and conditions of a contract is at the time the contract is made.

The Board also contends that petitioner has not alleged fraud, duress, coercion or evil intent on the part of the Board. It must be assumed, therefore, that the original placement of petitioner represented the mutual intent of the parties.

The discretionary acts of a board of education must not be invalidated unless unreasonableness clearly appears and petitioner has made no such showing here.

IV

Petitioner's well-crafted equitable argument must fail. She dealt, by her own admission, with individuals and not the Board. She testified that, while a superintendent may recommend, only a board of education can approve employment and the terms and conditions of employment and this, indeed, is the law.

No sitting North Bergen Board of Education made a promise, express or implied, to petitioner.

N.J.S.A. 18A:29-9 is clear. It reads:

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

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The record also is clear that the Board as a body did not irregularly exercise this legislatively delegated power.

It must be noted that a prudent school board member would not discuss — much less make any commitment concerning — a personnel matter while he was not acting and could not act in an official capacity. The Board table is the proper forum for such discussions, not dinners and not employees' living rooms.

Nonetheless, in view of petitioner's testimony, the clear provisions of N.J.S.A. 18A:29-9 and the complete absence of any showing of evil intent on the part of the Board, I **FIND** that petitioner accepted employment in October 1977 in full knowledge of the salary and benefits she was to receive. That was the proper time for negotiation of prior teaching service credit. Thereafter, each Board could, in its discretion, make adjustments but was not required to do so. But there is no statutory authority for creating an adjustment obligation that falls on a successor board.

Accordingly, I **CONCLUDE** that petitioner has not made a case sufficient to support her claim for relief.

Based upon this conclusion, the petition of appeal is **DISMISSED.** It is so **ORDERED.**

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

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OAL DKT. NO. EDU 0611-81

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

11 FEBRUARY 1982
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

16 February 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb 17, 1982
DATE

Ronald L. Rakey
FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF EXHIBITS

P-2	Letter, To Whom It May Concern, from Rudolph Sellitti, January 13, 1981
J-5	Contract, dated October 1, 1978, between North Bergen Board of Education and Cheryl Dorrington
J-6	Contract, dated October 18, 1979, between North Bergen Board of Education and Cheryl Dorrington
C-1	Joint stipulation of facts submitted September 22, 1981, pages 2-4

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CHERYL DORRINGTON,	:	
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 exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the conclusion by the Honorable Bruce R. Campbell, ALJ that she could not rely on certain salary assurances allegedly made to her by the Superintendent and individual Board members. Petitioner contends that Judge Campbell's determination that the Board did not act in bad faith is in error. Petitioner avers that she tirelessly pursued the subject of her salary adjustments with two different Board presidents and the agents of the Board represented by her principal and the Superintendent.

The Board's reply exceptions refute those of petitioner and affirm the initial decision. The Commissioner views with favor the Board's exceptions.

The Commissioner finds no merit in petitioner's continued assertion that she can properly rely on individual Board members or any agent of the Board as having authority to hire her or set her salary. The Commissioner has long expressed his concern for such questions and perhaps most completely in Anna Brennan v. Board of Education of the City of Pleasantville, 1977 S.L.D. 1059 wherein he said:

> "***An examination of the record reveals that the Board committed itself not at all to petitioner, but that petitioner mistakenly relied on the opinions and assurances of the Board's administrators in concluding that a commitment had been made. Such reliance was misplaced, since opinions and assurances cannot stand in the stead of deliberate Board action. The Board alone has the ultimate

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authority to decide the employment of its teaching staff members. Harold A. Vandenbree v. Board of Education of the School District of Wanaque, 1967 S.L.D. 4, aff'd State Board January 3, 1968; Charles Gersie v. Board of Education of the City of Clifton, Passaic County, 1972 S.L.D. 462 As was previously stated in Esther Boyle Eyler et al. v. Board of Education of the City of Paterson et al., 1959-60 S.L.D. 68, 71:

> '***By the terms of N.J.S.A. 18:6-20 [now N.J.S.A. 18A:25-1 and 27-1], the appointment, transfer or dismissal of principals and teachers and the fixing of their salaries require a majority vote of the whole number of members of the board.*** It is the opinion of the Commissioner that any action under this statute should be taken by a recorded roll call majority vote of the full membership of the board of education in a public meeting of the board properly called. It is well established that boards of education may not delegate the appointment of school personnel to committees or school officials. Cullum vs. Board of Education of North Bergen, 15 N.J. 285 (1954). Taylor vs. Board of Education of Hoboken, 1938 S.L.D. 54 and 55. It is also well established that full compliance with the statutory requirements as to the formalities of employment is essential to the validity of such employment. McCurdy vs. Matawan, 1938 S.L.D. 298 at 299. Also LaRose vs. Egg Harbor City, 1938 S.L.D. 377; Valente vs. Board of Education of Hoboken, 1950-51 S.L.D. 57; Landrigan vs. Board of Education of Bayonne, 1955-1956 S.L.D. 91.***'

"An early case considering the issue of recovery for the rendering of teaching services under an unauthorized contract was William Hibbler v. Board of Education of the Township of Dover, 1939-1949 S.L.D. 1, 2 (1940), wherein the Commissioner stated:

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> '***A person dealing with a public officer is assumed to know the limitations of the officer's legal authority. Accordingly, the petitioner is assumed to know that the Supervising Principal could not employ him and make such employment binding upon the board of education.***'***" (at pp. 1061-62)

Nowhere in the record is there any evidence that petitioner's requests were presented for consideration by the whole Board.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

March 24, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. 182-7/78
EDU 1075-81
AGENCY DKT. NOS. 182-7/78 &
544-11/80A
(CONSOLIDATED)

NEW JERSEY CIVIL SERVICE ASSOCIATION AND NEW JERSEY STATE EMPLOYEES ASSOCIATION,
Petitioner
v.
NEW JERSEY STATE SCHOOL DISTRICT a/k/a GARDEN STATE SCHOOL DISTRICT ESTABLISHED PURSUANT TO N.J.S.A. 30:4AA-1, ANNE K. KLEIN, COMMISSIONER OF HUMAN SERVICES, AND WILLIAM FAUVER, COMMISSIONER OF CORRECTIONS,
Respondents.

WARREN E. WARD,
Petitioner
v.
STATE OF NEW JERSEY, ANNE K. KLEIN, BERNARD B. BLANKS, ACTING SUPERINTENDENT, WOODBINE STATE SCHOOL, CAPE MAY COUNTY,
Respondents.

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OAL DKT. NOS. 182-7/78 & EDU 1075-81

APPEARANCES:

Richard Greenstein, Esq. for petitioners (Fox & Fox, attorneys)

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

Record Closed January 11, 1982 Decided February 16, 1982

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

Petitioners herein contend that by reason of their employment they collectively, as Association members, and Warren Ward, individually, serve in positions in which, with the passage of time, they gain tenure and other benefits, pursuant to the provisions of the State Facilities Education Act of 1979. Petitioner Ward contends, further, that he was wrongfully dismissed without a hearing, in violation of the tenured status to which he lays claim.

Respondents, conversely, contend that petitioners, who were employed by the Department of Human Services, were not employed within the Garden State School District, and are thus not eligible for tenure and other benefits available to teaching employees of the Garden State School District.

The pleadings in the first of the two Petitions of Appeal were essentially a request for declaratory judgment. The first case was filed before the Commissioner of Education in 1978. The filings of pleadings in Ward were completed on February 23, 1981. Both were transferred as contested cases to the Office of Administrative Law, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. On May 4, 1981, at a third prehearing conference, it was agreed that the two cases should henceforth be consolidated. Provision was also made at that time for discovery. Two days of plenary hearing were concluded on November 18, 1981, in Trenton, New Jersey. The agreed-upon issues were as follows:

A. Was petitioner, being in a position of Teacher I in Woodbine School, Department of Human Services, under tenure, pursuant to N.J.S.A. 30:4AA-1 et seq. and Chapter 207 of P.L. 1979 (N.J.S.A. 18A:7B), at the time of his termination?

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B. In the event of an affirmative finding in A, above, to what relief, if any, is petitioner entitled?

It follows, of course, that if petitioner Ward was in a tenurable position, others similarly situated would also be entitled to protection under the State's tenure laws.

Prehearing briefs were filed. Post-hearing briefing was concluded, completing the record on January 11, 1982.

UNCONTESTED FACTS:

The following, as stipulated to by the parties at the beginning of the hearing, I **FIND** to be relevant facts to be considered, together with further findings of fact set forth, infra,

Petitioner Ward was employed from September 2, 1958 through October 9, 1980, as a teacher in the Woodbine School. He was issued an emergency teaching certificate in 1958. Thereafter, on May 24, 1967, he was issued a permanent certificate by the New Jersey State Board of Examiners as a teacher of the mentally handicapped in elementary and secondary schools. He was appointed to a "Teacher II" ten-month position on September 1, 1967 and to a "Teacher I" twelve-month position on November 13, 1978. Petitioner Ward worked until September 23, 1980, when he was suspended without pay. On October 9, 1980, he was terminated as of that date with entitlement to two days' vacation pay (P-1).

TESTIMONY OF WITNESSES:

Petitioner Ward, an unclassified employee under Civil Service, testified that an incident, which he believes resulted from rival union animosity, occurred between him and another employee of the Woodbine State School on September 23, 1980. He testified that in the midst of a dispute between them, the other employee pushed a pupil's freshly painted model airplane into his face. He testified that on the same day, he reported the incident to the Acting Superintendent, who suspended him.

Petitioner testified that when he contacted the Superintendent two days later, he was told to stay away in order to let things cool off. He testified that on October 9, he

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was called to the Woodbine School, told of the results of an investigation, and was given written notice of termination. He testified that although he was later afforded an appearance with representation at an informal conference in Trenton and allowed to present his side of the matter, he was never given an opportunity to face his accusers, and therefore the original termination action, which stated that he had exhibited unbecoming conduct, was allowed to stand.

In regard to his duties at the Woodbine School, petitioner testified that he taught mobile, sub-trainable, trainable, and educable mentally retarded pupils, ages 12 to 30, in academic, leisure time, and vocational classes similar to those provided for special education classes in the public schools. He also testified that he taught transitional skills for those about to leave the school. He testified that at the time of his termination, his daily assignments were to teach three separate groups of pupils in the following classes:

8:30-11:00	Greenhouse
11:00-12:00	Academics
12:30-3:45	Cement Crafts

Petitioner testified that when he applied and was rejected for a supervisory position in 1978 for lack of a supervisor's certificate, he received a letter from the personnel director, stating that he had found it necessary to consult with authorities of the Garden State School District before making an appointment (P-2).

Petitioner, in rebuttal, testified that he had served on the negotiations committee which, in reaching an agreement effective from June 1979 through June 1981, had incorporated the following:

ARTICLE XXXIV

GARDEN STATE SCHOOL DISTRICT-APPLICABILITY OF TITLE 18A

The determination as to whether employees in Teacher I, Teacher II or Teacher III titles who have been included in the Garden State School District are entitled to tenure and other provisions of Title 18A is one which can be made only by final adjudication under proper authority. However, pending such adjudication, it is hereby set forth for informational purposes that the parties to this Agreement assume these employees to be entitled to coverage under appropriate provisions of Title 18A.

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> The presumption of such coverage is not intended to preclude any representative of the State entering into litigation on these matters as an advocate of a contrary position. [P-5 at p. 55]

Lottie Barnes, a Teacher I employed at The Training and Research Center at Bordentown, testified that she had attended Senate Education Committee hearings in September 1978 when the State Facilities Education Act of 1979, N.J.S.A. 18A-7B-1, then under consideration as Bill A-86, had been the subject of testimony by Dr. Daniel Sullivan, Superintendent of the Garden State School District, who likened the role of the Garden State School District to "that of the other 610 public school districts in New Jersey" (P-4 at p.2), and "the only agency responsible for the education of children within state institutions and . . . directly accountable to the Commissioner of Education. . . ." [ibid at p.3]

Edgar Leeds, who until his retirement in 1980 had served as director of the educational program at Woodbine, testified that he reported to the Woodbine Superintendent. He testified that the education program there changed from a ten-month program to a twelve-month program when the Superintendent of the Garden State School District ordered that change. He also testified that Federal Title I and Title II funds were channeled through the Garden State School District, which applied for and approved the use of Title I funds in the Woodbine education program. He testified that the Woodbine School calendar, which he had once personally forwarded to the Department of Human Services, was later sent for approval to the Garden State School District which also received other reports from Woodbine. He testified, further, that regular monthly meetings were conducted by supervisors of the Garden State School District, but that those monthly meetings, which he attended were thereafter held less frequently. He testified that the principal purpose of those meetings was to discuss the use of Title I funds, which made up approximately one-half of the Woodbine educational expense budget after 1965.

Patricia Holliday, Director of the Office of Education for the Department of Human Services, who had previously been Assistant Superintendent of the Garden State School District, testified that the statutory scheme for bringing institutions and agencies of the State under the authority of the Garden State School District was to be accomplished in two phases: namely, Phase I which was to cover the ten correction institutions, was implemented first; Phase II, which was to bring the Department of Human Services under authority of the Garden State School District, was never

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implemented prior to or after the 1979 law which abolished the Garden State School District. She testified that aside from technical assistance, the only involvement of the Garden State School District with the Department of Human Services was to coordinate, administer and monitor the federal funds of the Title I program. In this regard, she testified that only in the educational programs of corrections did the Garden State School District hire and dismiss employees, and require the submission and approval of yearly calendars and reports. She testified that although the Garden State School District conducted numerous supervisory meetings for the educational programs at corrections institutions, those services were not provided to Woodbine or other Department of Human Services institutions. She testified that teachers in the corrections institutions, unlike those in the Department of Human Services, were paid and supervised by the Garden State School District.

Ann Marlowe, who from 1972-80 had held positions as Assistant Superintendent of Administration and Acting Superintendent of the Garden State School District, testified that the Legislature never directed that Phase II be implemented and that it never was implemented. She corroborated, however, that the Garden State School District, as a "broker" agency, had applied for, received approval for and disbursed funds for Title I programs in Woodbine and other Department of Human Services institutions. She testified that although it was a joint decision made by the Commissioner of Corrections and personnel of the Garden State School District to implement twelve-month education programs in the Department of Corrections, no such joint discussion or decision was made with the Department of Human Services. Marlowe further testified that although the Garden State School District personnel screened and interviewed and decided which certificates were required of teacher candidates for the Department of Corrections, no such procedure existed with the Department of Human Services. She testified that as a professional courtesy, teachers from the Department of Human Services were invited, but not compelled to attend teacher workshops sponsored by the Garden State School District. She also testified that the Garden State School District had served as a conduit only for applications for teacher certification for teachers in the Department of Human Services. In regard to her receipt of any calendars and reports from Human Services, she stated: "They were submitted because someone within the Department of Human Services wanted to submit them. But we did not request them. There was no mandate for our requesting them. . ." (Tr. II at p. 62).

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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, together with those stipulated facts set forth above, in arriving at a determination:

1. The inconclusive language of Article XXXIV of the negotiated agreement is indicative of the uncertainty in the minds of the parties as to whether Teacher I, II and II employees in the Garden State School District were serving in tenurable positions.

2. The testimony of Dr. Sullivan before the Senate Education Committee is in no way dispositive of whether petitioners were, at any time, brought under the aegis of the Garden State School District.

3. The Garden State School District was only a convenient conduit for certification applications of teachers in the Department of Human Services.

4. The Garden State School District also served in that same convenient conduit capacity for the Department of Human Services in applying for and channeling funds and monitoring reports for Title I programs.

5. The Garden State School District interviewed, hired, supervised and dismissed teachers for the Department of Corrections, determined the certificates required for teachers, conducted teacher workshops, approved calendars, and required reports of educational programs carried out in the ten correctional institutions. Only in respect to Title I programs did the Garden State School District become similarly involved with educational programs in the Department of Human Services.

6. A State School District within the then Department of Institutions and Agencies was created, effective December 1972, pursuant to N.J.S.A. 30:4AA-2, which provides as follows:

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There is hereby established in the Department of Institutions and Agencies a State school district for institutions under the supervision of a superintendent of schools. The district shall be composed of such correctional, charitable, hospital, relief, training and other institutions and noninstitutional agencies within the Department of Institutions and Agencies as the commissioner thereof shall determine. Establishment of the school district provided hereunder shall be in two phases. Phase I shall include the correctional institutions in the Department of Institutions and Agencies. Phase 2 shall include the institutions for mental health, State hospitals, charitable institutions and other institutions and agencies within the Department of Institutions and Agencies. Implementation of Phase 2 shall not commence until after the passage of 90 days after the Commissioner of Institutions and Agencies has advised the Commissioner of Education of the Commissioner of Institutions and Agencies intention to begin Phase 2. The 90-day period is for the purpose of affording the Commissioner of Education an opportunity to submit recommendations for Phase 2 and its implementation. Upon the approval of both the Commissioner of Education and the Commissioner of Institutions and Agencies, the 90-day period may be reduced to a shorter period of time.

7. Phase I was implemented by the Commissioner of Institutions and Agencies.

8. Since the reorganization of State institutions which created the Department of Corrections and the Department of Human Services with their own separate Commissioners in 1976, there has been no Commissioner of Institutions and Agencies.

9. That same reorganization, pursuant to N.J.S.A. 18A:61B-1, provided as follows:

The State School District for Institutions within the Department of Institutions and Agencies, together with all of its functions, powers and duties, is continued but such State School District is hereby transferred to the Department of Education. All personnel, appropriations, books, papers and property necessary to the operation of the existing State School District are likewise transferred. All rules, regulations, acts, determinations and decisions in force at the time of such transfer proceedings or other such matters undertaken or commenced by the State School District shall continue in force.

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10. The Legislature, in September 1979, repealed N.J.S.A. 30:4AA-1 et seq., thus abolishing, effective July 1, 1980, the Garden State School District. At no time prior thereto or since was a formal action taken by any Commissioner implementing Phase II of N.J.S.A. 30:4AA-2. Nor is there a record that the Commissioner of Education was ever given an opportunity to, or that he did in fact submit recommendations for, the implementation of Phase II, as provided for in N.J.S.A. 30:4AA-2.

DISCUSSION:

When, in 1972, the Legislature provided that a State school district would be created, it specified in clear language that it was to be composed "of such correctional, charitable, hospital, relief, training and other institutions and noninstitutional agencies within the Department of Institutions and Agencies as the Commissioner thereof shall determine. . ." (N.J.S.A. 30:4AA-2). This clear language cannot be interpreted as a mandate to include all institutions, since broad discretion was left to the then Commissioner of Institutions and Agencies to determine which were to be included in the State school district. That neither he nor any other commissioner ever formally implemented Phase II, as further specified in the statute, is uncontroverted. Since this was not done, the Commissioner of Education was never given opportunity pursuant to the statute to make recommendations for the implementing of a Phase II.

In 1976, the position of the Commissioner of Institutions and Agencies was eliminated in favor of another organizational structure which provided for both a Commissioner of the Department of Corrections and a Commissioner of the Department of Human Services. No recodification, however, was made by the Legislature vesting discretionary authority in either of these two commissioners to implement Phase II of N.J.S.A. 30:4AA-2.

It is also uncontroverted that Phase I was implemented. Two Attorney Generals' opinions, in 1975 and 1980, express the opinion that teachers who, after the implementation of Phase I, taught in the Garden State School District in State-mandated programs, served in tenurable positions. The 1980 opinion also expresses the idea that the right to attain tenure for teachers employed in State mental institutions was extinguished upon the abolition of the Garden State School District.

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While petitioner, under a certificate issued by the State Board of Examiners, for many years performed duties at the Woodbine School teaching handicapped persons, neither he nor the Woodbine education program was ever brought into the Garden State School District. Accordingly, I **CONCLUDE** that petitioner did not serve in a tenurable position, despite the fact that his duties closely resembled those of a teacher of the handicapped in a public school district. This conclusion is grounded on the absence of an implemented statutory scheme such as that which brought teachers in correctional institutions into the Garden State School District. It is only through implementation of such a statutory plan that tenure is acquired by any teacher or other employee in an educational program.

Petitioners argue, with some logic, that they are brought under the umbrella of tenured employment by the language of the State Facilities Education Act of 1979, which states at Section 15(b) that:

> 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.

I am unable to conclude that the Legislature, which has historically been assiduously explicit when conferring tenure rights on categories of school district employees, intended with such general language to create a new category of tenured teaching employees. To so conclude would fly in the face of the detailed, explicit and varied requirements of length of service, contract arrangements and certification requirements set forth for the acquisition of tenure in the education statutes. N.J.S.A. 18A:28-5 et seq.; N.J.S.A. 18A:17-14.3; N.J.S.A. 18A:17-2, 3; N.J.S.A. 60-1.

It is well settled that not all teaching staff members employed by public school districts can attain tenure, although they may perform teaching duties and be holders of certificates issued by the State Board of Examiners. Capella v. Bd. of Ed. of Camden County Voc. Tech. Sch., 145 N.J. Super. 209 (App. Div. 1976); Point Pleasant Beach Teachers Ass'n v. Callam, 173 N.J. Super. 11 (App. Div. 1980); Biancardi v. Waldwick, 139 N.J. Super. 175 (App. Div. 1976), aff'd 73 N.J. 37 (1977).

The courts, in deciding disputes over tenure acquisition, have frequently emphasized the necessity of a strict adherence to the clearly expressed language of the Legislature conferring tenure rights on local school district employees. There is, herein,

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no convincing evidence that schools such as Woodbine, under control of the Department of Human Services, are constituted as local school districts as were the schools in the Department of Corrections. Nor is there specific language conferring tenure status on teachers in institutions under the Department of Human Services. In the absence of such precise language as has historically accompanied the conferring of tenure, I **CONCLUDE** that the Legislature, at no time, has conferred tenure status on, or implemented a procedure whereby tenure may be acquired by, teachers in the Department of Human Services.

As was aptly stated by the court in Susan R. Stachelski v. Bd. of Ed. of the Borough of Oaklyn, (N.J. Super., App. Div. April 10, 1981, A-144-79 (unpublished):

> Tenure is a statutory grant and teachers can only acquire tenure by strict compliance with the conditions legislatively imposed.

DETERMINATION:

Absent proof that educational programs in the Department of Human Services were ever incorporated in the Garden State School District by implementation of Phase II of N.J.S.A. 30:4AA-2, and absent convincing proof that the Legislature ever enacted any alternate plan whereby teachers in the Department of Human Services can acquire tenure, it is **DETERMINED** that:

1. Petitioner Ward was not tenured when he was dismissed on October 9, 1979.

2. Petitioner Ward was not entitled to a hearing before the Commissioner of Education on tenure charges prior to his dismissal.

3. Other petitioners employed as teachers by the Department of Human Services do not serve in tenurable positions.

It is further **DETERMINED** and **ORDERED** that Petitioner Ward and other teachers employed by the Department of Human Services are not entitled to the relief they request. Accordingly, that requested relief, in the form of an order reinstating Petitioner Ward to his former position with lost salary, is **DENIED**. Also **DENIED** is the application for a declaratory judgment that petitioners serve in tenurable positions.

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

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

February 16, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

February 17, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 19, 1982
DATE

Ronald L. Parker /pa
OFFICE OF ADMINISTRATIVE LAW

fms

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DOCUMENTS IN EVIDENCE:

P-1 Blanks to Ward, October 9, 1980

P-2 O'Brien to Ward, April 5, 1978

P-4 Senate Education Committee Memorandum, September 15, 1978

P-5 Negotiated Agreement for July 1, 1979-June 30, 1981

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NEW JERSEY CIVIL SERVICE ASSOCIATION AND NEW JERSEY STATE EMPLOYEES ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE SCHOOL DISTRICT a/k/a GARDEN STATE SCHOOL DISTRICT, ESTABLISHED PURSUANT TO N.J.S.A. 30:4AA-1, ANN K. KLEIN, COMMISSIONER OF HUMAN SERVICES, AND WILLIAM FAUVER, COMMISSIONER OF CORRECTIONS,	:	DECISION
RESPONDENTS.	:	

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

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

Petitioners except to the determinations herein by the Honorable Eric G. Errickson, ALJ that petitioners collectively and Warren Ward individually, all employed in the Department of Human Services, do not serve in tenurable positions. Petitioners contend that all correctional and human services institutions are part of the Garden State School District (GSSD). Respondents' reply exceptions refute those of petitioners and affirm the initial decision. The Commissioner finds merit in respondents' arguments.

The Commissioner notes that pursuant to N.J.S.A. 30:4AA-2, ante, the ultimate composition of the GSSD was determinable by the Commissioner of Institutions and Agencies, further limited by the proper initiation of Phase II. It is noted herein by the Commissioner of Education that Phase II was never formally implemented.

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, Petitioner Ward and other teachers employed by the Department of Human Services are not entitled to the relief requested. The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

March 26, 1982

Affirmed State Board - August 4, 1982

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF:

THE TENURE HEARING OF	OAL DKT. NOS. EDU 3388-80
ERNEST E. GILBERT,	EDU 7375-81
SCHOOL DISTRICT OF THE	AGENCY DKT. NOS. 235-5/80A
TOWNSHIP OF WILLINGBORO,	414-10/81A
BURLINGTON COUNTY	
AND	and
WILLINGBORO BOARD OF EDUCATION	PERC DKT. NOS. CI-79-53-60
v.	CI-79-53-61
ERNEST E. GILBERT	

Record Closed December 16, 1981

Decided 2/16/82

APPEARANCES:

Louis B. Youmans, Esq. (Warren, Goldberg & Berman) for the Board of Education of the Township of Willingboro

Arnold M. Melik, Esq. (Katzenbach, Gildea & Rudner) for Ernest E. Gilbert in the tenure and salary increment matters

Ernest E. Gilbert, Pro Se in the PERC matter

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OAL DKT. NOS. EDU 3388-80 & 7375-81

BEFORE BEATRICE S. TYLUTKI, ALJ:

Written charges against Ernest E. Gilbert (hereinafter referred to as "respondent"), a teacher with tenure status, were certified to the Commissioner of Education by resolution of the Board of Education of the Township of Willingboro (hereinafter referred to as "Board" or "petitioner"). The respondent requested a hearing, and the matter was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

Part I - PROCEDURAL HISTORY

At the prehearing conference on the tenure matter, it was represented by the parties that Ernest E. Gilbert had filed charges with the Public Employment Relations Commission (hereinafter referred to as "PERC") alleging unfair labor practices, and that the only charge that had not been dismissed was the allegation that the petitioner violated N.J.S.A. 34:13A-5.4(a)(4) by bringing the tenure charges against Mr. Gilbert for filing the complaint with PERC. On November 7, 1980, I ordered the consolidation of the tenure and PERC matters and determined that the Commissioner of Education had the predominant interest. This order was reviewed and affirmed by PERC on December 10, 1980.

The consolidated hearing started on January 5, 1981, with the presentation of the witnesses for the petitioner in the tenure matter. This presentation involved 17 hearing days and 46 witnesses.

Petitioner withdrew charge 17 during the hearing on February 10, 1981, and charge 16 during the oral argument on a motion to dismiss on March 4, 1981. Both withdrawals were with prejudice; however, the petitioner reserved the right to raise the subject matter of these charges as rebuttal to any affirmative defenses presented in the tenure matter and in its response in the PERC matter. It was further understood that the withdrawal of these charges did not affect the petitioner's right to present evidence as to the subject matter of the charges in the pending federal case.

After the completion of the petitioner's presentation in the tenure matter, Mr. Mellk, attorney for Mr. Gilbert in the tenure matter, moved to dismiss all the

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charges. In an Order dated April 27, 1981, I concluded that the petitioner had not presented a prima facie case as to Charges 3 (including all 17 subcharges), 12, 18, and 19, and that these charges should be dismissed with prejudice. This Order was reviewed by the Commissioner of Education and by an Order dated June 3, 1981, he reversed my determination that Charges 3 (including all subcharges) and 18 be dismissed.

The hearing in this matter resumed on May 4, 1981, with the respondent's defense as to the remaining tenure charges and the testimony as to the PERC matter. During this portion of the hearing, it was brought to my attention that the petitioner had voted to deny Mr. Gilbert his salary increment for the 1981-82 school year. This denial was based on the reasons set forth in tenure Charges 1 through 15, 18, and 19. Mr. Gilbert requested a hearing, and the matter was referred to the Office of Administrative Law as a contested case (EDU 7375-81, Agency Dkt. No. 414-10/81A). The parties having been in agreement, I ordered, on December 1, 1981, the consolidation of the salary increment withholding matter with the pending consolidated tenure and PERC hearing. Further, the parties agreed that no additional testimony would be necessary and that they would rely on the record and briefs submitted in the consolidated tenure and PERC matters.

On September 30, 1981, Mr. Mellk and Mr. Youmans filed a joint motion regarding the legality of the petitioner's determination to withhold the salary increment of Mr. Gilbert during the pendency of the tenure matter. I indicated to the parties that I would make a determination as to this motion in this initial decision.

There were a total of 26 hearing days, excluding oral arguments on several motions filed in this matter. Prior to the closing of the record, more than 20 written motions were made by the parties and I issued 14 written orders. Since most of these matters are now moot, and none of them is germane to the matter in chief, I will not discuss any of them in this initial decision.

Briefs having been received by the parties, the record in this matter closed on December 16, 1981.

Part II - BACKGROUND

I **FIND** that the following background facts are not in dispute:

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(1) Mr. Gilbert holds New Jersey Teaching Certificates in Science and Mathematics (18 T 54)*. Respondent is certified to be a principal (18 T 98).

(2) Mr. Gilbert was first employed by the petitioner as a full-time teacher at the John F. Kennedy High School (hereinafter referred to as "JFK") in January 1973 (18 T 54).

(3) Since 1973, Mr. Gilbert has been a member of the Willingboro Education Association (18 T 55).

(4) Mr. Gilbert obtained tenure status in January 1976 (18 T 55).

(5) Mr. Gilbert started as a science teacher and continued in that capacity until the end of the 1977-78 school year (1 T 43).

(6) During the 1978-79 school year, Mr. Gilbert taught three science classes and two mathematics classes (1 T 43).

(7) During the 1979-80 school year, Mr. Gilbert was assigned to teach five mathematics classes (1 T 43).

(8) Dr. Franceschini was Chairperson of the Mathematics Department at JFK from 1975 to February 1979 (1 T 37). In February 1979, he became Assistant Principal and remained in that position until he left JFK in January 1980 for another job (1 T 38). For a while he held both positions, Chairperson and Assistant Principal (2 T 21-2)

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* See table 1 for the date of the hearing referred to by the references to the transcript volume.

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(9) At JFK, Mr. Gilbert served as advisor to the Chemistry Club (1974-80), Interact Club (1975), National Honor Society (1976-77) and Afro-American Club (1978-79) (18 T 56). He also served as a home bound instructor in mathematics and science (18 T 61).

(10) There was a teacher's strike in November 1977 (18 T 61). Mr. Gilbert initially went out on strike with the teachers and returned to work after receiving a copy of Judge Wood's Return to Work Order (18 T 63-4).

(11) During the strike, Mr. Gilbert took an active role in trying to persuade his fellow teachers to return to work (R 2, 18 T 65).

(12) During the strike, Mr. Gilbert was called a "scab" by John Mullineaux as the respondent crossed the picket line (4 T 159). Mr. Gilbert filed a complaint against John Mullineaux in the Willingboro Municipal Court on December 5, 1977 (P 18). Mr. Mullineaux was later found not guilty (P 19).

(13) During the strike, the respondent taught seniors in order to make sure that they could graduate, and he later received a letter of commendation from Mr. Brandau, Director of Secondary Education (P 46, 18 T 65).

(14) After the strike ended, Mr. Gilbert was given the silent treatment by the other teachers, and several times his car was tampered with (18 T 67-8). Respondent frequently found the word scab written along side of his name on the attendance sheet for teachers, and the word scab was painted on his mailbox (R 6, 18 T 68). The other teachers who did not participate in the strike were similarly identified as "scabs."

(15) On April 20, 1979, Mr. Gilbert filed two unfair labor practice matters with PERC against the Board and the Willingboro Education Association (18 T 73). Thereafter, respondent amended the charges to include an allegation that the tenure charges were filed against him as retaliation for initiating the PERC matters.

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(16) Mr. Gilbert initiated an action before the U.S. District Court alleging discrimination and unfair labor practices. Later he amended his complaint to add an allegation that the Board initiated the tenure matter in retaliation for Mr. Gilbert's pursuing his legal remedies.

(17) Mr. Gilbert was convicted in the Willingboro Municipal Court of an assault on Mark Franceschini on April 24, 1979 (P 1). After a de novo hearing in the Criminal Division of the New Jersey Superior Court, Mr. Gilbert was again convicted of assault and given a suspended sentence (P 2).

(18) Mr. Gilbert was suspended from April 24, 1979 until September 1979.

(19) As a result of the April 24, 1979 incident, Ms. Terry filed a complaint against Mr. Gilbert for assault and battery, and Mr. Gilbert filed a complaint against Dr. Franceschini for assault and battery. Both of these complaints were dismissed (18 T 83, 7 T 129).

(20) On March 5, 1980, there was a fist fight between Mr. Gilbert and a student, James A. May.* Mr. Gilbert was suspended on March 5, 1980, by Dr. Romanoli, Superintendent of Education (18 T 121).

(21) On April 28, 1980, the Board voted to forward tenure charges against respondent to the Commissioner of Education. As of April 29, 1980, Mr. Gilbert was suspended without pay. Respondent's salary payments resumed as of September 1980, pursuant to N.J.S.A. 18A:6-14.

PART III - TENURE MATTER

The remaining tenure charges filed against Mr. Gilbert allege conduct unbecoming a teacher, insubordination and incompetency. Each of these charges is hereinafter set forth with pertinent findings of fact and conclusions of law (the charges are not set forth in numerical order).

* Initials will be used in this initial decision for all students who are minors.

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CHARGE 1

This charge alleges that respondent's conduct which led to his conviction of assault and battery against Dr. Franceschini, Assistant Principal at JFK, constitutes conduct unbecoming a teaching staff member and insubordination.

The respondent's criminal conviction is conclusive evidence of guilt in this matter (P1, P2); however, in this disciplinary proceeding, it is appropriate to review the underlying facts relating to this conviction, since they have a bearing as to the severity of the discipline to be imposed in this matter. See, In the Matter of the Tenure Hearing of Humphreys, School District of the Township of Pennsville, Salem County, 1978 S.L.D. 689, affirmed by State Board, 1979 S.L.D. 839. In doing so, the fact of guilt will not be retried.

Respondent and Dr. Franceschini had a good relationship and played chess together prior to the teachers' strike in 1977 (1 T 42, 18 T 62). Dr. Franceschini, as a teacher, participated in the 1977 teachers' strike and admitted that he may have had strong feelings against respondent during the strike. On one occasion, there was a confrontation between them when Dr. Franceschini stepped in front of respondent's car as respondent tried to get through the picket line (2 T 66, 18 T 63). Dr. Franceschini denied that he felt any remaining hostility toward Mr. Gilbert as of April 24, 1979 (2 T 95). Dr. Franceschini was served in the PERC matter which was filed before April 24, 1979 (1 T 106, 18 T 95).

According to Dr. Franceschini, respondent came to his office at 7:45 a.m., prior to the first class, on April 24, 1979, to discuss the non-use of student pass forms by a teacher (1 T 82). Dr. Franceschini told Mr. Gilbert that they were out of the student pass forms; however, his secretary, Barbara Terry, indicated that the pass forms were available, but that the storage location had been changed (1 T 83). Ms. Terry took Dr. Franceschini and the respondent into the storage room to show them where the passes were located. Mr. Gilbert accused Dr. Franceschini of trying to "white wash" the matter (1 T 83). Dr. Franceschini stated that he and respondent were shouting at each other, but he denied that it was an emotional argument (1 T 84). He described it as "gamesmanship" (2 T 46). According to Dr. Franceschini, respondent punched him on the jaw, and in the same movement, struck Ms. Terry in the upper arm (1 T 85-6). Ms. Terry's testimony as to what occurred conforms with Dr. Franceschini's (7 T 119-121).

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According to Mr. Gilbert, Dr. Franceschini became hysterical, was foaming at the mouth and spraying him with saliva (18 T 92-3, 22 T 113-7). Mr. Gilbert stated that he was backed into a corner and that as he raised his hand to protect his face from the saliva spray, he accidentally struck Dr. Franceschini (18 T 94).

Based on the testimony and my observations of the demeanor of Dr. Franceschini and Mr. Gilbert at the hearing, I **CONCLUDE** that Mr. Gilbert's account of what occurred is not credible and that the respondent punched Dr. Franceschini without any provocation. No evidence was presented to show that Dr. Franceschini had provoked the attack through any word or action, nor has the respondent shown that Dr. Franceschini had a grudge against respondent since the 1977 strike and/or the initiation of the PERC action which manifested itself on April 24, 1979, and justified Mr. Gilbert's actions. Mr. Gilbert apparently lost his temper when Dr. Franceschini did not give serious consideration to his complaint that a teacher was not using the proper pass forms. Therefore, I **CONCLUDE** that Mr. Gilbert's actions on April 24, 1979, constituted conduct unbecoming a teacher.

CHARGES 4, 5, 6 AND 7

These charges all relate to the unsuccessful attempts by Dr. Franceschini, as Assistant Principal, to observe the respondent in the classroom in September 1979 and allege that respondent's conduct constitutes insubordination and conduct unbecoming a teaching staff member.

I **FIND** that the undisputed facts pertinent to these charges are:

(1) After the April 24, 1979 incident, Mr. Gilbert asked to be transferred to another school in the district (18 T 164).

(2) On or about September 10, 1979, Dr. Franceschini told the respondent that he would be observing him on September 13, 1979. Mr. Gilbert told Dr. Franceschini, Richard B. Smith, the Principal, Mr. Coppola, the Vice Principal, and Dr. Romanoli that he would not allow Dr. Franceschini to observe him. (1T 89-90, 93, 19 T 40, 70).

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(3) On September 13, 1979, Dr. Franceschini was in the respondent's classroom for the observation, and the respondent refused to enter the classroom (1 T 90-2). Dr. Franceschini advised Mr. Coppola, and Mr. Coppola requested Mr. Gilbert to return to the classroom. After Mr. Gilbert refused, Mr. Coppola sent Ms. Butchko to take over the respondent's class (19 T 65).

(4) On or about October 11, 1979, Dr. Franceschini again informed Mr. Gilbert that he would be observing him, and Mr. Gilbert again refused.

(5) On the second occasion, Dr. Franceschini entered respondent's classroom, and Mr. Gilbert left (1 T 94-5). Respondent refused to return until Dr. Franceschini left the classroom.

(6) Dr. Franceschini testified that as a result of the April 24, 1979 incident, he became the brunt of jokes, and he felt his position of authority with the students and teachers was placed in jeopardy (1 T 87- 8).

(7) Mr. Gilbert was suspended after the April 1979 incident; however, he returned to teaching in September, and no disciplinary action was taken against him.

(8) There were other staff members at JFK who could have been assigned the responsibility to observe the respondent.

Petitioner argues that Dr. Franceschini had a responsibility to observe Mr. Gilbert and that the respondent had no right to refuse to be observed by him. Dr. Franceschini testified that any animosity he had as a result of the April 24, 1979 incident had ended prior to September 1979 and that he told Mr. Gilbert in September 1979 that he bore no bad feeling toward him (2 T 95).

Respondent argues that he was within his rights to refuse to be observed by Dr. Franceschini and that the administrators of JFK acted in an arbitrary manner in refusing his request to be observed by another person.

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Having reviewed the facts, I **CONCLUDE** that the administrators of JFK should have granted respondent's request to have someone else evaluate him. Although I do not doubt that Dr. Franceschini felt he could render an unbiased evaluation, his supervisors should have realized that it would be humanly impossible for his opinion not to be influenced by the April 24, 1979 incident. Under the circumstances, Mr. Gilbert had reason to suspect that Dr. Franceschini would be biased and also to conclude that his performance would be affected if he were evaluated by Dr. Franceschini.

Respondent, having first tried to have another person do the evaluation, was within his rights to refuse to be observed by Dr. Franceschini. Although it is unfortunate that respondent's students were involved, the prime responsibility for any classroom disruption and student confusion must rest with the administrators of JFK. See, In the Matter of the Tenure Hearing of Joseph Maratea, 1966 S.L.D. 77, aff'd 1966 S.L.D. 106, aff'd by App. Div. on Dec. 1, 1967 (1967 S.L.D. 351).

Therefore, I **CONCLUDE** that Charges 4, 5, 6 and 7 are dismissed with prejudice.

CHARGE 2

This charge relates to the fist fight between respondent and a student, James May on March 5, 1980, and alleges that respondent's action constitutes conduct unbecoming a teaching staff member.

I **FIND** that the undisputed facts pertinent to this charge are:

(1) James A. May had a study hall period supervised by the respondent. Mr. May did not have Mr. Gilbert as a teacher.

(2) Mr. Gilbert had disciplinary problems with Mr. May in the study hall and on one occasion, as sponsor of the Afro-American Club, he asked Mr. May to leave a dance run by that club (18 T 133).

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(3) At the beginning of the study hall period on March 5, 1980, Mr. May was directed by respondent to sit down. At that time, Mr. May was standing and looking in a drawer, allegedly for a physics assignment.

(4) Mr. May refused and stated that he would not sit down until he found his physics assignment (21 T 12).

(5) Respondent called the office on the classroom intercom and requested a monitor to take Mr. May to the central office for discipline. Mr. Gilbert was informed that a monitor was not available and that he should send Mr. May to the office with a pass (21 T 12).

(6) Mr. Gilbert proceeded to his desk to write the pass.

(7) Mr. May stood in front of respondent's desk with his arms crossed (18 T 130).

(8) Mr. Gilbert told Mr. May to go stand by the door, but Mr. May continued to stand by respondent's desk.

(9) Mr. Gilbert moved from behind the desk and shoved Mr. May against a chalk board (18 T 121, 132, 10 T 100).

(10) Mr. May struck Mr. Gilbert and a fight ensued between Mr. Gilbert and Mr. May, which eventually resulted in their fighting on the floor (10 T 100).

(11) A student broke up the fight, and a student informed the central office of what had occurred.

(12) At the request of Mr. Sims, Assistant Principal, respondent and Mr. May prepared written statements (10 T 106, 7 T 63, P 26, R 4).

(13) Mr. Gilbert and Mr. May were suspended as of March 5, 1980 (18 T 121, 132).

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The only facts in controversy relate to how close to Mr. Gilbert's desk Mr. May was standing and whether Mr. May had something in his hand at the time of the incident.

Mr. May (10 T 100) and the seven students (8 T 149, 161, 170, 176, 180, 9 T 69, 10 T 6) who testified regarding the incident all claim that Mr. May stood close to the desk with his arms folded, waiting for Mr. Gilbert to write the pass. Mr. May denied that he had anything in his hand (10 T 101), and none of the student witnesses recalled seeing anything in his hand.

According to Mr. Gilbert, Mr. May came up to his desk and "squared off" on him (18 T 131), stood close, almost leaning over the desk, and had something in his hand. Mr. Gilbert was unable to identify the alleged object in Mr. May's hand (23 T 20-1). However, he considered it to be some sort of a weapon. Respondent stated that Mr. May blocked him in and that he pushed Mr. May out of the way (21 T 12).

Mr. Gilbert stated that he originally did not mention to Mr. Sims or include in his written statement any mention of an object in Mr. May's hand because he did not want to get Mr. May into any more trouble (23 T 28).

Thereafter, the respondent called Mr. Sims at home, told him that Mr. May had had something in his hand, and asked to amend his written statement (7 T 68). Mr. Sims refused to let respondent change his statement, but promised to investigate the matter. Mr. Sims testified that after his investigation, he concluded that Mr. May did not have anything in his hand at the time of the incident (7 T 92).

Based on the testimony, I **FIND** that the additional pertinent facts are:

(1) Mr. May did not have anything in his hand at the time of the incident.

(2) Mr. May was standing close to Mr. Gilbert's desk and manifested a belligerent attitude toward Mr. Gilbert.

One of the prime responsibilities of the teacher is to maintain order. As the supervisor of a study hall, this was probably Mr. Gilbert's only responsibility. In this case, Mr. Gilbert gave a reasonable direction to Mr. May, but the student refused to sit down.

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Under the circumstances, Mr. Gilbert was well within his rights to contact the central office, and to send Mr. May to the central office for discipline. The evidence seems to suggest that if Mr. May had received a pass, he would have left the room without further incident.

However, for some unexplained reason, Mr. Gilbert decided not to write the pass, but to walk out from behind his desk and push Mr. May out of his way. It is clear from the testimony that Mr. Gilbert resented Mr. May's attitude toward him, and that Mr. May did not like Mr. Gilbert. Under the circumstances, Mr. Gilbert should have tried to avoid a confrontation by giving Mr. May the pass. Mr. Gilbert's action clearly precipitated the fight that occurred.

Mr. Mellk, on behalf of the respondent, argued that respondent's actions did not constitute an attempt to inflict corporal punishment on Mr. May and that said actions fall within the exceptions set forth in N.J.S.A. 18A:6-1.

Based on the facts, I **CONCLUDE** that the respondent struck Mr. May without provocation, and it was not an act of self-defense (N.J.S.A. 18A:6-1), and I **CONCLUDE** that respondent's action was conduct unbecoming a teacher.

CHARGES 8 AND 11

These two charges relate to the alleged failure of respondent to submit classroom attendance forms, and they allege that respondent's action constitutes insubordination and conduct unbecoming a teacher.

I **FIND** that the undisputed facts pertinent to these charges are:

(1) Teachers at JFK are required to fill out classroom attendance forms and submit the same to Ms. Galvin, the attendance clerk (1 T 95, 2 T 112).

(2) The forms are simple and it takes only a few minutes to fill them out (P4).

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(3) The information on the forms is used to determine whether students are in their assigned classes (2 T 120).

(4) On several occasions, Ms. Galvin requested that Mr. Gilbert submit the attendance forms (2 T 113).

(5) When the forms were not submitted by the respondent, Ms. Galvin brought the matter to the attention of her immediate superior, Dr. Franceschini (2 T 113).

(6) Dr. Franceschini directed Mr. Gilbert to submit the classroom attendance forms (P 6), and Mr. Gilbert indicated that he did not intend to prepare the forms (1 T 99 - 101, P 7).

(7) On October 5, 1979, Mr. Coppola, Mr. Sims and Ms. Butchko met with Mr. Gilbert, and one of the subjects discussed was the respondent's failure to submit classroom attendance forms (P11). Mr. Gilbert was directed by Mr. Coppola to submit the forms (P13).

(8) Mr. Gilbert still did not submit said forms (2 T 113, P 14).

At the hearing, Mr. Gilbert testified that he had had problems filling out the classroom attendance forms because he did not have a permanent desk, had to carry all his papers with him, and was busy with student extra-curricular activities. He also stated that he would call a student himself if the student was not in class (19 T 84-5). Mr. Gilbert testified that he discussed the matter with the principal and that Mr. Smith told him not to worry, which he felt meant that he did not have to fill out the forms (19 T 84). Mr. Gilbert was unable to produce any documentation to suggest that Mr. Smith had relieved him of this responsibility.

Based on the evidence, I **CONCLUDE** that Mr. Gilbert's testimony that Mr. Smith relieved him of the responsibility of filling out the classroom attendance forms is not credible, and I **CONCLUDE** that Mr. Gilbert's action constitutes insubordination and conduct unbecoming a teacher.

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CHARGE 9

This charge relates to Mr. Gilbert's alleged refusal to attend a conference with the parents of a student, L.A., and alleges that Mr. Gilbert's conduct constitutes insubordination and conduct unbecoming a teaching staff member.

I **FIND** that the undisputed facts pertinent to this charge are:

(1) L.A. was in an Algebra I class taught by Mr. Gilbert (8 T 83-4).

(2) Mr. Gilbert called L.A. at home on a Saturday evening to discuss a homework assignment (8 T 68-9).

(3) Mrs. Andrews, mother of L.A., spoke to Mr. Gilbert on the phone and testified that he was nasty to her (8 T 70-1).

(4) Mrs. Andrews suggested a parent-teacher conference, and Mr. Gilbert told her that she could have a conference with him at any time (8 T 71, 19 T 76).

(5) On October 15, 1979, Mr. and Mrs. Andrews went to JFK without making a prior appointment (7 T 85) and had a conference with Mr. Sims (8 T 71).

(6) Mr. Sims requested that Mr. Gilbert attend the conference, but respondent refused (P 24, 8 T 71-2, 7 T 52).

(7) Mr. Coppola directed Mr. Gilbert to attend the conference with Mr. and Mrs. Andrews, but Mr. Gilbert refused (3T 56-7). Respondent was teaching a class at the time, and Mr. Coppola was going to send a temporary substitute to his class (3 T 58).

(8) On another occasion, Mr. Gilbert refused to meet with Mr. and Mrs. Gaines when they came in for a conference without an appointment (2 T 182-3, 7 T 49-50, P23).

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According to Mr. Coppola, parents are required to make an appointment with the teacher; however, it is the common practice at JFK for the administrators to try to accommodate parents and to have the meeting even if the parents come to the school without an appointment (2 T 163, 168). One of the administrators decides if the matter to be discussed warrants an immediate meeting with the teacher (2 T 177).

Under the circumstances, I **CONCLUDE** that Mr. Gilbert had more than ample reason to believe that Mr. and Mrs. Andrews would come to the school for a conference after he told Mrs. Andrews that he would meet with her at any time. Therefore, I **CONCLUDE** that Mr. Gilbert's refusal to meet with Mr. and Mrs. Andrews was insubordination and conduct unbecoming a teacher.

CHARGE 10

This charge relates to Mr. Gilbert's lesson plan for a substitute teacher, and alleges that his refusal to prepare a new lesson plan constitutes insubordination and conduct unbecoming a teaching staff member.

At the hearing, Mrs. Butchko, Department Chairperson for Mathematics, stated that the respondent was absent on September 28, 1979, and that the substitute teacher complained about the lesson plan in the respondent's substitute folder (4 T 113). Mrs. Buethko reviewed it and agreed with the substitute teacher that the lesson plan was not acceptable (P 22). Dr. Franceschini also thought the plan was inadequate (1 T 125-6). On October 5, 1979, Mrs. Buchko had a conference with the respondent concerning the matter. At the meeting, Mr. Gilbert stated that he would be out the next day, and he refused to prepare a new lesson plan (4 T 114).

Mr. Gilbert admits that Mrs. Butchko criticized his lesson plan, but he denies that it was inadequate (19 T 25, 32-4). Further, he testified that Mrs. Buchko did not give him any specific directions as to what was wrong with the lesson plan at the meeting on October 5, 1981 (19 T 35-7, P12). Respondent told her that he did not have the time to revise it prior to his absence the next day (P 13, 19 T 34-5). Respondent stated that Mrs. Butchko was "out to get [him]" because he filed a grievance regarding her appointment to the Chairperson position (20 T 141-2), and regarding Dr. Franceschini's holding of two positions.

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Ms. Helverson, the teacher who substituted for the respondent on September 28, 1979, stated that she could not work from what was in Mr. Gilbert's substitute file and that she got a lesson plan from Mrs. Butchko (R 27, 25 T 43-4, 51). Thereafter, she spoke to Mr. Gilbert about the matter, and she was able to substitute for him on October 3, 1979, without a problem (R 26, 25 T 75).

Mr. Coppola stated that Mr. Gilbert's lesson plan was inadequate at the time of his suspension in March 1980 (P14).

Ms. Calloway, a substitute teacher, testified that she substituted for Mr. Gilbert several times between January and March 1980 and used his lesson plan (R 7, R 8). She thought his lesson plans were well prepared (19 T 8-10).

Based on the testimony, I **FIND** that Mr. Gilbert's lesson plan which was given to the substitute teacher on September 28, 1979, was inadequate. At a meeting on this matter, Mr. Gilbert refused to prepare a new lesson plan prior to his absence the next day.

It is the teacher's responsibility to make sure that he has an adequate lesson plan for a substitute teacher. There is nothing in the record to substantiate Mr. Gilbert's claim that he could not have prepared a new plan prior to his absence. Therefore, I **CONCLUDE** that Mr. Gilbert's action in this matter constitutes insubordination and conduct unbecoming a teacher.

CHARGE 13

This charge relates to a conversation between John Mullineaux and Mr. Gilbert regarding honor passes, and it alleges that respondent's action constitutes conduct unbecoming a teacher.

I **FIND** that the undisputed facts pertinent to this charge are:

(1) In November 1976, a student asked her teacher, John Mullineaux, for permission to go to the guidance department (4 T 144). Mr. Mullineaux refused, since she did not have a guidance pass. A student in the class suggested that the honor pass could be used for this purpose. Mr. Mullineaux looked in the teachers' manual and stated that there was no authority to use the honor pass for such a purpose (4 T 145).

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(2) During the next class, students informed Mr. Gilbert of what had occurred regarding the honor pass. At the conclusion of the class, Mr. Gilbert and some of the students went to Mr. Mullineaux's classroom.

(3) In the hallway, between class periods, Mr. Gilbert told Mr. Mullineaux that an honor pass could be used for this purpose.

(4) After the incident, respondent and Mr. Mullineaux discussed what had occurred with the principal, and both considered the matter to be closed (5 T 51, 19 T 92).

At the hearing, Mr. Mullineaux testified that the respondent was animated, loud and threatened to "jack him up" and to take the matter to the Board if he did not honor such passes (4 T 145-7).

Mr. Gilbert testified that he did not threaten Mr. Mullineaux, but that he simply wanted to inform him of the new procedure permitting such use of the honor pass that was recently approved by the principal, in front of some students who were members of the National Honor Society (19 T 91-2).

Mr. Gilbert stated that Mr. Mullineaux felt animosity toward him since the 1977 teachers' strike. During the strike, Mr. Gilbert filed a criminal complaint against Mr. Mullineaux (P-18).

Having heard the testimony and observed the demeanor of both witnesses, I **FIND** that Mr. Gilbert did not threaten Mr. Mullineaux with any physical violence, but wanted to inform Mr. Mullineaux of his "mistake" regarding the honor pass in front of an audience.

Although a more prudent teacher might have informed Mr. Mullineaux privately of the change in policy, I **CONCLUDE** that under the circumstances, Mr. Gilbert's action was not conduct unbecoming a teacher. Therefore, I **CONCLUDE** that Charge 13 is dismissed with prejudice.

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CHARGE 15

This charge relates to Mr. Gilbert's activities as advisor to the National Honor Society, and alleges that certain actions by the respondent constitute conduct unbecoming a teacher.

I **FIND** that the undisputed facts relating to this charge are:

(1) In January 1978, while respondent was advisor to the Honor Society, he recommended a change in the methods of determining the student grade averages at JFK (P 38, R 21, 21 T 15, 22-4).

(2) The principal agreed to change the grade average determination procedure (P 39, 21 T 26).

(3) The general procedure for student selection to the National Honor Society at JFK involves:

(a) preparation of a list of academically eligible students by the Guidance Department (14 T 80),

(b) circulation of this list to the teachers for input as to character, leadership and service (14 T 18),

(c) decision as to who should be invited to join the National Honor Society and the preparation of a list of approved students,

(d) notification to the approved students asking them if they want to join the National Honor Society,

(e) initiation of new members.

(4) The selection process was delayed in the 1977-78 school year.

(5) In a committee meeting regarding the selection of the approved students in the 1977-78 school year, Mr. Gilbert stated that he caught two of the

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students on the eligible list cheating, and he recommended that they not be approved (21 T 36-7, 14 T 68).

(6) The committee, by a majority vote, decided to place both students on the approved list (14 T 18, 83).

(7) Mr. Gilbert asked the teachers at JFK to fill out a survey questionaire (P 37).

(8) Mr. Gilbert wrote and had published a paper entitled "The Politics of Grade Point Averages with Class Rank" (P 49, G 4, 14 T 119-21).

(9) Mr. DiPietro replaced the respondent as advisor to the National Honor Society prior to the initiation of new members to the National Honor Society in the 1977-78 school year (P 42, 14 T 118).

At the hearing, Mr. DiPietro and Ms. Speed, both members of the selection committee during the 1977-78 school year (14 T 18), stated that they were told that Mr. Gilbert removed the name of one or two students from the list of students approved by a majority of the committee (14 T 20). Mr. DiPietro stated that respondent admitted that he had vetoed the committee as to two students (14 T 113-4, 7).

Mr. DiPietro testified that Mr. Gilbert should not have published the paper or conducted the survey without approval of the administration (14 T 93-4, 42), and that it was Mr. Gilbert's fault that the student selection was delayed in the 1977-8 school year (P 43, P 45).

Mr. Gilbert denied that he removed any name from the list (21 T 30). Respondent stated that one students on the approved list was not sent a notification asking her if she wanted to join the Natinal Honor Society, since she had indicated her desire to join during the previous school year. This student was one of the students that Mr. Gilbert recommended not be approved since he caught her cheating on a test. Mr. Gilbert discussed the two students with the principal and he resigned from his position as advisor because he thought it was improper for two "cheaters" to be allowed to join the National Honor Society (21 T 51-2).

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Respondent stated that he discovered in January 1978 that the student grade averages at JKF were not being determined correctly and that the procedure used in violation of the constitution of the National Honor Society (21 T 15).

Mr. Gilbert testified that the delay in the initiation of new members was a consequence of the teachers' strike which had taken place at the beginning of the school year, and of a teacher work slow-down action which took place after the strike. The strike and slow-down action delayed receipt of the teachers' input on the candidates (21 T 47-9, P41). Mr. Gilbert denied any wrong doing on his part and stated that he was made to look bad due to the hostility against him because he did not participate in the strike (21 T 50, 54-5).

Based on the testimony, I **CONCLUDE** that the petitioner has not shown by a preponderance of the evidence that Mr. Gilbert removed the names of one or two students from the list of approved candidates for the National Honor Society or that any of the respondent's actions relating to the National Honor Society constituted conduct unbecoming a teacher. Therefore, I **CONCLUDE** that Charge 15 is dismissed with prejudice.

CHARGES 3 and 18

These charges relate to Mr. Gilbert's teaching methodology and his behavior toward his students and their parents, and allege that the respondent's actions constitute incompetency and conduct unbecoming a teaching staff member.

In support of these charges, petitioner presented the testimony of Edward Banos, Director of Guidance at JFK, the various supervisors who evaluated the respondent, a number of Mr. Gilbert's former students, and several parents.

Edward Banos stated that each Spring, the students select their courses for the next school year, with the advice of their guidance counselor (5 T 61). The students are permitted to take any course for which they have the established prerequisite, if any, even though their guidance counselor may have advised against it. In the beginning of each school year, the students may change or drop courses during the first two weeks and drop courses with the consent of their guidance counselor during the subsequent two weeks (5 T 62-3). Thereafter, any withdrawal has to be approved by the principal (5 T 62-3).

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Although Mr. Banos stated that class drops were discouraged (5 T 63), each year approximately two to three percent of the students drop or change courses (5 T 64).

Mr. Banos estimated that fifty percent of Mr. Gilbert's students dropped his courses (5 T 65). Mr. Banos concluded, as a result of his interviews with some of these students, that this was due to personality conflicts and to the lack of instruction provided by the respondent (5 T 67).

Robert Trama, as Assistant Principal, participated in the evaluations of Mr. Gilbert before the respondent obtained tenure, January 1973-January 1976 (10 T 193, 11 T 69). Mr. Trama received more complaints from parents and students about Mr. Gilbert than about any other teacher (10 T 143). These complaints included charges that the respondent's presentation was aimed above the comprehension level of his students (10 T 144), that it was not well organized (10 T 146), that respondent lacked flexibility (10 T 142), harassed his students (10 T 142), and that he had a caustic personality (10 T 142).

Based on formal observations and unannounced visits, Mr. Trama stated that Mr. Gilbert's teaching performance was satisfactory (10 T 185) and that he did not see any antagonism between Mr. Gilbert and his students (10 T 147). Mr. Trama felt that the respondent's presentation was sometimes too sophisticated (10 T 139).

In Mr. Trama's opinion, a high student dropout rate is an indication of teacher performance problems (10 T 178-9). He mentioned examples in which student complaints were verified by investigations. Mr. Trama did not investigate the complaints regarding Mr. Gilbert (11 T 15).

Based on his observations and the feedback he received from students and parents, Mr. Trama recommended that the respondent not be given tenure (11 T 34).

John Bergan, Chairperson of the Science Department, participated in the evaluation of Mr. Gilbert while the respondent was assigned to that department, before and after Mr. Gilbert received tenure. He was pleased with the petitioner's classroom performance (11 T 77-8); however, he felt that Mr. Gilbert had a rapport problem with the students.

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Mr. Bergan stated that Mr. Gilbert's student dropout rate increased after his first year at JFK (11 T 84) and that the percentage again increased after respondent received tenure (11 T 95). He attributed this dropout rate to respondent's lack of flexibility (11 T 84) and to his failure to meet the needs of the students (11 T 99, 107). His negative conclusion as to the respondent's rapport with the students was based on Mr. Gilbert's description of how he had handled a matter involving Karen Borden Delucas, a student (11 T 95, 130).

Mr. Bergan was upset when Mr. Gilbert arranged to have a double laboratory period after he (Mr. Bergan) had failed to get such double periods for all science teachers (11 T 86-7).

In the 1978-79 school year, Mr. Gilbert taught Science and Mathematics and was evaluated by both Mr. Bergan, Chairperson of the Science Department, and Dr. Franceschini, Chairperson of the Mathematics Department.

Dr. Franceschini testified that he thought Mr. Gilbert sometimes spoke at a level above the comprehension of the students (1 T 49), and that he gave too much homework (1 T 216). He recommended, and the principal directed, that Mr. Gilbert slow down and spend more time reviewing basic mathematics (1 T 68, 70). Thereafter, Mr. Gilbert spent too much time reviewing basic mathematics (1 T 70).

Dr. Franceschini stated that approximately fifty percent of the students dropped respondent's courses (1 T 64-5), that the respondent was not preparing his students for examinations (1 T 55), that the respondent was unreasonable as to his notebook requirements (1 T 55), and that the respondent once issued infractions to his entire class (1 T 59-60).

In the 1979-80 school year, Mr. Gilbert taught only mathematics. Respondent refused to be observed by Dr. Franceschini, now an Assistant Principal (Charges 4-5-6-7), but was observed that year by Rita Butchko, the new Chairperson of the Mathematics Department. She testified that Mr. Gilbert spent too much time reviewing basic mathematics (6 T 112) and that his vocabulary was sometimes above the comprehension level of the students (6 T 116). Based on her classroom observations, Ms. Butchko thought Mr. Gilbert was doing a good job (6 T 123). However, she became suspicious when a student remarked about respondent's good performance during an evaluation and other students agreed that it was unusual (6 T 114, 7 T 6).

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Angelo Coppola, evaluated Mr. Gilbert and concurred with the comments made by Mr. Trama, Mr. Bergan, Dr. Franceschini and Ms. Butchko. He stated that Mr. Gilbert had frequent confrontations with students or their parents, but he did not recall ever discussing this specific problem with Mr. Gilbert (2 T 190-1).

Annexed to Charge 3 are 17 subcharges. Each of the subcharges relates to the alleged experiences of a student and/or parent. The students who were mentioned in subcharges B, C, D, E, G, I, O and P did not testify at the hearing.

Subcharge A - Liza Burres testified that she withdrew from Mr. Gilbert's homeroom in the 1979-80 school year (9 T 92) because Mr. Gilbert disciplined only her for talking even though other students were also talking (9 T 89), and because the respondent refused to let her leave the homeroom to turn in some money on two occasions (9 T 90). On the second occasion, she left the class without Mr. Gilbert's permission (9 T 90).

Subcharge F - H.A. testified that he dropped the Algebra I course in 1979 after two weeks because respondent did not teach the subject matter (9 T 83). He was worried about failing the course, since doing so would prevent him from playing basketball (9 TR 86).

Subcharge H - Mrs. Louise Gaines testified that she removed her son from respondent's class in September 1979 after Mr. Gilbert said, "Oh, another Gaines" (8 T 51).

Andrea Gaines testified that she had had Mr. Gilbert for Chemistry in 1978 (9 T 19), that she did not get along with Mr. Gilbert (9 T 22) and that she did not understand respondent's presentation (9 T 28). Andrea Gaines had headaches when she was in Mr. Gilbert's class, which disappeared after she dropped Mr. Gilbert's class (9 T 20-22, 36). After dropping the respondent's course, Andrea Gaines received an infraction from Mr. Gilbert for talking in the school hallway with a group of students. Respondent then called her mother and accused Andrea Gaines of being a leader of a group that was getting into trouble (9 T 29-30).

Mrs. Gaines stated that the respondent refused to have a parent-teacher conference with her even after being ordered to attend by Mr. Sims and by Mr. Coppola (2 T 181-3, 9 T 53).

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Subcharges J and K - L.A. testified that she was in Mr. Gilbert's Algebra I class during the 1979-80 school year (8 T 83-4), that the respondent said she was not ready for Algebra I (8 T 89) and that he offered to help her with the work (8 T 110). On one occasion, after Mr. Gilbert refused to give L.A. permission to go to the nurse or the lavatory, she left the class and respondent gave her an infraction (8 T 89-91). L.A.'s mother, Mrs. Ida Andrews, testified that once Mr. Gilbert called her daughter, and when she spoke to him, Mr. Gilbert was nasty to her (8 T 68-71) and that the respondent referred to attend a parent-teacher conference (Charge 9).

Subcharge L - Karen Borden Delucas testified that she had Mr. Gilbert for Science in 1976 (10 T 80). Mr. Gilbert refused to let her leave his class to go to the nurse relating to her menstrual period until he called her mother (10 T 82). Mrs. Delucas was upset by his action and went home after she saw the nurse (10 T 83).

On another occasion, Mrs. Delucas was working as a counselor helper and Mr. Gilbert told her to leave the counselor's office, since she was handling student files (10 T 83). Mrs. Delucas stated that she was not permitted to look inside the student files, but was getting information marked on the outside of the files.

Mrs. Evelyn Borden, mother of Mrs. Delucas, testified that she was given oral permission to take her daughter on vacation. Thereafter, Mr. Gilbert called Mrs. Borden, told her that he would not accept the absence of her daughter and would give her a failing grade (10 T 70-71). He was nasty and arrogant to her (10 T 72).

Subcharge M - Florence Kathy Daniels testified that she had Mr. Gilbert for Biology in 1976 and that her mother had made her stay in Mr. Gilbert's class until the end of the semester (9 T 57, 66). She stated that Mr. Gilbert wore a crown, used tribal words, threw erasers and squirted water (9 T 58), and that he was called "Infraction Ernie" by the students because of the large number of infractions he gave students. Ms. Daniels stated that when she got a migraine headache, she would put her head down on her desk. Mr. Gilbert was aware that she had migraines, and still he told her to pick up her head or he would give her an infraction (9 T 60). On another occasion, respondent stated that her dog's death was not a good excuse for her crying in class (9 T 60-61). Also on another occasion, Mr. Gilbert refused to give her permission to go to the nurse, but she left, and Mr. Gilbert gave her an infraction (9 T 60).

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Subcharge N - Maurice Brown testified that he had Algebra I with Mr. Gilbert during the 1979-80 school year and that he dropped the course after approximately six weeks because respondent taught only forty percent of the class time and because he belittled Mr. Brown's achievements on the track team (13 T 20-2).

Subcharge Q - Arleen Jaime testified that she was in Mr. Gilbert's Chemistry class during the 1977-78 school year (10 T 52-3). Mr. Gilbert asked her to spit on a piece of paper in order to conduct a chemistry demonstration. She refused because she thought it was a disgusting act (10 T 53-4). Ms. Jaime stated that Mr. Gilbert acted like a voodoo doctor, and that he accused her of being a lesbian (10 T 54-8). She told her mother about Mr. Gilbert's actions and was aware that a complaint had been filed with the petitioner about the voodoo, but not about her being called a lesbian (10 T 58).

Mrs. Helen DiBonaventura, mother of Arleen Jaime, stated that she had problems with Mr. Gilbert when her daughter, Deborah, was his student in 1976 (10 T 47-48). Mrs. DiBonaventura would not permit Deborah to go alone to Mr. Gilbert's home for tutoring and had her daughter's boyfriend go along. Mr. Gilbert was annoyed and kept Deborah out of the Honor Society for one year (10 T 48).

In addition to the students mentioned in the specific subcharges, several other students testified regarding Mr. Gilbert's classes.

Karen Federman dropped Mr. Gilbert's Advanced Placement Chemistry course in 1978, since he was not teaching the course and she was afraid of getting a bad mark (7 T 153-4). She stated that at the beginning of the course, Mr. Gilbert talked about witchcraft and demonstrated chemical reactions (7 T 219-20).

James MacStravic took Advanced Placement Chemistry with Mr. Gilbert during the 1978-79 school year (8 T 5-6). Mr. MacStravic testified that he had had a problem following Mr. Gilbert's lectures, and that the respondent talked about unrelated matters and threw erasers (8 T 14, 17-20, 35). Mr. Gilbert would frequently run into the hallways to see if he could discover students without passes (8 T 13-4), and he was called "infraction Ernie" by the students (8 T 26).

David Sylvia had Mr. Gilbert for a science course. He stated that 85% of the grade for the course was based on the notebook (8 T 42), and that the respondent threw erasers (8 T 44).

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Jose Lopez had a mathematics class with Mr. Gilbert in the 1979-80 school year and dropped the course because Mr. Gilbert had told him that he had to learn the respondent's method of doing mathematics (8 T 53-4).

Reggie Sanders took Mr. Gilbert's Advanced Placement Chemistry course in 1976-77, and stated that he did not learn any chemistry, that Mr. Gilbert's presentation was confusing and disorganized, and that Mr. Gilbert offered to help his students (8 T 119, 121, 123-4, 130).

John Terry had College Preparatory Chemistry with Mr. Gilbert (9 T 4). He stated that the respondent's teaching was erratic, and that his grade was based entirely on the notebook (9 T 5-6). Barbara Terry, mother of John Terry, testified that Mr. Gilbert stated that her son could not work and do well in Chemistry (7 T 126).

R.F. had Mr. Gilbert for Algebra I. He stated that Mr. Gilbert spent a lot of time discussing other topics, and that he based the grade on the notebook (9 T 113). Mr. Gilbert had tapes available of his lectures and told R.F. that he should have a tape recorder (9 T 113-4). Mrs. Jacqueline Flynn, mother of R.F., testified that Mr. Gilbert upset her when he told her that her son would fail the course and that he needed a tape recorder, which she could not afford (9T 101).

Edward Bittle had Mr. Gilbert for a biology course in 1977. He testified that the respondent wore a crown, threw erasers, squirted water, harassed some of the students and based the grade on the notebook (13 T 4-6).

Dr. Paul Curtis had Mr. Gilbert for Chemistry during the 1973-74 school year. Dr. Curtis testified that Mr. Gilbert's failure to put away laboratory equipment at the end of the school day created a dangerous situation (13 T 31-32). He stated that Mr. Gilbert lacked organization in his classroom presentation, was unable to maintain a good teacher-student relationship, and that he, Dr. Curtis, had to teach himself the course (13 T 34, 38, 40).

Mr. Gilbert stated that the students and parents who had testified were not typical of the more than 800 students that he has had at JFK (26 T 156). He stated that many of the students who testified were known trouble makers and disciplinary problems at JFK and that the parents who testified had the reputation of being difficult and of

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frequently complaining about teachers (19 T 219-25). He accused the petitioner of specifically looking for students and parents who had a negative attitude toward him.

Respondent stated that he never called Arleen Jaime a lesbian (19 T 208), denied that he harassed any of his students (26 T 157), and claimed that many of the incidents mentioned by the students and parents were taken out of context (19 T 207). Mr. Gilbert admitted that he squirted water and threw erasers in class (19 T 204, 206).

Mr. Gilbert stated that he covered the prescribed material in each course (26 T 94-6) and offered assistance to his students by providing them with tapes of his lectures and holding after school study sessions (26 T 99-100). He denied that he told R.F. that his mother had to buy a tape recorder and stated that recorders were available to the student of JFK.

Respondent indicated that students were sometimes assigned to the wrong class by a computer error (19 T 184).

As to his supervisors, Mr. Gilbert stated that he was not aware until the hearing of many of the criticisms set forth against him (26 T 146-9). Mr. Gilbert was not aware that both Mr. Trama and Mr. Bergan were opposed to his receiving tenure (18 T 151-2). He was not told that the supervisors were concerned with his classroom methodology and with his rapport with students and parents. Respondent was never informed that tenure charges would be brought against him unless he changed his attitude and methods of teaching (18 T 153-31). Mr. Gilbert stated, that since 1979, the administrators at JFK were out to get him and were building a case for his removal (18 T 163) and that until that time he received generally good evaluations (18 T 153).

I FIND that based on the testimony, the pertinent facts as to these charges are:

(1) Seventeen students and three parents testified that they had problems with the respondent because of his personality, attitude and method of teaching.

(2) The parents and students who testified were used by respondent's evaluators and by Mr. Banos as examples of the complaints received regarding the respondent.

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(3) Prior to his suspension in 1980, the respondent had taught about 800 students at JFK.

(4) Approximately fifty percent of the students initially assigned to the respondent dropped his course.

(5) The testimony of the witnesses established the following possible reasons for students droping out of respondent's courses:

(a) respondent gave a lot of homework,

(b) respondent was inflexible and strictly applied the school regulations,

(c) respondent gave infractions to a large number of students,

(d) respondent lacked diplomacy in his handling of complaints,

(e) respondent's presentation of the subject matter was difficult to follow,

(f) respondent had personality clashes with some of his students,

(g) respondent taught several difficult courses,

(h) respondent harassed students,

(i) respondent required his students to keep a notebook of class notes and homework,

(j) students were assigned to respondent's course by mistake due to computer error.

(6) Except for the January 10, 1980 evaluation (P 5), Mr. Gilbert received generally satisfactory written evaluations. The January 10, 1980 evaluation primarily dealt with the assault on Dr. Franceschini (Charge 1) and the attempts by Dr. Franceschini to evaluate the respondent (Charges 4, 5, 6, and 7).

(7) Mr. Gilbert was never given any written or oral warning that the number of students' and parents' complaints or student dropouts was a matter of concern which, if not rectified, could lead to disciplinary action.

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(8) Mr. Trama and Mr. Romanoli testified that on three occasions, the number of student complaints about a teacher's performance created concern and resulted in an investigation.

(9) No evidence was presented that such an investigation was made regarding Mr. Gilbert's performance and there was no tabulation as to the number and type of complaints made against Mr. Gilbert, nor was there a study made as to why the large number of students dropped Mr. Gilbert's classes.

(10) The policy of the petitioner was that a student's grade should be based on three equal factors: examination, classroom and laboratory participation, and homework.

In reviewing the testimony, it is clear that the administrators at JFK received a large number of complaints about the respondent. These complaints fall into three general categories:

(1) method of teaching and amount of time given to teaching,
(2) grade policy, and
(3) insensitivity to student needs and caustic remarks to students and parents.

Several of the students who testified criticized respondent's teaching, claiming that it was unorganized and difficult to follow and that the respondent spent too much time discussing other matters.

A number of students testified that Mr. Gilbert based their grades primarily on the notebook which, according to these students, contained both their classroom notes and homework. Since, according to the policy of the petitioner, classroom participation and homework counts for 2/3 of the grade, Mr. Gilbert's policy system appears to be consistent with the petitioner's policy. It is evident from the testimony that the administrators at JFK were aware of the respondent's grading system and there was no indication that Mr. Gilbert was ever advised to change his grading policy.

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Several of the students who testified were unhappy about the respondent's unwillingness to release them from the classroom, even though they had apparent good reasons for leaving the classroom. Other students testified regarding adverse comments made to them by Mr. Gilbert regarding their extra curricular activities and their ability to perform the classroom work. The parents who testified also criticized Mr. Gilbert's classroom attitude toward their children, as well as the caustic remarks he made to the parents themselves. Most certainly, the respondent showed insensitivity in the manner in which he handled the incidents involving Karen Borden and Florence Cathy Daniels in 1976, Arleen Jaime in 1977, and L.A. in 1979.

I **CONCLUDE** that the testimony of the students represents insufficient evidence that there was a problem with the teaching methodology of the respondent especially since their comments are often inconsistent with the observations made by respondent's supervisors in their written evaluations (P3, P15, P16), See, In the Matter of the Tenure Hearing of John Birch, 1978 S.L.D. 63.

By the testimony of the students and parents, the petitioner has shown isolated problems relating to Mr. Gilbert rapport with his students and their parents which occurred during respondent's eight years of JFK, however, this testimony is insufficient proof to show that the respondent was incompetent or that his conduct warrants removal or a reduction in salary, See, Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd by 131 N.J.L. 326 (E & A 1944), In the Matter of the Tenure Hearing of Inez Mc Rae, 1977 S.L.D. 572.

The various incidents and problems which were the subject of the testimony by the parents and students were known to administrators at JFK when they occurred and yet the record does not show that Mr. Gilbert was ever given any written or oral warnings, that the number of complaints regarding his attitude toward students and parents was a matter of concern which, if not rectified, could lead to disciplinary action. Nor was there any evidence that any investigations were undertaken as a result of the complaints regarding Mr. Gilbert's performance. It is difficult for me to believe that the administrators gave these complaints serious attention or considered them an important indicator of the quality of the respondent's performance. However, it is these same administrators who appeared at the hearing and testified that they thought Mr. Gilbert was not a competent teacher and should be removed. The testimony of these witnesses was often, at variance with what they stated in their written evaluation of Mr. Gilbert.

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The petitioner would have me assume that there is a connection between the complaints against the respondent set forth by the witnesses and the large percentage of students who dropped Mr. Gilbert's class each year, even though no proof was submitted. The exact percentage of dropouts in any year was not determined, and there was no evidence presented that a survey had been conducted to determine exactly why the students dropped Mr. Gilbert's class. Without an investigation, there is no way to establish why Mr. Gilbert had the high student dropout rate. Although Mr. Gilbert was suspended prior to the decision to bring tenure charges against him, the administrators of JFK had ample opportunity to survey the students currently in JFK who had been assigned to one of the respondent's classes and thereby find out why the students dropped these courses.

Therefore, I **CONCLUDE** that there is no proof that the problems cited by the witnesses were widespread or were in fact the reasons for Mr. Gilbert's high student dropout rate.

Finally, I **CONCLUDE** that Charge 3, including all 17 subcharges, and Charge 18 are hereby dismissed with prejudice.

CHARGE 14

This charge alleges that since acquiring tenure, respondent has exhibited an insensitivity to the problems of his students and an unacceptable attitude toward his fellow teaching staff members and the administration, which actions constitute conduct unbecoming a teaching staff member.

For the purpose of this Initial Decision, that portion of Charge 14 which relates to Mr. Gilbert's attitude toward his students has been included in the discussion and determination on Charges 3 and 18.

The remaining portion of this charge deals with Mr. Gilbert's interaction with the administrators and teachers at JFK. I **FIND** that the evidence presented regarding this charge is the same as that offered in support of all of the charges heretofore discussed.

It is clear from their testimony, that the administrators of JFK considered Mr. Gilbert to be out of step with the majority of the personnel at JFK. Mr. Gilbert was a

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"maverick" and did not go along with the status quo which apparently was accepted by most of the administrators and teachers. If the respondent discovered what appeared to him to be a problem relating to the educational program at JFK or felt his personnal rights have been violated, Mr. Gilbert would file a legal action or grievance, appear at a meeting of the Board to discuss the matter, or demand action by the administrators of JFK, Dr. Romanoli or Mr. Brandau.

In 1977, there was a teacher's strike against the Board and Mr. Gilbert was one of the few teachers who did not participate in the strike. Not only did Mr. Gilbert not participate, he took an active role in attempting to get the teachers to return to work. Respondent wrote and distributed a sheet entitled "Think" to the striking teachers (R2, 22 T 68) and organized a unsuccessful motorcade to Trenton to protest the strike (22 T 20).

After the strike, Mr. Gilbert was subjected to harassment. His car was damaged and the word scab was placed on his mailbox and frequently was written along side of his name on the sign in sheet. The residue of this ill will against the respondent was still present at the time of his suspension in 1980 (18 T 168). Most certainly this activity by the teachers had an effect on the respondent and his attitude toward them.

It is clear that over the years, Mr. Gilbert has not been diplomatic in the way he has dealt with his fellow teachers and administrators. However, this lack of diplomacy does not rise to the level of conduct unbecoming a teacher. The actions of the respondent which are the subjects of Charges 1, 2, 8, 9, 10, and 11 will not be considered in relation to this charge.

No evidence was presented to show that Mr. Gilbert's actions or attitude was detrimental to the educational program in the school. In fact, one could say that his prodding and questioning and the attention he draw to certain situations could have improved the educational opportunities available at JFK.

Therefore, I **CONCLUDE** that Charge 14 is **DISMISSED WITH PREJUDICE.**

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SUMMARY

I have concluded as to Charges 1, 2, 8, 9, 10 and 11 that Mr. Gilbert's actions constitute conduct unbecoming a teacher. The remaining issue is the appropriate penalty to be imposed in view of this determination.

Charges 1 and 2 both deal with unprovoked attacks by Mr. Gilbert on the person of an Assistant Principal and a student, and occurred within a year of each other. Although Mr. Gilbert argues that his action was influenced by the hostility that existed at JFK against him due to his role as a strike breaker in 1977 and, further, that each of the two persons involved had personal animosities toward Mr. Gilbert, I concluded that in both cases there was insufficient provocation on the part of Mr. May and Dr. Franceschini to justify the action taken by Mr. Gilbert. Therefore, I **CONCLUDE** that each of these charges, and both charges taken together, warrant the removal of Mr. Gilbert from his tenure position.

The other charges standing alone would warrant a lesser disciplinary action however, taken in combination with Charges 1 and 2, they provide substantial justification for the removal of Mr. Gilbert from his tenure position.

Therefore, I **CONCLUDE** that the petitioner has proven the allegations set forth in Charges 1, 2, 8, 9, 10 and 11 and that Mr. Gilbert be removed from his tenure position as a teacher.

PART IV - PERC CHARGE

The respondent as an affirmative defense to the tenure charges alleged that the Board initiated the tenure charges "in retaliation for his [respondent's] lawful pursuit of redress in the courts and administrative agencies of this State and of the Federal Government by means of legimate complaints brought in good faith." (Third Separate Defense, Answer, dated June 17, 1980; see also, Sixth Separate Defense, Answer, dated June 17, 1980.)

Mr. Gilbert filed actions before PERC against the Board and the Willingboro Education Association. After the tenure charges were filed, Mr. Gilbert amended the matters before PERC by alleging that the Board violated N.J.S.A. 34:13A-5.4(a)(4) by

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preferring tenure charges against respondent in retaliation for his filing unfair practice matters with PERC.

N.J.S.A. 34:13A-5.4(a) provides:

> Public employers, their representatives or agents are prohibited from:
>
> (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.
>
> (2) Dominating or interfering with the formation, existence or administration of any employee organization.
>
> (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.
>
> (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.
>
> (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.
>
> (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement.
>
> (7) Violating any of the rules and regulations established by the commission. [emphasis added]

I **FIND** that the pertinent facts relative to this matter are:

(1) Mr. Gilbert regularly attended meetings of the Board (18 T 110) and a number of complaints by Mr. Gilbert and against Mr. Gilbert were brought to the attention of the Board since he became a teacher at JFK.

(2) The Board met with the respondent on October 22, 1979, to discuss his representation that he had been harassed at JFK as a result of the teachers' strike in 1977 (R5, 18 T 109, 167).

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(3) Mr. Gilbert testified that there was no affirmative action taken on his behalf as a result of the October 22, 1979 meeting.

(4) Dr. Romanoli suspended Mr. Gilbert after his altercation with Dr. Franceschini on April 24, 1979, and recommended to the Board that tenure charges be brought against Mr. Gilbert (25 T 241).

(5) The Board decided not to bring tenure charges against Mr. Gilbert in April 1979. No testimony was presented as to why the Board made this decision.

(6) On April 20, 1979, Mr. Gilbert filed the original charges in the PERC matter.

(7) After the altercation between Mr. Gilbert and a student on March 5, 1980, Dr. Romanoli suspended Mr. Gilbert and recommended to the Board that tenure charges be brought against the respondent (25 T 241).

(8) At the request of Dr. Romanoli, the Board's attorney, Ms. Williams, prepared the tenure charges based on the information and material presented to her regarding Mr. Gilbert.

(9) No evidence was submitted to show that any member of the Board or the administrators of JFK had requested the inclusion of any specific charge (25 T 242-3).

(10) The Board was presented with the written charges. At its April 28, 1980 meeting, without discussion, the Board voted that there was probable cause to support the charges and forwarded the same to the Commissioner of Education.

(11) Charge 17 was one of the charges approved by the Board (G6). This alleges that the respondent misused the legal process by instituting groundless litigation against the Board, administrative staff and teachers at JFK, lists nine specific matters initiated by the respondent, and alleges that the respondent's action constitutes conduct subversive to the

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discipline and morale of the school system, conduct unbecoming to a teaching staff member and insubordination. This charge was withdrawn at the hearing.

In PERC matters, the burden is on the charging party, Mr. Gilbert, to prove the allegations by a preponderance of evidence, N.J.A.C. 19:14-6.8. See, East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981). The issue here is whether Mr. Gilbert has shown that the Board initiated the tenure charges in retaliation for respondent's filing the PERC matter.

The Board alleges that the precipitating factor that led to the preparation of charges was the March 5, 1980 incident and that the April 24, 1979 incident was also a major factor. The Board argues that the initiation of the PERC charge by the respondent did not influence the decision to bring the tenure charges.

Mr. Gilbert on his own behalf argues that the administrators of JFK wanted to "get rid of" him and, through the administrators' influence, the Board voted to file tenure charges against him. He alleges that this action was taken because of an animosity toward him which has existed since the teachers' strike in 1977. Mr. Gilbert stated that he had on numerous occasions brought problems to the attention of the Board and was never afforded a hearing, except for the meeting on October 22, 1979, and even then the Board took no action to assist him.

Specifically, Mr. Gilbert argues that Tenure Charge No. 17 in itself proves that the Board had animosity toward him. This charge, which Mr. Gilbert claims violated his first amendment rights under the Federal Constitution, was withdrawn during the presentation of the petitioner's case in the tenure charges. Mr. Gilbert argues that even if some of the other charges are sustained, the fact that the Board brought Charge 17 demonstates that the tenure charge was filed in retaliation.

In this matter, 19 charges were brought against the respondent. I FIND that it is not unusual in a tenure matter for the drafter of the charges to set forth every possible ground for disciplinary action, even though some charges are more substantive than others.

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I have concluded in the previous section of this Initial Decision that certain acts of Mr. Gilbert constitute conduct unbecoming a teacher and that he should be removed from his tenure position. Although several charges have been withdrawn and others are to be dismissed, this, in itself, does not support Mr. Gilbert's argument that the tenure matter was initiated in retaliation. I **CONCLUDE** that Mr. Gilbert has not shown that the filing of the PERC matter by him was a factor, let alone a substantial and motivating factor, in the Board's determination to bring tenure charges and, therefore, I **CONCLUDE** that the PERC charge is **DISMISSED** with prejudice.

Part V - Salary Increment

As stated before, respondent filed a petition challenging the denial of his 1981-82 salary increment, and the matter was consolidated with the pending consolidated tenure and PERC matter. The parties then jointly moved for a determination as to whether the Board could legally deny Mr. Gilbert his 1981-82 salary increment, and I informed them that I would make a determination on the motion as part of this Initial Decision.

By statute, a board of education is empowered to file charges requesting the removal or reduction of salary of any board employee, N.J.S.A. 18A:6-10 and 11, and to withhold the annual salary increment of any board employee, N.J.S.A. 18A:29-14. Having considered these statutes and the arguments presented by the parties, I **CONCLUDE** that there is no statutory prohibition against any board of education both filing tenure charges and withholding a salary increment based on the same charges.

The Commissioner of Education, in Harrell v. Board of Education of the City of Paterson, Passaic County, 1978 S.L.D. 382, 383, stated that ". . . the Board, apprised of serious charges of unbecoming conduct against petitioner acted properly within its own discretionary authority to certify the charges to the Commissioner for hearing pursuant to law, N.J.S.A. 18A:6-10 et seq., and to withhold the increment on the basis of the same specific charges and general allocation of conduct unbecoming a teacher." In Harrell, the board of education followed the procedure set forth in N.J.S.A. 18A:29-14 for the withholding of a salary increment.

In his argument that the Board was not authorized to withhold a salary increment during the pendency of the tenure hearing, counsel for Mr. Gilbert relied on

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two decisions of the Commissioner of Education, In the Matter of the Tenure Hearing of Matilda Grabert, School District of the Township of Egg Harbor, Atlantic County, 1977 S.L.D. 163, and In the Tenure Hearing of Franklin Johnson, School District of the Township of Cherry Hill, Camden County, decided July 2, 1981.

In Grabert, the Commissioner of Education stated:

> In regard to the second issue set forth above as to whether an employee who has been suspended during one school year and who becomes eligible for the benefits of N.J.S.A. 18A:6-14 during the succeeding school year should receive salary benefits based on what that person's salary would have been during the succeeding school year, including the salary increment had the suspension not occurred, the Commissioner points out that that narrow issue has not yet been addressed. However, the Commissioner did state in Kizer, supra,:
>
> > ". . . In the judgment of the Commissioner, N.J.S.A. 18A:6-14 was amended by Chapter 435, Laws of 1971, in order to provide financial assistance to individuals who are suspended without pay from their employment with local boards of education, pending the determination of formal charges, and, consequently, find themselves in protracted legal proceedings. Nowhere is there any indication that the first 120 days of suspension was [sic] to be considered a penalty imposed upon the suspended employee by either the Legislature or the Commissioner. . . ." (at p. 505)
>
> Furthermore, it is well-established that a local board of education has no authority to set its own penalty against any of its tenured employees. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) The Commissioner alone has the authority to determine whether the proofs offered support charges preferred against a tenured employee. In re Fulcomer, supra. The employee against whom charges are certified by a board of education is, according to our most fundamental principle of jurisprudence, innocent of the charges until, and if, the board carries the burden of proof.
>
> Accordingly, the Commissioner determines that, in the circumstances as herein, when an employee suspended in one school year, becomes eligible for benefits pursuant to N.J.S.A. 18A:6-14, in the subsequent school year, salary payments are to be based on the salary that person would receive in the subsequent school year had the suspension not occurred. Otherwise, a penalty, in the form of the withholding of a salary increment would be imposed, which

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> was not intended by the Legislature and which is not within the authority of the Board under such circumstances. [Grabert, supra, at 164-5.]

In this matter, it would appear that the board of education decided to withhold the salary increment after tenure charges were filed, but without following the procedure set forth in N.J.S.A. 18A:29-14.

The Commissioner of Education, in Johnson, revised the administrative law judge's determination that Mr. Johnson was not entitled to annual salary increments during the pending of a tenure hearing and cited the Grabert matter. In Johnson, the administrative law judge in his Initial Decision specifically stated that the board of education had not followed the procedure set forth in N.J.S.A. 18A:29-14 for withholding salary increments, Oal Dkt. No. Edu _____, Agency Dkt. No. 393-11/78 (May 20, 1981), at 15. See also, In the Matter of the Tenure Hearing of King, School District of the City of Trenton, Mercer County, Oal Dkt. No. _____, Agency Dkt. No. 386-12/78, aff'd by Comm. of Education on February 5, 1981.

I disagree with respondent's position that the decisions in Grabert and Johnson are inconsistent with the decision in Harrell.

In both Grabert and Johnson, the board of education withheld the annual increment without giving proper notice and affording the teacher the opportunity to have a hearing, as required by N.J.S.A. 18A:29-14. Since the filing of tenure charges does not, by law, authorize a board of education to withhold any salary increment which may be due during the pendency of the tenure hearing, the Commissioner of Education properly held in Grabert and Johnson that the teacher was entitled to the increment. However, in the Harrell case and in this matter, the procedure set forth in N.J.S.A. 18A:29-14 for the withholding of the salary increment was followed.

Therefore, I **ORDER** that the Board could legally withheld Mr. Gilbert's 1981-82 salary increment, pursuant to the provisions of N.J.S.A. 18A:29-14.

As to the issue of whether the respondent has shown that the Board did not have reasonable grounds and, therefore, improperly withheld his 1981-82 increment, the parties have agreed to rely on the testimony and briefs presented in the tenure matter (Part III of this Initial Decision).

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Based on the facts set forth in Part III of this Initial Decision, I **CONCLUDE** that the respondent has not met his burden, and that the action of the Board in withholding the 1981-82 salary increment of Mr. Gilbert is hereby **AFFIRMED.**

PART VI - CONCLUSIONS

As to the tenure charges brought against Mr. Gilbert, I **CONCLUDE** that the Board has proven charges 1, 2, 8, 9, 10, and 11 and that Mr. Gilbert be removed from his tenure position as a teacher (Part III).

