NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1991 to December 31, 1991

VOLUME 3

PAGES 1725-2607

John Ellis
Commissioner of Education

NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1991 to December 31, 1991

VOLUME 3

PAGES 1725-2607

Published by

BARCLAYS

Barclays Law Publisher • P.O. Box 3066 • South San Francisco, CA 94080 • Customer Service (800) 888-3600

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3718-91
AGENCY DKT. NO. 48-3/91

JACQUES VERNERET,
Petitioner,
v.
BOARD OF EDUCATION OF THE
CITY OF ELIZABETH, UNION COUNTY,
Respondent.

ON MOTION TO DISMISS
PETITION OF APPEAL

Sanford Oxfeld, Esq., for petitioner
(Balk, Oxfeld, Mandel & Cohen, attorneys)

David F. Corrigan, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: July 29, 1991 Decided: August 23, 1991

BEFORE JAMES A. OSPENSON, ALJ:

Jacques Verneret, a bus driver/utility person employed by the Board of Education of the City of Elizabeth, Union County, suffered worker's compensation injuries on December 27, 1988 and January 24, 1989 He received full salary and medical treatment during absence from his employment from December 27, 1988 through March 3, 1989. His claim petition in the Division of Worker's Compensation for temporary compensation and permanent compensation benefits proceeded to judgment on February 4, 1991. He was allowed nine and three-sevenths weeks temporary compensation benefits, which were ruled adequate as theretofore paid by the Board. He was allowed 20 percent of permanent partial total disability

benefits as well, or 120 weeks at his worker's compensation rate of $92.05, a total of $11,046.

On March 4, 1991, he filed a petition of appeal before the Commissioner of the Department of Education claiming entitlement to a full year of salary for one year from date of accident under N.J.S.A. 18A:30-2.1. The Board's answer filed on March 21, 1991 admitted petitioner suffered work-related injury and was entitled to temporary compensation benefits, but only through March 3, 1991 as had been adjudicated in the Division of Worker's Compensation. The Commissioner transmitted the matter to the Office of Administrative Law on April 11, 1991, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On May 7, 1991, the Board filed a motion to dismiss the petition of appeal on grounds (1) that the petition was untimely filed under N.J.A.C. 6:24-1.2 and (2) that the petition failed to state a claim upon which relief may be granted under N.J.S.A. 18A:30-2.1. Annexed to the motion were Exhibits A and B detailing the worker's compensation award and fixing the period of temporary compensation benefits as ended on March 3, 1989. The parties submitted their respective memoranda of law by July 29, 1991. Essential facts in the matter are not in dispute. The Board's motion for summary decision is ripe for determination under N.J.A.C. 1:1-12.5 et seq.

DISCUSSION

Petitioner acknowledged the petition was not filed until two years after the time the Board ceased paying him his full salary. Pb. 1. When on February 4, 1991 the Division of Workers' Compensation affirmed that cessation as a proper measure of petitioner's period of temporary compensation disability, petitioner had by then allowed two years to elapse before invoking his right and obligation before the Commissioner to register his claim within 90 days of date of the action, order or ruling complained of, under N.J.A.C. 6:24-1.2. Proper procedure, I believe, is for such claims to be registered promptly within the 90-day period even though the Commissioner must give deference to the ultimate ruling of the Worker's Compensation Division. The Commissioner may permit the matter before him to be inactivated to await the ruling or may permit a dismissal without prejudice to later filing. Petitioner has no right, however, to avoid prompt filing. See, Riely v.

Hunterdon Central High School Board of Ed., 173 N.J. Super. 109, 112-14 (App. Div. 1980); Bernards Township Board of Ed. v. Bernards Township Education Association, 79 N.J. 311, 326-327, n.4 (1979); and Forgash v. Lower Camden County School, 208 N.J. Super. 461, 466-7 (App. Div. 1985).