As to the PERC matter, I **CONCLUDE** that the tenure charges were not initiated in retaliation for the filing of the PERC matter in violation of N.J.S.A. 34:13A-5.4 (a)(4) and this matter is **DISMISSED WITH PREJUDICE** (Part IV).

As to the salary increment matter, I **CONCLUDE** that Mr. Gilbert's petition is **DISMISSED WITH PREJUDICE** (Part V).

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

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OAL DKT. NOS. EDU 3388-80 & 7375-81

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

February 16, 1982
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

February 16, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 23, 1982
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

fms

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EXHIBITS ADMITTED INTO EVIDENCE

For the Petitioner:

P-1 Transcript of Proceedings in Mark Franceschini v. Ernest E. Gilbert, Willingboro Municipal Court, May 30, 1979

P-2 Transcript of Appeal in Mark Franceschini v. Ernest Gilbert, Criminal Division, New Jersey Superior Court, July 23, 1979

P-3 Supervisory Report containing the tenure evaluation of Ernest E. Gilbert, dated January 1979

P-4 Sample Classroom Attendance Form

P-5 Supervisory Report containing the tenure evaluation of Ernest E. Gilbert, 1979-80

P-6 Memorandum from Mark Franceschini to Ernest E. Gilbert, dated September 25, 1979

P-7 Memorandum from Mark Franceschini to Ernest E. Gilbert, dated September 25, 1979

P-8 Part of the Staff Manual for John F. Kennedy High School, 1979-80 (part of P-20)

P-9 Teacher's Plan Book of Ernest E. Gilbert

P-10 Weekly Lesson Plan Book of Ernest E. Gilbert for 1979-80

P-11 Memorandum from Angelo Coppola to Ernest E. Gilbert, dated October 4, 1979

P-12 Memorandum from Angelo Coppola to Richard B. Smith, dated October 5, 1979

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P-13 Memorandum from Angelo Coppola to Ernest E. Gilbert, dated October 5, 1979

P-14 Memorandum from Angelo Coppola to George Brandau, dated March 13, 1980

P-15 Supervisory Report containing the first non-tenure evaluation of Ernest E. Gilbert, September, November 1975

P-16 Supervisory Report containing the tenure evaluation of Ernest E. Gilbert, 1976-77

P-17 The Individual Professional Improvement Plan (IPIP) for Ernest E. Gilbert, dated January 10, 1980

P-18 Complaint filed by Ernest E. Gilbert against John Mullineaux in the Willingboro Municipal Court on December 5, 1977

P-19 Notification that John Mullineaux was found not guilty as to the December 5, 1977 complaint

P-20 Staff Manual for the John F. Kennedy High School, 1979-80

P-21 Grade Change Form

P-22 Memorandum from Rita M. Butchko to Ernest E. Gilbert, dated September 28, 1979

P-23 Memorandum from Herndon Sims, dated March 13, 1980

P-24 Memorandum from Herndon Sims to Richard B. Smith, dated October 15, 1979

P-25 Memorandum of Herndon Sims and Angelo Coppola, dated March 5, 1980

P-26 Report of Ernest E. Gilbert regarding the James May incident, March 5, 1980

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P-27 Notebook of Karen Sue Federman

P-28 Student Report Form of "R.F.," dated November 16, 1978

P-29 Test Form of "R.F.," dated December 8, 1978

P-30 Test Form of "R.F.," dated December 8, 1978

P-31 Test Form of "R.F.," dated December 8, 1978

P-32 Letter from Ernest Gilbert to Mrs. Flynn, dated January 9, 1979

P-33 through P-36 Marked for identification only.

P-37 Memorandum to the John F. Kennedy Faculty from Ernest E. Gilbert

P-38 John F. Kennedy High School National Honor Society Constitution

P-39 Letter from Ernest E. Gilbert to Edward Banos, dated March 15, 1978

P-40 Memorandum from Richard Smith to Anthony DiPietro, dated March 15, 1978

P-41 Memorandum to the John F. Kennedy teachers and guidance counsellors from Ernest E. Gilbert

P-42 Memorandum from Richard Smith to Anthony DiPietro, dated May 11, 1978

P-43 Memorandum from Richard Smith to Ernest E. Gilbert, dated May 11, 1978

P-44 Draft letter from Richard Smith to George Brandau, dated May 8, 1978

P-45 Letter from Richard Smith to George Brandau, dated May 11, 1978

P-46 Letter from George Brandau to Ernest E. Gilbert, dated December 12, 1977

P-47 Teacher Application Blank, Willingboro Public School

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P-48 Memorandum from Ernest E. Gilbert to Richard Smith, dated May 12, 1978

P-49 "Politics of Grade Point Average and Class Rank" by Ernest E. Gilbert

P-50 Letter from Nida E. Thomas to Ernest E. Gilbert, dated December 4, 1975

P-51 Brief submitted by Ernest E. Gilbert to the Burlington County Court in Gilbert v. Franceschini

P-52 Marked for identification only

P-53 Marked for identification only

P-54 Marked for identification only

For the Respondent in the Tenure Matter:

R-1 Index Card containing information about "L.A."

R-2 Leaflet entitled "Think"

R-3 Affidavit of Mark Franceschini, dated April 24, 1979

R-4 Affidavit of James May, dated March 25, 1980

R-5 Letter from Jerald L. Foltz to Ernest E. Gilbert, dated October 12, 1979

R-6 Copy of Photograph of Ernest E. Gilbert's mailbox

R-7 Mathematics Work Assignment

R-8 Classroom Attendance Form

R-9 Mathematics Evaluation Profile - Form 9A

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R-10 Evaluation Profile - Form 9A-2

R-11 Student Progress Master Sheet

R-12 Drawing to Scale Information

R-13 Collecting Terms in Equations Information

R-14 Class record for Mathematics Skills

R-15 Grading Criteria - Composite Outline Form

R-16 Grading Criteria - Composite Outline Form

R-17 Memorandum from Dolores B. Gross to Dr. Romanoli, dated October 24, 1975, and memorandum from Dr. Romanoli to Dolores B. Gross, dated October 27, 1975

R-18 Basic Skills test report

R-19 Lesson Plan of Ms. Butchko

R-20 Letter from Ernest E. Gilbert to Dr. Peter J. Romanoli, dated May 7, 1978

R-21 Constitution for a Chapter of the National Honor Society

R-22 Marked for identification only

R-23 Marked for identification only

R-24 Marked for identification only

R-25 JFK Journal, dated March 16, 1979

R-26 Substitute Teacher Report of Sandra Helverson, dated September 28, 1977

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R-27 Substitute Teacher Report of Sandra Helverson, dated October 3, 1979

For the Respondent in the PERC Matter:

G-1 Willingboro Education Association Member's Handbook, 1980-82

G-2 Problems in Chemistry Education by Ernest G. Gilbert

G-3 Marked for identification only

G-4 "The Politics of Grade Point Average Honor Societies and Rank in Class" by Ernest E. Gilbert

G-5 Brief filed by Ernest E. Gilbert with the New Jersey Superior Court, Appellate Division in Gilbert v. Willingboro Bd. of Ed. and Willingboro Ed. Ass.

G-6 Copy of tenure charge 17 brought against Ernest E. Gilbert

G-7 Copy of tenure charges 16, 3 (includes 17 subcharges), 12, 18 and 19

G-8 Letter from Herbert A. Goldsmith, Jr. to Ernest E. Gilbert, dated August 24, 1979

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WITNESSES

For the Petitioner:

Mark Franceschini	K.S.
Arlene Calvin	H.A.
Angelo Coppola	Liza Burres
John Mullineaux	Jacqueline R. Flynn
Edward Banos	R.F.
Rita Butchko	Constance Smith
Herndon Sims	Douglas R. Mimm
Barbara H. Terry	Donald E. Morgan
Karen Sue Federman	Helen DiBonaventura
James MacStravic	Arleen Jaime
David Grant Sylvia	Evelyn Mary Borden
Jose Manuel Lopez	Karen Borden Delucas
Ida Pearl Andrews	James A. May
L.A.	Robert Trama
Reggie Sanders	John Joseph Bergan
M.M.	Edward Bittle
R.M.	Maurice Brown
M.Z.	Paul Curtis
S.L.	Peter Romanoli
G.C.	Wanda Nelson
John Terry	Virginia Speed

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WITNESSES (cont'd)

For the Petitioner:

Andrea Gaines
Louise Gaines
Florence Kathy Daniels
Detective C. Deal
Helen Steubing
Arlene Harper
Sandra Helverson
Maryann Truskowski
Anthony N. DiPietro
George C. Brandau
Shirley Wright
William Kane
George Suleta
James McAndrew
Robert Montgomery

For the Respondent:

Ernest E. Gilbert
Rhonda Calloway

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TABLE I

Identification No.	Hearing date
1	January 5, 1981
2	January 6, 1981
3	January 8, 1981
4	January 9, 1981
5	January 13, 1981
6	January 14, 1981
7	January 16, 1981
8	January 19, 1981
9	January 20, 1981
10	January 21, 1981
11	January 22, 1981
12	January 23, 1981
13	February 10, 1981
14	February 11, 1981
15	February 13, 1981
16	February 17, 1981
17	February 18, 1981
18	May 4, 1981
19	May 5, 1981
20	May 6, 1981
21	May 7, 1981
22	May 8, 1981
23	May 11, 1981
24	May 12, 1981
25	May 18, 1981
26	August 31, 1981

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IN THE MATTER OF THE TENURE HEARING OF ERNEST E. GILBERT, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
AND	:	COMMISSIONER OF EDUCATION
ERNEST E. GILBERT, PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY, RESPONDENT.	:	

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

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

Firstly, the Commissioner notes that pursuant to L. 1978, c.67, §8 (N.J.S.A. 52:14B-10(c)) the time limit for the filing of the Commissioner's determination herein is extended until April 9, 1982 (a period of seven days).

The Board contends in its primary exceptions that it has proven Charges 3 and 18 through exhaustive testimony of 6 parents, 17 pupils and 8 administrators and excepts to dismissal of these charges by the Honorable Beatrice S. Tylutki, ALJ. (Board's Primary Exceptions, at pp. 7-11) The Commissioner agrees with the Board and finds that it presented ample proof to sustain Charges 3 and 18. The determination of Judge Tylutki is accordingly set aside and those charges are found to constitute conduct unbecoming a teacher. The Commissioner so holds.

The Board excepts to the determination that Charges 4, 5, 6 and 7 be dismissed. The Board argues that in reaching such a conclusion the Court ignored certain salient facts. (Id., at pp. 29-33) The Commissioner cannot agree. An examination of the record convinces the Commissioner that Judge Tylutki properly weighed and evaluated the facts in reaching her determination.

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The Board excepts to the finding by Judge Tylutki that respondent was within his rights to refuse to be observed by his assistant principal because he had "reason to suspect bias." (Id., at pp. 34-39) The Commissioner agrees with the Board. For a teacher to refuse to be observed by a properly certificated supervisor because that teacher might have "reason to suspect bias" is highly speculative in nature and improperly based on an unproven premise. The Commissioner determines that no such right exists and the Court's finding is accordingly set aside. As a concomitant to the above determination, the Commissioner agrees with the Board's exception that respondent had no right to unilaterally decide to walk out of the classroom when the vice principal came to observe him. (Id., at pp. 36-37) The Commissioner so holds.

The Board excepts further to Judge Tylutki's determination to dismiss Charge 14 that respondent "exhibited insensitivity" in dealing with pupils. (Id., at pp. 40-48) An examination of the record herein, including the extensive testimony of pupils, convinces the Commissioner that respondent's attitude toward pupils (and fellow teachers) was so negative as to constitute conduct unbecoming a teacher. Accordingly, the determination by Judge Tylutki that this charge be dismissed is set aside.

The Board also excepts to the dismissal by the Court of Charge 15. (Id., at pp. 50-61) The Commissioner finds no merit in such argument.

Nor does the Commissioner find it necessary to address the remainder of the Board's exceptions and the relative weight of charges proven to be true in light of the Commissioner's restoration of charges.

Respondent's reply exceptions by counsel contend that the Board failed to prove its case in support of Charges 3 and 18. As previously determined, the Commissioner cannot agree.

Respondent's primary exceptions disagree with the characterization by Judge Tylutki herein that the physical encounter between respondent and James May was a fist fight. Respondent excepts to the finding that his action on April 24, 1979 constituted conduct unbecoming a teacher. The Commissioner cannot agree; he finds no merit in such argument. Respondent's further contention that his physical contact on March 5, 1980 with May was privileged within the meaning of N.J.S.A. 18A:6-1 is not supported by the record including the testimony of other pupils. The Commissioner so holds. Respondent contends that the Board was out "to get" him. The Commissioner cannot agree nor does he find merit in respondent's stance that the Board itself is on trial herein and its action has been shown to be improper in this matter.

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The Board's reply exceptions refute those of respondent and affirm the findings herein that Charges 1, 2, 8, 9, 10 and 11 are true in fact and constitute conduct unbecoming a teacher such that, in combination, dismissal is mandated.

Respondent as an individual also filed exceptions, pro se. The Commissioner observes that respondent is properly represented by counsel who filed on his behalf primary and reply exceptions. The Commissioner finds superfluous respondent's pro se filing of approximately 60 pages of exceptions. Further, the Commissioner notes respondent's comments in introducing his exceptions, herewith set down in pertinent part:

> "PLEASE TAKE NOTICE that despite the fact the the copies delivered to the Commissioner are captioned BEFORE THE COMMISSIONER OF EDUCATION and those delivered to PERC are captioned PUBLIC EMPLOYMENT RELATIONS COMMISSION, the contents of the document are the same and written in the context to be considered chiefly by the Commissioner of Education. The documents are filed as such to protect my rights in the event that PERC is abandoning its jurisdiction."

In spite of respondent's aforenoted assertion, the Commissioner finds it impossible to clearly differentiate between those points applicable to the present matter and those intended by respondent to be applied to the PERC matter. The Commissioner finds no basis for, nor can he agree with, respondent's demands that an investigation be made of the Board because he alleges that corruption is therein evident.

The Commissioner notes the filing of reply exceptions by the Board in disagreement with respondent's pro se exceptions.

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

In summation, the Commissioner determines that the Board has proven Charges 1, 2, 3, 8, 9, 10, 11, 14, and 18 and that such charges constitute conduct unbecoming a teacher warranting the removal of Ernest E. Gilbert from his tenured position with the Willingboro Board of Education as of the date of this decision.

Additionally, the Commissioner concurs with Judge Tylutki's conclusions as listed.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

April 5, 1982

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IN THE MATTER OF THE TENURE HEARING OF ERNEST E. GILBERT, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
AND	:	
ERNEST E. GILBERT,	:	STATE BOARD OF EDUCATION
PETITIONER-APPELLANT,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, April 5 and April 22, 1982

Decided by the State Board of Education, July 7, 1982

For the Petitioner-Appellant, Ernest E. Gilbert, Pro Se

For the Respondent-Respondent, Warren, Goldberg & Berman (Barbara Williams, Esq., of Counsel)

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

November 3, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 8582/9181-81
AGENCY DKT. NOS. 445-11/81A and 492-12/81A

THOMAS D. HOGAN, ROSEMARY G. ROBERTSON, DAVID W. PYPER,
Petitioners
v.
KEARNY BOARD OF EDUCATION,
Respondent

KEARNY BOARD OF EDUCATION,
Petitioner
v.
THOMAS D. HOGAN,
Respondent

APPEARANCES:

Thomas D. Hogan, petitioner/respondent, Pro se
Rosemary G. Robertson, petitioner, Pro se
David W. Pyper, petitioner, Pro se

Frederick R. Dunne, Jr., Esq.,
on behalf of the Kearny Board of Education, respondent/petitioner
(Dunne & Waller, attorneys)

Record Closed February 3, 1982 Decided February 22, 1982

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OAL DKT. NO. EDU 8582/9181-81

BEFORE SYBIL R. MOSES, ALJ:

The above-captioned matters are consolidated proceedings whereby Thomas D. Hogan, Rosemary G. Robertson and David W. Pyper (hereinafter petitioners) seek a determination that they are entitled to reimbursement of legal fees, pursuant to N.J.S.A. 18A:12-20, incurred when they, as plaintiffs, brought a prerogative action which challenged an action taken by the majority of the Board in February 1978, as well as the qualifications of Walter Green, another Board member. Petitioners also ask for a declaratory judgment that Mr. Hogan is qualified to remain a member of the Board and qualified to be a candidate in the upcoming Board of Education election in April 1982. The Board of Education of Kearny (hereinafter Board) denied the allegations of the petition and filed a petition and Order to Show Cause for the removal of Thomas Hogan as a Board member, contending that he is in violation of N.J.S.A. 18A:12-2, amended L. 1981, c. 23, because his petition asking for indemnification for legal fees is a claim against the Board.

Both parties filed various motions, which were heard and considered on January 13, 1982. An order was entered on that date granting consolidation of both matters and decreeing that the matter shall be known henceforth as EDU 8582/9181-81. The motion to stay the proceedings, brought by petitioners Hogan, Robertson and Pyper, was denied. The motion brought by Thomas Hogan, as respondent in the matter seeking to remove him from his present position as a Board of Education member, was denied without prejudice for him to renew same at the conclusion of this matter, depending upon the results. The motion by petitioners Hogan, Robertson and Pyper to have counsel appointed to represent them in their claim for indemnification for legal fees was denied. Both parties joined in the motion to expedite the proceedings, which was granted, and the matter was heard on January 22 and 25, 1982. Copies of all orders in this matter which were entered on January 22, 1982 are attached to this Initial Decision and made a part hereof as if set forth at length.

A prehearing conference was held on January 13, 1982, at which time counsel agreed that the following legal questions were in issue:

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1. Whether or not the petition for legal fees is a claim against the Board?

2. Whether or not the underlying action for which the legal fees were paid arose out of the duties or in the course of the performance of the duties of members of the Board of Education?

3. Whether the underlying action was brought in good faith?

4. Was the underlying action taken for a public purpose — i.e., no personal or financial interest involved?

5. If legal fees are to be awarded, what is the correct amount?

6. Does this judge have the power and/or the jurisdiction to remove Mr. Hogan from office if the court finds the suit is a claim against the Board which causes a conflict of interest?

7. Whether or not a Board member who files a suit for reimbursement of legal fees is qualified to run for reelection? Subsumed in this issue is the question of whether or not a non-Board member who has filed a suit for reimbursement for actions taken while he was a Board member is qualified to run for election.

8. Is Mr. Hogan qualified to sit as a present member of the Board of Education?

A hearing in this matter was held on January 22 and January 25, 1982. Mr. Hogan testified on behalf of petitioners, as Mrs. Robertson and Mr. Pyper adopted his testimony as their own, albeit with some slight additions. Mr. Hogan gave the following version of the events which led to the institution of the Superior Court action, the legal fees for which are now in contention.

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The following testimony of Mr. Hogan generally presents facts which are not in controversy for purposes of deciding this action. Mr. Hogan was first elected to the Board of Education in 1976. He stated that in October 1977 the Board met to consider what action to take after it learned of the conviction of the superintendent of schools of a disorderly persons offense which was an offense of moral turpitude. At that time the Board determined to certify tenure charges to the Commissioner of Education and to suspend the superintendent for 45 days. In November 1977 the Board agreed not to oppose a request for a stay of the tenure proceeding, pending an appeal of the conviction. On November 30, 1977 the Board held an emergency meeting to respond to suits filed by Walter Green, and by a group called the Concerned Citizens, asking the Commissioner of Education to allow it to intervene in the tenure matter. The Board decided to have its attorney take action to restore the superintendent to his position if Mr. Green was granted intervention.

On December 19, 1977 the Board held a closed meeting to consider the Commissioner's order remanding the tenure matter because the fixed 45-day period of suspension was illegal, as the Board could only certify tenure charges with or without a permanent suspension. On that date, the Board voted to certify tenure charges without a suspension. Mr. Hogan knew that at the time the Board suspended the superintendent of schools for 45 days, its attorney had advised it it could only suspend or not suspend, but could not suspend for a fixed period of time. He conceded that all the meetings concerning the superintendent of schools were held in closed session.

In February 1978, after the annual election of Board of Education members, there was a reorganization meeting, and Walter Green was elected President of the Board. Mr. Hogan stated that he expressed concerns at that time about Mr. Green's continuing his suit to intervene in the tenure proceeding because of possible conflicts of interest. Immediately after the reorganization meeting on February 22, 1978, the Board went into closed session, and a resolution reversing the November 1977 position of the Board, not opposing the superintendent's request for a stay was passed by a five to four vote, without any discussion. Mr. Hogan said he received no prior notice that this would be raised or discussed. Mr. Hogan was troubled by this because the people who were petitioners to

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intervene were now on the Board, and the Board was reversing its position. It should be noted that at this meeting, which gave rise to the suit which forms the underlying action for which fees are being sought, the Board also voted to oust its former attorney and to retain its present attorney, by the same five to four vote. Mr. Hogan did not vote for the attorney who is presently representing the Board and who represents the Board at this hearing. It should be further noted that when a motion was made to enter into closed session on February 22, 1978, in order to discuss the superintendent of schools, Mr. Pyper seconded the motion and Mr. Hogan and Mrs. Robertson voted in favor of it.

Mr. Hogan and Mrs. Robertson then met with an attorney to discuss the fact that the meeting of February 22, 1978 had decided issues of which they had had no notice, which had not been on the agenda, and which resulted in the Board reversing its position in regard to the superintendent. Their lawyer advised them that if they wanted to raise Sunshine Law issues they had to file a suit in Superior Court. An Order to Show Cause was filed on their behalf (a) to determine if the meeting of February 22, 1978, as well as a meeting held on March 2, 1978 which discussed settlement possibilities, was in violation of the Sunshine Law; and (b) to determine whether or not Mr. Green could continue to participate as a member of Board of Education while maintaining his suit to intervene.

On the return date of the Order to Show Cause, Superior Court Judge John J. Geronimo heard motions for summary judgment in regard to both the Sunshine issue and the conflicts issue. Hogan said the judge's decision was that Mr. Green and Mrs. Schirm, another co-plaintiff in the suit to intervene, were not in conflict, but that the meeting of February 22, 1978 had been held in violation of the Sunshine Law and that the vote should have been taken in public, but personnel discussions, pursuant to N.J.S.A. 18A:6-11, should be held in private. Mr. Hogan and others filed an appeal from those portions of the judge's ruling which ordered voting in public and which found no conflict. The appeal was never perfected, and was ultimately dismissed for insufficiency of papers.

Mr. Hogan stated that during the period between Judge Geronimo's decision and the ultimate dismissal of the appeal, all stays of the tenure matter were lifted and the hearing examiner for the Commissioner of Education went forward in the case. He

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therefore denied that any delay was due to his appeal, which was taken solely for public policy reasons and not to help the superintendent of schools.

Mr. Hogan, as well as the two other petitioners herein, withdrew from the appeal in February 1979, after he had filed a petition to run for reelection to the Board of Education. He said he withdrew from the appeal because Mr. Dunne, the Board attorney, told the secretary of the Board, Mr. Borgess, that Mr. Hogan's qualifications to run would be in issue, as a result of the pendancy of the appeal. Both Mr. Hogan and Mr. Dunne stipulated that Mr. Hogan and the other petitioners notified the Board of their intent to withdraw from the appeal concurrent with the dismissal of the appeal by the Appellate Division and that there was no action taken by petitioners to reinstate the appeal. Once the appeal was dismissed, Mr. Dunne had no problem with Hogan's qualifications.

On March 19, 1980 Mr. Green's voucher for payment for legal services rendered to him when he was a respondent in the Superior Court action which underlies this petition was presented to the Board on that very night, and the Board voted, four to three with Mr. Green not voting, to pay the voucher. Mrs. Robertson and Mr. Pyper were no longer members of the Board, not having been reelected in the February 1980 election.

Mr. Hogan conceded the Board attorney gave consistent legal opinions in regard to matters which were similar, in that he advised the Board not to reimburse Mr. Green for legal fees incurred in the suit he filed as a petitioner to intervene into the tenure matter, and he advised the Board not to reimburse the instant petitioners for legal fees incurred in the suit they filed as plaintiffs in Superior Court. In September 1980 the instant petitioners requested the Board get a legal opinion from the Commissioner of Education, the Attorney General of the State of New Jersey or the New Jersey School Boards Association as to whether they were entitled to be reimbursed for their legal fees in the Superior Court action. Mr. Dunne advised the Board there was no authority for the Board to pay those fees, pursuant to N.J.S.A. 18A:12-20. Mr. Hogan said that Mr. Dunne told the Board that the efforts of Hogan et als. were commendable but not reimbursable.

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In July 1981 Mr. Hogan filed a voucher with the Board of Education on behalf of petitioners asking for reimbursement of their legal expenses. In August 1981 Mr. Dunne rendered a legal opinion to the Board advising it not to reimburse the legal fees. Mr. Hogan did not participate in the vote denying reimbursement, although he was a Board member at the time. He then filed the instant petition. The amount for which Mr. Hogan wishes reimbursement is $4,642, which came from his personal funds. He initially contributed $250 and said he had to borrow $5,000 in order to pay this larger share of the total attorney's fees of $6,200. Petitioners have held some fund raisers to help repay the debt, of which $3,100 is still outstanding. Mrs. Robertson contributed $1,000 to the total legal expenses, Dr. Caputo gave $100 and Mr. Pyper contributed $250.

Mr. Dunne stipulated for the Board that the good faith of the instant petition is not in issue. He further stipulated that Mr. Hogan requested payment of the legal fees for the underlying action in September 1980. He stipulated that Mr. Hogan wrote to Attorney General Zazzali on March 20, 1981 asking for an opinion on the issue, and the Attorney General refused to give an opinion. He further stipulated that Mr. Hogan wrote to the Commissioner of Education in May 1981 asking for an opinion on the issue, and the Commissioner of Education refused to give an opinion.

Mr. Pyper adopted the testimony of Mr. Hogan. He testified that he seconded the motion to go into closed session on February 22, 1978 because the open meeting had been confused and chaotic and because he thought it would be better to discuss personnel matters in closed session. He also was curious to see what would happen, as there was nothing on the agenda and nothing had been published in regard to discussing personnel matters at the reorganization meeting. Mr. Pyper has paid only $250 toward attorney's fees, because of his personal circumstances, but did promise to help further if it became necessary.

Mrs. Robertson adopted Mr. Hogan's testimony, with the following clarifications. It was several months before the Superior Court action was filed that she first questioned Mr. Green's standing and possible conflict of interest because of his petition to intervene in the tenure hearing. Mrs. Robertson joined in the Superior Court suit on the advice of

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independent counsel because, as an individual Board member, she was concerned about the way the meeting of February 22, 1978 was called, and about the way everything was turned around at the last minute. She did not ask the Board attorney to represent her because she felt insecure in his representation. She contributed $1,000 of her own money, as well as $100 of Dr. Caputo's money, toward the legal fees. She did not file the case just to forestall the firing of the superintendent of schools but undertook it as a matter of public policy rather than personal gain or interest. Mrs. Robertson withdrew from the appeal after Mr. Hogan told her of the attorney's opinion that there might be a conflict. She felt that her qualifications as a current member were also in question and it was not in her own interest to continue on the appeal. She feels she should be reimbursed for her costs in bringing the suit because she only brought the suit in order to do the right thing.

Mrs. Robertson conceded that there were Board meetings where members may have discussed matters not previously published or matters of which she had not previously received notice, and she realized that there were many times they discussed matters in closed session. Mrs. Robertson felt her conduct throughout was in good faith, despite the fact that she never forwarded a letter concerning Mr. Dunne's conduct to county ethics committees, although she represented that she had done so.

All three petitioners were emphatic that any relationship they had with Dr. Mulligan ensued after they became members of the Board of Education, and as a result of their positions on the Board of Education.

Mr. Green, Mr. Monaco and Mrs. Schirm testified on behalf of the Board of Education. Mr. Green is completing his tenth year as a member of the Board and was elected president on February 22, 1978, succeeding Mr. Hogan. He testified that there were many discussions about the superintendent's problems during Mr. Hogan's presidency, which were always held after they moved into closed session, by voting on a resolution in the public meeting. Sometimes the discussions concerning the superintendent were published and sometimes they were not. All votes in regard to the superintendent were taken in closed session and only announcements were made in the public meeting.

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Mr. Green pointed out that Mr. Hogan's objections to his being a member of the Board while suing to intervene in the tenure matter, and the alleged conflict caused by that, never precipitated any action until after the meeting of February 22, 1978. Mr. Green conceded that he was reimbursed for the cost of legal fees for his defense in the action in Superior Court before Judge Geronimo. He was never reimbursed and he never asked to be reimbursed for approximately $4,000 spent on legal fees as a petitioner to intervene in the tenure matter, which occurred when he was still a member of the Board of Education but before he became president. He did not ask to be reimbursed because he received an opinion from Mr. Dunne stating that there was a statute which prevented that.

Mr. Green was co-author of the resolution of February 22, 1978, which reversed the position of the Board of Education concerning the stay, and is contained in J-10 in evidence. He conferred with the attorney who represented him in the intervention matter before preparation of the resolution and discussed the matter with Mr. Monaco before introducing it. He did not discuss it with any of the other members, including Mr. Hogan, the President, and he did not tell the Board secretary. The resolution was typed on the afternoon of February 22, but not circulated.

Mr. Monaco, who is completing his ninth year as a Board of Education member of the Town of Kearny, adopted Mr. Green's testimony as if it were his own. He discussed the resolution with Green before the meeting of February 22, 1978, as part of a general discussion concerning a change of direction by the Board in regard to the superintendent of schools. He did not discuss it with the instant petitioners.

Mrs. Schirm, who has completed four years as a member of the Board of Education, adopted Mr. Green's testimony in regard to the events after February 22, 1978. She had attended Board meetings prior to that date, when Mr. Hogan was president, and heard both Mr. Hogan and Mrs. Robertson evince concerns about possible conflicts Mr. Green might have as a member of the Board while petitioning to intervene in the tenure matter. While Mrs. Schirm was affiliated with the Concerned Citizens' group, she was not a member per se. Mr. Green did not tell her of the resolution before introducing it at the meeting of February 22, 1978.

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Mr. John Campbell testified as a rebuttal witness for petitioners. He was elected to the Board of Education in February 1978. He is familiar with the resolution contained in J-10, and had discussed the specific contents of that resolution with Mr. Green on the Sunday evening before the Monday night reorganization meeting. He had also spoken to Mr. Green during the previous week, asking what would be included in the resolution. He knew that the purpose of Mr. Green's resolution was to overturn the Board's prior resolution in favor of staying the tenure proceedings against the superintendent of schools.

On surrebuttal Mr. Green conceded he told Mr. Campbell some time during the week before the reorganization meeting that something would be done in regard to the stay of the tenure proceedings. He called Mr. Campbell on Sunday night to tell him specifically of the resolution he would introduce. He did not have the resolution in hand when he spoke to Mr. Campbell, as it was not typed until the day of the meeting, February 22, 1978.

The following exhibits were introduced during the course of the hearing by consent:

J-1	Complaint
J-2	Affidavit of Thomas Hogan
J-3	Affidavit of Gladys Malles
J-4	Order to Show Cause
J-5	Affidavit of Walter Green
J-6	Affidavit of Mr. Monaco
J-7	Affidavit of Mrs. Schirm
J-8	Affidavit of Mr. Campbell
J-9	Affidavit of Mr. Lacasto
J-10	Petitioner's brief
J-11	Respondent's brief
J-12	Petitioner's brief
J-13	Transcript (decision only), dated April 11, 1978
J-14	Final judgment in original proceeding

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J-15 Minutes - November 16, 1977 - Closed meeting
J-16 Minutes - November 30, 1977 - Emergency meeting
J-17 Minutes - December 19, 1977 - Closed meeting
J-18 Minutes - February 22, 1978 - Adjourned meeting
J-19 Minutes - February 22, 1978 - Organization meeting
J-20 Minutes - February 22, 1978 - Closed meeting
J-21 Minutes - October 17, 1977 - Regular meeting
J-22 Letter from Brown to Borgess, dated February 22, 1979
J-23 Letter from Carol Curtis to Board of Education, dated February 23, 1979
J-24 Memo to Ralph Borgess from Dr. Lerner (no date)
J-25 Letter from Dunne to Borgess, dated February 23, 1979
J-26 Letter from Hogan to Board of Education, dated February 26, 1979
J-27 Letter from Dunne to Board of Education, dated February 26, 1979
J-28 Letter from Dunne to Board of Education with March 19, 1979 time stamp
J-29 Memo from Borgess re Robertson telephone call, dated March 5, 1979
J-30 Memo from Borgess re Pyper, dated March 5, 1979
J-31 Memo from Borgess re Hogan message, dated March 5, 1979

The following items were introduced into evidence or marked for identification on behalf of petitioners:

P-1 For identification only - press release - Jersey Journal, September 28, 1977
P-2 In evidence - personal check of Thomas Hogan for $250, March 6, 1978
P-3 In evidence - Letter from Mrs. Robertson to Stephen Wiley, Esq., March 10, 1978
P-4 In evidence - a bill from Wiley, Malehorn & Sirota, April 21, 1978
P-5 In evidence - personal check of Thomas Hogan for $4,642, June 15, 1978
P-6 For identification only - Memo from Mr. Hogan to Mr. Borgess, September 9, 1980
P-7 For identification only - most current billing statement re $5,000 note of Thomas Hogan

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P-8 For identification only - letter of Mrs. Robertson to Appellate Division, March 13, 1979

The following items were marked into evidence on behalf of the Board of Education:

R-1 Second Ward election day workers list, May 1979

R-2 Letter from Mrs. Robertson to the Kearny Board of Education, Mr. Dunne and Mr. Borgess, March 18, 1978. (This letter was introduced only for the limited purpose of impeachment of Mrs. Robertson's credibility.)

The court has considered the credibility of all the witnesses, whether parties or not. These witnesses have been actively involved in political campaigns amongst and against each other for the last five years, if not longer. Each witness testified in a manner to support his or her version of the events in question. The court has no doubt that each witness gave what he or she thought was the truth and the court further has no doubt that the actions of all the witnesses were taken during the heat of political campaigns and in the wake of a traumatic event concerning the conviction of a superintendent of schools for an offense of moral turpitude involving the sexual mores of society. The court will consider the threats and counterthreats, the inconsistencies and lapses in memory as only minimally impeaching the credibility of the witnesses because of the charged atmosphere in which the whole episode took place. This is because it is unnecessary to rely heavily on the witnesses' testimony in light of the fact that, for the most part, this case can be, and will be, decided as a matter of law.

Having reviewed the testimony and evidence in this matter, and having considered both the prehearing and posthearing memoranda of law, affidavits and pleadings, this court has concluded that the facts which gave rise to the Superior Court action which underlies the instant petition for reimbursement of legal fees are not in controversy. The matters which are in controversy are conclusions of law concerning the intent and purpose of the underlying action and legal determinations of the ramification of the instant petition upon candidacy and membership on the Board of Education. The court therefore adopts Mr. Hogan's and Mr. Green's factual presentation as the basic facts in this case,

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with the specific deletion of any references to their or others' personal intentions, beliefs and feelings. The court further adopts the factual determinations of Judge Geronimo, as set forth in J-13, pp. 2-5.

It is not in dispute that petitioners have filed a voucher asking for reimbursement for legal fees spent in the underlying action. The dispute centers around the interpretation of that voucher and whether or not it violates any statutes in the State of New Jersey.

There are two specific statutes which are in issue in the instant matter. They are:

N.J.S.A. 18A:12-2 Inconsistent interests prohibited

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board.

N.J.S.A. 18A:12-20 Indemnity of members of boards of education

> Whenever a civil or a criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

It is the position of petitioners that they are entitled to be reimbursed for their legal fees in the prerogative action which challenged, and was successful at least in part, the action taken at the closed meeting of the Board on February 22, 1978. The petitioners argue they filed the suit in Superior Court in furtherance of their obligations as members of the Board of Education and during the course of their duties and therefore they are entitled to be reimbursed because the suit arose out of the performance of their public duties and was brought in the public interest. They further argue they had no personal or financial interest in the underlying matter. Petitioners insist that the Kearny Board of

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Education has the implied power to pay legal fees incurred by minority Board members when filing suits in the performance of their official duties.

Mr. Hogan, although pro se, filed a pretrial memorandum relying in part, on the case of Errington v. Mansfield Township Board of Education, 100 N.J. Super. 130 (App. Div. 1968), which discusses the "arising out of and in the course of" language he urges the court use as a standard to review applications for reimbursement of legal fees. He also cited numerous instances from other jurisdictions where individual members or employees of public bodies have had implied authority to hire separate counsel, and argues that these cases stand for the proposition that N.J.S.A. 18A:12-20 does not limit the implied power of the Board to pay for legal fees but only expresses it in part when it indemnifies Board of Education members for costs of litigation in suits brought against them.

Mr. Hogan et als. further argue that these contracts or claims prohibited by N.J.S.A. 18A:12-2, and which cause conflicts of interest, are not those arising out of the performance of a board member's duty. He relies, inter alia, on South Plainfield Independent Voters v. Board of Education of Borough of South Plainfield, 1975 S.L.D. 47, 51, where the Commissioner of Education upheld the propriety of three board members voting in favor of a resolution introduced pursuant to N.J.S.A. 18A:12-20 to require the local board to pay the costs of their legal defense, because their votes were essential to develop a majority on the issue. Therefore, Mr. Hogan urges there is no conflict of interest when he files a claim for legal fees incurred for an action arising out of his perceived duties as a Board member.

The Board takes the position that it is clear that a request for payment of any amount of money followed by a legal action requesting an order that the Board be required to pay said amount is a claim against a Board of Education. Counsel for the Board also argues that the proceedings in the underlying action were not brought in good faith but for the purpose of delaying the ouster of the superintendent of schools until such time as he could retire gracefully. Counsel argues that this court clearly has the jurisdiction to remove Mr. Hogan from office if it finds his suit is a claim because this judge sits in lieu of the Commissioner of Education. Further, he argues that if Mr. Hogan

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is not qualified to be a Board member because of a pending claim, then, a fortiari, he is not qualified to seek reelection to the Board. Counsel also argues that even if this judge were to dismiss the petition, a conflict would continue to exist for as long as petitioners have the right to appeal or to bring this action before another forum.

Counsel for the Board sees broad ramifications in the case at bar. If the court allows Board members to be reimbursed for legal fees incurred when they press actions against their Board of Education, as opposed to being indemnified for legal costs incurred when actions are brought against them as a result of their being members of the Board, the floodgates of litigation would be opened, as elected officials in the minority on a civic body, who are displeased by the action of the majority, would not submit to majority rule, but would initiate action against these bodies at great cost to the taxpayers.

This judge has considered the arguments of all the parties as set forth in the papers and briefs filed prior to the hearing, as well as the closing argument filed by Mr. Dunne, after the hearing. The court has also reviewed the applicable law, as well as all the evidence submitted. This review, when considered in conjunction with the uncontroverted facts in this matter, indicates to this judge that the instant matter boils down to the following three basic issues, in which all other questions are subsumed.

1. Is the petition for reimbursement of legal fees expended by petitioners in pursuance of their suit as plaintiffs in the underlying Superior Court action a claim under N.J.S.A. 18A:12-2?

2. If it is a claim under that statute, does it automatically disqualify Mr. Hogan and the other petitioners from sitting on the Board of Education and/or for running for a position on the Board of Education?

3. Should the legal fees expended in the pursuance of the underlying Superior Court action be reimbursed to petitioners under the authority of N.J.S.A. 18A:12-20?

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The threshhold question to be determined is whether or not the petition for legal fees is a claim against the Board, within the purview of the prohibition of N.J.S.A. 18A:12-2. Petitioner Hogan implies that if a member of the Board is acting in the course of his duties as a Board member when filing a suit against the Board, said legal action must not be considered a claim under the above-mentioned statute, which he states only applies to situations of third-party contracts or claims pertaining to vendors or suppliers. The court has reviewed those Commissioner's decisions which deal with situations where there were presumed to be disqualifying conflicts of interest or claims against the board, such as whether or not the occupation of a spouse would disqualify a board member because of the prohibition of a conflict of interest in N.J.S.A. 18A:12-2, or whether or not requests for legal fees disqualify a board member. The court finds it instructive that the Commissioner of Education automatically assumed that a request for reimbursement of legal fees was a claim against the Board under the statute, when he determined that individual board members could properly vote for reimbursement when their own claims for legal fees were involved, because if they were not permitted to vote and the claims were appropriate and legal, it would be impossible for a board to carry out its business. Famette v. Board of Education of the Borough of Wood-Ridge, 1964 S.L.D. 42. The court has also considered the following definition of a claim, "To demand as one's own. . . cause of suit or cause of action. . . a demand for compensation or for payment. . . ." Black's Law Dictionary 313-14 (4th ed. 1951), in reaching its conclusion on this issue.

In applying the aforementioned law to the facts in this case, where petitioners have filed a suit before the Commissioner of Education asking that he order the Board reimburse legal fees expended when they filed suit as plaintiffs against the Board of Education, this court must conclude, initially, that the act of suing to get money back is, on its very face, a claim against the Board of Education. This conclusion is reached without determining the merits of the claim, without determining whether it is the type of claim which falls within the disqualifying prohibition stated in N.J.S.A. 18A:12-2, and without determining if the underlying action arose out of the performance by petitioners of their duties as Board members. This conclusion is based merely on the fact that the petition, if successful, would require the Board to pay a sum of money, and also on the underlying assumption of Famette, that a suit for reimbursement of legal fees was held to be a claim against the Board of Education.

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The next issue with which the court will deal is whether or not this claim, which has arisen as a result of the suit filed by petitioners for reimbursement of their legal fees and which comes within the purview of N.J.S.A. 18A:12-2, automatically disqualifies Mr. Hogan from presently sitting as a member of the Board and automatically disqualifies all petitioners from running for the Board of Education. See, for example, In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, Mercer County, 1974 S.L.D. 595, Commissioner's decision, State Board of Education decision, 1974 S.L.D. 603 where the question of whether the employment of a spouse by a board of education would disqualify a board member from sitting because of the prohibition of conflicts of interest of N.J.S.A. 18A:12-2. The State Board of Education held that the circumstances of every case must be considered before it can be determined whether a claim is so substantial or material as to disqualify an incumbent from holding a seat on a board of education or whether it would be sufficient, under that statute, for the member to abstain from participation in a particular matter in which the member (here Mrs. Bayless) has an interest (here her husband's employment). The State Board of Education chose not to solve this conflict through disqualification for office in order to avoid creating grave constitutional problems in the abridgement of the right to hold public office. Id. at 605. See also, in partial accord, Sweeney v. Komorowski, 1974 S.L.D. 740.

The court has already discussed the Famette case which considered whether or not claims for legal fees were conflicts under N.J.S.A. 18A:12-2 which disqualified the persons involved from sitting as board members. In Famette the Commissioner of Education specifically held that individual board members can properly vote for reimbursement when their own claims for payment are involved. The Commissioner stated that the prior law, R.S. 18:7-11, which requires, inter alia, that a member of the board ". . . shall not be interested directly or indirectly in any contract with or claim against the board. . ." (an identical provision to N.J.S.A. 18A:12-2) must be construed so that board members who have an interest in the claims against the board can vote on them in order that the work of the board may go forward. Thus, even though the positions presented by both the plaintiffs and defendants in the underlying action which gave rise to the Famette petition were considered claims against the board, the Commissioner of Education found they were

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not automatically diqualified as a result of those claims as sitting as members of the board. See also South Plainfield Independent Voters v. Board of Education of the Borough of South Plainfield, 1975 S.L.D. 47 at 51 which discussed the interaction between N.J.S.A. 18A:12-2 and N.J.S.A. 18A:12-20. In South Plainfield the Commissioner of Education upheld the propriety of three board members voting in favor of a resolution pursuant to N.J.S.A. 18A:12-20 in order to require the local board to pay the costs of their legal defense. The logic was similar to that in Famette in that their votes were essential to develop a majority on the issue. It is instructive to note, and the court will refer to same in discussing the issue of actual reimbursement for the legal fees, that the Commissioner stated:

> The Commissioner can envision logical circumstances where local board members who stand accused must vote to effectuate N.J.S.A. 18A:12-20 and thus provide for their own defense. Such a situation would arise at any time that a majority of the members of a local board were subject to (emphasis added) a civil suit or criminal action. To hold . . that no member of a local board of education may vote to effectuate the statute and thus provide himself indemnification because such participation in the voting constitutes a conflict of interest, would in many instances render the statute a nullity. Statutes are not to be construed so as to lead to absurd or unreasonable results. State v. Gill, 47 N.J. 441, 444 (1966). The objective of a statute is to be fulfilled insofar as the terms of the legislation and proper consideration of the interest of those subject to it will fairly permit. State v. Provenzano, 34 N.J. 318, 322 (1961). It may not be assumed that by enacting the statute, N.J.S.A. 18A:12-20 the Legislature intended something which it new in practice would mean nothing. Gualano v. Board of Estimate of Elizabeth School District, 39 N.J. 300, 313 (1963). South Plainfield, supra at 51.

Thus, it is clear that even when a conflict of interest as a result of a claim exists, such conflict does not automatically disqualify a board member even in the situation where a board member comes foward and votes for his own indemnification.

Accordingly, this judge concludes that the petitioners' claim against the Board for reimbursement of legal fees falls into the same category as the claims of the plaintiffs and defendants in Famette, as well as, to some extent, the South Plainfield parties. In those situations, the board members were not automatically disqualified from sitting on the board because of their suits for reimbursement of legal fees and the court will not, in

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fact, automatically disqualify Mr. Hogan from sitting on the Board, nor will it disqualify him, or the other petitioners, from running if all other requirements for running as a candidate are met.

This conclusion does not say that the court would not have the power to remove Mr. Hogan under the appropriate circumstances. This court does have the power to determine qualifications for candidacy for a seat on a board of education and thus, by implication, the power to determine qualifications for membership on a board. Therefore, the request by Mr. Hogan for a declaratory judgement of his qualifications to sit or to run, and the request of the Board for an order removing him from office both come within the parameters of this judge's authority. The authority arises from that of the Commissioner of Education, who has the ultimate authority to determine controversies and disputes arising under the school laws. See N.J.S.A. 18A:6-9. All laws regarding elections to school boards, N.J.S.A. 18A:14-1 et seq., have been placed under Title 18, which deals with the running of the schools in the State of New Jersey. Those laws set procedures for the administration of elections, procedures for nomination, appointment of election personnel, designation of and equipping polling places, etc. The school election process is conducted by board secretaries and boards of education. The Commissioner of Education is empowered to conduct a recount, see N.J.S.A. 18A:14-63.1, as well as to conduct any inquiry in alleged violations of statutorily prescribed procedures, N.J.S.A. 18A:14-63.12. The Commissioner of Education has issued decisions pertaining to the validity of nominating petitions, see Board of Education of Union County Regional High School Disctrict #1, Union County v. Henry T. Karamus, 1977 S.L.D. 162 and Board of Education of the Township of Clark, Union County v. Henry T. Karamus, 1977 S.L.D. 259, and has determined the qualifications of candidates on the basis of citizenship or residency. See Rolane Sestrand v. Susan Oppermann, 1977 S.L.D. 361, as well as Board of Education of the Borough of Middlesex, Middlesex County v. Robert M. Sherr, III, 1977 S.L.D. 363 and In the Matter of the Annual School Election Held in the School Disctrict of the Borough of Fairview, Bergen County, 1977 S.L.D. 591.

Accordingly, this court finds that it has the jurisdiction to determine the qualifications of a particular person to sit or to run for membership on a board of

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education, as well as to determine whether or not a person should be removed from his position as a result of application of the "conflict and claims" statute, N.J.S.A. 18A:12-2. The court's conclusion is that Mr. Hogan is not automatically disqualified because of the instant petition and the Order to Show Cause and petition for removal must be denied. The Bayless logic, that abstention on the relevant votes will suffice to meet the intent of the statute, would apply here if the Board would ever vote on the voucher for fees.

This court will next resolve the issue of whether or not this claim for legal fees which gives rise to a conflict, but which conflict does not automatically disqualify petitioners from sitting or running, should be reimbursed under the authority of N.J.S.A. 18A:12-20. Subsumed in this question are the issues of whether the legal fees arise out of an action which the petitioners took as a result of their duties or in the course of their performance of their duties as members of the Board, whether the action were taken in good faith, and whether the action was taken for a public purpose. In reviewing N.J.S.A. 18A:12-20 this court is convinced that the key portion of that statute is the language which states that "whenever a civil . . . action has been or shall be brought against any person. . . ." In this matter concerning the repayment of petitioners' legal fees, it is evident that these petitioners brought the underlying action against the Board, individual Board members and others and were in control of whether or not there would be an action and to what extent it should go. There has been absolutely no authority presented to this judge which would support entitlement to indemnification for legal fees for suits when Board members are plaintiffs in an action. All the cases which deal with indemnification discuss defense of the board member for acts or omissions which arose out of or were undertaken in the course of the performance of his or her duties. The "arising out of" phrase has been construed as a limitation on indemnification for defense. In Famette v. Board of Education of the Borough of Wood-Ridge, 1964 S.L.D. 42, reimbursement was denied not only to the four board members plaintiffs, on the ground that their suit served no public purpose and was personal and private, but also to the Board member who was the defendant in that action for the same reason.

Harvey v. Board of Education of the Township of Brick and Ross W. Smith, Ocean County, 1971 S.L.D. 144 is relevant because the Commissioner of Education found that

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Smith was the respondent in fact, even though the board itself initiated the action for declaratory judgment as to whether or not Mr. Smith could continue to serve as a board member while working for the State Department of Education. The Commissioner relied on Houston v. Board of Education of North Haledon, 1959-60 S.L.D. 73, aff'd, 1960-61 S.L.D. 232, decided before the instant statute was enacted, where both the Commissioner and the State Board arrived at a determination that the Board of Education has the implied power to use school funds to defray the legal expenses of one of its members for defense of a suit arising out of the member's performance of his duties. In Smith the Commissioner held that counsel fees are reimbursable because the action, ". . . while not 'brought against' the person directly, is brought in a manner that may be considered to be brought against his interests by indirection. In any event, the interpretation of this statute, particularly the words 'brought against' must be viewed within the principles of public policy referred to in Famette v. Wood-Ridge, and particularly the third policy; namely, that principles to be adopted should not serve to discourage interested citizens from assuming the burdens of such public service which they render and serving on, or for, boards of education." 1971 S.L.D. at 50. In no imaginable way could the underlying action ever be termed to have been an "indirect" attack on petitioner Hogan et als. interest.

The court is quite sure that N.J.S.A. 18A:12-20 was enacted to protect board members from having to pay for their own legal defense when actions are brought against them for conduct or for decisions or determinations made in the course of their duties as board members. The purpose of this is to assure that persons of high caliber shall be on boards of education and shall not be intimidated or choose not to hold such office because of fear of financial loss as the result of their being sued while a board member. The statute was never intended to give board members a free reign to bring suits as individuals or as groups of individuals acting in accord what with they think are their duties as members, which perception is not in accord with the majority of the board.

Famette was particularly clear on this issue when the Commissioner stated that the board was without authority, either express or implied, to expend public funds to reimburse present or former board members for their legal fees and expenses as plaintiffs. This denial was distinguished from a determination that a board could reimburse legal fees

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expended for the defense of one of its members at its discretion, only bounded by the criteria set forth in Houston, that the member defendant had to be sued for an action committed in the good faith performance of his office. This court finds it absolutely clear, based on the aforementioned Commissioner's decisions, as well as on Errington v. Mansfield et al., 100 N.J. Super. 130 (App. Div. 1968), that the "good faith, public purpose or arising out of" limitations apply only to indemnification and reimbursement for the defense of board members. See also South Plainfield, relied on by petitioners, where the Commissioner upheld the propriety of three board members voting in favor of payment of the costs of their defense in order to prevent those members, if denied reimbursement, from bringing a civil suit against the majority to secure said reimbursement for legal costs for such a defense. Accordingly, based on the foregoing analysis, this judge concludes that the instant petition for legal fees is a claim against the Board under N.J.S.A. 18A:12-2, which does not automatically disqualify petitioners, but which the Board cannot, under any circumstances, pay pursuant to N.J.S.A. 18A:12-20, because of the procedural position in which petitioners put themselves in the underlying suit.

The court has already commented on the credibility of witnesses and on the atmosphere in Kearny at the time the underlying action was pursued. The court finds, as a matter of fact, that the underlying action arose out of what the petitioners felt was good faith and did not concern personal or financial gain, but the underlying action did not arise out of their duties or in the course of the performance of their duties as members of the Board of Education. These determinations are not relevant to the ultimate conclusion here, that the claim cannot be reimbursed because N.J.S.A. 18A:12-20 does not permit indemnification of board members who are plaintiffs in the underlying action for any reason, although it does give the board discretion to reimburse legal fees to members who are defending actions. Accordingly, the petition for reimbursement will be dismissed, with prejudice, and thus Mr. Hogan will be deemed qualified to sit on the Board and to run for office, as will the other petitioners in this matter, assuming all other requirements are met.

Counsel for the Board foresaw such a conclusion and argues that even if this court dismisses the instant matter, a conflict or claim would still exist because of the period of

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time which must run, during which an appeal can be taken, or because if petitioners run for election and win they could reintroduce their petition and vote to pay it.

The court finds that the effect of the dismissal of the petition with prejudice will be to allow petitioners to stand as qualified candidates for election or reelection to the Board and to allow Mr. Hogan to continue to sit on the Board. The suggestion of the Board of Education that petitioners' right of appeal or possible later redetermination of entitlement to reimbursement would perpetuate a disqualification is contrary to practice. The New Jersey Court Rules governing appellate practice provide that even where a party exercises his or her right of appeal by filing a motion for leave to appeal, the underlying order is not stayed. See Pressler, Current N. J. Court Rules, Comment, R. 2:9-5:

> Paragraph (a) of the rule was amended effective September 1981, consistent with the change then made in Rule 2:5-6(a), to provide expressly that the filing of a motion for leave to appeal does not operate to automatically stay the order which is the subject of the motion or the proceeding below.

Furthermore, R. 2:9-3 provides, "A sentence of imprisonment shall not be stayed by the taking of an appeal. . . ." See also Hayes v. Hudson County Board of Freeholders, 116 N.J. Super. 21 (App. Div. 1971), which involved the application of N.J.S.A. 2A:135-9, the former criminal statute providing for the forfeiture of office upon the conviction of certain crimes. (This statute has since been superceded by the enactment of N.J.S.A. 2C:51-2.) The issue in Hayes arose out of the question of whether the institution of an appeal would abate the effect of the forfeiture statute. The Appellate Division held that the office was forfeited upon conviction and an appeal would not abate the statute. Similarly, O'Halloran v. DeCarlo, 156 N.J. 249 aff'd, 162 N.J. Super. 174 (App. Div. 1978) cert. den. DeCarlo v. New Jersey, 442 U.S. 917 (1979) held that N.J.S.A. 2A:135-9 demanded immediate and automatic forfeiture and was not stayed or abated on appeal. Id. at 254. See also the discussion of the Appellate Division in State v. Anderson, 177 N.J. Super. 334, 336 (App. Div. 1981) which discussed the fact that majority of jurisdictions which have considered the issue have found that a conviction which has been appealed represents a final judgement which may be used to impeach credibility. Therefore, this judge concludes that the instant dismissal, with prejudice, of the petition for reimbursement is a

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final judgement for purposes of presenting qualifications to sit as a member or to run to be a member of the Board of Education, despite the fact that exceptions may be filed to this judge's initial decision or appeals may be taken from the decision of the Commissioner of Education of the State Board of Education. Furthermore, a dismissal with prejudice prevents reinstitution of an action and concludes the right of the parties. See Mayflower Industries v. Thor Corp., 17 N.J. Super. 505, 509 (Chan. Div. 1952), appeal dismissed, 20 N.J. Super. 39 (App. Div. 1952).

Accordingly, based on the foregoing analysis, it is hereby **ORDERED** that the petition for reimbursement of legal fees of $6,242 for the cost that petitioners bore as plaintiffs in a Superior Court action, be, and is, hereby **DISMISSED WITH PREJUDICE**; and

It is further **ORDERED** that the petition to oust Mr. Hogan as a member of the Board of Education be, and is, hereby **DISMISSED**; and

It is **DECLARED** that Mr. Hogan, Mrs. Robertson and Mr. Pyper are qualified to run for election as members of the Board of Education of Kearny, assuming all other relevant qualifications are met; and

It is further **DECLARED** that Mr. Hogan is qualified to maintain his present seat as a member of the the Board of Education.

It is further **ORDERED** that no fees are to be awarded to petitioners Hogan, Robertson and Pyper.

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OAL DKT. NO. EDU 8582/9181-81

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

I hereby FILE my Initial Decision with Fred G. Burke for consideration.

DATE — SYBIL R. MOSES, ALJ

Receipt Acknowledged: by Office of Admin. Law through phone call from Dept. of Ed.

Feb. 22, 1982
DATE — DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 22, 1982
DATE — FOR OFFICE OF ADMINISTRATIVE LAW

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THOMAS D. HOGAN, ROSEMARY G. ROBERTSON, DAVID W. PYPER,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,

RESPONDENT,

AND

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,

PETITIONER,

V.

THOMAS D. HOGAN,

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 exceptions were filed by the parties 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 Sybil R. Moses, ALJ that they are not eligible for reimbursement by the Board for monies expended by them for legal fees and associated costs. Petitioners object to Judge Moses' reference to the Superintendent of Schools as having been involved in an "offense of moral turpitude involving the sexual mores of society." Petitioners allege that such characterization is suggestive of partiality, prejudice and passion which may have influenced Judge Moses with respect to her opinion. Petitioners contend that their legal claim herein is not against the Board but rather on behalf of and for the Board.

Petitioners argue that Judge Moses erred in her determination herein that there is "absolutely no authority" for the reimbursement requested. Petitioners aver that their action arose out of and in the course of their duties. Petitioners contend that Judge Moses misapplied Famette, supra, and appeals to the Commissioner to provide reimbursement.

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The Board's reply exceptions refute those of petitioners and affirm that portion of the judgment herein in favor of the Board which dismisses the Petition for reimbursement of monies allegedly expended by petitioners. The Board excepts to the determination by Judge Moses that petitioners' claim against the Board did not disqualify them from being members of the Board. N.J.S.A. 18A:12-2

The Commissioner does not agree in entirety with the exceptions filed by either party.

The Commissioner finds no relevance to petitioners' claim that Judge Moses showed bias because of her characterization of an incident involving the Superintendent. The Commissioner cannot agree that such characterization is evidence of prejudice; nothing in the record sustains such a prescription.

The Commissioner finds no merit in petitioners' assertion that their claim is not against the Board but rather on behalf of the Board. Such inverse logic is completely self-serving and, as such, is not determinative in the present matter. The Commissioner so holds.

The Commissioner cannot agree with the Board's exceptions to Judge Moses' conclusion that petitioners are qualified to run for election as members of the Board of Education of Kearny. The Commissioner determines that the Court properly applied Mayflower Industries, supra.

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

The Commissioner adopts the conclusions set down herein by Judge Moses.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

April 12, 1982

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THOMAS D. HOGAN, ROSEMARY G. ROBERTSON, DAVID W. PYPER,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,

RESPONDENT-RESPONDENT,

AND

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,

PETITIONER-RESPONDENT,

V.

THOMAS D. HOGAN,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 12, 1982

For the Petitioners-Appellants, Thomas D. Hogan, Pro Se

For the Respondent-Respondent, Dunne & Walker (Frederick R. Dunne, Jr., Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for substantially the reasons expressed therein.

We wish to add that, since the underlying action for which legal fees were incurred did not arise out of the duties or in the course of the performance of duties of members of the Board pursuant to N.J.S.A. 18A:16-6, there is no authority to award reimbursement of legal fees and expenses. Furthermore, to the extent that Petitioners desired to have alleged statutory violations investigated and pursued, avenues other than private law suits brought by them were available such as referral of the alleged violations to the State Department of Education, the Attorney General's Office or other law enforcement agencies. See for example Emmons v. Board of Education of the City of Trenton, (decided by the State Board, November 5, 1980; App. Div., affirmed, October 1, 1981, Docket No. A-1491-80T4), and Ross v. Board of Education of the City of Jersey City, (State Board affirmed, October 7, 1981).

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5313-81
AGENCY DKT. NO. 289-7/81A

LAURIE CURRIER,
Petitioner
v.
BOARD OF EDUCATION OF WEEHAWKEN, HUDSON COUNTY,
Respondent

APPEARANCES:

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

Brian N. Flynn, Esq., for the Board
(Krieger and Chodash, attorneys)

Record Closed March 1, 1982 Decided March 5, 1982

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

Petitioner contends the Board violated her tenure and seniority rights when it resolved not to renew her employment for the 1981-82 school year. The Board posits that petitioner is not tenured and therefore does not possess seniority rights.

The matter was transmitted to the Office of Administrative Law as a contested case on August 14, 1981, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 24, 1981 at which the parties agreed to submit the matter for summary decision. A jointly executed stipulation of facts was filed on January 14, 1982 and the matter was briefed. The record closed with the filing of petitioner's rebuttal on March 1, 1982.

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The following facts were stipulated or deduced from documentary evidence and are adopted herein as **FINDING OF FACTS:**

1. Petitioner was at all times pertinent a certified elementary school teacher and was employed by respondent as a compensatory education teacher (S.C.E.) at $42 per day from December 7, 1976 to June 17, 1977, and also in that same assignment at $45 per day from February 24, 1978 to June 21, 1978. She was then employed as an elementary school teacher by respondent during the 1978-79, 1979-80 and 1980-81 school years and was compensated according to the teachers salary guide.

2. The Board acted at a special meeting on April 28, 1981 to nonrenew petitioner's employment contract for the 1981-82 school year (J-20). However, she was reemployed as a part-time S.C.E. teacher from September 9, 1981 through September 30, 1981, and then employed fulltime in that assignment beginning October 1, 1981 and currently holds said position. (See Stipulation #1(f) and (g), C-2 and C-3.)

3. Pursuant to an arbitration opinion and award dated October 20, 1978, it was determined that S.C.E. teachers employed by the respondent had been improperly compensated for the period September 1977 through June 1981 (J-1). The award directed differentiated back pay and that such teachers be placed on the salary guide and be granted all fringe benefits received by all other teachers employed by respondent. This opinion and award was confirmed by Superior Court, Chancery Division (J-2) and Superior Court, Appellate Division (J-3).

4. General responsibilities of S.C.E. teachers are outlined in J-5, and petitioner's functions and responsibilities as an S.C.E. teacher are delineated in the joint stipulation at #16. They are deemed to be typical of S.C.E. teachers and are incorporated herein by reference.

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5. A number of teaching staff members employed by respondent during the 1981-82 school year and assigned as either elementary, S.C.E., and/or Title I teachers were initially employed after petitioner and accumulated less service in the district than she (C-1).

The gravamen of this dispute centers on whether the Board improperly non-renewed petitioner for the 1981-82 school year, in the absence of a reduction in force, if in fact she is deemed to be a tenured teaching staff member. She prays for a determination that she is tenured and therefore entitled to differential back pay for September 1981.

Petitioner submits that the issue of tenurability of S.C.E. teachers has been rendered stare decisis by the decision in Hamilton Township Supplemental Teachers Association, et al. v. Hamilton Township Board of Education, Superior Court, Appellate Division, Docket No. A-667-80-T1 (decided July 10, 1981).

The Board also relies on Hamilton, as well as Point Pleasant Beach Teachers Association, et al. v. Callam, 173 N.J. Super. 11 (App. Div. 1980) and Spiewak v. Rutherford Board of Education, Superior Court, Appellate Division, Docket No. A-4853-79-T2 (decided June 22, 1981).

The Board argues the applicability of Point Pleasant based on its contention that petitioner's employment as a S.C.E. teacher from December 7, 1976 to June 17, 1977 and from February 24, 1978 to June 21, 1978 was offered and accepted as temporary employment. It asserts that her compensation of $42 per diem during 1976-1977 underscores the temporary nature of her employment.

I **FIND** this argument to be without merit. It was previously noted an arbitration opinion and award found per diem compensation for the period from September 1977 through June 1981 to have been improper. Further, the State Board of Education in Mary Ellen Monaco v. Board of Education of the Borough of River Edge (decided February 3, 1982) held that a S.C.E. teacher acquired tenure "even though she was only paid by the hour rather than by contract salary" (slip opinion at 4). Also, the record is barren of any

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offer, or acceptance of employment during 1976-77 or 1977-78 with the understanding that such employment was temporary. (See J-7 an J-10).

The only reference to temporary employment was for petitioner's employment during the 1981-82 school year when said employment was possibly contingent upon her signature on "temporary employment statements" (see C-2, C-3, C-4, C-5, C-6 and C-7). These incidents occurred after the cause of action and filing of this Petition of Appeal. I **FIND** petitioner's 1981-82 employment of no relevance to the tenure issue here, and refrain from characterizing the signatory exercise of C-4 and C-6, noting that petitioner's acceptance of 1981-82 employment was conditioned by notations on C-4 and C-6 with correspondence from her counsel (C-5 and C-7) respectively attached.

The Board also relies on Kuboski v. Board of Education of the Borough of South Plainfield, 1978 S.L.D. 322, wherein the Commissioner deemed it relevant to compare the duties performed by a regular teaching staff member to those of a supplemental teacher. It asserts the petitioner in the instant matter fails to met the standards established in Kuboski, and therefore cannot be considered for tenure purposes as she is not entrusted with the prime responsibility for classroom instruction, educational planning and curriculum development.

In Hamilton, the State Board of Education reaffirmed the Board's position here, as did the Commissioner in Monaco. However, the Appellate Division reversed the State Board in Hamilton, and the State Board reversed the Commissioner in Monaco.

The Appellate Division also decided Spiewak, "which limited the scope of the Point Pleasant decision to cases where the employment was only temporary in nature and was so understood by both employer and employee." Monaco (slip opinion at 3).

It has already been determined here the Board has failed to meet its burden of proof of any understanding between employer and employee relative to the temporary nature of petitioner's employment prior to September 1981. It is also well established that S.C.E. programs are mandated. N.J.S.A. 18A:7A-5.6; N.J.S.A. 18A:46A-1; N.J.A.C. 6:28-3.2.

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The State Board stated in Monaco: "The law now appears to be that a supplemental or compensatory teacher is eligible for tenure if he or she regularly teaches in an established instructional program, especially one which is mandated by the State, such as a remedial reading program" (slip opinion at 3). See also Richardson v. Lawnside Board of Education (decided by State Board October 7, 1981).

A careful review of petitioner's employment as a S.C.E. teacher through J-5 and Stipulation #16 a-v clearly indicates that she possessed enough elements of regularity to characterize her as a teaching staff member for the purpose of tenure accrual. **I SO FIND.**

The question now is at what point in service did petitioner acquire tenure, which will only be relevant for determining seniority ranking in the event of a reduction in force.

Petitioner was employed for six months and ten days during 1976-1977; was reemployed for the remaining four months of the 1977-78 school year beginning on February 24, 1978; and was then reemployed for the following three successive school years (1978-79, 1979-80, 1980-81).

I **FIND** petitioner acquired tenure no later than her first day of employment following February 24, 1981 pursuant to N.J.S.A. 18A:28-5(c), which states that teaching staff members shall be under tenure after employment for "the equivalent of more than three academic years within a period of any four consecutive academic years."

The record is void of evidence relating to petitioner's break in service between June 17, 1977 and February 24, 1978. Petitioner may have indeed acquired tenure prior to February 1981. Having confidence in counsel for the parties and their knowledge of case law relating to breaks in service, I leave petitioner's service for seniority purposes in their good hands for amicable resolution, as seniority ranking with other tenured teaching staff members is not at issue here.

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I **CONCLUDE** that petitioner is a tenured teaching staff member and was improperly nonrenewed for the 1981-82 school year in the absence of a reduction in force. The Board is therefore **ORDERED** to compensate petitioner for her salary and other benefits as a fulltime teacher for September 1981 when she was illegally deprived of her tenured employment, less mitigation for sums earned during that period, and is **FURTHER ORDERED** to determine petitioner's proper placement on the seniority list for tenured teachers.

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

I hereby **FILE** this Initial Decision with **FRED G. BURKE** for consideration.

5 March 1982
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

9 March 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 10, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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EVIDENTIARY DOCUMENTS:

J-1	10/20/78 Arbitration Opinion and Award.
J-2	5/8/79 Chancery Division Letter Opinion re J-1.
J-3	6/20/80 Appellate Division affirmation re J-2.
J-4	9/15/81 Chancery Division Judgment re J-1.
J-5	S.C.E. job description.
J-6	S.C.E. funding application.
J-7	12/8/76 letter of assignment, Superintendent to Petitioner.
J-8	4/25/77 letter re 1977-78 employment status, Superintendent to Petitioner.
J-9	4/29/77 nonrenewal notice for 1977-78, Superintendent to Petitioner.
J-10	2/24/78 letter of employment, Superintendent to Petitioner.
J-11	6/9/77 memo, Superintendent to Title I and S.C.E. teachers, re end of year.
J-12	4/20/78 nonrenewal notice for 1978-79, Superintendent to Petitioner.
J-13	5/25/78 memo, Superintendent to Title I and S.C.E. teachers, re end of year.
J-14	Petitioner's 11/1/76 employment application with teacher certificate attached.
J-15	Petitioner's 1/16/78 employment application.
J-16	7/12/78 letter of employment, Superintendent to Petitioner.
J-17	6/20/79 letter of employment, Superintendent to Petitioner.
J-18	4/30/80 nonrenewal notice for 1980-81, Board secretary to Petitioner.
J-19	6/11/80 letter of employment, Superintendent to Petitioner.
J-20	4/29/81 nonrenewal notice, Business Administrator to Petitioner.
J-21	Petitioner's 1979-1980 employment contract.
J-22	Petitioner's 1980-81 employment contract.
C-1	1981-82 seniority list for tenured teachers; 1981-82 roster of S.C.E. and Title I teachers; 1981-82 roster of full-time nontenured teachers.
C-2	9/9/81 letter of part-time employment, Superintendent to Petitioner.
C-3	9/25/81 letter of full-time employment, Superintendent to Petitioner.
C-4	9/9/81 temporary employment agreement.
C-5	9/4/81 nonwaiver letter, Petitioner's counsel to Superintendent.
C-6	9/25/81 temporary employment agreement.
C-7	9/28/81 nonwaiver letter, Petitioner's counsel to Superintendent.

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BUCCERI AND PINCUS
COUNSELORS AT LAW
1200 ROUTE 46
CLIFTON, NEW JERSEY 07013
(201) 773-5665

OON H. PINCUS
S P. BUCCERI
ory T. Syrek

September 28, 1981

Dr. Richard Onorevole
Superintendent of Schools
Weehawken Board of Education
Liberty Place
Weehawken, NJ 07087

Re: Laurie Currier v. Bd.
of Ed., Twp. of Weehawken
O.A.L. Docket No. EDU 5313-81

Dear Dr. Onorevole:

We are informed that the Weehawken Board of Education has decided to employ Laurie Currier as a full time compensatory education teacher in its Webster School beginning October 1, 1981. You have requested that Mrs. Currier sign a contract dated September 25, 1981, for that position at an annual salary of $13,600.

Mrs. Currier will sign this contract, since you have made it a pre-condition to her employment. However, said signing is without prejudice to Mrs. Currier's claim that she is a tenured employee who cannot normally be compelled to sign a contract and it is further without prejudice to her claim that the compensatory education position she is accepting is not temporary in nature and is a fully tenure eligible position in and of itself. Thus Mrs. Currier does not accept or agree to the contract language which refers to the position as temporary or not tenurable. Furthermore Mrs. Currier contends that the salary specified in the contract is incorrect because it fails to account for all of her prior employment experience. If necessary, this will be a matter for a contractual grievance and/or action in other forums. The contract is not intended as a waiver or relinquishment of her tenure or seniority.

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I am instructing Mrs. Currier to type the words "accepted subject to attorney's letter of September 28, 1981, which is attached hereto and made a part hereof" on the contract and to staple a copy of this letter to the contract before signing and returning it to you. In this way, her employment may continue without any waiver of rights by either party.

Sincerely,

Louis P. Bucceri

/lep
cc: Brian Flynn, Esq.
Laurie Currier

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BUCCERI AND PINCUS
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1200 ROUTE 46
CLIFTON, NEW JERSEY 07013
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SHELDON H. PINCUS
LOUIS P. BUCCERI

September 4, 1981

Dr. Richard Onorevole
Superintendent of Schools
Weehawken Board of Education
Liberty Place
Weehawken, NJ 07087

Re: Laurie Currier v.
Bd. of Ed. of the Twp.
of Weehawken, Hudson County
Agency Docket No. 289-7/81A

Dear Dr. Onorevole:

Confirming your phone conversation with our client, Laurie Currier, on September 4, 1981, Ms. Currier has agreed to accept the part-time so-called 'supplemental' teaching position at Weehawken High School for 1981-82 which you offered to her. She does so without prejudice to her claim to tenure currently pending before the Commissioner of Education/Office of Administrative Law and without waiver of her tenured status. It is understood that Ms. Currier contends that the position offered to her is tenure eligible as well, although the Board contests that view.

Ms. Currier accepts the part-time position in order to fulfill her duty to mitigate damages to the extent possible and acceptance of said part-time position is not a waiver of her claim that she is entitled, by virtue of tenure and seniority, to a full time position. Ms. Currier looks forward to a pleasant and productive employment experience.

Sincerely,

Louis P. Bucceri

Louis P. Bucceri

/lep
cc: Brian N. Flynn, Esq.

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LAURIE CURRIER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, 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 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, petitioner is a tenured teaching staff member entitled to salary and other emoluments as mitigated for September 1981. The Board shall determine her placement on the seniority list.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

April 15, 1982

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LAURIE CURRIER,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 15, 1982

For the Petitioner-Respondent, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, Krieger, Ferrara, Feinsilver, Flynn & Catalina (Frank R. Jenkins, Esq., of Counsel)

On June 23, 1982, the New Jersey Supreme Court decided a trilogy of cases settling the issue of whether public school teachers who provide remedial or supplemental instruction to educationally disabled children may acquire tenure if they meet the specific criteria in N.J.S.A 18A:28-5. Spiewak v. Rutherford Board of Education, 93 N.J. 63 (1982). The Supreme Court held that such teachers are eligible for tenure, so long as they meet the statutory criteria.

The Supreme Court concluded further that: "the legal rule established by these cases shall be applied to the teachers before us, as well as prospectively to all persons not before the Court." In footnote 2, it was stated that teachers not before the Court would "not be entitled to any back pay award," and teachers terminated prior to the date of the Supreme Court's holding in Spiewak (June 23, 1982), were "not entitled to be rehired." It was held that currently employed supplemental and remedial teachers should have their tenure eligibility calculated from the beginning of their employment.

Petitioner Currier was employed by the Weehawken Board of Education as State Compensatory Education teacher for six months and ten days during 1976-77; reemployed as a State Compensatory Education teacher for the remaining four months of the 1977-78 school year beginning on February 24, 1978; and reemployed as an elementary school teacher for the following three successive school years (1978-79, 1979-80, 1980-81). She is currently holding a full-time State Compensatory Education position with the Weehawken Board of Education.

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The State Board has studied the language of the Court in Spiewak, supra, and the record in this matter. Based on the plain language of the Supreme Court, we find that Petitioner Currier, who is currently employed by the Weehawken Board of Education, should have her tenure eligibility calculated from the beginning of her employment with the Weehawken Board. We defer to the arbitration opinion and award confirmed by Superior Court, Chancery Division and Superior Court, Appellate Division, which was specifically noted by the Administrative Law Judge in his findings of fact. The State Board of Education directs dismissal of the September 1981 back pay issue which has been raised by petitioner, since the State Board of Education is unable to interpret the Supreme Court's bar to retroactive relief in any other manner or to any further extent than that which we have stated.

Attorney Exceptions are noted.

December 1, 1982

Pending N.J. Superior Court

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 2883-81
AGENCY DKT. NO. 79-3/81A

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF MERCHANTVILLE, CAMDEN COUNTY,
Petitioner
v.
JOAN R. NOLAN,
Respondent.

APPEARANCES:

Paul Mainardi, Esq. for the petitioner (Brown, Connery, Kulp, Wille, Purnell and Greene, attorneys)

John L. White, Esq. for the respondent (White and Uzdavinis, attorneys)

Record Closed March 5, 1982 Decided March 11, 1982

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

The Board of Education of the School District of the Borough of Merchantville (Board) filed tenure charges against respondent who is the Board Secretary/Business Administrator. After respondent filed her Answer to the charges, the matter was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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After several days of hearing, the litigants have amicably agreed to resolve their dispute. Essentially, the settlement contains the following terms:

1. The Board will pay Joan R. Nolan one year's salary with appropriate deductions;

2. The Board consents to dismissal of the tenure charges;

3. Joan R. Nolan will resign from her position;

4. Joan R. Nolan will not pursue any claim against the Board;

5. The parties will exchange general releases.

The full text of the Consent Order of Dismissal has been executed by the undersigned administrative law judge, and it is attached and incorporated herein by reference.

Accordingly, the tenure charges are DISMISSED WITH PREJUDICE [N.J.A.C. 1:1-17.1(a)].

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

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OAL DKT. NO. EDU 2883-81

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

11 March 82
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

12 March 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 16, 1982
DATE

Ronald L. Parker/pa
OFFICE OF ADMINISTRATIVE LAW

plb

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OAL DKT. NO. EDU 2883-81

DOCUMENTS IN EVIDENCE

Consent Order Dismissing Tenure Charges, etc., signed by ALJ, March 5, 1982.

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BROWN, CONNERY, KULP, WILLE, PURNELL & GREENE
One Centennial Square
East Euclid Avenue
P. O. Box X 180
Haddonfield, New Jersey 08033
(609) 428-0460

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

IN THE MATTER OF THE TENURE HEARING OF JOAN R. NOLAN, SCHOOL DISTRICT OF THE BOROUGH OF MERCHANTVILLE, CAMDEN COUNTY	CONSENT ORDER DISMISSING TENURE CHARGES, ETC.

This matter having been brought the Court upon joint application of John L. White, Esquire of the law firm of White and Uzdavinis, attorneys for Joan R. Nolan (hereinafter "Mrs. Nolan") and Paul Mainardi, Esquire of the law firm of Brown, Connery, Kulp, Wille, Purnell & Greene, attorneys for the Board of Education of the Borough of Merchantville (hereinafter "The Board of Education"), and

It appearing, subject to review and approval by the Commissioner of Education, this matter in dispute has been resolved by agreement between the parties as follows:

1. Within ten (10) days of entry of the within Order, the Board of Education will pay to Mrs. Nolan one year's salary from March 1, 1981 at

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her salary rate as of March 1, 1981, with normal payroll deductions withheld, including normal pension payments which will be paid to the State of New Jersey. There will be no other offsets.

2. The Board of Education will consent to dismissal of the tenure charges in this matter, and further agrees not to assert any criminal charges against Mrs. Nolan arising out of said tenure charges or any related matter.

3. Upon delivery of the payment referred to above, the Board of Education will lift the suspension of Mrs. Nolan for the period of the next calendar day. Within that calendar day, Mrs. Nolan will deliver her written resignation to the Board of Education, effective immediately. Mrs. Nolan will not report to work.

4. Mrs. Nolan will not pursue any claim against the Board of Education.

5. Upon receipt of payment described above the parties will exchange general releases.

/ OFFICES
Connery, Kulp,
rnell & Greene

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6. The Board of Education will prepare a general letter of recommendation regarding Mrs. Nolan's employment to be signed by the Board Superintendent to the extent that he can give it.

7. The Board of Education will remove any and all contents of its personnel file concerning Mrs. Nolan that refer in any way to the pending tenure charges or the subject matter of those tenure charges, and specifically it will remove all adverse evaluations filed on or after February 10, 1981, including the 1980-1981 evaluation. No further evaluations or memoranda of any kind will be added to Mrs. Nolan's personnel file.

8. The Board of Education will not pursue any claim against its bonding company for any alleged improprieties by Mrs. Nolan. Any claim notice heretofore submitted shall be promptly withdrawn. Counsel for the Board of Education will certify to counsel for Mrs. Nolan, in writing, that the provisions of this paragraph have been complied with.

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And it further appearing that the parties have consented to the form and substance of the within Order, as evidenced by the signatures of their respective attorneys set forth below; and the Court having reviewed the substance of the parties' agreement and for good cause shown

IT IS HEREBY ORDERED that the tenure charges in the within matter are dismissed with prejudice and without costs to either party.

IT IS FURTHER ORDERED that the agreement between the parties, set forth above, is hereby incorporated into this Order and made a part hereof, by reference. This Order shall be effective immediately.

Dated: March 5, 1982

August E. Thomas
August E. Thomas, A.L.J.

The undersigned consent to the form and substance of the within Order.

WHITE & UZDAVINIS
Attorneys for Joan R. Nolan

By: John L. White
John L. White

March 2, 1982

BROWN, CONNERY, KULP, WILLE, PURNELL & GREENE
Attorneys for the Board of Education of the Borough of Merchantville

By: Paul Mainardi

March 3, 1982

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OAL DKT. NO. EDU 2883-81

IN THE MATTER OF THE TENURE	:	
HEARING OF JOAN R. NOLAN,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF MERCHANTVILLE,	:	DECISION
CAMDEN COUNTY.	:	
	:	

This matter was presented to the Commissioner by way of an Initial Decision based upon a Consent Order Dismissing Tenure Charges entered into between the parties and recommended to the Commissioner by August E. Thomas, ALJ, said Consent Order being incorporated herein by reference.

The Commissioner has reviewed the Consent Order and the charges certified by the Board, as well as the written statements in evidence appended thereto and respondent's Answer to said charges. Based upon such review, the Commissioner finds and determines that the charges herein delineated are of such a serious nature, involving the misappropriation of ESEA Title I funds as to preclude their disposition in the manner provided for in the Consent Order entered into by the parties.

The Commissioner assumes that a board of education, when it certifies tenure charges pursuant to the statutory

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formula prescribed in N.J.S.A. 18A:6-11, is fully cognizant of the gravity of its responsibilities. The Commissioner observes that such statutory formula requires that:

> "***The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.***"

The Commissioner further observes that any board embarking upon such course of action does so in full knowledge that it may not lay down such burden without a careful weighing of the public interest as well as the interests of the parties. In the instant matter, the Commissioner cannot construe that the settlement as herein contemplated can possibly serve either the interests of justice to the individual so charged or the broader public interest. If respondent is innocent of the charges certified, she deserves the opportunity of removing from her reputation the stigma attached to such accusations. If, on the other hand, the Board demonstrates by a preponderance of the credible evidence that such misappropriation of funds did take place, the Commissioner may not only impose the penalty of dismissal, but may also, if the circumstances so warrant, refer said matter to the State Board of Examiners for further proceedings pursuant to the revocation of respondent's certificate.

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Whenever presented with the necessity for exercising his statutory responsibility for establishing a penalty pursuant to a tenure charge or, in the alternative, accepting a settlement of such matter, the Commissioner is fully cognizant of the heavy burden imposed upon him to carefully and fully consider the impact of his determination on the parties to the controverted matter, as well as the possible consequences of his decision upon the statewide system of education. While the Commissioner in no way seeks to predetermine the guilt or innocence of respondent, he cannot in good conscience condone a settlement which would permit a board secretary/business administrator charged with the misappropriation of funds to seek and obtain employment elsewhere within the public schools of New Jersey or any other state until the hearing process established for reaching a determination in such matters has run its full course.

The Commissioner is further constrained to observe that he regards the entire matter of the settlement of tenure charges as being particularly subject to his most careful and deliberate scrutiny. The Commissioner believes such diligence to be essential in ensuring that the purposes of the Tenure Employees Hearing Act (N.J.S.A. 18A:6-10 et seq.) are not subverted in a piecemeal fashion through settlements of convenience obtained at the expense of public funds and which may fail to fully take into account both the local and statewide public interest. See In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

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Accordingly, and for the reasons contained herein, the Commissioner rejects the settlement herein and remands the instant matter to the Office of Administrative Law for a full plenary hearing on the merits.

IT IS SO ORDERED this 22nd day of April 1982.

COMMISSIONER OF EDUCATION

April 22, 1982

Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7911-81
AGENCY DKT. NO. 418-10/81A

"F.G." INDIVIDUALLY AND AS
GUARDIAN AD LITEM FOR "F.G.,"
Petitioner
v.
HAMILTON TOWNSHIP BOARD OF
EDUCATION, MERCER COUNTY,
Respondent.

APPEARANCES:

Robert B. Rottkamp, Esq. for petitioner (Merlino, Rottkamp & Flacks, attorneys)

Henry F. Gill, Esq. for respondent

Record Closed February 3, 1982 Decided March 15, 1982

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Action to set aside a pupil suspension allegedly effected improperly and illegally.

"F.G." (petitioner) claims his daughter ("F.G.") was improperly and illegally suspended from attendance at Hamilton High School East, also known as Joseph Steinert Memorial High School, for a period of nine days.

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The Hamilton Township Board of Education (Board) denies petitioner's claims in all respects.

I.

Few facts in this matter are uncontroverted. What is stipulated or uncontested may be stated succinctly.

Petitioner and his 15-year-old daughter attended a Steinert High School boys' varsity soccer game, not on the team's home field, on the evening of October 17, 1981. Petitioner's daughter is a member of the girls' varsity soccer team at the school. Several of her teammates and a female graduate of Hamilton High School West were in a group with petitioner's daughter. Throughout the time in question, the group stood behind a crowd-restraining rope behind the Steinert team bench. Petitioner was within five to ten yards of the group.

At some point during the game, the girls' soccer team coach, who was at the game in the capacity of a chaperone, spoke to "F.G." The young, woman graduate, subsequently identified as Lorraine Vasanski, then took "F.G.'s" handbag and left the field. Shortly thereafter, the entire group, including "F.G.," left the game.

Late on the following Monday morning, October 19, "F.G." was summoned to the office of the school's vice principal. She was informed that the vice principal had been in attendance at the October 17 game. After a discussion, the subjects which are disputed, "F.G." was informed that she was suspended from school for nine days under Discipline Rule 11, for possession or use of alcohol (R-1).

Petitioner spoke to the vice principal and principal that afternoon. The conversation yielded nothing satisfactory to him.

"F.G." was returned to classes on October 23 at approximately 11:30 a.m. by order of the Honorable William A. Dreier, J.S.C., entered in the Chancery Division of Superior Court, Mercer County. Judge Dreier's order also transferred the matter to the Commissioner of Education, pursuant to R. 1:13-4(a). The Board timely filed an answer. The matter was transmitted to the Office of Administrative Law as a contested case,

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pursuant to N.J.S.A. 52:14F-1 et seq. It was heard on January 25 and 29, and February 3, 1982, at the Office of Administrative Law, Trenton.

II.

Petitioner testified that he attended the game on October 17 with "F.G." and several of her friends; "F.G." and her group were never more than five to ten yards away from him; he saw no occurrence; that he saw "F.G." drink nothing; no school staff member spoke to "F.G."; he saw the vice principal standing well behind the spectators, and that lighting in the spectator area was poor.

Petitioner also testified that he spoke to the principal and vice principal on the following Monday after learning of "F.G.'s" suspension; he was told the suspension was for possession of alcohol at a school activity; he spoke mainly to the vice principal; the vice principal told him that he had seen petitioner at the game, but had not spoken to him; the vice principal said he saw "a girl" put something in "F.G.'s" handbag, and that the vice principal stated he could not "give a break" to "F.G." that he would not give to anyone else.

He stated further that he learned from other girls in the group that the vice principal took nothing from "F.G." or from any of them; the vice principal examined no bottle or the contents of any bottle; the vice principal said to him, "Come on, we both know what was in that bottle"; the vice principal never told petitioner anything other than that another girl put a bottle in "F.G.'s" handbag; and that the vice principal stated he had directed the girls' soccer coach, in his chaperone capacity, to approach "F.G."; the coach did so and told "F.G." to get rid of whatever did not belong in her pocketbook.

On cross-examination, petitioner testified that he did not have his eye on "F.G." at all times, but that she was in his vicinity at all times; he does not know whether she had a bottle; he assumes there was a bottle in the handbag put there by another person, but he does not assume that it contained alcohol, and to his knowledge and belief Miss Vasanski took the handbag and left the game immediately after the alleged incident.

When he spoke to administrators on the following Monday, he discussed the severity of the penalty; the vice principal conceded that "F.G." drank nothing; petitioner

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stated that Miss Vasanski said the bottle contained cider, and the principal stated he was not in a court of law and was standing by the vice principal's decision.

Petitioner also testified that school administrators told him they had been told to be aware of alcohol at school activities because of an incident a week earlier at another school in the district.

"F.G." testified. Her testimony was substantially the same as petitioner's. She specifically stated that while watching the game, she was asked for her handbag by Miss Vasanski; without turning her attention from the game, she let the bag strap slide from her shoulder; Miss Vasanski returned the handbag; "F.G." saw Miss Vasanski put nothing in the bag, and no one told her that Miss Vasanski had put anything in the bag.

Her coach then approached her and said, "Whatever you have in your purse, get rid of it," or words to that effect. Miss Vasanski then said, "Whatever she has is mine," took "F.G.'s" handbag and left the game. No school staff member said anything further to her, took possession of the handbag or asked what was in it.

On the following Monday morning, the vice principal summoned her to his office. He told "F.G." she was suspended from school for nine days. She told the vice principal to call Miss Vasanski.

The vice principal said he saw a girl drink from a bottle, that the contents of the bottle were alcoholic, and that the girl put the bottle in "F.G.'s" handbag and returned the handbag to "F.G." The vice principal referred to an alcoholic beverage; "F.G." states she referred to only "the bottle." At this point, according to "F.G.'s" testimony, the administrative assistant entered the meeting. "F.G." left to get her books and the vice principal called her mother.

On cross-examination, "F.G." testified that she did not go to the game with Miss Vasanski, but met her there; Miss Vasanski did not tell "F.G." why she wanted her bag; "F.G." saw Miss Vasanski carrying only a hairbrush; she is not positive of what Miss Vasanski put in her handbag; she at no time told the vice principal or anyone else what was in the bottle because she did not know, and she never made a statement that there was blackberry brandy in the bottle.

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Over the objection of her counsel, "F.G." was asked if she had ever before been charged with possession of alcohol. She replied that she had once before been suspended for nine days when she had admitted to appearing in school with beer on her breath.

III.

The vice principal testified that he stood some five to six yards behind the team bench during the October 17 game; he saw the group including "F.G." at about the same distance from him; he saw "F.G." remove a paper bag from her pocketbook and hand it to another girl, later identified as Miss Vasanski, who offered it to the other members of the group; all refused; he recognized the bottle as being a particular brand of liquor, but could not identify its contents.

He further stated that he then called the girls' soccer coach and directed him to speak to "F.G." After doing so, the coach reported to the vice principal that "F.G." had said the bottle belonged to Miss Vasanski.

The vice principal testified that he heard "F.G." use his name. He approached her and said, "Why not just give it to me," or words to that effect. At that point Miss Vasanski said, "I'm 19. Give the bag to me," took the handbag and left. "F.G." left the game at halftime. The vice principal did not see her again that evening.

On Monday morning, the vice principal discussed the incident with the principal. The principal instructed him to discuss the matter again with "F.G." before reaching a decision as to suspension.

The vice principal called in the administrative assistant and had "F.G." summoned to his office. He stated that "F.G." said Miss Vasanski bought the bottle, that she was old enough to do so and the bottle contained blackberry brandy. When informed of her suspension, "F.G." broke into tears and left his office. The administrative assistant followed.

On Monday afternoon, petitioner came to the school and discussed the matter with the principal and vice principal. Petitioner said nothing about the contents of the bottle, but seemed worried about the severity of the suspension.

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The vice principal also testified that petitioner telephoned him that night and asked if the vice principal had the bottle or had examined its contents. The vice principal answered no to both questions. He further testified that he did not see "F.G." drink anything at the game, or ask for, or offer the bottle; he knows petitioner, but did not speak to him; the bottle was first in a brown paper bag; Miss Vasanski took the bottle out of the paper bag, opened it, drank from it, offered it to the other girls who refused, capped the bottle, put it back in back in "F.G.'s" handbag, and returned the handbag to "F.G."

The Steinert team was not the home team. It was the responsibility of the other team, therefore, to provide security at the game. The vice principal contacted no one connected with security or the home team, but directed the girls' soccer coach to speak to "F.G." before he did.

As to the incidents of the following Monday morning, the vice principal stated that the administrative assistant was present for the entire meeting with "F.G."; other than "F.G.'s" statement at the meeting, he has no knowledge of the contents of the bottle; he did not suspend "F.G." until he had conferred with her; he did not memorialize the incident or the meeting with "F.G.," and he did not speak to "F.G.'s" parents until after the suspension was effected.

The administrative assistant testified essentially as the vice principal did concerning the events of Monday, October 19. He added only that when he followed "F.G." from the vice principal's office, she said, "It wasn't mine, I had no intention of drinking it, I don't know why I'm in trouble."

The principal testified that he has suspended other pupils under the policy in the Student-Parent Handbook (R-1); the usual penalty is a nine-day suspension; the vice principal informed him of the incident on Monday morning; he told the vice principal to attempt to gather more information and, if no facts were changed, to proceed with a nine-day suspension for "F.G."

From what the vice principal told him, the principal said it was clear to him that a policy violation had occurred. The vice principal had never said he had possession of the bottle, but did say it contained an alcoholic beverage and that he had identified the bottle. The principal stated he did not ask the vice principal how he knew what the bottle

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contained. The principal's only knowledge was the vice principal's representation. Later that day, the vice principal told the principal that "F.G." had identified the contents as blackberry brandy.

IV.

Two of the group who attended the game with "F.G." testified as rebuttal witnesses and stated that they did not see the vice principal speak to "F.G." at any time on the night of October 17.

Lorraine Vasanski testified on behalf of petitioner. She stated she went to the game alone and met "F.G." and her group there; she never took the bottle out of the bag; she asked "F.G." for "F.G.'s" handbag, placed the package in the handbag, and returned the handbag to "F.G."; the bottle contained cider from her home; she saw the coach speak to "F.G.," but heard only part of the conversation; the coach said, "Whatever is in your pocketbook," and something else which she thinks was "get rid of it."

Miss Vasanski did not speak to the coach in an attempt to clarify the situation. She left a little before halftime, immediately upon conclusion of the conversation between the coach and "F.G." She heard "F.G." say to the coach, "I can't give it to you because it's Lorraine's."

Neither party called the girls' soccer coach. The court directed his appearance as its own witness.

The coach testified that he attended the October 17 game, but in the capacity of faculty chaperone, not as coach. The vice principal stood some 10 to 15 yards behind the crowd control rope. During the second quarter of the game, the vice principal called the coach to him. The vice principal told the coach that a Steinert pupil had something—a bottle or a flask. The vice principal instructed the coach to speak to the pupil and to tell her to give the object to the vice principal.

The coach approached "F.G." and whispered words to the effect that if there is something in your purse that doesn't belong there, give it to the vice principal. He may have repeated the words. He recalls no response from "F.G." The coach then turned,

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faced the field, and walked a few steps away. He is aware of no other events, facts or discussions that evening. He did not follow up on his instruction from the vice principal because there "was no particular reason" to do so. He saw no object and overheard no conversation.

On cross-examination by petitioner's counsel, the coach stated that five or six members of his girls' team were present. He spoke to them "on and off" as he walked up and down the crowd rope as a part of his duties. He was usually about six feet from "F.G." He smelled no liquor at any time. The field was well lit, but the light diminished in all directions away from the playing area. The vice principal stood 30-45 feet from the crowd rope, which was 10-15 feet from the sideline.

On cross-examination by the board's counsel, the coach testified that the vice principal told him to tell "F.G." that if she had something she shouldn't have, the vice principal wanted her to give it to him (the vice principal.) When he relayed this to "F.G.," he thinks her response was, "What did you say?" He then repeated the message. "F.G." may have said that what she had did not belong to her.

He does not know Miss Vasanski. He observed the vice principal standing some 40-60 feet away in light less bright than in the area near the field. He also observed a group of adult males, not pupils, near the vice principal and could see that they were drinking beer.

V.

Some cases inevitably turn on the credibility of witnesses. A trier of fact may accept all of a witness' testimony, may reject it all, or may accept part and reject part, in accordance with the credibility of the witness.

Having carefully reviewed all the testimony in this matter and having observed the witnesses as they testified, I **FIND:**

1. An alcoholic beverage was in the possession of one or more persons in the group including "F.G." that attended the game on October 17, 1981, as admitted by "F.G." to the vice principal on October 19, 1981.

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2. At least at one point, the bottle or flask containing the alcoholic beverage was in the possession of "F.G."

3. There is nothing in the record to indicate that "F.G." drank any of the liquor at any time during the game.

4. Discipline policy 11 set forth in the Student-Parent Handbook of Hamilton High School East (R-1) is explicit: "possession or use of alcohol, or being under the influence of alcohol, on school property or at any school activity" is misconduct upon which a suspension may be based. [Emphasis supplied.]

5. Notwithstanding that school authorities might have handled the matter better, they did not handle it wrongly or in a way that violated the procedural due process rights of "F.G."

In his summation, petitioner asked the court, should it find for the Board, to consider the penalty invoked as harsh and excessive in relation to a "silly" incident.

The New Jersey Constitution guarantees the right to a free, public education to all children, residents of the State, between the ages of five and eighteen. N.J. Const., (1947), Art. VIII, § IV, par. 1. The statutes extend the privilege to any person over five and under twenty years of age who is domiciled within the school district. N.J.S.A. 18A:38-1.

This right is not without restriction, however. Pupils must submit to the authority of teaching staff members, must pursue their prescribed courses of study, and must comply with the rules that have been established by law for the governance of their schools. N.J.S.A. 18A:37-1. Each district board of education is empowered by N.J.S.A. 18A:11-1 to make, amend, and repeal rules for its own government and for the management of the schools of the district. The same statute authorizes each board to perform all acts and to do all things, consistent with law, necessary to proper conduct of the schools of the district.

Ordinarily, school authorities have no right of control over pupils for acts of misbehavior outside of school and school hours, but such acts may subject a pupil to

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punishment where they are detrimental to good order and to the best interest of the school or where they adversely affect school discipline. 79 C.J.S., Schools and School Districts, § 496 at 445.

The home school in an athletic contest has a right to expect the visiting school to take reasonable steps to insure that the visiting team and visiting spectators comport themselves appropriately. The assignment of faculty chaperones to the October 17 game by the visiting school is adequate showing that the administration of Hamilton High School East takes the responsibility seriously.

In addition to the findings set forth above, I further **FIND:**

6. "F.G." was afforded all due process rights required in the matter of her suspension. She faced her accuser, knew the nature of the accusation, and had an opportunity to present her side of the story. Goss v. Lopez, 419 U.S. 565, 581 (1975).

7. The actions of the board and its agents were reasonable in that both the disciplinary rule and the application of it in this matter are directly related to the good order and best interest of the school and to school discipline generally.

8. The actions of the board and its agents were proper in that the board has limited jurisdiction over pupil spectators at school events, whether at home or away.

9. The penalty in this matter was not unduly severe as related to the infraction.

In consideration of the foregoing, and having considered all arguments of law put forward by the parties, I **CONCLUDE** that the petition of appeal is without merit. Accordingly, the petition shall be and hereby is **DISMISSED.** It is so **ORDERED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not

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so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

15 MARCH 1982
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

17 March 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

19 March 1982
DATE

Elizabeth Rogers Gr
OFFICE OF ADMINISTRATIVE LAW

fms

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DOCUMENTS IN EVIDENCE

R-1 Student-Parent Handbook 1981-82, Hamilton High East, Joseph Steinert Memorial, pp. 14-16

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F.G., individually and as guardian ad litem for F.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER 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 Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

May 3, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. —
AGENCY DKT. NO. 252-10/74

FERDINAND A. IMPROTA,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY,
Respondent.

APPEARANCES:

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

Frank E. Catalina, Esq. for respondent (Krieger & Chodash, attorneys)

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

Petitioner, a teacher with a tenure status in the employ of the Weehawken Board of Education (Board), claims the Board wrongfully placed him on an unpaid, involuntary leave of absence from September 1, 1974 through February 27, 1978, contrary to N.J.S.A. 18A:16-2 et seq. Petitioner seeks compensation for the salary he claims he was improperly denied, together with compensation for health insurance premiums he paid, and health expenses he incurred. Finally, petitioner seeks to have the Board make contributions on his behalf for that period to the Teachers' Pension and Annuity Fund.

Though filed before the Commissioner of Education for adjudication prior to the existence of the Office of Administrative Law, upon its creation, the matter was brought forward for disposition by the undersigned. The parties agree that the issues presented may be decided on the record developed, which includes the administrative

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record here and relevant portions of a record simultaneously developed in the United States District Court.

The issue presented is whether petitioner's statutory due process rights were violated by the Board when, under the provisions of N.J.S.A. 18A:16-2 et seq., it placed petitioner on unpaid, involuntary sick leaves for 1974-75, 1975-76, 1976-77 and from September 1, 1977 through February 27, 1978.

Background Facts

Petitioner began employment as a teacher with the Board during September 1958 and continued that employment each academic year thereafter through the completion of the 1966-67 year. Petitioner may have been on sick leave from September 1960 through June 1961 and from November 1962 through May 1963, as he testified in federal district court (Vol. V-14) (Vol. II-8), but the Board's records do not reflect such a leave for him at that time (C-5). From the 1967-68 year through the end of the 1973-74 year, a total of seven academic years, petitioner was on sick leave for four and one-half years. He reported to his teaching duties for two and one-half years during those seven years. There is no dispute that each sick leave petitioner took, from the time of his initial employment in 1958 through the sick leave he took for the whole of 1973-74, was requested by him of the Board and that each such request was approved by the Board. There is also no dispute that petitioner suffered various physical ailments during that time, including pseudopolyps, hemorrhagic gastritis and Crohn's disease. In fact, he underwent a subtotal colostomy and a permanent ileostomy.

Prior to the completion of the 1973-74 sick leave, petitioner advised the then acting superintendent of schools that he was fully recovered from his medical problems and was willing and capable of returning to his teaching position for the 1974-75 academic year. The acting superintendent advised petitioner by letter dated June 3, 1974, that:

> The Weehawken Board of Education has instructed me to inform you that, before your request to return to your full time teaching duties for the 1974-75 school year can be considered, you must first submit a thorough and complete medical report from your physician(s), including a statement that you are capable of returning and fulfilling the duties and responsibilities of a teacher. This report should be sent to this office by June 30, 1974.

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> Upon receipt of this report you will further be required to be examined by physicians selected and paid for by the Weehawken Board of Education. These examinations will take place during July 1974 and thereby, provide the Weehawken Board of Education sufficient information to act on your request to return to full time teaching for the 1974-75 school year. . . ." [P-2]

Petitioner's physician submitted the following letter, dated June 11, 1974, to the acting superintendent on behalf of petitioner in compliance with the request of the Board:

> Mr. Improta has been under my care since 1958 for ulcerative colitis and as you are probably aware has undergone several operative procedures, the last of which was a two stage total colectomy. The final procedure was completed in May, 1973.
>
> Mr. Improta has tolerated all procedures extremely well and seems to have adjusted to a permanent ileostomy quite well. At present his general condition is good and I do believe that he is physically and mentally adjusted and capable of returning to his teaching duties on a full-time basis for the 1974-75 school term. [P-1]

The acting superintendent then advised petitioner, by letter (P-3) dated July 8, 1974, that arrangements had been made for him to be examined by physicians selected and paid for by the Board. These examinations were conducted during the last two weeks of July 1974, and the resulting reports (R-1, R-2) were submitted to the superintendent. The Board had selected and employed a superintendent of schools.

The superintendent advised petitioner, by letter dated August 20, 1974, that:

> I have received the results of your examinations conducted by Dr. Gerta Schwarz and Dr. Henry J. Schwarz, Jr.
>
> The examinations indicated certain physical and mental abnormalities; therefore, the Weehawken Board of Education considered you to be ineligible to return to your teaching duties, until proof of satisfactory recovery 18A:16-4, is furnished to the Board of Education.
>
> I am recommending that you be continued on sick leave, without pay, at the next Board of Education meeting. [P-4]

Thereafter, the superintendent advised petitioner, by letter dated August 28, 1974, that:

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> At a recent meeting of the Board of Education the members agreed to continue your sick leave of absence, without pay, for the 1974-75 school year.
> All insurances, hospitalization, pension fund and other items shall be paid by you.
>
> The members of the Weehawken Board of Education and I wish you the best of good luck. [P-5]

The Board's physician reported his conclusion that petitioner "is in remarkably good health and [I] feel that he could do the job assigned [to a] teacher without any limitations" (R-1). The Board's psychiatrist, however, reported to the Board her conclusion that petitioner manifests paranoia characterized by a feeling of grandeur, in addition to petitioner's propensity to be a "trouble maker" and "a crank letter writer" (R-2). The recommendation of the psychiatrist to the Board with respect to whether petitioner was well enough to return to teaching reads as follows:

> [Petitioner's] condition is neither physically nor emotionally well enough to return to teaching. . . . [R-2]

Petitioner was not allowed the opportunity the review either the physical or psychiatric report; nor did he learn their contents prior to the time the Board placed him on involuntary sick leave. Petitioner remained on involuntary sick leave between and including 1974-75 and February 27, 1978, when the Commissioner ordered his reinstatement to the Board's employ. (See: Ferdinand Improta v. Weehawken Bd. of Ed., 1978 S.L.D. _____ (decided on motion Feb. 27, 1978).

Procedural History

The following recitation of the matter's procedural history is substantially as set forth in petitioner's brief.

The petition was filed with the Commissioner during October 1974. Two successive amended petitions were filed on February 5, 1975, and August 12, 1975, respectively. The Board filed an answer to the petitions on November 7, 1974. The petitions alleged that the Board violated the provisions of N.J.S.A. 18A:16-2 et seq., and petitioner's rights to due process of law emanating therefrom, in respect to its action of placing him on an involuntary leave of absence. Petitioner demanded reinstatement to his position of employment, together with all back pay and emoluments withheld from him.

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A conference of counsel was held on Janaury 7, 1975, with the agreements reached therein being incorporated into a conference of counsel agreement dated January 14, 1975.

Petitioner subsequently moved for an Order requiring the Board to resume his salary payments, pursuant to N.J.S.A. 18A:6-14, while he remained on involuntary leave and while the matter was before the Commissioner. The Commissioner denied the motion to resume salary payments. Ferdinand A. Improta v. Bd. of Ed. of the Tp. of Weehawken, Hudson County, decided on Motion, November 1, 1976.

A motion for reconsideration was then filed by petitioner on November 16, 1976. The motion related to the scope of the plenary hearing which was to be held. On December 8, 1976, the Commissioner affirmed his earlier decision in regard to reinstatement, but clarified that the hearing ordered "shall be consistent with the issues of the matter agreed to at the conference of counsel conducted on January 7, 1975." Ferdinand A. Improta v. Bd. of Ed. of the Tp. of Weehawken, Hudson County, decided on Motion, December 8, 1976.

Between the time petitioner filed his motion for immediate resumption of salary payments and the time of oral arguments on the motion, petitioner initiated an action before the United States District Court for the District of New Jersey. The complaint was filed on February 19, 1975, and stemmed from the same nucleus of operative fact as the petition herein. Petitioner therein alleged that the Board had denied him substantive and procedural due process of law accorded him by the Fourteenth Amendment to the United States Constitution and 42 U. S. C. § 1983.

On June 11, 1975, the Court (Honorable Herbert J. Stern presiding) ordered the Board to provide petitioner a hearing on its original determination to place him on involuntary leave of absence. The Order further provided that the present matter could proceed unabated before the Commissioner. The federal action was then dismissed without prejudice. Ferdinand A. Improta v. Bd. of Ed. of the Tp. of Weehawken, et al., Docket No. 75-283, U.S. District Court (D. N.J.), decided June 11, 1975.

The Board conducted the court-ordered hearings on August 7 and September 11, 1975. Petitioner took the position that the scope of the Board hearing did not comport with Judge Stern's directive; consequently, petitioner filed a second federal action on August 6, 1976.

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In the meantime, hearing dates on the petition before the Commissioner were scheduled for April 5 and 6, 1977. These dates were adjourned because of the unavailability of certain individuals whom petitioner had been granted the right to depose.

While the administrative discovery proceedings were proceeding, the parties in interest again returned before Judge Stern in the United States District Court. The purpose of this appearance was to have Judge Stern select a psychiatrist who would examine petitioner to establish his mental competency to return to his teaching duties. An Order was signed by Judge Stern on May 20, 1977, by which Dr. David J. Flicker was selected as the examining psychiatrist who was to report his findings directly to the Commissioner. Ferdinand A. Improta v. Bd. of Ed. of the Tp. of Weehawken, et al., Docket No. 76-1529, U.S. District Court (D. N.J.), May 20, 1977.

Dr. Flicker examined petitioner on August 26, 1977, and filed a report with the Commissioner on September 9, 1977. Immediately thereafter, petitioner moved for immediate reinstatement to his teaching position, based on Dr. Flicker's examination of him and the conclusion set forth in the report that his mental condition was such that he could perform teaching duties.

It was on the basis of Dr. Flicker's report that the Commissioner ordered the reinstatement of petitioner to his teaching position, 1978 S.L.D. _____, supra. Thereafter, the first day of the administrative hearing was scheduled and proceeded as scheduled on May 23, 1978. The matter, though scheduled for May 24, 1978, was not heard again in the administrative forum until May 1980.

In the meantime, petitioner's claim under 42 U. S. C. § 1983 was tried to a jury in federal district court. The trial resulted in a jury deadlock on or about March 6, 1980. That matter has been reassigned and is currently waiting for trial dates.

On May 19, 1980, the administrative hearing into petitioner's complaint resumed and the parties agreed that the matter may be decided upon: (1) the administrative record developed thus far; (2) certain exhibits and seven volumes of transcripts of testimony in the federal proceeding; (3) the Board's record of petitioner's attendance in its employ from September 1958 through June 1979; and (4) at the Board's request, respective briefs of counsel to be filed.

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Facts of Record in Addition
to Stated Background Facts

During the course of petitioner's active employment with the Board, his performance of his teaching duty was adjudged to be competent. There is no evidence before me even to suggest that petitioner's teaching performance was less than satisfactory. Petitioner, while on sick leave during 1974, developed an interest in the political and social issues of the day, including but not limited to the participation of the United States in the Vietnam war, the defense posture of the United States, and the manner of reporting the news by the media. Petitioner expressed his views on these topics, in writing, on January 13, 1974, to his congressional representative. The congressman's assistant forwarded a copy of petitioner's letter to the Mayor of Weehawken, with his own cover letter, and advised the Mayor:

> I am very much disturbed by the writer's accusations against [the congressman], but America guarantees the right of free speech to crankpots as well as college professors. Thus, letters like this which seem to come when the moon is full are part of the Congressional process.
>
> What is disturbing is his suggestion that he is a teacher in the Weehawken school system and the implied threat that he will use his public position as an anti-Daniels pulpit. Disturbing as this might be, even more disturbing is the possibility that students might listen to him. If this is so, then the Weehawken school system has really failed its people. [P-13]

Two months later, petitioner advised the acting superintendent that he was prepared to resume his teaching duties the following September (P-16). The assistant superintendent reported his receipt and the contents of the letter to the Board at a meeting held on or about May 14, 1974. The Board determined at that meeting:

> The Board of Education, over a period of time, has granted [petitioner] seven sick leaves of absence. Mr. Coyle moved, seconded by Mr. Willmott and unanimously carried that before returning to his teaching duties, [petitioner] shall submit a certificate from his doctor stating that he is able to return to teaching, and also [petitioner] shall be examined by doctors chosen by the Board for a physical examination and neuro-psychiatric examination [P-17, p. 2].

The acting superintendent advised petitioner, by letter dated June 3, 1974, of the Board's determination in respect of his return to his teaching duties in September

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1974. The assistant superintendent advised petitioner only that once he submitted his physician's report, he would "be required to be examined by physicians selected and paid for by the Board" (P-18). No mention was made, nor is there any evidence before me to show that petitioner was ever advised that he was required to undergo a psychiatric examination.

Petitioner submitted the certificate of physical fitness from his physician on or about June 11, 1974 (P-12). The acting superintendent advised petitioner, by letter dated July 8, 1974, that appointments had been made for him with two physicians selected by the Board (P-20). The letter did not advise petitioner of the specialities of the physicians, nor did it advise as to the form of the examinations. Petitioner made several unsuccessful attempts, by way of telephone calls and personal visits, to discuss the matter of the examinations with the acting superintendent.

Petitioner was examined by Dr. H. J. Schwarz, a specialist in internal medicine, who reported to the Board that petitioner "is in remarkably good health and [I] feel that he could do the job of assigned teacher without any limitations" (P-26). Petitioner was examined by Dr. Gerta Schwarz, a psychiatrist, on July 30, 1974, who reported to the Board that "on account of [petitioner's] strong beliefs, this man could be dangerous in an official position such as a teacher. He is grandiose, paranoid, a trouble maker and a crank letter writer" (P-75). Dr. Schwarz's, the psychiatrist's, report states, on its face, that the contents of the report are not to be read, or shown to petitioner.

Petitioner, it is noted, learned that the Board required a psychiatric evaluation of him when he reported to Dr. Gerta Schwarz's office and inquired of her the nature of the examination.

The Board's then newly employed superintendent thereafter wrote to Improta on August 20, 1974, informing him that (a) the examinations indicated "certain physical and mental abnormalities that;" (b) he was ineligible to return to his teaching duties until proof of satisfactory recovery was furnished to the Board; and that (c) he would recommend that he be continued on sick leave, without pay (P-19). The Board resolved on August 26, 1974, to continue petitioner on sick leave, without pay. All insurance, hospitalization, pension and other emoluments were also ceased (P-20). The Board never asked for another psychiatric opinion of petitioner.

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In addition to these facts just set forth, together with the prior background facts, the following facts are established in the record:

1. The Board did not, at any time, advise petitioner of the reasons why it requested him to submit to a psychiatric examination.

2. The request by the Board for petitioner to have a physical examination is, in the circumstance in which petitioner was seeking to come off two full years' sick leave, reasonable, and prior notice as to reasons was given (P-18). No nexus is found between the reasons for petitioner's having been on sick leave (physical condition) and the Board's directive that he be examined by a psychiatrist before he resume his duties.

3. The Board, through the recommendation of its newly appointed superintendent, accepted the recommendation of Dr. Gerta Schwarz, psychiatrist, that petitioner should not be returned to his teaching duties. Dr. Schwarz's report, obviously, was more persuasive to the Board than the reports in respect to petitioner's physical health.

4. The Board, at no time between August 1974 and February 1978, when petitioner was ordered reinstated by the Commissioner, directed or requested another psychiatric evaluation of petitioner to be completed.

7. The Board relied on Dr. Gerta Schwarz's psychiatric evaluation submitted in August 1974, to keep petitioner on an unpaid, involuntary sick leave for 1974-75, 1975-76, and 1976-77 through February 1978.

8. The Board has not filed tenure charges at any time against petitioner.

Discussion of Law

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.,

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124 N.J. Super. 203 (Ch. Div. 1973); Gish v. Bd. of Ed. of Paramus, 145 N.J. 96 (App. Div. 1976); cert. den. 98 S. Ct. 434, 233 U.S. 879 (1977).

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, St. Bd. 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.

Initially, it is to be noted that Improta provided the Board with a certificate of physical fitness on June 11, 1974 (P-12). This should have been sufficient to remove any doubts the Board may have had regarding his physical ability to return to his teaching duties. It demanded another physical examination by its selected physician, Dr. H. J. Schwarz. Dr. H. J. Schwarz reached the same conclusion as Dr. DeMarco, petitioner's physician.

The Board went further. It required that petitioner submit to a psychiatric examination before Dr. Gerta Schwarz. It did so despite the undisputed testimony of the acting superintendent that he had absolutely no reason to question petitioner's competency to perform teaching duties.

Clearly, the only possible reason which may be inferred from the record for the Board's action, as documented through hearing testimony, was its knowledge that Improta chose to exercise his fundamental constitutional right to speech, through communicating with his congressman and the news media, while on sick leave. One would be hard put, however, to suggest that the exercise of these rights signifies harmful, significant deviation from normal mental health. See, e.g., Pickering v. Bd. of Ed. of Tp. H. S. Dist. 205, Ill., 391 U.S. 563 (1963); Tinker v. Des Moines Independent Com. Sch. Dist., 393 U.S. 503 (1969).

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Based on the record before me, I **CONCLUDE** that the Board violated petitioner's statutory right to obtain reasons for the imposition of the condition of a psychiatric evaluation from a physician of its choosing, and violated his right to select his own physician for such an examination, with its approval, even if the Board provided him with reasons.

Secondly, I **CONCLUDE** that even if the Board afforded petitioner the reasons and even if Dr. Schwarz were the psychiatrist chosen to conduct the examination, a review of her total report, together with her deposition filed in the matter, does not support the Board's determination to place petitioner on an unpaid, involuntary leave of absence without his opportunity to see and to read the report. Recalling that petitioner was coming off two full years' sick leave for physical problems, he complied with the acting superintendent's request, the Board's agent in such matters, by filing a certificate of his fitness from his physician. The Board's own physician certified petitioner's state of health. There is no nexus between the reason why petitioner was on sick leave and the Board's request for a psychiatric evaluation.

The inference that the Board sought a psychiatric evaluation because of petitioner's interest in political and social issues of the day and because of his letter writing, which strongly expresses his views, is not equivalent to the required standard that a teacher who shows significant deviation from normal physical or mental health may be required to undergo a psychiatric examination. N.J.S.A. 18A:16-2. 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). Boards need not wait until the harm occurs; a reasonable possibility of its occurrence warrants such action.

Here, I **FIND** no basis upon which to conclude that the Board had a basis to foresee a reasonable possibility of harm occurring from petitioner's emotional state to (1) require him to undergo a psychiatric evaluation, or (2) to place and continue him on an unpaid, involuntary leave of absence for 1974-75. Such action by the Board, I **CONCLUDE,** is an abuse of its discretion to the detriment of petitioner.

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Because petitioner was continued on an unpaid, involuntary leave of absence for two and one-half years after 1974-75, without a renewed psychiatric evaluation, his continuance on such leave is seen as a continuing abuse of the Board's discretion to the detriment of petitioner.

In sum, I **CONCLUDE** that the Board violated petitioner's statutory due process rights by not affording him the reasons why it directed him to undergo a psychiatric examination. I **CONCLUDE** that the Board, in the first instance, had no basis upon which to find that petitioner showed a deviation from normal mental health in order for it to secure such an examination. I, accordingly, **CONCLUDE** that the Board's determination to place petitioner on an unpaid, involuntary leave for 1974-75, and each relevant year thereafter, was an abuse of its discretion to the detriment of petitioner.

Relief

Counsel to the parties have stipulated here, as they did in federal district court, that petitioner's compensatory damanges are as follows:

(a) Back salary - $59,513 less $3,600 from Social Security payments (Vol. 6-646)

(b) Alternate Health Insurance Premiums - $845.95 (Vol. 7-100)

(c) TPAF contribution (Vol. 2-102)

(d) Additional Major Medical Insurance expenses $585.95 (Vol. 6-228)

The Board is directed to compensate Ferdinand Improta the amount of $55,913, together with the amounts of $845.95 and $585.95, or the total sum of $57,344.90. Such payment shall be made within 90 days from the date of this decision. The Board is also directed to arrange with the secretary, Teachers' Pension and Annuity Fund, so that it may make contributions on behalf of petitioner for the time it has been declared here that it abused its discretion by placing and maintaining him on an unpaid, involuntary leave of absence. Petitioner, of course, is responsible for making his contributions for the same period of time.

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AGENCY DKT. NO. 252-10/74

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

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

February 19, 1982
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

February 23, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 26, 1982
DATE

Ronald L. Tarkenton
OFFICE OF ADMINISTRATIVE LAW

bm

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DOCUMENTS IN EVIDENCE

P-1 Letter, dated June 11, 1974, to acting superintendent from S. V. DeMarco, M.D., petitioner's physician

P-2 Letter, dated June 3, 1974, to petitioner from acting superintendent

P-3 Letter, dated July 8, 1974, to petitioner from acting superintendent

P-4 Letter, dated August 20, 1974, to petitioner from superintendent

P-5 Letter, dated August 28, 1974, to petitioner from superintendent

P-7 Handprinted letter, dated December, 1973, to acting superintendent from petitioner

P-8 Letter, dated December 13, 1973, to petitioner from acting superintendent

P-10 Minutes, Board meeting held May 14, 1974

P-11 Extract of minutes of Board meeting held December 11, 1973

R-1 Medical report dated July 15, 1974, to acting superintendent from Henry J. Schwarz, M.D., in regard to petitioner's physical health

R-2 Psychiatric report dated August 12, 1974, to superintendent of schools from Gerta Schwarz, M.D., in regard to petitioner's psychiatric health

C-1 Order, dated June 11, 1975, by Herbert J. Stern, U.S.D.J., in regard to the duty of the Board to afford petitioner a hearing

C-2 Letter, dated March 12, 1975, to petitioner from secretary, Teachers' Pension and Annuity Fund

C-3 Letter, dated November 4, 1974, to superintendent from Board counsel

C-4 Report, dated August 26, 1977, to the undersigned (under Judge Stern's Order) from David J. Flicker, M.D., in regard to petitioner's psychiatric health

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C-5 Board's record of petitioner's attendance at his teaching duties between 1958-59 and 1978-79

Exhibits From Federal Proceeding

Volumes 1 through 7 - Transcripts of testimony taken at petitioner's 42 U. S. C. 1983 claim in United States District Court

P-12 Handwritten letter, dated January 13, 1973

P-13 Letter, dated January 16, 1974

P-14 Letter, dated January 16, 1974, with notation

P-15 Letter, dated January 17, 1974

P-16 Handwritten letter, dated April 5, 1974

P-17 Minutes, Board meeting held May 14, 1974

P-18 Letter, dated June 3, 1974

P-19 Letter, dated June 3, 1974

P-20 Letter, dated July 8, 1974

P-21 Letter, dated August 16, 1974

P-22 Letter, dated August 20, 1974

P-23 Minutes, Board meeting held August 26, 1974

P-24 Letter, dated August 28, 1974

P-25 Psychiatric Report, dated August 12, 1974

P-26 Physical health report, dated July 15, 1974

P-27 Handwritten letter dated, December 10, 1973

R-3 Minutes, Board meeting held February 19, 1974

R-4 Minutes, Board meeting held February 19, 1974

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FERDINAND A. IMPROTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

For the Respondent, Krieger, Ferrara, Feinsilver, Flynn & Catalina (Frank E. Catalina, Esq., of Counsel)

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

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

Firstly, the Commissioner observes that two Orders of Extension have been set down in this matter such that the time limit for Department review and rendering a final decision is extended to May 3, 1982.

Respondent's primary exceptions to the initial decision by the Honorable Daniel B. McKeown, ALJ raises the question, inter alia, of credibility judgments by Judge McKeown not favorable to the Board. The Commissioner finds no merit in such exceptions. Where conflicting evidence is offered on any issue and there is sufficient evidence contained in the record to reasonably support the findings made, the Commissioner will defer to the judgment of the hearer on questions of credibility since he/she had the opportunity to hear and observe the witnesses and so was in a better position to assess credibility. Cf. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976)

The Commissioner observes that much of the primary exceptions of the Board stresses its selective affirmation of the negative findings about petitioner by its psychiatrist as opposed to the favorable evaluation by petitioner's physician (P-1) and the Board's physician (R-1). Respondent excepts to the use of Kochman, supra, and Gish, supra, by Judge McKeown as being

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apposite to the present matter. The Commissioner cannot agree and finds the aforementioned cases directly relevant to the matter presently controverted.

Petitioner's reply exceptions refute those of respondent and affirm the initial decision. The Commissioner agrees with petitioner. The Commissioner notes the filing by respondent of a reply to the reply exceptions for which there is no provision in law and which accordingly were not considered.

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

The Commissioner finds and determines that petitioner herein shall be accorded by the Board the sum of $57,344.90 as detailed by the Court in its paragraph entitled, "Relief", ante.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 3, 1982

Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3069-80
AGENCY DKT. NO. 202-4/80A

RUTHERFORD EDUCATION ASSOCIATION, CAROL A. FROEHLICH, DAVID SKIDMORE and JOANNE ROSS,
Petitioners
v.
RUTHERFORD BOARD OF EDUCATION,
Respondent

APPEARANCES:

Gregory T. Syrek, Esq., on behalf of petitioner
(Bucceri & Pincus, attorneys)

H. Ronald Levine, Esq., on behalf of respondent

Record Closed February 8, 1982 Decided March 19, 1982

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

This matter concerns a request by the named petitioners that the Commissioner of Education find they held tenurable employment while with the Rutherford Board of Education, and that they receive all the emoluments attached to said employment.

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PROCEDURAL HISTORY

On April 15, 1980 petitioners filed a verified petition with the Commissioner of Education asking the Commissioner to issue an order directing respondent to compensate them on a basis equal to that of other regular teachers with similar qualifications and experience, grant an award of back pay, grant appropriate sick leave time and find petitioners to have been engaged in tenurable employment. Petitioners also asked the Commissioner to direct respondent to cease and desist from discriminatory treatment of S.C.E. and Title I teachers and to declare the Board policy which is at issue, to have been illegal as an attempt to circumvent the tenure laws. The Rutherford Board of Education (hereinafter Board), in turn, denied the allegations of the petition and argued that it should be dismissed because S.C.E and Title I teachers do not acquire tenure by virtue of their service to the school system. 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 September 4, 1980 the first of two prehearing conferences was held and it was determined that the following legal issues had to be resolved:

1. Whether or not the individual petitioners, while employed as State Compensatory Education and/or Title I teachers, are entitled to the relief requested, which is set forth in Paragraph 10 of Count I of the verified petition and in the request at the conclusion of Count I of the verified petition?

2. Whether or not the Board acted pursuant to a policy which is in contravention of the tenure laws, when it refused to employ Title I and/or State Compensatory Education teachers for a period of three years plus one day, which would entitle them to tenure?

3. Even if the Board determined not to employ said teachers for the period which would grant them tenure, whether or not there is any law to compel a board of education to retain said teachers, who do not have tenure, for any reason?

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4. The Board reserved the right to raise the issue of whether the Rutherford Education Association (hereinafter REA) is a proper party to this action and whether it represents the individually named petitioners? It was the position of the Board that the R.E.A. was not the bargaining unit representing petitioners, inasmuch as the matter had been previously mentioned in negotiating sessions and not acceded to. However, for the purposes of this action, and providing it would furnish no precedent for any future actions and would not be deemed to be an admission of any kind for any purpose, the Board agreed not to raise this issue if attorneys for petitioners so stipulated, which they did.

Both parties agreed to put the matter on the inactive list until the Appellate Division rendered a decision in the case of Spiewak et als. v. Board of Education of Rutherford, Dkt. No. A-4853-79, which involved a determination of the status of certain Title I and/or Supplemental teachers employed by the Board in regard to tenure and other benefits. An order was entered on October 27, 1980, putting the matter on the inactive list for a period of six months. Both parties agreed to be guided by the determination of the Appellate Division in Spiewak. On May 14, 1981 when it was determined that Spiewak, et als. v. Board of Education of Rutherford was still pending before the Appellate Division, a second order was entered by this judge on May 14, 1981, designating this case "inactive" for an additional period of six months. On June 22, 1981 the Appellate Division issued its decision in Spiewak et als. v. Board of Education of Rutherford, see 180 N.J. Super. 312 (App. Div. 1981), and although counsel for the Board asked this matter be kept on the inactive list until all appeals in Spiewak were concluded, on July 16, 1981 this judge ordered that the within matter be removed from the inactive list and placed on the active calendar.

A second prehearing conference took place on September 9, 1981. The parties agreed that the nature of the proceedings and the legal issues set forth above remained the same. Additional legal issues were introduced by respondent:

1. Whether or not the retroactive granting of tenure to petitioners in this matter will interfere with a thorough and efficient education of the children of Ruterford?

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2. Laches.

3. Estoppel.

The hearing took place on December 1 and 2, 1981 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. Simultaneous briefs were filed on January 8, 1982 and response briefs were filed by petitioners and respondent on January 22, and January 27, 1982, respectively. No further papers were filed during the 10-day response period and the record closed on February 8, 1982.

STIPULATIONS OF FACT

Counsel entered into pertinent stipulations of fact in regard to the employment history of petitioners, which was not in controversy. They are:

1.(A) Carol Froehlich holds a valid teaching certification issued by the State Board of Examiners. She is certified as an Elementary School Teacher pursuant to a certification issued in June 1972.

(B) David Skidmore holds a valid teaching certification issued by the State Board of Examiners. He is certified as a Secondary School Teacher of Mathematics pursuant to a certification issued in June 1967.

(C) Joanne Ross holds a valid teaching certification issued by the State Board of Examiners. She is certified as an Elementary School Teacher and a Nursery School teacher, pursuant to a certification issued in June 1976.

2.(A) Carol Froehlich has been employed by the Board during the following periods of time and in the corresponding positions of employment:

October 31, 1977 - June 26, 1978 (S.C.E. - Reading/Math)

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September 1978 - June 1979 (S.C.E./Title I - Reading/Math)
September 4, 1979 - June 20, 1979 (Title I - Reading)
1980-81 school year (5th grade teacher under contract)
1981-82 school year (5th grade teacher under contract)

(B) David Skidmore has been employed by the Board during the following periods of time and in the corresponding positions of employment:

September 22, 1977 - June 26, 1978 (S.C.E. - Math)
September 1978 - June 1979 (S.C.E. - Math)
September 4, 1979 - June 19, 1980 (S.C.E. - Math)
September 1980 - June 1981 (S.C.E. - Math)
September 1981 - present (S.C.E. - Math)

(C) Joanne Ross was employed by the Board during the following periods of time and in the corresponding positions of employment:

September 1975 - February 1977 (substitute teacher)
(Respondent disputes this term of substitute service by Ross)
February 4, 1977 - June 1977 (S.C.E. - Math)
September 6, 1977 - March 31, 1978 (S.C.E. - Math)
April 3, 1978 - June 26, 1978 (substitute teacher)
September 1978 - June 1979 (S.C.E. - Math)
September 4, 1979 - April 30, 1980 (S.C.E. - Math)
May 19, 1980 - June 12, 1980 (substitute teacher)

She no longer is employed by the Board.

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3. A valid certification as a teacher is required for each position of employment set forth in Stipulation #2. Each petitioner possessed the necessary certification of such employment.

4. For the 1977-78, 1978-79 and 1979-80 school years, the petitioners received $7.00 per hour of employment in S.C.E. and Title I. For the 1980-81 school year, this amount has been increased to $8.00 per hour. [sic] As opposed to those considered by the Board to be tenured or eligible for tenure.

5. For the 1980-81 school year, Carol Froehlich was placed on Step 4, M.A. level 3 of the salary guide. Such placement represents credit for three (3) years of classroom teaching experience in another school district. She did not receive credit for prior S.C.E. or Title I teaching experience with the respondent. For the 1981-82 school year, she was placed on Step 5, M.A. level 3 of the salary guide.

6. While employed as Title I and S.C.E. teachers, the petitioners were not employed pursuant to contracts of employment with the respondent.

7. While employed as Title I and S.C.E. teachers, the petitioners have not received sick leave benefits. They are not compensated for days on which they are absent due to illness.

8. The respondent does not consider Title I and S.C.E. employment to be tenurable.

9. Additional stipulations:

   A. Petitioners were not required to sponsor co-curricular activities.

   B. Petitioners were not required to coach inter or intra sports events.

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C. Petitioners were not required to accept home-room assignments.

D. Petitioners were not required to attend "back-to school nights."

E. Petitioners, while employed as Title I and S.C.E. teachers, did receive health benefits, Blue Cross, Blue Shield, Rider J, Major Medical fully paid, but not dental benefits or other benefits afforded to regularly employed teachers.

F. Petitioners were not represented by the R.E.A. for collective negotiations.

G. No proceeding, prior to the within proceeding, was ever filed by petitioners in order to enforce their "rights" to "fringe benefits" prior to the within proceeding.

H. Petitioners, while employed as Title I or S.C.E. teachers, would generally have a maximum number of six students, and an average of four.

EVIDENCE

Counsel stipulated to the entry of the following documents into evidence:

J-1 1977-78 school calendar
J-2 1978-79 school calendar
J-3 1979-80 school calendar
J-4 1980-81 school calendar
J-5 Froehlich certification (Elementary School Teacher)
J-6 Skidmore certification (Secondary School Teacher of Mathematics)

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J-7 Ross (nee Gempp) certification (Elementary School Teaher; Nursey School)

J-8 Froehlich time sheets - 1979-80; 1978-79 (missing); 1977-78 (incomplete)

J-9 Skidmore time sheets - 1979-80; 1978-79 (missing); 1977-78

J-10 Ross time sheets - 1979-80; 1978-79 (missing); 1977-78

J-11 Ross, Skidmore and Froehlich salary summaries for 1977-78, 1978-79 and 1979-80. (N.B. monthly totals correspond with preceding month on time sheets set forth in (h), (i) and (j)).

J-12 Minutes of Board meetings appointing Froehlich, Ross and Skidmore

a. September 12, 1977
b. October 10, 1977
c. November 14, 1977
d. March 13, 1978
e. September 11, 1978
f. September 10, 1979
g. March 10, 1980
h. April 14, 1980
i. June 9, 1980

J-13 Undated letter of Joseph R. Loffredo to parents.

In addition, the following items were introduced into evidence on behalf of petitioners:

P-1 Letter from Board to Ross re reasons for dismissal

P-2 Skidmore's teaching schedule - February 1980 to end of March 1980

P-3 Letter from Board to Skidmore, re 1980-81 school year

P-4A Letter from Superindent to Froehlich, April 18, 1980

P-4B Letter from Superintendent to Froehlich, undated

P-5 Froehlich's schedule, 1979-80

P-6 Froehlich's schedule, 1979-80

P-7 Memo, April 17, 1979

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P-8 Memo re workshop, October 4, 1978
P-9 Memo, November 9, 1978
P-10 Memo, May 18, 1978
P-11 Letter to Froehlich, August 24, 1979
P-12 Letter to Froehlich, June 8, 1978
P-13 Memo, November 8, 1978
P-14 Memo, November 2, 1979
P-15 Memo, October 24, 1978
P-16 Memo, November 1, 1978
P-17 Letter to Froehlich, April 29, 1980
P-18 Memo, March 3, 1978

TESTIMONY

Petitioners Froehlich, Skidmore and Ross testified on their own behalf, only in regard to the matters to which counsel stipulated but, more importantly, in regard to the factual issues which remained in controversy, namely the terms and conditions of the employment (as opposed to the stipulated employment history). The real nub of this case turns on the inferences and ultimate conclusions that are to be drawn from the stipulated facts and the other facts to be found by this court, since this judge must determine the character of petitioners' employment after examining its terms, conditions and duties.

Ms. Froehlich's relevant testimony made it clear that beginning with her second year of employment with the Board, she began teaching either one day before the regular school year or on the same day. She was paid for four and one-half hours a day of student contact and for one-half hour of preparation time. She was observed by her superiors two or three times a year and received written reports of said observations, although she never received a yearly general evaluation. She did not have to reapply for employment each year, as she was told at the end of the school year that if funding was approved, she would be back. She would ask every year if she was coming back.

The court finds it pertinent that Ms. Froehlich believed she was earning time for tenure in her job as a S.C.E. and Title I teacher, as a result of her initial interview with Mr. Loffredo, the Administrative Assistant to the Superintendent of Schools in Rutherford, who coordinated the Title I and S.C.E. programs, and whose duties in that

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regard included hiring teachers for those positions. Mr. Loffredo had told her that the job might result in tenure, depending on a case that was presently before the courts, and that there was no question that the job would open other doors. Although Ms. Froehlich was first hired in 1977, it was in the spring of 1978 that she learned from her principal that she would not get tenure. She agreed tenure had not been a primary factor in her accepting the job, but she still complained to the principal, the vice-principal, and Mr. Loffredo, about not receiving it. She also complained about not receiving vacation days, sick days, dental benefits, and pension benefits. She knew continuation of her job was dependent on funding. Notwithstanding her complaints, Ms. Froehlich candidly stated she chose to remain in the system. The court found her a credible and truthful witness and accepts her representation that she was outspoken in regard to the unfair conditions of her job, but accepted the position, hoping to make changes in regard to tenure from within the system and hoping that the case that was being litigated (obviously Spiewak et als. v. Rutherford) would bring about new laws which would be applicable to her as well.

Mr. Skidmore also had four and one-half hours of student contact a day, plus 30 minutes of preparation time, for which he was paid. He met 30 students every day. His first day of employment was the same as regular teachers, and his last day was two or three days before the end of the school year. He contrasted his five hours a day with regular high school teachers who have five teaching periods a day. His classroom performance was observed by the head of guidance and the principal, and he received reports of the observation which he discussed with his superiors. He acknowledged he received no general evaluation at the end of the year, which he knew regular teachers received, and on which there was an opportunity to comment and to contest any conclusions reached. He knew that those evaluations were used in rehiring and assumed that the observations which were made of him were also used in rehiring him.

Mr. Skidmore conceded he was never told the S.C.E. position was a regular staff job. Rather, he was told it would be a "foot in the door" for a regular job. He said that tenure was never discussed at the time of his initial hiring interview, but he began to inquire about it after a year and a half, knowing he had no contract as an S.C.E. teacher, knowing he was paid hourly and knowing he did not receive sick leave or vacation time. Mr. Skidmore was aware, as were the other teachers, that the S.C.E. program was a state funded program, not in the normal school budget, and he knew that the amount of state

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funding had gone up and down, which directly affected the number of teachers employed in S.C.E. positions. Mr. Skidmore first took steps in regard to obtaining tenure during his third year (1979-80) when he consulted with other S.C.E. teachers and with the R.E.A. Mr. Skidmore conceded he had applied for a regular position as a teacher, but was really interested in obtaining any job and knew the S.C.E. position was available. He never had to make a new application in subsequent years, although he did not know whether he would be hired until notified in August that he was to teach in September.

Joanne Ross is no longer employed by the Board. At the time she was originally hired, Ms. Ross knew she was applying for a special position, which was different from that of a regular teacher. However, she emphatically stated that despite not receiving pay for holidays, sick leave and only being paid on an hourly basis, she thought she was eligible for tenure because no one told her she would not be eligible for tenure and because when she spoke to the principal of her school in February 1977, he also thought she was eligible for tenure. It was only in September 1977 that a co-worker told her she would be fired after three years. At the end of the 1977-78 school year, that situation was clarified when she asked Mr. Loffredo, "Are you going to fire us?" (meaning S.C.E. teachers). Ms. Ross stated Mr. Loffredo replied, "Yes, we use the baseball method. Three strikes and you're out," which she took to mean that she would be fired after three years. It was at this point that Ms. Ross spoke to the principal about the tenure problem, expressing outrage over Mr. Loffredo's comment, despite the fact that she had never had a contract nor any expectation of one. She asked Mr. Loffredo to try and find a way to solve the problem, but he was not encouraging and told her not to expect that it could be changed. It was at this point (early 1980) that she first took steps to try and change the situation by contacting the R.E.A. and becoming a member. Counsel for the Board stipulated to Ms. Ross's credibility.

Mr. Loffredo's testimony in regard to the content of the initial interviews with all three petitioners was directly opposite to that of petitioners. He stated he made it clear to each teacher that this was not a contractual job and that they would be paid on an hourly basis. He said he told them their years would not accrue for tenure and that they were not eligible for sick leave, personal days or vacations. This testimony was diluted when he stated he did not specifically remember each interview, but based his testimony on the fact that he always starts out interviews with prospective Title I or S.C.E. teachers by telling them the position is not contractual and not a job leading to tenure.

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Mr. Loffredo pointed out that Title I is federally funded, that the amounts received from the government have changed through the years, and that the Board never knows until late in the summer exactly how much it is going to receive. Funds for the S.C.E. program, which come from the state, have been dwindling from a high of $214,000 to $26,00 for the 1981-82 school year. Less money, of course, means reduced staff. He acknowledged that the S.C.E. program is mandated by statute, but argued that the method in which the program is administered is not mandated. The amount of money the state gives for the S.C.E. program depends on the number of students who fall below the norm. There has been a 25 percent decline in such students in the Rutherford school district during the last three years.

Mr. Loffredo made the Board's policy crystal clear. After three years of service the Board does not rehire Title I or S.C.E. teachers because of funding problems and because of the ambiguity in cases presently pending before the Commissioner and the courts concerning the tenurability of those positions. The Board does not want to take a chance on being locked into giving tenure to said teachers. Mr. Loffredo said this policy was made well known to applicants at the time of their initial interviews and has been in effect at least since 1972, although he did not know if it was specifically in writing. However, letters in that regard had been sent to teachers. (See P-1 and P-3 in evidence.)

The Superintendent of Schools in Rutherford, Dr. Luke A. Sarsfield, said that funding for the Title I and S.C.E. Program is not included within the "cap" limits of the budget, which is presented to the voters for approval. He described alternatives which the Board may take if S.C.E. funding is further reduced, which include using smaller remedial sections where the regular teacher gives the S.C.E. work, or having the S.C.E. teachers go right into the classroom, instead of the "pull out" program presently in existence, which is the most desirable. If the Board had to fund the S.C.E. program itself the amount of money available would be affected by the budget cap and waivers of that cap are not favored by the electorate because of the increased tax burden. Therefore, the Board must rely on federal and state funds to hire S.C.E. and Title I teachers.

FINDINGS OF FACT

After having reviewed and considered the testimony and evidence in this matter, and having considered the acknowledged credibility of petitioners' witnesses, and

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having reviewed the cogent post-hearing briefs and letter memoranda filed by both counsel, and having considered the arguments contained therein, and having reviewed the applicable law, the court makes the following findings of fact:

1. The court adopts by reference the stipulations of fact which are set forth above.

2. While it is clear that each petitioner understood and accepted the terms of his or her employment as an S.C.E. and/or Title I teacher, which included hourly pay, and no paid vacations, personal days, or contracts, it is also clear that each teacher felt that tenure would eventually accrue as a result of his or her job.

3. Each petitioner thought, as a result of the initial interview, he or she was working for tenure and had "a foot in the door." Each petitioner protested vehemently as soon as each learned he or she was not going to get tenure and would be fired after three years.

4. The responsibilities of the named petitioners differed from contract teachers in that they did not have homeroom duties, supervisory duty or lunch duty, they taught in small classes or one-on-one, they were not paid for lunch, snow-days, holidays or vacation, they did not receive sick leave, they were not told in the spring if they were going to be rehired but received notification of rehiring in August, and were not members of the pension fund.

5. The responsibilities of the named petitioners were similar to those of contract teachers in that they had four and one-half hours a day of student contact time and 30 minutes of preparation time for which they were paid, their employment was for the entire school year, their hours did not vary, they

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were not brought in on an "as-needed" basis, they were not required to reapply for employment every year, and they received all the health benefits regular contract teachers enjoyed (Blue Cross, Blue Shield, Rider J and Major Medical fully paid,) except for dental benefits.

6. The character of petitioners' positions had taken on a permanent nature because the S.C.E. programs in which all three instant petitioners worked were well-established and integrated with the school's regular instructional program, and because each petitioner had as much, if not more, student contact time than regular teachers and because their services were clearly required indefinitely into the future.

7. The policy of the Board of Education was to fire S.C.E. and Title I teachers, or not give tenure at the end of three years. The purpose of this policy was to avoid giving them tenure because of the difficulties inherent in the funding of the S.C.E. and Title I positions and because of ambiguities as a result in tenure cases which were in litigation before the Commissioner and the Appellate courts. Title I and State Compensatory Education Programs in the Borough of Rutherford are totally dependent on federal and state funding. Petitioners' teaching skills and subject expertise were never in question when they were not rehired.

CONCLUSIONS OF LAW

In reviewing the briefs and letter memoranda and the applicable law it is clear that different parts of the Appellate Division, Superior Court, have rendered somewhat divergent opinions on the issue of whether Title I/Compensatory Education Teachers are to be considered teaching staff members within the meaning of N.J.S.A. 18A:28-5, which sets forth the nature by which "all teaching staff members holding proper certificates" will receive tenure after employment in the district.

> The services of all teaching staff members including all teachers.... and such other employees as are in positions which require them to hold

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> 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 inefficience, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title,[1] after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years;

In Point Pleasant Beach Teachers' Association v. Board of Education of the Borough of Point Pleasant, 173 N.J. Super. 11 (App. Div. 1980), certif. den. 84 N.J. 469 (1980), the court determined that such teachers were not teaching staff members for purposes of the Teachers' Tenure Statute, as entitlement to tenure depends on the nature of the employment tendered and accepted. After a review of the terms, conditions and duties of employment and of the conduct of the parties in order to determine if the Title I teachers therein qualified for tenure, the court noted the many differences between the Point Pleasant Title I teachers' duties and those of regular contract teachers, especially the temporary nature of their work, and particularly noted that the flexibility of Title I operations would be impeded if its instructors were granted tenure because their employment was so contingent and reliant upon the receipt of Title I funds from the federal government. The Appellate Division found that the teachers in question understood they were hired on a temporary basis, accepted such arrangement, and therefore were not entitled to tenure.

The year after Point Pleasant was decided, another part of the Appellate Division ruled, in Spiewak et als. v. Board of Education of Rutherford, 180 N.J Super. 312

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(App. Div. 1981), that two "Beadleston" supplementary teachers of the handicapped and a Title I remedial reading teacher met the definition of teaching staff member contained in N.J.S.A. 18A:1-1 and were thus eligible for tenure.

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

The Spiewak court read the Point Pleasant decision as being based primarily on the premise that where employment is offered and accepted on a temporary basis, and where this temporary nature is understood by both employer and employee, and where it continues as temporary employment, that employment cannot be relied on as the basis of tenure. The Spiewak court viewed that rationale as inapplicable to its facts, as it found that what may have been temporary employment at one time had taken on a permanent character since the programs in which the individuals worked had become well established and integrated with the school's regular instructional program and since they performed services that were clearly required indefinitely into the future. The Spiewak court also concluded that the immediate source of the funding for such programs could not be regarded as dispositive of an individual's tenure status if the instructional programs in question was mandated by statute and had to be continued irrespective of the source of funding. The Spiewak holding is particularly apposite here, since instant respondent was respondent there and since, when this judge entered the orders of inactivity, both counsel agreed to be guided by an Appellate Division decision in Spiewak.

Hamilton Township Supplemental Teachers' Association v. Hamilton Township Board of Education, 180 N.J. Super. 321 (App. Div. 1981), which had a factual situation virtually indistinguishable from that of Point Pleasant v. Callam, 173 N.J. Super. 11 (App. Div. 1980), save for the fact that the indivudals in Hamilton were not employed in a federally-funded program, is also relevant here. The Hamilton court found the difference in funding to be dispositive of the case. In Hamilton the petitioners were regularly employed by the Board of Education in a state-funded and state-mandated educational program in positions for which they were required to hold teaching certificates. The Hamilton court found that state funding made the individuals eligible for tenure, given their qualifications, since it removed their employment from the uncertainty of continued federal funds.

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Counsel for petitioners argues that the holding in Spiewak et als. v. Rutherford Board of Education, 180 N.J Super. 312 (App. Div. 1981) is stare decisis in regard to instant petitioners not only because counsel agreed to be guided by said decision, but because the factual summary presented therein is virtually identical to these petitioners while employed as S.C.E. teachers, and it was on that factual basis that the Spiewak court specifically concluded that the employment was tenurable. Counsel distinguishes Point Pleasant by asserting that Spiewak limited its application to situations where employment is offered and accepted on a temporary basis, and where that basis is understood by both employer and employee to be one of its essential predicates, which is not the situation here. He asserts that passage of time removed the "temporary" modification of the employment.

Respondent urges the application of the holding of Point Pleasant to the instant matter, because the differences between the positions held by petitioners and those of regularly employed teachers far outweigh any similarities, and because petitioners were well aware of the temporary and limited nature of their employment. Counsel also argues that there is no requirement that would compel the Board to retain these teachers after three years and grant tenure, because at common law, an employer has unbridled authority to discharge an employee with or without cause, in the absence of contractual or statutory restrictions. English v. College of Medicine and Dentistry of New Jersey, 73 N.J. 20, 23 (1977). Respondent relied heavily on those cases which hold that time served as a substitute teacher cannot be added to time served as a regular teacher in order to effect tenure. Biancardi v. Waldwick Board of Education, 139 N.J. Super. 175 (App. Div. 1976); Driscoll v. Board of Education of Clifton, 165 N.J. Super. 241 (App. Div. 1977). Counsel also urges the court to find that the Spiewak court overlooked the fact that while State Compensatory Education to educationally handicapped children is statutorily mandated, neither the methods and procedures to render such aid nor the employment of special teachers for such purposes are mandated by the statute.

Counsel argues that the granting of this petition would be against the principals of a thorough and efficient education because the school board would be unable to make an appropriate distribution of funds since there is no surplus in the budget with which to fund tenured positions for these petitioners. Counsel further argues that petitioners are estopped from arguing that they were in tenurable positions because the Board relied on their acceptance of nontenurable temporary employment and because they did not bring their action within the 90-day time limit set forth in N.J.A.C. 6:24-1.2.

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This judge does not find Point Pleasant, Spiewak and Hamilton irreconciliable since in each case, the Appellate Division has directed the finder of fact to review the nature of the employment tendered and accepted, and only then to determine its character and whether it falls within the rubric of tenurable, or eligible for tenure, employment pursuant to statute. Until the New Jersey Supreme Court decides the pending appeal in Spiewak and permanently reconciles the divergent views of the various parts of the Appellate Division, this court will follow the guidance offered by Judge Learned Hand, when he stated, "I can see that the measure of (a lower court's) duty is to define, as best it can, what would be the event of an appeal (in that instance to the United State Supreme Court) in the case before it." Spector Motor Service, Inc. v. Walsh, 139 F. 2d 809, 823 (2d Cir. 1944). With that as a starting point, this judge concludes that, for purposes of deciding this particular case, she is clearly bound by the holding of Spiewak et als. v. Rutherford Board of Education 180 N.J. Super 312 (App. Div. 1981). The comprehensive decision of Judge Pressler in that matter found that those petitioners (who were employed in substantially similar positions to instant petitioners) had set forth sufficient facts which compelled the conclusion that they were encompassed within the definition of teaching staff member and that they met the tenure requirements of N.J.S.A. 18A:28-5. The Spiewak Decision specifically found ". . . by the 1973-74 academic year, if not before, the original temporary character of the employment changed, the programs (Supplementary and Title I) pursuant to which petitioners were employed became well-established and integrated with the regular instructional program, their employment became regular and continuous, and their services by whomever they might be performed were clearly required indefinitely into the future." 180 N.J. Super. at 318.

This judge is bound by the holding of the Appellate Division in regard to the Rutherford Title I program. Further, it finds that by the time the instant petitioners became involved in the Compensatory Education program (1977), it was certainly fully integrated with the regular instructional program. Applying the logic of Spiewak to the instant case, this judge finds that the employment of Froehlich, Skidmore and Ross, as S.C.E. or Title I teachers, was tenurable within the meaning of the statute. Each teacher was employed as an S.C.E. or Title I teacher in a mandated program, in a position for which each was required to hold, and did, in fact hold the appropriate certificate, each was employed in a regular position, each worked for a full day during an entire school year, (less one or two days at the end), each had a weekly schedule of assignments, each was not brought in on "as needed" basis, such as a substitute teacher, and each was not required to reapply for employment every year. Surely, the nature of the positions was not temporary, and, for these three, never had been.

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The court has noted that each teacher was paid on an hourly basis, did not have a contract, was not paid for lunch, was not paid for sick leave, was not paid for vacation or personal days, was not admitted into the pension fund, and was paid from state and federal funds, but these facts do not detract from the full time nature of their work. The board benefited from such arrangements. Each teacher was observed during the course of the year, and conferred with the observing supervisor in regard to that observation. Although they did not receive the regular evaluations that tenured teachers received , this observation was used for the same purpose. Furthermore, it is clear that from the outset of their employment, each teacher was teaching five hours a day, five days a week, (four and one-half hours of student contact time and one-half hour of preparation time) and their teaching responsibilities, along with their additional functions of conferring, reporting, planning and evaluating students, were part of the district's special program of educationally compensating students who fall into certain categories, which is mandated by statute. (See, for example, N.J.S.A. 18A:7A-5 and 6.) Their duties were regular and continuous and their student contact was of such a nature as to be equal to that of regular teaching staff members.

While each of these teachers was aware of the conditions of employment, each also felt, after the initial interview, either that they were working for tenure or that they did not know if time spent in the S.C.E. program would be counted towards tenure. It was only after being employed that they learned of the specific policy of the district to fire every S.C.E. and Title I teacher after three years in order to avoid giving them tenure because of the difficulties in funding the program. Each of these teachers specifically complained about, and urged change of this policy of the Board. Despite their complaints, the Board rehired Ms. Froehlich and Mr. Skidmore. The court cannot conclude that the Board relied to its detriment on petitioners' acceptance of their employment. To the contrary, all parties were aware of the ongoing nature of the Spiewak case and that a decision there would have an effect on the employment of these petitioners and the responsibility of the Board to them. This can be seen from Mr. Loffredo's testimony, where he candidly stated that it was because of ambiguities and uncertainties resulting from the ongoing litigation that the Board refused to hire these teachers with tenure after three years.

It is also clear that while the problem with the immediate source of funding is an element to be taken into consideration, it cannot be dispositive of the issue of tenurability of these teachers' employment. Hamilton Township held that individuals who

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were regularly employed by a Board of Education in a state-funded, mandated, educational program in positions for which they were required to hold teaching certificates were eligible for tenure, since the state funding removed their employment from the uncertainty of federal funding. 180 N.J. Super. at 324. The Hamilton decision applies to S.C.E. teachers specifically, while Spiewak deals, inter alia, with a Title I teacher in Rutherford, who had other attributes of tenurability. Spiewak pointed out that the immediate source of funding cannot be dispositive, given the fact that the district has no choice but to continue the S.C.E. program. Noone gainsays the fact that if the necessary funds are not available, the Board could abolish these positions for good faith economic reasons.

Having reviewed these facts, this court finds it clear that these petitioners had been regularly and continuously employed by the Board of Education as professional staff members in a position requiring certification, holding appropriate certificates, and were entitled to tenure upon the passage of the requisite statutory time. The fact that they are paid an hourly salary can have no legal effect on this conclusion, see, Board of Education of Jersey City v. Wall, 119 N.J.L. 308 (Sup. Ct. 1938), nor can the fact that these petitioners use a tutorial instructional technique and have no homeroom or noninstructional assignments militate against their professional status. Spiewak et als. v. Rutherford, 180 N.J. Super. at 316. All three petitioners have met the criteria and thus have tenurable status. Ms. Ross is no longer employed by the Board and has not met the time requirements necessary to receiving tenure, but petitioners Skidmore and Froehlich do meet the test.

Therefore, this court concludes that all three of the individual petitioners were employed in tenurable positions while employed as S.C.E. or Title I teachers since 1977 and two of the instant petitioners, Skidmore and Froehlich, should be granted tenure as of the date set forth in this opinion. The court further concludes that the Board of Education, when it denied them tenure and refused to rehire them, was acting pursuant to a policy which is in contravention of circumvented the tenure laws of the State of New Jersey.

David Skidmore has been employed as follows:

September 22, 1977 - June 26, 1978 (S.C.E. - Math)
September 1978 - June 1979 (S.C.E. - Math)
September 4, 1979 - June 19, 1980 (S.C.E. - Math)
September 1980 - June 1981 (S.C.E. - Math)
September 1981 - present (S.C.E. - Math)

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Applying the standards in N.J.S.A. 18A:28-5(c) this court concludes that Skidmore attained tenure status at the end of the month of September 1980.

Carol Froehlich has been employed as follows:

October 31, 1977 - June 26, 1978 (S.C.E. - Reading/Math)
September 1978 - June 1979 (S.C.E./Title I - Reading/Math)
September 4, 1979 - June 20, 1979 (Title I - Reading)
1981 school year - 5th grade teacher under contract
1981-82 school year - 5th grade teacher under contract

Applying N.J.S.A. 18A:28-5(c) this court concludes that Froehlich attained tenured status at the end of the month of November 1980.

The court has reviewed Ms. Ross's employment and concludes that because it contained two periods of employment as a substitute (which she does not contest), she has not met the standards of N.J.S.A. 18A:25-5(c) and should not receive tenure.

In regard to the retroactive granting of compensation and other emoluments and benefits of tenurable and tenured status the court concludes that petitioners are entitled to sick leave pursuant to N.J.S.A. 18A:30-2, just as are other employees are regularly employed by the district. The retroactive benefits to be afforded to all three petitioners should be the difference between the hourly wage that was received and their proper placement on the salary guide, as well as appropriate sick leave benefits pro rated to the hours they worked, appropriate dental benefits, if such were given, and pension contributions. In regard to prospective benefits for those teachers who should have been granted tenure, the court concludes that they are entitled to be placed on the salary guide pursuant to the date tenure should have been granted. See N.J.S.A. 18A:29-4.1. In regard to Ms. Ross's request for reinstatement, the court concludes from the facts before it that the refusal to reemploy Ross was made for additional reasons to that of barring her from gaining tenure. The district had received far less state funds than in previous years, and the number of children in the program had declined by 25 per cent, both of which of can be construed to come within the good faith rationale of abolishment of a position for economic reasons. The court will deny her request for reinstatement.

Accordingly, this court concludes that individual petitioners Ross, Froehlich and Skidmore were employed in tenurable positions as S.C.E. and Title I teachers based on the nature and condition of employment and the understanding by both the Board and the

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petitioners in that regard. The court further concludes that petitioners Froehlich and Skidmore should have received tenure on the dates set forth in this opinion. The court further concludes that petitioners should be granted the emoluments and benefits afforded all other teaching staff members employed in tenurable or tenured positions on a pro rated basis for the years when they did not receive said emoluments. The court is guided throughout this decision by the specific holdings of Spiewak et al. v. Board of Education of Rutherford, which holdings are based on factual premises substantially identical to the ones in the case at bar.

The court further concludes that laches and estoppel do not apply in this matter since petitioners, from the outset of learning of the tenure problem, complained and alerted the board of their desire to achieve tenure. The Board's actions were predicated on a decision to await the conclusion of ongoing litigation (Spiewak), and the Board must have been aware of a possibility the Commissioner and the Appellate Courts could rule against them. Laches should not apply to the instant matter because the Board has not established specific prejudice as a result of any delay. Furthermore, the issue of not filing within the 90-day period set by the administrative code has not been briefed and argued by counsel other than in general terms, and is not applicable here. Certainly from the time each petitioner learned that he or she was not going to receive tenure, each complained about the lack of tenure to persons in the administration, specifically their school principal and/or Mr. Loffredo, and took steps to become members of the R.E.A. and to file the instant action. There is no question the instant action was filed before tenure would have accrued to any of the petitioners. It was filed on April 15, 1980, and Ms. Froehlich would have achieved tenured status in November 1980, Mr. Skidmore in September 1980, and Ms. Ross was not in a position to claim tenure in 1980.

The issue raised by counsel for the Board, that it may terminate teachers, who are not employed pursuant to contract and are "at will" employees, for any reason whatsoever, as opposed to a determination of good cause for contracted teachers, is inapposite to the case at bar. Donaldson v. Board of Education of N. Wildwood, 65 N.J. 236 (1974) holds, inter alia, that nonretention of a teacher may not be based upon reasons that are unlawful, arbitrary or capricious, although good cause does not have to be shown. This judge cannot permit nonretention of a teacher just to subvert the tenure laws.

The statement that by granting this petition such a decision will interfere with a thorough and efficient education for the children of Rutherford is a novel issue. In

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support of that defense respondent has raised the spectre of the "cap" laws, in that since funds for the instant programs are not within the school budget, as they are provided by state and/or federal funding, money for the "pull out" S.C.E. program may not be available, and it may be scrapped. There is no evidence before this judge from which she can conclude that even if that happens, the result will have such a deleterious effect on the children in the Rutherford school district so as to eviscerate their constitutional right to a thorough and efficient education.

Accordingly, it is **ORDERED** that petitioners Froehlich, Skidmore, and Ross shall receive the retroactive granting of sick leave and other emoluments and benefits of tenurable positions on a pro rated basis; and it is further **ORDERED** that petitioners Froehlich and Skidmore be granted tenure as of the dates set forth herein, November and September 1980, respectively; and

It is further **ORDERED** that petitioners Skidmore and Froehlich's salary level and other benefits be adjusted to accord with the receipt of tenure on the dates in question; and

It is further **ORDERED** that petitioner Joanne Ross's request for reinstatement and the granting of tenure be, and is hereby **DENIED.**

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

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OAL DKT. NO. EDU 3069-80

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

March 19, 1982
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

March 23, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 24, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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RUTHERFORD EDUCATION ASSOCIATION, CAROL A. FROEHLICH, DAVID SKIDMORE AND JOANNE ROSS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioners except to the finding by the Honorable Sybil R. Moses, ALJ that Petitioner Joanne Ross is not entitled to retroactive reinstatement with tenure and emoluments.

Respondent's primary exceptions contend that tutorial remedial work for children not doing well in the minimum basic skills test is not a mandated program. Respondent objects to the retroactive granting of tenure and compensation to Petitioners Froehlich and Skidmore contending that tenure "***should be granted only as an hourly employee."

Petitioners' reply exceptions refute those of the Board and affirm the restoration of Petitioners Froehlich and Skidmore. The Commissioner finds merit in petitioners' arguments.

An examination of the record herein convinces the Commissioner that Judge Moses properly determined the ineligibility of Petitioner Ross for retroactive reinstatement with tenure and emoluments. Petitioner Ross did not satisfy the requisite conditions for the acquisition of tenure. Schulz v. State Board of Education, 132 N.J.L. 345 (E. & A. 1945)

The Commissioner cannot agree with the Board that tutorial remedial work for the children not doing well in their programs is not mandated. The Commissioner observes that, regardless of how measured the definition for such a pupil is clearly indicated in N.J.S.A. 18A:7A-3 herewith set down in pertinent part:

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> "'State compensatory education pupil' means a pupil who is enrolled in preventive and remedial programs offered during the normal school day, or in programs offered beyond the normal school day or during summer vacation, which are integrated and coordinated with programs operated during the regular school day and year. Said programs shall be approved by the State board, supplemental to the regular programs and designed to assist pupils who have academic, social, economic or environmental needs that prevent them from succeeding in regular school programs."

The Commissioner can find nothing in the statutes to show that tenure entitlement can be conditioned by tenure as an hourly employee as separate and distinct from some other basis.

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

The ORDERS as set down by the Court in the initial decision are adopted herewith.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

May 6, 1982

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RUTHERFORD EDUCATION ASSOCIATION, CAROL A. FROEHLICH, DAVID SKIDMORE AND JOANNE ROSS,	:	
PETITIONERS-CROSS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, May 6, 1982

For the Petitioners-Cross-Appellants, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, H. Ronald Levine, Jr.

On June 23, 1982, the New Jersey Supreme Court decided a trilogy of cases settling the issue of whether public school teachers who provide remedial or supplemental instruction to educationally disabled children may acquire tenure if they meet the specific criteria in N.J.S.A 18A:28-5. Spiewak et al. v. Rutherford Board of Education, 1979 S.L.D. 739, rev'd State Board July 2, 1980, rev'd/rem'd Superior Court 180 N.J. Super. 312 (App. Div. 1981), aff'd/rem'd Supreme Court 90 N.J. 63 (1982) The Supreme Court held that such teachers are eligible for tenure, so long as they meet the statutory criteria.

The Supreme Court concluded further that: "the legal rule established by these cases shall be applied to the teachers before us, as well as prospectively to all persons not before the Court." In footnote 2, it was stated that teachers not before the Court would "not be entitled to any back pay award," and teachers terminated prior to the date of the Supreme Court's holding in Spiewak (June 23, 1982), were "not entitled to be rehired." It was held that currently employed supplemental and remedial teachers should have their tenure eligibility calculated from the beginning of their employment.

The instant matter involves three State Compensatory Education and/or Title I teachers: Carol Froehlich, David Skidmore, and Joanne Ross. Petitioners Froehlich and Skidmore are currently employed by the Board; Ross is not. The Administrative Law Judge found that Petitioners Skidmore and Froehlich met the test of tenure, but Ross did not. All were awarded retroactive granting of sick leave and other emoluments by the Administrative Law Judge. The Commissioner affirmed the determination of the Administrative Law Judge. The Rutherford Board appealed to the State Board of Education and Petitioners cross-appealed.

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The State Board has studied the language of the Court in Spiewak, supra, and the record in this matter. Based on the plain language of the Supreme Court, we find that Skidmore and Froehlich, who were not terminated and are currently employed by the Rutherford Board of Education, should have their tenure eligibility calculated from the beginning of their employment with the Rutherford Board, and their sick leave benefits calculated from June 23, 1982, the date of the Supreme Court's holding in Spiewak. We shall not engage in the interpretation of negotiated salary agreements in the context of this case. Ross, who was terminated and is not currently employed by the Rutherford Board is foreclosed from relief. The State Board dismisses all other issues of retroactivity, including sick leave and other emoluments, which have been raised, since the State Board is unable to interpret the Supreme Court's bar to retroactive relief in any other manner or to any further extent than that which we have stated.

Exceptions are noted.

December 1, 1982

Pending N.J. Superior Court

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4126-81
AGENCY DKT. NO. 224-6/81A

BARBARA SAAD,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT,
Respondent

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

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

Record Closed March 5, 1982 Decided March 25, 1982

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, Barbara Saad, who was reduced from full-time to half-time teaching from September through November 30, 1981, contended that such reduction in employment was in violation of her seniority rights, which should have run from June 1969, when she was eligible for a teaching certificate in English. Respondent asserted that petitioner's seniority rights only run from March 1979, when she was in actual possession of an English certificate.

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On June 4, 1981, a petition of appeal was filed with the Commissioner of Education. On July 1, 1981, 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.

At a prehearing conference on October 2, 1981, the following issues were identified:

1. Did respondent violate petitioner's tenure and seniority rights pursuant to N.J.S.A. 18A:28-5, 10 and 12 and N.J.A.C. 6:3-1.10 when it reduced her employment from full-time to part-time?

2. What relief is petitioner entitled to?

On January 8, 1982, the following joint stipulation of facts was received by the court, which this court adopts as part of its **FINDINGS OF FACTS:**

1. Petitioner is a tenured teaching staff member initially employed by respondent in September 1969.

2. At the time petitioner was hired, she possessed a teaching certificate as a secondary teacher of speech arts and dramatics (Exhibit "A").

3. Petitioner's employment history with respondent is as follows:

Year	Subject	Number of Sections
1969-70	English	1
	Speech Arts	4
1970-71	English	1
	Speech Arts	4
1971-72	English	2
	Speech Arts	3
1972-73	English	0
	Speech Arts	5

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1973-74	English	1
	Speech Arts	4
1974-75	English	1
	Speech Arts	4
1975-76	English	1
	Speech Arts	4
1976-77	Speech Arts	5
1977-78	English	3
	Speech Arts	2
1978-79	English	2
	Speech Arts	4
1979-80	English	3
	Speech Arts	2

		1st semester	2nd semester
1980-81	English	2 1/2	2 1/2
	Speech Arts	2	1
1981-82	Speech		3

Petitioner was employed on a part-time basis for the first time in 1981-82.

4. In or about March 1979 petitioner applied for an English certificate.

5. Enclosed with a letter of March 19, 1979 (Exhibit "B") was a copy of petitioner's transcript from William Paterson College (Exhibit "C"). No other transcript or other evidence of academic credits earned was submitted by petitioner in support of the application for an English certificate.

6. In or about April 1979 petitioner's certificate in English (Exhibit "D") was issued.

7. On or about April 21, 1981, petitioner was informed that respondent had voted to reduce her teaching position from full-time to half-time for 1981-82 (Exhibit "E").

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8. The following teachers have been assigned teaching responsibilities in English by respondent during 1981-82 and have the respective years of experience teaching English prior to 1981-82:

NAME	TEACHING CERTIFICATE (Subject)	(Date of Issue)	YEARS TEACHING ENGLISH
C. Barragato	Sec. teacher of:		
	English	6/67	14
	Principal	5/74	
	Student Per. Serv.	7/78	
A. Bender	Teacher of:	8/71	10
	English		
D. Castino	Teacher of:		
	English	7/71	10
	Soc. Studies	7/71	
	Jr. High Teacher	7/71	
F. Ciecierski	Sec. teacher of:		
	English	2/66	*
	Principal	6/76	
K. T. Donahue	Teacher of:		
	English	9/76	5
	Reading Spec.	8/80	
H. Eldredge	Sec. teacher of:		
	Eng. (7-12)	2/24/60	25
	Soc. Studies (7-12)	2/24/60	
	French (7-12)	2/24/60	
N. Fink	Sec. teacher of:		
	English	10/3/60	24
	Spanish	10/3/60	
L. Gilbert	Sec. teacher of:		
	English	6/67	14

*The parties cannot agree as to this individual's seniority as a teacher of English.

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NAME	TEACHING CERTIFICATE		YEARS TEACHING ENGLISH
E. Guarino	Sec. teacher of:		
	English	7/61	20
	Soc. Studies	7/61	
R. Juselius	Teacher of:		
	English (7-12)	6/18/42	38
	Soc. Studies (7-12)	6/18/43	
R. Meade	Sec. teacher of:		
	English (7-12)	9/58	23
	Principal	12/73	
D. Mulcahy	Sec. teacher of:		
	English	9/61	20
	French	9/61	
G. Pennington	Sec. teacher of:		
	English (7-12)	10/7/63	0
	French (7-12)	10/7/63	
	German (7-12)	10/7/63	
M. Ring	Sec. teacher of:		
	English	3/70	11
	Soc. Studies	3/70	
H. Sacks	Sec. teacher of:		
	English	6/65	6
L. Santos	Teacher of:		
	English	1954	28
	Spanish (7-12)	1952	
	Math	1952	
	Elementary (3-8)	1952	
J. Sommers	Teacher of:		
	English	11/66	12
D. Speronello	Teacher of:		
	English	5/73	6
	Spanish	10/73	
M. Starrs	Sec. teacher of:		
	English	1960	24
J. Thomas	Sec. teacher of:		
	English	4/70	10

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9. Effective November 30, 1981, petitioner was employed by respondent as a full-time English teacher.

10. Petitioner submitted a photocopy of her 1969 transcript (Exhibit "C"), to the State Department of Education on December 10, 1981 (Exhibit "F"). By letter of December 23, 1981 (Exhibit "G") the Director of the Division of Field Services, Bureau of Teacher Education and Academic Credentials, informed petitioner that she would have been eligible for English certification in 1969 if she had applied for that certificate. The parties hereby agree to stipulate to this fact without the need for testimony by a staff member of the Department of Education.

A hearing was held at the Office of Administrative Law in Newark, New Jersey, on February 2, 1982. The witnesses who testified and the exhibits marked into evidence are set forth in the appendix attached hereto. The record was closed on March 5, 1982, when certain post-hearing documents were submitted.

It was further stipulated at the trial that if petitioner should prevail, the amount of money to which she would be entitled from September through November 30, 1981 would be $3,357.90. This stipulation is also adopted as part of the court's FINDING OF FACTS.

DISCUSSION OF LAW

The threshhold issue which this court must decide is whether petitioner acquired seniority rights in September 1969 because of her eligibility to obtain a certificate in English, even though she did not acquire and possess the certificate until March 1979.

The law is clear that eligibility for, instead of actual possession of, an appropriate certificate has been held sufficient to allow one to assume a position. See Kane v. Hoboken Bd. of Ed., 1975 S.L.D. 12. Kane involved a claim that the local board's failure to appoint petitioner to a principalship was arbitrary, capricious and unreasonable.

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Kane argued that since another candidate did not possess the appropriate certificate, although he was eligible for it, the appointment of the other candidate should have been set aside. The commissioner's decision rejected this contention, noting that the superintendent had determined that the other candidate was eligible for the certificate. The opinion stated: "To hold that a candidate would be precluded from appointment to a position of principal because he did not have in his possession a specific certificate, while acknowledging he was eligible for it, would place form over substance (emphasis in original)." Id. at 17.

Kane was recently cited with approval by Administrative Law Judge Lillard Law in Fulton v. Long Branch Bd. of Ed., OAL DKT. EDU 83-2/78 (Aug. 29, 1980), adopted Comm'r of Ed. (Oct. 17, 1980), aff'd State Bd. of Ed. (Feb. 4, 1981). In Fulton, petitioner contested the appointment of Virginia Stewart, among other candidates, for the position of elementary supervisor over petitioner on the grounds that Ms. Stewart did not possess a valid New Jersey Principal/Supervisor certificate at the time of her employment. Petitioner asserted that the possession of such a certificate by Ms. Stewart was mandated by the regulations of the State Board of Education. It was undisputed that Ms. Stewart did not possess a valid certificate at the time of her employment. Judge Law stated: "Thus, the Commissioner has held that the absence of a specific certificate, where the individual is otherwise eligible for such certificate, is a not a bar to the employment of that individual by a Board of Education. I FIND, therefore, that [Ms.] Stewart was eligible to hold the Supervisor/Principal Certificate on August 17, 1977. . . ." Id. at 10.

It is significant in the instant matter that for the period 1969-70 through 1978-79 petitioner taught both speech and English. Petitioner's eligibility for the English certificate was quite obvious to her superiors who assigned her to teach English during these years. No other courses were taken by Ms. Saad between the time that she acquired her initial certificate as a secondary teacher of speech arts and dramatics and the time that she acquired her certificate in English in April 1979. Furthermore, petitioner, according to the State Department of Education (see Stipulation No. 10), would have been eligible for her English certificate in 1969 if she had applied for it. In the context of the

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instant matter, the board either knew or should have known of petitioner's lack of a specific English certificate. Such failure to have actual possession of her English certificate in 1969 was merely a mistake not attributable to any wrongdoing on anyone's part. This mistake was corrected by the ministerial act of petitioner applying for and receiving a certificate in April 1979, an act which could have been accomplished in 1969.

Accordingly, it is **CONCLUDED** that petitioner was eligible for her teaching certificate in English in 1969, even though she did not acquire actual possession of it until April 1979. Petitioner's seniority as a teacher of English began to accrue in September 1969. Since it was stipulated (paragraph 8 of the Stipulation of Facts) that petitioner had more English seniority than many of the individuals listed, it is clear that her seniority rights were violated.

It is, therefore, **CONCLUDED** and **ORDERED** that petitioner be awarded the stipulated sum of $3,357.90, which represents the amount of money lost when she was improperly reduced from full-time to half-time employment from September through November 1981 in violation of her seniority rights.

It is further **CONCLUDED** and **ORDERED** that respondent correct petitioner's records to accurately reflect that her seniority as an English teacher commenced as of September 1969.

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

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I hereby FILE my Initial Decision with **FRED G. BURKE** for consideration.

March 25, 1982
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

March 26, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 30, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

WITNESSES:

Barbara Saad
Joseph Ferrie

EXHIBITS:

R-1 Application for Employment - March 2, 1959

R-2 Evaluation Form - February 6, 1970

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BARBARA SAAD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Respondent excepts to the legal conclusion by the Honorable Robert P. Glickman, ALJ that petitioner's seniority as an English teacher commenced as of September 1969. Respondent also excepts to the monetary award ordered by Judge Glickman.

Respondent makes much of the rule that only those teachers with appropriate certification may be employed and be eligible for tenure and seniority rights. Respondent seems to imply that petitioner was somehow remiss by not applying for a certificate to teach English for which she was eligible in 1969 when she was initially hired. The Commissioner notes, however, that nothing is offered by respondent to explain its dereliction of N.J.S.A. 18A:26-2 by its assignment of petitioner to teach English, in part, for ten years. That statute states in its entirety:

> "No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law."

The Commissioner notes with approval Judge Glickman's summation of circumstances surrounding the situation wherein he said "such failure to have actual possession of her English certificate in 1969 was merely a mistake not attributable to any wrongdoing on anyone's part." (ante) The Commissioner finds no merit in respondent's exceptions.

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Petitioner's reply exceptions refute those of respondent and affirm the initial decision while further relying on Harold Reinish v. Board of Education of Cliffside Park, 1965 S.L.D. 50, aff'd State Board of Education 1966 S.L.D. 252, aff'd Superior Court Appellate Division 253. The Commissioner's holding therein is directly applicable to the instant matter wherein is said:

> "***Nor is there any merit in the argument that even though petitioner may have been eligible for the issuance of a certificate to teach Social Studies, none was issued to him. This also is consistent with usual practice. Application for a certificate is made when employment is obtained and for the particular license needed. Petitioner, having no need of a Social Studies certificate, could not be expected to apply for its issuance until he had need for it. The fact that he qualified for such a certificate is enough. The Commissioner finds that petitioner has held an appropriate teacher's certificate and the mere omission of additional fields on the license already issued is no bar to the inclusion of such other areas of teaching competence as he may qualify for when and if needed.***" (1965 S.L.D. at 54)

The Commissioner looks with favor on petitioner's arguments.

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

The Commissioner finds and determines that petitioner's seniority as a teacher of English began to accrue in September 1969 and was violated by the Board when she was improperly placed on half-time employment from September through November 1981. Accordingly, petitioner shall be awarded $3,357.90, the difference between her part-time employment and what she should have received as a full-time teacher.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 10, 1982

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4056-81

AGENCY DKT. NO. 229-5/81A

MAYOR AND COUNCIL OF THE BOROUGH OF GLEN GARDNER,

Petitioner

v.

BOARD OF EDUCATION OF THE BOROUGH OF GLEN GARDNER AND BOARD OF EDUCATION OF THE TOWN OF CLINTON, HUNTERDON COUNTY,

Respondents.

APPEARANCES:

J. Peter Jost, Esq. for petitioner

Raymond B. Drake, Esq. for respondent Glen Gardner Board of Education (Drake & Drake, attorneys)

Richard Dieterly, Esq. for respondent Clinton Town Board of Education (Gebhardt & Kiefer, attorneys)

Record Closed March 1, 1982 Decided March 24, 1982

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

The petitioning Mayor and Council of the Borough of Glen Gardner, hereinafter Council, appeal to the Commissioner of Education to act under his broad powers by issuing an order closing the Glen Gardner Elementary School and

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compelling the Glen Gardner Board of Education, hereinafter Glen Gardner Board, to enter into an arrangement whereby Glen Gardner elementary school pupils would be educated by the Clinton Town Board of Education at its elementary school as tuition pupils under a sending-receiving relationship.

The respondent Glen Gardner Board opposes Council's application for an order closing its elementary school, denies Council's allegations that it is not in compliance with legal requirements in the operation of its school, and asserts that it is maintaining a thorough and efficient program of education, approved under the requirements of the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., and other relevant statutory and State Board of Education mandates.

Respondent Clinton Town Board of Education, hereinafter Clinton Board, admits that it entered into discussions with the Glen Gardner Board over possible regionalization, but denies that it has ever made in-depth studies of, or offered or agreed to enter into, a sending-receiving relationship with the Glen Gardner Board.

When the pleadings were joined, the Commissioner, on June 26, 1981, transferred the matter as a contested case to the Office of Administrative Law, pursuant to N.J.S.A. 52:14F-1 et seq. Issues were framed at a prehearing conference on July 28, 1981. Thereafter, a plenary hearing of seven days' duration was conducted and concluded on December 22, 1981, at the Clinton Town Municipal Building. Post-hearing briefs and memoranda were submitted, thus completing the record on March 1, 1982.

At the prehearing conference, all parties agreed and the undersigned ordered that the Borough of High Bridge Board of Education, which had at the outset been a named respondent, should be dropped as a named party respondent.

UNCONTESTED FACTS:

I **FIND** the following, which are uncontroverted within the record, to be those facts which reveal the contextual setting of the dispute:

Glen Gardner is a small community encompassing 1.46 square miles with approximately 835 residents in northern Hunterdon County. The community, approximately five miles north of the Town of Clinton, straddles a two-lane highway,

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Route 31, through the glen's narrow valley area which is, in turn, bounded on the east and west in large part by steep hillsides. About a dozen small businesses operate in Glen Gardner. No industries are totally within the boundaries of the borough. One operating quarry is located partly within the borough and partly in adjacent Lebanon Township.

Glen Gardner's five-member school board operates a K-8 elementary school on which there is no bonded indebtedness. The original brick building, erected in 1919 as a four-room school, was expanded by erection of a painted masonry addition of two classrooms in 1956. Two relocatable classrooms were added in 1969. The school is located on a 1.9 acre site adjacent to a municipally-owned park area which, in part, is utilized for physical education and athletic contests. For the same purpose, the school also utilizes an off-site, borough-owned gymnasium in a youth facility to which pupils walk. The borough-owned park land also has a gravel surfaced parking lot which serves as a parking lot for school employees during the day. The school is situated on the northwest corner of the site, close to the crossing of a local road and Route 31. Flashing warning lights installed to the north and south on Route 31 operate prior to the opening of and at the end of the school day.

Enrollment at the time of the hearing in 1981-82 at the Glen Gardner School, by grades, was as follows:

K -	8	5 -	13
1 -	14	6 -	11
2 -	11	7 -	12
3 -	10	8 -	14
4 -	10	Total -	103

Each class from K through 8 has its own properly certified teacher. The school is administered by a full-time Administrative Principal (Principal) who holds an administrator's certificate. Certain other teaching staff members are hired on a part-time basis. These include a school nurse who is employed one day per week. In addition, six classified pupils are educated as tuition pupils outside the district.

Glen Gardner is a component member of the North Hunterdon Regional High School District which maintains two high schools at which Glen Gardner's secondary school pupils are educated.

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SUMMARY OF TESTIMONY:

The Mayor of Glen Gardner (Mayor), a lifelong resident who had attended the Glen Gardner School himself and who has two of his six children still enrolled, testified that about 60% of the land area of the Borough is undeveloped, but that because of steep slopes, rugged terrain, inaccessibility, and unsuitable drainage for septic systems, only 30% of the area is suitable for residential development. He testified, however, that application has been made and preliminary approval given recently by the planning board for a developer to erect a 326-unit development of condominiums on an operating farm to the west of Route 31, opposite the school. The Mayor testified that in the absence of a borough or regional sewage system, there is serious question as to whether this proposed project, which it is estimated would result in 100 additional pupils, will be completed before ten years, if at all. In this regard, he testified that the developer has signified intention to build only 100 units in the first stage of the project.

The Mayor testified that Glen Gardner is a "target area" with low ratables, necessitating an increase of one cent in the tax rate for every additional $862 raised by public taxation. He testified that absentee landlords in a section of summer homes have allowed severe deterioration of many of those buildings. He testified further that, although many of these have been converted to year-round homes, they still do not add substantially to the tax base of Glen Gardner.

The Mayor testified that he views the school as an antiquated structure from which adequate maintenance has so long been withheld as to make it imprudent, if not impossible within the limits of the public's ability to pay taxes, to bring the school up to reasonable standards. In this regard, he testified that he perceives the plant to be inadequate because specialized rooms, offices, an on-site gymnasium, an all-purpose room, locker rooms, and a properly functioning heating system are lacking. He also testified that he perceives both the curricular and extracurricular programs to be deficient in terms of preparing pupils for entrance into ninth grade in the modern North Hunterdon Regional District High Schools. The Mayor attributed many of these problems to the low enrollment.

The Mayor testified that he favors entering into a sending-receiving relationship with Clinton Board for the following reasons:

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1. Past studies have been conducted by the two districts.

2. The Clinton Board offers an expanded program of curricular and extra-curricular activities.

3. Clinton Town does not have the growth potential which would result in overcrowding of its school facility.

4. The two buses required to bus Glen Gardner pupils to Clinton would be relatively inexpensive for the short five-mile trip.

5. Glen Gardner voters will not vote for an extensive capital improvement program to the Glen Gardner School.

6. Pupils at the Glen Gardner School are threatened by heavy traffic on Route 31 while in school and on the playground.

Robert L. Strauss, whose firm in 1979 prepared a "Facilities Master Plan" for both the Glen Gardner Board (P-5) and the Clinton Board (P-7), testified that his overall rating of the Glen Gardner school physical facilites by educational function was 259 and by physical condition was 592 on a range of 1-1000 (P-5 at pp. 105-107). He testified that his recommendations in respect to both educational function and physical condition were to renovate and remodel. Strauss testified that there is need of an alternate facility for upper grade pupils, that the building is lacking in special facilities for art, music, indoor physical education, library and science instruction, that the site size is smaller than the recommended standard of 10 acres, that there appears little likelihood of a marked increase in enrollment, that the kindergarten is a substandard, below-grade-level room, that storage space is lacking, that the school is one of the poorest in the county for grades K-4 and "very poor" for grades 6-8, and that the kitchen is cramped and lacking in ventilation.

Strauss testified that the Clinton school, by contrast, with a projected 1982-83 enrollment of approximately 248 in a building with a capacity of 340, is a better-than-average elementary school which, with its more specialized facilities and specialist teachers, could provide for the needs of Glen Gardner pupils. Strauss testified that when he completed the master plan for Glen Gardner, he recommended that all pupils and, most

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importantly, pupils in grades 5-8 be sent as tuition pupils to some neighboring district with excess capacity. He testified that his recent revisitation of both the Clinton and Glen Gardner schools has not altered his opinion that the implementation of his recommendation is urgently needed.

Strauss testified that if Glen Gardner were to renovate, the extent of needed renovations would trigger requirements for upgrading the building to current standards and would result in at least $1,000,000 in capital improvements. He testified that the Board's capacity for bonded indebtedness is only $250,000, so that when architects' and engineering fees and inflation since 1979 are considered, state funding would have to bear approximately 75% of the cost. He testified that he concludes that such aid is unlikely and that a capital project of these proportions is beyond the means of the Board and the community.

Testimony corroborative of that of Strauss was elicited from Edward H. Herbst, whose inspection noted an absence of fire resistive stairwell and heater enclosures, absence of well-ventilated rest rooms, absence of emergency lighting, absence of provision for access for the physically handicapped, absence of both faculty rest rooms and a faculty room of sufficient size. He, too, testified that he believes renovation, while not impossible, would be prohibitively expensive to upgrade the building with a current assessed value of only $129,700 (P-6 at p. 4). Herbst also testified that he considers the well-maintained, modern Clinton School on a larger, well-placed site away from heavy traffic to be a more appropriate facility. In this regard, he testified that the Clinton Board's use of small and specialized instructional rooms increases the functional capacity of the building from 340 to 413. He testified, as did Strauss, that additional building and major renovation of the Glen Gardner School would not be practical for an enrollment approximating one-hundred pupils.

Howard Holcombe, Chief Safety Consultant for the New Jersey Department of Education's Bureau of Facilities and Planning Services, testified that he had inspected the Glen Gardner School on May 10, 1978, and issued a report to the County Superintendent. That report (P-12) cited as deficiencies the lack of sufficient office space, a kindergarten below grade and insufficient in size, an undesirable cafeteria-library combination, lack of mechanical exhaust ventilation in rest rooms, and absence of direct exits from below-grade facilities. It also cited a number of correctable safety hazards. At the end of his report, Holcombe stated:

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> Educationally, the Glen Gardner Elementary School must be considered an incomplete school. It lacks many of the educational facilities necessary to provide the youngsters with a complete, thorough and efficient educational program. However, the Principal and his staff appear to be striving to offer a good program despite the poor facilities of the building. We question as to whether or not it is feasible and practical to put more money into this building. Perhaps, the taxpayer in this small school district would benefit from a study for alternatives to educate the children of Glen Gardner. In the mean time [sic], the board of education should immediately embark upon a plan of positive action to eliminate as many hazardous conditions as possible and to plan for a permanent solution to their total educational needs.

In a similar report in 1968, the State Department of Education's Chief Consultant, School Planning Services, Charles Updike, cited similar deficiencies and safety hazards (P-13).

Norman Gathany, County Superintendent of Schools from 1966 to August 1, 1981, testified that he had given annual emergency approval for the use of the off-site gymnasium and the below-grade kindergarten, that he concurs with the deficiencies cited by Holcombe, and that he had recommended corrective action (P-20, 27). He testified that he considers the Glen Gardner Board's participation in a regionalization study with Clinton Board and its exploration with other boards of a possible sending-receiving agreement to be good faith attempts at corrective action. Gathany testified that while he had never formally recommended that the school be closed, he did recommend that the Glen Gardner Board participate in such studies. He also testified that he had never disapproved the school's educational program. In regard to the Glen Gardner below-grade kindergarten classroom, he testified that the room has the potential for being fully approved, as was the Clinton School's kindergarten, after architectural study and regrading.

Brian Bolig, Administrative Principal for the Clinton Board, testified that his district has experienced and continues to experience declining enrollment. In this regard, he testified that Lebanon Borough will relocate its seventh and eight grade tuition pupils at another school in 1982-83. He testified that, although the two districts over a two-year period had conducted a regionalization study, no official position had ever been taken by either Board favoring or rejecting regionalization.

He testified that, when at the request of his Board he had prepared "A Sending-Receiving Study" which was then reviewed at a joint meeting of the two Boards, on April 27, 1981, no formal offer or acceptance of such an arrangement was consumated.

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Bolig testified that further loss of enrollment would have an adverse impact on the departmentalized program for upper grade pupils, that his building which once housed 422 pupils could, without any addition, comfortably accommodate the 320 Glen Gardner and Clinton Town pupils who would be enrolled (assuming loss of Lebanon Borough's seventh and eigth grade tuition pupils) if a sending-receiving relationship existed between the Glen Gardner and Clinton Boards (P-8, p. 22). In this regard, he testified that he believes the Clinton Town pupils and Glen Gardner pupils to be fully compatible both socially and educationally. Bolig testified, further, that the incorporation of Glen Gardner's pupils could be expected to result in a lower overall cost per pupil than that which would otherwise be experienced by the respective Boards operating separate schools. His estimates were that both Boards, in a sending-receiving arrangement, would effect a savings when compared to the costs of operating separate schools (P-22 at pp. 11-12). In all of Bolig's study, the assumption is that the Glen Gardner School would be closed and all Glen Gardner pupils bused to Clinton.

John Polt, who, on a full-time basis, operates a large fleet of school buses in the North Hunterdon area, testified that for two 54-58 passenger buses required to transport Glen Gardner pupils to Clinton, the cost would be $14,000 with up to $5,000 additional for half-day kindergarten pupils (P-3).

Timothy Poole, a Glen Gardner Council member and member of the Planning Board, testified that most of the level land in the Borough has already been developed, that steep slopes and lack of municipal sewers hamper land use elsewhere in the borough, that a municipal or regional sewage system appears unlikely, that the population of the Borough is projected to approximate only 1000 by the year 2100, and that low ratables, a deteriorating school plant and declining enrollment do not justify an extensive capital improvement program.

Poole testified that because of the limited enrichment and extracurricular offerings, run-down school plant and lack of equipment, he feels he will never send his preschool child to the Glen Gardner School.

Lorraine Olszyk, mother of three, formerly a Glen Gardner Board member and Board Secretary for one year, testified that the Board, in 1977, in connection with a proposed $77,600 renovation program, requested the inspections made by Holcombe. She testified that the Board was shocked to learn that it could not legally make the

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proposed renovations without a far greater and more costly overall renovation and upgrading of the entire building. She testified that this prompted the Board to distribute to citizens a questionnaire signifying their reaction to entering into a sending-receiving arrangement or a regionalization with some other district(s). She testified, further, that a generally favorable response from citizens caused the Board, with Council's approval, to begin exploring possible options with nearby boards with the long-range goal of regionalization (P-10 RG-1). She testified that while informal meetings were being held, the Glen Gardner Board proceeded to correct safety hazards and make improvements at the school. Olszyk also testified that the members of the Board were greatly concerned with reports in the press that Clinton citizens had, at a public meeting, expressed negative reactions to the inclusion of Glen Gardner pupils at the Clinton School. She testified that, at a subsequent joint meeting on February 4, 1980, of the Glen Gardner and Clinton Boards, it was decided that, because of as yet unanswered questions, no action would be taken to set up a regionalization referendum or a sending-receiving relationship.

Olszyk testified that while she worked as part-time Board Secretary, she and the part-time school nurse shared a downstairs basement room which, until recently, had to be entered through the heater room. She testified that the heater twice backfired, spewing soot all over the furnace area, and that her own quarters there needed an electric heater to provide warmth. She testified that she was told by a heater repair man that the heater could not be repaired and that caulking was but a temporary measure. She testified that her own children and others in other classes reported that they were cold and had to wear coats in certain classrooms during the winter. She also testified that, when an engineer stated the heater could not be fixed and estimated that replacement of the heating system would cost at least $150,000, she applied on behalf of the Board, without success, to the Commissioner for emergency assistance (P-17, 29). She testified, further, that she had received complaints from teachers and pupils about the smell of oil fumes and septic odors in certain classrooms, the cafeteria and rest rooms.

Olszyk testified that, as a parent, she feels the school lacks ability grouping and social interaction and is deficient in professional specialized instruction in offerings such as art, music, home economics, library science, instrumental instruction, and gifted and talented programs. In this regard, she noted that her daughter has only three other girls in her class. She testified that she perceives too great a change for pupils who must leave the 100-pupil school and cope with the reality of entering large, modern, well-equipped Regional High Schools at grade nine in competition with other pupils who have had the benefits of better facilities, equipment, curricular and extracurricular offerings.

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Ingrid Raupp, who after employment as Board Secretary at Glen Gardner moved to Clinton and assumed that same post for the Clinton Board, testified that the principal reason for her relocation was her desire to provide her children with an education which included professional instruction in such areas as music, home economics, library science, art, vocational studies and other enrichment subjects. She corroborated Olszyk's testimony regarding the unsatisfactory nature of the Glen Gardner heating system and quarters for the Board Secretary. She also testified that she finds the educational program at Clinton to be conducted by a highly motivated, stimulating and creative staff.

Carol Behrens, kindergarten teacher at Glen Gardner, testified that from 1979-81 she had experienced headaches and other severe discomforts, necessitating medical care. She attributed this to fumes from the nearby heater room and complained to the Board (P-15, 16, 18). She testified that she was unable to tell whether any of her pupils were similarly affected. She also stated that since repairs had been made, she noticed a distinct improvement in 1980-81 and noticed no fumes at all during 1981-82.

John Carpenter, Glen Gardner Board President, whose years as a board member total 27, testified that the school's furnace was installed when the building was built in 1916. He testified that a second, smaller furnace was added in 1956 to compensate for the later addition to the building. Carpenter corroborated that there had been furnace "backfires" and that the Board's heating company representative had said, in August 1980, that the furnace could not be fixed. He testified that caulking has been only a temporary expedient, that the heating system has been a matter of great concern to him, and that the Board lacks the $122,500 which an engineer estimated a new heating system would cost.

Carpenter testified that after the citizens voted the budget down in 1981, a board committee was formed to continue to look into a tuition arrangement or regionalization, which latter option he favors if financial and curricular benefits would result. He also testified that, while the Board has not yet found a district to agree to either a sending-receiving relationship or regionalization, it intends to continue exploring such possibilities.

A resident of Glen Gardner since 1975 whose children have attended the Glen Gardner School testified that when his son went from Glen Gardner to the North

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Hunterdon Regional High School, he was on the honor roll for three years. He testified that his children experienced no social problems as the result of their educational experiences at Glen Gardner, that he was well satisfied with their education there, that Glen Gardner teachers were always willing to give extra help, that he never felt his children were unsafe, that they had not reported being cold or uncomfortable, that the school was clean, that the food service there was satisfactory, and that Glen Gardner's small classes were desirable, as compared to those classes of 30-35 where they had previously attended at Babylon, Long Island.

Another citizen who has resided in Glen Gardner since 1976 and is currently the President of the Glen Gardner Parent Teacher Organization (P.T.O.) testified that her child in fourth grade reads at the sixth-grade level. She testified that the child study team made early and accurate appraisal of one child's need for special help, that the Principal was helpful in classifying that child, that teachers are alert to having pupils using appropriate levels of materials, that the combination of the school's library and the county bookmobile provides a wealth of books, that art projects and instruction are regularly provided by classroom teachers, that music instruction is given on a regular basis by a volunteer under P.T.O. auspices, that teachers incorporate interesting projects in science and home economics, that microscopes are used in science instruction, and that career instruction and related field trips are provided. She testified further that, having moved from a large school system, she is pleased with the smaller school, its individualized approach, its worthwhile field trips to ballet, and its drama productions. She testified that in her frequent visits to the school, she has found the building to be safe, clean and well-maintained. She testified that although she is open-minded about regionalization, she does not favor the busing of her elementary children to any other location. She also testified that she believes the school's athletic and other extracurricular activities are appropriate and adequate to meet the needs of the pupils enrolled.

Elizabeth Housel, a Glen Gardner teacher who is one member of a committee to coordinate programs with the North Hunterdon Regional district's Voorhees High School, testified that Glen Gardner's curriculum is essentially the same as that of Clinton and other elementary schools which are within the regional area. She testified that Glen Gardner teachers use a one-on-one approach to learning problems, that they frequently confer with one another, that they exhibit a caring and cooperative attitude, and that they promote and foster peer tutoring among pupils. She testified that although classes

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are small, teachers use, at their option, ability grouping in their instructional programs, that teachers give extra help during and after school when needed, that they meet twice each year in parent teacher conferences, and that she has found a high degree of cooperation between parents and teachers. She testified, further, that she believes the low pupil-teacher ratio and small classes lessen anxiety, allow for informality, heighten individual pupil participation, and allow teachers more time to observe and evaluate pupil progress. She also testified that a program of art instruction has been instituted since October 1981.

Housel also testified that while fumes from the heater had been a problem, no fumes had been noticed or reported during the fall of 1981. In regard to safety, she testified that she is unaware of any safety hazards.

George Gianforcaro, an engineer who was employed by the Board to design a new heating system, testified that he applied, on the Board's behalf to the Department of Energy (D.O.E.) for a hardship grant to defray the $120,000 which he estimated would be the cost of a new heating system (P-30). He testified that, because D.O.E., in the face of a funding cutback, reduced its qualifying 15-year "payback" to a 3-year "payback" period, the project no longer qualified and was not approved. He testified, however, that the physical construction of the Glen Gardner school is sound and conducive to installation of an efficient, modern, zoned heating system.

Glen Gardner Board member Joseph Cadden testified that during his one year on the Board, new blackboards, suspended ceilings, new heating ducts, and certain aesthetic improvements have been authorized by the Board. He testified that it has been reported to the Board that the prior problems of uneven heating and fumes from the furnace have been fully corrected. He testified that the Board has placed no moratorium on building maintenance and improvement, and that its studies do not show conclusively that a regionalization or sending-receiving arrangement would be financially advantageous to Glen Gardner. He testified, further, that since he has been on the Board, no complaints have been lodged at meetings by citizens concerning the curricular offerings at the school. Cadden also testified that, if Glen Gardner pupils were enrolled at Clinton, he believes pupil participation in extracurricular activities might well decrease because of transportation problems since parents would be required to transport the pupils.

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Glen Gardner's Principal testified that safety hazards noted by the Chief Safety Consultant and others have been corrected by removing stored furniture from the base of the stairwell, by making fire doors fully operational, and by installing a direct outside exit in addition to two internal exits from the below-grade kindergarten room. In regard to complaints about pupils and staff passing through the auxiliary heater room, the Principal testified that such passage is now prohibited and all access to the area is directly from outside. He testified that when in November 1981 the heating system was worked on for three days under the personal direction of the owner of the Board's heating company, the owner detected and corrected valve malfunctions and a blockage in the heating duct leading to those classrooms that frequently registered low temperatures. He testified that no complaints have since been received from teachers or pupils and that those rooms now receive adequate heat. He testified, further, that installation of an air intake lever in the heater room, repairs to the chimney flue, and new firebrick and recaulking in the firebox have corrected all problems of fumes.

In regard to curricular offerings at Glen Gardner, the Principal testified that upper grade pupils are now receiving art instruction from a certified instructor, that instruction in algebra begins with the second semester of the eighth grade,. that instruction in technology for children is provided, that a science fair was held in 1979-80, that art competitions are encouraged, that photography instruction and a darkroom are available for interested pupils, that classroom teachers in lower grades teach both art and music, that two parent volunteers assist teachers with music instruction for grades 5-8, that educational television is available and used in the instructional process, that water safety is taught, and that volunteer parents monitor and check out books in the library twice weekly.

Concerning cocurricular offerings, the Principal testified that classes put on dramatic and musical programs, that guitar instruction was offered under P.T.O., sponsorship without cost to interested pupils during 1980-81, that game days and fund raising projects were organized by the P.T.O., that a yearbook activity is functional, that the school is made available for Brownie and Girl Scout programs, and that pupils play on volleyball, basketball and softball teams against other elementary school teams.

The Principal testified that although Glen Gardner has an old school and has been hampered by budgetary considerations from expending large sums for capital improvements, the building is sound and free from hazards. He also testified that he

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views Glen Gardner's small classes with individualized instruction as compensating factors for the absence of specialized personnel which larger schools are able to provide. He testified, further, that he has received no complaints from the North Hunterdon Regional High School district concerning the preparation of Glen Gardner's elementary pupils for secondary study. The Principal also testified that the Glen Gardner school, pursuant to the approval and classification process under N.J.S.A. 18A:7A-1 et seq., was approved on August 31, 1981, as shown in the following communication from the Commissioner:

> The classification status of the district and school is as follows:
>
> 1. The Educational Plan
> The district and school are classified as approved.
>
> 2. Basic Skills
>
> The school is classified as approved.
>
> 3. Other Law and Regulation
>
> The district and school are classified as interim approved.
>
> Facilities - Action plan to provide adequate facilities to meet present state standards.
>
> 4. Achievement of Local Goals, Objectives and Standards.
>
> The school is classified as approved.
>
> [P-19]

He also testified that the following commentary had been received a year earlier from the Commissioner under date of August 29, 1980, wherein essentially the same classification was given:

> The district offers a balanced program within its budget and school facility. It recognizes the need for facility improvements and has initiated steps to remedy the need. The board of education has

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formed a committee to investigate solutions to the inadequate facilities to meet present state standards.

The environment of the school offers the professional staff and its students an atmosphere that produces a supportive cohesive group.

DISTRICT/SCHOOL COMMENDATIONS

In recognition of Glen Gardner school district's efforts and progress toward the implementation of a thorough and efficient system of public education, the following commendations are cited:

A basic skills remedial program includes mathematics and reading.

Curriculum revision in the areas of mathematics, science and language arts are presently being conducted.

Curriculum development programs permit teachers to work in terms of their purposes and student needs.

Staff meetings are organized around the study of school needs.

Professional staff are committed to making provision for sharing ideas, teaching skills and new educational information.

Reporting procedures are planned to provide parents and teachers with information concerning the child's potential and progress.

The district has established articulation procedures within the school and with North Hunterdon sending districts.

[P-21]

FINDINGS OF FACT:

On the basis of a preponderance of credible evidence within the record, I **FIND** the following to be relevant facts to be considered, in arriving at a determination, together with those uncontroverted facts previously set forth:

1. The curricula in the basic skill areas as offered by Glen Gardner and Clinton are substantially the same. Clinton's school plant, however, has a capacity for laboratory demonstration and experimentation in science, which is superior to the Glen Gardner building.

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2. Clinton offers a variety of extra curricular sports programs including soccer, basketball, cheerleading, gymnastics, volleyball and intramural basketball (P-23). These are more extensive in scope and more regularly offered than the more limited after-school sports activities at Glen Gardner, where offerings are frequently not implemented for lack of participation in the school, which has only 50 pupils in grades 5-8.

3. Clinton offers and maintains the following specialized programs to meet special needs of enrolled pupils: supplemental mathematics, resource room and a gifted and talented program (P-24). The Clinton School has specialized and small group instruction rooms which provide an excellent setting for such instruction while regular classrooms are in session.

4. Clinton employs specialists in library science, art and music on a full-time basis. They provide services in those areas to pupils in all grades in special rooms set aside for such instruction (P-8). Glen Gardner has almost no specialized small instruction areas and only a limited number of specialists. Glen Gardner does, however, provide classroom teacher instruction in music and art for grades K-4 and, under teacher direction, music instruction 5-8 with volunteer assistance from parents. Art instruction by a certified art teacher has recently been provided for grades 5-8 at Glen Gardner.

5. Clinton has an on-site, centrally located all-purpose room which serves pupils as an indoor physical education instruction area, cafeteria and assembly room. Glen Gardner has scheduled use of a municipally controlled off-site indoor physical education facility for both physical education and after-school activities. In inclement weather, this facility is used at teacher discretion only, since it is at least a five minute walk without sidewalks from the school. When that walk is contraindicated, pupils have no alternative indoor activity area. Both schools have adequate access to an outdoor playground area.

6. The main heater at the Glen Gardner School is approximately 65 years old. Credible evidence within the record, however, establishes that,

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following three days of extensive work in the fall of 1981 when blockages were removed from ducts, that heater, together with its auxiliary heating unit, was providing sufficient heat to the school. There is no evidence within the record on which to base a conclusion that the heater at the Clinton school is not heating that school properly.

7. The Clinton School is, by contrast to the Glen Gardner School, a more modern plant with special provisions for child study team members and a speech correctionist, ample administrative and library offices and specialized small group instruction areas. There is, however, no convincing showing within the record that Glen Gardner has been unable to function and provide for the needs of its pupils by "making do" through flexible use of the facilities it does have.

8. There is no convincing proof that pupils at the Glen Gardner School are currently subjected to hazardous conditions. While the school is, admittedly, near a busy highway, such placement in proximity to a major thoroughfare is not uncommon on a statewide basis. Nor is the temporarily approved below-grade kindergarten, with its three exits, intolerable in a school which, in a fire drill, exits all of its pupils in one and one-half minutes. While that kindergarten is smaller than optimum size, its classes are also smaller than average. Additionally, its size is expandable by the simple expedient of removal of a closet.

9. There is no convincing proof that Glen Gardner pupils have been unable to adjust either socially or educationally when they enter ninth grade in either of the two high schools of the North Hunterdon Regional District.

10. The current expense costs per pupil since 1978, as reported by the County Superintendent's office, are as follows:

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	1977-78	1978-79	1979-80	1980-81
Clinton Town	$ 1,485.	1,851.	1,986.	2,336.
Glen Gardner	1,609.	2,075.	2,138.	2,255.

11. Projected enrollment in the near future for Glen Gardner will be little different from its current enrollment of 103 pupils. Its building could accommodate at least twice that number, since classes now average under 12. Clinton's school enrollment in September 1982, with loss of Lebanon Borough's 7th and 8th grade pupils, will be between 220 and 230 in a building which, with a functional capacity of 413, could easily accommodate all of the 330 pupils from Clinton and Glen Gardner, should a sending-receiving relationship be ordered.

12. The former County Superintendent of Schools, recognizing the limitations of the Glen Gardner School building, recommended to the Glen Gardner Board that alternate plans be made by the Board for its pupils to be educated elsewhere under regionalization or sending-receiving relationship with a district or districts with excess building capacity. In response to that recommendation, the Glen Gardner Board entered into regionalization studies and also explored possibilities for a sending-receiving relationship.

13. The regionalization studies conducted by the Clinton Board and the Glen Gardner Board resulted in no action either to accept or reject the idea of going to referendum. Nor did the Bolig report or the results of the questionnaires promoted by both boards in an effort to assess the preferences of citizens culminate in either an offer, or an acceptance, or a rejection of a sending-receiving or regional relationship. Rather, the two boards, at their last meeting early in 1981, agreed that no action would be taken, since there were yet unanswered questions they deemed important.

14. Some citizens of Glen Gardner are strongly in favor of entering a sending-receiving relationship with the Clinton Board. Others are strongly opposed to such and desire to maintain their own Glen Gardner

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School where their children can attend without being bussed to another community. Similar responses were given in a questionnaire concerning the concept of regionalization with Clinton Town.

15. The proofs within the record, which rely largely on studies conducted by Brian Bolig, support the conclusion that there would be some limited reduction in costs per pupil to both districts if a sending-receiving relationship existed with the resultant larger classes. The amount of such savings would, of course, be determined by yet unknown class sizes, enrollments and a multitude of other educational policy decisions, which have not yet been made.

16. The Glen Gardner School, pursuant to N.J.S.A. 18A:7A-1 et seq., for the past two years has been classified as approved by the Commissioner in regard to basic skills, the educational plan and achievement of local goals and objectives. It was, however, given only interim approval in the area of school facilities. The interim approval was given on the basis of the Board having "formed a committee to investigate solutions to the inadequate facilities to meet today's State standards. . ." (P-21).

DISCUSSION AND CONCLUSIONS:

Mayor and Council, arguing that the Glen Gardner School should be ordered closed by the Commissioner under his broad implied powers, cite as authority in this regard Jenkins et al. v Twp. of Morris School District, 58 N.J. 483 (1971); In the Matter of the Closing of the Jamesburg High School, 1979 S.L.D. 35, 53; aff'd State Bd. of Ed. 1979 S.L.D. 52, 69; aff'd in part N.J. Super. (App. Div.) 1979 S.L.D. 73, reversed in part 1979 S.L.D. 78; aff'd 83 N.J. 540; Bd. of Ed. of Twp. of East Brunswick v. Twp. Council of East Brunswick, 48 N.J. 94 (1966); Laba v. Newark Bd. of Ed., 23 N.J. 364; Booker v. Board of Education of Plainfield, 45 N.J. 161 (1965).

It is well established that the Commissioner, by reason of statutory authority, and even in the absence of specifically detailed authority, has broad powers to insure compliance by local school districts with the constitutional and statutory mandates for a thorough and efficient education. However, the circumstances in each of the above cases cited by the petitioners are not on point with the facts in the matter herein controverted.

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There is herein not so much as a reference to racial imbalance as was the key issue in Jenkins, supra, and Booker, supra; nor is there a dispute over what amount shall be fixed for the school budget, as in East Brunswick, supra; nor is there an issue of fitness of a tenured teacher to continue to teach, as in Laba, supra.

It is clearly apparent from this record that in both curricular offerings and extracurricular opportunities, the Clinton Board offers its enrolled pupils greater diversity of programs. It also provides more modern and diverse forms of housing for its pupils and programs.

This dispute may not be decided, however, solely on whether the Clinton Board's educational offerings are more extensive or its school building more commodious. The Commissioner has recognized that budgetary exigencies may justify a board's curtailment of both curricular and extracurricular offerings. Thus in 1977, two years after the enactment of the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., he affirmed the action of a board abolishing the positions of its certified music teacher in favor of classroom-teacher-directed music instruction such as that now offered at Glen Gardner. In this regard, see Mary Ann Popovich v. Wharton Bd. of Ed., 1977 S.L.D. 440. Therein, the Commissioner stated at pp. 443, 444:

> The Board's emergency financial problems provided what it determined on April 21 to be good cause to abolish its then existing music instructional program for the ensuing year. Thereupon, petitioner was duly noticed that, since she was certified only as a teacher of music, her employment would be terminated on June 30, 1976.
>
> N.J.A.C. 6:8-4.3, adopted by the State Board of Education on January 7, 1976, pursuant to authority of N.J.S.A. 18A as amended by Chapter 212, Laws of 1975, seeks to define more precisely than heretofore those components of a thorough and efficient education as contemplated by the Legislature and the New Jersey State Constitution. Therein it is provided, inter alia, that:
>
> > "(a). . .The district board of education shall provide certified personnel needed to implement a thorough and efficient system of free public schools, which may include but not be limited to the following: . . .art teachers, educational supervisors, foreign language teachers, health teachers, . . .instrumental and vocal music teachers, nurses. . . ." (Emphasis supplied.)
>
> The Commissioner finds that such regulation is permissive as it applies to petitioner in that it employs the word "may" in reference

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to employment of certified music teachers. No State Board rule or regulation mandates that the Board employ certified music teachers or maintain or adopt a specific type of music curriculum for its elementary school. Nor does such requirement appear in the New Jersey statutes.

The Commissioner has in the past consistently recognized the discretionary authority of local boards to determine the type of music program to be offered in local districts. In one such instance, he stated in Frank W. Zimmermann et al. v. Board of Education of the Southern Regional High School District, Ocean County, 1973 S.L.D. 741, aff'd State Board of Education 1974 S.L.D. 1441, aff'd Docket No. A-1682-73 New Jersey Superior Court, Appellate Division, March 18, 1975 (1975 S.L.D. 1160):

> ". . .The Commissioner is of the opinion that musical offerings set forth by the Board could be more advanced, extensive, and individualized, but such offerings frequently have not been possible in public schools, and their establishment is subject to the discretionary judgment of local boards of education. . . ." (at 748)

Similarly, herein, the Commissioner finds it lamentable that circumstances have so conspired that the Board deemed it necessary to abolish both positions of its professional music instructors thus depriving pupils of their ministrations. The record is clear that the Board is actively moving to establish an alternative program of vocal music instruction utilizing its elementary classroom teachers. Similarly, it is expending limited funds and making its facilities available for instrumental instruction and a band activity during the summer and extracurricular hours. The effectiveness of such programs will routinely come under the scrutiny of the monitoring procedures mandated by the State Board and the Commissioner in the rules for a Thorough and Efficient System of Free Public Schools, N.J.A.C. 6:8-1.1 et seq.

The Commissioner finds no violation of either the statutes or rules of the State Board. Absent a finding that the Board acted in bad faith, punitively in reprisal, arbitrarily, capriciously or in subterfuge, the Board's determination must stand, however regrettable may be the diminution of its instructional program. The Commissioner so holds. . . .

Given this clear language and the finding above that for the past two years, after careful scrutiny required by the monitoring and classification process, the Commissioner has classified as approved without condition the Glen Gardner school in the area of basic skills, educational plan and local goals and objectives, I CONCLUDE that the Glen Gardner Board is in compliance in these areas with thorough and efficient requirements under education law.

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This contrasts sharply to the Commissioner's holding in Jamesburg, supra, wherein, in determining that the Jamesburg High School should be closed, he stated:

> While in no way denigrating the commendable performance of the Board or its teaching staff members, the Commissioner determines that Jamesburg High School is not operating and shows no early promise of operating in full compliance with thorough and efficient requirements.
>
> The curriculum available to pupils at Jamesburg High School is so limited that it must be considered less than thorough within the contemplation of the Legislature and the State Board of Education as set forth in N.J.S.A. 18A:7A-1 et seq. and N.J.A.C. 6:8-2.2. Assuming the renovation of the schoolhouse to correct its present deficiencies, it would still be inadequate to house an expanded high school curriculum such as that contemplated as being consistent with thorough and efficient requirements. Nor is the school with its unusually small classes and correspondingly high per pupil costs, fiscally efficient. Already high per pupil costs would be yet further escalated by ordering the Board to expend large sums to effect major repairs and renovations which have been deferred in anticipation of the closing of the school. Such action would be imprudent. The Commissioner so holds.
>
> Given the factual context hereinbefore set forth, the Commissioner concludes that the Board's request for an order directing that it close its high school is a sound exercise of its discretionary authority.
>
> The Board placed before the electorate a referendum proposing that Jamesburg High School be closed pursuant to N.J.S.A. 18A:33-2.1. That referendum failed to pass.
>
> 1979 S.L.D. 49

In the instant matter, there are marked contrasts to the facts considered by the Commissioner in Jamesburg, supra.

First, the conclusion herein is that unlike Jamesburg High School the Glen Gardner School's program is sufficiently broad to be in compliance with thorough and efficient requirements. Second, Jamesburg, unlike Glen Gardner, was experiencing runaway per pupil costs. Third, Jamesburg Board, as the elected representative of the citizens for educational purposes, petitioned the Commissioner to close its high school after an unsuccessful referendum seeking that closing. In the instant matter, no such referendum, as provided for by the statutes, has been conducted. Nor does the Glen Gardner Board, the duly elected representative of Glen Gardner citizens for educational purposes, concur in the municipal governing body's appeal to the Commissioner to close its school.

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While I do not hold that a municipal governing body could not successfully petition the Commissioner to order a school closed, it bears a heavy burden of proof when a board which has acted in good faith opposes that closing. As was stated by the New Jersey Superior Court, Appellate Division, in Michael A. Fiore v. Jersey City Bd. of Ed., 1965 S.L.D. 177 at 178:

> The Legislature has committed the operation of local schools to district boards of education. It has provided a system of administrative appeals from such boards to the Commissioner, R.S. 18:3-14, and thereafter to the State Board, R.S. 18:3-15. The powers of boards of education in the management and control of school districts are broad. Downs v. Board of Education, Hoboken, 12 N.J. Misc. 345, 171 A.528 (Sup. Ct. 1934), affirmed sub nomine Flechtner v. Board of Education of Hoboken, 113 N.J.L. 401 (E. & A. 1934). . . . Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse. 78 C.J.S., Schools and School Districts, 6128, p. 920; Boult v. Board of Education of Passaic, 135 N.J.L. 331 (Sup. Ct. 1947), affirmed 136 N.J.L. 521 (E. & A. 1948). Where, however, the board's action is patently arbitrary, without rational basis, or induced by improper motives, the rule is otherwise. Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 294 (App. Div. 1960); East Paterson v. Civil Service Dept. of N.J., 47 N.J. Super. 55, 65 (App. Div. 1957); cf. Moore v. Haddonfield, 62 N.J.L. 386, 391 (E. & A. 1898); Peter's Garage Inc. v. Burlington, 121 N.J.L. 523, 527 (Sup. Ct. 1939). In short, we may not substitute our discretion for that of the local board, nor may we condemn the exercise of the board's discretion on the ground that some other course would have been wiser or of more benefit to the parties or community involved. Boult, supra. (136 N.J.L. at p/ 523).

See also Quinlan v. North Bergen Bd. of Ed., 73 N.J. Super. 40 (App. Div. 1962); Robert B. Lee v. Montclair Bd. of Ed., 1972 S.L.D. 5 at 8.

That which appears similar herein to the facts in Jamesburg supra, is the inability of the Glen Gardner Board to raise capital to mount a renovation program which would bring its school building into compliance with modern-day standards. While regrading could conceivably make its kindergarten room an approved facility, the Board is faced with such costly items as providing mechanical ventilation in toilet rooms, an on-site indoor physical education facility, and replacement of its aged heater. While that heater now appears to be functioning adequately, it will not last forever.

The Board, faced with continuing interim approval of its building, cannot disregard the County Superintendent's continuing recommendation to remedy its school

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plant's deficiencies or to seek out either regionalization or a sending-receiving relationship with another district or districts. Its regionalization study with the Clinton Board and its exploration of possible sending-receiving arrangements have thus far been interpreted by education officials as good faith compliance. I also **CONCLUDE** that those efforts constitute good faith compliance. Thus far, however, they have not resulted in an answer to the Board's dilemma. Nor has the Glen Gardner Board made any proposal to another Board to engage in regionalization or a sending-receiving relationship.

The dilemma is one in which the prevailing rules of the State Board of Education would require that the entire Glen Gardner School be brought into compliance with today's standards if the Board were to undertake a capital improvement which would cost as much as 50% of the $129,500 assessed worth of the school. Thus the erection of an on-site all-purpose room at a cost of $65,000 would trigger much larger capital costs which could exceed the Board's borrowing capacity, as shown by the Strauss report. It appears that such expenditure would be imprudent for a school enrollment of only about 100 pupils. There is no assurance at this juncture as to whether the proposed Spruce Hills condominium development, with its final potential of an additional 100 pupils, will or will not be approved. Should it be approved and move rapidly to completion, the per pupil costs of a capital improvement program would be altered downward. Similarly, the borrowing capacity of the Glen Gardner Board would rise beyond its present limits.

DETERMINATION:

After careful consideration and balancing of the above findings of fact, conclusions and the arguments of law set forth by the litigants, it is **DETERMINED** that the Mayor and Council of Glen Gardner have not proven by a preponderance of the credible evidence that the school should be ordered closed at this time. Rather, the Glen Gardner Board has successfully shown that it has maintained an approved program of education at a cost similar to that which would be incurred at Clinton if a sending-receiving relationship were ordered. The Glen Gardner Board, as the duly elected representatives of the populace, has also made good faith attempts to seek out alternatives in the form of regionalization or sending-receiving relationships and professes its intention to continue such exploratory efforts.

Given these good faith efforts, it is **ORDERED** that petitioners' application for a directive closing the Glen Gardner School as of September 1982 be and is **DENIED**. It is further **ORDERED** that the Commissioner retain jurisdiction over the yet unresolved

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problems concerning those deficiencies in the Glen Gardner School which must be resolved for full and unconditional approval of its school plant. To this end, the County Superintendent of Schools, using such experts as he may choose, is directed to present to the Glen Gardner Board and to the Commissioner within four months of the Commissioner's final decision, an explicit written report detailing what physical improvements must be made, together with recommended time deadlines for their completion. By so doing, the Glen Gardner Board will be able to examine more intelligently its alternatives of making improvements to the school or embarking on an alternative program of action to arrange for the education of all or some of its pupils by another district. It is further ORDERED that the Glen Gardner Board present a written report of its progress in this regard to the Commissioner, with a copy to the County Superintendent of Schools one year from the issuance of the Commissioner's final decision.

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

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I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

March 24, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

March 26, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 29, 1982
DATE

Ronald L. Harkey/pa
OFFICE OF ADMINISTRATIVE LAW

bm

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DOCUMENTS IN EVIDENCE:

P-1 Tax Rates in Hunterdon County by Municipalities
P-3 Polt to Oleniacz, October 9, 1981
P-5 Facilities Master Plan for Glen Gardner Schools, October 1979, by Strauss & Associates
P-6 Herbst Report, September 30, 1981
P-7 Facilities Master Plan for Clinton Town Schools, August 1979, by Strauss & Associates
P-8 Facilities Use at Clinton Town School, 1981-82
P-9 Inspector of Buildings to Commissioner Kendall, September 3, 1915
P-10 Solomon to Nixon, April 25, 1978
P-11 Solomon to Gathany, April 25, 1978
P-12 Holcomb to Gathany, May 15, 1978
P-13 Updike to Gathany, May 27, 1968
P-15 Behrens to Board, September 3, 1980
P-16 Glen Gardner Education Association to Board, November 3, 1980
P-17 Olszyk to Glen Gardner Education Association, November 5, 1980
P-18 Behrens to Kline, December 1, 1980
P-19 Classification of Glen Gardner Schools, August 31, 1981
P-20 Gathany to Kline & Olszyk, June 1, 1981
P-21 Evaluation & Classification Status of Glen Gardner, August 29, 1980
P-22 Bolig's Report, April 27, 1981
P-23 Sports Programs at Clinton
P-24 Special Programs for Special Needs at Clinton
P-27 Minutes of Glen Gardner Board, June 12, 1978
P-28 1981 Hunterdon County Abstract
P-29 Olszyk to Burke, February 23, 1981
P-30 Gianforcaro to Nixon, April 29, 1981
P-31 Glen Gardner Board Minutes, February 4, 1980

RG-1 Questionnaire and Information Sheet
RG-2 Raupp to Olszyk
RG-3 Curriculum Listings, Glen Gardner, K-8
RG-4 K-4 Time Breakdown for Instruction
RG-5 Cwik to Kline

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OAL DKT. NO. EDU 4056-81

RG-6 NJEA Statistical Tables, 1981 Edition

Marking Symbols:

P Mayor and Council of Glen Gardner

RG Respondent Glen Gardner Board of Education

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MAYOR AND COUNCIL OF THE BOROUGH OF GLEN GARDNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF THE BOROUGH OF GLEN GARDNER AND THE TOWN OF CLINTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENTS.	:	

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

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

Petitioner excepts to the conclusion herein by the Honorable Eric G. Errickson, ALJ denying petitioner's application for an order closing the Glen Gardner Elementary School. Petitioner contends that Judge Errickson failed to properly evaluate testimony concerning the school's heating system alleging that it has a long history of periodic and serious breakdowns. Petitioner argues that the present Board has not made sufficient effort to resolve the school's dilemma and urges that the timelines for possible studies and proposed action be markedly constricted. The Commissioner cannot agree with petitioner's exceptions.

A thorough examination of the documents submitted in evidence and the testimony elicited in hearing convinces the Commissioner that Judge Errickson properly weighed and evaluated the manifold circumstances surrounding this controverted matter.

The Commissioner, while recognizing the legitimate concern of the Mayor and Council, must hold the Board to its broad responsibilities for the education of its pupils. N.J.S.A. 18A:11-1.

The present matter involves the closing of a school system and, as such, deserves and must have appropriate study and consideration without undue obfuscation and delay. The Commissioner has long been sensitive to the problems involved in the consideration of possible school closings. In the Committee to Save Bayard School, 1978 S.L.D. 454, 461, the Commissioner said:

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> "***The Commissioner is constrained, in spite of the very real fiscal and time constraints with which the Board was faced, to caution this Board and all boards of education that in so sensitive a matter as the proposed closing of a neighborhood elementary school the members of the public, as well as school employees, should be given ample opportunity to react to that proposal before final action is taken.***" (Emphasis in text.)

Further, in Ronald Polak et al. v. Board of Education of the Township of Woodbridge, Middlesex County, decided July 28, 1981, the following concern was expressed:

> "***The Commissioner recognizes the strong and deep emotions commingled in a district faced with the marked decline in enrollment as evidenced herein. The task of a board of education faced with possible school closings is a heavy one. However, the responsibility of a board to take proper action to recognize and best resolve its resultant enrollment problems while ensuring a thorough and efficent education for its pupils outweighs all other considerations.***"
> (Slip Opinion, at p. 21)

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

The Commissioner notes with approval the conditions set down herein by the Court and the timelines so established and adopts them as his own.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

May 10, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8868-81
AGENCY DKT. NO. 407-10/81A

BRENDA GRIER,
Petitioner
v.
BOARD OF EDUCATION,
CARL SHARIF, NINA ROBINSON,
CHARLES BELL, DANIEL W. GIBSON, JR.,
ELEANOR GEORGE, HECTOR ORTIZ,
ANTONIO ALBUQUERQUE, COLUMBUS
SALLEY, KENNETH A. GIBSON, MAYOR,
CITY OF NEWARK, ESSEX COUNTY,
Respondents.

ON SUMMARY DECISION
COUNT I

APPEARANCES:

Eugene G. Liss, Esq., for petitioner (Liss & Meisenbacher, attorneys)

Rosalind L. Bressler, Esq., Assistant Corporation Counsel, for respondent,
Kenneth A. Gibson, Mayor
(John J. Teare, Newark Corporation Counsel, attorney)

Louis C. Rosen, Esq., Associate Counsel, for respondent,
Newark Board of Education and other individual respondents
(Cecil J. Banks, Board General Counsel, attorney)

Record Closed March 19, 1982 Decided March 30, 1982

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OAL DKT. NO. EDU 8868-81

BEFORE JAMES A. OSPENSON, ALJ:

In June, 1980, before appointing Brenda Grier to a three-year term on the Board of Education of the City of Newark, Essex County, Mayor Kenneth A. Gibson asked for, and she gave him, her undated letter of resignation "... due to the press of personal business ..." When, after serving on the board for a year, she and the mayor fell into disagreement over the board's appointment of a new executive superintendent of schools,[1] Dr. Columbus Salley, and when her publicized dissatisfaction with Salley's appointment reached the level, in the mayor's view, of "fomenting dissension and creating an atmosphere that interfered with the orderly and efficient operation of the school district," the mayor accepted her "press of business" resignation. Then, having notified the board, he promptly appointed Nina Robinson to fill the unexpired term. At a meeting of the board on September 8, 1981, Grier was unseated over her objection and Robinson, sworn in, was seated.

Petitioner filed a petition in the Division of Controversies and Disputes of the Department of Education on September 25, 1981 seeking judgment of the Commissioner under Count I of the petition:

A. Invalidating acceptance of her resignation as illegal;

B. Declaring her a voting and participating member of the board;

C. Restoring her to the board; and

D. Enjoining the mayor from using undated resignation letters in future as conditions precedent to board appointment.

---

[1]Under N.J.S.A. 18A:17A-1 the power and duty to make such an appointment is vested exclusively in the board.

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Named parties respondent to the petition were the mayor, the board, Executive Superintendent Salley, and certain other board members including petitioner's successor, Robinson. Answers were filed by the board and individual respondents on December 15, 1981 and by the mayor on November 10, 1981. Among other things, the mayor alleged petitioner's resignation had been submitted willingly and voluntarily in 1980 and had never been withdrawn before he accepted it a year later.

The Commissioner transmitted the matter to the Office of Administrative Law on December 21, 1981 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On February 16, 1982, petitioner filed a motion for summary decision on Count I of her petition, pursuant to N.J.A.C. 1:1-13.1 et seq. On March 10, 1982 the administrative law judge directed the parties to file for record board minutes for the meeting of September 8, 1981, petitioner's questioned resignation, and the letter or instrument appointing petitioner's successor. Argument on the motion was heard and concluded on March 19, 1982. The record on motion closed then. The position of the board and the other individual respondents was announced by counsel to be neutral, the issue in their view being one between appointing authority and appointee over legal sufficiency of her resignation. See board letter brief, pp 2-3.

HEARING ON MOTION

Summary decision motion practice in the Office of Administrative Law parallels that in New Jersey courts. Compare N.J.A.C. 1:1-13.1 et seq. with R. 4:46-1 et seq. In general, where a party so moves on his own pleading, summary decision or summary judgment shall be rendered if the papers and discovery that have been filed, together with the affidavits, show there is no genuine issue as to any material fact challenged and that the movant is entitled to prevail as a matter of law. Compare N.J.A.C. 1:1-13.2(a) with R. 4:46-2. If there appear genuine triable issues of fact, the motion is denied and the matter proceeds to trial. Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 73-77 (1954).

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Petitioner and the mayor differed on the existence of genuine or palpable issues of fact: petitioner argued there are none; the mayor argued there are several. Petitioner certified in her moving papers, argued the mayor, that she never informed anyone to insert a date on her resignation, never authorized anyone to do so and never communicated to anyone an intention to resign. But, said the mayor in his affidavit, petitioner readily agreed to his request and signed her resignation willingly, voluntarily and without hesitation. Moreover, he said, she never withdrew it before acceptance. These factual divergences required formal hearing, argued the mayor, and as a result required denial of petitioner's motion for summary decision. In addition, he said, there may be "substantial questions with respect to the actions of petitioner which caused [him] to accept her resignation."

The parties do not dispute the City of Newark is a Type I school district governed generally by provisions of N.J.S.A. 18A:17A-1, 7 and possessed of general educational powers and duties under N.J.S.A. 18A:11-1.

Organizationally, its board is subject to provisions for qualification, membership and removal under N.J.S.A. 18A:12-1,2,3 et seq. Its members are nine in number, serving in staggered groups of three for terms of three years beginning July 1st annually. N.J.S.A. 18A:12-6,7,8,9. Members are appointed and vacancies filled by the mayor. N.J.S.A. 18A:12-7. As appointing authority, it is the mayor who properly accepts resignations of board members. See Georgia v. Suruda, 154 N.J. Super. 439, 444-5 (Law Div. 1977). Members are subject to removal for failure of qualifications or for inconsistent interests under criteria in N.J.S.A. 18A:12-1,2,2.1,3, eo instanti upon cessation of bona fide residence in the district, or otherwise at the instance of the board or others upon invoking jurisdiction of the Commissioner to hear and determine disputes under N.J.S.A. 18A:6-9. See Contardo v. Bd. of Ed. City of Trenton, 1974 S.L.D. 650, 652-4 ("a board of education [may not] sit as a tribunal in judgment upon ... its members"). Nowhere in education law is there expressly vested in the mayor as appointing authority a power summarily to remove board members once he has appointed them to statutory terms in office. Here, the mayor argued that under certain circumstances such power existed by implication of the terms of N.J.S.A. 18A:17A-1 et seq.

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DISCUSSION

In well established principle, it is said, undated resignations signed by prospective employees, procured by the appointing authority before appointment, are ineffectual to operate as such, although not recalled by the appointees after their appointment. One reason is that such resignations afford opportunity for duress and coercion with respect to matters unrelated to the public service. 67 CJS 102, Officers, p. 448-9; and 78 CJS 115, Schools and School Districts, p. 882. Another reason, said a New Jersey court almost 50 years ago, is that were such resignations valid, the appointing authority would enjoy a power of summary removal it did not have. In Dolphin v. Mayor and Council of Town of Kearny, 116 N.J.L. 58 (Sup. Ct. 1935), plaintiff was appointed by the borough council as water purveyor for a term of two years as fixed by ordinance. Before his induction into office, a member of the council required him to sign in blank a resignation from the office. Five months after his induction, the council member presented the resignation to the council, which accepted it and appointed another to the unexpired term. The court set aside the action of the council in accepting the resignation and appointing a successor. Obtaining such a resignation before appointment, it said, was obviously detrimental to the public interest: the practice clothed a member of the council with a power of summary removal not granted by ordinance and not to be sanctioned in a government of law. Such a paper is invalid when signed, it was held, and lapse of time could not render it valid. Ibid., p. 59-60 of 116 N.J.L. Cf. State v. Jones, 4 N.J. Super. 599, 606-9 (Law Div. 1949), in which a pre-appointment disclaimer taken from appointee by the appointing authority was found to be subterfuge and, as a result, contrary to public policy, illegal, and of no effect.

That the practice of undated resignations in this context generates risks not tolerable for reasons of public policy stems essentially from the concept that municipalities and boards of education are creatures of the Legislature, each vested with only those powers expressly granted by law. Their powers are generally separate, the sound policy being to keep undue political considerations out of administration of local public education. See Botkin v. Mayor and Council of Westwood, 52 N.J. Super. 416, 430-

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31 (App. Div. 1958), app. dism. 28 N.J. 218 (1958). Sometimes, however, the powers of one are not free of control by the other. The legislative scheme of N.J.S.A. 18A:12-1,7 under which the mayor is given power to appoint board members, but not to remove them, one may presume, is but a legislatively designed check and balance upon the otherwise untrammeled independence of each body: that is, the board's independence is checked and balanced by the mayoral power of appointment but it goes no further. To sanction the practice of use of undated resignations would by judicial implication add the power of summary removal to the mayor's appointing power and would thus in turn imbalance the legislative scheme. Carried to extreme, the mayor could completely reconstitute a recalcitrant board and thus usurp the exclusive power of the board under N.J.S.A. 18A:17A-1, for example, and so appoint an executive superintendent only he favored. That here the mayor's action may have been, as he argued, both benevolent and altruistic, and not for political considerations, is therefore of little moment. Whatever his purpose, the practice is unjustifiable and can not be sustained. N.J.S.A. 18A:17A-1 et seq. does not imply otherwise. It follows necessarily the issues raised by petitioner's motion for summary decision on Count I of the petition are ripe for determination. There are no material disputed issues of fact. Petitioner is entitled to prevail as a matter of law.

CONCLUSION

Based on the foregoing, therefore, I CONCLUDE petitioner's undated resignation from the board was invalid when given and lapse of time since then, unrevoked, did not render it valid. The actions of the mayor in seeking it, accepting it, and in purporting to appoint petitioner's successor to the board are without legal force, void and to no effect.

I hereby ORDER petitioner restored forthwith to her lawful office as board member for the term of her original appointment expiring June 30, 1983. Correspondingly, I ORDER respondent Nina Robinson, not holding board membership de jure, be, and she is hereby, forthwith excluded therefrom.

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Seeing no proper occasion for interposition of equitable relief enjoining the mayor from future use of undated resignation of others, I hereby ORDER such part of the ad damnam clause of Count I of the petition be, and it is hereby, DISMISSED.

Judgment upon Count I of the petition is entered accordingly. Being fully dispositive of the substantive issues therein, this decision is to be treated as an initial decision subject to N.J.A.C. 1:1-13.2 and 1:1-16.3. Counts II and III of the petition herein are hereby severed and shall proceed in due course to hearing and resolution as otherwise provided by law and administrative rule.

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

I hereby FILE my Initial Decision with FRED G. BURKE for consideration.

March 29, 1982
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

March 30, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 2, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

awe

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APPENDIX

LIST OF EXHIBITS

J-1	Petitioner's letter of resignation "due to press of personal business" dated September 3, 1981
J-2	Mayor's appointment of Nina Robinson to board for term to expire June 30, 1983, dated September 8, 1981
J-3	Mayor's appointment of Brenda Grier to board for term to expire June 30, 1983, dated June 27, 1980
J-4	Board minutes of conference work session, dated September 8, 1981
P-1	Petitioner's certification of facts, dated February 13, 1982
R-1	Affidavit of Kenneth A. Gibson, dated September 30, 1981
R-2	Affidavit of Zinnerford Smith, dated February 26, 1982
R-3	Wechsler report, dated October 30, 1975

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BRENDA GRIER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK ET AL., KENNETH A. GIBSON, MAYOR, CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

The Commissioner has reviewed the entire record in the instant matter as well as the initial decision rendered by Judge Ospenson. The Commissioner notes that exceptions were filed by Respondent Kenneth A. Gibson pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c. The Commissioner further notes that petitioner has submitted cross-exceptions.

Respondent Gibson takes exception to Judge Ospenson's rendering of summary judgment in the instant matter contending that petitioner failed to meet the burden of showing clearly the absence of genuine issues of material fact. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 74 (1954) Respondent Gibson contends the existence of questions of material fact relative to whether petitioner's signing of an undated letter of resignation prior to official appointment to membership on the Board was a knowing and voluntary act or whether such signature was pro forma without an understanding as to its consequences. Respondent Gibson further alleges the existence of further material questions at issue relative to those actions of petitioner which caused him to accept her resignation.

Respondent Gibson further alleges that the initial decision herein erred in finding in petitioner's favor on the merits, in that it improperly failed to give sufficient consideration to the intent and spirit of N.J.S.A. 18A:17A-1 et seq., said statutes having provided for the reorganization of school districts with populations over 325,000. Respondent Gibson contends that the mayor's power with regard to removal of a board member must be viewed within the context of N.J.S.A. 18A:17A-1 et seq. in addition to the removal process contained in Chapter 12 of Title 18A. As proof of same, Respondent Gibson points to the recognition of the "***exceptional conditions present in a large metropolitan school system" within the Statement to the bill as introduced in the Senate. Respondent Gibson further cites as recognition of such special circumstances excerpts from a letter written by Walter Wechsler to then Governor Brendan Byrne in his capacity as Special Agent to over-

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see the implementation of fiscal reforms in the management of the Newark School System. Said letter refers to "[c]onstant agitation by some members of the Board and the fomenting of restlessness and strife in the school system***." (Respondent's Brief, Exhibit C, p. 3) Mr. Wechsler's letter continues by urging the Mayor not to hesitate to replace Board members who defy the spirit of Chapter 169 (N.J.S.A. 18A:17A-1 et seq.).

Respondent Gibson's exceptions further argue that petitioner signed the letter of resignation willingly and in full knowledge of the consequences without ever attempting to withdraw such resignation between July 1, 1980 and September 8, 1981. Judge Ospenson's determination rendering such resignation null and void, contends Respondent Gibson, rests upon Dolphin, supra, which involved a water purveyor rather than a school board member and was, in any event, decided nearly one-half century ago at a time when the urban climate was far different from that which faces Respondent Gibson here.

Petitioner's reply exceptions essentially rebut Respondent Gibson's arguments and urge the Commissioner's affirmance of the initial decision.

The Commissioner, upon review of the record herein and the exceptions filed by the parties, finds Respondent Gibson's exceptions relating to the ripeness of the instant matter for summary judgment without merit. The issue as reviewed by the Commissioner is not whether petitioner knew what she was signing and what consequences might flow from such signature, nor is it what actions petitioner might have taken as a Board member which might have caused Respondent Gibson to seek to validate the unsigned letter of resignation. The issue, as perceived by the Commissioner, is whether the actions of Respondent Gibson in seeking such undated letter of resignation and accepting it at a later date have the force of law. In the Commissioner's view they do not. The Commissioner notes that Judge Ospenson in his initial decision has more than adequately dealt with the exact same arguments as propounded by Respondent Gibson in his exceptions. The Commissioner notes with approval the legal discussion and analysis contained on pages 5 and 6, ante, of the initial decision and adopts them as his own.

The Commissioner further observes that Respondent Gibson's exceptions relating to the special powers for removal of board members allegedly implicit in N.J.S.A. 18A:17A-1 et seq. are entirely without substantiation within the statutes themselves. To the contrary, the explicit provisions of N.J.S.A. 18A:17A-7 provide:

> "Except as otherwise provided in this act, the board of education in districts in cities of the first class with a population of over 325,000 shall retain the power to perform all

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> acts and do all things consistent with law and State board rules that are necessary for the proper conduct and maintenance of the public schools in its district and all other powers and responsibilities vested in it under Title 18A of the New Jersey Statutes, including but not limited to appointing, transferring or dismissing employees, fixing the terms and salaries of employees, adopting or altering a course of study, and selecting textbooks." (Emphasis supplied.)

From such language as cited above, it becomes abundantly clear that apart from the explicit changes enacted relative to the reorganization of the Newark Public Schools it was the clear intent of the Legislature to leave intact all other existing matters relating to the appointment, operation and removal of school board members as contained within Chapter 12 of Title 18A. The Commissioner further notes that the Wechsler letter cited by Respondent Gibson as support for the Mayor's authority to remove Board members contains a further sentence which states: "If existing statues (sic) do not permit such replacements, then legislation should be enacted to do so under appropriate conditions." (Respondent's brief, Exhibit C, p. 4)

Having failed to enact such specific legislation, it must be assumed that the Legislature did not intend to afford such authority to a mayor and, thus, the argument presented by Respondent Gibson must fall of its own weight.

Finally, the Commissioner rejects Respondent Gibson's contention as to the inapplicability of Dolphin, supra, as a precedent for the ruling herein because of its "ancient" vintage as well as the fact that it dealt with a water purveyor rather than a school board member. Carrying such argument to its ultimate conclusion would invalidate the Bill of Rights because of its 18th century vintage. Absent legal precedent to the contrary, the renderings of the highest judicial tribunal in the state remain valid law. If, as Respondent Gibson argues, such rendering fails to consider changing circumstances presently extant in the urban centers of New Jersey, only the Courts themselves or the Legislature may take cognizance of such changing circumstances by altering their position or changing the law. Having failed to do so, Respondent Gibson's argument must be rejected. The Commissioner likewise finds Respondent Gibson's contention relative to the inapplicability of Dolphin, supra, because of the differences in the offices involved to be frivolous and entirely without merit. Such contention totally ignores the fundamental principle inherent in both situations, namely, requiring a potential appointee to a public office to sign a resignation from such office prior to the assumption of the office. Such requirement imposed by an appointing authority, not otherwise empowered to remove such office holder, provides

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such appointing authority with a power exceeding statutory intendment as found by Judge Ospenson and affirmed herein. Consequently, and for the reasons herein contained, the Commissioner affirms the initial decision in this matter and adopts it as his own. Petitioner is therefore ordered restored forthwith to her lawful office of Board member of the Board of Education of the City of Newark and Respondent Nina Robinson, having been found to have been appointed to a seat on the Board legally held by petitioner herein, is forthwith held to be excluded from such position.

The Commissioner further affirms and adopts as his own all other findings and conclusions contained within the initial decision.

COMMISSIONER OF EDUCATION

May 11, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0456-82
AGENCY DKT. NO. ~~500~~ 502-12/81A

B.C., as natural guardian for A.C.,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,
Respondent.

APPEARANCES:

Thomas J. Orr, Esq. for petitioner (Bookbinder & Colaguori, attorneys)

Maurice Denbo, Esq. for respondent

Record Closed February 26, 1982 Decided April 12, 1982

BEFORE DANIEL B. MC KEOWN, ALJ:

A.C., an infant, by his mother and guardian ad litem, B.C., as petitioners, seek to have set aside the action of the Burlington Township Board of Education (Board) by which it expelled A.C. from regular school attendance as of November 5, 1981. The matter was transferred to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq., after which a hearing was conducted on February 25, 1981. The record was readied for disposition February 26, 1982 under N.J.A.C. 1:14.1.

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The uncontroverted facts of the matter, as established by the testimony of witnesses before me, the documents in evidence, and the transcript of a hearing afforded A.C. by the Board on November 4, 1981, (J-1), are these:

On October 23, 1981, A.C., who was 16 years of age and in the eleventh grade, left a brown paper lunch bag in his geometry classroom. His geometry teacher noticed the bag when A.C. left her classroom after class. The teacher looked in the lunch bag and discovered a quantity of envelopes. The teacher delivered the bag, containing the envelopes, to the vice-principal. The vice-principal opened the envelopes, and discovered vegetation, which he believed to be dried tree leaves and lawn grass. He also observed seeds he believed to be marijuana seeds. The vice-principal sought the view of a Burlington Township police detective in respect of the seeds, who, through observation, confirmed the vice-principal's view that the seeds were marijuana seeds.

The vice-principal secured A.C.'s presence in his office for an explanation. A.C. told the vice-principal that he had had the lunch bag in his possession; that he had taken the bag to geometry class; and, that he placed the bag under the seat where it was later discovered by the teacher. A.C. explained that another pupil, M.D., then a senior but now no longer enrolled in the Board's school because he quit, had met him in the corridor prior to geometry class and had asked him, A.C., to hold the brown paper lunch bag for him. A.C. looked in the bag and asked M.D. what the contents were. M.D., A.C. says, told him not to worry; that the contents were not marijuana. A.C. took the bag to geometry class, placed it under his seat, and, upon the conclusion of geometry class, he deliberately left the bag under the seat.

The vice-principal then contacted A.C.'s mother and requested her presence in his office. The vice-principal also arranged for the principal to be present in his office. The record is not clear whether the Township detective was present at this meeting among A.C., his mother, the vice-principal, and principal. What is clear, though, is that the vice-principal informed A.C.'s mother of the contents of the brown paper bag found under A.C.'s seat, and A.C.'s admission that he had placed the bag there. The vice-principal also advised A.C.'s mother of his suspicion that the seeds were marijuana seeds, and that because of that suspicion, the principal and vice-principal advised A.C.'s mother that A.C. was suspended for ten days from regular school attendance. The principal also

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advised, that if the seeds were determined to be, in fact, marijuana seeds, that he would recommend to the Board the permanent explusion of A.C. from regular school attendance. The vice-principal then requested the Burlington County Forensic Laboratory to examine the seeds.

Later that same day, the vice-principal memorialized the meeting, in writing, to A.C.'s mother, and as reproduced here (P-1):

> This is to confirm our conversation of today that under the provisions of New Jersey Statutes 18A:37-2, [A.C.] is suspended from school October 26, 27, 28, 29, 30, November 2, 3, 4, 5, & 6.
>
> The reason is that [A.C.] was in possession of a suspected Controlled Dangerous Substance. This substance was turned over to the police and we will be in touch with you as soon as the analysis is received.
>
> Prior to November 6, it is likely that a hearing will be scheduled with the Burlington Township Board of Education. The purpose of this hearing will be to hear charges as stated above. At this time, the Board will also review [A.C.'s] general performance and behavior patterns in school.
>
> I will be there to present evidence and witnesses from the standpoint of the school and I will send you those documents which will be prepared for the hearing, if it becomes necessary. Any other information that is brought out at the hearing will be given to you also.
>
> I am advising you that [A.C.] will have the right to be heard in his own defense; the right to present witnesses and evidence in his defense; the right to cross examine any adverse witnesses, and the right to be represented by an attorney.

Three days later, the vice-principal advised A.C.'s mother, in writing, that the Board scheduled a hearing for A.C. for November 4, 1981, at 9:45 p.m., on the charge that A.C. was in possession of a suspected controlled dangerous substance, and that (P-2)

> . . . the Board will also review [A.C.'s] general performance and behavior patterns in school.
>
> I will be there to present evidence and witnesses from the standpoint of the school and I am enclosing those documents which have been prepared for the hearing. Any other information that is brought out at the hearing will be given to you.
>
> I am advising you that [A.C.] will have the right to be heard in his own defense; the right to present witnesses and evidence in his

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> defense; the right to cross examine any adverse witnesses, and the right to be represented by an attorney.

The documents enclosed with the letter were A.C.'s prior disciplinary record while in school attendance (R-3).

The hearing was held November 4, 1981, with eight of the nine member Board in attendance. Also in attendance were the vice-principal, the board secretary, the superintendent of schools, board counsel, and the former pupil M.D. A.C. and his mother were present. A.C.'s mother acknowledged that she received the charge that her son was in possession of a suspected controlled dangerous substance; that she waived legal representation on behalf of A.C.; and, that she wished to proceed with the hearing. The vice-principal recounted for the Board the events, essentially as set forth above, leading to the hearing for A.C. The Board then listed to M.D., under oath, testify that he did meet A.C. in the corridor on the morning of October 23, 1981. M.D. testified he gave A.C. the brown paper lunch bag which he, M.D., brought to school, knowing the six packets inside contained leaves and marijuana seeds. M.D. testified, in response to the question of why he brought the bag to school, "I just brought it to school. You know" (J-1, p. 11). M.D. testified he gave the bag to A.C., and asked A.C. if he wanted to sell some of the bag. A.C. was to have said yes, and then asked whether the contents were real. M.D. testified that he told A.C. the contents were not real. A.C. testified before the Board that M.D. simply asked him to hold the bag for him; that M.D. told him the contents were not marijuana; and, that he deliberately left the bag under the seat in geometry class, because he figured the bag contained nothing of importance when M.D. failed to reclaim it. M.D. also testified he asked A.C. if he wanted to sell the packets because he, personally, saw A.C. sell, on other occasions, to pupils M.D. testified he knew but refused to identify.

The hearing ended. A.C. and his mother left. The Board, its counsel, the vice-principal, and, presumably, the Superintendent, remained to discuss the matter. On November 6, 1981, the vice-principal advised A.C.'s mother (P-7)

> This is to confirm our conversation of 12:30 p.m. yesterday, concerning the outcome of the hearing Wednesday night.
>
> The Board of Education unamimously (sic) voted to expel [A.C.] pending a positive identification of the material sent to the police laboratory and the Child Study Team evaluation.

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> The Board also unamimously (sic) agreed to supply those guidance services necessary to encourage [A.C.] to obtain his high school diploma throught the New Jersey State GED program and to pay any fees associated with that endeavor.

with the addendum:

> Paragraph two means that [A.C.] is not to attend school unless directed by the Burlington Township Board of Education to do so.

In the meantime, the suspected seeds were still being tested. The report of the Burlington County Forensic Laboratory, dated November 5, 1981, which shows the seeds tested positive for marijuana (R-2), had not been received by the Board until at least November 9, 1981. This is so for a memorandum, dated November 9, 1981, of a telephone call to A.C.'s mother from the vice-principal shows the vice-principal had been notified that day, by telephone call from the Burlington Township Police, that the seeds were identified as marijuana seeds. But, even though the Board eventually received the report (R-2), neither A.C., nor his mother, were shown the document.

After the Board determined to "expel [A.C.] pending a positive identification of [seeds]" (P-1), school authorities caused a referral of A.C. to be made to the Board's child study team for classification and evaluation on November 10, 1981 (P-4). See N.J.S.A. 18A:46-5 et seq. A psychiatric evaulation of A.C. was conducted December 4, 1981 (P-5), and a classification conference was conducted with A.C.'s mother on January 13, 1982. It appears that on that date, the Board's child study team concluded, and so informed A.C.'s mother, that A.C. is "naive, overly-compliant and dependent young man, but [it] found no significant adjustment, character or personality disorder which would warrant [A.C.'s] classification or special educational placement" (P-4). The child study team concluded A.C. need not be classified as one in need of special education.

In the meantime, however, A.C., expelled by the Board on November 4, 1981, was placed on home instruction. Home instruction consisted of teachers appearing at A.C.'s home for two hours a day, three days a week, for one-half hour periods of instruction in history, geometry, Spanish and English. A.C. testified before me that he had aspirations of attending college prior to his expulsion from school.

The vice principal testified that as of February 22, 1980, A.C., and others who have been expelled from regular school attendance, for various infractions, participate in special programs, at the school, after regular school hours, by which each expelled

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student, including A.C., received six hours of instruction per week in classroom atmosphere.

Finally, it is noted that the Superintendent, by memorandum dated November 17, 1981, advised all employees and students in the Board's schools that:

> The Burlington Township Board of Education has officially and unanimously gone on record in its total opposition to the use, possession, or distribution of any dangerous controlled substance (drugs) in the schools, on the school buses, or property of the Burlington Township Schools.
>
> In a recent Executive Session, the Board of Education heard testimony and unanimously decided to expel a high school student for the possession of a dangerous controlled substance. Employees and students should be clearly aware of the importance and seriousness of this offense; and, it is the expressed desire of the Burlington Township Board of Education that all involved employees and students be made fully aware of their position (P-9).

Discussion

A.C., on the basis of the New Jersey Constitution, has a legitimate claim of entitlement to a free, thorough and efficient, public school education N.J. Const., Art VIII, Sec. XV, Par. 1 (1942). N.J.S.A. 18A:38-25 requires all children between the ages of six and sixteen to regularly attend school. The legislature affords boards of education the authority to prescribe and enforce standards of conduct in its schools N.J.S.A. 18A:37-1. Pupils who do not comport their behavior to such standards of conduct, so long as such standards are reasonably established, may be suspended or expelled by the board from regular school attendance N.J.S.A. 18A:37-2. For the Board to invoke its authority to discipline A.C., by way of expulsion, for misconduct, it must first recognize A.C.'s entitlement to a free, thorough and efficient public school education as a property interest which is protected by the 14th Amendment Due Process Clause of the United States Constitution Goss v. Lopez, 419 U.S. 565, 574 (1975). New Jersey courts, as well as the Commissioner of Education, have long recognized the right of children to a public school education as being protected by the Due Process Clause. See Tibbs v. Board of Education of Twp. of Franklin, 114 N.J. Super. 287 (App. Div.), aff'd 59 N.J. 506 (1971); R.R. v. Board of Education, Shore Reg. H.S., 109 N.J. Super. 337 (Ch. Div. 1970); and Scher v. Board of Education of West Orange, 1968 S.L.D. 92. There is a distinction between a short suspension of a pupil from regular school attendance and that pupil's permanent expulsion, as here, from regular school attendance. The former discipline is of

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short term, no more than ten days, while the latter is permanent and unforgiving. Thus, the process due a pupil in respect of a suspension may be, in recognition of the nature of the property interest, "some kind of notice of the alleged misconduct and . . . some kind of hearing" 419 U.S. 579. The process due a pupil who faces a permanent exclusion from the public school, a far more significant cessation of the property interest, demands more than some kind of notice and some kind of hearing. "If sustained and recorded, disciplinary charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment [footnote omitted]" 419 U.S., 575.

Here, there is no dispute that A.C., prior to the hearing afforded him by the Board, was entitled to notice of the charges against him, and, of course, that he was entitled to a hearing on the charges. There is no dispute that A.C. was advised by the vice principal that he, the vice principal, would present evidence and witnesses at the hearing which would be adverse to A.C.'s interests. And, there is no doubt that A.C. was advised, prior to the hearing, that A.C. could present his own evidence to refute the charges; that he could present his own witnesses; that he could cross-examine witnesses who appear against him; and that he could secure his own legal counsel.

A.C. contends the Board erred in respect of its determination to expel him on several grounds: 1. by taking its action to expel him pending an analysis of the substance for confirmation the seeds were marijuana; 2. by failing to have the child study report prepared prior to its expulsion action; 3. that the Board, at A.C.'s hearing, considered hearsay testimony by M.D., in respect of A.C. selling marijuana on prior occasions; 4. that the Board met in private session after the hearing, with the vice principal in attendance, ostensibly to discuss the merits of the case; and 5. that the Board failed to set forth specific findings as to the charge, based on evidence it heard.

A.C. was charged with being in possession of a suspected controlled dangerous substance. It is clear from the record before me that A.C., and his mother, knew that the suspected substance, marijuana, was the seeds found in the lunch bag A.C. admitted placing under his chair. A.C. also knew the vice principal would present evidence and witnesses against him at the hearing.

The Board listened to testimony from M.D., not so much addressed to the charge of possession but, in large measure, with the more serious charge of possession,

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with intent to distribute. The charge to be heard by the Board, as set forth in the notice of charge, was "possession of suspected controlled dangerous substance." The Board admitted no evidence in respect of the analysis of the substance during the hearing, insofar as the transcript reveals. Yet, A.C. was permanently expelled based, apparently, on a suspicion as to what a chemical analysis would reveal. The alternative explanation as to the basis for the Board's determination to expel is that the Board members were swayed by M.D.'s testimony in respect of his purported personal observations of A.C.'s sales of marijuana on prior occasions, or, as he later testified, what other pupils had told him without identifying those other pupils. If it is reasonable to believe, which I do, that the Board members were swayed by M.D.'s testimony in respect of A.C.'s alleged prior sales activity, it is also reasonable to believe that when the Board met privately after the hearing, it considered the merits of the matter and, more probable than not, it also solicited information from the vice principal who was present. In any event, A.C. was charged with possession of suspected marijuana seeds and, at the hearing, the Board had no proof as to the nature of the seeds, but it listened to testimony in respect of M.D.'s version of how A.C. came into possession of the lunch bag; that is, to sell the packets that M.D. told A.C. did not contain real marijuana.

A.C.'s entitlement to a free, thorough and efficient public school education is more substantial than to be defeated by either the Board proving the truth of the charge against A.C., "possession of a suspected controlled dangerous substance," under the circumstances, for the record before it, though A.C. admits to prior possession, cannot establish A.C. brought the substance to school, or, that he initiated his acquiring possession of the lunch bag, or, that he knew what was in the bag and set out to distribute the packets. The fact is, A.C. intentionally left the lunch bag under his chair. If the Board acted to permanently deprive A.C. of his entitlement to a free, public school education on his act of prior possession, under the circumstances, the penalty is too severe. If the Board acted to permanently deprive A.C. of a free, public school education for possession with intent to distribute, it violated A.C.'s due process to prior notice of the charge because he was not charged with intent to distribute. Finally, there is not basis in the record before me which shows the reasons why the Board acted to expel A.C. from regular school attendance, nor does the record show when it arrived at that determination.

I have considered the record of the matter before me and I find that the Board's action to permanently expel A.C. from regular school attendance for the possession of the seeds, later identified as marijuana, is simply too severe, under these

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circumstances, and that A.C.'s constitutional entitlement to a public school education may not be defeated by the infraction of possession of the lunch bag to which he admits. A.C.'s initial suspension of ten days by the vice principal, though severe in itself, is not challenged here. The expulsion action, the permanent separation of A.C. from regular school attendance, is challenged and it is upon that challenge the relief of reinstatement is requested.

Though I know of no requirement, in law, which demands a child study evaluation prior to a board imposing a discipline upon a pupil, even the discipline of expulsion, a board who requires such an evaluation has more of a basis to make a decision with respect to discipline it shall impose. The child study evaluation of A.C., though done after the fact, does not disclose any characteristics, physically, socially or psychiatrically, which would indicate A.C. is, was or will be a disruptive member of the school society. A.C.'s prior disciplinary record, which shows A.C. cut class, failed to report to detention and other infractions all of which were the subject of separate discipline imposed by school authorities, is not persuasive to show he cannot function in school.

It is accordingly **ORDERED** that the action by which the the Burlington Township Board of Education expelled A.C. from regular school attendance, for the charge of possession of a suspected controlled dangerous substance even if the Board found the charge true, is set aside as being too severe. The initial ten day suspension is **AFFIRMED.**

The Board is directed to reinstate A.C. to regular attendance forthwith, and it is further directed to expunge from its official records all references to its act of expulsion of A.C. The Board is finally directed to instruct its school authorities to take whatever steps are necessary to afford A.C. the hours of instruction he missed from regular school attendance from November 6, 1981 to the date of his actual reinstatement due to its overly severe discipline.

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 0456-82

I hereby **FILE** my Initial Decision with **GUSTAV H. RUH** for consideration.

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

April 13, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 15, 1982
DATE

Ronald L. Parker/sa
OFFICE OF ADMINISTRATIVE LAW

plb

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DOCUMENTS IN EVIDENCE

J-1 Transcript of Hearing afforded A.C. by Board on November 4, 1981

P-1 Letter dated October 23, 1981

P-2 Letter dated October 29, 1981

P-3 Handwritten Note

P-4 Program Conference Report

P-5 Letter dated November 18, 1981

P-6 Letter dated November 19, 1981

P-7 Letter dated November 7, 1981

P-8 Letter dated November 23, 1981

P-9 Memorandum

R-1 Letter dated November 6, 1981

R-2 Failure Report

R-3 Two-page Disciplinary Record

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B.C., as natural guardian for A.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, 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 pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent Board excepts to the initial decision in this controverted matter by the Honorable Daniel B. McKeown, ALJ. The Board contends that other avenues of education are available to pupils. The Board argues that its use of the Child Study Team was a proper use of its discretionary authority. Petitioner's reply exceptions refute those of the Board and affirm the initial decision. The Commissioner does not agree entirely with either party.

The Commissioner observes the conclusion by Judge McKeown, ante, wherein he states:

> "***I know of no requirement, in law, which demands a child study evaluation prior to a board imposing a discipline upon a pupil, even the discipline of expulsion***."

The Commissioner notes that such pronouncement must be modified by N.J.A.C. 6:28-1.5(e) which states:

> "(e) A pupil shall be referred to the basic child study team to determine if the pupil is eligible for the services described in these regulations as a prerequisite to any board of education action on expulsion from the public schools. "

The Commissioner observes that the Board in good-faith action placed petitioner on home instruction for two hours a day, three days a week, for one-half hour periods of instruction in four subject areas. A.C. also received six hours of instruction

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per week after regular school hours. The Commissioner finds the Court's fashioning of an award to afford A.C. the hours of instruction he missed from regular school attendance to be an excessive one. The Commissioner, while in agreement with the Court's finding that the Board's action expelling A.C. was too severe, finds and determines that A.C.'s return to regular instruction with subsequent additional hours shall be mitigated by the home instruction and after hours classroom instruction already afforded A.C.

With the aforenoted modification, the Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

A.C., as directed, shall be returned to regular classroom instruction and all official records be accordingly expunged.

COMMISSIONER OF EDUCATION

May 12, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4054-81
AGENCY DKT. NO. 221-6/81A

ROBERT J. BISLER,
Petitioner
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF WOODBRIDGE,
MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

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

Joseph J. Jankowski, Esq. for respondent (Hutt, Berkow Hollander & Jankowski, attorneys)

Record Closed February 18, 1982 Decided March 29, 1982

BEFORE ERIC G. ERRICKSON, ALJ:

Petitioner, on June 1, 1981, appealed the April 1981 action of his employer, the Woodbridge Board of Education (Board), transferring him from his position as department head to a classroom teaching position. Specifically, petitioner alleged that he has seniority entitlement to continued employment as a department head.

The respondent Board, in its Answer, denied that petitioner had gained either tenure or seniority as a department head and asserted that its transfer of petitioner to a classroom teaching position was a legal exercise of its discretionary authority.

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When the pleadings were joined on June 18, 1981, the Commissioner transferred the matter as a contested case to the Office of Administrative Law, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. At a prehearing conference, conducted on October 13, 1981, a plenary hearing was scheduled. The parties, however, were successful in stipulating all essential facts, thus obviating the need for a hearing. The matter became ripe for determination on Cross Motions for Summary Decision when briefing was completed, and the record closed with the receipt of a Stipulation of Facts on February 18. An appearance by Wayne J. Oppito, Esq., as counsel for the New Jersey Principals and Supervisors Association, on a Motion to Intervene, was withdrawn on January 18, 1982, when the Motion to Intervene was withdrawn.

RELEVANT FACTS:

I **FIND** the following to be relevant facts as formally agreed to by the parties in a properly executed Stipulation of Facts (J-1) with appended Exhibits A through G:

Petitioner, who has been employed by the Board since 1956 as a teaching staff member, was certified as follows:

1956 - Limited Social Studies and English Certificate to teach grades 7-12

1960 - Permanent Social Studies and English Certificate to teach grades 7-12 (Exhibit A)

1971 - Supervisor Certificate (J-1, Exhibit B)

1972 - Principal Certificate (J-1, Exhibit C)

Respondent, at all times relevant to this controversy, has maintained three separate titles/positions and job descriptions entailing supervisory responsibilities. They are:

Department Head	(J-1, Exhibit D)
Elementary Coordinator	(J-2, Exhibit E)
Program Supervisor	(J-3, Exhibit F)

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Salary expectancy for department heads is less than that for the other two supervisory titles. The Board, during April 1975, submitted the job description for department head to the County Superintendent who stated that a supervisor's certificate was required to fulfill those duties (J-1, Exhibit G). When, in 1978, the Board advertised the position of department head-social studies, petitioner applied and was appointed, effective September 1, 1978. He was, thereafter, reappointed and served continuously in that position for more than two academic years, thus gaining tenure as a department head, pursuant to N.J.S.A. 18A:28-6.

In the spring of 1981, petitioner was advised that for reasons of economy or because of a reduction in the number of students and reorganization of the district, he would be reduced in rank and compensation, effective September 1981, from his department-head position to that of a nonsupervisory classroom teacher. This was done. In turn, a schoolwide supervisor of social studies, with greater seniority than he, was appointed to the Social Studies Department Head position which he had held. Respondent, at the same time, retained nontenured department heads in other subject matter areas. When a vacancy again occurred in the position of department head - social studies, the Board reappointed petitioner to that position, effective January 1, 1982.

DISCUSSION AND CONCLUSIONS:

Petitioner, having been restored, on January 1, 1982, to his social studies department-head position, seeks relief only in the form of lost salary and a declaration that the period from September 1981 through December 1981 counts as seniority in the district as a department chairman. Since the department-chairman position he held until September 1, 1981, was filled by the Board with a supervisor with greater seniority than he, he does not lay claim to that position from September 1, 1981 through December 31, 1981. Rather, he contends that he was entitled, by reason of his seniority, to appointment to a department-head position held during those months by nontenured department chairmen in the subject areas of foreign language or business education.

N.J.A.C. 6:3-1.10, enacted pursuant to N.J.S.A. 18A:28-9,13, provides that "seniority. . .shall be determined according to the number of academic or calendar years of employment. . .in the school year in specific categories. . . ." (N.J.A.C. 6:3-1.10b).

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N.J.A.C. 6:3-1.10(k) lists specific categories of employment recognized by the State Board rules. Among them are the following numbered categories wherein the word "supervisor" appears:

10. General Supervisor
11. General Secondary Supervisor
12. General Elementary Supervisor
13. General Vocational Supervisor
22. Subject Supervisor

Until approximately ten years ago, a separate certificate was issued bearing the distinguishing titles for each of the above numbered categories. Acting on recommendations from the New Jersey State Board of Examiners, those several designated supervisory certificates were abolished. Thereafter, a single supervisory certificate (except for administrative certificates) has been issued bearing only the word "Supervisor." Although that change was made, no corresponding adjustment has since been made to consolidate the five categories into a single category. Accordingly, I **CONCLUDE** that they still remain as five separate and distinct identifiable categories for purposes of determining seniority.

The Board's carefully framed job description for the position of department head required an appointee to that position to be the holder of a master's degree, a supervisor's certificate and a permanent New Jersey teacher's certificate in the field of specialization. I **CONCLUDE** that petitioner had that specialization in the field of social studies but did not have it in other disciplines of business and foreign languages when he claims he had entitlement by reason of seniority from September through December 1981.

The Board's job description for a department head also specified that the function was to provide educational leadership by administering and supervising the program of an assigned department (J-1, Exhibit D). It is patently clear and I **CONCLUDE** that petitioner was never assigned by the Board to supervise the programs of the business education or foreign language departments.

Petitioner, by the clear language of the Board's job description, had the limited responsibilites of a social studies supervisor. This corresponds, within the framework of the categories which have continued to be recognized by the State Board,

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with category No. 22: Subject Supervisor. Accordingly, I **CONCLUDE** that his category of employment from his appointment in September 1978 to June 30, 1981, was that of "Subject Supervisor." He was precluded by the limits of the Board's job description from exercising authority as a general supervisor, a vocational supervisor, or a general elementary or secondary supervisor.

Accordingly, I **CONCLUDE** that since he was not employed in those capacities, he was not tenured and thus had no seniority in any one of those other four supervisory categories.

I further **CONCLUDE** that the Board, in providing for the unrecognized title of "department head," acted precisely as required by N.J.A.C. 6:11-3.6(b), which reads:

> If a local board of education determines that the use of an unrecognized position title is desirable, or if a previously-established unrecognized title exists, such board shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his/her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year.

The County Superintendent was charged with designating what certificate a department head, given the Board's job description, should hold. Since only one supervisory certificate was being issued in 1975 and thereafter, I **CONCLUDE** that his designation of "a supervisor's certificate," the only available one other than an administrative certificate, was a correct designation.

The Board, pursuant to N.J.S.A. 18A:27-4, was empowered as follows:

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

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Perceiving no inconsistency with statutory provision or case law, I **CONCLUDE** that the Board's job description was not in conflict with any aspect of education law.

Petitioner cites, in support of his contention, James J. Flanagan v. Camden Bd. of Ed., 1980 S.L.D. _____ (decided November 16, 1980); aff'd, State Board of Education, 1981 S.L.D. _____ (decided December 1981). The facts of that case, currently on appeal before the New Jersey Superior Court, (Dkt. No. A-1826-81-T-1, filed Jan. 6, 1982) Appellate Division, are importantly distinguishable from those herein. Flanagan was a coordinator, not a department head. As an audiovisual coordinator, Flanagan was not restricted by the Camden Board's job description to serve in a single academic area as was petitioner herein. Accordingly, I **CONCLUDE** that, because of the differing factual contexts, the holding in Flanagan does not control in this case.

DETERMINATION:

After careful consideration of the facts and the conclusions set forth above in the light of prevailing education law, it is **DETERMINED** that petitioner was not entitled, by reason of seniority, to be assigned, from September 1, 1981 through December 31, 1981, as a department head of either the foreign language or the business education department. It is also **DETERMINED** that he has not proven entitlement to a declaration that that four-month period is countable toward his total seniority as a department head in the district. It is further **DETERMINED** that he is not entitled to a salary differential between his salary as a teacher and the higher amount he would have earned had he been a department head during that four-month period. Finally, it is **ORDERED** that the Board's Motion for Summary Decision is **GRANTED** and that Petitioner's Motion for Summary Decision is **DENIED.**

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

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OAL DKT. NO. EDU 4054-81

I hereby **FILE** my Initial Decision with **FRED G. BURKE** for consideration.

March 29, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

March 30, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 1, 1982
DATE

Ronald L. Parker/sa
OFFICE OF ADMINISTRATIVE LAW

plb

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OAL DKT. NO. EDU 4054-81

DOCUMENTS IN EVIDENCE:

J-1, Exhibits A through G	Complete Stipulation of Facts

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ROBERT J. BISLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the finding by the Honorable Eric G. Errickson, ALJ that distinguishes Flanagan, supra, from the present matter. Petitioner contends in his exceptions that despite Judge Errickson's conclusion herein, Flanagan, supra, and the matter presently controverted are indistinguishable. The Commissioner cannot agree.

A careful examination of the record herein convinces the Commissioner that the Board's action in this matter created a different set of circumstances by which the findings in Flanagan do not prevail in the matter presently controverted. Herein the Board approved a job description that required each individual to possess subject area certification in the department supervised. In the opinion of the Commissioner such requirement unmistakably places the above individual in the category of subject supervisor. 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

May 14, 1982

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ROBERT J. BISLER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 14, 1982

For the Petitioner-Appellant, Klausner & Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Hutt, Berkow, Hollander & Jankowski (Joseph J. Jankowski, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein.

September 8, 1982

Pending N.J. Superior Court

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUBSTANTIVE ORDER -
SUMMARY DECISION
OAL DKT. NO. EDU 6446-81
AGENCY REF. NO. 328-7/81A

BOARD OF EDUCATION OF THE
TOWNSHIP OF NORTH BERGEN,
Petitioner

v.

CARMINE PELLECHIO,
Respondent

APPEARANCES:

Louis P. Bucceri, Esq., for the Petitioner
(Bucceri and Pincus, attorneys)

Martin R. Pachman, Esq., for the Board

Record Closed March 8, 1982 Decided March 22, 1982

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

The North Bergen Board of Education (Board) certified tenure charges of unbecoming conduct against vice-principal Pellechio (respondent). Respondent denied the charges.

In apparent derogation of its own certification of charges, the Board filed a Motion for Summary Decision seeking judgment that respondent has not attained status as a tenured vice-principal, in order, presumably, to occasion avoidance of a need further to prosecute tenure charges and thereupon to deal with him in other ways as if he were untenured.

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Respondent claims he is tenured as vice-principal. He alleges the Board's adoption of a settlement resolution in a prior case acts as a waiver of its power to challenge his tenured status.

A history of disputes between the parties is essential.

Respondent here filed a petition of appeal with the Commissioner of Education, wherein he charged the Board acted illegally when it transferred or demoted him back to teaching duties from his position as vice-principal. The Honorable James A. Ospenson, A.L.J., rendered an Initial Decision in that matter on February 26, 1981, and succinctly stated the issue there in his opening paragraph:

> Carmine E. Pellechio, a tenured English teacher who had been appointed Vice-Principal for 1978-79, was transferred or demoted back to teaching duties on September 20, 1979, against his will, at lesser salary, without charges or explanation and without notification of non-reemployment as Vice-Principal prior to April 30 of the 1978-79 school year. Having purported to accept employment as Vice-Principal by letter to the Baord on May 9, 1979, under N.J.S.A. 18A:27-11, 12, having served in the position from September 1, 1978 to September 20, 1979, and having then been transferred as above, he seeks reinstatement as Vice-Principal, restoration of salary loss, and such other relief as is proper.

The dispute above was amicably resolved by the parties by agreement of Pellechio and a ratificatory resolution of the Board adopted on January 21, 1981, wherein "the prior resolution of the Board of September 20, 1979 concerning the petitioner was rescinded by the Board, which recognized petitioner's status as Vice-Principal from September 1, 1978 to date." (Initial Decision at 2).

The Commissioner concurred "with the amicable settlement of this controverted matter evidenced by the filing of a joint stipulation of dismissal and settlement," and dismissed the petition with prejudice in a decision rendered April 10, 1981. Pellechio was reinstated as vice-principal with differential backpay.

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The Board next certified tenure charges of unbecoming conduct against Pellechio on July 21, 1981, further certified it followed the procedures as set forth in N.J.S.A. 18A:6-11, and filed the charges with the Commissioner on August 6, 1981 pursuant to N.J.S.A. 18A:6-16. At the time of certification of tenure charges, the Board did not act to suspend Pellechio from his employment as vice-principal, but did act to suspend him by resolution on July 28, 1981. Subsequent to the July 28, 1981 suspension resolution, Pellechio was reassigned to a teaching position at a reduced salary.

The Commissioner transmitted this matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on September 23, 1981.

Prior to a prehearing conference on the tenure charges, Pellechio filed a Motion for Summary Decision alleging the Board's action in suspending him one week after it certified tenure charges against him was in violation of N.J.S.A. 18A:6-14 and therefore ultra vires.

A Substantive Order was entered by the undersigned on December 15, 1981, wherein the Board's action was found to be ultra vires and the Board was ordered to "restore Carmine Pellechio to his position of employment as vice-principal with pay and differential backpay, pending a final determination of tenure charges against him" (at 6).

Prior to the prehearing conference on the tenure charges, the undersigned requested the Office of Judicial Management to inquire as to whether the Commissioner intended to choose to review the Order entered on December 15, 1981 for the purpose of being properly prepared for the conference. The response from the Commissioner through Judicial Management was negative but "he concurs with your determination."

The Board next filed the Motion for Summary Decision alleging that Pellechio is not tenured as vice-principal. The matter was briefed by the parties, and the record closed on March 8, 1982 with the expiration of the time established for the Board to submit a rebuttal, which was not filed.

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ARGUMENT OF COUNSEL

The Board cites North Bergen Federation of Teachers v. North Bergen Board of Education, 1975 S.L.D. 138, in rebutting respondent's contention the Commissioner's recognition of the settlement approval in Judge Ospenson's Order validated Pellechio's tenure status as vice-principal. In that matter, the Board terminated an employee with three years service who had not met the precise requirements to gain tenured status pursuant to N.J.S.A. 18A:28-5. The Commissioner held the action of the Board illegal, but stated "the time which passed in litigation, until the time of her reinstatement shall be treated as though it had not passed. Therefore, as of the first day of her reinstatement she acquired a tenure status . . ." (at 143). The Commissioner also stated in the preceding sentence: "Being thus prevented from working by the Board's improper act may in no way work to her detriment."

DISCUSSION

The matter in which the Commissioner affirmed the Order entered by Judge Ospenson is clearly distinguishable from North Bergen. In North Bergen, the Board did not act on its own to recognize the employee's status after termination. In the case before Judge Ospenson, the Board rescinded its demotion resolution on January 20, 1981 and recognized Pellechio's status as vice-principal "from September 1, 1978 to date." It now argues that its own prior action should be ignored and Pellechio's employment as vice-principal from September 20, 1979 to January 21, 1981 must be treated as though it had not passed.

FINDINGS OF FACT

The following facts were stipulated by the parties and are adopted herein as my own:

1. Carmine Pellechio, a tenured teacher employed by the North Bergen Board of Education was appointed effective September 1, 1978 as an elementary vice-principal and served in that capacity through September 21, 1979.

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2. On September 21, 1979, Pellechio was transferred to a position of a teacher in the North Bergen school system effective that date.

3. On January 21, 1981, the North Bergen Board of Education adopted a resolution, "rescinded" its transfer resolution and recognized Pellechio's status as vice-principal from September 1, 1978 to date and provided for backpay.

4. That resolution was pursuant to settlement of a contested matter filed by Pellechio challenging the action of the Board on September 20, 1979, and the Commisisoner of Education concurred with the settlement in a decision dated April 10, 1981 (dismissing the petition of appeal with prejudice).

DISCUSSION OF LAW

The contested matter (that is, Pellechio's cause of action) stipulated in Fact #4 above was dismissed with prejudice, which is defined in Black's Law Dictionary 421 (5th ed. 1979). "[A]n adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause. It is res judicata as to every matter litigated." Thus, Pellechio's cause of action became foreclosed forever by terms of the settlement he was induced by the Board to accept.

A party is prevented by its own acts from claiming a right to the detriment of another who was entitled to rely on those acts and has acted accordingly. Graham v. Asbury, 112 Ariz. 184, 540 P. 2d 656, 658. An estoppel arises when one is concluded and forbidden by law to speak against his own act or deed. Gural v. Engle, 128 N.J.L. 252, 25 A. 2d 257, 261. An inconsistent position, attitude or course of conduct may not be adopted to loss or injury of another. Brand v. Farmers Mut. Protective Ass'n of Texas, Tex. Civ. App., 95 S.W 2d 994, 997. See Restatement, Agency, Second §8B. See Black's Law Dictionary 494 (5th ed. 1979).

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ADDITIONAL FINDINGS OF FACT

1. Pellechio was induced, in the settlement of the dispute in Fact #4, to abandon a cause of action to his detriment by terms of settlement that ended the matter with prejudice.

2. A stipulation of fact in the matter of tenure charges certified by the Board, now pending, was filed on March 4, 1982, recognized Pellechio as a tenured teacher.

3. The Board's contention that its latent discovery that Pellechio had not been employed for the requisite period of time to acquire tenure as a vice-principal was due to the unavailability of personnel records for review as they were in the possession of the State Attorney General's office (and returned to the Board in the Spring of 1981) is without merit. Tenure charges were certified on July 21, 1981, and Board minutes incorporate Pellechio's record of service.

4. The Board is now derogating against its own prior act; is palpably acting in bad faith; and is estopped therefrom on ground of equity in view of Pellechio's detrimental position change.

CONCLUSIONS OF LAW

I **FIND** that Pellechio has met the service requirements of N.J.S.A. 18A:28-6 and is a tenured vice-principal in North Bergen and that the Board will not now be heard to deny such tenure.

I **CONCLUDE**, therefore, the Board's motion for Summary Decision should be and is hereby **DENIED**.

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Accordingly, **IT IS ORDERED** that the parties proceed to plenary hearing on the certified tenure charges as scheduled in the Prehearing Order entered on January 29, 1982.

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

I hereby **FILE** this Initial Decision with **FRED G. BURKE** for consideration.

22 March 1982
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

24 March 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE HEARING OF CARMINE PELLECHIO, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

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

Petitioning Board excepts to the finding by the Honorable Ward R. Young, ALJ that respondent has met the service requirement of N.J.S.A. 18A:28-6 and is a tenured vice principal in the Board's school district. Respondent's reply exceptions argue that a settlement reached by the parties may not be unilaterally disavowed. Respondent refutes the Board's exceptions and agrees with the decision herein. The Commissioner finds merit in respondent's exceptions.

A consideration of the determination reached in the Board's exceptions leads the Commissioner to a contrary conclusion.

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

The Commissioner concludes that respondent has properly acquired tenure in the system. Accordingly, the parties shall move forward to a hearing on the merits of the tenure charges previously filed.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

May 20, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6446-81
AGENCY REF. NO. 328-7/81A

NORTH BERGEN BOARD OF EDUCATION,
Petitioner

v.

CARMINE PELLECHIO,
Respondent

APPEARANCES:

Louis P. Bucceri, Esq., for respondent
(Bucceri and Pincus, attorneys)

Martin R. Pachman, Esq., for the Board

Record Closed June 7, 1982 Decided July 7, 1982

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

The North Bergen Board of Education certified tenure charges of unbecoming conduct against Vice Principal Carmine Pellechio. Respondent denied the charges, which alleged breach of fiduciary obligations as student council advisor to account for student funds.

The matter was transmitted to the Office of Administrative Law by the Commissioner of Education on September 23, 1981 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Both parties moved for summary decision in favor of Pellechio on June 7, 1982 with appropriate certifications from counsel for each.

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Dr. Herman Klein, Superintendent of Schools, subscribed, under oath, a written statement of evidence on July 14, 1981. Pellechio denied any wrongdoing. The Board certified unbecoming conduct charges on July 21, 1981. The Board suspended Pellechio on July 28, 1981. Pellechio was later assigned to teach at a reduced salary.

Pellechio filed a motion for partial summary decision, alleging the suspension action of the Board was in violation of N.J.S.A. 18A:6-14 and therefore ultra vires. An Order was entered on December 15, 1981 which granted the motion after a finding the Board's suspension of Pellechio and his subsequent reassignment as a teacher at a reduced salary were ultra vires. Reinstatement of Pellechio to his position of vice-principal with differential back pay was ordered pending a final determination of the tenure charges. The Commissioner chose not to review the Order but orally approved.

The Board then filed a motion for summary decision alleging Pellechio had not attained status as a tenured vice-principal. The motion was denied on March 22, 1982 after a finding Pellechio was indeed tenured as a vice-principal. The Order directed the matter proceed to plenary hearing. The Commissioner affirmed on May 20, 1982, and the issue is now on appeal.

In the Prehearing Order entered on January 29, 1982, the parties were given the right to take depositions of witnesses.

The Board indicated it would rely on the testimony of five witnesses to meet its burden of proof the tenure charges were true. Those witnesses were deposed by respondent on April 30, 1982. The transcripts are in evidence.

In support of the joint motion for summary decision, a jointly executed stipulation of fact and certifications by counsel for each party were filed, which are in evidence.

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The stipulation states:

> After a thorough review of the records, witnesses and facts involved in this matter the Board of Education of the Township of North Bergen stipulates that it can produce no evidence, either documentary or testimonial, to establish any wrongdoing by Carmine Pellechio in connection with the allegations contained in the charges certified against Carmine Pellechio in July 1981.

Now to order the parties to plenary hearing, pro forma, at increased public expense, would serve no useful purpose. Neither party demands or requests a hearing. I have scrutinized the depositions and entire record in this matter with great care, and am convinced a hearing would be futile.

I **FIND** the charges filed by the Superintendent were based on the insubstantial and insufficient hearsay of individuals, who, when deposed, did not provide any credible evidence to support the charges.

The filing of charges against a teaching staff member, as well as the certification of same, is a traumatic experience for the one charged. The Board's certification pursuant to N.J.S.A. 18A:6-11 is not faulted, because it relied on the sworn affidavit of written charges by Klein.

N.J.S.A. 18A:6-11 states:

> If written charge is made . . . the board shall determine by majority vote . . . whether or not such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant . . . . [emphasis added]

N.J.S.A. 18A:6-15 states:

> The board shall forthwith serve a copy of every written charge which is determined to be sufficient and to be supported by sufficient evidence, if true in fact, to warrant...

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The execution of an affidavit of written charges must have a rational basis and be done with cognizance of its traumatic impact and care not to abuse the process intended by the Legislature when it created the Tenure Employees Hearing Law. N.J.S.A. 18A:6-10 et seq.

I **CONCLUDE** the motion for summary decision should be **GRANTED**, and the tenure charges certified against Carmine Pellechio should be and hereby **DISMISSED.**

The Board is therefore **ORDERED** to reinstate Carmine Pellechio to his position of vice-principal and compensate him for the differential back pay to which he is entited, forthwith.

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.

7 July 1982
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

7/9/82
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 14, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

J-1 Stipulation of Fact

J-2 Board counsel certification

J-3 Respondent counsel certification

J-4 Depositions of Joanne Colello, Peter J. Fischbach, Rosemary Farley, Herman G. Klein and Louis LaMastio

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IN THE MATTER OF THE TENURE	:	
HEARING OF CARMINE PELLECHIO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF NORTH BERGEN, HUDSON	:	
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 tenure charges filed by the Board against Pellechio shall be and are hereby dismissed. Accordingly, the Board is therefore ordered to reinstate Carmine Pellechio to his position of vice-principal forthwith with requisite back pay.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 23, 1982

Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0067-81
AGENCY DKT. NO. 565-12/80A

ARLINE BROIDA AND ENGLEWOOD CLIFFS EDUCATION ASSOCIATION,
Petitioners
v.
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,
Respondent.

APPEARANCES:

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

Eric J. Weiss, Esq. for respondent (Stein, Joseph & Rosen, attorneys)

Record Closed March 9, 1982 Decided April 16, 1982

BEFORE AUGUST E. THOMAS, ALJ:

Petitioner is a teacher employed by the Board of Education of the Borough of Englewood Cliffs (Board) and who was assigned half-time duties as a teacher's aide. Petitioner asserts that she performed as a teacher in the aide position and that her designation as an aide was a subterfuge to justify her pay at an aide's salary.

This matter was filed in the office of the Commissioner of Education and thereafter transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Although petitioner started through the grievance procedure,

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as provided in the negotiated agreement between the teachers' association and the Board, she did not pursue her grievance through "Level Three." Instead, she elected the appeal route to the Commissioner.

The Board filed a letter motion with supporting brief, seeking an Order that petitioner pursue the grievance procedure. Petitioner filed a brief in opposition to the motion. At the prehearing conference, the petitioner agreed to appear before the Board in an effort to resolve their dispute. However, that meeting never took place because petitioner objected to the kind of meeting set up by the Board. When the Board sought an Order from the undersigned administrative law judge (ALJ) directing petitioner to appear before a Board committee, the motion was denied (letters of June 2 and 18, 1981). It should be noted that a court order entered on January 29, 1981, by James J. Petrella, J.S.C., permanently enjoined the litigants from seeking arbitration of the grievance.

A hearing was conducted on October 5, 1981, in the Palisades Park Municipal Court, Palisades Park, New Jersey. Ten documents were admitted in evidence and briefs were filed after the hearing. The Board also submitted a letter supplement brief.

It is not disputed that petitioner is certified to teach elementary grades K-8 and typing.

Petitioner testified that she was first employed as a full-time aide in 1974. During the 1975-76 through 1979-80 school years, she was employed as a part-time typing teacher and part-time aide. She testified that during the 1979-80 year, the one immediately preceding the year now in controversy, she taught typing and performed clerical aide duties, spending about one-half of her time at each duty. She was compensated at one-half on the teachers' salary guide and one-half on the aides' salary guide.

In August 1980, petitioner's principal sent her a letter which is reproduced below in its entirety because of its significance:

> Arlene [sic]:
>
> Sit down before reading further..... You will be assigned the fifth and sixth grade Math Lab groups in addition to the typing classes. This means that all your time will be taken up with those assignments, except for one twenty-five minute lunch supervision assignment.

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> If possible I am going to have to [sic] typewriters moved to the Math Lab. It is a very large room and should take all the furniture necessary for both programs. Once you get going, you should have a good year. It is really a good assignment.
>
> Enjoy the rest of your summer.
>
> (Signed)
> (P-9)

An analysis of the first line of this letter shows that the principal recognized that this change in assignment from clerical aide to Math Lab was a major change, and, as will be discussed below, petitioner's duties changed drastically from those clerical duties she performed earlier when she was assigned as an aide under the supervision of a language arts teacher. It is also noticed that no mention is made that the Math Lab position will be an aide's position; nor does the letter tell petitioner who her supervisor(s) will be. The law requires that aides be under the direct supervision of a teaching staff member (N.J.A.C. 6:11-4.9). Also significant is the fact that the principal envisioned moving typewriters to the Math Lab. It certainly was contemplated, at this point, to make the Math Lab her teaching station, since she was the typing teacher. It appears to me that if petitioner were expected to perform essentially the same kind of aide tasks she had performed the year before, there would have been no need to tell her to "sit down before reading further. . . ." Additionally, petitioner was compensated at 52.5 percent of the seventh step of the teachers' guide and 47.5 percent of the ninth step on the aides' guide. The negotiated agreement states only that aides will be paid at one-half the teachers' salary guide, not more than one-half.

Petitioner testified that when she commenced her new assignment in the fall, no materials were given to her. She testified that she brought this problem to her principal's attention and that he said he would contact the Math Lab aide from last year to see if she could direct them to the necessary materials. The Math Resource Teacher was also unable to help find the required materials and petitioner testified that he told her to improvise until they were located. Ultimately, the person who previously ran the Math Lab showed petitioner the materials and outlined a general procedure for her.

These responses are indications that petitioner was operating on her own. If she did not have the required materials, the first person to turn to for help should have been her supervising teacher. Apparently, there was no such person.

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Petitioner's testimony shows that she performed many duties in the Math Lab as follows:

(a) petitioner administered tests and marked them;

(b) petitioner kept a log of each student's progress;

(c) petitioner was responsible for classroom management — e.g., each period two students were assigned to a Classmate 88 computer with a program corresponding to their skill levels. Two students were assigned to other enrichment materials. The rest of the group worked on math worksheets which petitioner had placed in their folders, geared to their individual progress in the Individualized Computational Skills Program;

(d) Work sheets were checked by petitioner and all work was then corrected by students and checked again by petitioner;

(e) Individualized help was given to all students whenever needed;

(f) As the student progressed through the program, new material was taught on a one-to-one basis;

(g) Petitioner was responsible for classroom discipline and used appropriate positive and negative reinforcement to maintain a pleasant environment. . . .

Petitioner testified further and described and identified the materials she utilized while independently running the Math Lab. Petitioner gave survey tests to all fifth grade students and new sixth grade students to determine the students' weak skill areas as well as skills that had to be learned (P-2).

Petitioner maintained a log to record progress in the Individualized Computational Skills Program (ICSP), and it was stapled to each child's folder (P-3).

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Petitioner testified further that she diagnosed each weak skill area by giving the appropriate corresponding ICSP Arithmetic Skills Inventories to the student. A "careless" mistake on the inventory did not necessarily mean that the student did not know the skill. Therefore, petitioner testified, she gave the student another problem that measured the same skill to determine whether or not the mistake was "careless." Petitioner stated that the ICSP Teachers' Manual states in this regard, "Teacher judgment and sensitivity should always play a part in the skill placement of the student" (P-4).

Petitioner testified that when a student had completed the drill and practice sheets according to results achieved in a Skills Inventory Test (P-4), petitioner administered the Science Research Associate Probes to determine whether or not mastery in the skill had been achieved (P-5). If mastery had been achieved, she directed the student's progress to a new skill area. If mastery had not been achieved, help was provided and appropriate additional drill and practice sheets were assigned.

In furthering her testimony, petitioner indicated that her program functioned independent of any math skills that the fifth and sixth grade classroom teacher taught. There were neither assignments from, nor any coordination between, the classroom program and the Math Lab program. Petitioner testified that she was solely responsible for implementing the Math Lab curriculum.

Petitioner filed her grievance early in the fall, asserting that she was a teacher and not an aide in the Math Lab. She asserted that neither the building principal nor the Superintendent of Schools ever outlined her duties prior to the initiation of her grievance. She asserted further that it was only after the grievance had been filed (ultimately leading to this petition) that the parties discussed the issue controverted here. Petitioner testified that at that time, the administration (a) insisted on referring to her position as one for an aide, (b) suggested that she allow students to correct their own work by using answer keys, and (c) advised her to direct students to seek help from their classroom teacher, rather than from her for problems or difficulties encountered in the Math Lab.

Petitioner believed that this meeting was contrived, ignored sound educational procedures in order to save an aide's position, and served no purpose other than to build a case for administration against the very nature of her complaint.

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Petitioner was never observed in the Math Lab during the 1980-81 school year. However, in September 1981, she was given classroom evaluation reports (P-6) (P-7). Moreover, while the Board has contended that petitioner was an aide to a math resource teacher, his report states, "I did not recognize her as being my aide, and did not view her as such throughout the year" (P-6). The reason for this comment, as the resource teacher testified at the hearing, was that he did not supervise petitioner. To the contrary, his function was to supply materials and assist if requested by petitioner or another classroom teacher. Otherwise, the Math Lab functioned independently and with no supervision or direction from him. He testified also that the program was not remedial; it was for all fifth and sixth grade pupils.

The resource teacher testified finally that he would not recommend a high school graduate to operate the controverted program. The Math Lab, he asserted, was designed for the person assigned the previous year and that person was a competent college graduate.

Petitioner admitted that the administration asked her to conduct the Math Lab as it had been conducted during the previous year by that "aide." Petitioner conceded also that the program's focus was on skills taught by the classroom teacher, and that she did not have to make lesson plans or grade report cards. However, she testified also that she had no meetings with the fifth and sixth grade teachers to determine the level of her pupils and that she essentially provided individualized instruction.

The Superintendent testified that petitioner functioned as an aide. He testified that the program was self-directing and that he met with petitioner at the beginning of the school year to explain her function as an aide. The record shows that the County Superintendent of Schools approved her position as a classroom aide and an aide's job description was introduced in evidence which states in part as follows (R-1):

> . . . The School Aide is directly responsible to the assigned teacher and works under the general supervision of the building principal to assist teachers in pupil and classroom management, housekeeping and instruction. (Emphasis added)

The 1979-82 collective negotiations agreement (P-1) further provides:

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Article 10(B)

The Board shall employ full time aides to assist in instruction under the supervision of a qualified teacher and to perform non-teaching duties for the teacher.

Article VII(B)(2)

. . . A student instruction-supervision period means any period during which a teacher is responsible for directing the learning or supervising the behavior of students. (Emphasis added)

In this regard, Exhibits R-1 and P-1 envisage that a school aide works under the direct supervision of a teacher and not independently of the teacher.

The Board contends that its assignment of petitioner to the Math Lab as an aide was proper because the County Superintendent of Schools had approved the general job description of a school aide (R-1). Such a contention is really of no moment, however, because there is no indication that the job description set forth the fact that petitioner was not "directly responsible to the assigned teacher," nor did she "assist teachers in pupil and classroom management, housekeeping and instruction." Had the County Superintendent been apprised of this situation, he may have concluded that the job description as applied to petitioner was inaccurate. Further, N.J.A.C. 6:11-4.9 states, inter alia:

(a) School aides and or classroom aides, assisting in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel, shall be approved in accordance with regulations and procedures adopted by the State Board of Education. . . .

(b) Current regulations require school districts employing aides to develop job descriptions and standards for appointment. . . . The nature of the job descriptions will dictate the qualifications to be met, the proficiency standards needed, and the pay to be received.

(c)(2) If he [the county superintendent of schools] finds that the descriptions and qualifications are in accord with the policies of the State Board of Education, and conform to sound educational practice, he shall approve them. . . .

Based on the foregoing testimony and evidence, I **CONCLUDE** that petitioner functioned independently, that she was the teacher of the Math Lab, and that she was directly responsible for directing the learning of students and supervising their behavior.

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The documents in evidence give their own mute testimony concerning the level and type of instruction which petitioner provided. Exhibits P-2, 4 and 5 provide examples of the arithmetic skills covered in the Math Lab. These skills include addition, subtraction, multiplication and division of fractions; rounding off decimals; and computing percentages.

While most college graduates may be able to understand and explain these arithmetic functions, the determination concerning a particular aide's qualifications must be made by the County Superintendent of Schools (N.J.A.C. 6:11-4.9). On the other hand, petitioner was qualified as a K-8 teacher, and I am convinced, performed as a teacher in the Math Lab.

It strains credulity to believe that she could perform as an automaton, passing out and collecting papers without answering questions and giving professional instruction and providing professional judgments for her pupils.

The relief requested in the Petition of Appeal is GRANTED.

The Board is ORDERED to pay petitioner for the 1980-81 school year the salary she should have received as a full-time teacher at her appropriate step on the 1980-81 salary guide.

This recommended decision may be affirmed, modified or rejected by the ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH, who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 0067-81

I hereby **FILE** my Initial Decision with **GUSTAV H. RUH** for consideration.

16 April 82
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

19 April 1982
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 21, 1982
DATE

Ronald L. Parker/ps
OFFICE OF ADMINISTRATIVE LAW

plb

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DOCUMENTS IN EVIDENCE

P-1 1979-82 Agreement

P-2 Survey test

P-3 Log of Pupil Progress

P-4 Arithmetic Skills Inventory

P-5 Probes (13 pages)

P-6 Aide evaluation, dated September 9, 1981

P-7 Principal's evaluation

P-8 Math Lab booklet—1977

P-9 Letter from Lindner to Broida

R-1 Aide Job Description

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ARLINE BROIDA AND ENGLEWOOD CLIFFS EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed 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 relief requested in the Petition of Appeal is hereby granted.

COMMISSIONER OF EDUCATION

May 28, 1982

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ARLINE BROIDA AND ENGLEWOOD CLIFFS EDUCATION ASSOCIATION,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, May 28, 1982

For the Petitioners-Respondents, Bucceri & Pincus
(Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Appellant, Stein, Joseph & Rosen (Marc Joseph, Esq., of Counsel)

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

We point out that the Englewood Cliffs Board protests the Commissioner's lack of consideration of the Board's exceptions to the Administrative Law Judge's Initial Decision. The Board claims the Commissioner should have considered the exceptions, even if not timely received, and the Commissioner's failure to consider the exceptions resulted in prejudice and injustice to the Board. The Commissioner refused to consider the exceptions holding they were untimely filed pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The record shows the Board's exceptions were due May 3, 1982 and received by the Commissioner on May 5, 1982. The Board claims the exceptions were timely mailed on April 30, 1982, and in support cites N.J.A.C. 1:1-7.1(d), where papers are deemed complete upon mailing; however, the record contains no proof of the Board's mailing thereof. We do note that Petitioners' Reply to the Exceptions contains the statement that Petitioners received the exceptions on May 4, 1982, which is the day before the Commissioner's receipt--May 5, 1982. This, of course, does not prove mailing date. We also note that the Department of Education's rules for filing exceptions, N.J.A.C. 6:24-1.17(b), allow for filing of exceptions within 15 days of delivery or 18 days of mailing. In any event, the Board has raised the very same exceptions issues before us in its Points of Appeal, which we have considered in our review of this case.

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We would also point out that the Administrative Law Judge's Initial Decision contains certain conclusory comments which we consider inappropriate; however, we are satisfied from our review that the record contains substantial competent evidence supporting our recommendation to affirm the decision of the Commissioner.

December 1, 1982

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REPORT AND
RECOMMENDATIONS TO THE
COMMISSIONER OF EDUCATION
OAL DKT. NO. EDU 2561-82
AGENCY DKT. NO. 66-1/82A

IN THE MATTER OF THE
NEW JERSEY INTERSCHOLASTIC
ATHLETIC ASSOCIATION'S
PROPOSED REALIGNMENTS OF
ATHLETIC LEAGUES AND
CONFERENCES

APPEARANCES:

See Alphabetized lists of attorneys and other presenters, post.

Record Closed April 5, 1982 Decided May 4, 1982

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

PRESENTERS AT THE HEARINGS:

The following two alphabetized lists are of attorneys and other who made presentations during the three days of hearings held in Trenton, Camden and Newark, New Jersey on March 25, 26 and 31, 1982:

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LIST I

Leon A. Consales, Esq. for Passaic Valley Regional High School

Samuel J. Curcio, Jr., Esq. for Cape Atlantic League

Patrick English, Esq. for Clifton Board of Education

John A. Errico, Esq. for Bloomfield Board of Education

John G. Gilfillan, Esq. for Delbarton School

Jeffrey L. Gold, Esq. for South Jersey Conference

Louis J. Greco, Esq. for Greater Egg Harbor Regional and Mainland Regional School Districts

Michael J. Herbert, Esq. and Jane Kelly, Esq. for N.J.S.I.A.A.

Shawn Kelley, Esq. for Colonial Hills Conference

Raymond J. O'Brien, Esq. for Elizabeth Board of Education

Gilbert E. Owren, Esq. for Northern Hills Conference

David B. Rand, Esq. for Iron Hills Conference

Raymond J. Zane, Esq. for Olympic Conference

LIST II

James Buckley, President, Colonial Hills Conference re Colonial Hills Conference

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James Clancy, Union County Superintendent of Schools re Watchung Conference, et al.

Joseph Clements, Athletic Director, Pleasantville High School, for Cape Atlantic League

David DeGroot, Principal, Washington Township Schools, for Olympic Conference

Joseph Esposito, Principal, for Randolph High School and Iron Hills Conference

Torrey Froisland, Principal, Bernards High School, re Colonial Hills Conference

William Grady, Superintendent for Passaic Valley Regional High School

Giles P. Hayes, Headmaster for Delbarton School

Robert F. Kanaby, Executive Director, for N.J.S.I.A.A.

Michael E. Kelley, Headmaster, for Seton Hall Preparatory School

Gerald A. Killeen, Superintendent, for Black Horse Pike Regional School District and Olympic Conference

Joseph Lennon, Principal, Bayley-Ellard School, re Colonial Hills Conference

Robert Max, Principal, for Clifford Scott High School

James J. McNasby, Principal, for Bloomfield Board of Education

Wallace J. McPherson, Athletic Director, Camden High School

Derry Michaels, Athletic Director, Whippany Park High School, Re: Colonial Hills Conference

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Angelo V. Palermo, Principal, for Bishop Eustace Preparatory School and South Jersey Conference North

Frank T. Penn, Principal, for East Orange High School

PROCEDURAL RECITATION:

On February 8, 1982, the then Commissioner of Education, Fred G. Burke, requested that an administrative law judge be assigned to conduct public hearings, on a non-contested case basis, concerning a proposed realignment of leagues and conferences as submitted to the Commissioner by the New Jersey State Interscholastic Athletic Association (NJSIAA). When the request was granted on February 26, 1982, the Commissioner advertised in the March 15, 1982 issue of the New Jersey Register, as follows:

> Pursuant to authority granted to him by c. 172 of the Laws of 1979 (N.J.S.A. 18A:11-3 et seq.), Fred G. Burke, Commissioner of Education, directed the New Jersey State Interscholastic Athletic Association (NJSIAA) to develop a plan which would allow schools who are members of that Association, and who had heretofor been precluded from participating in certain interscholastic athletic contests, to be considered for membership in various interscholastic conferences and leagues. Thereafter, the NJSIAA adopted such a plan which included a scheduling procedure, an application procedure for league and conference membership and an internal appeals procedure within the NJSIAA. The scheduling procedure was approved by the Commissioner on May 15, 1981.
>
> After approval of this scheduling procedure, applications were made by a number of schools to various leagues and conferences, resulting in reports of hearing officers appointed by the NJSIAA, and appeals to the Executive Committee of the NJSIAA, which made final determinations on January 20, 1982 and submitted those determinations to the Commissioner on that date.
>
> The Commissioner has decided to afford all Association members, conferences and leagues, who have exhausted the internal hearing procedures of the NJSIAA, and all other interested parties, an opportunity to be publicly heard with respect to the decisions of the Executive Committee. This public hearing is not a contested case proceeding. It is a public hearing to assist the Commissioner in making an administrative determination on these matters. Towards this end, the Honorable Eric G. Errickson has been assigned by the Office of Administrative Law, pursuant to N.J.S.A. 52:14F-50., to conduct these hearings, develop a record of

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comments received, and prepare recommendations for the Commissioner.

Association members or their representatives and other interested parties are hereby notified of the following times, dates and places at which oral presentations will be made before the Honorable Eric G. Errickson, A.L.J.:

March 25, 1982, 9:00 A.M.
Office of Administrative Law
88 East State Street
Trenton, New Jersey 08625

March 26, 1982, 9:00 A.M.
Camden County Court House
Court Room 6C
6th and Market Street
Camden, New Jersey 08101

March 31, 1982, 9:00 A.M.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Association members and other interested parties wishing to make oral presentations are urged to attend the hearing in closest geographic proximity to their own location in order to facilitate the development of an orderly record.

Association members and other interested parties may submit written comments, supplemental to any materials originally presented before the NJSIAA Executive Committee, in lieu of or in addition to oral presentations. Written comments must be submitted on or before April 1, 1982. . . .

On or before April 1, 1982, the NJSIAA will submit to Judge Errickson the entire record of proceedings below, including hearing transcripts, along with a copy of any briefs, affidavits or supplemental materials.

Public hearings were conducted and concluded at the designated locations on the announced dates. While it was not required that witnesses be sworn, each was given that option. Although presenters were not subjected to cross examination as in a contested case procedure, two full rounds of rebuttal comments were allowed in each of the three days of hearing. Presenters were not held to any time limits except those which were self imposed. Documents were marked as exhibits both during the hearings and thereafter. The advertised April 1 deadline for written submissions was extended to April 5 in order to give reasonable time for preparation to those who had participated in the March 31 hearing at Newark.

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HISTORICAL BACKGROUND:

On November 16, 1979, Administrative Law Judge Ward R. Young issued an oral Initial Decision in consolidated cases entitled In the Matter of Passaic Board of Education, Seymour Puckowitz, Superintendent of Schools and Frank Verducci, Coach of Barringer High School v. New Jersey State Interscholastic Athletic Association, OAL Docket Nos. EDU 5166-79 and 5167-79 (Unreported). Those petitions were dismissed. However, Judge Young, stating that he was appalled at instances of unequal athletic competition between schools of different sizes and the apparent lack of racial and socio-economic balance in leagues and conferences, stated, in pertinent part:

> What better place for young people to be impressed and gain the respect for an opponent, regardless of the socio-economic background or his race than on the field of competitive athletics. The State Legislature has seen fit to pass a new law, which was referred to during the course of these proceedings, which gives the Commissioner of Education, for the first time in the history of education in the State of New Jersey, jurisdictional authority in relation to actions, policies, et cetera, of the New Jersey State Interscholastic Athletic Association. . . .
>
> I do not intend to impose my judgment on the Commissioner of Education. I wish to emphasize in this decision that I strongly urge the Commissioner to give every consideration to issuing an order to the New Jersey State Interscholastic Athletic Association to show cause why they should not govern the scheduling of interscholastic athletics throughout the State of New Jersey, the thought being in mind equal levels of competition, the thought being in mind complete integration, socio-economic, black, white, surburbia, city, et cetera. . . .
>
> My sincere hope is that the Commissioner will act to bring about the only real remedy, a schedule of Group 4's against Group 4's, equal levels, with regard to the composition of student bodies. . . .

The Commissioner's November 16, 1979 decision in that same case directed N.J.S.I.A.A. as follows:

> The Commissioner observes that, in the Initial Decision, the Administrative Law Judge expresses concern regarding the possibility of inequities in the scheduling of interscholastic athletic contests among some secondary schools. The time restraints in the instant matter have obviously prevented a thorough perusal of whether such inequities exist.

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The Commissioner hereby directs the New Jersey Interscholastic Athletic Association to conduct an inquiry, under the authority of c. 172, L. 1979, to determine whether inequities exist among New Jersey secondary schools in the scheduling of interscholastic athletic contests. The N.J.S.I.A.A. shall issue a report to the Commissioner within 120 days describing the extent and causes of any such inequities, and shall provide recommendations to the Commissioner for appropriate remedial action, if such should be considered necessary.

The 1979 laws to which the Commissioner made reference and which became effective August 26, 1979 are here set forth in their entirety as codified in N.J.S.A. 18A:

18A:11-3. Voluntary associations regulating conduct of student activities; membership; rules and regulations; appeals

A board of education may join one or more voluntary associations which regulate the conduct of student activites 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, bylaws, 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 association. In matters involving only public school districts and students, faculty, administrators and boards thereof, appeals shall be to the commissioner and thereafter the Superior Court. In all other matters, appeals shall be made directly to the Superior Court. The commissioner shall have authority to direct the association to conduct an inquiry by hearing or otherwise on a particular matter or alternatively, direct that particular matter be heard directly by him. The association shall be a party to any proceeding before the commissioner or in any court.

18A:11-4. Minutes of meetings of associations overseeing interscholastic sports programs; report

The minutes of every meeting of any association functioning under this act which shall oversee activities associated with statewide interscholastic sports programs in this State shall be transmitted by and under certification thereof to the commissioner or his designee who shall acknowledge the receipt of the minutes by his signature. The commissioner or his designee shall prepare a report detailing all programs and fiscal activities of the Statewide associations and such other associations functioning under this act as he feels may be necessary. This report shall be based upon

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annual reports submitted to him by the associations operating under this act and shall detail any developments contrary to the public interest and shall indicate whether or not the intent of the Legislature in its grant of statutory authority to boards of education to join such associations is faithfully being executed.

18A:11-5. Effective date of amendments to charter, constitution, bylaws, rules or regulations of association; disapproval of amendments

Any amendment to the charter, constitution, bylaws, rules or regulations of the association shall be effective not less than 20 days after its submission to the commissioner. No such amendment shall take effect if the commissioner in said 20 day period returns to the secretary of the association his disapproval of the amendment.

UNCONTESTED FACTS:

I **FIND** the following to be uncontested facts which further reveal the contextual setting within which this matter arose:

1. The NJSIAA originated as a voluntary association of public schools, involved in various interscholastic athletic activities. As of the present time, the NJSIAA consists of 441 member schools, comprising 377 public schools and 64 parochial schools.

2. The NJSIAA is governed by a Constitution and Bylaws, which among other things, provide for an Executive Committee, comprising 40 members, 21 of whom represent public secondary schools in each county of New Jersey; 3 members representing parochial schools, in different sections of the State, as well as 8 ex officio members, including a representative of the Commissioner of Education, and 8 at large representatives. [Exhibit A-3]

3. There are 32 athletic leagues and conferences with long and varied histories. These conferences largely determine the scheduling of contests between their members. The larger the conference, or divisions of conferences, the more likely conference members will not compete with nonconference schools.

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4. Over the past decades there has been a substantial shift in public school enrollment from New Jersey's urban centers to suburban areas and a shift in parochial schools from urban parishes to regional suburban facilities. With this shift in population, inner city public schools, with larger concentration of minority students, and certain parochial schools, have had increasing difficulty in scheduling athletic contests in a variety of sports.

5. This difficulty in scheduling has led to a number of inner city schools and parochial schools applying to conferences in their geographic areas, so as to assure a full schedule of athletic contests.

6. Over the years, many of these applications by innercity and parochial schools have been rejected.

7. In response to the Commissioner's November 16, 1979 directive, the NJSIAA undertook a statewide survey involving 60 schools, and issued a 120 page report on May 14, 1980, setting forth the scheduling inequities involving both urban and parochial schools and recommending, among other things, the restructuring of leagues and conferences. (Exhibit A-5). That report issued by NJSIAA's special Hearing Officer, Harold J. Ruvoldt, Jr., Esq., stated, at its conclusion:

> Based upon a thorough review of the testimony and a thorough review of all the documents admitted into evidence, the Hearing Officer makes the following findings of facts:
>
> 1) There exist in the State of New Jersey a system of scheduling interscholastic sports which does in fact work a hardship on urban, poor, minority, rural and Catholic schools. That hardship is an outgrowth of the haphazard manner in which leagues and conferences have grown to the effect that leagues and conferences are not regulated in terms of their membership and/or governments.
>
> 2) As a result, in the system of leagues and conferences there are substantial inequities in the scheduling of interscholastic sports, both in the opportunities for students to play schools of comparable size as well as in the burdens placed upon schools in the form of transportation, responsibilities and expenses. These

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burdens fall most heaviest [sic] upon schools who are poor, urban and black.

3) There is in New Jersey no power specifically vested in the New Jersey State Interscholastic Athletic Association or in the Commissioner of Education other than the provisions of Chapter 172 of the Laws of 1979, which clearly enables the abolition and/or restructuring of leagues and conferences. The Hearing Officer hereby finds as a matter of fact that absent a restructuring of leagues and conferences, the inequities which exist will continue to exist and will indeed worsen in the future.

It is possible to restructure leagues and conferences in such a fashion so as to create leagues within reasonable geographical distance of each other with schools of comparable size which would be capable of competing with each other. . . . [Exhibit A-5]

8. On August 4, 1980, the Commissioner of Education wrote to the NJSIAA as follows:

I have read the report of the NJSIAA concerning discrimination in the scheduling of high school athletic events and I find it to be thorough and persuasive. The report documents a clear pattern of inequity in the scheduling of events and in the formation and selection of conferences. A systematic bias against urban schools exists. The conclusions in the report are quite disturbing and demand action. I commend the willingness of the association to call a meeting in December, 1980 for the purpose of discussing the rearrangement of leagues. . . .

It is my view that alternatives to the suggested rearrangement of leagues might also be considered. Empowering the association to assign a school to an appropriate conference if it has been excluded unfairly; requiring each school in a conference to leave several games unscheduled and authorizing the association to schedule those games with schools of equal size; and establishing new incentives and disincentives in the quality point system which would enhance scheduling opportunities for urban schools are possible alternatives which might be considered if the proposed solution is impractical.

I do not believe that this office should develop the remedies for the problems noted in your report or even guidelines for such remedies unless the NJSIAA fails to meet the issues itself. A solution which emanates from your membership and is self-imposed is preferable to one imposed by the state. As

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> noted previously, the inequities described in your report are serious and must be remedied. I call upon you to adopt by January 1, 1981 a plan that will ensure equality of opportunity to schedule athletic events for the 1981-82 school year and all years thereafter.

9. In response to this mandate, the NJSIAA Executive Committee proposed, and the general membership of the Association adopted, a Constitutional Amendment in December 1980, which provided as follows:

> No member school shall be a member of any league or conference not recognized, sanctioned or approved by the Association. (Article III, Section 3)

At the same general membership meeting, which approved the Constitutional Amendment, the membership rejected specific Bylaw changes concerning the scheduling issue.

10. On January 7, 1981, the Commissioner of Education wrote to the NJSIAA and expressed disappointment over the rejection by the membership of the Executive Committee plan for equalizing athletic schedules, but approved the Constitutional Amendment, noting that "the power of NJSIAA over interscholastic sports has been increased by the above amendment." In that letter, the Commissioner granted an extension to the NJSIAA until May 15, 1981 to develop a plan to provide for equalization for the 1981-82 athletic season. He also retained jurisdiction until the issue was resolved (Exhibit A-3, attached Exhibit D).

11. The Executive Committee then organized ad hoc committees throughout the State to formulate a plan to implement the Constitutional Amendment and thereby comply with the mandate of the Commissioner. As a result of that process, a scheduling plan was adopted by NJSIAA in May 1981 which would allow individual member schools to apply to conferences and, if denied, to appeal to the Executive Committee, which would thereafter appoint hearing officers to conduct hearings and set forth findings that would ultimately be considered by the Executive Committee. That scheduling plan also set forth criteria for the hearing

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officers to consider, such as the size of the schools involved; their geographic location; the nature of schools' total athletic programs and facilities; the effect on other leagues; administrative personnel; and financial burden, as well as other factors.

12. On May 15, 1981, when the Commissioner wrote to the NJSIAA approving the scheduling plan, he again retained jurisdiction.

13. In accordance with the scheduling plan, a number of urban and rural schools, as well as parochial schools, applied to several of the 32 conferences and leagues. While some applications were accepted, many of these applications were rejected, leading to hearings conducted by NJSIAA-trained hearing officers who thereafter reported to the Executive Committee, recommending the inclusion of many of these schools in conferences or leagues (Exhibits A-6a-g).

14. After the issuance of these hearing officers' reports, appeals were taken by several of the conferences and schools involved in the earlier appellate process. The Executive Committee conducted hearings on those appeals during January 1982 (Exhibits A-7a-c).

15. As a result of this process, the NJSIAA Executive Committee on January 26, 1982 issued its Realignment Plan on January 26, 1982, which was then forwarded to the Commissioner (Exhibit A-1, Charts A through H).

16. The realignment plan provides league or conference membership for many inner city and or urban secondary schools which have a high minority enrollment. In several cases, the racial imbalance between conferences is reduced. In no case does any of the realignments affect the racial balance adversely when the league or conference is considered without regard to divisional composition.

17. The following is a listing of the various conferences involved in this proceeding, and their respective minority percentages for public schools both pre- and post-Executive Committee Action:

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Realigned Conference	Pre-Executive Committee Min. %	Post-Excutive Committee Min. %
NNJIL	13%	45%
Bergen Schol. League	10%	11%
Iron Hills Conf.	7.5%	17%
Colonial Hills Conf.	3%	3%
Northern Hills Conf.	4%	12%
Watchung Conf.	43%	43%
Cape Atlantic Conf.	22%	24%
Olympic Conf.	11%	26%

18. On January 26, 1982, the NJSIAA Executive Director wrote to the Commissioner, as follows:

The Executive Committee has concluded all hearings on the recommendations of the hearing officers relative to the alignment of Leagues and Conferences.

The Executive Committee has ruled:

1. Effective September 1, 1982, the Northern New Jersey Interscholastic League shall be composed of two (2) divisions: one to include Bergen Catholic, Immaculate Heart, Bergenfield, Don Bosco (Ramsey), Fair Lawn, Hackensack, Paramus, Paramus Catholic Boys, Paramus Catholic Girls, Ridgewood, St. Joseph (Montvale) and Teaneck. The other division to include Belleville, Bloomfield, Clifton, Montclair, Nutley, Passaic, Passaic Valley, Eastside (Paterson) and John F. Kennedy (Paterson).

2. Effective September 1, 1982, the Bergen County Scholastic League shall (a) admit Weehawken High School/Olympic Division; (b) include Lyndhurst High School/American Division for 1982-83, National Division for 1983-84; (c) New Milford High School/National Division; and (d) not be required to admit Clifford J. Scott High School.

3. Effective September 1, 1982, the Iron Hills Conference shall (a) admit East Orange High School and Seton Hall Preparatory School to membership in the conference; and (b) not be required to admit Belleville High School as a member.

4. Effective September 1, 1982, the Colonial Hills Conference shall (a) admit Bayley-Ellard Regional High School and Immaculate Conception High School as members; (b) not be required to admit Delbarton

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School, Kinnelon High School, Clifford J. Scott High School or Verona High School as members.

5. Effective September 1, 1982, the Northern Hills Conference is approved as a merger of the former Suburban and Skyline Conferences with the following member schools: West Milford H.S., Wayne Valley H.S., Lakeland Regional H.S., Summit H.S., Montville H.S., Millburn H.S., Caldwell H.S., Butler H.S., Pequannock H.S., DePaul Diocesan H.S., West Orange H.S., Madison, H.S., Verona H.S., Morris Catholic H.S., and Kinnelon H.S.; and in addition the Conference shall admit Clifford J. Scott H.S. and Delbarton School as members; submit a Constitution of the new conference; and Verona H.S. and Kinnelon remain members of their respective conferences.

6. Effective September 1, 1982, the Olympic Conference shall admit the following schools as members: Camden H.S., Cherry Hill-East H.S., Pennsauken H.S., Woodrow Wilson H.S., Bishop Eustace Prep School, Camden Catholic H.S. and Paul VI Regional H.S. (Haddonfield).

7. The Burlington County Scholastic League shall not be required to admit Camden H.S., Cherry Hill-East H.S., Pennsauken H.S., Woodrow Wilson H.S., Bishop Eustace Prep School, Camden Catholic H.S. and Paul VI H.S. (Haddonfield) as members.

8. The Colonial Conference shall not be required to admit Camden H.S., Cherry Hill-East H.S., Pennsauken H.S., Woodrow Wilson H.S., Bishop Eustace Prep School, Camden Catholic H.S. and Paul VI H.S. (Haddonfield) as members.

9. Effective September 1, 1982, the Watchung Conference shall (a) admit St. Mary of the Assumption High School (Elizbeth) as a member and, (b) release Montclair High School from membership in the Conference.

10. The North Bergen Interscholastic League is not required to admit Fair Lawn H.S., Paramus Catholic Boys H.S., Paramus Catholic Girls H.S. and St. Joseph Regional H.S. (Montvale) as members of the league.

11. Effective September 1, 1982, the Cape/Atlantic League shall admit Atlantic City H.S., Bridgeton H.S., Cumberland Regional H.S., Holy Spirit H.S., Millville H.S. and Vineland Sr. H.S. and continue as members Absegami H.S., Mainland Regional H.S. and Oakcrest H.S.

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12. The South Jersey Conference schools will be admitted to the Cape Atlantic League and the membership of Absegami H.S., Mainland Regional H.S. and Oakcrest H.S. will be continued in the Cape Atlantic League.

13. To approve the recommendation of the hearing officers that New Providence High School be admitted to the Mountain Valley Conference effective September 1, 1982.

14. That the Bergen Passaic Scholastic League not be required to admit Kinnelon High School.

Please be advised that the necessary timelines to implement the above will be acted upon at the February 1982 meeting of the Executive Committee.

19. With the exception of the Bergen Scholastic League, the realignment plan placed new parochial schools in each of these leagues and conferences, so as to increase parochial school membership from the present 8 to 21 parochial schools as follows:

NORTHERN NEW JERSEY
INTERSCHOLASTIC LEAGUE (CHART A-2)

Bergen Catholic
Don Bosco (Ramsey)
Paramus Catholic
St. Joseph

IRON HILLS CONFERENCE (CHART C-2)

Seton Hall Prep

COLONIAL HILLS CONFERENCE (CHART D-2)

Bayley Ellard
Immaculate Conception

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NORTHERN HILLS CONFERENCE (CHART E-2)

DePaul
Morris Catholic
Delbarton

WATCHUNG CONFERENCE (CHART F-2)

Roselle Catholic
Union Catholic (Scotch Plains)
St. Mary of the Assumption

CAPE ATLANTIC LEAGUE (CHART G-2)

Sacred Heart (Vineland)
St. Joseph (Hammonton)
Wildwood Catholic
Holy Spirit

OLYMPIC CONFERENCE (CHART H-2)

Gloucester Catholic
Bishop Eustace
Camden Catholic
Paul VI (Haddonfield)

[A-1 at pp. 13-14] [Underscoring denotes new placements]

20. Separate appeals were filed by Olympic Conference, Iron Hills Conference, Cape Atlantic League and Elizabeth Board of Education before branches of the Superior Court in Counties of Gloucester

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(Olympic Conference v. New Jersey Interscholastic Athletic Association, Chan. Div. Dkt. No. C-2058-81), Morris (Iron Hills Athletic Conference v. New Jersey State Interscholastic Assoiciation, Chan. Div. Dkt. No. C-2297-81E), Atlantic (Cape Atlantic League v. New Jersey Interscholastic Association, Law Div. Dkt. No. L30194-81E) and Union (Board of Education City of Elizabeth v. New Jersey, Chan. Div. Dkt. No. C1916-81E), counties respectively. In all four instances, the Superior Court judges declined to take further action until the matter was subjected to the administrative hearings scheduled under the jurisdiction of the Commissioner of Education (A-4, a-d). Judge Gruccio, in Cape Atlantic League, supra, issued a preliminary injuction on implementation of the realignment plan pending exhaustion of administrative remedies. An appeal of Iron Hills, supra, is now pending before the Appellate Division of the Superior Court concerning Judge Stanton's dismissal of the complaint in Dkt. No. A-2787-81-T3.

21. On February 25, 1982, the NJSIAA sent a "Flash News" bulletin to all member schools which reported further action by the Executive Committee at a meeting of February 10, 1982. Therein, the conferences and leagues were directed to comply with the following guidelines:

I. League/Conference Organizational and/or Scheduling Deadlines.

(a) By March 31, 1982 - all/leagues conferences to which schools have been assigned must have met with those schools to draft schedules effective September, 1982.

(b) By April 15, 1982 - all leagues conferences to which schools were assigned must notify the Executive Committee in writing of the completion of the scheduling process.

(c) By April 20, 1982 - the Executive Committee, through its Executive Director, will notify the Commissioner of Education of league/conference compliance or non-compliance with the directive of the Commissioner and the Association.

(d) By April 27, 1982 - all schools affected by these scheduling changes must inform those schools presently holding contracts which are in conflict,

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that such contracts are null and void and stating the reason for the termination of the said contract(s).

(e) For 1982/83 and 1983/84 - the Executive Committee has declared a moratorium on the appeal process for league conference membership during 1982/83 and 1983/84. A panel will be appointed to develop criteria for the Executive Committee's consideration which will project future procedure for league/conference alignment.

JURISDICTIONAL ISSUES:

The Cape Atlantic League (CA-1), the Colonial Hills Conference (CHC-1,2), Elizabeth Board of Education (ELBE-1,3), the Iron Hills Conference (IHC-3,4), the Northern Hills Conference (NHC-1) and others assert that:

1. The Executive Committee of NJSIAA had no jurisdiction to direct its member leagues and conferences to alter their membership without the consent of the affected leagues and schools.

2. The Commissioner is also without jurisdiction:

   a. to direct NJSIAA to alter the membership of leagues and conferences;

   b. to approve or hear appeals on a plan which has been contested by schools which are grouped together as public schools and parochial schools.

As part of its realignment plan, NJSIAA has ordered certain leagues and conferences to admit one or more parochial schools into membership. Some of those leagues and conferences have objected to the inclusion of a parochial school, claiming that the Commissioner of Education has no jurisdiction to hear this dispute and that admittance of the schools would violate the First Amendment's Establishment Clause. When injunctions were sought before the Courts to prevent NJSIAA action in this regard, the Chancery and Law Court judges declined to rule on those cases and concluded that the Commissioner of Education was best equipped to issue a decision which would then be appealable to the Appellate Division of the Superior Court.

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N.J.S.A. 18A:11-3 authorizes public boards of education to join "voluntary associations which regulate the conduct of student activities between and among their members, whose membership may include private and parochial schools." (Emphasis added). The statute further provides that such a voluntary association shall not be operative without "approval of its charter, constitution, bylaws and rules and regulations by the Commissioner of Education."

New Jersey case law has established that the Commissioner has broad powers to regulate the activities of public schools. Jenkins, et al. v. Tp. of Morris School Dist. and Bd. of Ed., 58 N.J. 483 (1971) and Booker v. Bd. of Education, Plainfield, 45 N.J. 161 (1965) affirmed the Commissioner's authority to cross district lines in order to avoid "segregation in fact." In Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966) the New Jersey Supreme Court ruled that where the Commissioner found a local school budget insufficient to satisfy educational requirements, he had authority to take corrective action. Similarly, the Commissioner possesses statutory authority to "inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state." N.J.S.A. 18A:4-24. See N.J.S.A. 18A:6-9. See also In the Matter of the Application of Upper Freehold Regional School District Bd. of Ed, 1979 S.L.D. 35, 53, 69, 73, 78.

I **CONCLUDE** that through his general mandate over public schools, the broad powers recognized by the courts, and the authority conferred upon him, pursuant to N.J.S.A. 18A:11-3 and 11-4, the Commissioner having recognized that inequities existed, had the jurisdictional authority to order NJSIAA to devise and report to him a proposed realignment plan which would require school conferences and leagues to accept public, private and parochial schools into membership.

When, in 1979, the Legislature promulgated N.J.S.A. 18A:11-3, et seq., it was not unaware that in the decades since NJSIAA was founded in 1918, certain leagues and conferences have included parochial member schools. Nevertheless, the Legislature in 1979 made the very operation of a voluntary association contingent on approval by the Commissioner of its constitution, by-laws, rules and regulations. N.J.S.A. 18A:11-3.

The athletic activities and contests which NJSIAA oversees have no direct relationship to the content of the instructional program in member schools. Nor are those athletic activities such that they foster the establishment of religion. As such, they do

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not violate the principles enunciated by the United States Supreme Court in Everson v. Ewing Board of Education, 330 U.S. 1 (1946) and School District of Abington Township, Pennsylvania, et al. v. Schempp, 374 U.S. 203 (1963). Since the regulation of athletic contests by NJSIAA does not promote or foster any religion, or any religious group, or any parochial school, I **CONCLUDE** that the incorporation into NJSIAA Leagues and conferences of parochial schools is not violative of the Establishment Clause of the United States Constitution. I further **CONCLUDE** that review or approval or modification by the Commissioner of an NJSIAA plan which directs that certain parochial schools be allowed into membership in leagues and conferences is not in violation of the constitutional principles of separation of church and state. See also Resnick v. East Brunswick Tp. Bd. of Ed., 77 N.J. 88 (1978).

It is well established that "[e]ducation in our State is essentially a state-supervised function, and this includes private schools as well as public, religious as well as secular." West Morris Reg. Bd. of Ed. v. Sills, 110 N.J. Super. 234, 243 (Ch. Div. 1970). See Fox v. Bd. of Ed. of W. Milford Twp., 93 N.J. Super. 544 (Law Div. 1967) where the validity of a statute authorizing local boards to provide school transportation for public and parochial students was upheld. (See also West Morris, supra where another busing statute was found unconstitutional because it discriminated against students based upon geographical location.) The Legislature's promulgation of the 1979 statutes, N.J.S.A. 18A:11-3 et seq., was merely a legislative sanction to provide, in the public interest, an orderly means of State supervision over the operation of voluntary associations of public and parochial schools such as NJSIAA.

Apropos of the above conclusions is that part of Judge Stanton's March 2, 1982 opinion in Iron Hills, supra which states, at 8-9 of this slip opinion:

> I think the next step should be through the Commissioner and if one or more of the parties are aggrieved by what the Commissioner does, or what one of the Administrative Law Judges assigned to the Department of Education does, if someone is aggrieved with that they can eventually take an appeal to the Court, but the appeal would be to the Appellate Division of the Superior Court.
>
> I note that there is a claim here that there is a violation of the constitutional rights of the public schools involved in this case because they are being compelled to become entangled with a religious school. I am inclined to think that that argument is frivolous on its face. It is hard to imagine that in the New Jersey of 1982 where we have hundreds of interscholastic involvements

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> between public schools and between non-church private schools and church-related private schools, all of which seem to be handled with harmony and without entanglements of public institutions and religious practice of belief, it is hard to imagine that there is really anything seriously to be concerned about with respect to those allegations.
>
> However, to the extent that there is any meaning to those allegations it seems to me that, again, the Commissioner and the Administrative Law Judges within the Department of Education, are people who are used to dealing with church-State problems, as they impact over a wide area of public school activity; and it seems to me that initially, at least, they should be deferred to them, as they can be expected to have a useful sensitivity and expertise.

I further **CONCLUDE** that the Commissioner had primary jurisdictional authority under N.J.S.A. 18A:11-3 et seq. to order the development of, to review, to reject, to accept, or to modify the proposed realignment plan. The exercise of that authority is not only authorized but also mandated by statute. When a state official is required to exercise such supervisory authority in the public interest, there must be commensurate authority to act. To hold otherwise would render the statute inoperative. As was said by the court in Board of Education of the City of Plainfield v. Plainfield Education Association, 144 N.J. Super. 521 (App. Div. 1976):

> [T]he authority delegated to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent. Cammarata v. Essex Cty. Park Comm'n, 26 N.J. 404, 411 (1958). Moreover, when construing a statutory enactment it is fundamental that the general intention of the act controls the interpretation of its parts. . . .

I further **CONCLUDE** that NJSIAA had and has jurisdictional authority to comply with the directives of the Commissioner to study the problems inherent in interscholastic scheduling, to order its leagues and conferences to receive and act on applications, to hear appeals by schools whose memberships in leagues and conferences were rejected, and to develop a realignment plan for consideration by the Commissioner.

There remains the issue of whether the NJSIAA had jurisdictional authority to order, unilaterally, its member leagues and conferences to take into membership both public and parochial schools and to direct that scheduling between those schools begin.

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This order by the Executive Committee was apparently taken in anticipation that the Commissioner would approve the proposed realignment plan. The order appears to have been a somewhat premature attempt to give member leagues and schools more time to revise athletic contest schedules in keeping with the proposed plan. Apparently, the time constraints were such that the Executive Committee felt compelled to issue those directives prior to the Commissioner's review, acceptance, rejection or modification of the proposed realignment plan. I **CONCLUDE,** however, that those directives were not and are not binding on leagues and conferences without the Commissioner's approval of the realignment plan. Should the Commissioner approve the plan, those leagues, conferences and member schools which have not complied with NJSIAA's directive will, of course, be under greater time pressures to do those things which must yet be done to have their athletic programs in place by September 1982.

The prematurity of these NJSIAA directives, however well intentioned, was undoubtedly at least one factor in engendering the four court actions referred to above. Until the Commissioner acts on the proposed realignment plan, those four actions were likewise premature. Since no official realignment plan can have force and effect until it is sanctioned by the Commissioner, who retained jurisdiction over the matter, any determination at this time of those appeals would be inappropriate. It is noted that Judge Gruccio in his oral opinion in Cape Atlantic, supra, opinion similarily recognized the prematurity of certain directives and entered "an injunction enjoining any scheduling of any kind or description other than that which has taken place. . . ." (A-4f at p. 28)

After the Commissioner has discharged his administrative obligation by acting to sanction a plan, I **CONCLUDE** that any appeal from an implementation of that plan, if it is based on facts which involve both public and parochial schools, must be directly to the Superior Court. This conclusion is grounded on the clear wording of the statute which states:

> In matters involving only public school districts and students, faculty, administrators and boards thereof, appeals shall be to the commissioner and thereafter the Superior Court. In all other matters, appeals shall be made directly to the Superior Court. . . .

This holding is consistent with canons of statutory interpretation as enunciated by the Supreme Court in Watt v. Mayor and Council of Franklin, 21 N.J. 274 (1956), at 277:

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> In every case involving the application of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them, Carley v. Liberty Hat Mfg. Co., 81 N.J.L. 502, 507 (E. & A. 1910). A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to the doctrine of the separation of powers. Such a statute is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation. Watt v. Mayor and Council of Borough of Franklin, 21 N.J. 274 (1956) (at p.277)

Duke Power Co. v. Patten, 20 N.J. 42 (1955), states at 49: "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". (Citations omitted)

SUMMARY OF TESTIMONY

ROBERT KANABY, EXECUTIVE DIRECTOR OF NJSIAA:

Much of the testimony of the Executive Director is in the form of uncontested facts which, having already been set forth, are not duplicated here.

The director testified that NJSIAA regulates eligibility requirement for student athletics, adjudicates internal conflicts within the schools, leagues and conferences, conducts tournament play for championships, sanctions all-star games, and certifies the group categories of each member school on the basis of its pupil enrollment. He testified that NJSIAA, until the Commissioner's directive in 1979, had not attempted to exercise control over schools withdrawing and entering leagues and conferences but had left the control of such matters with the leagues and conferences.

Kanaby testified that, in response to the Commissioner's directive, the 21 Executive Committee members contacted their constituent schools who in turn elected a representative to the special ad hoc committee which, thereafter, submitted its report and recommendations on league and conference membership. In regard to the process which ensued, he testified as follows:

> An individual member school that wanted to change their status to a different league or conference, or if on independent basis wanted

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> to join a league or conference must petition that league or conference by June 1st of [1981]....
>
> The conference then had until October 15 to indicate to that school whether or not they were accepted in the conference or rejected and the reasons why. The school, if rejected, had until October 30 to appeal to the Executive Committee for relief if they were rejected. The Executive Committee then would institute Article 13, our hearing procedure for an adjudication of the appeal process, and that calls for a Hearing Officer being requested to examine and make a recommendation to the Executive Committee. The recommendation of those Hearing Officers was to be forwarded to the Executive Committee by December of 1981, and the Executive Committee took one full month, and I think that this is significant, they took one full month to study each and every one of those hearing committee reports and make a decision in January of 1982 relative to all of the recommendations and all of the situations that were dealt with. Then, of course, the last aspect of it was any appeal of that Executive Committee decision would go to the Commissioner, and thus we find ourselves here in the room today.
>
> I think I should also take a moment to review on page 8 the criteria for the league and conference applications that were developed by the Executive Committee, and by that special ad hoc committee and given to each of the Hearing Officers who heard one of the cases. They are listed there. I certainly will not read them, but I think that they are sufficient in scope to take into account the things like the geography of the school and the size of the school, and the effect on other leagues and conferences and so on and so forth. Each of the Hearing Officers was charged with that responsibility....
>
> I also think that it is significant to indicate at this time that those Hearing Officers, there was never any situation, with only one exception because a school had applied to four different leagues, where one individual heard any one case. Every case that was heard was heard by a minimum of three Hearing Officers and a maximum of five Hearing Officers, and these gentlemen were selected from the ranks of our own peers, responsible for the educational programs and the interscholastic programs in their respective communities. They were made up entirely of athletic directors, superintendents of schools and principals. These are the gentlemen who served as the Hearing Officers and made the study and the initial recommendations relative to that....
>
> [Tr. I at pp. 20-22]

Kanaby testified that the resulting realignment plan results in leagues and conferences which have:

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1. improved balance of competition between inner city and suburban schools;

2. improved balance of competition between public and parochial schools;

3. improved geographic proximity of competing member schools;

4. improved balance of competition between schools of similar enrollment;

5. improved balance of minority representation in all leagues and in the State.

IRON HILLS CONFERENCE (IHC):

DAVID RAND, ESQ., counsel for IHC testified that the Iron Hills Conference (IHC), which was formed in 1976 by sixteen member schools, fosters not only interscholastic athletic competition, but also curricular, student government, faculty and cultural exchanges. He asserted that the general membership of NJSIAA at its annual meeting on December 1, 1981 rejected a proposed by-laws revision which read:

> . . . the Executive Committee with good cause may dissolve, merge or alter any existing league or conference, its determination to be based on what is in the best interest of interscholastic sports as a whole.

He argues that the rejection of that by-law precludes NJSIAA from taking the action it did to unilaterally direct that IHC take into conference membership schools it has not approved. Rand further argued that the Executive Committee's unilateral action without sanction of the general membership of NJSIAA was arbitrary, capricious and violative of the internal procedures and rules and regulations of NJSIAA. Rand further asserted that, despite the long and tireless good faith efforts of all who labored diligently to come up with the revised plan, the hearing officers were poorly trained and their efforts were significantly flawed by arbitrariness, closed proceedings, deficiencies and lack of rational basis, absence of fundamental fairness, failure of NJSIAA to follow its own hearing officers' recommendations. Rand further argued that the admission of Seton Hall would violate the principal of separation of church and state (IHC at p. 14). In this regard, see

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also B-1. Corroborative testimony to that of Rand's was offered by Joseph Esposito, Principal of Randolph High School (See IHC-1).

ROBERT WINTER, Superintendent of Montville Public Schools, entered a written statement (M-1) which is essentially a plea for restoration of local autonomy in determining conference membership, an argument which was also endorsed by Esposito.

FRANK T. PENN, Principal of East Orange High School, enthusiastically endorsed the assignment of his school to the IHC. He stated that, since his school has repeatedly been rejected by leagues to which it had applied, under the plan it will not be forced to act independently in scheduling contests or be forced to travel to such distant locations as Camden and New York City. He testified, however, that because of the reticence of schools in the IHC to schedule games with East Orange High School, he is in a quandary concerning the scheduling of 1982-83 contests.

MICHAEL KELLY, Headmaster at Seton Hall, also expressed appreciation of the assignment of his school to the IHC. He, too, expressed concern with the refusal of all but one team in the IHC to schedule games with Seton Hall. He testified that, in a good faith effort to fulfull his school's obligation to IHC, he has kept its schedule open for competition with IHC teams. He categorically denied rumors that Seton Hall recruits or subsidizes its student athletes. He further argued that students in parochial schools ought be afforded full opportunity to compete with their neighbors who are enrolled in public high schools.

JOSPEH ESPOSITO, President of the IHC and Principal of Randolph High School, testified that the present 16 team conference with its two eight-team divisions has been extremely stable and has allowed for both divisional competition and scheduling of independent schools. He asserted that the arbitrary alteration of the 16 team conference by NJSIAA violates the conference's autonomy, NJSIAA's own constitution, and the best interests of the youth it seeks to serve.

WATCHUNG CONFERENCE:

JAMES CLANCY, Union County Superintendent of Schools, testified that he views the realignment plan as short-sighted and the cause of more problems than it will

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solve. Clancy objected to the inclusion of Linden High School, a Group III school of 1,268 in the American Division of the Watchung Conference which otherwise consists of seven Group IV schools. He also objected to the placement of Kearney High School in the National Division as its only Group IV school.

Clancy argued that more strict adherence to grouping by size would reduce glaring inequities in the proposed plan. He further advocated that NJSIAA be given authority to "see that schedules are properly set to ensure equity in scheduling. . . ." (C-1).

RAYMOND O'BRIEN, ESQ., on behalf of the Elizabeth Board of Education, asserted that neither NJSIAA nor the Commissioner has authority to declare the two year contracts between Elizabeth and Montclair and Paterson null and void (ELBE-V, Exhibits D, E). He asserts that any realignment plan should have allowed existing contracts between schools to be honored. He testified that when attempts to reschedule Montclair on an open date failed to produce results, Elizabeth was forced to schedule football games in Newark and New York City to round out its schedule. He argued that Elizabeth, a Group IV school, and its original opponents, Montclair and Paterson, should be allowed to and compelled to honor their 1982-83 contracts. In this regard, O'Brien asserted that no provision of the NJSIAA constitution confers authority to nullify scheduled contests of member schools or to usurp the authority of member schools to enter into binding agreements. O'Brien further asserted that no such emergent conditions now exist in athletic scheduling in this State to justify the extreme measures which in the past were taken by the Commissioner and the Courts to avoid a worsening of racial imbalance as reported in Porcelli v. Titus, 108 N.J. Super. 301 (App. Div. 1969) and Jenkins v. Morris School District, 58 N.J. 483 (1971). He argued further that it is ironic that Elizabeth High School with a minority segment of 70% is now being adversely affected by an order in the "name of racial justice." (ELBE-6) He further asserted that, even if the Commissioner has authority to order nullification of contracts, NJSIAA was not so clothed with the same authority since the Commissioner has not, to this date, given his stamp of approval to a realignment plan. In conclusion, O'Brien requests, on behalf of Elizabeth, that both NJSIAA's directive setting aside contracts and the proposed realignment plan be declared ultra vires. (ELBE-6).

It is noted that Elizabeth has filed a Petition of Appeal before the Commissioner asking essentially the same relief as was requested in the hearing. An

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Answer is in this record as filed by the Paterson Board requesting dismissal of Elizabeth's Petition of Appeal (ELBE-4; P-1). These have not, however, been transferred to the undersigned as contested cases by the Commissioner, pursuant to N.J.S.A. 52:14F-1 et seq. Thus, no determination is made in this, a non-contested case proceeding.

OLYMPIC CONFERENCE:

RAYMOND J. ZANE, ESQ., attorney for the Olympic Conference, argued that, in the absence of approval by the Commissioner of the realignment plan, NJSIAA's January 22, 1982 order to its constituent leagues, conferences and schools to schedule games in keeping with the proposed realignment plan, should be set aside (see Exhibit O-1). He argued further that NJSIAA's approval of the Olympic Conference's constitution and by-laws which provide for both a sixteen member limit and the conference's own regulation of its scheduling, precludes an order of NJSIAA, directing admission of nineteen schools and further directing that member schools be scheduled in a specified manner. In this regard, Zane argued that the Olympic Conference's constitution also provides that it has authority to act on applications for membership, a process with which, he asserts, it is better able to cope than is NJSIAA. Zane argued that the adding of teams which constitute the present South Jersey Conference North will create more problems than it will alleviate.

Zane testified that he understands that Camden High School, which presently travels great distances over the Eastern Seaboard to play its contests, does not intend to play teams within the Olympic Conference because of size and facilities. He testified further that a number of the schools in the Olympic Conference presently have split sessions and are expected to build additional separate high schools which would increase the present twelve schools to sixteen as provided for in the Olympic Conference constitution.

DAVID DEGROOT, Superintendent of Washington Township and an officer in the Olympic Conference, echoed the objections raised by Zane and asserted that unequal competition of suburban schools with bigger city schools would be undesirable. He also testified that he is concerned about what would happen to the many non-athletic competitive activities such as student council and band competitions which are engaged in by present members of the Olympic Conference. He testified that his district is already

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in the first phases of planning for a second high school. DeGroot also expressed concern over the cost of traveling greater distances to compete with teams in the northern part of the county.

ANGELO V. PALERMO, Principal of Bishop Eustace Preparatory School and member of both NJSIAA's Executive Committee and its Ad Hoc Committee to examine scheduling inequities, testified that he considers the realignment plan to be proper and just. In this regard, he testified as follows:

> Much reference has been made, first of all, to the fact that the South Jersey Conference North seem[s] to have violated the procedure established by the association in application to the Olympic Conference en masse. I think I would like to explain why that was done. Our South Jersey Conference North bears within its membership some of the very schools that seem to have been suffering the difficulties of scheduling and joining conferences. We represent suburban schools, we represent inner city schools and we represent parochial schools. And in the report of the ad hoc committee that was established several years ago, it was pointed out it was precisely those schools that had been classified as inner city schools and those schools classified as parochial schools were the ones that seemed to have the greatest difficulty in membership of leagues and thereby their inability or problems of scheduling athletic contests for their younger people. So, therefore, since our conference represents all of those, we felt were we to apply to any conference as an individual school, it might be the result that some of our conference schools would be selected for membership in another conference whereas others would not, thereby creating an even more difficult situation.
>
> So, for example, in the conference of seven schools, as we presently are, if three of those schools were accepted into a conference it would create an even greater difficulty for the other four schools remaining in that conference. Consequently, . . . we felt [there] was reaction to the hidden agenda, namely that schools were not selected because they were inner city schools and, therefore, had a particularly high population of minority students or perhaps of parochial schools. . . .
>
> [Tr. II at 40-41]

Palermo testified that, when application was made to the Olympic Conference by South Jersey Conference North, the application was denied by letter without affording an opportunity of an audience. He also testified that the principal of Camden High School had personally told him that allegations that Camden High School would not play conference teams were untrue. Palermo also testified that rumors of subsidization and

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athletic recruiting by his parochial school are untrue and that any such objectionable practice is subject both to monitoring by coaches of other schools and to sanctions by NJSIAA. Palermo also testified that he believes the addition of the seven schools to the Olympic Conference better provides for competition by schools of similar size in all group rankings.

In regard to allegations that the realignment plan resulted solely from two disputes raised by Barringer and Passaic High Schools in 1979, Palermo testified as follows:

> There are many today in the State of New Jersey who because of their unwillingness to accept the recommendations of the NJSIAA as a possible solution to a very present problem seem to want to blame the football playoffs as the reason. If we had no football playoffs, we wouldn't have these problems. And I think it's the case of not seeing the forest because of the trees. Whether we have football playoffs or not our member schools are having difficulty in scheduling their athletic contests and allowing their young people an opportunity of participation in full and organized athletic programs. And the young people are having the problems because of the inability and unwillingness to schedule inner city schools and parochial schools and so forth. That is the problem. That is the difficulty that faces us today. And I think that when people talk about the fact that the difficulty is the association attempting to impose its will on the member schools, I think the realization has to be made we were brought into this by the Commissioner who saw the problem. We are trying to solve the problem as he saw fit. And this is the recommendation we make.
>
> [Tr. II at 54-55]

WALLACE J. MACPHERSON, Athletic Director of Camden High School, testified as follows regarding the scheduling of athletic contests:

> I speak for Mrs. Kream, our principal, and we intend to abide by the rules of the Olympic Conference. We will play every sport that they want us to play, and we will play the games in all sports against every team same as any other team in the league would do.
>
> [Tr. II-116]

Asked whether Woodrow Wilson High School in Camden would act in similar fashion, Macpherson responded in the affirmative stating that he had met with the principals of both schools who had opted for admission to the Olympic Conference.

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CAPE ATLANTIC LEAGUE:

SAMUEL A. CURCIO, JR., ESQ., representing the Cape Atlantic League, argued that the Commissioner is without jurisdictional authority to conduct these hearings since the league is composed of both parochial and public schools. He argued further that NJSIAA was without authority to restructure conferences and leagues by reason of the adverse vote at the December annual meeting by the membership which refused to authorize NJSIAA to order or approve conference and league membership. Curcio argued further that NJSIAA had no authority from the Commissioner to implement such a plan since the Commissioner has not to this date approved a realignment plan. For fuller exposition see Curcio's written submission, CA-1.

Curcio argued that no advance notice was given of the possible merger of the South Jersey Conference South into the Cape Atlantic League, thus depriving member schools of the right to protest such a move. He argued further that inclusion of schools such as Atlantic City and Vineland, with enrollments up to 2,409 in the Cape Atlantic League would not comport with the criteria of competition between schools of similar size. Curcio asserted that philosophies and facilities are also divergent between such large schools and those presently in the Cape Atlantic League where the enrollment ranges from 203 to 904. Curcio argued that a more reasonable approach would have been a merger of the South Jersey Conference South with the South Jersey Conference North, which merger would include schools with similar large enrollments. In conclusion, Curcio asserted that a change of only 2% in the minority component of a league is not meaningful.

JOSEPH CLEMENTS, athletic director at Pleasantville High School and President of the Cape Atlantic League, testified that two schools, Oakcrest and Absegami, in the South Jersey Conference South, applied to the Cape Atlantic League in 1979 for membership to avoid scheduling schools which were far larger than they would become when a third school, Egg Harbor Regional, absorbs yet more of their enrollment. He testified that, although they were not then admitted because the league was not satisfied that the projected enrollments were accurate, a later application in 1980 by Absegami, Mainland Regional and Oakcrest was accepted by the Cape Atlantic League. Clements testified that, as a precaution, the league then modified its constitution to require any school which reached Group IV size to give one year notice of resignation and find membership in another league. He testified that he perceives no reason why a large

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number of Group IV schools such as Vineland and Atlantic City should be in the same leagues with Group I, II and III schools of the present Cape Atlantic League.

LOUIS J. GRECO, ESQ., representing the Mainland Regional Board and the Greater Egg Harbor Regional Board which operates both Absegami and Oakcrest, endorsed the legal arguments on jurisdiction put forth by Curcio. He asserted that NJSIAA has denied due process by placing the three schools he represents ex post facto in Division B of the Cape Atlantic League which is in fact the same group of schools from which they withdrew when they were voluntarily accepted by the Cape Atlantic League with its grouping of smaller schools. See GEHR-1

JEFFREY GOLD, ESQ., representing the South Jersey Conference South which, in the realignment plan, is essentially Division B of the Cape Atlantic League, endorsed the realignment plan stating:

> The Cape Atlantic League attempts to say we will bring in the South Jersey Conference, bring up all kinds of big schools, and that's unfair. It should be pointed out the three schools that the Cape Atlantic League attempts to bring in all of them have over a thousand students. They are of the nine schools in the South Jersey Conference, they are comparable with three others. . . .
>
> [Tr. II-87]
>
> Another point that should be considered, there's more than two sports, and more than football and basketball. And it seems to be made the arguments on football and basketball. We have many problems with many schools, and I would submit the plan as its proposed and affects the Cape Atlantic League and South Jersey Conference, when you consider there's more sports than just football and basketball, there's more problems because you have the intensive rivalries which is the nature of those sports, but many other sports don't have those same problems. And yet the only thing that takes this all into consideration is the basic overall plan of NJSIAA. . . .
>
> [Tr. II-80]

This argument was also expanded upon by the Executive Director on the second day of hearing:

> I will point out on the other side of that coin, it is possible that in certain sports there is a much wider range of abilities on the part of the school to compete relative to size. And I would offer as an example and an illustration of that that presently the smallest

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> school in the Cape Atlantic League, Sacred Heart, which has a student population of 203, presently participates in certain sports against the largest school in the South Jersey Conference, being Vineland with 2,409. . . .
>
> [Tr. II-91]

EXECUTIVE DIRECTOR KANABY also testified that if Absegami, Mainland Regional and Oakcrest, all suburban predominately white schools, were allowed to leave the South Jersey Conference South, the result would be a substantial worsening of the racial balance in the Cape Atlantic League.

Gold argued further that Absegami,Mainland Regional and Oakcrest have not, to this date, ever completed their official withdrawal from the South Jersey Conference.

Emphasizing, on rebuttal, his earlier argument that NJSIAA has exceeded its authority, Attorney Curcio stated:

> I'm not surprised that statewide the various member schools are considering dropping out of the NJSIAA because when they agreed to become members, they agreed to abide by the constitution, bylaws, regulations of that association, not the dictates of the Commissioner of Education, not the dictates of the executive committee. If they want to pass a regulation or a bylaw, do it in the proper fashion, through the membership. Let them vote. If the Commissioner has some authority and he feels it must be exercised, order them, take it to court, take the association to court. Let the court rule. You don't ram it down the membership's throats contrary to their views, contrary to what they want. . . .
>
> [Tr. II-110]

JOSEPH IRVIN, an athletic director in the Tri-County Conference, in a written statement of his views of realignment of schools in a number of leagues in South Jersey, stated that he favors inclusion of Atlantic City, Holy Spirit, Bridgeton, Vineland, Cumberland and Millville schools in the Cape Atlantic League as directed by NJSIAA (O-3).

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COLONIAL HILLS CONFERENCE (CHC):

SHAWN KELLY, ESQ., representing the Colonial Hills Conference, testified that the Conference was founded by eight member schools in 1969 and has retained the same membership as a stable and successful organization. He testified that there are student exchanges, faculty exchanges and other non-athletic programs engaged in by member schools. He further testified that the constitution of the Conference limits membership to eight schools, each of whose pupil enrollment must not exceed 800 (CHC-2, Exhibit A).

Kelly testified that, when eight other schools applied for admission and several meetings were held to consider those applications, it was "decided that no school had made a compelling case to enter the conference." (Tr. III-16). He stated that the reasons for denials were based on school size, geographic problems, school facilities and the desire to maintain benefits of an eight team league. He testified that, after six of the eight teams appealed the denial and in the appeals process were all recommended by the hearing panel for admission, the Conference in turn appealed that recommendation to the Executive Committee which then admitted only Bayley Ellard and Immaculate Conception.

Kelly argued that the hearings provided by the panel were unfair and alleged that the decision was determined before the proceeding by at least one of its members. He further asserted that the modification of the panel's decision by the Executive Committee did not rectify the procedural due process violation. In this regard, see CHC-2 at p. 23.

TORRY H. FROISLAND, Principal of Bernards High School, emphasized in his testimony the desire to maintain an eight team league of similar sized schools in geographic proximity which are also compatible in curricular matters. He testified that the eight member schools have rejected applications because of their adherence to that the original purpose for which the Conference was established: "that of having similar schools, geographic balance and the quality and quantity of the program. . . . (Tr. III-24). He further testified that:

> . . . to seriously affect one conference and to downgrade what we feel what we have now, which has been operating extremely successfully, extremely fine, for the sake of other schools is in

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> effect robbing Peter to pay Paul and it seems an inherent injustice, and perhaps bad for all schools and we would sincerely request that we be allowed to maintain our league in the way that it has been structured.
>
> [Tr. III-25]

JAMES BUCKLEY, President of the Colonial Hills Conference, testified that since any bias against urban schools has not emanated from the Colonial Hills Conference, its correction should not affect the systematic and well-planned organization of the Conference. Buckley argued that the separate championship competition for public and parochial schools is yet another reason why the admission of two parochial schools in a league of otherwise public schools should be rejected.

DERRY MICHAELS, Athletic Director for Whippany Park High School, stated that he objects to a ten-team league because it will reduce the flexibility of member schools to schedule independent and traditional games as in the past.

JOSEPH H. LENNON, Athletic Director of Bayley Ellard, a Group B parochial school, testified that urban or not, his school has had a serious scheduling problem. He spoke in favor of membership by reason of school size, geographic location and good relationship with schools in the Conference. He further testified that he believes that Bayley Ellard will not only benefit from membership but also has much to contribute to the Colonial Hills Conference.

NORTHERN NEW JERSEY INTERSCHOLASTIC LEAGUE (NNJIL):

JOHN A. ERRICO, ESQ., on behalf of Bloomfield School District, argues that the expansion of the ten-team, one division league to a two division, nineteen school league has developed a serious scheduling problem for Bloomfield. He testified that Bloomfield does not object to the inclusion of additional teams in a two division league, but does object to "being deprived of a complete athletic program. . . ." (Tr. III-53). In this regard, he testified as follows:

> Bloomfield's athletes in the area of soccer, basketball and baseball are deprived of a full season of competition. The Bloomfield girls athletes are deprived of the opportunity for proper competition with other schools and are prevented from engaging in competition

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> seeking championship level. Bloomfield will not be able to adequately comply with the mandate of the Administrative Code, 6:4-1.2, Section F, which provides, the athletic program including but not limited to intramural, extramural and interscholastic 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 ensure that there are sufficient activities so that the program does not deny the participation of large numbers of students of either sex.
>
> Now, if there is no incentive to participate with other schools and to compete for championships, Bloomfield girl athletes may be loathe to give their time and their talents which may go unrecognized in their particular sports and thus this provision of the Administrative Code is rendered meaningless. . . .
>
> The Athletic Association admitted into the league Immaculate Heart, a girls' school, which was combined with Bergen Catholic, a boys' school and also Paramus Catholic girls which was combined with Paramus Catholic boys. Now, this may have been commendable on the part of the Athletic Association, but . . . the Athletic Association placed both of these girls schools in Division 1, which action was rendered of no consequence to the schools in Division 2, which Bloomfield is a part, especially in view of the fact that the league decided that there would be no crossover of scheduling between the schools of the two divisions.
>
> Now, when we complained that the admitted schools don't have an adequate girls' program so that the Bloomfield girls can participate in a full and complete girls' program, it strikes us as kind of awkward to tell us, well, we will admit girls, but now they won't be in your division, they will be in another division. While we have admitted girls, your girls won't be able to play. That doesn't make sense.
>
> We believe that the objectives of the Commissioner to ensure equality of opportunity in the state's program, can be achieved, but under the present setup of the Northern New Jersey Interscholastic League it's very doubtful that it could be so.
>
> [Tr. III-53-55]

Errico further objected to the assignment of all of the three urban schools with large minority enrollment in Division 2 and none in Division 1 of the NNJIL. See NNJIL-1.

JAMES MC NASBY, Principal of the Bloomfield Schools, testified that he does not object to the expansion of the league but does object to the two-divisional alignment which created a severe scheduling problem in the nine school Division 2, especially for

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girls sports. He proposes a three-divisional league and recommends that the plan on interdivisional play be abolished so that schools may cross divisional lines in order to play complete and competitive sports schedules. See NNJIL-2.

WILLIAM GRADY, Superintendent of the Passaic Valley Regional High School District and a member of the Ad Hoc Committee which met in May 1981, also testified in opposition to the "arbitrary" division of the league with a ban on interdivisional competition. He also testified that NJSIAA's hearing officers were poorly prepared and gave little attention to historical derivations of the league and the sensitivity of persons who had worked so hard over the years to establish the league (Tr. I-64). He testified that Passaic Valley intends to comply with the realignment plan in 1982-83 but thereafter intends to seek membership elsewhere in another league or play an independent schedule. He testified that, with the current decline in enrollment, his school will be the only Group III in Division 2 which has Group IV schools with enrollment of up to 2,222 pupils.

PATRICK ENGLISH, ESQ., on behalf of Clifton School District, urged the Commissioner:

> . . . to give every consideration to issuing an order to the New Jersey State Interscholastic Athletic Association to show cause why they should not govern the scheduling of interscholastic athletics throughout the State of New Jersey, the thought being in mind equal levels of competition, the thought being in mind, complete integration, socio-economic, black, white, suburbia, city, et cetera. I . . . too would like to key on the comment adverted to by Mr. Errico, the comment which appears on page 12 of Mr. Kanaby's report that the proposed realignments succeed in substantially reducing scheduling inequities of the inner city and/or urban secondary schools which have high minority enrollments. This would set forth the primary reason for enhancing the proposed alignments.
>
> [Tr. III-67]

English also raised objection to the assignment of schools with a large number of minority pupils to only Division 2 of the NNJIL. He testified that Clifton objects strenuously to the ban on interdivisional contests which is forcing Clifton to schedule many games outside the league to maintain its many sports programs. In this regard, he stated:

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> Interdivisional play will avoid the problems that have been outlined here, will avoid a desertion of women's sports programs in Division 2, will avoid what appears to be a very clear attempted invasion of the mandate of the Commissioner of Education to balance inter-scholastic sports on a racial basis as well as other bases, that evasion occurring by the so-called Division 1 schools and it will lead to a stronger all-around league, which will accomplish the very purposes . . . given as the primary reasons for realignment.
>
> [Tr. III-78-79]

NORTHERN HILLS CONFERENCE (NHC):

GILBERT OWREN, ESQ., representing the fifteen schools of the Skyline and Suburban Conferences which applied for approval to form the NHC, raised objections to the assignment to NHC of two additional schools: Clifford Scott, a public school and Delbarton, a parochial school. He testified that those two schools had applied for and been recommended by the hearing officers for membership in the Colonial Hills Conference (NHC-1, Exhibit E). He further testified that contrary to the hearing officer's recommendation, the two schools were inexplicably assigned by the Executive Committee to the NHC. Owren argued that:

> [T]he Committee has no authority to approve the formation of a conference on the condition that two schools be admitted which were not parties to the application for approval and did not apply for membership to the conference.
>
> The Executive Committee's ruling in the present case is not only ultra vires, but it represents the type of action by the Committee which was forbidden by the membership when proposed changes to the bylaws were rejected at the Association's annual meeting on December 1, 1980.
>
> [Tr. III-92-93]

Owren asserted that the action by the Executive Committee was so permeated by such confusion, off the record discussions and secrecy as to throw into question the ability of the Executive Committee to act in a fair manner in an orderly democratic society. In this regard, Owren, citing numerous case decisions decided before the courts and the Commissioner (Tr. III-100-103), requested that the Executive Committee's action assigning the two schools to the NHC be set aside.

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JOHN J. GILFILLAN, ESQ., on behalf of Delbarton School, submitted letters dated November 6, 1981, whereby the headmaster of Delbarton had requested membership in the merger of the Skyline and Suburban Conferences (NHC-2,3). He stated that Delbarton had also requested but was rejected for membership in the Colonial Hills Conference. Gilfillan stated that Delbarton

> was not surprised when it was assigned to the Northern Hills Conference, in light of its prior communication with the representatives of the Suburban and Skyline Conferences and it concluded that such determination must have been made by the Executive Committee as part of the totality of their consideration as to what should be done to rectify the problems which had been facing the Executive Committee and the N.J.S.I.A.A. and indeed all of the schools in the State of New Jersey who are faced with scheduling problems, inequities, for whatever reason.
>
> [Tr. III-108-109]

In regard to scheduling problems for the ensuing 1982-83 school year now faced by Delbarton, Gilfillan testified as follows:

> Upon receiving the indication that it would be a member of the Northern Hills Conference, Delbarton communicated with other athletic directors in that proposed conference in attempt to establish a schedule. It was in all cases denied the opportunity to schedule athletic events, particularly, football and soccer being the ones that are primarily of concern at the moment and has not been able to schedule more than four games for the coming football season.
>
> Of these four games two are against schools which will have problems or may have problems. More importantly, one is a prospective member of the Northern Hills Conference, Kinnelon and Delbarton has been advised by Kinnelon that Kinnelon seeks to cancel its contract to play football with Delbarton in the coming year, because it has to play against West Orange. West Orange is another member of the proposed Northern Hills Conference. This appears to be an activity which has become widespread. The communication from Mr. Owren, counsel for the 15 schools, formerly of the Suburban and Skyline Conferences, to Delbarton, forwarding a copy of his communication to Mr. Kanaby, indicated that the Suburban and Skyline Conferences was choosing not to implement the decision of the Executive Committee.
>
> Now, that may have been the decision of the conference. However, the experience of Delbarton, it appears that the 15 schools, formerly members of the Suburban and Skyline Conferences, there is a great deal of cross scheduling going on for

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> the coming year, schools which previously had not played one another in the respective conferences are now planning to play one another, but all to the exclusion of Delbarton.
>
> It seems to me that this is exactly the type of scheduling inequity which caused the entire undertaking to be commenced two years ago. . . .
>
> [Tr. III-109-110]

Gilfillan asserted that Delbarton is pleased to be a member of the NHC but pleads for a directive which would require other schools in the NHC to implement a full schedule of athletic contests with Delbarton. See D-1.

GILES P. HAYES, Delbarton's Headmaster, echoed that plea, as follows:

> . . . Delbarton people are really good folks. It's a feeling which comes from a little paranoia that I have developed over the last few months arising from the fact that whatever appeal process we have gone to, whatever meeting we have gone to, with respect to developing some sort of an athletic schedule for our school, we have gotten the very, very distinct impression that we weren't wanted.
>
> Now, I know that that impression should be qualified, because both in the Colonial Hills Conference and in the proposed Northern Hills Conference Delbarton School and many of us personally at the school find some very good friends, some of whom who are sitting in this room, or who just left a few minutes ago.
>
> Yet, we find ourselves on the eve of April 1 and our great April fool's joke is that we are looking at two football games next year for sure, we think for sure and literally no other athletic contests for a school which has had an excellent athletic reputation and can bring a great deal, it seems to me, to competition in athletics.
>
> [Tr. III-113-114]

ROBERT MAX, Principal of Clifford Scott High School in East Orange, testified that his Group IV school has for ten years since its conference was disbanded in 1972 been trying unsuccessfully to get into various leagues. He testified that Clifford Scott, which has 99% black enrollment, applied for membership in the Colonial Hills Conference and in the Bergen County Scholastic League and was recommended by two teams of hearing officers for admission to the CHC and the Suburban Conference (incorporated into NHC by the realignment plan). Max testified of his objections to being

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assigned to a conference to which no application was made. He stated that the assignment will require excessive time of travel. He testified that:

> Yes, for ten years we have been an independent, but at least we had some choice of whom we were playing. At this particular point we have no choice in getting into a league.
>
> [Tr. I-86]

Max also testified that he considers the size of schools in the NHC to be too large to compete with Clifford Scott with its enrollment of 852.

The Executive Director testified that size and distance were the reasons why Clifford Scott was not admitted to the Bergen County Scholastic League and the Colonial Hills Conference. He testified that, by contrast, placement of Clifford Scott in NHC where there are five other Group II schools meets the criteria of both compatible size and geographic proximity.

FINDINGS OF FACT:

On the basis of a preponderance of the credible testimony and documentation entered into this record, I **FIND** the following to be additional facts which should be considered by the Commissioner in reaching a decision on whether he will approve, in full or in part, or disapprove NJSIAA's proposed realignment plan:

1. The applications of numerous schools, both public and parochial, have been repeatedly rejected by leagues and conferences to which they applied.

2. Numerous schools both public and parochial, have either been unable to schedule full seasons of athletic contests or have been forced to schedule contests with schools which were not of comparable size.

3. Some schools, both public and parochial, have had to travel great distances to complete a full schedule of contests.

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4. Some schools with a large enrollment of minority pupils have been forced to compete in contests which, taken as a whole, do not show a desirable racial balance between competing schools. This amounts to a systematic bias against numerous urban schools including but not by any means confined to those which were the two petitioners in the case before Judge Young in 1979.

5. NJSIAA, having become convinced by its own research that serious inequities existed regarding access to league and conference membership, racial balance in competitive contests, distances schools were required to travel, and difficulty of scheduling contests, involved its member schools in establishing a representative ad hoc committee to formulate a better plan. Thereafter, NJSIAA, with the Commissioner's approval, directed schools which wished to do so to make application for membership in leagues and conferences. It also trained teams of hearing officers to listen to and make recommendations on applications which were rejected. Allegations that these hearing officers were incompetent or acted arbitrarily, capriciously or unfairly, are not borne out by the record. Subsequent thereto, appeals from the decisions of hearing officer teams were heard by the Executive Committee which then presented a realignment plan to the Commissioner who, throughout the process, had retained jurisdiction.

6. The question of what due process was proper, in such extensive and time-consuming proceedings conducted for the most part by unpaid volunteers, must be viewed as one of first impression. No such comprehensive restructuring proposal had ever before been attempted. My finding is that NJSIAA, in responding to the Commissioner's directive to submit such a proposal, sought to insure and did assure that local and county representation was inherent in the process.

7. This record shows that there were instances of off the record discussions and that there was no appeal process from the final placements of schools by the Executive Committee. The record also shows that NJSIAA developed essentially a well-planned, good faith procedural process to develop the realignment plan which is now before the

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Commissioner. Rather than do this in a hurried manner, NJSIAA asked for and received from the Commissioner an extension of one year to complete its development of the realignment plan.

8. The realignment plan adheres to the criteria of comparability of school sizes and facilities, geographic proximity of competing schools, equitability of scheduling, improved racial balance in league and conference membership and improved balance of competition between urban and suburban public and parochial schools.

9. Seton Hall, Delbarton, Bloomfield, Clifton, Bayley Ellard, and East Orange schools are having great difficulty or have reached impasse in their attempts to schedule contests for the 1982-83 school year. This is largely attributable to the following factors:

   a. league or conference rules which forbid scheduling across divisional lines;

   b. refusal of schools now in leagues and conferences to schedule contests with schools unilaterally assigned by NJSIAA to leagues and conferences;

   c. refusal to schedule contests with schools assigned by NJSIAA until the Commissioner approves the realignment plan.

10. There is insufficient credible evidence within this record to credit the allegation that Camden High School and other large city high schools are unwilling to schedule contests with the schools in the leagues to which they are assigned.

11. There is no credible evidence within this record to credit the allegation that implementation of the realignment plan would have an adverse impact on faculty and student council exchanges, band competitions or on interscholastic academic type competitions. Those which have existed could still continue, since NJSIAA does not seek to regulate such activities. The inclusion into leagues of schools which have not engaged

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in such activities in the past does not threaten the continuance of such worthwhile interchanges.

12. The placement of Clifford Scott in the NHC does not violate the criteria of geographic proximity or comparability of size. While there are indeed five Group III schools in the NHC, there are nine schools besides Clifford Scott whose enrollment is within one hundred pupils of Clifford Scott's enrollment of 852.

13. The NNJIL ban on interdivisional contests impacts adversely on attempts by Bloomfield and Clifton to continue to offer a full schedule of their many girls' sports. It similarly impacts adversely on the de facto racial balance and the balance of scheduled contests between parochial and public schools, since all parochial schools were placed in Division I of the NNJIL and many schools with a preponderance of minority enrollment were assigned to Division 2.

DISCUSSION AND CONCLUSIONS:

My review of the documents entered into evidence, the testimony of witnesses, the above findings of facts, and the applicable education law causes me to **CONCLUDE** that NJSIAA wisely and painstakingly provided for proper representation and input at the local level and at the conference and league levels in the formulation of the realignment plan.

That aspects of the realignment plan are contrary to the desires of certain leagues, conferences and schools is clearly apparent. It is equally apparent that other leagues, conferences and schools have not raised objections. Indeed, many schools have expressed their opinion that the plan, if implemented, will alleviate scheduling problems by granting them league membership which had frequently been sought and rejected. It is not unusual that a plan which sought to apply multifaceted criteria would result in the displeasure of some schools, leagues and conferences. Nor is it surprising that some procedural flaws occurred nor that the plan does not exhibit perfection in the application of each criterion. That geographic proximity, for example, might have to give way, in part, to size of competing schools is only to be expected in such a comprehensive effort. I

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CONCLUDE, however, that the plan reduces inequities by providing for availability to all schools of league and conference membership, geographic proximity of competing schools, scheduling opportunities between urban and suburban, public and parochial schools of comparable size, and improved racial balance within leagues and conferences.

I also **CONCLUDE** that the successful implementation of such a plan, if approved by the Commissioner, will necessitate the modification of constitutional provisions in some leagues which, for example, restrict membership to fewer teams than those provided for in the realignment plan and which prohibit interdivisional scheduling. The successful implementation of such a plan would also necessitate that some schools and leagues modify their traditional scheduling of contests to make provision for full schedules of contests by new league and conference member schools as provided for in the realignment plan. I further **CONCLUDE** that an orderly implementation of the plan would require schools such as Elizabeth, which has as yet unexpired contracts with schools reassigned by the plan to other leagues, to forego the playing of some contractual games not yet played in the interests of implementation of the realignment plan.

RECOMMENDATIONS TO THE COMMISSIONER:

On the basis of the above facts and conclusions, I recommend to the Commissioner that he:

1. approve the realignment plan as submitted by N.J.S.I.A.A. as a plan to be implemented in the public interest;

2. approve the adjustment of contracts between schools when those adjustments are necessary in order to implement the realignment plan effective September 1982;

3. direct N.J.S.I.A.A. to instruct its component leagues and conferences and member schools to alter their constitutions, by-laws and regulations and schedules as necessary to provide for:

    a. full schedules of athletic contests for both boys' and girls' sports for all member schools beginning with September 1982;

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b. implementation of the above without adverse impact on racial balance between competing schools in leagues, conferences and divisions of leagues and conferences;

c. implementation of the above in such a manner as to adhere to the additional criteria of geographic proximity of competing schools, balance of competition between urban and suburban schools, and public and parochial schools, and competition between schools of comparable size.

TRANSMITTAL:

I herewith submit the above report, findings of facts, conclusions and recommendations together with the entire record of this noncontested case proceeding to Gustav H. Ruh, Acting Commissioner of Education for his consideration.

May 4, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

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DOCUMENTARY EXHIBITS:

Exhibit A-1	NJSIAA Executive Director's Report on Realignments, March 19, 1982
Exhibit A-2	Herbert to Errickson, March 19, 1982
Exhibit A-3	Affidavit of Robert F. Kanaby, Executive Director, NJSIAA, February 19, 1982
Exhibit A-4(a)	Oral Opinion Transcript of Judge Desimone, March 19, 1982
Exhibit A-4(b)	Judge Grucio's Opinion, February 17, 1982
Exhibit A-4(c)	Judge Kentz's Opinion, March 1, 1982
Exhibit A-4(d)	Judge Stanton's Opinion, March 2, 1982
Exhibit A-5	Ruvoldt Report
Exhibit A-6(a)	Hearing Officers' Report re Watchung Conference
Exhibit A-6(b)	Hearing Officers' Report re New Milford, et al.
Exhibit A-6(c)	Hearing Officers' Report re Paterson Eastside H.S., et al.
Exhibit A-6(d)	Hearing Officers' Report re Bayley Ellard Regional H.S., et al.
Exhibit A-6(e)	Hearing Officers' Report re South Jersey Conference North, et al.
Exhibit A-6(f)	Hearing Officers' Report re Cape Atlantic League
Exhibit A-6(g)	Hearing Officers' Report re East Orange H.S., et al.
Exhibit A-7(a)	Transcript of Proceedings, NJSIAA, January 13, 1982

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Exhibit A-7(b)	Vols. I and II, Transcript of Proceedings, NJSIAA, January 20, 1982
Exhibit A-7(c)	Transcript of Proceedings, NJSIAA, November 19, 1981 Evening Session
Exhibit A-8	Post Hearing Written Statements of NJSIAA
Exhibit B-1	Norman A. Bleshman's Written Statement
Exhibit C-1	Text of Union County Superintendent Clancy's Statements at March 31 hearing
Exhibit CA-1	Brief on behalf of Cape Atlantic League
Exhibit CHC-1	Arguments of Law entered by Colonial Hills Conference
Exhibit CHC-2	Arguments of Law and Appendix by Colonial Hills Conference
Exhibit D-1	Delbarton School's Written Statement, post hearing
Exhibit ELBE-1	Complaint before Chancery Court by Elizabeth School District, with Attachments
Exhibit ELBE-2	Brief on behalf of Elizabeth School District
Exhibit ELBE-3	Supplemental Brief on behalf of Elizabeth School District, with Attachments
Exhibit ELBE-4	Petition of Appeal before Commissioner Burke by Elizabeth Board of Education
Exhibit ELBE-5	Answer to ELBE-4, above, by Paterson Board of Education
Exhibit ELBE-6	Letter Brief by Elizabeth Board of Education
Exhibit GEHR-1	Transcript of Proceedings and Exhibits submitted by Greater Egg Harbor Regional and Mainland Regional Schools

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Exhibit IHC-1	Affidavit of S. Joseph Esposito with Attachments
Exhibit IHC-2	Complaint by Iron Hills Conference before Chancery Court
Exhibit IHC-3	Brief by Iron Hills Conference before Chancery Court
Exhibit IHC-4	Rand's Letter Brief before Judge Antell
Exhibit M-1	Winter to Errickson, March 23, 1982
Exhibit NHC-1	Northern Hills Conference's Brief with Attachments
Exhibit NHC-2	Hayes to Gardiner, November 6, 1982
Exhibit NHC-3	Hayes to Sanfillipo, November 6, 1982
Exhibit NHC-4	Owren's Letter Reply dated April 5, 1982
Exhibit NNJIL-1	Errico's March 19, 1982 filing with Judge Errickson
Exhibit NNJIL-2	Grady's March 25, 1982 filing with Judge Errickson
Exhibit O-1	Zane's Brief opposing Hearing Officers Recommendations
Exhibit O-2	Zane to Errickson, March 16, 1982
Exhibit O-3	Athletic Director Irvin's Written Statement Re: Olympic Conference
Exhibit P-1	Paterson Board's Answer to Elizabeth Board's Petition
Exhibit PVHS	Letter Memorandum by Superintendent Grady, Passaic Valley High School
Exhibit SJ-1	Written Submission on behalf of South Jersey Conference

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Code for Exhibit Designations

"A" Exhibits are those entered by NJSIAA

"B" Exhibit is a written submission by Norman A. Bleshman

"C" Exhibit is that entered by County Superintendent Clancy

"CA" Exhibit is that entered by Cape Atlantic League

"CHC" Exhibits are those entered by Colonial Hills Conference

"D" Exhibit is that entered post hearing by Delbarton School

"ELBE" Exhibits are those post hearing by Elizabeth School District

"GEHR" and "MRHS" Exhibits are those entered post hearing by Greater Egg Harbor Regional and Mainland Regional High Schools

"IHC" Exhibits are those entered by Iron Hills Conference

"M" Exhibit is that entered by Superintendent of Montville Schools

"NHC" Exhibits are those entered by Northern Hills Conference

"NNJIL" Exhibits are those entered by Northern New Jersey Interscholastic League

"O" Exhibits are those entered by or regarding the Olympic Conference

"P" Exhibit is Paterson Board's Answer to Elizabeth Board's Petition

"PVHS" Exhibit is that entered by Passaic Valley High School

"SJ" Exhibit is that entered by South Jersey Conference

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IN THE MATTER OF THE NEW	:	
JERSEY STATE INTERSCHOLASTIC	:	
ATHLETIC ASSOCIATION'S	:	COMMISSIONER OF EDUCATION
PROPOSED REALIGNMENTS OF	:	ADMINISTRATIVE DETERMINATION
ATHLETIC LEAGUES AND	:	
CONFERENCES.	:	
_____	:	

The Commissioner has reviewed the extensive record and the transcript of the hearings held at his direction in this matter on March 25, 26, and 31, as well as the Report and Recommendations to the Commissioner of Education (Report) rendered by the Honorable Eric G. Errickson, ALJ. Such review impels the Commissioner to comment upon the thoroughness, organization and clarity of the Report rendered by Judge Errickson in this highly complicated and extensively argued proceeding.

While, as acknowledged above, the Commissioner believes Judge Errickson has more than adequately addressed all of the various legal issues inherent in the restructuring of leagues and conferences undertaken at his direction by the NJSIAA, he feels it incumbent upon himself to highlight such exposition.

The Commissioner notes upon review of both the record and the report of Judge Errickson herein that various representatives of leagues, conferences and individual schools have raised the question of the authority of both the NJSIAA and the Commissioner to direct the reorganization of leagues and conferences which is the subject of the instant matter. The Commissioner likewise notes that none of the representatives who have taken issue with the restructuring of the leagues and conferences denies or attempts to refute the existence of those conditions of exclusivity and preclusion which worked to the disadvantage of urban schools and which were the basis of the original Petition before the Commissioner. It was the initial decision by Judge Young which precipitated the Commissioner's directive to the NJSIAA to conduct an inquiry into whether such inequities did, in fact, exist. (Commissioner's Decision, November 16, 1979) The Commissioner further observes that, despite the confirmation by the NJSIAA report of May 4, 1980 of the existence of widespread inequities in scheduling and despite the Commissioner's directive to the NJSIAA of August 4, 1980 to develop a remedy to such situation for his review, various representatives of leagues, conferences and individual schools continued to assert that the same principles of local autonomy and self-governance, which have produced the inequities herein considered, bar both the NJSIAA and the Commissioner from rectifying them.

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In addressing himself to the contentions of those testifying against the restructured leagues and conferences, the Commissioner deems it inconceivable that N.J.S.A. 18A:11-3 should grant him " *** authority to direct the association to conduct an inquiry by hearing or otherwise on a particular matter *** " and that N.J.S.A. 18A:11-4 should provide him with the responsibility to " *** detail any developments contrary to the public interest and *** indicate whether or not the intent of the Legislature in its grant of statutory authority to boards of education to join such associations is faithfully being executed" without endowing him with the authority to rectify those matters which he has, through inquiry, determined not to be in the public interest and within the intent of the Legislature.

The Commissioner notes with approval the legal arguments presented by Judge Errickson in support of such authority and adopts them herein by reference. The Commissioner further finds and determines that, insofar as these matters relate to public schools, and the overwhelming preponderance of the memberships of the leagues and conferences in the State of New Jersey are comprised of public schools, N.J.S.A. 18A:4-23 gives him authority to " *** have supervision of all schools of the state receiving support or aid from state appropriations, except institutions of higher education *** " and to " *** enforce all rules prescribed by the state board." Such authority, coupled with the mandates contained within N.J.S.A. 18A:36-20 and N.J.A.C. 6:4-1.1 et seq. as promulgated by the State Board of Education that "[n]o pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or course of study of the school by reason of race, color, creed, sex or national origin", provides further basis for directing the remediation prescribed by him in his letter of August 4, 1980 to the NJSIAA and its membership.

Consequently, in conformity with the findings and conclusions rendered by Judge Errickson in his Report, the Commissioner finds and determines that, notwithstanding his deep commitment to the principles of local autonomy and his equally firm adherence and frequent legal reference to the "presumption of correctness" doctrine as it relates to the actions of local authorities, the public interest and the constitutional and legislative mandates which have been vested in his office provide ample support both for directing the NJSIAA to restructure the leagues and conferences so as to provide equality of opportunity for membership in such leagues and conferences and for directing approval and implementation of such restructuring.

The Commissioner further takes note of the contention raised by various representatives of leagues and conferences and individual schools that the Commissioner is without authority to hear appeals relative to matters which involve both public and private schools by virtue of the provisions of N.J.S.A. 18A:11-3 which seemingly restrict his jurisdiction to "*** matters

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involving only public school districts and students, faculty, administrators and boards thereof ***." It is further argued by such representatives that, by directing the restructuring of leagues and conferences to include both public schools and private parochial schools, the NJSIAA has violated the separation clause of the First Amendment to the U.S. Constitution by excessively entangling public schools with sectarian religious institutions. Several leagues and conferences which object to the reorganized structure as developed by the NJSIAA argue that such excessive involvement is accentuated by virtue of the fact that relationships between league members are not limited exclusively to athletics but extend into cultural, curricular and cocurricular activities.

In response to the contention which challenges the jurisdiction of the Commissioner to hear appeals relating to matters involving both public and private schools, the Commissioner observes that he does not deem the restructuring of leagues and conferences as proposed by the NJSIAA as an enforceable plan until such time as he has approved it. Consequently, the administrative hearings which preceded the Report of Judge Errickson and the administrative determination herein are designed purely for the purpose of affording the Commissioner further information to assist him in the approval process.

Any appeals from the NJSIAA draft plan are therefore deemed to be premature and may be taken only after the Commissioner has accepted it and ordered its implementation.

In keeping with Judge Errickson's findings contained within pages 19 and 20 of the Report, the Commissioner finds no merit in the contention that the restructured leagues and conferences as proposed by the NJSIAA represent a violation of the Establishment Clause of the First Amendment to the Constitution. The Commissioner notes that the First Amendment, as interpreted by the Courts, requires neutrality toward religion and the avoidance of excessive entanglement. This prescription is summarized by the Supreme Court's holding in Everson v. Board of Education of the Township of Ewing et al., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) as reiterated in Abington v. Schempp:

> "***The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.***" (374 U.S. 203, at 224)

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It would appear to be frivolous to argue that a conference structure which admitted nonpublic sectarian schools into athletic competition with public schools resulted in the advancement of religion in violation of the Establishment Clause. In the Commissioner's view, a league and conference structure that provides opportunity for healthy athletic competition among urban, suburban, rural and parochial schools adds substantially to the benefits derived from such interaction and serves the interests of preparing our young people for future involvement with persons of diverse socioeconomic, regional and religious backgrounds.

The Commissioner likewise finds little merit in the argument advanced by certain representatives of leagues and conferences that the restructuring as proposed by the NJSIAA interferes with existing non-athletic interchanges of a cultural, curricular and cocurricular nature. He sees no reason why such exchanges may not be continued at the option of the conference members and even expanded to encompass newly-admitted schools, to the mutual benefit of all concerned.

The final argument advanced by those leagues and conferences opposing the proposed restructuring advanced by the NJSIAA alleges procedural shortcomings in the internal hearing and appeals process established by that organization. The Commissioner, upon examination of the voluminous record compiled in connection with said hearing and appeals process, concurs in the findings and conclusions reached by Judge Errickson and adopts them herein by reference. In so doing, the Commissioner takes particular notice of Judge Errickson's observations that, despite a few procedural shortcomings, the appeal and review process, including the administrative hearings conducted at the Commissioner's direction, viewed in its entirety, has provided more than adequate due process to all concerned.

In conclusion, the Commissioner adopts in their entirety, the findings, conclusions and recommendations rendered by Judge Errickson in his Report of May 4, 1982. For purpose of emphasis, however, the Commissioner specifically directs the NJSIAA's attention to Judge Errickson's Recommendation 3a, b, and c for immediate action in conformity with same.

COMMISSIONER OF EDUCATION

May 28, 1982

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IN THE MATTER OF THE NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION'S PROPOSED REALIGNMENTS OF ATHLETIC LEAGUES AND CONFERENCES.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, May 28, 1982

For the New Jersey Interscholastic Athletic Association, Sterns, Herbert & Weinroth (Michael J. Herbert, Esq., of Counsel)

For the Colonial Hills Conference, Riker, Danzig, Scherer & Hyland (Shawn L. Kelly, Esq., of Counsel)

For the Iron Hills Conference, Rand & Algeier (David B. Rand, Esq., of Counsel)

The State Board of Education grants the New Jersey State Interscholastic Association's Motion to Dismiss the Appeal. The State Board's determination is based upon the New Jersey State Interscholastic Association's two-fold argument that appeals from Commissioner's decisions in this area are to the Superior Court, pursuant to N.J.S.A. 18A:11-3, and the fact that appeals involving the instant controversy are currently pending before the Appellate Division of the Superior Court.

September 8, 1982

Pending N.J. Superior Court

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4852-81
AGENCY DKT. NO. 268-7/81A

MICHAEL LAW,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,
Respondent.

APPEARANCES:

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

Myles C. Morrison, Esq. for respondent (Dillon, Bitar & Luther, attorneys)

Record Closed March 1, 1982 Decided April 13, 1982

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

Petitioner, a tenured teacher employed by the Parsippany-Troy Hills Board of Education (Board), appeals from an action of the Board, on April 14, 1981, withholding his salary increment and adjustment increment for the ensuing 1981-82 school year. Petitioner charges that the Board's action was taken without good and sufficient cause, that its action was arbitrary, capricious and unreasonable, and that the Board failed to comply with N.J.S.A. 18A:29-14, which requires written notice of reasons within ten days. The Board, while admitting that no written reasons for its action were given within the ten-day statutory period, asserts that petitioner was clearly aware of the reasons why his increments were withheld and asks that the Petition of Appeal be dismissed.

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After the pleadings were joined, the Commissioner of Education transferred the matter for processing as a contested case to the Office of Administrative Law on July 31, 1981, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. Petitioner filed a Notice of Motion for Summary Decision on September 23, 1981. Briefs and affidavits with exhibits were filed by the parties. Petitioner's Motion was denied in a Procedural Order, dated December 3, 1982, on grounds that essential facts necessary to a determination could only be determined by conducting an evidentiary hearing. A plenary hearing was convened and concluded on December 8, 1981. Post-hearing briefs were filed and the record was declared complete as of March 1, 1982.

UNDISPUTED FACTS:

I **FIND** the following to be facts which, being either admitted or uncontroverted within the record, reveal the context of the dispute.

Petitioner, a tenured teaching staff member, was employed by the Board as a science teacher at the beginning of the 1980-81 school year at the Parsippany High School. He was absent for medical reasons for 75 days during that school year (R-1). Shortly after returning from an extended medical leave of absence, which lasted from November 17, 1980 to March 13, 1981 (R-11), he was reassigned to the Board's Brooklawn Junior High School.

On April 1, 1981, the Board Secretary-Business Manager notified petitioner as follows:

> In accordance with the provisions of the New Jersey Statutes Annotated 18A:29-14 and Schedule A, Provision No. 3 of the 1980-81 Board of Education Parsippany-Troy Hills Education Association Agreement, the Board of Education will, at its meeting on Tuesday, April 14, 1981, vote on a recommendation to withhold salary increments for you for the 1981-82 school year. In accordance with the provisions of Board of Education Policy No. 4115.3, you are hereby advised that you have a right to an informal hearing with the Board of Education relative to the action to withhold your increments.
>
> Within ten (10) days of the Board action, you shall be advised in writing of that action, together with the reasons therefore. Within ten (10) calendar days of receipt of that notification, you must request an appearance before the Board of Education and the Board

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> will schedule an appearance within twenty (20) days of the request for the informal hearing. [R-4]

The Board voted on April 14, 1981, to fix petitioner's salary at $16,800, the same salary which he had received during the 1980-81 school year. Petitioner signified, on May 22, 1981, that he would accept employment at that salary without prejudice to his tenure rights and pending litigation (R-5).

The Board, admittedly, did not, within 10 days of April 14, 1981, send petitioner the reasons for its action in writing, as required by N.J.S.A. 18A:29-14:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. . . . [Emphasis added.]

TESTIMONY OF WITNESSES:

Principal Samuel C. Parkinson testified that he twice observed and wrote observation reports on petitioner at Brooklawn Junior High School during the latter part of the 1980-81 school year (P-1, 2). He testified, however, that he was not asked to recommend and did not recommend whether petitioner should be granted an increment for the ensuing school year.

Robert L. Tracy, petitioner's science area chairman at the junior high school during 1980-81, testified that as the result of his one formal and numerous informal observations of petitioner during the spring of 1981, he had noted no problems at all regarding petitioner's planning, professional growth, organization or interaction with pupils.

Petitioner testified that although his area chairman and the vice-principal at the high school had observed him in years prior to 1980-81, neither they nor Principal Scatton had formally observed him at the high school during 1980-81. He further testified that during his nine years of employment at the high school, Principal Scatton had never

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formally observed him and had visited his room for only a few minutes in November 1980. He also testified that his department chairman at the high school had been instructed by his superior not to observe him. He testified that Principal Scatton, after the brief visit to his room in November 1980, had conferred with him on November 6 and expressed displeasure at what he had seen and told him he would be in to observe him thereafter on a regular basis. He testified that Scatton had criticized his lesson plans because of the strong similarity of plans for life science classes and biology classes (R-6). He testified that as the result of the stress engendered by Scatton's criticism, he sought medical help and applied for the leave which ended with his return to the high school on March 16. He testified that soon after his return, Principal Scatton summoned him to his office, told him he did not call him in to be criticized, but proceeded to do so. He testified that during that conference, Scatton told him that pupils and parents and teachers were giving him a hard time over petitioner's return to the classroom, that his lesson plans were unsatisfactory, that he was the "worst teacher he had ever seen," and that he would not recommend him for an increment for the ensuing year.

Petitioner testified that to the date of the hearing, he had never been given written reasons for the withholding of his increments. Petitioner testified also that he attributes many of his problems in teaching and his stress-related absences to lack of communication, to his supervisor's magnification of negative elements, to the lack of recognition of his positive contributions, and to the insensitivity of his supervisors.

Petitioner's science department chairman at the high school testified that he had criticized petitioner for the reason that his lesson plans in September 1980 were not only inadequate in content, but also insufficiently differentiated between life science classes for terminal students and biology classes for college preparatory students. He stated that he also notified Principal Scatton on November 4, 1980, as follows:

> Mr. Law was absent on the following dates: October 29, 30, 31 and November 3. He did not have adequate lesson plans for the first three days (see attached). These plans, for the week of 10/27/80 show the same lesson for both Biology I and Life Science. The plans do not provide for the difference in ability and/or learning level between the two courses. In addition, materials were not really available to the substitute and they (plans) assumed that the substitute was proficient in science.
>
> I spoke to Mr. Law today and gave him several copies of a lesson plan format that I want him to use and turn in to me on a weekly basis. One form is to be submitted for each subject taught.

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> For whatever reason, Mr. Law appears to be eschewing his teaching responsibilities which is resulting in a pejorative atmosphere for both students and staff. [R-6]

The department chairman testified that petitioner's lesson plans thereafter were acceptable to him. He also testified that after petitioner had gone on sick leave, he reported to the principal on November 25 as follows:

> Mr. Law has been absent from school since Monday, November 17, 1980.
>
> During that time he has called or sent in lesson plans on only two occasions (on one of these occasions he included his first marking period grades which were distributed as follows: 31% A's, 41% B's, 20% C's, 7% D's and 1% F's).
>
> As of today, Mr. Law has not contacted me relative to his grade verification report, which is due today, without this information it will be very difficult to up-date the accuracy of his class roster. . . .
>
> Based upon the paucity of evaluative materials, I find the fact that Mr. Law could assign a term grade to his students, educationally indefensible.
>
> In my opinion Mr. Law has reverted to the type of behavioral pattern which prompted our recommendation to withhold his increment last year, in spite of his improved performance during the last three months of the 1979-1980 school year. [R-7]

The department chairman testified that he had intended to observe petitioner during the fall of 1978 but did not do so because of his frequent absences. In this regard, he testified that he made it a practice not to observe a teacher who had been absent until a few days after his return. He also testified that he felt petitioner's frequent absences adversely affected his classes because of lack of continuity of instruction. He testified further that he was, at some indeterminate date in October or November, advised by Principal Scatton to discontinue observations of petitioner.

Principal Scatton testified that after petitioner had been absent for three days, he informally visited his class on November 4, 1980, expressed his concern over both what he observed and petitioner's inadequate and missing lesson plans for substitutes (R-8). He testified that he had informally visited petitioner's classes many times during the years he taught in the high school. Scatton testified that because of petitioner's many

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absences, his occasionally unsatisfactory lesson plans and his failure to differentiate instruction for life science and biology classes, he had recommended that no increment be granted for the ensuing school year.

Scatton also testified that when petitioner signified his desire to return to his duties on February 2, the Board required that he submit medical verification of his readiness to return.

The Board's Director of Employee Relations, Arthur Mildner, testified that because of the Board's reorganization of its administrative staff during March and April 1981, the Assistant Superintendent who, in the past, had prepared the statement of reasons for increment withholding did not do so on the assumption that that duty had shifted to another. He also testified that it was because neither of them had prepared a statement of reasons for increment withholding that the Board Secretary did not send one out to petitioner.

FINDINGS OF FACT:

On the basis of a preponderance of the credible evidence within the record, I FIND the following additional facts to be considered together with the undisputed facts set forth above in reaching a determination:

1. Petitioner, in the fall of 1980, was criticized by both his high school department chairman and the high school principal for lesson plans which did not differentiate between the teaching techniques used in life science, a science course for terminal students, and biology, a course for college preparatory pupils. This criticism was valid since the only differentiation in his plans referred to the level of expectancy. Such is not sufficiently informative to give direction to substitutes who had to conduct petitioner's classes when he was absent on 17 days from the beginning of school in September to the end of November 1980 (R-1). Nor were those plans sufficiently detailed and differentiated to keep his superiors abreast of the teaching strategies and techniques petitioner intended to use in his classes.

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2. Principal Scatton at no time formally observed petitioner during the nine years petitioner taught in his school. He did, however, make numerous visits of an informal nature to petitioner's classroom. After one such brief informal observation on November 4, 1980, he advised petitioner that he was displeased and would begin making regular formal visits. He did not do so largely because of petitioner's extended leave of absence from November 17, 1980 through March 13 and because of his transfer to Brooklawn Junior High on March 29, 1981.

3. Petitioner was not formally observed by his department chairman at the high school in the fall of 1980 prior to his extended sick leave. Petitioner's two observation and evaluation reports at Brooklawn Junior High School, subsequent to his transfer on March 26, 1981, had numerous commendations and rated him as satisfactory in three areas and as exceeding acceptable performance in planning and organizing (P-3, 4).

4. Principal Scatton advised petitioner in writing, prior to the Board's action on April 14, that his performance had been consistently unacceptable and that he would recommend that petitioner's increments be withheld because of his absences and his previous performance (R-20).

5. No input was asked for or received from petitioner's superiors at Brooklawn Junior High School regarding his teaching performance between his transfer there on March 29 and the Board's action withholding his increment sixteen days later on April 14, 1981.

DISCUSSION:

Petitioner argues that this is the second of two successive years in which the Board has withheld his increments and failed to follow the statutory directive that a written statement of reasons be supplied by the Board within ten days of the Board's action. Unquestionably, this is so. The Board secretary, on April 1, 1981, gave petitioner an appropriate prior notice of the Board's intent to act on the principal's recommendation to withhold his salary increments. That notice signified that petitioner could be present when the Board acted. It further signified intent to give written notice of reasons, should

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the increments be withheld. Although the Board did withhold the increments, no written statement of reasons was given.

Petitioner had already been notified by his principal that he was recommending that his increment be withheld for the ensuing 1981-82 school year. He was also notified by he principal at that time of the reasons why he was making that negative recommendation.

Petitioner argues that the Board's failure to comply with giving reasons within ten days as specified by N.J.S.A. 18A:29-14, in two successive years, must be viewed as a willful and deliberate violation. See in this regard Michael Law v. Parsippany-Troy Hills Bd. of Ed., 1981 S.L.D. ____ (decided October 26, 1981). One can only conclude from the facts in Law that the Board did fail, in two successive years, to give a written statement of reasons for its withholding of petitioner's increments. After careful consideration of the record, I **CONCLUDE** that the Board's failure to do so in April 1981 was not deliberate and willful. This conclusion is based not only on the Board Secretary's notice that written reasons would be given in ten days if the increment was withheld, but also on the convincing testimony of the Board's director of employee relations that it was an inadvertent error of omission caused by transfer of administrative duties in a district reorganization. While such can in no way fully excuse failure to comply with a clear statutory directive, it lends some understanding as to why the omission occurred.

I further **CONCLUDE** that there is no validity to petitioner's charge that the Board's action was arbitrary and capricious in that there was no good and sufficient reason for withholding the increments. Inappropriate and missing lesson plans from a teacher who was frequently absent, standing alone, would provide sufficient reason. This, coupled with his numerous absences and an extended absence from November through March 15, provides ample reason for the Board's action to withhold the increments.

It remains to be determined whether the failure to give reasons within ten days on two successive years is fatal to the Board's case. I **CONCLUDE** that it is not fatal. This conclusion is based primarily on the disposition of similar cases under administrative law. Precedents in case law must be carefully considered.

One such case is Bd. of Ed. of Northern Highlands Regional School District v. James Martin, 1979 S.L.D. 852. Therein, the Appellate Division of the Superior Court

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reversed decisions of the Commissioner and the State Board of Education which had set aside a board's action withholding Martin's increment for failure to give written statement of reasons within ten days, pursuant to N.J.S.A. 29:14. Therein, the Appellate Court stated:

> The Commissioner of Education set aside the school board's action for failure of strict compliance with N.J.S.A. 18A:29-14 which requires a "recorded roll call majority vote of the full membership of the board of education" for a withholding of an increment and the giving of written notice of the action and the reasons therefor to the person concerned within ten days.
>
> We conclude that the Commissioner's determination was hypertechnical and that the substance of the statutory requirement is satisfied when the school board acts by public recorded roll call vote prior to the commencement of the school year involved and the individual affected is informed of the reasons for the action, whether before or after the public roll call vote. We regard the intent of the statutory requirement of notice within ten days as being to assure that the individual is apprised of the reasons for the action no later than ten days after the official action.... [Emphasis added.]

Petitioner, in the instant matter, was similarly notified and aware of the reasons for the withholding of his increment prior to the Board's action.

A similar holding to that in Northern Highlands, supra, was reached by the Commissioner in Charles R. Baker v. Bergenfield Bd. of Ed., 1978 S.L.D. 740, wherein the reasons were made known similarly prior to a board's action withholding an increment. Therein, it was stated:

> The Commissioner finds that the Board's actions were not consistent with the legislative intendment of N.J.S.A. 18A:29-14. He observes that the instant matter is similar, in many respects, to the matter of Ralph Marshall v. Board of Education of the Southern Ocean County Regional High School District, Ocean County, 1978 S.L.D. ___ (decided July 10, 1978)wherein he stated:
>
> > "... The Commissioner observed that petitioner was in receipt of the Superintendent's evaluation and was well aware that the Superintendent had recommended that the Board withhold his increment.... To argue that the Board failed '... to give written notice of such action, together with the reasons therefor...' in the Commissioner's judgment places form over substance. Petitioner was aware '... of such action, together with the reasons....' N.J.S.A. 18A:29-14

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> As the Commissioner stated in the matter of Hillman, supra [1977 S.L.D. 218]:
>
> "... The intent of the notification requirement in N.J.S.A. 18A:29-14 is to give the affected employee opportunity to appeal the action to the Commissioner....' (at 226)...."
>
> The Commissioner has carefully reviewed the facts in the instant matter and the legal arguments set forth by respective counsel in light of relevant statutory and case law. He finds that the Board was remiss in not following the letter of the law by its failure to notify petitioner in writing of its reasons to withhold his salary increment within ten days of its action. He determines, however, that such failure is not fatal in the total circumstances of the instant matter. For full compliance with the statute, albeit tardy, the Commissioner now directs the Board to provide petitioner with a complete statement of its reasons to withhold his salary increment....
>
> The Commissioner finds and determines that the action of the Board of Education of the Borough of Bergenfield on October 6, 1974 to withhold the salary increment of Charles Baker was proper and legal. Accordingly, for the reasons stated, the Petition is dismissed. [at pp. 743-744]

The Board, in the instant matter, was remiss in not following precisely the letter of the statute. I **CONCLUDE,** however, that its omission of the statement of reasons was not fatal, since petitioner, like Baker and Martin, had already been advised of and was cognizant of the reasons for the withholding.

DETERMINATION:

The facts of this case are directly on point with the facts in Baker, supra and Martin, supra. Absent a finding that the Board acted arbitrarily or capriciously, or with conscious attempt to ignore or thwart the statutory ten-day requirement, the precedents in the cited case law are dispositive. Petitioner knew the reasons for the withholding of his increment, as in Baker and Martin. Accordingly, consistent with the holdings in Baker and Martin, judgment is entered herein in favor of the Board. Petitioner's requested relief in the form of an order directing the Board to instate his 1981-82 school year employment and adjustment increments is **DENIED.**

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H.

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Ruh 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 **GUSTAV H. RUH** for consideration.

April 13, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

April 14, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 16, 1982
DATE

Ronald L. Parkerson
OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE:

P-1	Observation Report of Law, April 9, 1981
P-2	Observation Report of Law, June 4, 1981
P-3	Performance Evaluation Report, June 22, 1981
P-4	Observation Report by Tracy, May 20, 1981
P-5	Performance Improvement Development Plan, May 20, 1980
P-6	Law's Plan Book (Excerpts), October 1980
P-8	Scatton to Monahan, May 1, 1980
P-9	Law to Monahan, December 5, 1980
P-10	Doctor's Note by Buklad, January 27, 1981
P-11	Doctor's Note by Valvo, February 4, 1981

R-1	Law's Attendance Report, 1980-81
R-2	Monahan to Law, December 2, 1980
R-3	Windish to Law, December 15, 1980
R-4	Windish to Law, April 1, 1981
R-5	Windish to Law, April 14, 1981
R-6	Santersiero to Scatton, November 4, 1980
R-7	Santersiero to Scatton, November 25, 1980
R-8	Informal Observation, dated November 4, 1981
R-9	Office Memoranda, dated March 17, 1981
R-10	Scatton Memo Recommending No Increment, March 31, 1981
R-11	Dr. Buklad To Whom It May Concern, November 21, 1980
R-12	Dr. Valvo to Monahan

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MICHAEL LAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner's primary exceptions contend that the Honorable Eric G. Errickson, ALJ erred by not concluding that the Board's failure to comply with the precise provisions of N.J.S.A. 18A:29-14 to supply written notice to petitioner within ten days of its action constituted fatal error. Petitioner argues that the decision of the Board to withhold his increments was arbitrary and capricious based upon an insufficiency of evidence. The Board's reply exceptions refute those of petitioner and affirm the initial decision. The Commissioner finds merit in the Board's arguments.

A thorough examination of the record herein, including the documents in evidence and the arguments of law submitted by the parties, convinces the Commissioner that Judge Errickson properly relied on the case citation entitled Board of Education of Northern Highlands Regional School District v. James Martin, 1979 S.L.D. 852. Therein it is noted that the Appellate Division of the Superior Court reversed the decisions of the Commissioner and the State Board of Education for failure of the board of education to strictly comply with the ten-day timeline set down in N.J.S.A. 18A:29-14, referring to such determination as "hyper-technical." The Commissioner acknowledges the pervasive impact of the aforementioned decision, but is constrained to note that, in the matter presently controverted, it is shown that the Board for two years in a row has failed to observe the technical requirement of ten-day notification therein specified. The Commissioner determines that the conclusion by the Court in Martin, supra, shall not be construed by boards of education as license to ignore the requirement of N.J.S.A. 18A:29-14, ante. The Commissioner so holds. In the matter presently controverted the Commissioner finds that the Board had a reasonable and sufficient basis for its decision to withhold petitioner's increments.

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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 relief requested herein for restoration of his employment and adjustment increments is denied.

The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

June 1,1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4161-81
AGENCY REF. NO. 236-6/81A

JOHN DUMANSKY,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA,
Respondent

APPEARANCES:

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

Irving C. Evers, Esq., for the Board
(Parisi, Evers and Greenfield)

Record Closed March 30, 1982 Decided April 19, 1982

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

John Dumansky alleged the Board of Education of the Borough of Leonia acted arbitrarily and/or capriciously in withholding his employment and adjustment increments for the 1981-82 school year. The Board denied any improprieties and said its action was based on good and valid reasons.

The matter was transmitted to the Office of Administrative Law by the Commissioner of Education as a contested case pursuant to N.J.S.A. 52:14 F-1 et seq. Two days of plenary hearing were held and the matter was briefed by counsel for the parties. The record was closed on March 30, 1982, the date established for petitioner's rebuttal brief, which he chose not to submit.

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The petitioner is a tenured teaching staff member, having been employed in Leonia since 1953. He taught eighth and ninth grade social studies from 1953 to 1970. He was then assigned as a full-time Audio-Visual Aids (AVA) Coordinator, a position in which he acquired tenure and served until the 1980-81 school year. He had been assigned to two periods of library supervision in 1979-80, and in 1980-81 was assigned to teach two periods of American History, a subject he had never taught previously, which reduced his AVA responsibilities to four periods. He accepted the assignment without objection. Petitioner is certified in Social Studies, English, Russian and as a Media Specialist. He was noticed concerning his 1980-81 schedule in the Spring of 1980.

The gravamen of the dispute focuses on unsatisfactory evaluations of petitioner's performance as a teacher of American History made by his subject supervisor, principal and Superintendent, which served as the basis for the Board's increment withholding action. See J-1, J-2, J-3, J-4, J-5 and J-6. Petitioner contended he was not evaluated in his assignment as AVA Coordinator in which he spent the majority of his time.

Petitioner testified the observations of his classroom performance were initiated by the Superintendent on October 3, 1980, less than three weeks after school opened, and were followed by observations by his subject supervisor on November 5 and his principal on November 11. He conceded on cross-examination that the suggestions made in the observation reports were designed to assist him and improve his classroom performance, after having testified on direct that although administrative procedures were proper, the impropriety related to the approach and concept of the process which he perceived to be adversarial. His rebuttals to observation reports and the Summative Evaluation, P-2 through P-7, were given consideration by his observers in post-observation conferences.

The Superintendent testified the observation and evaluative process employed with petitioner was no different from that with other teaching staff members, recognizing that his observation of petitioner was the first. Due to the fact that his subordinates, the subject supervisor and principal, were nontenured, and the fact that his observation and evaluation report of petitioner was shared with his subordinates, the court questioned the Superintendent on the process. He testified that he believed the subsequent evaluations

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of petitioner by his subordinates resulted from their independent assessments and were not influenced by his initial unsatisfactory evaluation.

The subject supervisor and principal also testified that their evaluations of petitioner were the result of independent professional judgments.

Petitioner contended that N.J.A.C. 6:3-1.21 required observations and evaluations in all facets of a teaching staff member's employment. If this were so, it would appear that a properly certified teacher assigned to teach two classes of French, two classes of Spanish and one class of English would have to be observed and evaluated in the three different subject assignments. I **FIND** no merit in petitioner's contention and no such requirement in N.J.A.C. 6:3-1.21.

The wisdom of the Superintendent may indeed be questioned when he initiated the observation process and shared his evaluation with his nontenured subordinates, who subsequently observed and evaluated petitioner. Although there is clearly no evidence in the record the observers colluded to arrive at the unsatisfactory evaluations utilized by the Board as a basis for the withholding action, the spectre of undue influence by the chief school administrator is nevertheless present.

Petitioner had several months notice to prepare for his American History teaching responsibilities. Although the Superintendent's observation of petitioner three weeks after school started might appear arbitrary and precipitous (petitioner after all had not been in the classroom for ten years and had never taught American History before) such appearance in itself does not require a finding the Superintendent's ensuing recommendation and Board's consequent action to withhold increments were arbitrary and capricious.

I **FIND** no procedural defects in the observation and evaluative process that would characterize said process as unlawful. I **ALSO FIND** the Board had a rational basis upon which it relied when it acted to withhold petitioner's increments.

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Absent an affirmative showing of arbitrariness, capriciousness or unreasonableness, the action of the Board shall not be set aside. Thomas v. Bd of Ed of Morris Twp.,89 N.J. Super. 327 (App. Div. 1965); Contardo v. Bd of Ed of the City of Trenton, 1978 S.L.D. 633; aff'd State Board of Education April 4, 1979.

I **CONCLUDE** the Petition of Appeal should be, and is hereby, **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 **GUSTAV H. RUH** for consideration.

19 April 1982
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

20 April 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 22, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

WITNESSES

For Petitioner:

Doris Grassini, teacher and athletic director

Dr. Paulette B. Maggiolo, teacher and supervisor of foreign languages

Mary A. Connor, media specialist

Clare McGill, guidance counselor

John Dumansky, petitioner

For the Board:

Charles J. Murphy, Superintendent of Schools

Dr. Robert Penna, English/Social Studies coordinator

Melvin Zirkes, high school principal

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EVIDENTIARY DOCUMENTS

P-1 Annual library report for 1980-81, June 22, 1981

P-2 Dumansky rebuttal of 11/6/80 Penna observation (J-2)

P-3 Dumansky rebuttal of 11/11/80 Zirkes observation (J-3)

P-4 Dumansky rebuttal of 12/5/80 Penna observation (J-4)

P-5 Dumansky rebuttal of 3/5/81 Zirkes observation (J-5)

P-6 Dumansky rebuttal of 3/5/81 Zirkes "Summative Evaluation of 3/12/81" (J-9)

P-7 Dumansky rebuttal of 5/13/81 Penna observation (J-6)

P-8 Dumansky 6/22/81 monthly and annual AVA report

J-1 Murphy 10/3/80 observation report on Dumansky

J-2 Penna 11/6/80 observation report on Dumansky

J-3 Zirkes 11/11/80 observation report on Dumansky

J-4 Penna 12/5/80 observation report on Dumansky

J-5 Zirkes 3/5/81 observation report on Dumansky

J-6 Penna 5/13/81 observation report on Dumansky

J-7 2/6/81 improvement items

J-8 Conference notes of 2/6/81 meeting

J-9 Zirkes 3/12/81 Summative Evaluation of Dumansky

J-10 Zirkes to Dumansky 6/18/81 memo

J-11 Murphy to Dumansky 1/8/81 letter

J-12 Dumansky to Meskill 3/23/81 letter

J-13 Murphy to Dumansky 3/25/81 letter

J-14 Murphy to Dumansky 3/27/81

J-15 Dumansky to Murphy 3/30/81 letter

J-16 Murphy to Dumansky 3/31/81 letter

J-17 Dumansky to Meskill 4/1/81 letter

J-18 Murphy to Dumansky 4/24/81 letter

J-19 Excerpts of minutes of 4/23/81 Board meeting

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JOHN DUMANSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioner excepts to the determination by the Honorable Ward R. Young, ALJ that the Board's action in withholding his employment and adjustment increments for the 1981-82 school year had a rational basis and was not arbitrary and capricious. Petitioner claims not to have been properly and completely observed as such observations, did not include his offsetting strengths, outstanding ratings and special contributions. The Commissioner finds no merit in petitioner's exceptions.

In the opinion of the Commissioner, there is nothing within the law which supports petitioner's arguments that the process for observation and evaluation of teaching staff members must find such staff members' performance uniformly unsatisfactory in all assigned instructional areas before it can take action to withhold an increment pursuant to N.J.S.A. 18A:29-14. It is so determined.

A thorough examination of the record herein, including the testimony of witnesses and the documents in evidence, convinces the Commissioner that the Board had a rational basis for its decision to withhold petitioner's increments.

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 4, 1982

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5175-80
AGENCY DKT. NO. 367-7/80A

BARBARA MESSICK,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,
Respondent.

APPEARANCES:

Steven R. Cohen, Esq. for petitioner (Selikoff & Cohen, P.A.)

Alan R. Schmoll, Esq. for respondent (Capehart & Scatchard, P.A.)

Record Closed March 8, 1982 Decided April 19, 1982

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

Petitioner, a school psychologist employed by the Board of Education of the Borough of Haddonfield (Board) since September 1971, alleges that the Board improperly reduced her employment for the 1980-81 and 1981-82 school years from 12 to 10 months with a concomitant reduction in salary, while requiring her to perform the identical duties during the summer months at the reduced rate of pay.

This matter was filed in the office of the Commissioner of Education and thereafter transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Hearings were conducted on October 6 and 29, 1981, at the

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Somerdale Municipal Building, Somerdale. Six documents were admitted in evidence, together with petitioner's employment contracts and certain Board minutes which were stipulated in evidence.

HISTORY

During her first two years of employment, 1971-72 and 1972-73, petitioner worked four days per week for ten months each year, September through June. From September 1973 through June 1979, petitioner's employment was governed by written agreements which required twelve-month work years, and she received regular salary increases as set forth in the stipulated employment contracts as follows:

STIPULATED EMPLOYMENT CONTRACTS

Year		Salary
1973-74		18,500
1974-75		20,000
1975-76		21,000
1976-77		22,050
1977-78		23,100
1978-79	Letter from Board Secretary dated June 14, 1978, stating salary commensurate with law, or negotiations	24,100
1979-80		25,100

Petitioner's salary for each of these years was paid in 24 equal semi-monthly installments, and each contract began on July 1 and ended on June 30 of the following year.

It is also stipulated that for the two years in dispute, 1980-81 and 1981-82, petitioner's work years began on September 1 and ended on June 30. Petitioner was paid in twenty equal semi-monthly installments and her salary for the two years was $22,752 and $23,536, respectively.

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DISCUSSION

Petitioner contends that she and the other members of the Child Study Team (CST) first learned in late January or early February 1980 that the Board and the Haddonfield Education Association (HEA) were negotiating a change in the CST work year, including a reduction in petitioner's work year, from twelve to ten months.

It was stipulated that the litigants ratified the agreement which included the reduction in the work year for petitioner's position (Board Minutes, February 28, 1980). Previously, the other two members of the CST had worked, pursuant to ten-month contracts with an additional month of summer work. The members of the CST, particularly petitioner, opposed the reduction. This opposition took the form of the presentation of evidence in support of the CST's position that although there was a general decline in student enrollment and population in the district, the CST workload had either remained constant or increased. Several discussions were held between members of the CST and representatives of the HEA.

Notwithstanding petitioner's contentions, the contract was ratified by the HEA Executive Committee despite the reduction in the work years of the CST.

Petitioner testified that the principal duties of the school psychologist center around the evaluation of students and the development of Individual Educational Plans (IEP). During the summer months, the CST devoted the bulk of its time to evaluations and attendant meetings and paperwork. For the summer of 1980, the first under the new agreement, there was as much work as, if not more than, in previous summers. Petitioner testified further that although the contract between the Board and the HEA guaranteed the CST ten days of summer work for 1980, the Board ultimately approved 20 days because of the volume of evaluations required to be completed. Petitioner testified, also, that this additional time was insufficient, as evaluations scheduled for the last week in July had to be cancelled and moved to September.

Petitioner testified also that the Board approved 20 days of summer work for the CST in 1981, resulting in the postponement of evaluations for approximately 30 youngsters until September.

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Petitioner testified finally that the total number of students being served annually by the CST has stayed about the same over the past several years, despite declining enrollment in the district.

Testimony given by Board witnesses is summarized as follows:

Enrollment had declined by 607 pupils, from a total of 2,738 in 1970-71 to 2,131 in 1979-80 when the decision was made to eliminate the twelve-month position. In 1981-82 there was a further decline to 1,920 pupils in the district, so that at the time of hearing in this matter there was a total decline of 818 pupils (R-1).

The Board also considered the effects of both its transitional first grade program and the Gessel Screening Program which were in operation. The Board President testified that the former program was demonstrating reduced referrals of students to the CST at the elementary level and the latter was requiring participation by the elementary principal, thus reducing the involvement of the CST. There was also evidence that referrals of students could be handled during the school year instead of during the summer.

The former superintendent testified that there were inquiries made of surrounding school districts of comparable size to determine what they were doing with their CST's. It was learned that not only did they not have a Director of Pupil Personnel Services, which the Board has, but that the members of their CST's were working under ten-month contracts. In addition, referrals and psychological studies were frequently handled by using personnel on a part-time basis or by bringing someone in on an as-needed basis.

Notwithstanding the elimination of this position and the changes in scheduling imposed upon the CST, the Director of Personnel Services testified that the Board continues to be in substantial compliance with State regulations.

Based on the foregoing, I **FIND** the following facts:

1. The district's schools evidenced a significant declining enrollment during the years 1970-71 to 1979-80.

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2. The record discloses no evidence of bad faith on the part of the Board.

3. The Board negotiated the change in the work year with the HEA and the parties ratified that agreement which changed petitioner's work year.

CONCLUSIONS OF LAW

Petitioner presents the legal argument that as a tenured teaching staff member, her compensation can be reduced only pursuant to the procedures set forth in N.J.S.A. 18A:6-10. Further, petitioner argues that no reduction in her work year may take place except as set forth in N.J.S.A. 18A:28-9. Petitioner asserts further that by reducing her work year and compensation, the Board has also reduced her pension benefit entitlement upon retirement.

Additionally, petitioner holds that she has a statutory right under N.J.S.A. 18A:28-5, 29-8 and 6-10 to continued employment and compensation as a twelve-month employee, and that the Board and the HEA were without authority to waive her rights by negotiating her position.

The decision of the Board to eliminate petitioner's twelve-month position was within its authority.

N.J.S.A. 18A:28-9 provides as follows:

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

Under this provision, it has consistently been held that a board of education, acting in good faith, may abolish a full-time position and create a position involving less work time as well as less compensation. See Wexler v. Bd. of Ed. of the Borough of Hawthorne, 1976 S.L.D. 309, aff'd. State Board, 1976 S.L.D. 314; Roe et al. v. Bd. of Ed. of the Twp. of Mine Hill, 1976 S.L.D. 672, aff'd. State Board, 1976 S.L.D. 676; Hynn v. Bd. of Ed. of the

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Borough of Wharton, 1976 S.L.D. 763; Sherman v. Bd. of Ed. of North Plainfield, 1981 S.L.D. ____, decided August 19, 1981. It must be recognized that at least one of the reasons set forth in the quoted statutory language must also be present for such action to be effective.

Here, the facts are abundantly clear that the enrollment in the school district had declined substantially over a ten-year period. During that same time period, the record above shows that the Board improved and expanded its services to students and the community by hiring a Director of Pupil Personnel Services in 1974 under whom the CST then worked. Subsequently, the Board reviewed the CST area to determine whether the structure which was in place should continue.

The conclusion was reached that it was no longer necessary to have the school psychologist work on a twelve-month basis, nor was it necessary to continue automatically to schedule the other two members of the CST to work during the month of July.

The record shows that the Board decided to reduce the work force, pursuant to N.J.S.A. 18A:28-9, by abolishing petitioner's twelve-month position and establishing a ten-month position. There is no indication in the record that the Board's action was one of subterfuge or designed to accomplish any purpose other than one properly within its authority granted by the aforementioned statute.

It is well settled that statutes are to be interpreted in keeping with the ordinary meaning of the words employed. The clear language of N.J.S.A. 18A:28-9 states that the right of a board to effect a reduction in staff may not be limited by any provision in N.J.S.A. 18A or any other law. I **CONCLUDE**, therefore, that the Board had statutory discretionary authority to effect a reduction in petitioner's employment. This conclusion is consistent with that stated in Adele Vexler v. Red Bank Bd. of Ed., 1977 S.L.D. 625 at 630, as follows:

> . . . The Commissioner observes that the matter controverted herein is grounded upon the Board's exercise of its discretionary authority at N.J.S.A. 18A:28-9. Such discretionary actions of the Board, exercised in good faith, will not be set aside unless such actions are shown to be arbitrary, without rational basis, or are induced by improper motives. Boult and Harris v. Passaic Board of Education, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd. 136 N.J.L. 521 (E. & A. 1948) An action of a local board of education is presumed to be valid and proper and the Commissioner will not substitute his

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> judgment unless it is established that the controverted action is arbitrary, capricious, or unreasonable. Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966). . . .

In addition to complying with N.J.S.A. 18A:28-9, the Board negotiated with the petitioner's representative prior to abolishing the twelve-month position. In the case of In re Piscataway Township Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978), the court affirmed the decision of the New Jersey Public Employment Relations Commission which held that a school board unilaterally reducing employment of a number of principals from 12 months to 10 months with a proportionate reduction in salary was guilty of an unfair practice in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(5). While this decision seems contrary to the consistent holdings of the Commissioner of Education, the Board nevertheless negotiated with the HEA over the proposed change in the terms and conditions of employment. Consequently, if there was a duty to negotiate under the facts of this case, the Board met that duty as well as having acted in accordance with the Commissioner's decisions.

The import of the above case is that if a school board, has an obligation to negotiate reductions in work year and pay, it also has the right to carry out those reductions. In the present matter, there is no contention that the Board failed to meet any obligation in that regard and the testimony establishes that, in fact, negotiations were carried out.

Among her several cites, petitioner includes Annette Shteir v. Bd. of Ed. of the Borough of Bound Brook, Somerset County, 1980 S.L.D. ____, decided March 24, 1980, aff'd. State Bd. of Ed., 1980 S.L.D. ____, decided July 1, 1980, aff'd (App. Div.) March 6, 1981, which held that a local board of education does not have the authority to reduce compensation, except as set forth in N.J.S.A. 18A:6-10 et seq., the tenure statutes, irrespective of the fact that a negotiated agreement established her compensation at a lesser level.

However, Shteir is distinguishable. In that matter, there was no allegation of reduced pupil enrollment or economic reason suggested. It was a simple case of a negotiated agreement between the employees' association and the local board which had the effect of reducing Shteir's salary. That is not the case in the present matter, where

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there is a demonstrable decline in pupil enrollment. Further, in Shteir, the administrative law judge held, in part, as follows: "It is uncontested that [Shteir's] salary for the 1978-79 school year was less than for the 1977-78 school year based on a reduction in the length of her work year. That reduction is neither improper nor at issue" [emphasis added] (Slip. Op. at 4).

In consideration of the above decisions, the actions of the Board reducing petitioner's salary are proper and within its statutory and discretionary authority.

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

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 **GUSTAV H. RUH** for consideration.

19 April 82
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

21 April 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 23, 1982
DATE

Ronald L. Lakey/ss
OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

Exhibit A	Contract, dated 1979-80
Exhibit B	Contract, dated 1980-81
Exhibit C	Letter from Superintendent to Association President
Exhibit D	Memo from Kleinbord to Superintendent
P-1	Memorandum, dated May 5, 1981
R-1	Enrollment Comparisons and Projections

STIPULATED IN EVIDENCE

1. Petitioner's employment contracts and/or statements of salary for 1973-74 through 1981-82
2. Minutes of Board meeting of February 28, 1980, where negotiated agreement was ratified

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BARBARA MESSICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, 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 petitioner in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner's exceptions contend that no rational basis existed for the workyear reduction made by the Board. Petitioner argues that no analysis was made of the workload of the Child Study Team (CST) or the legal requirements under which it operated. Petitioner avers that the declining pupil enrollment cannot form a rational basis for the staff reductions herein effectuated. The Commissioner finds no merit in petitioner's arguments.

The Commissioner observes that in the past decade the pupil enrollment in the district has declined by over 800 pupils representing a 30% reduction in total enrollment. Testimony on the record shows the CST caseload to be a steady 180-200 pupils. No explanation of this unvarying number is offered.

However, an inspection of his own records of the form entitled "Monthly notification report of time extensions granted for evaluations exceeding 60 days", form number MIS 05 D024, NJDE 417-11, the filing of which is required by law, reveals to the Commissioner no delinquency on the part of the Board. Nor can the Commissioner agree with petitioner's cavalier dismissal of the requirements established by the Legislature in N.J.S.A. 18A:28-9, ante, which states in part "*** or because of reduction in the number of pupils ***." The Commissioner finds nothing in the record to show that the Board is not meeting the requirements of pupils as set down in law. 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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Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

June 7, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3654-81
AGENCY DKT. NO. 161-4/81

SAYREVILLE EDUCATION ASSOCIATION on behalf of JOANN RUCKI, JOSEPHINE MARCHESI and DEBORAH FARLEY,
Petitioners
v.
BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

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

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

Record Closed April 12, 1982 Decided May 3, 1982

BEFORE **LILLARD E. LAW,** ALJ:

The Sayreville Education Association (Association) filed the herein Petition of Appeal before the Commissioner of Education (Commissioner), pursuant to N.J.S.A. 18A:6-9, on behalf of petitioners Rucki, Marchesi and Farley, asserting that each, individually, had been employed by the Board of Education of the Borough of Sayreville (Board) on or subsequent to February 17, 1981, and alleging that the Board was in violation of N.J.S.A. 18A:1-1 et seq. when it compensated petitioners on a per diem basis and denied them the benefits afforded other teaching staff members. The Board, by way of

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Answer and separate affirmative defenses, denies the allegations and asserts, among other things, that petitioners were employed, and accepted such employment as substitute teachers on a per diem basis to complete the 1980-81 school year.

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 October 13, 1981, at which the issues to be determined were set forth and agreed to by the parties. Thereafter, on January 19, 1981, a hearing was conducted at the Edison Township Municipal Court, Edison, New Jersey. The parties submitted post-hearing briefs and the matter was closed on April 12, 1982.

ISSUES TO BE DETERMINED

The issues for determination before this tribunal are as agreed upon by the parties at the prehearing conference and are set forth in toto as follows:

1. Whether the terms and conditions of petitioners' Rucki, Marchesi and Farley employ with the Board, on February 17 and March 2, 1981, respectively, were those of substitute teachers, pursuant to N.J.S.A. 18A:29-16.

2. Whether the Association herein has standing to bring this cause of action before the Commissioner of Education.

3. Whether the Petition of Appeal is defective by virtue of the absence of verification by the herein named petitioners.

4. Whether the Commissioner has authority to award petitioners, if successful, interest, costs and attorney fees.

STATEMENT OF STIPULATED FACTS

1. Petitioner Joann Rucki commenced her employment with the Sayreville Board of Education (Board) for the 1980-81 school year on February 17, 1981, replacing Jeffrey Mesinoff, who resigned effective February 13,

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1981. She was assigned to the Junior High School, teaching mathematics and science to the seventh and eighth grades. She remained in that position through the close of the school year ending in June 1981.

2. Josephine Marchesi was employed by the Board on March 2, 1981, to replace Joseph Bonczek, who had retired effective February 27, 1981. She remained in the position through the close of the school year ending in June 1981. She was assigned to the Junior High School, teaching eighth grade language arts and social studies.

3. Deborah Farley was employed by the Board from March 2, 1981 through the close of the school year ending in June 1981. She replaced Karen Loupassakis, who resigned effective February 27, 1981. She was assigned to the Junior High School, teaching physical education and health.

4. None of the three above-named petitioners was hired by a resolution of the Board adopted at a public meeting or at any other meeting for the positions which they held during the 1980-81 school year in the Sayreville School District.

TESTIMONIAL EVIDENCE

Petitioner Rucki testified as to her prior employment experience with the Board which included day-to-day substitution from 1975 through 1977; full-time teaching of third grade for the 1977-78 and 1978-79 school years; no employment by the Board for the 1979-80 school year; employment from February 17 to June 30, 1981, on a per diem basis; and, employment under contract with the Board for the 1981-82 school year, teaching junior high school English. With regard to her employment from February 17 to June 30, 1981, petitioner Rucki was advised that she was to replace a teaching staff member who had left the employ of the Board and that she was to receive compensation in the amount of $56 per day for the days she taught. She received no other benefits nor was she paid for days she was absent for illness or other causes. Petitioner Rucki stated that she was assigned to teach junior high school level biology and two sections of mathematics under her standard grades K-8 Teaching Certificate. She prepared daily lesson plans, followed the objectives as set forth in the Teachers Guidebook, disciplined

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pupils, prepared and graded pupil tests and examinations, was assigned hall duty and cafeteria duty, conducted after-school remedial programs for pupils in need and performed all of those duties expected of a regular contract teacher employed by the Board. She stated that her classroom performance was observed by the department chairperson, which was followed by a written evaluation.

Petitioner Marchesi testified that prior to her employment for the period of March 2 to June 30, 1981, she had served as a day-to-day substitute for the Board at a rate of $32 per day. Petitioner Marchesi stated that prior to commencement of her employment on March 2, 1982, she was advised that she would replace a teaching staff member who had retired from the profession and, further, that her rate of pay was set at $56 per day with no other benefits. Petitioner Marchesi was assigned to teach eighth grade social studies and language arts under her standard elementary K-8 teaching certificate. She stated that the retiring teacher, whom she replaced, left no lesson plans and that she prepared her daily lesson plans setting her own guidelines and standards. In addition, she prepared and graded pupil tests and examinations and was assigned cafeteria duty. She stated that she did not attend faculty meetings because per diem teachers were not required to do so. She was observed and evaluated by two department chairpersons, i.e., in social studies and language arts. Petitioner was not employed by the Board for the 1981-82 school year; however, she was called upon as a substitute teacher and was compensated at the rate of $32 per day.

Petitioner Farley neither attended the hearing nor testified on her own behalf.

The president of the Association testified, among other things, with regard to Article 22 "Replacement Teachers" as set forth in the Negotiated Agreement between Board of Education Sayreville, New Jersey and Sayreville Education Association, July 1, 1980 - June 30, 1982 (Agreement) (P-1). That Article is set forth in its entirety as follows:

> A properly qualified teacher holding an appropriate certificate, having had experience in the field to which he is assigned, who replaced a regular teacher during an extended absence, carrying out regular teaching procedures, and preparing and following lesson plans, shall be paid at the minimum salary for his classification in the guide, but shall not receive any other benefits. (P-1) Id. p. 25

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The president stated that the Association brought the herein action against the Board on behalf of the petitioners, grounded upon the negotiated Agreement and the decision in the matter of Red Bank Reg. Ed. Assn. v. Red Bank Reg. High Sch. Bd. of Ed., 78 N.J. 122 (1978).

The superintendent of schools testified as to the distinction between per diem substitutes and day-to-day substitute teachers. The day-to-day substitute teachers are paid at the rate of $32 per day if the teacher holds a standard New Jersey teaching certificate, or $28 per day if he/she does not possess such certification. The per diem teacher, compensated at the rate of $56 per day, is expected to replace a regular teaching staff member for an extended period of time. No contract is offered to the per diem teacher and such teacher may be dismissed at any time. The superintendent stated that in the event a replacement teacher were awarded a contract, 60 days notice would have to be given to the teacher before the Board could terminate employment. The per diem teacher was expected to perform all of the functions and carry out all of the duties and responsibilities of the replaced regular teaching staff member, whereas the day-to-day substitute teacher was merely required to follow the daily lesson plans prepared by the absent regular teaching staff member. The superintendent testified that it was the Board's practice not to enter into a contract with per diem teachers or those employed in February of the school year. The reason for this practice was to avoid and eliminate any confusion with regard to tenure accrual in subsequent years, and it was not necessary that the Board give notice of non-reemployment for the subsequent year on or before April 30, pursuant to N.J.S.A. 18A:27-10. The superintendent further stated that several tenured teaching staff members had been granted medical leaves of absence by the Board and in the event one or more returned to duty between Feburary and June 1981, the returning tenured teacher could have been assigned to replace one or more of the petitioners.

Legal Arguments of the Parties

Petitioners contend that the terms and conditions of their employment were those of teaching staff members, that such employment must be credited toward tenure, and that it was improper for the Board not to provide them with full contractual benefits. Petitioners cite N.J.S.A. 18A:28-5 which provides in relevant part that all teaching staff members holding the "proper certificate" shall be under tenure after employment by a school district for:

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(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) The equivalent of more than three academic years within a period of any four consecutive academic years.

and; N.J.S.A. 18A:1-1 and N.J.A.C. 6:11-3.4 defining teaching staff members as follows:

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

In addition, petitioners cite N.J.S.A. 18A:29-16 which refers to a substitute teacher as follows:

> The provisions of this Subarticle B shall not apply to any person whose appropriate certificate, valid for his office, position, or employment is an emergency certificate and to any person employed as a substitute on a day-by-day basis.

Petitioners contend that the initial question in the instant case is whether the petitioners fit within the definition of a teaching staff member, or a day-by-day substitute. This question is significant not only to the question of tenure, but also for determining those benefits to which the petitioners are entitled. In this regard, the Commissioner in Quinlan v. Board of Education of the Town of North Bergen, 1959-60 S.L.D. 113, 114, stated that:

> The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion. He must be equally vigilant against the employment of devices to confer tenure upon those who are not entitled to its protection. The duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure. Nomenclatures may not be the deciding factor.

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Petitioner suggests that a number of cases over many years have examined this question and it has been uniformly held that neither per diem salary status, nor the designation given a teacher by a board can necessarily deprive a teacher of tenure accrual status. Instead, each case must be examined on its own merits. In such an examination, a crucial question in many instances is whether the petitioner replaced a teacher on leave, or a teacher who permanently left the school district. See South River Education Association and Deborah Swanson v. Board of Education of the Borough of South River, 1980 S.L.D. ___ (C.D. April 18, 1980). In Myra Richardson v. the Board of Education of the Borough of Lawnside, 1981 S.L.D. ___ (S.B.D. February 3, 1981), the State Board stated:

> Subsequent to the Commissioner's decision the Appellate Division decided Spiewak v. Rutherford Board of Education on June 22, 1981, docket no. 4853-79T2 (180 N.J. Super. 312 (App. Div. 1981)). One of the petitioners in Spiewak was Patricia O'Reilly, who had been employed since February 1973 as a Title I remedial reading teacher. She, like the other two petitioners (who were "Beadleston" supplemenatary teachers of the handicapped), began work several days after the start of the academic year and completed her work several days before the conclusion thereof. She was paid on an hourly basis for actual instruction time. She was not paid for her lunch break, received no sick leave or other emoluments, such as paid vacations or personal days, nor was she admitted into the Teachers Pension and Annuity Fund. Nevertheless the Court noted that O'Reilly had been continuously employed as a Title I tutor since February 1973 to provide remedial training and that her actual instructional week of five hours per day five days a week was as long, if not longer, than that of regular elementary teachers. The fact that she was paid hourly on per diem did not bear upon the tenure issue, nor did the fact that she used a tutorial instruction technique and had no homeroom or other non-instructional assignments. The Court limited the scope of the Point Pleasant Beach decision (173 N.J. Super. 11 (App. Div. 1980), certif den. 84 N.J. 469 (1980)) to cases where the temporary nature of Title I employment was understood by both employer and employee. In O'Reilly's case the Court held that she had achieved tenure because the original temporary character of her employment changed, the program in which she taught became well established and integrated with the regular instructional program, and her employment became regular and continuous. (Emphasis added.)

Accord, Hamilton Tp., etc. v. Hamilton Tp. Bd. of Ed., 180 N.J. Super. 321 (App. Div. 1981). Petitioners contend that being paid on an hourly or per diem basis does not bear upon the tenure issue. Rather, it is the character of a person's employment which is significant. In this connection, the commissioner in Yanowitz v. Board Education of Jersey City, 1973 S.L.D. 57, 75, stated:

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> The distinction between teachers and substitute teachers had been dealt with on previous occasions by the Commissioner and by the courts of this State. In Board of Education of Jersey City, Hudson County v. Margaret M. Wall and State Board of Education of the State of New Jersey, 119 N.J.L. 308 (Sup. Ct. 1938) the Court affirmed the finding of the State Board of Education that the teacher, Miss Wall, had been continuously employed by the Board in two teaching assignments for a period in excess of four years, and had thereby acquired a tenure status, notwithstanding the Board's attempt to evade the tenure statutes by the device of compensating the teacher on a per diem basis and contending that her status was merely that of a substitute teacher. (Emphasis added)

Moreover, petitioners observe that in Schultz v. State Board of Education, 132 N.J.L. 345 (E. & A. 1945), the court stated at 353:

> The Courts have condemned evasions of the tenure statute and refused to countenance the subterfuge of designating a teacher as a substitute where the service rendered and intended to be rendered was that of a regular teacher. "It clearly appears from the record that the seven persons designated as special substitute teachers were actually continuously employed, the minutes notwithstanding. The action of the board was the merest subterfuge to defeat the legislative purpose. . . ." Downs v. Board of Education of Hoboken, 13 N.J. Misc. R. 853 (1935).

Accord, Givens v. Board of Education of the City of Newark, 1974 S.L.D. 906, See also Driscoll v. Board Education of the City of Clifton, 79 N.J. 126 (1979). Petitioners note that teachers cannot be compelled to waive their rights to tenure as a condition of employment. Lange v. Bd. of Ed. of Borough of Audubon, 26 N.J. Super. 83, 88 (App. Div. 1953).

Petitioners cite the matter in Middletown Township Education Association v. Board of Education of the Township of Middletown, 1980 S.L.D. ___ (C.D. September 22, 1980), aff'd S.B. March 4, 1981, wherein the Commissioner considered a case in which the petitioners were hired on an annual basis to fill approved leaves of absence. The Middletown Board of Education, labelling the petitioners as "replacement teachers," failed to recognize their service toward accrual of tenure. The commissioner ruled that credit toward tenure should be given to the petitioners who fell within this category. Said the commissioner:

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> Under such circumstances the Commissioner does not deem petitioners to be substitute teachers. Schultz, supra, Biancardi, supra (139 N.J. Super. 175 (App. Div. 1976), aff'd 73 N.J. 37 (1977)), Driscol, supra. He likens petitioner's status to that in Yankowitz, supra. The Commissioner notes that in Driscol and in the recent case decided by the Appellate Division of the Superior Court, Point Pleasant Beach Teachers Association, supra, it was determined that whether or not a teaching staff member is eligible for tenure depends upon the status of the employment offered and accepted in view of the terms, conditions and duties of such employment.

Accord, Kuboski v. Board of Education of the Borough of South Plainfield, 1978 S.L.D. 322, 332, it was said:

> The Commissioner determines that those persons employed to perform duties to supplement the regular instructional program of the school's professional teaching staff members are not entitled, even if fully certified, to all the benefits or protection afforded to regular teaching staff members unless they perform all of the principal responsibilities of regular teachers.

Petitioners contend that each, individually, held an appropriate certification, each performed all of the duties of other classroom teachers, and, significantly, each replaced a teacher who resigned permanently from the employ of the Board. Additionally, each was distinguished by the Board from day-by-day substitute teachers, as they received a $56 per diem salary rather than the $32 daily salary given to day-by-day substitute teachers. And, unlike a day-by-day substitute, the petitioners were hired for an extended duration. Their status was identical to that of non-tenured teachers who were provided a contract. They assert that they were teaching staff members within the meaning of N.J.S.A. 18A:1-1 and N.J.A.C. 6:11-34. Accordingly, their employ with the Board during the late winter and spring of 1981 must be counted toward the accrual of tenure.

Petitioners argue that they were contractually entitled to all of the benefits provided to nontenured teachers hired by the Board under a contract. In this regard, it is well settled that although a Board of Education has discretionary authority to make rules, such rules must be reasonable and cannot contravene statutory or constitutional standards. See Quiroli v. Board of Education of Linwood, 1974 S.L.D. 1035, 1039-40; Angell v. Board of Education of Newark, 1960 S.L.D. 141. Moreover, a Board's actions cannot be arbitrary and capricious, and must be reasonably applied. In defining "arbitrary and capricious", the New Jersey Supreme Court in Canada Dry Ginger Ale, Inc. v. F. & A. Distrib. Co., 28 N.J. 444 (1958), stated at 456 that, "[a]rbitrary means depending on will

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or discretion; that is not governed by any fixed rules or standards." See also Lichtman v. Board of Health, 128 N.J.L. 416 (Sup. Ct. 1942). In this connection, it is important to note that where a fixed standard has been established, it must be impartially adhered to. See McGautha v. California, 402 U.S. 183, 277-78 (1971) (Brennan, J., dissenting).

Petitioners argue that it is settled law that the Board must treat all nontenured teaching staff members similarly. Accordingly, every nontenured classroom teacher must be given a contract with full benefits for the period of his or her employment. The petitioners here were teaching staff members. Thus, the Board was thereby required to hire them under a contract with benefits.

The Board asserts that there is no question that boards of education have the authority to hire substitute teachers. N.J.S.A. 18A:29-16. In the instant matter, testimony on behalf of the respondent indicated that there had been a substantial decline in the enrollment of the respondent school district over the past several years. This fact was well known to the superintendent at the time he hired the individual petitioners herein. Further, evidence was produced that because of other teachers who were out on leave, the superintendent hired the individual petitioners herein on a substitute basis.

The Board contends that the Agreement between the Board and the Association, which was marked into evidence as P-1, provides in Article 22 that replacement teachers may be hired during an extended absence carrying out regular teaching procedures and being paid at the minimum salary but not receiving any other benefits. The length of time that persons serve as substitutes is not necessarily determinative of whether or not they should be considered as substitutes or as regular teaching staff members. See Driscoll v. Board of Education of the City of Clifton, 165 N.J. Super. 241 (App. Div. 1977); affirmed 79 N.J. 126 (1979). In the Driscoll case the plaintiff was employed by the district from September 6, 1973 through the ensuing school year ending June 11, 1974, and was paid the usual rate for substitute teachers of $23 per day. In Driscoll, supra, the substitute teacher performed all of the regular duties of a regular schoolteacher. In that particular case, the regular teacher was out on leave and there was some question as to the teacher's right to return from that leave. It should be noted that the Supreme Court was unanimous in its affirmance.

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The Board argues that in the instant matter, the testimony was clear that the three individual petitioners accepted the per diem basis of the their contract. In the matter of Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175 (App. Div. 1976), the court reestablished the right of the Board of Education to hire teachers as substitute teachers. Further, it is clear from the opinion of the court that the petitioner in that case was well aware that she was not hired at the rate of pay established by the salary guide for regular teachers and was well aware that she could not receive any of the benefits afforded a regular teacher such as sick leave, paid holidays and vacation periods. Further, the teacher in that case was not enrolled in the Teachers Pension and Annuity Fund during the period in question. It should be noted that the court quotes N.J.S.A. 18A:66-2(p) which states in part that ". . . [n]o person shall be deemed a teacher within the meaning of this article who is a substitute teacher. . . ."

The Board observes that petitioners cite many cases decided by the Commissioner of Education and the courts with regard to supplemental teachers. It is submitted that there is a significant difference between supplemental teachers and substitute teachers. It is the opinion of the Board that all of those cases concerning supplemental or remedial teaching teachers or compensatory education teachers have no application in the instant matter.

The Board contends that the Commissioner has held in other matters that petitioners' type of employment was intended to be as substitute teachers rather than under regular contract. See Thomas A. DeLeo and Thomas Degise v. Board of Education of the City of Jersey City, 1980 S.L.D. ____ (C.D. August 4, 1980); Barbara McGinnis v. Board of Education of the Borough of Haddonfield, 1980 S.L.D. ____ (C.D. August 6, 1980). In the DeLeo case, supra, the petitioners for a portion of the time period in which they were employed by the respondent school district were members of a category known as "Pool substitute." Certainly, their employment was for an entire contract year. The duties as school substitutes were varied depending upon the circumstances and the length of time they substituted for a particular teacher. Testimony was quoted that their services were required to be the same as any other contracted or appointed members of the staff. The commissioner ruled that such service did not constitute service of a regular teaching staff member within the meaning of the tenure statute citing Biancardi and Driscoll, supra.

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Petitioners now raise the issue that, during their employment with the Board, they were statutorily entitled to compensation for school holidays, sick-leave days and that the Board was required to make contributions in their behalf to the Teachers' Pension and Annuity Fund. The Board objects, arguing that such an issue was not agreed upon nor set forth in the prehearing order. The Board further argues that, in the absence of such an issue, petitioners are precluded from raising it at this juncture, pursuant to N.J.A.C. 6:24-1.2 and the Rules of Procedure of the Office of Administrative Law, N.J.A.C. 1:1-1.1 et seq.

This court finds the arguments of the parties to be academic, procedurally as well as substantively. Procedurally, this specific issue was not raised by petitioners at the prehearing conference. Substantively, petitioners did, in fact, set forth the issue in their Petition of Appeal. It is implicit that such an issue would give rise to the remedies sought by petitioners in the event they were to prevail in the litigation. Accordingly, the issue of retroactive compensation will be determined, post.

FINDINGS OF FACT

Having carefully reviewed and considered all other 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** that:

1. The Statement of Stipulated Facts, set forth hereinbefore, is hereby adopted by reference as Findings of Fact.

2. Petitioner Rucki is currently employed, for the 1981-82 school year, by the respondent Board.

3. Petitioners Marchesi and Farley were not reemployed by the Board in September 1981.

4. By virtue of the Agreement between the Board and Association, Article 22, and the holding by our Supreme Court in Red Bank Reg. Ed. Assn., supra, the Association has standing to bring the herein action.

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5. Each of the individual petitioners was employed by an agent of the Board to replace a regular teaching staff who had left the employ of the Board.

6. Each of the petitioners, individually, when employed by an agent of the Board, was advised that her rate of compensation was to be $56 per diem with no other benefits afforded.

7. The Board did not, by formal resolution enter into a contractural arrangement with any of the petitioners for the period of February and March through June 30, 1981.

8. Petitioners accepted and were compensated in accordance with the terms and conditions of the oral advisement that their pay would be at the rate of $56 per diem without any other benefits.

9. The Board compensated its day-to-day substitute teachers at the rate of $32 per day.

10. Several of the Board's tenured teaching staff members were absent on extended medical leave, any one of whom could have returned to duty and replaced petitioners.

DISCUSSION

Having found that the Association had standing to bring the herein action against the Board, grounded upon Article 22 of the Agreement and case law in Red Bank, supra, it is necessary at this juncture to discuss the Association's limitations thereto. It is uncontroverted that all parties relied upon Article 22 which, on its face, is clear and unambiguous. The Article sets forth the conditions of replacement teachers which holds that ". . . a properly qualified teacher holding an appropriate certificate . . . who replaced a regular teacher . . . [will carry] out regular teaching procedures, and . . . [prepare and follow] lesson plans. . . ." These standards and conditions were met by petitioners in the performance of their duties. The terms, moreover, specifically state that "[the replacement teacher] shall be paid at a minimum salary for his classification in the guide, but shall not receive any other benefits." Thus, the Association has standing to bring an action within the scope of the terms and conditions of Article 22 of the Agreement.

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It is uncontroverted that petitioners met the conditions of the Article. As to its terms in arriving at the rate of pay afforded petitioners, it is presumed that the Board referred to its Teachers Salary Guide for 1980-81 (P-1, Schedule A, No. 1 at p. 29). Therein, the minimum salary for the B.A. level was set at $11,200 per annum. Applying the standard, pursuant to N.J.S.A. 18A:30-6, which provides that ". . . a day's salary is defined as 1/200 of the annual salary," with the appropriate mathematical computation, shows that the per diem rate of pay to be equal to $56. Thus, it is shown the Board met its obligation of Article 22 and compensated petitioners in accordance with its terms.

The threshold issue to be determined is whether the terms and conditions of petitioners' employment with the Board were those of substitute teachers or, as petitioners contend, regular full-time teaching staff members. The facts herein demonstrate that the parties did not enter into a contractual agreement, duly executed by Board resolution and acceptance by petitioners. The facts further establish that each petitioner was individually advised that the terms of employment were to be on a per diem basis, without other benefits, and that each was to fulfill the teaching duties and responsibilities of the regular teaching staff member replaced. Under similar circumstances, the Commissioner has observed in Kathy A. Wolf v. Board of Education of the Borough of Norwood, Bergen County, 1975 S.L.D. 494 at 500 that:

> When parties enter into agreements of employment, they are free agents seeking a meeting of the minds regarding such matters as responsibilities, duties, compensation and other involvements, pertaining to such employment. While neither party may properly resort to subterfuge, they are bound by such agreements as they have entered into for the duration of such employment.

Thus in the instant matter, the parties relied upon the specific and unambiguous language of Article 22. The Board's agents offered employment in good faith, and petitioners accepted in accordance therewith.

Our Supreme Court has held that boards of education are empowered with the statutory authority to employ substitute teachers for prolonged periods of time. Biancardi, supra, Driscoll, supra. An analysis of the facts in the instant matter reveals that they are indistinguishable. The uncontroverted facts in Biancardi, as set forth at 139 are as follows:

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> . . . that (1) respondent wrote a letter dated May 18, 1970, expressing her desire for a "full time teaching position" in the upcoming year; respondent thus implicitly admitted that, as stated in the local board of education's resolution, she had been hired as a substitute to fill the two-month period of vacancy caused by the departure of a regular teacher; (2) she was not hired at the rate of pay established by the salary guide for a regular teacher (11,385 a year), but was paid at the rate of $40 a day; (3) she did not receive any of the benefits afforded a regular teacher, such as sick leave, paid holidays and vacation periods, and paid absences for attendance at teachers' conventions (indeed respondent was absent two days during the period from April to June 1970 and was not paid for those days); (4) respondent was not enrolled in the Teachers' Pension and Annuity Fund during the period in question. The Teachers' Pension and Annuity Law, N.J.S.A. 18A:66-1 et seq., expressly provides that "No person shall be deemed a teacher within the meaning of this article who is a substitute teacher . . ." N.J.S.A. 18A:66-2(p). The fact that respondent was not enrolled in the pension plan is additional evidence that she knew she was taking a temporary appointment and was working as a substitute teacher.

The only facts that are distinguishable between the two matters are the rate of pay and the period of time served in substitute teaching service.

Similarly, Justice Pashman in his concurrence with the per curiam affirmance of the Appellate Division decision in Driscoll, supra, stated at 126-127 that:

> Plaintiff was informed at the start of her employment that she would be compensated merely as a substitute. This remained the expectation of the parties throughout the performance of her duties. The fact that she ultimately worked for the entire school year cannot alone allow her to retroactively recover the salary and emoluments due a full-time teacher. Any holding to the contrary would involve this Court in highly speculative line-drawing problems as to when and under what circumstances a substitute's status would convert to that of a full-time teacher.

Thus our Supreme Court has upheld the local boards of education's right and authority to engage and employ substitute teachers at a lesser rate of pay and without the benefits and other emoluments afforded regular contracted teachers for prolonged and protracted periods of time.

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CONCLUSIONS

Having fairly weighed the facts and considered case law with regard to this matter, I **CONCLUDE** that petitioners have failed to established a claim upon which relief may be granted. Finding no evidence of intent on the part of the Board, or its agents, to subvert, deceive, defraud or deprive petitioners of any entitlements by subterfuge, the Board's actions must be accorded a presumption of correctness. Schinck v. Bd. of Ed. of Westwood Consol. School Dist., 60 N.J. Super. 448 (App. Div. 1960).

Accordingly, there is no relief to be afforded petitioners and the herein Petition of Appeal is hereby **DISMISSED** in all respects.

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 **GUSTAV H. RUH** for consideration.

3 May 1982
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4 May 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

May 6, 1982
DATE

Ronald L. Parker/ps
OFFICE OF ADMINISTRATIVE LAW

ms

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OAL DKT. NO. EDU 3654-81

DOCUMENTS IN EVIDENCE:

P-1 Agreement between Board of Education, Sayreville, New Jersey, and Sayreville Education Association July 1, 1980 - June 30, 1982

P-2 School Calendar 1980-81

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SAYREVILLE EDUCATION ASSOCIATION, on behalf of JOANN RUCKI, JOSEPHINE MARCHESI AND DEBORAH FARLEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, 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 in their primary exceptions argue that the determination by the Honorable Lillard E. Law, ALJ that the Petition of Appeal be dismissed in all respects is in error. Petitioners contend that Judge Law's finding that they were substitute teachers not entitled to the benefits and emoluments of a regular teacher, including tenure credit for employment, is in error. In their exceptions petitioners recapitulate their arguments presented to and considered by Judge Law. The Commissioner does not deem it necessary to reevaluate what has previously been amply weighed, evaluated and properly considered. The Commissioner so holds. An examination of the circumstances herein convinces the Commissioner that petitioners served in the employ of the Board as substitute teachers. Biancardi, supra, and Driscoll, supra

The Commissioner finds no merit in the argument that petitioners are statutorily entitled to compensation for school holidays, sick days and contributions by the Board to the Teachers' Pension and Annuity Fund. The Commissioner notes that the Board filed exceptions in affirmance of the initial decision.

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 18, 1982
Pending State Board

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. - - - - -
AGENCY REF. NO. 105-3/78

LINDA McGOVERN,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY,
Respondent

APPEARANCES:

Gregory T. Syrek, Esq., for petitioner
(Bucceri and Pincus, attorneys)

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

Record Closed April 19, 1982 Decided May 5, 1982

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

Linda McGovern claimed tenured status as a teaching staff member on the basis of her service as a Title I supplementary teacher from September 1974 through December 1977 and as a regular classroom teacher from January 1, 1978 through June 30, 1978.

Her employer, the Board of Education of the Borough of Riverdale, Morris County, denied the claim, relying on the current status of law and a clear understanding between the parties that petitioner's Title I employment was temporary.

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The Petition of Appeal was filed on March 16, 1978 with the Commissioner of Education, joined on April 5, 1978, and assigned to a hearing officer in the Division of Controversies and Disputes (C & D), State Department of Education. The matter was reassigned to the undersigned on March 12, 1979, who was also a hearing officer with C & D at that time, and brought with him as a contested case with the creation of the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq.

Many procedural delays ensued due to various reasons such as change of attorneys, unsuccessful settlement efforts, summary decision motion (briefing and withdrawal), an inactivated status, reactivation, and subsequent hearing and briefing. The details of the delays will not be belabored here. They are not deemed relevant, as the substantive issue will be addressed.

A plenary hearing was held on Februry 17, 1982 at the Morris Township Municipal Court and the matter was briefed. The record was closed with the expiration of the date established for petitioner's optional rebuttal brief on April 19, 1982, which petitioner chose not to file.

The following facts were stipulated or taken directly from the pleadings or evidentiary documents, and are adopted as FINDINGS OF FACT:

1. Petitioner was employed in 1974-75 by contract as "Title I Supplemental" at an annual salary of $6,000. It was agreed that the "open" salary indicated on Step 1 of the salary guide could reasonably be set at $9,150.

2. Petitioner was employed in 1975-76 by contract "to teach" at an annual salary of $6,500. Step 2 on the salary guide was $10,105.

3. Petitioner was employed in 1976-77 by contract as "ESEA Title I Supp." at an annual salary of $7,000. Step 3 of the salary guide was $10,925.

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4. Petitioner was employed in 1977-78 by contract as a "Title I Teacher" at an annual salary of $7,500 ("provided Title I funds are available"). As of January 1, 1978 her annual rate of salary was increased to $10,500. Step 4 of the salary guide was $11,900.

5. Throughout the period of employment, petitioner received the same emoluments as all other teachers other than salary, such as hospitalization insurance, sick and personal leave days, and TPA&F membership.

The only notable differences between petitioner's job and that of regular classroom teachers were salaries less than those accorded by the salary schedule, and the supplementary teaching of pupils in math remediation on a one-to-one basis or in small groups rather than a normal class size of approximately 25 pupils.

The petitioner testified on cross-examination she understood from her initial interview for employment that her salary would be less than the salary guide accorded and would be related to funds made available from Title I grants (Tr. 31, 32). She also testified she would not have the job if Title I funds were not made available (Tr. 33, 34). She further testified she was non-renewed for the 1978-79 school year due to a reduction in force caused by declining enrollment (Tr. 44).

The former Superintendent of Riverdale, currently a County Superintendent, also testified. He stated he conducted the interviews with petitioner for employment consideration, which was solely as a Title I supplementary teacher of remedial computational mathematics (Tr. 54), and that he advised her that salary would be "predicated upon the amount of money that was available under our Title I grant" (Tr. 55), and further advised her that continued employment "was predicated upon the availability of funds in the Title I program" (Tr. 55, 56).

The former Superintendent also testified that petitioner was offered an opportunity for a regular classroom assignment as of January 1, 1978 when a vacancy developed, accepted it, and was non-renewed for 1978-79 because the Board reduced its

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force due to declining enrollment, which impacted on several teachers, both tenured and non-tenured. He stated his belief that the Title I assignment went to a RIF'd classroom teacher who was tenured.

It is conjecture if petitioner would have continued her employment due to seniority ranking if the Board considered her tenured. The gap in this record due to the absence of employment data of teachers retained and reduced in force for the 1978-79 school year will be relevant only if petitioner is deemed to be tenured, and in that event continued employment will be addressed.

According to the former Superintendent, the Board's policy was to treat all teachers the same whenever possible, whether they held tenurable or non-tenurable positions. This petitioner was treated the same except for salary.

ADDITIONAL FINDINGS OF FACT:

Petitioner understood, as she testified, that her employment as a Title I teacher was contingent on approved Title I grants, and that her salary for services rendered would be less than teachers salary guide and determined by the funds made available through approved Title I grants.

DISCUSSION:

Petitioner argues what she perceives to be applicable law. What she argues, however, is contrary to the holding of the Appellate Division in Point Pleasant Beach Teacher's Assn. v. Callam, et al, 173 N.J. Super. 11 (App. Div. 1980), certif. den. 84 N.J. 469 (1980), in reliance on Spiewak v. Bd. of Ed. of Rutherford, 180 N.J. Super. 312 (App. Div. 1981), certif. granted November 19, 1981. She concedes that Spiewak limits the application of Point Pleasant to situations "where employment is offered and accepted on a temporary basis and where its temporary nature is understood by both employer and employee to be one of its essential predicates . . ." 180 N.J. Super. at 318 (Pb 7). She also properly argues the Spiewak holding makes it quite clear that after the passage of time, this "temporary" employment claim will no longer be valid. (Pb 7, 8).

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Petitioner argues critically of Appellate Division's holding in Point Pleasant due to its authoritative citing of Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175 (App. Div. 1976) aff'd o.b. 73 N.J. 37 (1977) and Schulz v. State Board of Education, 132 N.J.L. 345 (E. & A. 1945) in support of an exception to tenure for 'temporary employment' (Pb 11). She states that "In point of fact neither of these decisions can justify the holding in Point Pleasant" (Pb 11).

I am compelled to state that, however meritorious her argument may be, it should be reserved for a court possessing the authority to set aside the holding in Point Pleasant. This court will apply the law as it perceives it to be, but will not address the wisdom of a higher court's holding.

The Board argues the applicability of Point Pleasant and buttresses its position with a supporting cite in Zjawin v. Bd. of Ed. of Jersey City, 1980 S.L.D. _____ (decided June 10, 1980) wherein the Commissioner determined that tenure should not be awarded and stated "The Commissioner notes that as in Point Pleasant . . . , while petitioner performed duties functionally similar to those of other teachers, she was restricted to the Title I program and acted primarily as a tutor giving remedial aid to the children" (Rb 8).

The Board also cites Bergenfield Education Association, et al. v. Board of Education of Bergenfield, decided by the State Board on January 8, 1982, wherein "The State Board analyzed the tenure status of Title I instructors and Supplementary/Compensatory Education Instructions" (Rb 12), and noted at p. 2 of its decision:

> We find considerable difficulty in reconciling the decision of the Appellate Division in Spiewak v. Rutherford Board of Education, decided June 22, 1981, Docket No. A-4853-79-T2 with the decision of the same court (but a different part) in Point Pleasant Beach Teachers Associaiton v. Callam, 173 N.J. Super. 11 (App. Div 1980, cert. denied 84 N.J. 469, particularly with respect to the petitioner in Spiewak who had been employed under Title I. Moreover, the approach taken by the opinions in Spiewak and in Hamilton Township Supplemental Teachers Association v. Hamilton Township Board of Education, decided by the Appellate Division

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> July 10, 1981, Docket No. A-677-80-T1, appear substantially different from some of the reasoning in the Point Pleasant Beach opinion. However, we think Point Pleasant Beach controls here with respect to the two petitioners employed in the Title I program, especially where, as here, the Board took pains each year to make the teachers aware of the temporary nature of their employment and it was accepted by the teachers with full knowledge of such temporary nature. We believe therefore that Petitioners Casazza and Kingsley did not accure time toward tenure when employed under Title I.

CONCLUSIONS OF LAW:

The petitioner's own testimony, corroborated by that of the Superintendent, clearly indicates her understanding of the temporary nature of her Title I employment and the salary to be received for her services at the time she accepted the employment offered.

I **FIND** Point Pleasant and the State Board's subsequent determination in Bergenfield to be dispositive of the instant matter, and that petitioner did not acquire the status of a tenured teaching staff member.

There is no need, therefore, to address the salary issue, but the Commissioner's decision in Maryann Moller v. Bd. of Ed. of Hoboken, 1981 S.L.D. _____ (decided August 25, 1981) is noted, wherein he said:

> In the absence of an adopted policy in regard to initial placement upon the salary guide, a board is governed by the provisions of N.J.S.A 18A:29-9 which states:
>
> > Whenever a person shall hereafter accept office, position or employment as a member in any school district of this state, his initial place on the salary schedule shall be at such point as may be agreed upon by the member and the employing board of education.

I **CONCLUDE** the Petition of Appeal should be and is hereby **DISMISSED.**

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OAL DKT. NO. _____
AGY REF. NO 105-3/78

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 **GUSTAV H. RUH** for consideration.

5 May 1982
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

7 May 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

May 14, 1982
DATE

Ronald L. Parker/sa
FOR OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. _____
AGY REF. NO 105-3/78

ADDENDUM

WITNESSES:

Linda McGovern-Silbernagel, petitioner

Louis C. Accocella, former Superintendent

EVIDENTIARY DOCUMENTS:

P-1 - Elementary Teacher Certificate
P-2 - Teacher of Handicapped Certificate
P-3 - 1974-1975 Teacher Contract
P-4 - 1975-1976 Teacher Contract
P-5 - 1976-1977 Teacher Contract
P-6 - 1977-1978 Teacher Contract
P-7 - January 1, 1978-June 1978 Teacher Contract
P-8 - 1974-1978 Salary Guide
P-9 - 1974-75 Lesson Plan Book
P-10 - March 13, 1978 Evaluation of Petitioner

R-1 - 1975-1976 and 1976-1977 Title I Applications

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LINDA MC GOVERN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE, 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.

Petitioner excepts to the determination by the Honorable Ward R. Young, ALJ that petitioner's position was temporary in nature and nontenurable. Petitioner argues that the dicta of Point Pleasant Beach Teachers Association, supra, should have been modified by the restrictions imposed by Spiewak, supra. The Board's reply exceptions refute those of petitioner and affirm the initial decision. The Commissioner finds merit in the arguments of petitioner.

The Commissioner notes the difficulty encountered by the State Board in its consideration of Bergenfield Education Association et al., decided by the Commissioner May 18, 1981, in its analysis of the tenure status of Title I teachers in Spiewak and Hamilton Township Supplemental Teachers Association, supra. Consideration of the circumstances herein controverted convinces the Commissioner that Spiewak controls in the present matter. See also Myrna Richardson v. Board of Education of the Borough of Lawnside, Camden County, decided by the State Board October 7, 1981. The Commissioner so holds.

The Commissioner reverses the determination of Judge Young as rendered in the initial decision in this matter and finds that petitioner's service counted towards the accrual of tenure which she achieved.

COMMISSIONER OF EDUCATION

June 21, 1982

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LINDA MC GOVERN, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY, : DECISION

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, June 21, 1982

For the Petitioner-Respondent, Bucceri & Pincus
(Gregory T. Syrek, Esq., of Counsel)

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

Petitioner McGovern was first employed by the Riverdale Board of Education in September 1974 as a Title I Supplemental teacher. She continued to serve as a Title I teacher until January 1, 1978, when she was assigned to a classroom teaching position and so served until June 30, 1978. Petitioner McGovern was non-renewed for the 1978-79 school year due to a reduction in force. The Administrative Law Judge found that petitioner did not acquire the status of a teaching staff member; however, on June 21, 1982 the Commissioner reversed the initial decision of the Administrative Law Judge and held that petitioner's service counted toward the accrual of tenure which she achieved. The Riverdale Board appealed to the State Board of Education for clarification of whether petitioner is entitled to reinstatement and back pay.

On June 23, 1982, the New Jersey Supreme Court decided a trilogy of cases settling the issue of whether public school teachers who provide remedial or supplemental instruction to educationally disabled children may acquire tenure if they meet the specific criteria in N.J.S.A 18A:28-5. Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The Supreme Court held that such teachers are eligible for tenure, so long as they meet the statutory criteria.

The Supreme Court concluded further that: "the legal rule established by these cases shall be applied to the teachers before us, as well as prospectively to all persons not before the Court." In footnote 2, it was stated that teachers not before the Court would "not be entitled to any back pay award," and teachers terminated prior to the date of the Supreme Court's holding in Spiewak (June 23, 1982), were "not entitled to be rehired." It was held that currently employed supplemental and remedial teachers should have their tenure eligibility calculated from the beginning of their employment.

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The State Board of Education has studied the language of the Court in Spiewak, supra, and the record in this matter. Based on the plain language of the Supreme Court, the State Board holds that Petitioner McGovern who was terminated in June 1978, and is not currently employed by the Riverdale Board of Education, is foreclosed from reinstatement and back pay, since the State Board is unable to interpret the Supreme Court's bar to retroactive relief in any other manner.

Attorney Exceptions are noted.

December 1, 1982

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 0977-81

AGENCY DKT. NO. 12-1/81A

WALTER STILL, JR.,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

Respondent.

APPEARANCES:

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

Kenneth D. Roth, Esq. for the respondent (Davis & Reberkenny, P.A.) attorneys

Record Closed March 26, 1982 Decided May 10, 1982

BEFORE **AUGUST THOMAS**, ALJ:

Petitioner, a school janitor, appeals to the Commissioner of Education the determination of the Board of Education of the Township of Cherry Hill (Board), placing him on an involuntary unpaid leave of absence.

An Amended Petition of Appeal was later filed, alleging that petitioner holds a tenured status, and that the Board's action is violative of the rights to which he is entitled under the janitors' tenure law.

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This matter was filed in the office of the Commissioner and thereafter transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Thirty-eight documents were admitted as evidence and Briefs were filed after the hearing, which was conducted on December 17, 1981, in the Camden County Courthouse, Camden.

The following facts are stipulated:

1. Petitioner was first employed by the Board as a substitute custodian, effective February 23, 1959 through June 30, 1959 (Exhibit A).

2. From July 1, 1959 through November 21, 1980, petitioner was employed as a janitor and/or head custodian.

3. Petitioner's employment from July 1, 1959 through June 30, 1981, was authorized in accordance with Exhibits B - W, annexed hereto as Board minutes and/or contracts.

4. From mid-October 1979 through January 2, 1980, petitioner was absent from work due to illness.

5. Petitioner presented a note from his physician, dated December 20, 1979, regarding his return to active employment, stating in part, "No heavy lifting." (Exhibit X).

6. Pursuant to the Board's request, petitioner was examined by the school medical inspector on or about January 2, 1980. The Board's medical inspector supported the recommendation of petitioner's physician (Exhibit Y).

7. Petitioner thereafter returned to his position as head custodian at Sharp School and worked in that position through November 20, 1980, with the exception of certain days on which he was absent (Exhibit Z).

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8. Upon petitioner's return to work in September 1980, he presented to the Board certificates from his physicians, dated September 26, 1980; October 15 and 30, 1980; and November 8, 1980. (Exhibits AA, BB, CC and DD).

9. On or about November 17, 1980, a meeting was held among representatives of the Board, petitioner and a field representative of the New Jersey Education Association representing petitioner and petitioner's union, at which time petitioner was advised that he would be placed on an unpaid leave of absence.

10. Petitioner was advised also at this meeting that he would be allowed to return to work on presentation to the Board of a note from his physician advising that he would be able to work without restriction.

11. By action of the Board on December 15, 1980, petitioner was placed on an unpaid leave of absence retroactive to November 21, 1980 (Exhibit EE). At the time petitioner was placed on the unpaid leave of absence, he had exhausted all accumulated sick leave days.

12. Petitioner has not provided the Board with any medical certificates indicating that the restrictions contained in Exhibits AA through DD are no longer applicable.

DISCUSSION

After approximately 20 years' employment with the Board, petitioner came under the care of a physician for various medical problems. He was totally incapacitated for a short period of time in September 1980; nevertheless, his physician determined that petitioner was able to return to "light work duties" on September 29, 1980. His physician's note on October 30, 1980, stated that petitioner must refrain from any heavy lifting, and finally, his physician's additional note on November 8, 1980, limited petitioner's work day and stated that he could "perform light duties only." (Exhibits AA, BB, CC, DD attached to Stipulation of Fact).

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The Board asserts that under the consistent working policy of the custodial and maintenance department, there were no "light duty" assignments available, and since petitioner could not produce any certification from his physicians that he was able to return to work without restriction, and had no further vacation time or sick leave remaining, he was placed on unpaid leave of absence (Stipulation No. 11).

The petitioner seeks reinstatement with full back pay to a position which the Board asserts requires extensive physical labor. This assertion was corroborated by petitioner who also testified that the job ordinarily requires an average of 20 to 22 hours overtime work per week, including weekends, and which also requires him to be on call at all hours of the night and, on occasion, requires him to work 7 days per week. Petitioner seeks return to this position despite his last medical certification that limited him to light duty work and further restricted the overtime hours which his employer could require of him. The Board has taken the position that reinstatement of the petitioner to a position as described by him and under the restrictions imposed upon him by his physician would place the petitioner in physical peril and place him in a job that he is not physically capable of performing, especially in light of petitioner's own testimony as to his duties and the overtime requirements of his job.

It is the Board's position that its action in placing the petitioner on an unpaid medical leave of absence was the only reasonable and responsible action that could be taken by it in light of the restrictions placed upon the petitioner by his physician — that he could perform light duty work only and would not be available for more than 10 hours overtime per week. It is further submitted by the Board that its conclusion was arrived at based upon its review of the reports submitted to the Board by the petitioner's physician, the Board's knowledge of the requirements of the petitioner's job, as well as the petitioner's refusal to authorize the Board to secure copies of his medical records. This refusal of access to petitioner's medical records was set forth by the testimony of the Administrative Assistant for personnel.

Prior to any determination regarding the legality of the Board's action, a finding must be made as to whether or not petitioner has acquired a tenured status. This finding is necessary since different statutes will be applicable if petitioner is a janitor with a tenured status.

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TENURE

Whether or not petitioner has acquired a tenured status depends on the relevant statute and the method of his employment.

N.J.S.A. 18A:17-3, regarding tenure of janitorial employees, reads as follows:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title. . . . (emphasis added.)

The record shows the method of petitioner's employment as follows:

1. February 23, 1959 to June 30, 1959 - substitute custodian. The reference to "permanent" position in the context of this employment clearly means only full-time and not a substitute position (Exhibit A).

2. By letter dated June 30, 1959, the Board established petitioner's employment for the period July 1, 1959 to June 30, 1960 - (Exhibit B).

3. The Board minutes of May 21, 1960 show a motion to "elect" maintenance men as per attached schedule which listed their names and individual salaries. Petitioner accepted this employment and the salary in writing, for the school year (Exhibit C).

4. The Board minutes of April 3, 1961 show only that a motion was made to "adopt salaries" as listed on an attached schedule. Petitioner accepted this employment and salary in writing for the school year (Exhibit D).

5. The Board approved on June 18, 1962, a list of janitors "for the period" July 1, 1962 to June 30, 1963. Petitioner accepted this employment in writing (Exhibit E).

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6. On June 4, 1963, the Board voted to "re-elect" janitors on an attached list which established their salaries for the 1963-64 school year (Exhibit F).

7. On June 29, 1964, the Board voted and "approved for the period September 1, 1964 to June 30, 1965," the list of janitors attached. Petitioner's name is on the list (Exhibit G).

8. For the first time, on June 14, 1965, the Board voted to award the janitors "contracts" for the 1965-66 school year. Petitioner accepted this employment in writing (Exhibit H).

9. The minutes of April 18, 1966, show that the Board "approved" janitors' employment for the 1966-1967 school year. Petitioner accepted this employment for the school year in writing (Exhibit I).

10. On May 16, 1967, a formal contract was issued to petitioner for the school year (Exhibit J). At the May 15, 1967 Board meeting, salary proposals were approved.

11. Formal contracts were thereafter issued for each school year from 1968-69 through 1980-81 (Exhibits K through W).

Any fair evaluation of the above exhibits will lead to the conclusion that petitioner has been employed at all times for a series of one-year fixed terms. Such a conclusion is not only clear from the documents mentioned above, which have been admitted as evidence, but also from the understanding of the parties. It is simply not reasonable to hold that petitioner could have accepted formal contracts for the past thirteen years while believing he held a tenured status. Further, a review of the record shows that his alleged right to tenure was asserted in an Amended Petition of Appeal filed more than eight months after the original Petition was filed. This filing was not considered untimely because tenure status, once attained, is continuous; consequently, the Petition was considered timely.

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Although several Commissioner's decisions were cited by petitioner, the case most similar to the present matter is Frank Giandomenico v. Board of Education of the Twp. of Winslow, 1975 S.L.D. 258. In that case, as here, there were several periods of appointment by Board resolution which were accepted by the petitioner. The Commissioner held in Giandomenico that the petitioner was hired for fixed terms and had not acquired a tenured status.

Based on the janitors' tenure statute, N.J.S.A. 18A:17-3 and the documents in evidence (Exhibits A through W).

I **CONCLUDE** that petitioner has not acquired a tenured status; rather, he has been employed at all times with a series of one-year fixed terms.

Left to be determined is whether the Board's action in placing petitioner on involuntary, unpaid medical leave of absence was within the discretion granted to it by statute and was not arbitrary, capricious or unreasonable.

Having established that the petitioner was not a tenured employee, but an employee hired for fixed terms, the contractual and legal relationships between the petitioner and the Board will now be examined.

Exhibit W, annexed to the Stipulation of Fact, is the last executed contract of employment between the petitioner and the Board. Its third paragraph expressly provides:

> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving 15-days notice, in writing, of such intention.
>
> This contract may also be terminated forthwith by the party of the first part (the Board) in the event of the misconduct, insubordination or unauthorized absence of the party of the second part.

According to the terms of this employment contract, together with N.J.S.A. 18A:11-1, 16-1 and 27-4, the Board has the discretionary authority to terminate the employment of any employee. It is also well established that the Board's discretionary authority is not unlimited and it may not act in ways which are arbitrary, unreasonable,

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capricious or otherwise improper. However, petitioner has not established that the Board's action was contrary to law or improperly motivated. Absent sufficient credible evidence that the Board in any way abused its discretionary authority or acted contrary to statutory or constitutional requirements the Board's actions are entitled to a presumption of correctness.

Schinck v. Board of Education of Westwood Consolidated School District, 60 N.J. Super. 448, 476 (App. Div. 1960) the court held as follows:

> We are mindful of the general principle that on appellate review we should not substitute our judgment for the specialized and expert judgment of the Commissioner and the Board, and also of the local school board, all of whom have been entrusted with the fulfillment of the legislative policy.

The Board, therefore, has the discretionary authority to terminate the employment of petitioner both by statute and by petitioner's personal employment contract; nevertheless, it has taken an action with regard to petitioner's employment status which is less than termination of his employment. In this case, that lesser action was the placement of petitioner on an unpaid leave of absence.

The statutory scheme for leaves of absences as applicable to boards of education employees is found at N.J.S.A. 18A:30-1 et seq. By negotiated agreement with the petitioner's negotiating unit, petitioner was granted 12 days of sick leave per year. N.J.S.A. 18A:30-3 provides for the accumulation of unused sick leave from year to year for use as additional sick leave as needed in subsequent years. N.J.S.A. 18A:30-4 provides that a Board of Education may require a physician's certificate to be filed by an employee in order to obtain sick leave.

In the instant case, the petitioner's record of absences is contained in Exhibit Z, annexed to the Stipulation submitted by the parties. The petitioner testified that in October 1979, he was forced by illness to go on an extended medical leave of absence. These absences were discussed by petitioner at trial. A review of Exhibit Z shows that petitioner exhausted all of his sick leave days for the period July 1, 1980 through June 30, 1981, by October 28, 1980. Additionally, petitioner had utilized all of his vacation days

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and personal days granted to him by contract. Therefore, any additional days required by petitioner for personal illness would have to have been without compensation unless petitioner applied to the Board for extended sick leave, pursuant to the provisions of N.J.S.A. 18A:30-6.

The Commissioner has determined that the denial by a board of education of a request for extended sick leave, pursuant to N.J.S.A. 18A:30-7, is within that board's discretion and said denial may be without reason absent a specific allegation that the denial was based upon proscribed reasons. Under such circumstances, the Commissioner has determined that he would not intervene. Taccone v. Board of Ed. of City of Newark, 1976 S.L.D. 1045.

Regarding the applicable statutes and considering petitioner's medical condition, the record shows that petitioner had medical restrictions placed upon the performance of his duties (Exhibits AA, BB, CC, DD). Petitioner testified about this fact, and one of his supervisors testified that petitioner refused to sign a statement releasing his medical records for examination by the Board's medical inspector. This same witness testified very clearly that petitioner would be permitted to return to work when he was physically capable of returning to full-time employment, without any light duty restriction. Finally, the supervisor testified that it was not only his concern for petitioner's well-being, but also the fact that the Board had no light duty assignments and that this meant that he could not perform the function of a head custodian or janitor.

Based on the foregoing testimony and the documents in evidence, I **FIND** that medical restrictions were placed on petitioner and that he could not perform his duties as he had in the past.

Therefore, I **CONCLUDE** that these medical restrictions by petitioner's physicians, combined with petitioner's refusal to submit his medical records for examination by the Board's medical inspector, show that the petitioner was physically unable to continue in his position. Consequently, his placement on medical leave of absence without pay until such time as he produces a statement from his physician certifying that he is able to return to his regular full time duties was a proper action taken by the Board.

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WORKER'S COMPENSATION

Petitioner raises in his Brief allegations which were not contained in the Petition of Appeal nor tried at the hearing. However, a review of this argument shows that the allegations of violations of the Worker's Compensation Statutes or the Law Against Discrimination are without merit. The record simply does not support petitioner's contentions.

For all of the above reasons, the Petition of Appeal is **DISMISSED** with prejudice.

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 **GUSTAV H. RUH** for consideration.

10 May 82
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

10 May 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

May 13, 1982
DATE

Ronald L. Parker/jar
OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

J-1 through J-5 Overtime Sheets, January 1980

Exhibit A	Letter	February 20, 1959
B	Letter	June 30, 1959
C	Board minutes	May 25, 1960
D	Board minutes	April 3, 1961
E	Board minutes	June 18, 1962
F	Board minutes	June 4, 1963
G	Board minutes	June 29, 1964
H	Board minutes	June 14, 1965
I	Board minutes	April 18, 1966
J	Contract	May 16, 1967
K	Contract	May 21, 1968
L	Contract	May 20, 1969
M	Contract	June 9, 1970
N	Contract	June 22, 1971
O	Contract	April 18, 1972
P	Contract	July 17, 1973
Q	Contract	April 16, 1974
R	Contract	May 21, 1975
S	Contract	June 22, 1976
T	Contract	October 21, 1977
U	Contract	June 20, 1978
V	Contract	March 19, 1980
W	Contract	July 23, 1980
X	Doctor's prescription	December 20, 1979
Y	Doctor's prescription	January 2, 1980
Z	Attendance record	1980-81

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Exhibit AA	Disability certificate	September 26, 1980
BB	Doctor's note	October 15, 1980
CC	Doctor's note	October 30, 1980
DD	Doctor's note	November 8, 1980
EE	Personnel letters	December 16, 1980

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WALTER STILL, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, 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 petitioner in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the determination by the Honorable August Thomas, ALJ that he has not acquired tenure. Petitioner argues that the form letters (Exhibits A through W) submitted to him from 1959 through 1978 were not contracts and relies on Gilliam v. Toms River Regional, 1974 S.L.D. 540, 546. Petitioner contends that the Board acted in an arbitrary, capricious and unreasonable manner when it placed him on an involuntary unpaid medical leave of absence. Petitioner avers that he has been improperly deprived of employment. The Commissioner finds no merit in petitioner's exceptions.

A thorough examination of the record herein, the testimony evoked and the exhibits submitted in evidence convinces the Commissioner that Judge Thomas correctly concluded that petitioner was employed for a series of one-year fixed terms and, as such, had not acquired a tenure status. Giandomenico, supra Further, the Commissioner determines no impropriety on the part of the Board by its placement of petitioner on an unpaid medical leave of absence. Petitioner has exhausted his sick leave days and his inability to perform the regular duty assignment of a janitor stands clearly on the record.

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 24, 1982

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WALTER STILL, JR.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 24, 1982

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

For the Respondent-Respondent, Davis & Reberkenny
(Kenneth D. Roth, Esq., of Counsel)

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

S. David Brandt abstained in the matter.

December 1, 1982

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ERNEST E. GILBERT,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,
Respondent,

OAL DKT. NO. EDU 3463-82
AGENCY DKT. NO. 90-4/82A

and

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,
Petitioner
v.
ERNEST E. GILBERT,
Respondent,

and

OAL DKT. NO. EDU 3480-82
AGENCY DKT. NO. 91-4/82A

APPEARANCES:

Jeffrey M. Hall, Esq. (Katzenbach, Gildea & Rudner, attorneys), for Ernest E. Gilbert

Louis B. Youmans, Esq. (Warren, Goldberg & Berman, attorneys) for the Board of Education of the Township of Willingboro

Record Closed May 4, 1982

Decided May 19, 1982

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BEFORE BEATRICE S. TYLUTKI, ALJ:

The Board of Education of the Township of Willingboro (hereinafter referred to as "Board") filed a petition with the Commissioner of Education (hereinafter referred to as "Commissioner") on April 7, 1982, requesting the Commissioner to hold in escrow a check issued by the Board and payable to Ernest E. Gilbert, pending a determination as to whether there should be a set-off pursuant to the provisions of N.J.S.A. 18A:6-14. The check was submitted to the Commissioner with the petition. On the same day, the Commissioner received a petition filed on behalf of Ernest E. Gilbert requesting the Commissioner to make a determination as to the legality of the Board's withholding of the check and to order the check to be given to Mr. Gilbert.

Both of these matters were referred to the Office of Administrative Law as contested cases on April 8, 1982, pursuant to N.J.S.A. 52:14F-1 et seq. and, as emergent matters, the cases were scheduled for hearing before me on April 9, 1982. After the first day of the hearing, I issued an Order on April 14, 1982, consolidating the two cases. The hearing concluded on April 16, 1982.

By letter dated April 27, 1982, the Board sent me the last salary check to be issued to Mr. Gilbert, pursuant to N.J.S.A. 18A:6-14 and requested that it be made part of this consolidated matter. I received a letter from Mr. Hall on May 6, 1982, indicating his concurrence with this request. I agreed to the request.

I FIND that the following pertinent facts are undisputed:

(1) Mr. Gilbert was employed as a full-time teacher by the Board since January 1973.

(2) Mr. Gilbert's current gross bi-weekly salary is $945.70 (P 5). His daily salary is less than $100.

(3) The Board brought tenure charges against Mr. Gilbert. On April 29, 1980, Mr. Gilbert was suspended without pay.

(4) Mr. Gilbert's salary payments resumed as of September 1980, pursuant to the provisions of N.J.S.A. 18A:6-14.

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(5) Mr. Gilbert's salary payments, pursuant to N.J.S.A. 18A:6-14, were to end on April 5, 1982, the date on which the Commissioner issued the final decision in the tenure matter.

(6) Since 1971, Mr. Gilbert has represented himself to be a consultant (PR 1) and since 1973 he has used the trademark "PRESS" for his consulting work.

(7) As a consultant, Mr. Gilbert has worked in the areas of minority job placement and education, as well as the electroplating process.

(8) In 1971 and in 1978, Mr. Gilbert had discussions with the President of Methode Electronics, Inc. about the possibility of his doing some consulting work for the company's plant in Willingboro, New Jersey.

(9) In late February or early March 1982, Jack Glasser, Vice President of Methode Electronics, Inc., contacted Mr. Gilbert to engage him to do some work at the Willingboro plant. At that time, Mr. Glasser had recently lost a plating supervisor.

(10) Mr. Glasser and Mr. Gilbert entered into an agreement which dealt with Mr. Gilbert's responsibilities (P 1). This contract was prepared and executed in order to explain Mr. Gilbert's position and responsibilities to the corporation officers.

(11) Pursuant to the agreement, Mr. Gilbert submitted three vouchers:

Voucher dated March 20, 1982, for $500 (P 2).

Voucher dated March 28, 1982, for $500 (P 3).

Voucher dated March 31, 1982, for $500 (P 4).

(12) As of April 9, 1982, Mr. Glasser had paid the March 20, 1982 voucher (P 2) and the company will pay the other two vouchers (P 3, P 4).

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(13) Mr. Gilbert worked for Methode Electronics, Inc. from March 15, 1982 through March 24, 1982. Mr. Gilbert submitted vouchers for the period of March 15, 1982 through March 31, 1982. These vouchers are for the period he worked plus compensation pursuant to the reasonable notice provision of the contract (P 1).

(14) In response to an inquiry by the Board, Mr. Gilbert denied that he was employed by Methode Electronics, Inc. The Board also contacted Mr. Glasser.

(15) The Board withheld the March 26, 1982 salary check made out to Mr. Gilbert. This check represents compensation for the second half of March 1982.

(16) The March 26, 1982 check is for $363.38. The stub attached to this check shows a gross salary payment of $945.70. In addition to the standard deductions, there is a deduction of $315.23 which represents an installment payment, pursuant to the recoupment order of the Commissioner, dated January 18, 1982.

(17) The Board withheld the April 20, 1982 salary check made out to Mr. Gilbert. This check represents compensation for the first five days of April 1982.

(18) The April 20, 1982 check is for $170.13. The stub attached to this check shows a gross salary payment of $283.71. In addition to the standard deductions, there is a deduction of $94.57 which represents an installment payment, pursuant to the recoupment order of the Commissioner, dated January 18, 1982.

There is a factual dispute as to Mr. Gilbert's responsibilities, pursuant to his contract with Methode Electronics, Inc. Mr. Glasser testified that Mr. Gilbert's responsibilities included:

(1) Acting as the Plating Supervisor until such time as a new person could be hired.

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(2) Participating in the employee selection procedure for the position of Plating Supervisor.

(3) Reviewing the plating process and making recommendations for improvement.

Mr. Glasser described Mr. Gilbert's principal role as the Plating Supervisor and stated that Mr. Gilbert had to be available during the peak production hours, 7:00 a.m. to 5:00 p.m., five days a week, in order to supervise the plating operation and to give technical advice to the employees. Mr. Gilbert's compensation was $500 a week for five days' service (PR 2).

Mr. Glasser stated that he signed an affidavit presented to him by Mr. Gilbert which denied that Mr. Gilbert was "an employee" of Methode Electronics, Inc. According to Mr. Glasser, Mr. Gilbert was a consultant and not an employee. It was understood that Mr. Gilbert's contract was for an indefinite period of time and would end when a new plating supervisor was hired and after Mr. Gilbert made his recommendations as to improvements in the plating process.

According to Mr. Gilbert, when Mr. Glasser contacted him about engaging his services, Mr. Gilbert initially said that he could not be an employee of the company because he was receiving salary payments from the Board. Mr. Gilbert informed Mr. Glasser that he could be a consultant and they entered into a contract. Mr. Gilbert stated that his primary responsibility was to develop a new plating proeedure, and included writing an operational manual and developing an employee training program for the new procedure (PR 3). Mr. Gilbert denied that he had assumed the regular responsibilities of a plating supervisor and stated that he was serving in an advisory capacity. Mr. Gilbert denied that he had any regular hours or that he was paid on a per diem basis. Mr. Gilbert stated that he received $500 a week and that the number of hours he devoted varied from week to week and day to day.

On cross-examination, Mr. Gilbert admitted that he was required to be on call during the two working shifts, between 7:00 a.m. and 11:00 p.m., five days a week, so that employees could reach him if they had a problem regarding the plating process. On at least two occasions, Mr. Gilbert had to go to the plant early in the morning in order to start the system. Mr. Gilbert was at the plant for several hours each day from March 15, 1982 through March 24, 1982.

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Based on the evidence, I **FIND** that the additional pertinent facts are:

(1) Mr. Glasser contacted Mr. Gilbert in order to engage his services. Since Mr. Gilbert did not want to be classified as an employee, a consultant contract was executed by the parties.

(2) Mr. Gilbert was engaged by Methode Electronics, Inc. primarily to perform the responsibilities of the Plating Supervisor until such time as the company hired a new employee for this position.

(3) In this capacity, Mr. Gilbert had to be either in the plant or available by telephone between the peak hours of 9:00 a.m. and 5:00 p.m., Monday through Friday, so that he could respond to requests for assistance and handle emergency situations regarding the plating process.

(4) In addition, Mr. Gilbert was to assist in the selection of a new plating supervisor and to recommend improvements to the existing plating process.

(5) Mr. Gilbert was paid $100 a day for each day he worked (eight days) and he received an additional five days' compensation, pursuant to the termination clause in the contract (P 1).

Mr. Gilbert's argument that the set-off provision in N.J.S.A. 18A:6-14 is not applicable, since he was a consultant, is without merit. In order to determine whether a position is "substituted employment," it is necessary to look at the job responsibilities and not whether the person is classified as an "employee" or a "consultant."

In this case, Mr. Gilbert agreed to be available to handle problems at the plant from 7:00 a.m. through 5:00 p.m. This responsibility could not have been undertaken by Mr. Gilbert if he had been teaching. Although it is true that in the past Mr. Gilbert had undertaken some consulting work while teaching full time, I must presume that this work was done at a time when it would have been compatible with his responsibilities as a teacher. However, in this case it is clear that Mr. Gilbert's primary responsibility pursuant to his contract would have been incompatible with his responsibilities as a full-time teacher.

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Based on the facts, I **CONCLUDE** that Mr. Gilbert's business relationship with Methode Electronics, Inc. was "substituted employment" as that term is used in N.J.S.A. 18A:6-14 and that the Board is entitled to mitigation. Further, I **CONCLUDE** that the Board is entitled to deduct the salary for eight days from the payment due to Mr. Gilbert. This eight-day period represents the eight days during which he worked for Methode Electronics, Inc. and earned a daily rate higher than his daily rate as a teacher.

The remaining issue is whether the Board could legally withhold Mr. Gilbert's salary payments based on its belief that Mr. Gilbert was engaged in substituted employment. No evidence was introduced to indicate either the basis for the Board's belief that Mr. Gilbert had a business association with Methode Electronics, Inc. or the date on which the Board first became aware of such an arrangement. The verified complaint makes reference to a telephone conversation with Mr. Glasser and Mr. Glasser testified that the Board had contacted him. Mr. Gilbert, on the other hand, denied that he was employed by Methode Electronics, Inc. and apparently did not give any further information to the Board.

Mr. Hall, on behalf of Mr. Gilbert, argued that the Board acted in an illegal, arbitrary and capricious manner when it withheld Mr. Gilbert's salary check and that Mr. Gilbert was denied his property right without due process of law. Mr. Hall stated that the Board should have initiated the matter sooner and that Mr. Gilbert was entitled to a hearing prior to any set-off or withholding of his salary check.

Mr. Youmans, on behalf of the Board, argued that the Board had reason to believe that Mr. Gilbert had been engaged by the Methode Electronics, Inc. and that a set-off was appropriate pursuant to N.J.S.A. 18A:6-14. The Board was unable to settle the matter administratively since Mr. Gilbert was uncooperative, refused to give any information to the Board and vigorously objected to any set-off. Since the matter could not be settled, the Board filed the petition and asked that the check be held in escrow pending a determination.

Pursuant to the provisions of N.J.S.A. 18A:6-14, Mr. Gilbert was entitled to receive salary payment from the Board during the pendency of the tenure hearing, starting with the 121st day and ending on the day on which the Commissioner rendered a final decision on the tenure charges (April 5, 1982). However, Mr. Gilbert's statutory right to such salary payments, is not unconditional. By the same statute, the Board is entitled to a set-off for any substituted employment undertaken by Mr. Gilbert.

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As the parties know, I was the administrative law judge who heard the tenure case against Mr. Gilbert. While that matter was before me, I issued a recoupment order on December 1, 1981 (affirmed by Commissioner on January 18, 1982) which related to Mr. Gilbert and a different position. During the oral presentation relating to December 1, 1981 Order, I admonished Mr. Gilbert, through his attorney of record, that in the future he should inform the Board if he undertook any new employment during the pendency of the tenure matter. In this case, it is clear that Mr. Gilbert attempted to avoid a set-off by using the subterfuge of a consultant label.

Under the circumstances presented in this matter, I **CONCLUDE** that the Board acted in a reasonable manner and that it was entitled to withhold the salary payments to Mr. Gilbert pending a determination regarding mitigation.

Finally, I **ORDER** that the March 26, 1982 check shall be returned to the Board and that a new check shall be issued to Mr. Gilbert for an amount consistent with the conclusions in this Initial Decision, and that the April 20, 1982 check shall be paid to Mr. Gilbert. The disbursement of these checks shall be made by the Commissioner consistent with his final determination in this matter.

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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. NOS. EDU 3463-82 & EDU 3480-82

I hereby **FILE** my Initial Decision with **GUSTAV H. RUH** for consideration.

May 19, 1982
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

May 19, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

May 21, 1982
DATE

Ronald L. Parker/jsh
OFFICE OF ADMINISTRATIVE LAW

fms

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APPENDIX

EXHIBITS ADMITTED INTO EVIDENCE:

FOR THE BOARD:

P 1 Agreement between Ernest E. Gilbert and Jack Glasser.

P 2 Invoice to Methode Electronics, Inc., dated March 20, 1982.

P 3 Invoice to Methode Electronics, Inc., dated March 28, 1982.

P 4 Invoice to Methode Electronics, Inc., dated March 31, 1982.

P 5 Affidavit of Ernest E. Gilbert, dated November 1981.

FOR MR. GILBERT:

PR 1 Stationary and business card of Ernest E. Gilbert.

PR 2 Purchase Order of Methode Electronics, Inc.

PR 3 Cover sheet for the manual and training program prepared by Ernest E. Gilbert.

WITNESSES:

For the Board:

Jack Glasser

For Mr. Gilbert:

Ernest E. Gilbert

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ERNEST E. GILBERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, 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.

In Gilbert's primary exceptions to the initial decision by the Honorable Beatrice S. Tylutki, ALJ, contention is made that none of the remuneration received by Gilbert from Methode Electronics was subject to the set-off pursuant to N.J.S.A. 18A:6-14. Gilbert argues that this is so because he was retained by Methode as a consultant and not as an employee. The Commissioner cannot agree with such argument finding that it clearly places "form over substance." Union Beach Board v. NJEA et al., 53 N.J. 29, 39 Gilbert's responsibilities to Methode Electronics Inc. clearly constituted substitute employment and his salary pursuant to the provisions of N.J.S.A. 18A:6-14 was subject to mitigation. The Commissioner so holds.

The Commissioner finds no merit in the primary exceptions of the Board that its entitlement to mitigation is in excess of the eight day period of Gilbert's association with Methode Electronics.

The Board's reply exceptions refute those of Gilbert and generally affirm the determination of its entitlement to mitigation. The Commissioner agrees with the affirmation of the Board therein.

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

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Accordingly, the March 26, 1982 check is hereby returned to the Board for adjustment as specified herein. The April 20, 1982 check shall be included in the mailing of this decision to Gilbert.

It is so ordered.

COMMISSIONER OF EDUCATION

July 6, 1982

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ERNEST E. GILBERT,	:	
PETITIONER-CROSS-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, July 6, 1982

For the Petitioner-Cross-Appellant, Katzenbach, Gildea & Rudner (Jeffrey M. Hall, Esq., of Counsel)

For the Respondent-Appellant, Warren, Goldberg & Berman (Barbara Williams, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed with the modification that the total amount of monies earned by Petitioner from Methode Electronics be corrected to that of $1,300.00 as evidenced by exhibits P-2, P-3 and P-4.

November 3, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUBSTANTIVE ORDER
PRESERVING STATUS QUO
OAL DKT. NO. EDU 1943-82
AGENCY DKT. NO. 26-1/82A

BOARD OF EDUCATION OF
BOROUGH OF DUNELLEN,
Petitioner
v.
BARRY HAMLIN,
Respondent.

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter was opened to the Office of Administrative Law by Rubin, Lerner & Rubin, attorneys for petitioner (David B. Rubin, Esq., appearing) on petitioner's motion for an order striking respondent's Fourth Separate Defense and by Klausner & Hunter, attorneys for respondent (Stephen E. Klausner, Esq., appearing) on respondent's cross-motion for an order dismissing the Tenure Charges filed against him by petitioner. Oral argument was scheduled on both motions for 1:30 p.m. on May 19, 1982. At that time, both counsel indicated, by telephone conference call, that they wished to rely on the papers which had been previously filed.

The issue addressed by both motions is whether the tenure charges herein must be dismissed for failure of petitioner to wait 15 days after service of the charges on respondent before certifying those charges to the Commissioner of Education.

The relevant facts are not in dispute. On the morning of January 13, 1982, respondent was personally served with a notice entitled "Receipt For Mail" which stated:

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I, Barry Hamlin, have received from Board Secretary Dr. Murray S. Peyton on January 13, 1982 at 7:53 A.M., the following information:

1. Affidavit filed by Superintendent of Schools Dr. Gerald A. Stefanski with Board Secretary Dr. Murray S. Peyton on January 12, 1982 regarding Certification of Charges for Conduct Unbecoming a Teacher and Just Cause for Dismissal.

2. Statement of Evidence in Support of Charge Against Barry Hamlin filed by Superintendent of Schools Dr. Gerald A. Stefanski with Board Secretary Dr. Murray S. Peyton on January 12, 1982.

3. Notice of Board of Education Special Meeting of January 20, 1982.

and with the documents referred to therein. Respondent accepted the documents and signed the receipt. The notice of the Board of Education Special Meeting on January 20, 1982, advised respondent:

> In consideration of recent decisions on the interpretation of the intent of the Open Public Meetings Act as well as of the due process rights of employees, the Board attorney has advised that you be notified that it is anticipated that the following personnel matter will be on the agenda of the Special Board of Education meeting for review and disposition on January 20, 1982:
>
> Agenda Item: Private Session:
>
> 1. Board of Education Policy no. 902 - Public Complaint, Sub-section A. Matters Regarding A Teaching Staff Member: High School Health/Physical Education Teacher.
>
> Should you wish further discussion-clarification of this matter, please contact me at your convenience.

Respondent filed no written statement of position or of evidence under oath with petitioner prior to the meeting. At the meeting on January 20, 1982, petitioner certified the charges against respondent and suspended him without pay. He was notified of the petitioner's actions by telephone that evening and by confirming letter, dated January 21, 1982. The certified charges were forwarded to the Commissioner and served upon respondent by letters dated January 26, 1982. An Answer and Separate Defenses was filed on behalf of respondent with the Commissioner by letter dated February 25, 1981. The Commissioner thereafter 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.

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Petitioner notes in its moving papers that the provisions of N.J.S.A. 18A:-6.11* provide no specific time period after service upon an employee for response to the charges prior to a board's consideration of the matter. Petitioner acknowledges, however, that the Commissioner, in In the matter of the Tenure Hearing of Marilyn Feitel, 1977 S.L.D. 451 provided for a 15-day period after service of the charges for an employee to submit the "written statement of position and a written statement of evidence under oath" referred to in the statute, but asserts that the petitioner's failure to wait 15 days after serving respondent and before considering the charges for certification is not a jurisdictional defect. In support of this assertion petitioner argues that if there were any defect, it was cured when, by letter, dated March 11, 1982, petitioner offered respondent an additional ten days to file such a written response which the board would then consider with the charges de novo. If the requisite probable cause were found, charges would be certified to the Commissioner as a new proceeding.

Petitioner, citing Bally Mfg. Corp. v. N. J. Casino Control Commission 85 N.J. 325, 337-341 (1981) (Handler, J., conc.), also argues that the "fifteen-day rule" of Feitel is invalid because such attempted rulemaking violates the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

---

* Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the Commissioner for a hearing, pursuant to N.J.S.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.

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Respondent asserts that he was never advised by petitioner that he had a right to respond to the charges at any time and that petitioner's failure to give him 15 days to respond prior to certification mandates dismissal of the present matter and immediate reinstatement and reimbursement for all salary and benefits lost. In support of his contentions he cites: Tenure Hearing of Feitel, 1977 S.L.D. 451, aff'd State Board 1977 S.L.D. 458; Tenure Hearing of Levitt, 1977 S.L.D. 976, aff'd State Board 1978 S.L.D. 1027, aff'd App. Div. 1979 S.L.D. 849 (4/9/79); Tenure Hearing of Levine, 1977 S.L.D. 1129 aff'd State Board 1978 S.L.D. 1026, aff'd App. Div. 1979 S.L.D. 846 (Docket No. A-2689-77, 2-5-79); and Tenure Hearing of Kagdis, 1980 S.L.D. _____ (decided 7-30-80). Respondent concludes that N.J.S.A. 18A:6-11 is jurisdictional and that there can be no substantial compliance with a jurisdictional prerequisite; he dismisses petitioner's argument that the "Rule of Feitel" is invalid with a notation that Mr. Justice Handler's concurring opinion in the Bally case is merely the view of one justice which has no separate precedential value. Respondent further states that petitioner's argument "ignores the doctrine of stare decisis of each decision cited above. The Appellate Division has, at least twice, approved the Feitel procedure. See, Levitt and Levine, supra, See, respondent's "Cross-Notice for Dismissal," pg. 5.

Having considered petitioner's moving papers, respondent's moving papers, including respondent's affidavit, the relevant statutes, and the case law, I CONCLUDE that petitioner's failure to follow the 15-day procedure outlined in Feitel does not constitute a procedural defect factual to jurisdiction or otherwise require dismissal of the proceedings in this case.

The provisions of N.J.S.A. 18A:6-11 set forth the mandatory procedure for filing of tenure charges. As respondent notes, compliance with the provisions of this statute is a jurisdictional prerequisite to the Commissioner's consideration of the charges on the merits; however, the petitioner herein has complied with the requirements of the statute. The charges were filed with the board secretary in writing and a written statement of evidence was presented to the board. On January 13, 1982, the board provided respondent with a copy of the charge and a copy of the statement of evidence. The board also provided respondent at that time with written notice that the charges would be on the agenda of the special meeting on January 20, 1982, "for review and disposition." Respondent was thereby provided with an opportunity, which is all the

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statute requires, to submit a written statement of position and written statement of evidence under oath with respect thereto. The statute does not require petitioner to provide respondent with notice of his legal rights under the statute; it requires only that petitioner provide an opportunity for a response. Seven days elapsed between service of the charges and the board's vote thereon. Respondent knew when the board was scheduled to consider the charges; if he had wished to submit a response, he certainly could have done so within that week, or he could have asked for an extension of time within which to respond as the employee did in Feitel. Respondent is presumed to know his legal rights; in fact, he does not deny that he knew he had a right to respond. He simply states that petitioner did not so advise him. The logical conclusion to draw from the facts in this matter is that respondent chose not to exercise his right to respond under N.J.S.A. 18A:6-11. Petitioner did not violate respondent's rights under the statute.

The decision in Feitel does purport to impose additional responsibilities upon the board. In addition to the statutory requirements, Feitel requires:

> The board, through its board secretary, shall, within seventy-two hours cause a copy of the charge and the written statement of evidence to be served upon the affected employee, either personally or by registered or certified mail to the employee's last known address. The employee shall also be notified of the opportunity to respond in writing to the charge and to file a statement of evidence, executed under oath, with the board. Fifteen days shall be allowed, from the date of service of the charge, for the employee to file a statement with any supporting evidence. 1977 S.L.D. at 455.

N.J.S.A. 52:14B-2(e) defines an administrative rule as:

> each agency statement of general applicability and continuing effect that implements or interprets law or policy or describes the organization, procedure or practice requirement of any agency.

The foregoing directions as set forth in Feitel are most certainly intended to be of general applicability and continuing effect, and by the Commissioner's own designation are intended as interpretation of N.J.S.A. 18A:6-11. Where an agency is concerned with "broad policy issues" affecting an entire field or industry, and the proposed final agency action is intended to be applied prospectively, "in futuro,"

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compliance with the rule making procedures of N.J.S.A. 52:14B-4(a) is required. N.J.A.C. 1:1-1.6(a)(3) -1.6(a)(7); Bally Mfg. Corp. v. Casino Control Comm'n, supra at 340 (Handler, J., conc). See also, Iuppo v. Burke, 162 N.J. Super. 538, 547-552 (App. Div. 1978).

The above quoted portion of Feitel was obviously intended to have universal applicability to all local boards filing tenure charges under the statute. The pronouncements of Feitel cannot logically be described as other than rulemaking, and, indeed, respondent makes no attempt to characterize them otherwise. The Appellate Division decisions affirming the State Board in Levitt and Levine, supra, cannot be read to compel compliance with a rule which has not been properly promulgated; the holdings of those decisions do not even deal specifically with the 15-day provision which is at issue here, in any event. The procedures which were implicity approved there related only to the tolling of the 45-day time limit of N.J.S.A. 18A:6-13.* These cases hold that the 45 days begins to run with the filing of the employer's response or the expiration of the time for response. Levine, supra, at 1133, does mention allowing 15 days for an answer to be filed, but only in connection with determining the last possible day on which the board could have certified charges.

The nonstatutory time limits and procedures described in Feitel are undoubtedly reasonable and should be considered by local boards as directory; until such time as they are properly promulgated as rules, however, they cannot provide a basis for dismissing a case on jurisdicational grounds. In the present matter respondent was permitted a reasonable length of time to reply to the charges before the board meeting (seven days). He could have asked for more time if he needed it to prepare his reply; he did not choose to do so. Under the circumstances the procedure utilized by the petitioner comported not only with the statutory mandate, but also with the principles of due process and fundamental fairness.

For all of the foregoing reasons, it is on this 26th day of May, 1982 **ORDERED** that petitioner's motion to strike respondent's Fourth Separate Defense is hereby granted and respondent's motion to dismiss the tenure charges filed against him is hereby **DENIED.**

---

* N.J.S.A. 18A:6-13 provides: If the board does not make such a determination within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon.

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It is further **ORDERED** that this order preserving the status quo is entered pursuant to N.J.A.C. 1:1-9.7(b) and is effective immediately. If by June 7, 1982, the Commissioner determines not to review this order or fails to indicate whether he wishes to review this order, this order shall become the final order of the Commissioner on June 8, 1982.

If the Commissioner determines by June 7, 1982, to review this order, the Commissioner may affirm, reject, or modify this order within forty-five days from the entry of this order unless this time period is extended in accordance with N.J.A.C. 1:1-9.7(c).

If the Commissioner does not affirm, reject, or modify this order within forty-five days from its entry, and unless this time period has been extended, this order shall become the final order of the Commissioner on July 12, 1982 in accordance with N.J.S.A. 52:14B-10.

I hereby file this Order with the Commissioner for consideration.

May 26, 1982
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

ij

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IN THE MATTER OF THE TENURE	:	
HEARING OF BARRY HAMLIN,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF DUNELLEN,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

The Commissioner of Education has determined to review the Substantive Order Preserving the Status Quo issued by the Office of Administrative Law, M. Kathleen Duncan, ALJ, under date of May 26, 1982. The authority invoked by the Commissioner to render his determination upon review of such matters is in accordance with the applicable provisions of N.J.A.C. 1:1-9.7(c). The Commissioner observes that counsel for the parties have filed letter memoranda in support of their respective legal positions pertaining to Judge Duncan's Order.

Succinctly stated, Judge Duncan's Substantive Order denies respondent's Motion to Dismiss the tenure charges against him, said Motion being grounded upon the Board's failure to provide him at least 15 days to submit to the Board a written statement of position and a written statement of evidence under oath in response to the tenure charges.

In denying respondent's Cross-Motion, Judge Duncan thereby granted the Board's Motion to Strike his Fourth Separate Defense in his Answer which stated that its action was violative of the applicable provisions of N.J.S.A. 18A:6-11 as amended, as well as decisional case law. The case law upon which the Motions of the parties are grounded has been recited in the Substantive Order and is incorporated by reference herein.

The Commissioner takes particular notice of the following legal conclusions reached, ante, by the ALJ in determining the applicability of the provisions of N.J.S.A. 18A:6-11 and relevant case law:

> "***The provisions of N.J.S.A. 18A:6-11 set forth the mandatory procedure for filing of tenure charges. *** The statute does not require petitioner to provide respondent with notice of his legal rights under the statute; it requires only that petitioner provide an opportunity for a response. Seven days elapsed between service of the charges and the board's vote thereon. Respondent knew when the board was scheduled to consider the charges; if he had wished to submit a

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response, he certainly could have done so within that week, or he could have asked for an extension of time within which to respond as the employee did in Feitel. *** The logical conclusion to draw from the facts in this matter is that respondent chose not to exercise his right to respond under N.J.S.A. 18A:6-11. Petitioner did not violate respondent's rights under the statute.

"***Where an agency is concerned with 'broad policy issues' affecting an entire field or industry, and the proposed final agency action is intended to be applied prospectively, 'in futuro,' compliance with the rule making procedures of N.J.S.A. 52:14B-4(a) is required. N.J.A.C. 1:1-1.6(a)(3) - 1.6(a)(7); Bally Mfg. Corp. v. Casino Control Comm'n, supra at 340 (Handler, J., conc). See also, Iuppo v. Burke, 162 N.J. Super. 538, 547-552 (App. Div. 1978).

"***The pronouncements of Feitel cannot logically be described as other than rule-making, and, indeed, respondent makes no attempt to characterize them otherwise. The Appellate Division decisions affirming the State Board in Levitt and Levine, supra, cannot be read to compel compliance with a rule which has not been properly promulgated; the holdings of those decisions do not even deal specifically with the 15-day provision which is at issue here, in any event. *** Levine, supra, at 1133, does mention allowing 15 days for an answer to be filed, but only in connection with determining the last possible day on which the board could have certified charges.

"The nonstatutory time limits and procedures described in Feitel are undoubtedly reasonable and should be considered by local boards as directory; until such time as they are properly promulgated as rules, however, they cannot provide a basis for dismissing a case on jurisdicational [sic] grounds. *** Under the circumstances the procedure utilized by the petitioner comported not only with the statutory mandate, but also with the principles of due process and fundamental fairness.***" (at pp. 4-6, ante)

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The Board, in its supplemental letter memorandum, concurs with the ALJ's conclusions and determination and urges the Commissioner to adopt Judge Duncan's Order as his own so that its tenure charges against respondent may proceed to a plenary hearing on their merits.

Respondent, on the other hand, rejects the legal conclusions and determination set forth in Judge Duncan's Substantive Order. Respondent argues that the ALJ erred in construing the statutory and regulatory provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-4(a), N.J.A.C. 1:1-1.6(a)(3)-1.6(a)(7), as well as decisional case law, Bally Mfg. Corp. v. Casino Control Commission, 85 N.J. 325 (1981) and Iuppo v. Burke, 162 N.J. Super. 538 (App. Div. 1978) to conclude that the "15 day rule" enunciated by the Commissioner in Feitel, 1977 S.L.D. 451, aff'd State Board 458 is nonbinding upon the Board. Moreover, respondent argues that the ALJ ignored the pertinent language of the New Jersey Supreme Court in Texter v. Human Services Dep't, 88 N.J. 376 (1982) which discusses at great length an agency's adjudicatory and rulemaking authority. The Commissioner observes that respondent has quoted extensively the pertinent language in Texter in his supplemental memorandum (at pp. 1-3).

The Commissioner incorporates by reference the quoted material in Texter, supra, relied upon by respondent in his memorandum but especially notes the emphasized portion which appears below:

> "***'Administrative agencies possess the ability to be flexible and responsive to changing conditions. (cite). This flexibility includes the ability to select those procedures most appropriate to enable the agency to implement legislative policy. See N.J.S.A. 52:14F-7(a) (Supp. 1981). Therefore, agencies sometimes develop hybrid proceedings possessing characteristics of both adjudication and rulemaking. (cite). N.J.A.C. 1:1-1.6(a)3. In fact, courts and commentators have encouraged hybrid agency proceedings as a way of producing more reasoned agency decisions, especially in complex and controversial policy areas. (cites).
>
> "'The choice of proceedings, however, rests within the discretion of the agency. Courts normally defer to that choice so long as the selection is responsive to the purpose and function of the agency. (cite).' (emphasis added). [Texter at pp. 385-386]***"

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The Commissioner observes that the New Jersey Supreme Court has recently addressed agency adjudicatory and rulemaking authority In the Matter of the Appeal of Certain Sections of the Uniform Administrative Procedural Rules, Docket No. A-51, decided June 29, 1982. The opinion of the Court, delivered by the Honorable Justice J. Handler, reads in pertinent part:

> "*** Administrative agencies are empowered to effectuate their regulatory responsibilities through either rulemaking or adjudication. See Texter v. Department of Human Services, 88 N.J. 376, 383-85 (1982); Bally Mfg. Corp. v. N.J. Casino Control Comm'n, 85 N.J. 325, 335-41 (1981) (Handler, J., concurring).*** Administrative agencies necessarily possess great flexibility and discretion in selecting the form of proceeding best suited to achieving their regulatory aims. Texter, 88 N.J. at 383; Bally, 85 N.J. at 338-39. As the Supreme Court has explained:
>
> > 'The function of filling in the interstices of [an enabling act] should be performed, as much as possible, through th[e] quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. *** Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order.' (Cite).***"
>
> (Slip Opinion, at pp. 8-9)

The Court commented further stating that:

> "*** Thus, 'the adjudicative functions of administrative agencies are actually an

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> aspect of their regulatory powers and, in essence, do not embrace or constitute an exercise of judicial authority.' Hackensack v. Winner, 82 N.J. at 29. See Horn, 85 N.J. at 655-57; Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 109 (App. Div. 1975).
>
> "*** In the context of public administration, adjudication is regulation. In effect, an agency engages in ad hoc rulemaking everytime it decides a contested case. The agency can use the adjudicative process to set certain policies, to define the contours of its regulatory jurisdiction, to give specific content to general regulations, and to handle specialized problems that arise. Thus, the agency's decisional authority over contested cases is directly and integrally related to its regulatory function.
>
> "***Administrative agencies cannot be expected to cover the course of administrative regulation on one leg. They need both their rulemaking and adjudicatory powers to perform their duties properly.***"
>
> (Id., at pp. 11-13)

The Commissioner has thoroughly reviewed the entire record of this matter including the Substantive Order, the supplemental memoranda filed by the respective parties and the applicable decisional case law. In the Commissioner's judgment the principles essential to the effective administration of the procedural provisions of N.J.S.A. 18A:6-11 as amended are susceptible to agency adjudication, rather than rulemaking, in accomplishing regulatory aims, as extensively addressed by the court in Texter, supra, and In the Matter of the Appeal of Certain Sections of the Uniform Procedural Rules, supra.

The Commissioner views the procedural issues raised in Feitel, supra, as well as those addressed in subsequent tenure cases, as being stare decisis insofar as they constitute an appropriate exercise of his adjudicatory authority as agency head to interpret the inherent principles necessary to achieve those regulatory aims in compliance with the provisions of N.J.S.A. 18A:6-11 as amended and N.J.A.C. 6:24-5.1 et seq. See also Levitt, supra; Levine, supra; Kagdis, supra.

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In arriving at the above finding and determination the Commissioner hereby reverses Judge Duncan's Substantive Order to Preserve the Status Quo of these proceedings. Accordingly, respondent's Motion to Dismiss is granted and the Board's Motion is denied. The Commissioner's determination in dismissing these tenure proceedings is without prejudice to any future Board action.

COMMISSIONER OF EDUCATION

7/12/82

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

~~INITIAL DECISION~~
OAL DKT. NO. EDU 6676-80
AGENCY DKT. NO. 460-9/80A

FAIR LAWN EDUCATION ASSOCIATION,
ELLEN LEVY, ELAINE PAVON, PHYLLIS STOLAR,
ARLENE ALBALAH, ESTATE OF PATRICIA SMOTZER,
KATHERINE SOLOMON, ELEANOR JASNOW,
Petitioners
v.
FAIR LAWN BOARD OF EDUCATION,
Respondent

APPEARANCES:

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

Reginald F. Hopkinson, Esq.,
for respondent
(Jeffer, Hopkinson & Vogel, attorneys)

Record Closed April 6, 1982 Decided May 19, 1982

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

This is a teacher tenure controversy resulting from a petition filed by the Fair Lawn Education Association (hereinafter FLEA), and certain individual teachers asking that they be declared to have been employed in tenurable positions while with the Fair Lawn Board of Education (hereinafter Fair Lawn or Board), and that they receive all the

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emoluments attached to said status. The petition was filed pursuant to N.J.S.A. 18A:6-9, which vests the Commissioner of Education with jurisdiction to hear and determine all controversies and disputes arising under the school laws. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

PROCEDURAL HISTORY

On July 2, 1980 the instant petitioners, as well as certain others, filed a verified petition with the Commissioner of Education asking that he issue an order directing the respondent, the Board of Education, to compensate them on a basis equal to that of other regular teachers with similar qualifications and experience, to grant an award of back pay, to grant petitioners appropriate sick leave time, to award compensation for days for which petitioners were out but did not receive pay, to require respondent to provide medical insurance benefits for petitioners, to find petitioners to have been engaged in tenurable employment and to determine that those teachers who have fulfilled the requirements of tenure have achieved such status, to direct the respondent to cease and desist from such discriminatory treatment of Title I, supplemental and State Compensatory Education (S.C.E.) teachers and to require the Board to notify the Board of Trustees of the Teachers' Pension and Annuity Fund of the employment status of said petitioners and to contribute to the fund for petitioners and to require retroactive payment of contributions to the fund. The Board, in turn, denied the allegations of the petition, and argued that FLEA only represented Title I and supplemental teachers while the S.C.E. teachers had elected not to be represented by them. The Board urged the petition be dismissed because petitioners cannot be equated to regular teaching staff members and, in any event, the doctrines of estoppel, waiver and laches were applicable since petitioners knowingly accepted their status as temporary employees.

On December 22, 1980 the first of two prehearing conferences was held. At that time it was determined that the following legal issues had to be resolved.

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1. Whether or not the named petitioners are to be considered regular teaching members of the teaching staff within the meaning of Title 18A?

2. Affirmative defenses - waiver, estoppel, laches.

After the prehearing conference it became apparent that some of the named petitioners had requested that their names be removed from the list of petitioners. All requests by any petitioner to be deleted as a party were granted. The court ordered that the parties in interest were to be limited to the instant petitioners.

Respondent filed a motion for summary judgment to which petitioners demurred. Respondent's motion for summary judgment was denied by this judge on September 11, 1981 and it was ordered that a full evidentiary hearing be held in this case. The decision denying the motion for summary judgment is attached to this Initial Decision and incorporated herein as if set forth at length.

A second prehearing conference took place on November 6, 1981. The parties agreed that the nature of the proceeding revolved around a petition by certain Title I, S.C.E. and supplemental education teachers asking for benefits which now accrue to regular contract teachers. The parties further agreed that the legal issues included the following:

1. Whether or not the named petitioners are to be considered regular teaching members of the teaching staff within the meaning of Title 18A? Included in that broad general topic are such issues as the nature and character of the employment of the petitioners, whether or not the programs are well established and integrated with the school's regular instructional programs, whether or not their services are required indefinitely in the future, the source of the funding, and other matters.

2. Affirmative defenses of waiver, estoppel and laches, and failure to comply with the 90-day rule set forth in N.J.A.C. 6:24-1.2.

3. Failure to comply with the general statute of limitations as to a contract action.

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The specific petitioners in this case are FLEA and Eleanor Jasnow, Phyllis Stolar, Estate of Patricia Smotzer, Elaine Pavon, Katherine Solomon, Arlene Albalah, and Ellen Levy.

The hearing in this matter was held on February 22 and 23, 1982 at the Fair Lawn Municipal Building, Fair Lawn, New Jersey. Briefs and responses were timely filed and the record closed on April 6, 1982.

STIPULATIONS OF FACT AND EVIDENCE

Counsel entered into detailed and pertinent stipulations of fact in regard to the employment history of petitioners, which is not in controversy. See C-1. Any portions that were disputed in the stipulation were color-coded. Immediately prior to testimony being taken, the court reviewed each disputed fact with counsel and all disputed facts were stipulated except those which the court has marked in black ink. The stipulation is incorporated herein as if set forth at length.

Counsel also stipulated to the entry of the following documents into evidence.

J-1	Job Description - Title I teacher
J-2	Job Description - Supplementary Teacher
J-3	Job Description - Compensatory Education Teacher
J-4	Duties of Arithmetic Elementary Compensatory Education Teacher
J-5	Duties of Mathematics High School Compensatory Education Teacher
J-6	Duties of Compensatory Education Teacher - Communication Skills
J-7	Annual Improvement Program Budget
J-8	Letter, dated June 13, 1977 (sample - identical letter sent to all petitioners)
J-9	Employment notification form

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J-10	Letter, dated June 18, 1980 (sample - identical letter sent to all petitioners)
J-11	Letter (undated) - notice of employment for 1980-81 school year (sent to all petitioners)
J-12	Letter, dated June 24, 1980
J-13	Letter, dated July 10, 1980
J-14	Letter, dated July 10, 1980
J-15	Memo (undated) to parents
J-16	Minutes of June 26, 1980 special meeting approving employment of petitioners (sample -similar resolution occurs in each year of employment)
J-17	Arlene Albalah application
J-18	Eleanor Jasnow application
J-19	Elaine Pavon application
J-20	Patricia Smotzer application
J-21	Katherine Solomon application
J-22	Phyllis Stolar application
J-23	Title I funding application (sample - similar application made in each year)

In addition the following items were introduced into evidence or marked for identification on behalf of respondents.

R-1	For identification - Interrogatories served by Board of Education
R-2	For identification - Ms. Jasnow's notes, re 1969 employment requests
R-3	In evidence - Sample resolution 1980
R-4	In evidence - Sample Board resolution 1972
R-5	In evidence - response form in regard to areas of teaching

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Petitioner marked, for identification only, one page of the minutes of the Board meeting of June 26, 1980.

TESTIMONY

It should be noted that immediately prior to testimony petitioners' counsel moved to limit the issues concerning Ellen Levy, Eleanor Jasnow and the Estate of Patricia Smotzer to retroactive compensation only, since not one is still teaching in the district and therefore is not looking to get tenure. Respondent objected, arguing that the petition only goes to tenure. The motion was granted by the court, and respondent's motion to dismiss all compensation claims because of a lack of delineation of relief sought was denied.

Petitioners Levy, Albalah, Solomon, Jasnow, Pavon and Stolar testified on their own behalf in regard to the factual issues which remained in controversy; the terms under which they accepted employment. Ms. Levy worked three and one-half to four hours a day, five days a week, in a remedial math program as an S.C.E. instructor. The students regularly met with her during their school math period. She taught for a little over two years and was never paid for sick days, holidays or when school was closed. She is not claiming the right to be employed now by the Fair Lawn Board of Education but desires an ~~unspecified amount of back pay. Ms. Levy has not attempted~~ to return to teaching, and while in Fair Lawn's employ, she never spoke to the superintendent of schools or anyone else in the administration about her demands for back pay. She did discuss S.C.E. matters with Mr. Bryant, the supervisor of compensatory education, and did apply for a regular teaching job, for which she was not hired. She had a clear understanding when she was hired that she would not receive pension benefits, sick benefits, insurance benefits or any other fringe benefits which regular teachers receive.

At the conclusion of Ms. Levy's testimony respondent moved to dismiss her claims since she had not worked in excess of three years. Petitioner's counsel responded that she is only seeking a determination that she was engaged in tenurable employment at the time she worked. The court denied the motion to dismiss.

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Arlene Albalah, an S.C.E. teacher, corroborated the testimony of Ms. Levy. She is certified to teach elementary education and special education at the high school and elementary levels and is also certified to teach nursery school, although she did not need the second and third certificates to teach compensatory education. Despite the fact that she applied for a regular position and was not hired, she continued working in Fair Lawn as a compensatory education teacher. Ms. Albalah never stated she did not want to work as a compensatory education teacher. She did state that she discussed regular payments and being on the salary guide at meetings with Mr. Bryant. Ms. Albalah testified that the compensatory education teachers voted not to have the Fair Lawn Education Association represent them in bargaining, although the supplemental education teachers did vote to have the Fair Lawn Education Association bargain for hourly wages on behalf of the supplemental education teachers. (It was conceded for purposes of this litigation that FLEA represents the compensatory education teachers.) She has taught only math, working approximately three and one-half hours a day, and was free to leave school immediately after finishing her teaching duties.

The only Title I teacher involved in the instant matter is Katherine Solomon. She worked with small groups of children who fell below the 50 percentile level on the basic skills tests, giving remediation in reading. She taught two to four students at a time, and no more than 15 to 25 throughout the year. Ms. Solomon testified she planned her instruction ahead of time, prepared individual work sheets and folders for each child, evaluated their work, and made progress reports two to four times a year. She was never paid for the time she was absent or sick, etc., and was never on a salary guide. Because she was a contract tenured teacher between 1954 and 1961, Ms. Solomon understood the regular hours and benefits that accrued to regular teachers and understood that Title I teachers' remuneration and benefits were different. Ms. Solomon reapplied for a regular elementary position, but was not chosen. She elected to continue as a Title I teacher, working 10 to 25 hours a week, about four hours a day. She understood that her continued Title I employment was contingent on federal funds. Ms. Solomon never wrote to the Board or to the superintendent in regard to being paid on a salary basis, although she was a member of the negotiating committee which negotiated with the Board for an increase in hourly salaries. This was in the spring of 1979, when the Title I

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teachers in Fair Lawn voted to have FLEA represent them and FLEA negotiated an increase in their hourly rate of pay.

Eleanor Jasnow, Elaine Pavon and Phyllis Stolar are all supplementary teachers. Each works with "learning disabled" children in order that they can cope more efficiently in the classroom. They work on a one-to-one basis and have five to eight or ten students assigned to them in a given year. They keep an anecdotal record on a daily basis and prepare lesson plans for each child. They also meet with classroom teachers about individual children. They were never paid for absences or holidays and received hourly wages.

Ms. Jasnow resigned at the end of the 1980-81 school year. She says that in 1969 she voiced a request for sick leave and other benefits, and always urged the Board to increase the hourly salaries. In 1979 the supplemental teachers voted to have FLEA represent them as a bargaining unit linked with the Title I teachers. The bargaining team initially asked for full contractual rights, but agreed to an increase in hourly rates. Ms. Jasnow is not claiming present tenure, but wants tenure applied to her previous employment.

Ms. Pavon was never appointed to a regular teaching job, although she had applied for one. After not being selected she continued as a supplementary teacher. She testified that FLEA always wanted contractual rights for the supplementary teachers, but after two and one-half years of bargaining, they agreed to continue to be paid on an hourly basis in 1981. She recalled that in 1969 the supplemental teachers wanted certain benefits but could not remember if that thought was ever conveyed to the Board of Education. She did remember telling Mr. Cannito in 1969 that the supplemental teachers wanted sick leave and other benefits, including tenure, but conceded that a petition was never filed until FLEA represented the supplemental teachers. None of the teachers who testified ever thought they were earning time for tenure in their jobs as S.C.E., Title I or supplementary education teachers. None ever worked for more than three and one-half to four hours a day.

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Thomas J. Cannito, superintendent of schools in Fair Lawn since 1966, testified on behalf of the respondent. He described the Title I program, the supplementary education program and the compensatory education program. He indicated that a requirement for teaching in all three programs is that the teacher must hold a K-8 elementary education certificate. Since 1967, a single yearly motion has been passed by the Board of Education, enabling it to employ an entire list of people as substitute teachers, Title I teachers, etc., and each person's specific job is not delineated in the motion. This, he conceded, was really an eligibility list, since hiring depends on funding from the state and federal governments and the number of children eligible for the programs. Mr. Cannito testified that the only complaints he ever received over the years from the petitioners were in regard to requests for increases in the hourly rate of pay.

Mr. Cannito went into detail in regard to the distinctions, from an educational point of view, between regular elementary teachers and these teachers. He pointed out that Title I teachers teach nothing but reading, compensatory education teachers teach only language arts and math and supplementary teachers teach language arts and math to classified students. Regular teachers, on the other hand, must teach all subjects to larger groups and must discipline students and be competent in classroom management. Regular teachers have 16 to 25 students all day long, whereas the instant petitioners teach either on a one-to-one basis or, at maximum, a group of five to seven students. Those students are all in need of remedial aid and are at the lower end of the ability spectrum, while the classroom teacher has to cope with a broad range of abilities.

Mr. Cannito said there is no seniority classification for Title I, supplementary or compensatory education teachers. If tenure were granted and seniority accrued as a result of this petition, they would receive seniority as elementary education teachers, which would create problems in the district which has 86 elementary education teachers and which has seen elementary schools close in recent years. According to Mr. Cannito, if the positions of these petitioners are declared tenurable, and if they obtain tenure as elementary teachers, they could "bump" regular teachers, despite their lack of classroom experience. He argued that the school district could end up with a travesty; a teacher teaching general school subjects, but who only had experience teaching reading and/or

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math. Furthermore, these teachers have not been evaluated and assessed, and have not been reviewed by the Board of Education. In marked contrast to the Title I, etc., teachers, Mr. Cannito testified that regular teachers have two and one-half hours of pupil contact both morning and afternoon and must be in school 30 minutes before the students enter and stay 30 minutes after they leave.

Mr. Cannito stated that the monetary impact of granting tenure to these petitioners would be tremendous, especially in light of existing budget difficulties. For the past 25 years the school budget has been formulated, relying on an hourly rate paid to these teachers, with an adjustment for a percentage increase on the hourly rate.

Mr. Cannito conceded that in 1980 the title of the eligibility list was changed to read "auxiliary teachers." He further conceded that part-time teachers could get seniority as part-time teachers. Although there is no prohibition against evaluating these teachers, it has never been done because of the temporary nature of their employment which results from uncertainty about the number of eligible students and the funding. For example, if a student in a supplemental program moves out of town, the school district does not look for more students with disabilities to keep a teacher employed. (In Title I and compensatory education programs, the students are not classified, but are in the programs due to test scores and therefore the State allows other students to fill vacated spots.) Furthermore, if the teacher is sick, time is added during the remaining days of the week so that the child gets the prescribed educational hours. To give sick pay and then pay for the extra hours so the child gets the prescribed additional help would cost a great deal and would give the teacher double pay. To give sick pay and not have the extra hours would deprive the child.

Donald A. Fusco, assistant superintendent of schools in Fair Lawn in charge of business and secretary to the Board, supervises and controls the financial operations, the budget preparation process and administration of the budget. He stated that unforeseen contingencies, such as the problems generated by this case, would create an enormous problem for the Fair Lawn budget, because it could produce a claim of $1,000,000 or more, based on the 1981-82 salary schedule which would apply to petitioners if they win the

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litigation. That amount would exceed the CAP increase allowed to the Board for the entire budget. Mr. Fusco conceded that the financial impact on the present budget for the four people who are still employed, if the relief requested was granted, would be approximately $132,240 for a 15-year period. Although the amount of people employed in the three programs has varied, he used 30 employees in computing the maximum figure in order to cover the highest amount for which the Board might be liable.

FINDINGS OF FACT

After having reviewed and considered the testimony and evidence in this case and after having considered the credibility of all the witnesses and after having reviewed the cogent and extensive post-hearing briefs and responses filed by both counsel and having considered the arguments contained therein and after having reviewed the applicable law, the court makes the following findings of fact.

1. The court adopts by reference the stipulations of fact which are set forth above.

2. The stipulations of fact set forth above clearly show that the programs in which the instant petitioners were teaching were well established and integrated into the Fair Lawn schools' regular instructional program.

3. Each petitioner worked less than a full day and did not have the student contact that the full-time teachers did. However, their responsibilities were similar to those of contract full-time teachers in that their employment was for the entire school year, they were not brought in on an as-needed basis, they were not required to reapply for employment every year, and they had responsibilities which were essentially the same as those required of regular teachers and included a broad range of instructional as well as non-instructional duties.

4. Each petitioner was regularly and continuously employed by the Fair Lawn Board of Education throughout the school year on a part-time basis.

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5. Each teacher had the required certificate needed to teach in the Fair Lawn school system.

6. The S.C.E. teachers and supplemental teachers taught in a state-mandated and state-funded program. The Title I program has been funded every year since 1950.

7. The Title I and supplemental teachers are in a separate bargaining unit of FLEA and negotiated directly with the Board for an agreement separate and apart from that of full-time contract teachers. The S.C.E. teachers specifically rejected FLEA as their agent and chose to negotiate on their own. The Board relied on all the negotiations held as a result of the choice of the individuals involved. The negotiations resulted in increased hourly salaries for these part-time teachers.

8. If retroactive benefits are granted, it will cost the Board and the taxpayers at least $146,000 because of the Board's reliance on the negotiations.

9. Petitioners Solomon, Albalah, Pavon and Stolar are presently employed as part-time supplemental or Title I teachers by the Board and have been employed as part-time teachers for more than three academic years within a period of any four consecutive academic years.

10. Petitioner Jasnow and petitioner Smotzer, now deceased, are no longer employed by the Board of Education. While they were employed by the Board, they worked the equivalent of more than three academic years within a period of any four consecutive academic years in part-time positions.

11. Petitioner Levy has not worked the equivalent of more than three academic years within a period of any four consecutive academic years in a part-time position.

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CONCLUSIONS OF LAW

In reviewing the briefs and letter memoranda it is clear that the threshold questions in this matter are whether or not the positions in which petitioners were employed were in fact tenurable or whether or not the employment was offered and accepted on a temporary basis, which basis did not change. If the court should determine that the positions were tenurable, it will then determine the effect of that conclusion by deciding if each petitioner still employed by the Board is entitled to tenure, if all petitioners should receive full retroactive granting of the emoluments of a tenured position, or if the relief should be prospective, or by deciding if waiver, laches, estoppel or the statue of limitations apply in this matter.

In regard to the tenurability of these types of teaching positions, different parts of the Appellate Division of the Superior Court have rendered divergent opinions on the issue of whether Title I/Compensatory Education and/or supplemental teachers are to be considered "teaching staff members" within the meaning of N.J.S.A. 18A:28-5, which sets forth the nature by which "all teaching staff members holding proper certificates" shall receive tenure after employment in the district.

> The services of all teaching staff members including all teachers... and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title,[1] after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years;

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In Point Pleasant Beach Teachers Association v. Board of Education of the Borough of Point Pleasant, 173 N.J. Super. 11 (App. Div. 1980), certif. den. 84 N.J. 469 (1980), the court determined that such teachers were not teaching staff members for purposes of the Teacher-tenure Statute, as entitlement to tenure depends on the nature of the employment tendered and accepted. After a review of the terms, conditions and duties of employment and of the conduct of the parties in order to determine if the Title I teachers therein qualified for tenure, the court noted the many differences between the Point Pleasant Title I teachers' duties and those of regular contract teachers, especially the temporary nature of their work, and particularly noted that the flexibility of Title I operations would be impeded if its instructors were granted tenure because their employment was so contingent and reliant upon the receipt of Title I funds from the federal government. The Appellate Division found that the teachers in question understood they were hired on a temporary basis, accepted such arrangement, and therefore were not entitled to tenure.

The year after Point Pleasant was decided, another part of the Appellate Division ruled, in Spiewak et al. v. Board of Education of Rutherford, 180 N.J Super. 312 (App. Div. 1981), certif. granted _____ N.J. _____ (1981), that two "Beadleston" supplementary teachers of the handicapped and a Title I remedial reading teacher met the definition of "teaching staff member" contained in N.J.S.A. 18A:1-1 and were thus eligible for tenure.

N.J.S.A. 18A:1-1 provides:

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

The Spiewak court read the Point Pleasant decision as being based primarily on the premise that where employment is offered and accepted on a temporary basis, and where this temporary nature is understood by both employer and employee, and where it

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continues as temporary employment, that employment cannot be relied on as the basis of tenure. The Spiewak court viewed that rationale as inapplicable to its facts, as it found that what may have been temporary employment at one time had taken on a permanent character, since the programs in which the individuals worked had become well established and integrated with the school's regular instructional program and since they performed services that were clearly required indefinitely into the future. The Spiewak court also concluded that the immediate source of the funding for such programs could not be regarded as dispositive of an individual's tenure status if the instructional programs in question were mandated by statute and had to be continued irrespective of the source of funding.

Hamilton Township Supplemental Teachers Association v. Hamilton Township Board of Education, 180 N.J. Super. 321 (App. Div. 1981), which had a factual situation virtually indistinguishable from that of Point Pleasant v. Callam, 173 N.J. Super. 11 (App. Div. 1980), save for the fact that the individuals in Hamilton were not employed in a federally funded program, is also relevant here. The Hamilton court found the difference in funding to be dispositive of the case. In Hamilton the petitioners were regularly employed by the Board of Education in a state-funded and state-mandated educational program in positions as supplemental education teachers, for which they were required to hold teaching certificates. The Hamilton court found that state funding made the individuals eligible for tenure, given their qualifications, since it removed their employment from the uncertainty of continued federal funds.

Counsel for petitioners argues that the holdings in Spiewak et al. v. Rutherford Board of Education and Hamilton Township Supplemental Teachers Association v. Hamilton Township Board of Education are applicable to them because the facts in Spiewak and Hamilton are on all fours with the facts in the case at bar. Counsel points out that the only limitation noted by the Spiewak court on the ability to find Title I employment tenurable is when the offer and acceptance of employment is on a truly temporary basis. This, he argues, is not the situation in regard to Ms. Solomon, the Title I teacher herein, or in regard to any of the other named petitioners. Counsel argues that it

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is not necessary to discuss the nature of their employment, since the instant teachers, no matter in what program they were working, were not offered and did not accept their employment on a temporary basis. Furthermore, all have the appropriate certifications to teach.

Even though a review is unnecessary, he urges that such a review makes clear that each of the instant teachers taught a regular schedule of classes, was not called in on an "as-needed" basis, met with the same pupils at the same time each week, worked for the entire school year, and was assigned a broad range of instructional as well as non-instructional duties, including curriculum and lesson planning, reporting in written and oral form to parents, ordering supplies, maintaining pupil records, attending in-service training sessions, developing programs, and attending staff meetings. Counsel argues that these teachers were not equal to substitutes or were not employed on a per pupil basis. Therefore, it is counsel's position, not only in regard to the Title I teacher, but in regard to all petitioners, that each was employed in a program which was a regular and permanent part of the school program in Fair Lawn and that each had responsibilities which were essentially the same as those required of regular teachers, albeit performed on a less than full-time basis.

Counsel for petitioners further argues that the source of funding cannot be ~~dispositive of an employee's status,~~ relying ~~on~~ Spiewak ~~as well as~~ Point Pleasant, ~~and in~~ regard to the Title I program, the only area in which the source of funding is somewhat tenuous, and where the program is not statutorily mandated, he states that the funding does not vary by more than 15 percent from year to year. Counsel argues that the question of tenurability of supplemental and S.C.E. teachers has been rendered stare decisis by the Hamilton criteria for tenurability; that the teachers in question be regularly employed by the Board of Education in a mandated program and hold the required appropriate certificates. Funding for compensatory education and supplemental teachers cannot be in issue since the program is mandated by statute and regulation. The Spiewak court specifically examined the tenurability of the positions of two supplementary teachers and determined that such employment was tenurable. The nature of compensation, duties and functions, etc. were deemed irrelevant, as the only thing the

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court found to be important was whether the teachers were properly certified and whether they freely accepted employment on a temporary basis. Therefore, once the court determined that the positions were regular (not temporary), were state funded in a mandated program and required a certificate (see 180 N.J. Super. at 324), they were declared tenurable.

Counsel for respondent does not specifically discuss the criteria for tenurability of these types of positions set forth by the Spiewak and Hamilton Township decisions. Rather, counsel argues that any claim for tenure can only be asserted on the basis of a part-time teaching position, and the length of time devoted by these teachers varies widely from year to year depending upon the number of students. He asserts that none of the above-mentioned decisions considered what the Board terms an "extremely educationally significant fact," that these petitioners are only required to hold certificates in the category of "elementary teacher" and, therefore, once granted tenure in that category they would be placed on a seniority list with other regular elementary teachers. This placement would force the Board to place these teachers, who have only taught in the supplemental, compensatory and/or Title I programs, in regular classes where they would have to teach a broad range of subjects which, counsel argues, the Board has determined it does not want them to teach. Counsel dismisses in one sentence any argument that tenure may be granted on a part-time basis, which would not mandate ~~the replacement~~ of full-time regular elementary teachers by these part-time teachers by saying that this solution is not practical because of generally diminishing enrollment.

This judge finds that the Point Pleasant, Spiewak and Hamilton cases are not irreconcilable, since in each case the Appellate Division has directed the finder of fact to review the nature of the employment tendered and accepted and only then to determine its character and decide if it falls within the rubric of tenurable, or eligible for tenure, employment pursuant to statute. In reviewing the facts set forth in this case the court finds in regard to the Title I teacher, Ms. Solomon, that the position which she held was clearly tenurable. She was regularly and continuously employed; she started and ended her employment with the beginning and end of the school year; she was properly certified to teach; the Title I program in Fair Lawn has been in operation since 1973-1974, and has

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been fully integrated at least since 1974 with the regular instructional program; her duties included teaching on a regular schedule with the same pupils at the same time; there was no break in instruction during the school year; she had instructional and noninstructional duties, was not brought in on an "as-needed basis" and possessed the appropriate certificate. Because of the ongoing nature of the Title I program in Fair Lawn, there was no real uncertainty as to whether the program would be continued, so the source of funds cannot be dispositive one way or another in regard to Ms. Solomon.

In regard to Ms. Levy and Ms. Albalah, the S.C.E. teachers, the court has reviewed the facts, and concludes that compensatory education has been a regular part of the Fair Lawn educational instructional program since the 1978-79 school year, although it was not regular in 1977-78. Since 1978-79, S.C.E. teachers in Fair Lawn have taught on a regular schedule, with the same students coming to them at the same time, and with no breaks during the school year. They were observed on an informal basis and evaluated, they were not required to reapply for employment, and were not brought in on an as-needed basis. It is important to note that they were solely responsible for the math instruction received by their students. Moreover, each S.C.E. teacher herein had the appropriate certificate and was teaching in a mandated program which must be provided in respondent's schools. See N.J.S.A. 18A:7A-5, N.J.S.A. 18A:46A-1, N.J.A.C. 6:28-3.2 and the analysis in the Hamilton Township case. The positions of S.C.E. teachers fall within the category of "tenurable" employment.

In regard to the supplemental teachers, the court has reviewed the Spiewak decision and finds that it is applicable to the positions in question here, and that they are "eligible for tenure." Each of the named teachers who taught in the supplemental program in Fair Lawn had the required certificate to teach. Further, it was mandatory for the district to provide supplemental education for the handicapped or classified children. See Spiewak et al. v. Board of Education of Rutherford, 180 N.J. Super. at 319. The Spiewak decision directs a finder of fact to determine whether or not, over a period of years, the employment was temporary in nature. In this situation, supplemental education has been provided by Fair Lawn on a regular basis since the 1964-65 school year, in a program that is fully integrated with the regular instructional program in the school district, clearly not a temporary program.

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Although the court notes that each teacher was paid on an hourly basis, did not have a contract, was not paid for lunch, was not paid for sick days, was not paid for vacation or personal days, was not admitted into the pension fund, and was paid from State and/or federal funds as opposed to tax dollars from the Fair Lawn citizens, these facts do not detract from the tenurable nature of their employment. The Board benefited from the above arrangements. Each teacher, as a matter of stipulated fact, did curriculum and lesson planning, did report to parents in oral and written form, did order supplies, did maintain pupil records, did confer and attend workshops and did teach on a regular and continuous basis. The court further notes that while these teachers were aware of the conditions of employment under which they accepted their employment and continued to work, and thus accepted positions which were not deemed "tenurable" status at the time of their employment, this does not detract from the fact that they were regularly and continuously employed by the Board of Education. The fact that they did not specifically complain about lack of tenure does not change the conclusion that their employment was of a permanent nature and their services were regularly required.

While it is clear that the immediate source of funding is an element to be taken into consideration in determining tenurability, it cannot be dispositive of that issue. The Hamilton Township court held that individuals who were regularly employed by a board of education in a state-funded and state-mandated educational program, in positions for which they were required to hold teaching certificates, were eligible for tenure, since the state funding removed their employment from the uncertainty of federal fundings. See 180 N.J. Super at 324. The language of Spiewak concerning supplemental teachers, which says that the immediate source of funding cannot be dispositive in regard to mandated programs, is applicable to the case at bar. No one gainsays the fact that if the necessary funds are not available, or there are no students who are eligible for the within programs, the Board could abolish these positions for good faith reasons.

Having reviewed the facts the court finds it clear that the instant petitioners were regularly and continuously employed by the Fair Lawn Board as professional staff members in positions requiring certification, that they held the appropriate certificates, and that they were regularly and continously employed in positions which were integrated

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into the regular instructional program. It is clear that the source of funding is not the dispositive factor in deciding whether they are entitled to tenure upon the passage of the requisite statutory period of time. Taking everything into consideration, this judge concludes that all of the positions held at one time or another by each individual petitioner while said petitioner was employed as an S.C.E., Title I or supplemental teacher are to be considered "tenurable" or "eligible for tenure" positions.

The next question which must be determined is whether or not each of the instant petitioners is entitled to actual tenure as a result of the above conclusion. As a general conclusion, this court finds that every one of the instant teachers was employed on a part-time basis and at no time did the work week of any of the instant teachers exceed 25 hours per week. For many of these petitioners the work week was between 15 and 20 hours, as compared to the work week of a regular staff teacher of approximately 37 and one-quarter hours per week. A review of the law indicates that the court should not discount the argument that tenure may be granted on a part-time basis, and leads this judge to the conclusion that the only tenure to which those petitioners, who meet all other tenure requirements, are entitled is that of part-time teacher.

The New Jersey Tenure Statute, N.J.S.A. 18A:28-5, provides that:

> The services of all teaching staff members including all teachers . . . and such other employees as are in positions which require them to hold appropriate certificates by the board of examiners serving in any school district or under any board of education. . . shall be under tenure . . . after employment [for the alloted time].

The Commissioner and the courts have held that a part-time teacher may acquire such protection in a part-time job. A part-time tenured teacher is protected only as a part-time employee, which is contrasted to full-time positions, and their seniority rights are only in their positions as part-time employees. See Fox v. New Providence Board of Education, 1939-49 S.L.D. 134; Josephine DeSimone v. Board of Education of the Borough of Fairview, Bergen County, 1966 S.L.D. 43; Woodbridge Township Federation of Teachers Local Number 822 AFL-CIO and Woodbridge Township School Administrators' Association

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v. Board of Education of the Township of Woodbridge, 1974 S.L.D. 1201. While it is clear seniority is afforded only to those teaching staff members who have acquired tenure status (see Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962)), the standards for determining seniority are set forth in N.J.A.C. 6:3-1.10 which states that "seniority. . . shall be determined according to the number of academic calendar years of employment or fraction thereof, as the case may be, in the school district in specific categories." (Emphasis added.) While there is no specific provision applicable to seniority of part-time teachers, the regulation makes it seem both clear and logical that neither the Legislature nor the Commissioner intended part-time staff members to have the same status or to be in the same category with full-time personnel so as to allow the former to obtain seniority over the latter. See Aslanian v. Board of Education of Westfield, 1976 S.L.D. 601, which held that a person who acquires tenure status as a result of part-time employment is protected only to the extent that the part-time employment and emoluments pertaining thereto may not be diminished or abolished except as provided by law. For example, a petitioner holding tenure in a four-fifths position would achieve seniority only over those other teachers who likewise held a position with four-fifths or less full- time duties. Ibid. While it is true that seniority for part-time services attaches to full-time service, each year served in less than a full-time position cannot be equated as a full-time year for purposes of determining overall seniority when a full-time position is abolished. See Farrow v. Board of Education of Riverdell, 1981 S.L.D. _____ (3/23/81) dismissed as moot 12/2/81. See also Woodbridge Township Federation of Teachers Local #822 AFL-CIO et al. v. Board of Education of the Township of Woodbridge, 1974 S.L.D at 1206.

> Tenure in a part-time position does not entitle a teaching staff members to rights to a full-time position: thus a tenure status in a part-time position is sharply differentiated from tenure in a full-time position. Those who do acquire a tenure status in a part-time position are steadily employed. The term steadily employed is construed to mean regular, continuous employment for the entire school year, for less hours daily or for fewer days per week than would be required for full-time employment.... Such steady employment is contrasted with employment which is occasional or for a brief duration of days or weeks. Under these circumstances the steadily employed teacher would be entitled to a prorated benefit as a principle of equity. A teaching staff member employed for half days for the entire academic year is entitled to one-half the benefit received by those steadily employed on a full-time basis.

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Therefore, this court concludes that the instant petitioners who have been employed for the statutorily required period of time, see N.J.S.A. 18A:28-5(c), and who are still employed, should be granted tenure as per the Woodbridge decision. The number of hours they worked per week must be contrasted with the full-time teachers' hourly employment, and computed on a percentage basis, and tenure will be granted based on that computation. This conclusion applies only to Katherine Solomon, Arlene Albalah, Elaine Pavon, and Phyllis Stolar, who are still employed by the Board. In regard to Jasnow and Smotzer, who are no longer employed due to resignation and death, the court concludes that because the positions in which they were formerly employed were tenurable, they should have received tenure after the appropriate passage of time. This conclusion does not apply to Ms. Levy, who was not employed for the requisite period of time.

Having made the aforementioned conclusion, granting tenure as part-time teachers to the above-named petitioners, the court must now determine whether each should receive full retroactive benefits of that status, including additional compensation and all the other emoluments and benefits of part-time tenure. In regard to granting of benefits generally, respondent's counsel argues that the claims of all petitioners should be dismissed because there has been no proof of specific damages. Further, they should not receive any retroactive granting of benefits based upon the salary guide for full-time teachers, since that was negotiated by collective bargaining through FLEA, which represented the full-time teaching staff members in Fair Lawn. In the instant matter, the Title I and supplemental teachers are in a separate bargaining unit of FLEA and negotiated directly with the Board for a separate agreement. Furthermore, counsel argues that the basis of such decisions such as Spiewak and Hamilton, which allowed retroactive granting of compensation, was the fact that the teachers in those cases were, for all intents and purposes, full-time teachers, as opposed to the clearly part-time status of the within petitioners. Respondent's counsel urges vehemently that the equitable defenses of laches, estoppel and waiver, are appropriate here because the Board relied on the negotiated salaries and will be prejudiced by putting these teachers on the regular salary guide, even on a pro rata basis.

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Petitioners' counsel argues, to the contrary, that their claims are not barred by waiver, estoppel or laches since they always indicated their interest in gaining higher salaries and benefits. Therefore, the Board did not rely to its detriment on petitioners' position and has not been prejudiced. Petitioners' counsel argues that their claims are not barred by N.J.S.A. 2A:14-1, the six-year statute of limitations, or by N.J.A.C. 6:24-1.2, the 90-day regulation, because, first of all, N.J.A.C. 6:24-1.9, the relaxation rule, is applicable and, furthermore, a continuing violation is present in the instant matter. Counsel argues that the retroactive benefits which should be granted to these petitioners include pro rata placement on the regular teachers' salary guide, and back compensation for the emoluments thereof.

Petitioner relies on Hamilton Township Supplemental Teachers Association v. Hamilton Township Board of Education, 1979 S.L.D. 715, approved 1980 N.J. Super. 321 and argues the discussion in the Initial Decision pertaining to wages and salaries was to illustrate the differences in full-time and part-time teachers and would not preclude the remedy of a pro rata placement on the salary guide. Spiewak et al. v. Board of Education of Rutherford, 1980 N.J. Super. 312 is also cited for support of the claimed remedy. Petitioner argues that the holding of Spiewak, which entitled supplemental teachers to the emoluments and benefits afforded all other teaching staff members employed by the district on a pro rata basis includes entitlement to a pro rata placement on the salary guide.

Both Hamilton and Spiewak only mention the compensation of supplemental teachers as illustrative of their positions. Neither decision, in discussion of tenure or entitlement to pro rata emoluments, addresses the method of compensation. The lack of discussion can be seen to indicate no impropriety in supplemental teachers being paid on an hourly basis. Petitioner's expansion of Spiewak to support pro rata salary placement is unwarranted given the failure of the Hamilton and Spiewak courts to make reference to the salary issue in the remedies awarded to supplemental teachers.

Petitioner also cites several education decisions pertaining to salary guides. While these decision are valid for the propositions espoused by the petitioner, they are

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inapposite to the case at bar as the decisions do not arise in the context where a collective bargaining agreement exists between the parties which would define salary entitlements. In Lenk v. Board of Education of the Monmouth Regional High School District, Monmouth County, OAL Dkt. No. 4594-79, (January 25, 1980), adopted Comm. Dec. #55-80 (March 17, 1980) petitioner's petition alleging improper salary placement was dismissed as res judicata where an arbitration of his claim was undertaken pursuant to the collective bargaining agreement.

> Though the authority for boards of education to establish '. . . rules . . . governing salaries. . .' (N.J.S.A. 18A:27-4) is at Title 18A, Education Law as are the above-cited statutes with respect to minimum salaries and increments, and as such would normally come within the purview of the Commissioner's authority at N.J.S.A. 18A:6-9, the fact is that compensation is a term and condition of employment subject to the provisions of N.J.S.A. 34:13A-5 the Employer-Employee Relations Act. (See Bd. of Education of Englewood v. Englewood Teachers, 64 N.J. 1 (1973)). Lenk at 4.

Frances Grossman v. Board of Education of the Borough of Collingswood, County of Camden, OAL Dkt. 2422-79 (December 31, 1980) adopted Comm. Dec #67-81 (February 11, 1981) concerned a teacher's claim for previous part-time teaching experience. In awarding petitioner an additional two years of teaching credit, Judge Tylutki recognized the existence of a 1973 collective bargaining agreement. "It is clear that the collective bargaining agreement controls and should be applied evenly though it may conflict with respondent's policy, Board of Education of the City of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973)." Grossman at 3.

Petitioner's final approach is to cite State v. State Supervisory Employees Association, 78 N.J. 54 (1978) for the proposition that the collective bargaining agreement may be invalid as contrary to the laws of the State. The proper approach to determine whether the collective bargaining agreement was within the scope of negotiations was established by the New Jersey Supreme Court in In re IFPTE Local 195 v. State, 88 N.J. 393 (1982). The court found a three-part test for a scope-of-negotiations determination. See 88 N.J. at 403-405. Applying this test in the instant matter, the collective bargaining agreement was properly within the scope of negotiations. The agreement in its

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determination of rates of pay is a prime example of a subject that falls within this category. Furthermore, N.J.S.A. 18A:29-4.1 does not speak in the imperative but is permissive in its terms. "A board of education of any district may adopt a salary policy. . ." (emphasis supplied). Therefore, N.J.S.A. 18A:29-4.1 does not preempt negotiations of rates of pay. Finally, a negotiated agreement as to rates of pay would not significantly interfere with the exercise of inherent management prerogatives.

This judge has thus concluded she will not grant pro rata placement on the regular salary guide as retroactive compensation. This decision will be prospective only. The supplemental and Title I teachers were represented in collective negotiations by FLEA, they knowingly bargained separately from the full-time teachers and they freely entered into an agreement accepting the hourly salary. The Board is bound by the contract it negotiated with the elected bargaining units of FLEA, and the teaching staff members within those bargaining units are also bound. The fact that they are now tenured part-time teaching staff members does not change the bargaining unit.

In regard to the S.C.E. teachers, the court will be guided by the fact that these teachers specifically rejected FLEA as their agent and chose to negotiate on their own. The Board relied on those negotiations. The court does not find that these negotiations or the collective negotiations were used as a method of circumventing the requirements of the laws of this State or were held illegally, but rather that petitioners and/or their representatives conducted arms-length negotiations and as a result of same settled for a higher hourly wage under the prevailing state of the law at the time. The petitioners responded as free agents to the Board's offer of compensation for the employment rendered to the Board. See Bisgay et al. v. Board of Education of Township of Edison, 1980 S.L.D. _____(1/18/80), aff'd on other grounds, State Bd. of Ed. 1980 S.L.D. _____ (9/8/80) where the Commissioner denied a retroactive award of salaries and emoluments to petitioning supplemental teachers on just that basis. The Commissioner noted that "the fundamental object of all rules of interpretation, whether primary or secondary, is to ascertain and give effect to the intention of the parties." (Cite omitted. 1980 S.L.D. at _____.) The court must strictly construe any agreement against the draftsman and must interpret agreements in the sense that the parties understood the agreement.

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Accordingly, if a teacher or his representative has consented to the terms of an agreement, he is bound by those terms. See Russell v. Princeton Laboratories, Inc., 50 N.J. 30, 38 (1967).

The court further finds that the Board, as part of a municipal government, operates on a current cash basis and must avoid unforeseen and crippling financial contingencies. The Board has proved to this judge's satisfaction that retroactive salary adjustments for these teachers which are related to the regular teacher's salary guide or the application of any additional fringe benefits would be detrimental (specifically avoiding adoption of the word catastrophic) to the orderly operation of the Board of Education. The court has found as fact that the Board has proved it will be prejudiced, at least to the amount of $146,000 (conceded by petitioner's in their brief), if not to the amount of $1 million, by relying on the prior negotiations. This Board has not acted in bad faith nor has it deliberately misled the instant petitioners in regard to the acquisition of tenure. At no time did petitioners ever think that they were going to acquire tenure as a result of their part-time employment with the Board. It is only as a result of recent decisions of the Appellate Division that the legal interpretation of the teacher-tenure statute has changed, and that tenure, under certain circumstances, attaches to teachers such as the instant petitioners. It would be inequitable to award retroactive salaries and emoluments based on the full-time teachers' salary guide, because of the detrimental effect it would have on the Board of Education Therefore, the court concludes that the petition for retroactive claims will be wholly denied. The court will direct prospective placement on the salary guide for those instant petitioners who are presently employed and have been designated part-time tenured teachers. The salary policy adopted by the Board is applicable to tenured teaching staff members and there is no prejudice to the Board in applying same prospectively to the instant petitioners.

Despite the fact that the court has concluded that the equitable defenses of laches has been proved; that is, the Board relied, to its detriment, on the freely entered negotiations for these petitioners' salaries, and, therefore, retroactive compensation and emoluments for part-time tenure will be denied, it is necessary to discuss, in slight detail, the Board's legal defenses, that the six-year statute of limitations and the 90-day rule

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apply here. The court adopts the analysis of the Appellate Division in Lavin v. Hackensack Board of Education, 178 N.J. Super. 221 (App. Div. 1981), certif. granted 87 N.J. 402 (1981) which concluded that a six-year statute of limitations is applicable in a case such as this because:

> Enforcement of the statute of limitations in the instant case [Lavin] is consistent with the legislative goal behind such statutes: "to stimulate litigants to pursue their causes of actions diligently and to spare courts from litigation of stale claims." Except in cases of severe hardship, such statutes should be strictly interpreted in order to foster a more stable society. . . .In the instant case in particular the allowance of petitioner's claims would subvert the desired societal order: "municipal governments must operate on a current 'cash basis,'" and thus "it is important to encourage the prompt assertion and resolution of a claim for transferred service credits, preferably before employment begins." [Cites omitted, Lavin at 228-229.]

The comment on the municipal budgets is particularly relevant to the case at bar where at minimum $146,000 would have to be provided if retroactive compensation were granted. These petitioners were not ignorant of the applicable statute, but even if they did not know their rights under the statute, this does not excuse delay. The fact that this is a claim arising from a statutory right as opposed to a contractual cause of action does not take this outside the statute of limitations. State v. Atlantic City Electric Company, 23 N.J. 259 (1957). In those cases where lengthy delays were not barred by laches (see for example, Whidden v. Board of Education of Paterson, 1976 S.L.D. 356), the decision may have been founded in part on the conclusion of the Commissioner that finding for the petitioner was not a case which would result in payment of excessive monies by the board of education as a result of delay. Therefore, even if the ultimate decision is that laches does not apply, retroactive benefits should not be awarded for any period of time prior to six years before the commencement of this action.

The court has also considered respondent's argument that the petition should be dismissed because of a violation of N.J.A.C. 6:24-1.2, which requires filing of a petition within 90 days after a complained of action of a board. That regulation is not applicable to the instant case for two reasons. The first reason is that the interests of justice would

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require a relaxation of the 90-day rule, which is permitted by N.J.A.C. 6:24-1.9(a)(4). The fair thing is to allow these petitioners to have their case decided in light of the new and innovative appellate decisions. More important, however, is the fact that the actions of the Board can be interpreted to have been a continuing violation of the tenure rights of the instant teachers. See Bergenfield Education Association et al. v. Board of Education, Borough of Bergenfield, 1981 S.L.D. May 18, 1981 aff'd in part, rev'd in part, State Board of Education, 1982 S.L.D. 1/6/82.

It is not necessary to rule on respondent's request to dismiss the claims because no specific dollar amounts of back salary have been proven, since the court has already determined it will not grant retroactive compensation for equitable reasons.

Accordingly, based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the positions of Title I, S.C.E. and supplemental teachers held by instant petitioners shall be deemed to have been positions of tenurable, or eligible for tenure, employment; and

It is further **ORDERED** that petitioners Solomon, Albalah, Pavon and Stolar be granted part-time tenure as presently employed teachers; and

It is further **ORDERED** that it be declared that petitioner Jasnow and petitioner Smotzer, now deceased, be deemed to have held part-time tenured positions, after passage of the appropriate period of time; and

It is further **ORDERED** that the specific part-time tenured positions of said teachers shall be determined by a specific review of the hours taught per week averaged over the period of years taught, and then compared to the full-time teaching position of 37 and one-quarter hours per week; and

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It is further **ORDERED** that the request for retroactive compensation and other emoluments and benefits of the part-time tenured positions be, and is hereby, **DENIED**; and

It is further **ORDERED** that the salary level and other benefits of petitioners Pavon, Albalah, Solomon, and Stolar be adjusted to accord with the receipt of part-time tenure at the present time, and shall be awarded prospectively only, with placement on the appropriate step on the tenured teachers salary guide as part-time tenured teachers;

Any and all other requests contained in the within petition shall be, and are hereby, **DENIED.**

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 **GUSTAV H. RUH** for consideration.

May 19, 1982
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

May 21 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

May 24, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

sv

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FAIR LAWN EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, 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.

Petitioners' primary exceptions generally support the conclusions by the Honorable Sybil R. Moses, ALJ reached in her initial decision herein while opposing the denial of retroactive compensation on the basis of laches.

The Board in its primary exceptions contests Judge Moses' determination granting petitioners tenure. The reply exceptions of the Board refute petitioners' exceptions in which contention is made that petitioners must be placed on the salary guide. Petitioners' reply exceptions refute those of the Board which argue against tenure for petitioners.

A thorough reading of the initial decision and the multiplicity of exceptions filed by the parties thereto convinces the Commissioner that he cannot agree in entirety with either party.

Further, the Commissioner is constrained to note that apparent contradiction between Spiewak, supra, and Point Pleasant Beach, supra, have been resolved and the right of part-time remedial or supplemental teachers to acquire tenure has been established by the June 23, 1982 decision of the New Jersey Supreme Court. Spiewak et al. v. Board of Education of Rutherford, Docket No. A-131/132 (consolidated case)

This case establishes that public school teachers who provide part-time remedial or supplemental instruction to educationally disabled children may acquire tenure if they meet the specific criteria in New Jersey's tenure statute, regardless of the source of funding for their salaries. The Court states as follows:

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> "***[T]he Legislature has explicitly mandated that teachers be granted tenure under certain conditions as a means to improve public education. Neither school boards nor teachers are free to disobey that mandate. Tenure is not dependent on agreement between the parties. Teachers are entitled to tenure because the Legislature has granted them that right. (Slip Opinion, at p. 27)
>
> "***[T]he teachers in this case fall within the express terms of the [tenure] statute. They are therefore presumptively eligible for tenure unless a statutory exception applies. ***We find no evidence of legislative intent to exclude remedial and supplemental teachers from the express language of N.J.S.A. 18A:28-5, and therefore conclude that they are eligible for tenure. (Id., at pp. 16-18)
>
> "***The decision in Point Pleasant relies on the wrong legal principles. By focusing on the contractual relations between the parties and not the statutory criteria for tenure, the court in Point Pleasant overlooked the authority which holds that tenure is a legal right governed by statute rather than contract.***We therefore overrule Point Pleasant. (Id., at pp. 21-28)
>
> "***[T]he court recognized [in Hamilton Tp., 180 N.J. Super. at 323] that no provision of the statute itself excluded teachers in federally funded jobs.***" (Id., at p. 30)

The Court held that the new legal rule established by these consolidated cases should be applied retroactively to parties now before the Court, and prospectively to all others.

The Commissioner finds and determines that the aforementioned holdings are directly applicable to the case at hand.

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

The orders herein set down by Judge Moses are affirmed.

COMMISSIONER OF EDUCATION

July 20, 1982

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FAIR LAWN EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, July 20, 1982

For the Petitioners-Appellants, Bucceri & Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Jeffer, Hopkinson & Vogel (Reginald F. Hopkinson, Esq., of Counsel)

Respondent's request for remand and oral argument are denied. The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

December 1, 1982

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8581-81

AGENCY DKT. NO. 463-12 81A

CEDARVILLE TEACHERS ASSOCIATION,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, CUMBERLAND COUNTY,

Respondent.

APPEARANCES:

John E. Collins, Esq. for petitioner (Selikoff & Cohen, attorneys)

John T. Barbour, Esq. for respondent (Barbour & Costa, attorneys)

Record Closed April 21, 1982 Decided June 7, 1982

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

The Cedarville Teachers' Association (Association), the exclusive majority representative of nonsupervisory teachers employed by the Lawrence Township Board of Education (Board), challenges the legality of the scope of Board policy 4112.4 (policy) which requires physical examinations of all employees, and it challenges the policy as an invasion of its affected members' privacy.

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The Commissioner transferred the matter to the Office of Administrative Law as a contested case, under N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted at which the parties agreed to cross-move for summary decision on the pleadings, exhibits and briefs of counsel.

I.

The uncontroverted facts of the matter are these:

The policy, adopted by the Board July 13, 1981, provides in full as follows:

PERSONNEL

PHYSICAL EXAMINATIONS OF EMPLOYEES

> As provided under N.J.S.A. 18A:16-2, the Lawrence Township Board of Education will require a physical examination of each employee. The scope of such physical examination shall be determined by the Lawrence Township Board of Education Medical Inspector using such examinations, procedures and records as the Medical Inspector deems necessary. Such examinations, procedures and records shall be approved by the Lawrence Township Board of Education and shall become a part of this policy.
>
> The Lawrence Township Board of Education Medical Inspector shall perform such examinations as required at no cost to the employee. Any employee may, as provided by N.J.S.A. 18A:16-3, elect to have the required examinations performed by a physician of the employee's choosing. In such a case, the cost of the required examinations shall be borne by the employee and the Lawrence Township Board of Education Medical Inspector's approved record form shall be utilized.

Provisions of this policy shall become effective for the 1981-82 school year.

On September 22, 1981, the Board caused the following writing to be distributed:

> To: All Staff
>
> Re: Required Physicians - Policy 4112.4

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> In the near future, Dr. Jespersen, School Medical Inspector will be giving the required physicals to all employees.
>
> If you will be using the services of your own physician, please secure the appropriate form from the school nurse.
>
> In order to allow adequate time for a schedule to be prepared in conjuction with Dr. Jespersen, the attached form is to be completed and returned to Mrs. Sharp by Wednesday, Sept. 23, 1981.
> All physicals are to be completed by Friday, October 16, 1981, if performed by your family physician.

Employees were to signify, on a cut-off portion of the writing to be returned to the school administrator, whether they selected the school medical inspector or their family physician to complete the examination.

The scope of the examination to be performed is shown by the physical examination form, ostensibly created by the school medical inspector, and provided to all teachers by the Board. It is reproduced here in full:

> I consent to having this medical report become part of the permanent personnel files of the Lawrence Township Board of Education.
>
> _____
> Employee's Signature
>
> Report concerning _____
>
> Occupation Position _____
>
> Age ____

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HISTORY

1. Has person had any of the following diseases?

A.	Yes	No	
	___	___	Tuberculosis
	___	___	Asthma
	___	___	Diabetes
	___	___	Kidney Disease
	___	___	Rheumatic Fever
	___	___	Psychiatric disorder
	___	___	Epilepsy

B. If answer to any of the above is yes, explain:

2. Has person ever consulted a physician, or suffered from, any disease of the:

Yes	No	
___	___	Gastrointestinal System
___	___	Nervous System
___	___	Respiratory System
___	___	Genito-Urinary System
___	___	Cardio Vascular System

3. Has person been immunized for: (Give date of last booster.)

Yes	No	
___	___	Diphtheria
___	___	Tetanus
___	___	Poliomyelitis

Up-to-date immunization against diphtheria, tetanus and poliomyelitis is required prior to employment.

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PHYSICAL EXAMINATION

Negative findings may be indicated by a check. Note physical defects of extremities, head, neck, spine, chest and abdomen:

_____Height	_____Weight
_____Respiration	_____Pulse
_____Blood Pressure	_____Neck
_____Skin	_____Bones
_____Bone Joints	_____Heart
_____Eyes	_____Lungs
_____Ears	_____Abdomen
_____Nose	
_____Throat	
_____Speech	
_____Mouth	

Neurologic:
1. _____Reflexes
2. _____Tandem gait
3. _____Fine motor movements

_____ Hemoglobin
_____ Urine (Hema-combistix)

Summary of significant facts:

Evaluation of suitability of employee for the type of duties which will be performed:

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I hereby certify I have this day examined _____
and I find no symptoms of communicable or infectious disease.

_____ _____
Date of examination Signature (Medical Doctor)

_____
Address

_____

If examined by own personal physician, please forward this completed form to:

School Nurse
Myron L. Powell School
Cedarville, New Jersey 08311

The Association filed a grievance with the school administrator on the same day the Board's writing was distributed to the staff, September 22, 1981. The Association argued there was no valid reason for the Board to require employees to subject themselves to an extensive physical examination; that the examination requirement violated certain articles of the Agreement; and that the Board policy in respect of the required physical examination constituted a gross invasion of the employee's privacy. The school administrator deemed the grievance to be a challenge to Board policy with which he could not interfere; consequently, the Association appealed the grievance to the Board. The Board, after review of the grievance, determined to affirm its policy and the requirement for a yearly physical examination. The Board did, however, modify its physical examination report form in the following manner:

1. Rather than the introductory statement "I consent to having this medical report . . ." signed by the employee, the Board substituted the following introductory statement:

> This medical report shall be retained by the Lawrence Township Board of Education Medical Inspector and shall not be released for any reason without the written consent of the employee.

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2. The Board deleted in the History part, section one, of the form the phrase, Psychiatric disorder, and the "Yes" "No" blanks.

3. The Board added in the History part, section three, of the form the phrase "Tuberculin Test (Maxtoux) [sic] Date _____".

4. The Board modified the narrative sections at the end of the Physical Examination part of the form in the following manner:

> The Board deleted the statement "Summary of significant facts" and "Evaluation of suitability of employee for the type of duties which will be performed"; it modified the certification statement so that it now reads "I hereby certify I have this day examined _____ and I find no symptoms of communicable or infectious disease or medical conditions which would prohibit the successful discharge of his/her employment responsibilities."

5. Finally, the Board required that if the employee was examined by their own physician the completed examination form was to be returned to the school medical inspector, not the school nurse as originally directed.

The Association did not consider that the Board's modifications to the physical examination form adequately addressed its concerns with the fact of the examinations, nor with the policy itself. The Petition of Appeal followed.

Two further facts must be reported. One, prior to the adoption of this policy, the Board did not generally require physical examinations of its employees. Two, the Board, since the inception of this dispute, has agreed not to implement its controverted policy pending final disposition of the matter here.

II.

The Association argues that the Board, being a creation of the legislature, may exercise only those powers granted it by the legislature, either expressly or by fair implication. That being so, the Association contends, one must first look to the authorizing legislature expression at N.J.S.A. 18A:16-2 in respect of the board's authority

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to require physical examinations of its employees. That statute, it is argued, limits the scope of physical examinations which may be required by the Board by the extent to which the State Board of Education provides for in its rules. The Association maintains that the only rule the State Board has adopted in respect of N.J.S.A. 18A:16-2, is at N.J.A.C. 6:29-4.2, which provides for intradermal tuberculin tests and related examinations. Thus the Association concludes that the Board has no authority to generally require physical examinations broader than that allowed by the State Board. The Association concedes the Board has authority under N.J.S.A. 18A:16-2 to require an individual to submit to a physical examination, but only when the employee shows evidence of deviation from normal, physical or mental health and only after that individual has been afforded due process of law.

Next, the Association contends that the provision of the controverted policy by which the Board delegates authority to the school medical inspector to determine the scope of the examination to be performed, is contrary to the legislative expression at N.J.S.A. 18A:16-2 which delegates such authority to the State Board.

Finally, the Association argues that the physical examination the Board attempts to require its employees to undergo infringes upon the employees' fundamental constitutional right to privacy without a compelling state interest demonstrated by the Board. The Association does not attack the constitutionality of N.J.S.A. 18A:16-2; it does attack the use made of the statute by the Board so as to interfere with the employees' asserted fundamental right to privacy.

The Board, to the contrary, takes the position that it clearly has the authority to require its employees to undergo physical examinations, of the scope and character contemplated here, by virtue of N.J.S.A. 18A:16-2, to be read in pari materia to N.J.S.A. 18A:16-3, 4 and 5. The Board argues that the State Board rule, N.J.A.C. 6:29-4.2, must, by virtue of N.J.A.C. 6:29-1.1, be seen to be minimum requirements, not maximum, in respect of physical examinations it must require of its employees. The Board contends it is legitimate for the State Board to establish minimum requirements and to delegate to local boards the discretion as to whether or not to require more than the stated minimum in respect of physical examinations. The Board maintains that its policy which requires physical examinations of its employees, and the scope of the examinations to be required,

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is within its authority at N.J.S.A. 18A:16-2 et seq. and clearly within its discretionary authority at N.J.S.A. 18A:11-1. No purpose is set forth by the Board for the physical examination requirement.

Discussion

The ultimate issue in the matter, agreed upon at the prehearing conference, is:

> Whether the Board's scope of authority under 18A:16-2 by which "Every Board shall require all of its employees . . ." is limited by the phrase "the scope whereof shall be determined under rules of the State Board . . ." so that in the absence of a special State Board rule, the Board may not generally require its employees to undergo any physical examination, other than the physical exams authorized by the State Board rules.

N.J.S.A. 18A:16-2 provides in full:

18A:16-2. Physical examinations; requirement

> 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.

In determining the authority which flows to boards of education from this statute, the following must be kept in mind:

> 18A:16-3 Character of examinations
>
> 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.

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> 18A:16-4 Sick leave; dismissal
>
> If the result of any such examination indicates mental abnormality or communicable disease, the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee is under contract or has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, be permitted to complete the term of his contract, if he is under contract, or be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years.

The primary statute, N.J.S.A. 18A:16-2, has two relevant component parts, the first of which is:

> Every board of education shall require all of its employees . . . to undergo a physical examination, the scope whereof shall be determined under the rules of the state board, at least once in every year. . .

while the second part, joined to the first by the conjuction "and" is:

> every board 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.

The latter portion of the statute was considered in Kochman v. Keansburg Bd. of Ed., 124 N.J. Super. 203 (Chan. Div. 1973), wherein the statute, as applied to an individual ordered to submit to a psychiatric examination, was held to be constitutionally valid, notwithstanding the possible infringement of the individual's right to privacy and other constitutional rights, so long as the affected person was given a statement of reasons for the requested examination and a hearing on those reasons, if requested by the person Id. p. 213. In Gish v. Bd. of Education of Paramus, 145 N.J. Super. 96 (App. Div. 1976), the court affirmed the request of the Paramus Board that Gish submit to a psychiatric examination after the board had given him the reasons for the request and afforded him the opportunity to be heard on those reasons. In both Kochman and Gish, the claimed protected interests of the individual were balanced against the competing interests of the boards.

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Here, the challenged action of the Board is to a general requirement that all employees submit to a physical examination, the scope of which is to be determined by the school medical inspector, which scope, according to the examination form here to be used, exceeds that of the State Board rule at N.J.A.C. 6:29-4.2, with the purpose of the required examination, insofar as this record is concerned, being the Board has the asserted authority to adopt and implement such policy.

First, I do not see the authority at N.J.S.A. 18A:16-2, as this Board does, for boards to require all employees to undergo physical examinations to the extent this Board seeks to impose here. The language of the relevant first part of the statute, not specifically the subject of prior litigation, is clear and unambiguous and, as such, the words must be given their ordinary meaning; every board of education, by the use of the word "shall," is required to have its employees submit to a physical examination, annually, "the scope whereof shall be determined under the rules of the state board." The latter clause modifies the former; that is, the scope of the physical examination is determined by State Board rules. The State Board has adopted a specific rule to implement the requirement of N.J.S.A. 18A:16-2. That rule, N.J.A.C. 6:29-4.2, Testing for tuberculosis infection, is introduced by the statement:

> 6:29-4.2 Testing for tuberculosis infection
>
> (a) The following are rules of the State Department of Education concerning testing for tuberculosis infection by school districts for implementation of N.J.S.A. 18A:16-2 and 40-16.

There follows a series of regulations in respect of the administering of intradermal tests to pupils, to all employees, and exemptions allowed from taking the tests, and the remedy for positive reactions to the test. The State Board, in promulgating this rule specifically to implement N.J.S.A. 18A:16-2, took deliberate action in respect of its responsibility to determine the scope of physical examinations local boards of education are legislatively authorized and required to have their employees undergo. This rule was amended by the State Board, effective April 19, 1982 (See 14 N.J.R. 385), but the amendments do not alter the legal fact that it is the State Board which determines the scope of the physical examination to be required by boards of education of its employees.

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The Board contends that the tuberculin testing examination must, in light of N.J.A.C. 6:29-1.1(a), be seen to be a minimum requirement of the examination it is authorized to secure from its employees. I disagree. That rule, under the general subchapter heading School Health Rules, addresses the duty boards have to adopt rules to govern health services it shall provide which must include, at a minimum, the health services and facilities the State Board declares must be provided. No mention is made in this rule of a duty or responsibility imposed upon, or authority granted to, local boards of education to exceed the scope of the physical examination as required by the State Board at N.J.A.C. 6:29-4.2 to implement N.J.S.A. 18A:16-2. It must be remembered that it is the State Board of Education in whom the legislature saw fit to vest the responsbility for the general supervision and control of public education in this state N.J.S.A. 18A:4-10. Local boards of education are subject to the authority of the State Board N.J.S.A. 18A:11-1. The legislature apparently intended all employees of local boards to receive physical examinations every year, but within the scope authorized by the State Board. The State Board plainly determined the scope of the required examination to be for tuberculosis. Until and if the State Board expands the scope of the generaly required physical examination under N.J.S.A. 18A:16-2, this Board is without authority to go beyond the scope of such physical examination than that set forth at N.J.A.C. 6:29-4.2.

Thus I conclude the Board is without authority to impose upon its employees a physical examination under N.J.S.A. 18A:16-2 which exceeds the scope of such examination authorized by the State Board at N.J.A.C. 6:29-4.2. The scope of the required examination here is clearly beyond the scope of tuberculosis testing and, as such, is not within the power of the Board to compel. This conclusion is, in my view, supported by the direction of N.J.S.A. 18A:16-3, Character of examination, which speaks of "Any such examination . . ." and then makes reference to laboratory tests and fluoroscopic or x-ray procedures. The examination referred to as "Any such" means either the general physical examination allowable under the first part of N.J.S.A. 18A:16-2 and as directed by N.J.A.C. 6:29-4.2, or an individual examination, psychiatric or physical, which may be required when "in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health." In the latter instance, the individual is, of course, entitled to procedural due process safeguards of Kochman. Further support for the conclusion is found at N.J.S.A. 18A:16-4 which addresses the result of the general physical examination, or the individual psychiatric or physical examination in respect of communicable disease. If a person, through the general physical examination as limited

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by N.J.A.C. 6:29-4.2, shows a positive reaction to the intradermal test, and, if further examination under the second part of N.J.S.A. 18A:16-2 reveals tuberculosis, then that person may be placed on sick leave until recovery is made.

Next, the Board, having been found to have adopted a policy and required physical examination, whose scope is beyond its authority, cannot be seen to have properly delegated authority to its medical inspector to determine the scope of such examination. Though boards of education may, in certain instances, delegate to their officers or employees certain kinds of daily responsibilities and duties, they may never delegate away their own ultimate responsibility of policy creation. Even if the Board had the authority to require a broader scope physical examination than that allowed by the State Board rule, it, in the final analysis, would be the body to determine its scope. Admittedly, the Board probably would have consulted with its medical inspector for advice as to what the scope of the examination would have been, but and again, assuming it had such authority, it would be the Board that would have determined the scope of such examination—not the school medical inspector.

Having concluded that the Board has no authority to require physical examinations under N.J.S.A. 18A:16-2 beyond the scope authorized by the State Board at N.J.A.C. 6:29-4.2, and having also concluded that the Board, even if it had such authority, may not properly delegate authority to its school medical inspector to determine the scope of the examination, so much of Board policy 4112.4 and so much of the scope of the physical examination which exceeds the State Board rule is hereby set aside.

I will briefly address, though not decide because of canons of judicial restraint, the question presented in respect to the employees' right to privacy as that concept relates to required annual physical examinations of all employees. Though not specifically mentioned in either the New Jersey or the United States Constitutions, both laws have been construed to include the interests of individual privacy as against unwarranted actions of the state. See Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); In re Quinlan, 70 N.J. 10 (1976); and, State v. Saunders, 75 N.J. 200 (1977). In each of the cited cases, considered for the particular constitutional right, or interest, to privacy recognized, the United States Supreme Court and the New Jersey Supreme Court, when finding the claimed protected interest to be fundamental, and the privacy interest not absolute, looked for a compelling state interest to justify the

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infringement of the fundamental interest of individual privacy. Both Courts also considered whether the means chosen to achieve the goal was the least onerous in respect of the affected interest. Thus, presumption of correctness does not attach to the state action (here, the Board) when that action infringes upon a fundamental interest protected by the Constitution.

In conclusion, summary decision is granted the Association on the following two points:

1. The Board has no authority to require its employees to undergo annual physical examination under N.J.S.A. 18A:16-2 which are beyond the scope of the State Board rule at N.J.A.C. 6:29-4.2; and

2. The Board has no authority to delegate authority to its school medical inspector to determine a greater scope of a physical examination under N.J.S.A 18A:16-2 than that provided at N.J.A.C. 6:29-4.2. The Board may, of course, consult with the medical inspector in respect of the tuberculosis testing and then adopt his/her recommendations.

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 8581-81

I hereby **FILE** my Initial Decision with **GUSTAV H. RUH** for consideration.

June 7, 1982
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

June 7, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 9, 1982
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

ij

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CEDARVILLE TEACHERS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, CUMBERLAND 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 respondent Board excepts to the initial decision by the Honorable Daniel B. McKeown, ALJ. The Board contends that Judge McKeown erred by holding that the authority of the Board to require annual physical examinations of its employees pursuant to N.J.S.A. 18A:16-2 is limited to those circumstances identified in N.J.A.C. 6:29-4.2. The Board asserts that it properly sought the recommendation in this matter of the district's medical inspector to enable it to determine the scope of the physical examinations herein referenced.

The Association's reply exceptions refute those of the Board and affirm the initial decision. The Association contends that legislative intent is clearly shown by the wording of N.J.S.A. 18A:16-2 wherein is stated that such exams "shall be determined under rules of the State Board." The Association avers that nothing beyond that specified in N.J.A.C. 6:29-4.2, testing for tuberculosis infection, may be required.

The Commissioner cannot agree with the Association's exceptions and finds merit in those of the Board. The Commissioner deems it proper that the history be herewith set down of the legislative enactment of the provisions for the physical examinations of employees approved August 2, 1939, L.1939, c.295, becoming N.J.S.A. 18:5-50.5. The Statement of Purpose appended to the bill expressing legislative intent is herewith set down in full:

> "The purpose of this act is to authorize boards of education to require a physical examination of all employees at least once in three years, and a special examination of any

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> employee upon evidence of deviation from normal health. If the examination indicates a communicable disease, the employees shall be ineligible for service until proof of recovery is furnished."

From his own records the Commissioner determines that, at the time of inception in 1939 of N.J.S.A. 18:5-50.5, the State Board had established certain controls through its Rules and Regulations. The portion of those rules in governance of School Health Services is herewith set down in pertinent part:

> "Every board of education in this State shall adopt rules to govern health services in its school district and such rules and regulations shall include as a minimum the rules and regulations of the State Board of Education which are expressed in the following sections.
>
> "Medical Inspection
>
> "63. Every board of education in this State shall appoint at least one medical inspector. He should be appointed for at least one year.
>
> "64. The medical inspector shall direct the professional duties or activities of the school nurse and shall compile and issue regulations governing professional techniques, the conduct of inspections or tests, and the administration of treatment.
>
> "65. Boards of education, school medical inspectors, any medical specialist employed by a school board, school dentists, teachers of health, and nurses shall at all times comply with the rules and regulations of the local boards of health and of the State Board of Health which relate to the sanitation of public buildings and grounds and to the prevention and control of communicable diseases." (Emphasis supplied.)

Subsequent action by the State Board pertaining to N.J.A.C. 6:29-4.2 may be depicted in chart form as follows:

June 24, 1955	Adopted rule as "Tuberculosis Case-Finding in Public Schools"
February 5, 1964	Amended
August 18, 1969	Rules and regulations recodified as Title 6

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August 3, 1977 Amended

April 4, 1979 Amended

March 3, 1982 Amended

The Commissioner observes that, when the statute N.J.S.A. 18:5-50.5 was promulgated in 1939, it was intended that

> "[t]he scope of such examination shall be determined under rules of the State Board of Education."

The State Board rules, ante, clearly refer to "communicable diseases." Tuberculosis as a specific communicable disease was not referenced in the rules until 1955 (see chart).

In 1939 the statement of legislative intent, ante, included all communicable diseases, with no specific reference to tuberculosis. In the opinion of the Commissioner, the subsequent State Board rules form only a minimal basis for any board of education in determining the scope of a physical examination under N.J.S.A. 18A:16-2.

The Commissioner places no credence in the concept that the only communicable disease of concern in public schools is tuberculosis. Nor can the Commissioner agree with Judge McKeown that the Board in any way erred by consulting with its school medical inspector to determine the scope of a physical examination. The Board of Education is charged with a heavy responsibility by N.J.S.A. 18A:11-1 which it cannot forego. It must solicit expert advice and recommendations from its professional employees in determining how to prudently and expeditiously discharge that responsibility. The Commissioner so holds.

The Commissioner herewith sets aside the conclusions by Judge McKeown and in summary form finds and determines:

1. The Board has authority to require its employees to undergo an annual physical examination under N.J.S.A. 18A:16-2.

2. The Board shall determine as part of its policy thereto the scope of a physical examination based on the advice and recommendations of its medical inspector.

The guidelines for the requirement by a board of education for an employee to submit to a psychiatric examination have been set down by the Courts of New Jersey in Kochman, supra, and Gish, supra, and by the Commissioner in Fred J. Hoffman v. Board of Education of Asbury Park, 1975 S.L.D. 929.

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The interrelation of the mental and physical health of all school employees with that of pupils in a school district is of prime importance to boards. The Commissioner so holds.

COMMISSIONER OF EDUCATION

July 22, 1982

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 6442-81
AGENCY DKT. NO. 353-8/81A

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN AND BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON,
Respondents.

APPEARANCES:

Paul Mainardi, Esq., representing the petitioner, Board of Education of the Borough of Merchantville

Neil Brodsky, Esq., representing respondents, Board of Education of the Township of Haddon and Board of Education of the Township of Pennsauken

Record Closed April 26, 1982 Decided June 10, 1982

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

This matter was filed in the Office of the Commissioner of Education and thereafter transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

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It appearing that respondent moved at the end of petitioner's case to dismiss the Petition of Appeal; and,

It appearing that the proofs submitted by petitioner do not establish good and sufficient reason for termination of the existing sending-receiving relationship; now therefore---

It is hereby **ORDERED** that the respondent's Motion to Dismiss the Petition of Appeal is granted, with Prejudice.

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 **GUSTAV H. RUH** for consideration.

June 10, 1982
DATE

August E. Thomas, alj
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

June 10/1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 14, 1982
DATE

Ronald L. Rubin/jm
OFFICE OF ADMINISTRATIVE LAW

fms

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BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN AND BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON, CAMDEN 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 although not in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes that extensive exceptions have been filed by both petitioner and Pennsauken Board (respondent) in the matter presently controverted. The Commissioner will consider the exceptions of the parties herein although not filed in a timely fashion because of the sparsity of the record in the initial decision. It is so noted.

Petitioner excepts to the conclusion by the Honorable August E. Thomas, ALJ that petitioner did not establish good and sufficient reasons for terminating the existing sending-receiving relationship with respondent.

Petitioner desires to modify its sending-receiving relationship with respondent by seeking enforcement of the expiration provision of the written contract ending its ten-year period in June 1982. Petitioner contests the applicability of N.J.S.A. 18A:38-13 herein:

> "No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except for good and sufficient reason upon application made to

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> and approved by the commissioner, who shall make equitable determinations upon any such applications." (Emphasis supplied.)

Petitioner argues that the legal standard to be applied herein should not be that of "good and sufficient reason" but should be based on contract law alone. Petitioner expressly acknowledges that the educational program and the physical facilities provided by respondent are not inadequate. Petitioner cites N.J.S.A. 18A:38-21:

> "Any board of education which shall have entered into such an agreement may apply to the commissioner for consent***to withdraw its pupils from the schools of the other contracting district***on the ground that the board of education of the receiving district is not providing school facilities and an educational program suitable to the needs of the pupils of the sending district or that the board of education of the receiving district will not be seriously affected educationally or financially by their withdrawal." (Emphasis supplied.)

Petitioner argues that the Legislature's use of the word "or" makes it clear that an alternative legal standard for withdrawal is the showing that the receiving district "***will not be seriously affected educationally or financially***" by the withdrawal.

Respondent's voluminous cross-exceptions argue otherwise. Respondent in reply contends that petitioner clearly has the burden of proof that it has good and sufficient reason for seeking a termination and/or modification of the sending-receiving relationship it has had with the Board of Education of the Township of Pennsauken for the past ten years. Respondent contends that such proof is mandated by law and that to argue that respondent might not be hurt by such withdrawal is not of itself sufficient reason to do so. Respondent avers that petitioner has failed to show the "good grounds" required by N.J.S.A. 18A:38-22 as herein set down in its entirety:

> "Upon the making of any such application, an opportunity to be heard before the commissioner shall be given to the board of education of the other district before any determination is made by the commissioner, and if the commissioner finds that there are good grounds for the application, as provided in this article, he shall give his consent, and the applying board of education shall thereupon be entitled to terminate the agreement

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> in accordance therewith but the commissioner's determination shall be subject to appeal to the state board.
>
> (Emphasis supplied.)

Respondent relies on the decision by the State's highest court in Jenkins et al. v. Township of Morris School District and Board of Education, 58 N.J. 483 (1971). Therein respondent notes that the Court determined that the standards set forth in N.J.S.A. 18A:38-21 are standards that will be applied in addition to the traditional standard in N.J.S.A. 18A:38-13 which requires "good and sufficient reason." Respondent cites page 502 of the Court's opinion in Jenkins:

> "***Apparently the 1953 enactment [referring to N.J.S.A. 18A:38-20 et seq. L.1953, c.273 - see page 501] was intended to give additional assurance to the receiving district furnishing additional facilities that it would not be endangered during the ten-year contract period. But the enactment was not in anywise intended to repeal nor did it have the effect of repealing the preexisting statutes such as that now embodied in N.J.S.A. 18A:38-13. Thus when the 1962 contract expires or is terminated in accordance with its terms, the Township's prior designation of Morristown High School continues in full effect until it is changed or withdrawn in strict accordance with N.J.S.A. 18A:38-13. (emphasis added)."
>
> (Respondent's Exceptions, at p. 6)

Respondent contends that petitioner has failed in its burden of proof herein and that, accordingly, Judge Thomas correctly dismissed the Petition at the conclusion of the case. Respondent pleads for affirmation of the initial decision. The Commissioner finds merit in respondent's arguments.

The Commissioner is constrained to observe that nothing in the record presented herewith convinces him that respondent has in any way failed to offer the pupils of the sending district, and its own, an education other than what may be characterized as thorough and efficient.

No inadequacy of building or program has been shown or even alleged. Absent a good and sufficient reason for termination of the existing sending-receiving relationship, the Commissioner finds no merit in petitioner's pleadings. Respondent's Motion to Dismiss the Petition of Appeal is accordingly affirmed with prejudice.

COMMISSIONER OF EDUCATION

July 26, 1982

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BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN AND BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON, CAMDEN COUNTY,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 26, 1982

For the Petitioner-Appellant, Brown, Connery, Kulp, Wille, Purnell & Greene (Paul Mainardi, Esq., of Counsel)

For the Respondents-Respondents, Florio & Maloney (Neil Brodsky, Esq., of Counsel)

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

S. David Brandt, John T. Klagholz and Robert J. Wolfenbarger opposed in the matter.

November 3, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3952-82
AGENCY DKT. NO. 106-4/82A

IN THE MATTER OF:
THE ANNUAL SCHOOL ELECTION
HELD IN THE HENRY HUDSON
REGIONAL SCHOOL DISTRICT,
MONMOUTH COUNTY

APPEARANCES:

Kathleen Levine, Pro Se

Peter P. Kalac, Esq., for respondent (Kalac, Newman, and Griffin, attorneys)

Record Closed May 24, 1982 Decided June 14, 1982

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

Petitioner filed with the Commissioner of Education a complaint alleging certain procedural irregularities at the annual school election which was conducted in the Henry Hudson Regional School District, Monmouth County, on April 6, 1982.

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 hearing was conducted on May 24, 1982, in the Monmouth County Hall of Records, Freehold.

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Petitioner seeks a new election. Her complaint is reproduced in pertinent part as follows:

> It is my opinion that all elections in Monmouth County should be held invalid due to conflicting reports from the Governor's office, along with erroneous media coverage which indicated school elections throughout the state were suspended on April 6, 1982. This together with severe inclement weather created a state of chaos and confused the voters of Monmouth County.
>
> In addition, there appeared to be a problem with the absentee ballots. The problem being that some potential voters who requested a regional school board ballot received two local school ballots instead of the requested regional ballot. The information was given to me by five registered voters. (Exhibit B)

Petitioner testified that a severe snowstorm struck the State on April 6, 1982; that many public buildings were subsequently closed; and that the media directions as to whether or not school elections were to be held were so confusing that many voters did not come out to cast their ballots. Petitioner alleges that the confusing media coverage was generated by direction from the Governor's office indicating in which counties the election would be postponed.

Official notice is taken of the fact that some county elections were postponed by direction from the Governor's office.

Petitioner testified also that although she prevailed at the polls by one (1) ballot, she lost the election for a seat on the Board of Education by sixteen votes because of the absentee ballots cast. In this regard, she testified that she knew of one person who requested an absentee ballot for the Henry Hudson Regional School District, but received instead two absentee ballots for the Highlands School District, which is a local sending district to the regional high school.

Petitioner testified also that she was not prepared to present witnesses or proofs of the alleged irregularities because she was informed by phone from the Office of Administrative Law that our hearing on May 24, 1982, was in fact a "pre-hearing" and that she did not have to present her proofs at that time. Petitioner conceded, however, that she received written notice of our hearing, but that she did not know the difference between a hearing and a pre-hearing.

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Notwithstanding petitioner's confusion about the nature of the hearing, the notice of hearing was clearly stated. Petitioner's decision to represent herself carries with it an obligation to understand and comport with all the rules embodied in the administrative code; consequently, she must be deemed competent to represent herself and to recognize the gravity of being a pro se litigant (N.J.A.C. 1:1-3.7).

For this reason, I **CONCLUDE** that the hearing conducted on May 24, 1982, was a valid hearing.

The Board Secretary testified that she prepared a sufficient number of absentee ballots (150 in number) and delivered them to the County Board of Elections for distribution pursuant to Statute (N.J.S.A. 19:57-4).

Consequently, if there was a mistake in sending the wrong ballot, the Board bears no responsibility for the error.

Based on the foregoing testimony, and assuming as fact that (1) many persons did not vote because of confusion over media accounts of the closing of polls, and (2) that one voter did not receive a proper absentee ballot, I **FIND** no evidence which would compel a re-scheduling of the annual school election, even accepting all of petitioner's allegations to be fact.

It is the clear intent of the law that elections are to be given effect whenever possible. It has been held by the courts of this State that gross irregularities, when not amounting to fraud, do not vitiate an election. Love v. Board of Chosen Freeholders, 35 N.J.L. 269 (Sup. Ct. 1871); Stone et al. v. Wyckoff et al., 102 N.J. Super. 26 (App. Div. 1968). It is also clear that irregularities and deviations from election laws by election officials provide insufficient grounds for voiding an election if the will of the people has been fairly expressed and determined and has not been thwarted. Petition of Clee, 119 N.J.L. 310 (Sup. Ct. 1938); In re Livingston, 83 N.J. Super. 98 (App. Div. 1964). It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. In re Wene, 26 N.J. Super. 363 (Law Div. 1953) sets forth the rule as follows:

> . . . The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the

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> election officials is to be adjuged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will. . . .

In the instant matter there is no allegation of fraud. What occurred was a snowstorm which caused some difficulty in going to the poll, and the resultant media reports which confused some of the voters. However, the Board Secretary testified that 371 ballots were cast, as compared to 401 and 397 for the prior two school elections. Petitioner testified concerning increasing population in the area; however, there was no proof of this allegation nor was there any showing of a significant change in the number of registered voters.

Regarding the absentee ballots, and assuming that some voters did not receive the proper ballot, there is no way to show how a voter would cast his ballot even if he/she had received the proper ballot.

Based on the foregoing, I **CONCLUDE** that there is no relief to which petitioner is entitled, and that the results of the annual school election must stand as announced.

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 3952-82

I hereby **FILE** my Initial Decision with **GUSTAV H. RUH** for consideration.

14 June 82
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 18, 1982
DATE

Ronald L. Lakey/ss
OFFICE OF ADMINISTRATIVE LAW

plb

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DOCUMENTS IN EVIDENCE

Exhibit A - Election inquiry request
Exhibit B - Voters' signatures
Exhibit C - Notice of Hearing

WITNESSES

Michael Levine, petitioner's husband

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
HENRY HUDSON REGIONAL SCHOOL	:	DECISION
DISTRICT, 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 for an inquiry is hereby dismissed.

COMMISSIONER OF EDUCATION

July 27, 1982

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5650-81

AGENCY DKT. NO. 333-7/81A

ELAINE WHALEN AND THE SAYREVILLE EDUCATION ASSOCIATION,

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 May 25, 1982 Decided June 29, 1982

BEFORE **LILLARD E. LAW,** ALJ:

Petitioner, Elaine Whalen, a tenured teaching staff member in the employ of the Board of Education of the Borough of Sayreville (Board), alleges that the Board improperly denied her two years of service credit towards her salary subsequent to her dismissal as a result of a reduction in force and her reemployment by the Board, pursuant to N.J.S.A. 18A:28-9 et seq. Petitioner seeks an Order issued by the Commissioner providing for two years' credit, placement on the appropriate step of the Board's salary guide, and back pay owed to her with interest and costs and attorneys fees. The Board denies that it acted improperly when it reemployed petitioner and placed her at the appropriate step on its salary guide for her years of service in the school district. It requests dismissal of the Petition of Appeal.

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This matter was filed before the Commissioner of Education on or about July 29, 1981, and on August 27, 1981, the Commissioner transmitted it to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Thereafter, on October 13, 1981, a prehearing conference was held at which the parties agreed to, among other things, the issues to be determined and set down the date of January 21, 1982 for hearing. Prior to January 21, 1982, the parties agreed to enter into a Stipulation of Facts and forego a hearing in the matter. The matter is now set forth for adjudication on the pleadings, Stipulation of Facts, exhibits and Briefs of counsel. No essential facts are in dispute.

STIPULATION OF FACTS

1. Petitioner Elaine Whalen is a tenured teacher employed by the Board of Education of the Borough of Sayreville, Middlesex County (Board).

2. The Board and the Sayreville Education Association (Association), are parties to a collective negotiations agreement (Agreement), effective from July 1, 1980 to June 30, 1982. (Exhibit J-1).

3. Effective September 1, 1973, petitioner Elaine Whalen was hired by the Board as a teacher of business education.

4. Effective June 30, 1979, petitioner Elaine Whalen was laid off due to an economic reduction in force; on the date of the layoff, she was tenured. She was employed continually by the Board from the date of her initial hire until the date she was laid off.

5. On her last day of employment before layoff, petitioner Elaine Whalen was paid at the rate of $13,300 per annum which was step 5 on the Teachers Salary Guide for the 1978-79 school year.

6. Petitioner Elaine Whalen was employed by the Woodbridge Board of Education as a teacher of business education from September 1, 1979 until June 30, 1981. Her salary for the 1979-80 school year was $15,058. Her salary for the 1980-81 school year was $16,934.

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7. During the spring of 1981, it became known by the Sayreville School Administration that a vacancy would occur for a teacher of business education, and the position, which was to become vacant as of September 1, 1981, was offered to Elaine Whalen pursuant to the legal requirements of N.J.S.A. 18A:28-12.

8. In a letter dated May 4, 1981 (Exhibit J-2), Elaine Whalen indicated her desire to return to the Sayreville School system as a teaching staff member. The letter stated that it was submitted at the request of Henry Counsman, Superintendent of Schools in Sayreville.

9. The Woodbridge Board of Education indicated by letter dated April 15, 1981, that it would not be rehiring Elaine Whalen for the school year 1981-82 (Exhibit J-3). By letter dated April 29, 1981 (Exhibit J-4), the Woodbridge Board of Education stated the reasons for its decision not to rehire Elaine Whalen.

10. Exhibit J-5 is the final evaluation of Elaine Whalen from the Woodbridge Board of Education.

11. At its meeting of May 19, 1981, the Sayreville Board of Education voted to hire Elaine Whalen as a tenured teacher of business education effective September 1, 1981.

12. Petitioner, Elaine Whalen was not given credit by the Board for purposes of her placement on the 1981-82 Teachers Salary Guide for the two years she was employed by the Woodbridge Board of Education. Her current salary is $15,575 and she was placed on step 6 of the 1981-82 Teachers Salary Guide.

ISSUES TO BE DETERMINED

1. Whether petitioner, subsequent to a reduction in force and her employment outside of the Board's employ for a period of two years, when reinstated to her tenured position is due two years salary credit on the Board's adopted salary policy?

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2. Whether the Association herein has standing to bring this cause of action before the Commissioner of Education?

3. Whether the Commissioner has the authority to award petitioner, if successful, interest, costs and attorneys fees?

LEGAL ARGUMENTS OF THE PARTIES

Petitioner observes that it is established law that words and phrases in statutes and contracts are to be given their ordinary meaning unless the context clearly requires otherwise. See Watt V. Mayor and Council of Borough of Franklin, 21 N.J. 274, 277 (1955); Duke Power Co. v. Patten, 20 N.J. 42, 49 (1955). Moreover, when construing a statutory enactment or contractual provision it is fundamental that the general intention of the act controls the interpretation of its parts. Hackensack Water Co. v. Ruta, 3 N.J. 139, 149 (1949). All statutory and contractual provisions are to be related and effect given to each if such be reasonably possible. Jamouneau v. Harner, 16 N.J. 500, 513 (1954). Regarding the process of interpreting statutes and the intent of the Legislature, the Appellate Division in State v. Conala, 135 N.J. Super. 224, 225 (App. Div.), certif. denied, 69 N.J. 82 (1975), stated that "full force and effect must be given, if possible, to every word, clause and sentence..."

Petitioner contends that the legal issue in the instant matter is whether a board of education which reemploys a laid off tenured teaching staff member, pursuant to N.J.S.A. 18A:28-12, must credit that teacher for salary purposes with employment time in another school district while on layoff. She argues that the pertinent statutory provisions require that a board of education must so credit a teacher, and cites N.J.S.A. 18A:29-4.1, which provides in part that:

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

In this connection, petitioner contends that N.J.S.A. 18A:29-7 and 10 specify the minimum standards for school district salary schedules. Petitioner contends that a board of education must comply with the pertinent law in establishing a salary policy.

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N.J.S.A. 18A:29-8 provides:

> Any member holding office, position or employment in any school district of this state, shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section.

Petitioner argues that from the foregoing, had she continued as a Board employee during the 1979-80 and 1980-81 school years, she would have been entitled to receive salary increments each year. Petitioner argues that the same increments are guaranteed to an employee on layoff who was employed by another district while on layoff.

Petitioner cites N.J.S.A. 18A:28-12, entitled, "Dismissal of persons having tenure on reduction; reemployment," which provides in part as follows:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service. (Emphasis added.)

and

N.J.S.A. 18A:29-6, entitled "Definitions," defines year or employment as follows:

> "Year of employment" shall mean employment by a member of one academic year in any publicly owned and operated college, school or other institution of learning for one academic year in this or any other state or territory of the United States ... (Emphasis added).

Petitioner argues that teachers reemployed pursuant to N.J.S.A. 18A:28-12 who were employed by different school districts during layoff, must be treated identically in terms of salary with teachers employed continually by a school district. Consequently, they must be reemployed at a salary which reflects employment while on layoff. This is so since according to the plain meaning of the aforementioned statutory provisions, employment during the terms of the layoff constitutes "previous years of service," if that employment was as a teaching staff member, as defined at N.J.S.A. 18A:1-1 and N.J.A.C. 6:11-3.4, in a publicly owned school. In the instant case, petitioner was so employed. Accordingly, her situation is clearly distinguishable from that of a

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person negotiating with a board of education for the first time. Such a person is, in essence, a "free agent," see John G. Nelson v. Board of Education of the Town of Kearney, 1976 S.L.D. 1041, 1044, and a board of education in such a situation can engage in arms length negotiations regarding salary. It is precluded, however, from negotiating salary with a teacher returning from a layoff, as that person's salary is set by the aforementioned statutory provisions.

Petitioner observes that the Commissioner supports the interpretation of N.J.S.A. 18A:28-12 presented above. In Angela Riemann v. Board of Education of the Township of Edison 1980 S.L.D. _____ (C.D., June 19, 1980), the Commissioner stated:

> An individual teacher's salary must recognize not only years of teaching experience acquired in a district in which such teacher had been previously employed but also years of employment in any other district. N.J.S.A. 18A:29-7 and 10. Year of employment for salary purposes is defined by N.J.S.A. 18A:29-6 to mean:
>
> Employment . . . in any publicly owned and operated college, school or other institution of learning for one academic year in this or any other state or territory of the United States. . .

See also Lucille Chaump v. Board of Education of the Town of Belleville, 1979 S.L.D. 241 (C.D. 1979).

Petitioner suggests that it bears noting that the Commissioner has been disposed, in other situations, to provide a teacher with credit at a particular board of education for time not spent in a classroom with that board. Beverly Micciche v. Board of Education of the Township of Mount Holly, 1981 S.L.D. _____ (C.D. November 30, 1981). Petitioner argues that this case demonstrates that she must be given credit for salary purposes for the two years she was employed by the Woodbridge Board of Education, and accordingly placed on step eight of the 1981-82 Teachers Salary Guide, effective September 1, 1981.

Petitioners observe that the Board claims that the Association lacks standing to join Elaine Whalen as a petitioner in this action. The petitioners submit that it is well-established that an Association has standing to file a grievance or a Petition of Appeal on

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behalf of its members, or to join with an individual member as joint petitioners. See: Red Bank Regional Education Association v. Red Bank Regional High School Board of Education, 151 N.J. Super. 435 (App. Div. 1977), 78 N.J. 122 (1978).

In this regard, the language of the Appellate Division in Red Bank, supra, at 440, is important:

> From a strictly pragmatic viewpoint we can think of many reasons causing a teacher to resist the individual filing of a grievance, among which might be a wholly salutary concern for her relationship and effectiveness with her students, or less altruistically, a human concern for nontenure status. Redress for a violation should not "be made contingent upon the intrepidity of the individual employee." Industrial Union of Marine & Shipbuilding Wkrs. v. N.L.R.B., 320 F.2d 615, 619 (3 Cir. 1963), cert. den. 375 U.S. 984, 84 S. Ct. 516 11 L. Ed. 2d 472 (1964).

Petitioner contends that the foregoing indicates that grievances filed by an employee association on behalf of individual members are not only sanctioned, but encouraged. Moreover, where a named individual petitioner files a Petition of Appeal, an association clearly has standing to join in the action, as its participation lends support to the individual petitioner. In this regard, Winston v. Board of Education of the Borough of South Plainfield, 125 N.J. Super. 131 (App. Div. 1973), aff'd, 64 N.J. 582 (1974), is important. In Winston, the Commissioner and the State Board of Education dismissed the South Plainfield Education Association as a party to an action commenced before the Commissioner. The Appellate Division reversed this decision. Its determination was later affirmed by the Supreme Court.

Petitioner contends that the Association has standing to join Elaine Whalen as a petitioner in this action.

Petitioner also argues that interest should be awarded to her for lost wages. The Appellate Division has ruled that under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A et seq., interest is recoverable. See Salem County Board for Vocational Education v. McGonigle, App. Div., Docket No. A-3417-78 (1980) (unpublished) and In re County of Cape May, PERC No. 82-2, 7 N.J. PER 432 Para. 12192 - 1981. The reasoning used in those cases is equally applicable herein.

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The Board observes that the principles of statutory construction as cited by petitioners in their Brief are not disputed. The Board reiterates the petitioner's reliance on State v. Conala, supra, wherein the Appellate Division stated at 235 that "full force and effect must be given, if possible, to every word, clause and sentence. . ."

The Board argues, however, that petitioner's analysis of the statutes in this matter does not give full force and effect to every word, clause and sentence. Petitioner places reliance on many of the provisions of Chapter 29 of Title 18A with regard to compensation and indicates that it must control the conduct of the Board with regard to the provisions of Chapter 28, Article III concerning the effect of reduction of force upon persons under tenure. While it is true that there are certain minimums of compensation that must be provided, not all of the provisions of Chapter 29 are necessarily applicable or can be interchangeably used with the provisions of Chapter 28.

Petitioner relies on the definitions of year of employment in N.J.S.A. 18A:29-6. A reading of the definitions section as set forth in the statutes discloses that N.J.S.A. 18A:29-6 is contained in sub-article of Chapter 29 entitled "B. Salary Schedule." This is commonly referred to as a sub-article in statutory parlance.

N.J.S.A. 18A:29-6 reads as follows:

As used in this sub-article the following words shall have the following meaning:

> year of employment" shall mean employment by a member for one academic year in any publicly owned and operated college, school or other institution of learning for one academic year in this or any other state or territory of the United States;

The Board contends that the definition of year of employment pertains only to the sub-article which encompasses the sections N.J.S.A. 18A:29-6 through 18A:29-16. The second important aspect of this definition which should be emphasized is that there is no language in N.J.S.A. 18A:28-12 that speaks of years of employment. The language in N.J.S.A. 18A:28-12 refers to "years of service." The exact language is as follows:

> if any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he

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> shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service. . ." (emphasis added).

The Board asserts that it is clear from the above-quoted statute that seniority is the "key" to this statute. The Board also notes that N.J.A.C. 6:3-1.10, providing for standards for determining seniority, was adopted by the State Board of Education pursuant to the authority vested in N.J.S.A. 18A:28-9 to 18A:28-13.

Sub-section (b) of N.J.A.C. 6:3-1.10, states:

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

Section (c) of N.J.A.C. 6:3-1.10 provides as follows:

"Employment in the district prior to the adoption of these standards shall be counted in determining seniority."

The Board contends that the regulations cited above attach a different interpretation of the language of N.J.S.A. 18A:28-12 than that contended by the petitioner.

The Board submits that there are no cases that it can find which have precisely the same factual pattern as in the instant matter. Petitioner cites several cases which she contends supports the proposition she argues. Chief among the cases cited by petitioner is the matter of Angela Riemann v. Board of Education of the Township of Edison, 1980 S.L.D. _____ (C.D., June 19, 1980). However, in that case, the factual pattern is that the tenured business education teacher who had been employed by the district previously had resigned and then was reemployed. The holding in that case indicates that the petitioner's voluntary resignation and subsequent long-term absence from teaching effectively broke the continuity of employment contemplated in determining seniority status. The Petition in that matter was dismissed. Petitioner relies on what can fairly be termed dicta of the Commissioner of Education. It is not necessary for the decision and the Commissioner apparently is referring to N.J.S.A. 18A: 29-7 and 10 for the proposition that employment in other districts must be recognized. However, this factual pattern was not presented in Reimann, supra. Further, N.J.S.A.

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18A:29-10 depends on applying the definition of "years of employment" to the reduction in force statute. Clearly, petitioner does not dispute the fact that a board of education has the authority pursuant to N.J.S.A. 18A:29-9 to agree as to initial salaries. See also John G. Nelson v. Board of Education of the Town of Kearney 1976 S.L.D. 1041, 1044 (C.D. 1976). When one reads N.J.S.A. 18A:29-10 literally, one does not see an exclusion for the provisions of 18A:29-9. However, it is apparent from case law that such has been excluded. It is also submitted that based upon the statutory construction as set forth above as well as the interpretation by the State Board of Education in adopting the New Jersey Administrative Code Provisions in N.J.A.C. 6:3-1.10, the Board acted properly in not giving credit to petitioner for her two years of employment in the Woodbridge school district.

The Board observes that petitioner also refers to the case of Lucille Chaump v. Board of Education of the Towns of Belleville, supra as applicable. The Board contends that the Chaump case is distinguishable from the instant matter. In Chaump the teacher was employed solely within the district in question. There was a question concerning proper credit on the salary guide for teaching half days. In that case, the Commissioner of Education ruled that the Board of Education had been inconsistent in its treatment of the therein petitioner and therefore directed placement of the petitioner on a certain step in the salary guide. In the instant matter, no other cases have been cited by petitioner for the proposition either that the Board has been inconsistent in its treatment of similarly situated petitioners nor has the petitioner been able to cite any cases in any other districts which have been decided by the Commissioner of Education or the courts concerning the requested interpretation of the statutes by the petitioner.

The last case cited by petitioner on this point is the matter of Beverely Micciche v. Board of Education of the Township of Mount Holly, 1981 S.L.D. _____ (C.D. November 30, 1981). However, that case clearly is decided under the appropriate section of N.J.A.C. which is cited herein that provides that "seniority status shall not be effected by occasional absences and leaves of absence." A two-year absence is certainly distinguishable from three months.

With regard to the petitioner's claim for interest, the Commissioner of Education has consistently held that he lacks the requisite subject matter jurisdiction to award interest, counsel fees or punitive damages. North Bergen Federation of Teachers,

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Local 1060, AFL-CIO et al v. Board of Education of the Township of North Bergen, 75 S.L.D. _____ 461, 467; Accord, Meisenbacher v. Board of Education of the City of Newark, 1980 S.L.D. _____ (December 8, 1980); Winter v. Board of Education of the Township of North Bergen, 75 S.L.D. 236.

For the reasons and authorities submitted herein, the Board requests that the Petition of Appeal be dismissed.

DISCUSSION

There being no material facts in dispute, this matter comes before this tribunal on cross-motions for summary judgement of the issue in controversy.

The threshold question to be determined is one of first impression. That question is whether a board of education upon the reemployment of a dismissed tenured teaching staff member, pursuant to N.J.S.A. 18A:28-12, is required to provide such reemployed teacher with salary credit on its adopted salary guide for the period of such dismissal.

The facts in this matter clearly demonstrate that subsequent to her dismissal by the Board as the result of a reduction in force, pursuant to N.J.S.A. 18A:28-12, petitioner was able to secure a comparable teaching position in another public school district. Petitioner held that equivalent position for a period of two years while remaining on the Board's preferred eligible list in order of seniority for reemployment. Petitioner was on step 5 of the Board's Teacher Salary Guide for the 1978-79 school year when she was dismissed. Upon her recall and reemployment, the Board placed petitioner at step 6 of its salary guide.

The statute, N.J.S.A. 18A:28-12, provides salary protection to the person dismissed and subsequently reemployed as a result of a reduction in force. The statute provides, in part, that ". . . in computing length of service for reemployment, full recognition shall be given to previous years of service. . . ." This provision precludes a board of education from renegotiating a beginning or intermediate salary with the reemployed teacher. Moreover, the statute requires that the board of education place the reemployed teacher on the appropriate step of its salary guide commensurate with the teachers training (degree level) and previous years of service. The statute is silent, however, with regard to what previous years of service is to be considered.

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The statute N.J.S.A. 18A:28-9 through 18A:28-14 controls the dismissal of tenured teaching staff members as a result of a bona fide reduction in force. Therein, the Legislature authorized the Commissioner of Education to establish the standards to determine teaching staff members seniority status as set forth in N.J.S.A. 18A:28-13, as follows:

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

Pursuant to such Legislative authority the Commissioner, through the State Board of Education, promulgated the standards for determining seniority in a school district at N.J.A.C. 6:3-1.10. The regulation, at N.J.A.C. 6:3-1.10 (b) provides that:

> Seniority, pursuant to N.J.S.A. 18A:28-9 et seq. shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories. . . . (Emphasis supplied.)

It is apparent, from a reading of the statute and rule promulgated pursuant to that statute, that seniority may only be gained by a teaching staff member according to the number of academic or calendar years of employment in the school district. It has been held by the courts of this State that the interpretation of statutes and the rules and regulations of an administrative agency must be consistent with the ordinary meaning of the language set forth therein. Essex County Welfare Board v. Klein, 149 N.J. Super. 241 (App. Div. 1977). Thus, it may be fairly concluded that the requisite employment in the school district for the determination of seniority as set forth in N.J.A.C. 6:3-1.10(b) defines the meaning of the language of the provision in N.J.S.A. 18A:28-12 which provides that ". . . in computing length of service for reemployment, full recognition shall be given to previous years of service. . . ." [in the school district]

It is apparent from the stipulated facts that the Board, upon its reemployment of petitioner, preserved her seniority status in the school district. It is equally apparent that the Board afforded petitioner the appropriate position on its salary guide when it advanced her from the fifth step, the position she held upon her dismissal, to the sixth step upon her reemployment. There has been no showing by petitioner that the Board

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violated, in any fashion, those rights and privileges conferred upon her by virtue of the statutory provisions, N.J.S.A. 18A:28-9 et seq.

Accordingly, I **CONCLUDE** that the Board acted within its authority and statutory requirements when it placed petitioner upon the sixth step of its salary guide, subsequent to petitioner's dismissal and reemployment pursuant to N.J.S.A. 18A:28-12.

I **FIND** and **CONCLUDE** that the Association has standing to bring the herein action before the Commissioner pursuant to the New Jersey Supreme Court's holding in Red Bank Reg. Ed. Assoc., supra.

With regard to petitioner's claim for the payment of interest, costs and attorneys fees, the Commissioner has previously determined that he lacks the statutory authority to grant such requested relief. As the Commissioner stated in the matter of Fred Bartle, Jr. v. Board of Education of the Township of Wall, 1971 S.L.D. 163, 165, that

> ...[N]othing in the cases cited by petitioner over-rides the principle enunciated by the Commissioner in Romanowski v. Jersey City Board of Education, 1966 S.L.D. 219, in which the Commissioner said at p. 221:
>
> . . . .there is no statutory authority for a board of education to pay interest as damages.
>
> . . . It has been held that interest is payable as damages for the improper withholding of funds by a governmental agency only when provided for by statute. Brophy v. Prudential Insurance Co. of America 271 N.Y. 644, 3 N.E. 2d 464 (Ct. App. 1936). Consolidated Police etc., Pension Fund Comm. v. Passaic 23 N.J. 645, 654 (1957)

CONCLUSIONS

Having considered and balanced all legal arguments of counsel, the stipulated facts and the conclusions set forth hereinbefore, I **CONCLUDE** that petitioner has failed to establish a claim upon which relief may be granted. Accordingly, it is **ORDERED** that **SUMMARY DECISION** be and is hereby entered for respondent Board of Education of the Borough of Sayreville. It is further **ORDERED** that the herein Petition of Appeal is hereby **DISMISSED.**

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This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 **GUSTAV H. RUH** for consideration.

29 June 1982
DATE

Lillard E. Law
LILLIARD E. LAW, ALJ

Receipt Acknowledged:

6/30/82
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 2, 1982
DATE

Ronald L. Yorkunson
OFFICE OF ADMINISTRATIVE LAW

bm

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ELAINE WHALEN AND THE SAYREVILLE EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the conclusion by the Honorable Lillard E. Law, ALJ that petitioner failed to prove her claim to two years' credit on the Board's salary guide plus costs and interest. Petitioner relies on Riemann, supra; Chaump, supra; and N.J.S.A. 18A:29-6, ante.

Petitioner claims that, although employed by a different school district during layoff, she must be treated identically, in terms of salary, with teachers employed in the particular school district from which she was laid off. Petitioner also relies on N.J.S.A. 18A:28-12. The Commissioner finds no merit in petitioner's contentions.

The Commissioner notes that petitioner's arguments repeat those presented to and thoroughly analyzed by Judge Law. The Commissioner finds Judge Law's conclusions herein to be directly on point.

Nor does the Commissioner look with favor on petitioner's claim for payment of costs, attorney fees and interest. The Commissioner has previously considered and rejected such claims. Fred Bartlett, Jr. v. Board of Education of Township of Wall, 1971 S.L.D. 163

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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Summary judgment is awarded the Board of Education of the Borough of Sayreville. The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 12, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4857-81
AGENCY REF. NO. 223-6/81A

ROBERT SCHMIDT,
Petitioner
v.
WEEHAWKEN BOARD OF EDUCATION,
Respondent

APPEARANCES:

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

Brian N. Flynn, Esq., for the Board
(Krieger, Ferrara, Feinsilver, Flynn and Catalina, attorneys)

Record Closed June 15, 1982 Decided June 30, 1982

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

Robert Schmidt, a tenured teaching staff member, alleged the Board's termination of his employment, effective May 31, 1981, violated his tenure and seniority rights under N.J.S.A. 18A:28-5, N.J.S.A. 18A:28-10, N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10.

The Board denied the allegations and asserted its action was proper and consistent with law.

The matter was transmitted by the Commissioner of Education to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq., on August

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3, 1981. A prehearing conference was held on October 19, 1981. The matter was heard on January 19, 1982. During the course of hearing the parties agreed to file a jointly executed stipulation of facts; attempt to settle the dispute; and submit the matter for summary decision if settlement efforts failed to resolve the dispute.

The matter was submitted for summary decision and briefed by the parties after settlement efforts failed. The record was closed upon receipt of petititoner's reply to respondent's brief on June 15, 1982.

The following, taken from statements by counsel in briefs, testimony, pleadings, evidentiary documents and joint stipulations, is adopted herein as FINDINGS OF FACT:

1. Petitioner is a tenured teaching staff member initially employed by respondent in September 1972 (see Petition and Answer, paragraph 1).

2. Petitioner was issued a certificate as teacher of English in May 1972, and a certificate as Reading Specialist in June 1979 (see P-2, P-3).

3. The Board acted on March 10, 1981, "to end the Title I ESEA/Compensatory Education program effective May 31, 1981 for the 1980-81 school year," and "approved a resolution to notify you [Schmidt] that your services in connection with these programs shall be terminated as of May 31, 1981." (see P-1).

4. Petitioner was assigned as follows during his years of employment in Weehawken:

   1972-1975: full-time teacher of English in junior high school, grades 7 and 8 (Tr. 7, 8, Pbl, Rbl)

   1975-1976: full-time teacher of English in high school, grades 10 and 11 (Tr. 8, Pbl, Rbl)

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1976-1977: full-time teacher of English, junior high school, grades 7 and 8. (Tr. 8, Pbl, Rbl)

1977-1978: full-time teacher of English in high school, grades 11 and 12, and one section of State Compensatory Education (S.C.E.) in Reading (Tr. 9, 10, Pbl, Rbl)

1978-1979: full-time teacher of English in high school, grades 11 and 12, and one section of S.C.E. (Tr. 12, Pbl, Rbl)

1979-1980: full-time teacher of English in high school, grades 10, 11 and 12 (Tr. 12, 13, Pbl, Rbl, 2)

1980-1981: full-time teacher of S.C.E. in high school until termination effective May 31, 1981 (Tr. 13, Pbl, Rb2)

5 The following individuals are or were employed in the Weehawken High School; with the employment history and certifications listed:

a) Anne Luppino

Hired: October 1981 (non-tenured)

Certification: Elementary (K-8): issued 6/81
Reading: issued 6/81

1981-82 employment: S.C.E./Title I (Reading periods 2, 3 & 4 (5 days per week)
S.C.E./Title I (Math) period 5 (5 days per week)

b) Brian Long

Hired: September 1979 (non-tenured as of 6/81)

Certification: Physical Education: issued 1/77
English: issued 1/77

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1981-82 employment: Physical education - periods 1, 3 & 4
(5 days per week)

Athletic Director - periods 6 & 8
(5 days per week)

S.C.E./Title I (Reading) period 7
(5 days per week - up to 1/25/82

As of 1/25/82 Mr. Long was removed from Reading and assigned to three periods per day as Athletic Director.

c) Thomas Russo
Hired: September 1969
Certification: Science: issued 6/69
Elementary (K-8): issued 4/80

1981-82 employment: Science - periods 1, 3, 4 & 7
(5 days per week)

(S.C.E. Reading - period 6
(5 days per week)

d) Starting times for each 40 minute period in the high school are as follows:

1)	8:30	Lunch	11:29	8)	2:35-3:09 (Prep)
2)	9:23	5)	12:29		
3)	10:06	6)	1:12		
4)	10:49	7)	1:55		

e) Thomas Urchuk

Hired: February 1959

Certification: Science and English: issued 2/62

Supervisor: issued 8/77

1981-82 employment: Science - periods 2, 4 & 5
(5 days per week) - period 3 (Mon., Tues., Wed., and Thurs.)

Asst. Department Chairman - period 3 (Fri.)
period 6 (Mon., Wed., Thurs., and Fri.)

S.C.E./Title I (Reading) period 7
(5 days per week)

Prior Employment History: Science and Supervisor

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6) The following individuals are employed at the Woodrow Wilson School with the employment history and certifications listed:

a) Anthony D'Angelo

Hired: September 1977

Certification: Elementary (K-8): issued 3/78

1981-82 employment: 8th grade science - two 45 minute periods (5 days)

8th grade instructional guidance - one 10 minute period (5 days)

8th grade language arts - one 45 minute period (5 days)

8th grade gym - one 27 minute period (3 days)

8th grade social studies - one 45 minute period (5 days)

8th grade reading (content area) - one 30 minute period (2 days)

8th grade motivational reading one period (2 days)

8th grade club reading - one 30 minute period (Fridays)

8th grade health - one 30 minute period (Wednesdays)

Prior employment history: (see attached Exhibit A)

b) Karen Farraro

Hired: October 1981 (non-tenured)

Certification: Elementary (K-8): issued 8/79
English (K-8): issued 8/79

1981-82 employment: Part-time 8:55 to 11:45 a.m. 8th grade S.C.E./Title I (Reading) - six 30 minute periods per week

8th, 7th, 5-6th & 4th grade S.C.E./Title (Math) fifteen 30 minute periods per week

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Testing: two 30 minute periods per week (see Exhibit B attached)

Prior employment history: None

c) Barbara Pastore
Hired: September 1977
Certification: Elementary: issued 6/73
English: issued 4/78
Student Personnel Services: issued 6/78
Principal/Supervisor: issued 12/80

1981-82 employment: 8th grade instructional guidance - one ten minute period (5 days)

8th grade Mathematics - one 45 minute period (5 days)

8th grade English - two 45 minute periods (5 days)

8th grade Science - one 45 minute period (5 days)

8th grade gym - one 27 minute period (3 days)

8th grade Reading - one 30 minute period (4 days)

8th grade Health - one 30 minute period (Wednesdays)

Prior employment history: All elementary

d) Rosemarie Gioffre
Hired: September 1976
Certification: Elementary (K-8): issued 5/76
Nursery: issued 5/76

1981-82 employment: Kindergarten - 8:45 - 11:15 a.m. (5 days)
11:30 - 3:00 S.C.E./Title I (Math) (Exhibit C)

Prior employment history: 9/76-6/79 full time elementary
9-79-6/80 half-time kindergarten
9/80-6/81 half-time kindergarten and half-time S.C.E./Title I Reading & Math

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7. The following individuals are employed at the Roosevelt School with the employment history and certifications listed:

a) Ana Miranda

Hired: March 1975
Certification: Elementary (K-8): issued 1/81
Bilingual: issued 1/79
Spanish: issued 6/74
Student Personnel Services: issued 9/75

1981-82 employment:
S.C.E./Title I (Reading) - three 30 minute periods per week

S.C.E./Title I (Math) - twenty-four 30 minute periods per week

Prior employment history: All S.C.E. Reading and S.C.E. Math

b) Carol Laino

Hired: February 1981 (Non-tenured)
Certification: Elementary: issued 5/80
Nursery: issued 5/80

1981-82 employment:
S.C.E./Title I (Reading) - eighteen 30 minute periods per week

S.C.E./Title I (Math) - fifteen 30 minute periods per week

Prior employment history: S.C.E. Reading and Math

8. The following individuals are employed at the Webster School with the employment history and certifications listed:

a) Laurie Currier

Hired: December 1976
Certification: Elementary: issued 9/74
Nursery: issued 9/74

1981-82 employment: September 1981 (High School schedule held, after October, by Anne Luppino, see 1(a) above).
After October, 1981: Full schedule
S.C.E./Title I Reading and Math at the Webster School

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Prior employment history: 12/7/76 - 6/17/77 S.C.E.
2/24/78 - 6/78 S.C.E.
9/78 - 6/81 - Elementary Classroom teacher

PERTINENT LEGAL AUTHORITY

N.J.S.A. 18A:28-5:

The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and . . . . [emphasis supplied]

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

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

N.J.S.A. 18A:28-12:

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

N.J.A.C. 6:3-1.10:

(k) 27. Secondary. The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction.

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> Any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate, except those subjects or fields for which a special certificate has or shall be required by the State Board of Education. However, if a person has held employment in the school district in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate;
>
> 28. Elementary. The word "elementary" shall include Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools.

Petitioner relies on Guidelines for Approval of Application for Basic Skills Improvement Program, New Jersey State Department of Education (1981), and the Board relies on Basic Skills Preventive and Remedial Programs Using State Compensatory Education Funds, New Jersey State Department of Education (1979), the pertinent language of each being identical in reference to certification:

> Teachers of students in BSI progrms (sic) ["in remedial programs" in the 1979 document] must be appropriately certified.
>
> Elementary teachers are eligible to teach reading, mathematics and language arts in grades K-12. They are eligible to teach all subjects in grades K-8 and may teach the common branch subjects such as reading, writing, mathematics and spelling on the secondary level, grades 7-12.
>
> Teachers of mathematics are eligible to teach only in their subject area in grades K-12.
>
> Teachers of reading are eligible to teach only in their subject area in grades K-12.
>
> Teachers of English are authorized to do vocabulary building, reading reinforcement, and to provide books and opportunities to read. They are not authorized to teach how to read or to provide remedial instruction in reading.
>
> Teachers holding English certification and who were employed as teachers of reading on February 4, 1976 are eligible to teach reading.

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The court incorporates by reference herein Regulations and Standards for Certification, State of New Jersey Department of Education (1976). Judicial notice is taken of the requirements for the certificate of Reading Specialist (at 38), which requires graduate studies and is classified under Education Services Certificate Endorsements, and the requirements for the certificate of Reading (at 100), which need not include graduate studies and is classified under Instructional Certificate Endorsements.

DISCUSSION AND ADDITIONAL FINDINGS OF FACT

Petitioner contends the Board violated his tenure and seniority rights by terminating his employment and assigning non-tenured teachers and less senior tenured teachers to S.C.E. classes as well as English classes for the 1981-82 school year.

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 secondary teacher of English. I **ALSO FIND** all other teachers incorporated in the Stipulation of Facts were legally assigned to S.C.E. classes as holders of elementary certificates. See Guidelines, Basic Skills and Regulations.

The legality of the Board's termination of a mandated S.C.E. program for the month of June 1981 has not been raised as an issue in this matter and will not be addressed. This is also true as to whether petitioner shall be granted a full year or nine-tenths seniority credit as a teacher of English for his 1980-81 service. This is noted solely for the benefit of the parties and appellate review.

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It was stipulated that teachers D'Angelo and Pastore were initially employed in September 1977 and were assigned to teach one and two sections of Language Arts and English in grade 8, respectively, during the 1981-82 school year. It cannot be disputed they had less seniority than petitioner. See N.J.A.C. 6:3-1.10(k)(27)(28). Since petitioner was entitled to those assignments, the Board must be held to have acted in violation of N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12. I so **FIND**.

There is no evidence the Board acted to reduce its force in English. It is therefore presumed the Board acted properly when it did not assign petitioner to teach within his English certificate in 1980-81. This petition was not filed until after Board terminated the petitioner near the end of that year.

Respondent argued that a complete reorganization would have been necessary in order to have allowed petitioner to teach the English classes that were assigned to Urchuk and Pastore in 1981-82 and cited the Initial Decision in Paul Fitzpatrick et al. v. Weehawken BOE, OAL and Agency DKT. NO. EDU 411-76 (decided April 29, 1980). I **FIND** no merit to respondent's contention. The facts addressed in Fitzpatrick are distinguishable from those in this matter.

Factually the assignments of D'Angelo and Pastore, both in the same school, were petitioner's entitlement, not that of Urchuk and Pastore. The need for possible schedule adjustment is conceivable, though improbable. The need for complete reorganization is incomprehensible. The juxtaposition issue address in Fitzpatrick related to the claim of petitioners that the Board was required to reassign teachers with multiple certifications in a domino process of "bumping" in order to preserve the tenure and seniority rights of petitioners and make room for them. Such is not the issue here.

CONCLUSIONS OF LAW

1. The Board's assignments of petitioner to teach S.C.E. classes in 1980-81 and subsequent assignments of teachers Long and Urchuk to teach S.C.E. classes in 1981-82 were ultra vires. None were appropriately certified.

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2. The Board's assignments of teachers D'Angelo and Pastore to teach three sections of Language Arts and English in 1981-82, and the Board's failure to employ petitioner during that year were in violation of N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12.

The Board is hereby **ORDERED** to:

1. Cease and desist making assignments of teaching staff members not appropriately certified.

2. Compensate petitioner in the amount of one-half the salary he would have received as a full-time teacher in 1981-82 for the assignments given to D'Angleo and Pastore, mentioned above, that were his entitlement.

3. Comply with legal requirements in staffing its schools in 1982-83 through the recognition of petitioner's placement on a preferred eligibility list as a tenured teacher of English pursuant to N.J.S.A. 18A:28-12.

This recommended decision may be affirmed, modified or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION, GUSTAV H. RUH,** who by law is empowered to make a final decision in this matter. However, if Gustav H. Ruh 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 **GUSTAV H. RUH** for consideration.

30 June 1982
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

6 July 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 8, 1982
DATE

Ronald L. Parker/sh
FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

WITNESS:

Robert Schmidt, petitioner

EVIDENTIARY DOCUMENTS:

P-1: Tullo to Schmidt letter of April 1, 1980

P-2: Petitioner's English certificate

P-3: Petitioner's Reading Specialist certificate

P-4: Oliveri to Schmidt letter of September 19, 1977

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ROBERT SCHMIDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

The Board in its primary exceptions to the initial decision by the Honorable Ward R. Young, ALJ contends that any monetary award to petitioner should be subject to mitigation. (Board's Exceptions, at p. 2) The Board argues that there is no indication that petitioner would have accepted a part-time position if such had been offered. (Id., at p. 3) The Board contends that its "semi-departmentalized" curriculum in the eighth grade and its "modified self-contained" course of study in the seventh grade are unique. (Id., at p. 5) The Board contends that recognizing petitioner's entitlement as a teacher of English pursuant to N.J.S.A. 18A:28-12 would create a "nightmare in scheduling." (Id., at p. 8)

Petitioner's primary exceptions aver that he has seniority in the teacher of reading category because of his certificate as a reading specialist. Petitioner argues that "***[i]f a reading specialist can teach teachers he can certainly teach children to read." (Petitioner's Exceptions, at p. 2)

Petitioner states that, if he had known his certificate was not proper, he would have applied for a reading teacher's certificate. (Id., at p. 4) Petitioner's reply exceptions argue that recognizing his entitlement to a part-time position would not require a massive restructuring and rescheduling of positions. (Id., at p. 9)

The Commissioner cannot agree in entirety with the exceptions filed by either party.

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The Commissioner agrees with the Board that pursuant to the provision that petitioner receive one half of the salary he would have received as a full-time teacher during the school year 1981-82, such award should be subject to mitigation. Ernest E. Gilbert v. Board of Education of the Township of Willingboro, Burlington County, decided July 6, 1982 The Commissioner finds no evidence in the record of the uniqueness claimed by the Board for its programs in grades seven or eight. Such argument places "form over substance." Union Beach Board of Education v. N.J.E.A. et al., 53 N.J. 29 (1968) The Commissioner so holds.

The Commissioner finds no merit in petitioner's speculative argument concerning his license to teach reading with a certificate of reading specialist. The Commissioner observes that such certificate is classified in Regulations and Standards for Certification under "Educational Services Certificate Endorsements" rather than under "Instructional Certificate Endorsements."

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own. The Commissioner modifies petitioner's monetary award by mitigation of other salaries and strongly enjoins this Board of Education and others to assign teachers duties only within their fields of certification.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

August 19, 1982
PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0043-82
AGENCY REF. NO. 481-12/81A

RUDOLPH J. PARRELLA,
Petitioner
v.
VERNON TOWNSHIP
BOARD OF EDUCATION,
Respondent

APPEARANCES:

Wayne J. Oppito, Esq., for respondent
(New Jersey Principals and Supervisors Association)

Lester Aron, Esq., for the Board
(Aron, Till & Salsberg, attorneys)

Record Closed June 14, 1982 Decided July 9, 1982

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

Rudolph J. Parrella, a tenured high school principal employed by the Board of Education of Vernon Township, alleged a "Board member input" document constituted an evaluation report in violation of N.J.A.C. 6:3-1.21 and sought its removal from his personnel file. The Board contended the document is not an evaluation report within the meaning of N.J.A.C. 6:3-1.21 and was properly included in Parrella's personnel file.

The matter was transmitted by the Commissioner of Education to the Office of Administrative Law on January 5, 1982 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on May 6, 1982, at which the parties agreed to submit the matter for summary decision because no relevant facts were in dispute. The

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matter was briefed by the parties, and the record closed on June 14, 1982 upon the expiration of the date established for the optional filing of petitioner's reply brief, an option was not exercised.

Parrella has been high school principal since 1966. Sometime in June 1981, he received a memorandum from the Board entitled "Board member input," which set forth the Board's perception of Parrella and was intended to "assist a specified administrator in gaining insight as to how the administrator's performance is viewed by the Board" (see exhibit "A" attached to Board's brief). A copy of the document was placed in Parrella's personnel file.

Parrella filed a grievance seeking removal of the memorandum from his personnel file and took issue with language and statements in the document (see exhibit "B"). The grievance was denied by the Superintendent and Board, the first two steps of the grievance procedure. The Board did agree to revise the memorandum, and forwarded it to Parrella only, and replaced the original in his personnel file with a copy of the revision (see exhibits "C" and "D"). The President of the Administrators Association advised the Board in a letter to the Board President of its "feeling in the matter . . . that it be forwarded to PERC for the assignment of a hearing officer and for a subsequent decision in the matter" (see Exhibit "E"). There is nothing in the record to indicate that the matter is in fact before PERC.

Exhibits "F", "G", "H", and "I" attached to the Board's brief represent formal, written evaluations by the Superintendent; Performance Appraisal Profiles by self and Superintendent; Performance Appraisal and Planned Performance Improvement; Administrative Goals; and Self-Assessment Evaluation, respectively.

It is essential first to examine the "Board member input" document in dispute. Section I of the document is entitled "Strengths, objectives attended to in commendable fashion, advantages to school assignment and position." Section II is entitled "Areas where improvement need is perceived, concerns for more effective administration." Section III is a concluding statement: "It is hoped that this communication will be

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understood as advisory in the most positive sense for Mr. Parrella's continued direction for self-improvement."

It is reasonably clear the substantive comments in the Board's document reflect the Board's own experiences with and observations of Parrella and represents their collective perceptions and concerns.

A review of the evaluation documents prepared by the Superintendent reveals an in-depth assessment of Parrella's performance and reflects the evaluation criteria expressed in N.J.A.C. 6:3-1.21. Those documents are different from the "Board members input" document.

There is no evidence in the record the Board judged Parrella's employment status, particularly salary, on the basis of its own input document. On the contrary, there is evidence of Board reliance on the Superintendent's evaluations and recommendations. Exhibit "F", the Superintendent's evaluation of Parrella under date of November 5, 1980, incorporated a statement to which Parrella affixed his signature: "Thank you - - special thanks for being instrumental in getting me an incentive award. I should have thanked you sooner."

It is well established that the Board may not only assess its staff members but has a duty continuously to do so.

The Commissioner held in David Payne v. Board of Education of the Borough of Verona, Essex County, 1976 S.L.D. 543 that:

> [N]o duty of a board of education is more crucial to the fulfillment of its constitutional mandate to provide a thorough and efficient system of education than is the responsibility of evaluating the performance of its employees and staffing its classrooms with skillful and effective teachers.

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He also said:

> [T]he Board had the statutory right to review its prior evaluation. It has not only the right but the responsibility to review the performance of its tenured or nontenured teaching staff members at any time. (emphasis added)

It was said in Sallie Gorny v. Board of Education of the City of Northfield, et al., 1975 S.L.D. 669:

> *** One of the most significant of all factors which comprises a thorough and efficient system of education is a well-trained, scholarly, and highly competent faculty, described in the school law as teaching staff members. In the judgment of the Commissioner, the overall competence and effectiveness of the faculty, in any local school district, is a primary factor, more so than the schoolhouse, the library, and all other instructional materials and equipment, which directly and positively correlates with the quality of the educational program received by the pupils. Indeed, since the very inception of the institution known as the free public schools, or common schools as they were originally called, professional practitioners of the art of teaching have recognized that the system cannot function without the services of competent teachers, principals, and other educational specialists. This sound education principle has, over the years, been cited with the approval by the courts of this State. See Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944); Kopera v. West Orange Board of Education, 60 N.J. Super. 286 (App. Div. 1960) *** (at pp. 680-681).

The disputed document in this matter is an evaluation but one that cannot be construed to be intended by N.J.A.C. 6:3-1.21. There is no evidence the Board intended it so to be, or relied on it for unlawful purposes. It appears to be nothing more than a Board expression that it would "be understood as advisory in the most positive sense for Mr. Parrella's continued direction for self-improvement." **I SO FIND.**

Filing the document in Parrella's personnel file is something else. It belies the purpose for which it was written. It was intended for Parrella's eyes. Personnel files are subject to review of others, and it is not inconceivable a review of raw documents may have detrimental effects on staff members. Such files are often referred to in response to requests when former staff members seek employment elsewhere, and are not personally known by the reviewer.

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Certainly, when a staff member seeks employment elsewhere, any gross or raw document not within the meaning of N.J.A.C. 6:3-1.21 should not be used to cast a shadow upon that person's professional standing.

I **CONCLUDE** the Board had every right in its discretionary authority to prepare its input document and submit it to Parrella for the purpose intended. The wisdom of doing so is not at issue. I **ALSO CONCLUDE** the document is not an evaluation report within the meaning of N.J.A.C. 6:3-1.21, and to file it in Parrella's personnel file for potentially gross or raw review by others is an abuse of the Board's discretionary authority.

The Board is therefore **ORDERED** to expunge the document from Parrella's personnel file.

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.

9 July 1982
DATE

Ward Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

13 July 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 16, 1982
DATE

Ronald L. Parker/sm
FOR OFFICE OF ADMINISTRATIVE LAW

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RUDOLPH J. PARRELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VERNON, 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 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 Board is directed to expunge the questioned document from petitioner's personnel file.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

August 23, 1982

New Jersey State Department of Education
225 West State Street
Trenton, New Jersey 08625

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