Petitioner's claim petition should be dismissed, therefore, on that ground alone; in the interest of judicial economy, however, I shall pass to the second question concerning construction and application of N.J.S.A. 18A:30-2.1. It provides:

> Whenever an 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 . . . 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, . . . 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.]

Exhibits A and B show clearly petitioner's entitlement was to temporary compensation benefits from December 27, 1988 through March 3, 1989, a total of nine and three-sevenths weeks. He was paid his full salary by the Board for that period. The judgment is final. Petitioner received his full entitlement; there is no rationality for an interpretation that petitioner's entitlement is greater than or not coextensive under the statute with the finding of the worker's compensation court. Petitioner has cited no authority to the contrary.

CONCLUSION

For the reasons advanced, I **CONCLUDE** the petition of appeal in this matter should be, and it is hereby, **DISMISSED** (1) for untimely filing under N.J.A.C. 6:24-1.2 and (2) for the reason that petitioner has no further entitlement to sick leave benefits beyond the period of temporary disability heretofore adjudicated in the worker's compensation division.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 23, 1991
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

8/29/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 29 1991
Date

OFFICE OF ADMINISTRATIVE LAW

amr

LIST OF EXHIBITS

A Statements of worker's compensation temporary disability payments from December 28, 1988 through January 10, 1989, from January 11, 1989 through January 24, 1989, from January 25, 1989 through February 7, 1989, from February 8, 1989 through February 21, 1989, and from February 22, 1989 through March 3, 1989, which was date of final payment; petitioner discharged from treatment by Dr. Bercik as of March 3, 1989

B Judgment of Worker's Compensation Division in favor of petitioner, dated February 4, 1989, showing temporary compensation benefits allowed for nine and three-sevenths weeks from December 27, 1988 through March 3, 1989, adequate as paid

JACQUES VERNERET,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner, and replies thereto by the Board, pursuant to N.J.A.C. 1:1-18.4.

In his exceptions, petitioner notes recent Commissioner's decisions which stand for the proposition that a determination from the Division of Workers' Compensation must be made before any claim arising from N.J.S.A. 18A:30-2.1 may be filed with the Commissioner and which dismiss appeals as premature on that basis. Steven B. Hern v. Board of Education of the City of Union City, Hudson County (letter decision of May 8, 1991, affirmed by the State Board on August 7, 1991) and Joseph R. Mulford v. Board of Education of the Township of Hillside, Union County (letter decision of May 29, 1990) Based on these decisions and the precedents on which they rely (including Forgash, supra), petitioner claims to have acted appropriately and in a timely fashion by waiting until he had

received a determination from Workers' Compensation to file his appeal with the Commissioner, which he did well within 90 days of the determination. (Exceptions, at pp. 2-4)

With regard to the ALJ's conclusions on the merits of his appeal, petitioner argues that although he was granted only a nine-week-plus period of temporary disability for Workers' Compensation purposes, the fact remains that his disability prevented him from returning to work thereafter and ultimately led to his termination for inability to perform the duties expected of him. Under the clear language of N.J.S.A. 18A:30-2.1, petitioner contends, he is therefore entitled to sick leave benefits for one year from the date of his injury. (Exceptions, at pp. 4-5)

In reply, the Board reiterates the arguments of its prior briefs, urges affirmance of the ALJ and characterizes as "irrelevant *** not raised in the petition and *** not timely" petitioner's allegation that the Board would not let him perform light duty upon his reaching the full extent of his possible medical recovery. (Reply Exceptions, at p. 2)

Upon careful consideration of this matter, the Commissioner reverses the ALJ with respect to both petitioner's timeliness and his entitlement to benefits.

With regard to the issue of timeliness, the Commissioner notes that unlike the cases relied upon by the Board and ALJ, supra, the within matter does not involve preserving one's rights in an alternative forum during the pendency of a dispute. In this case, the Workers' Compensation determination upon which petitioner reasonably waited to file his claim was an absolute prerequisite to

any ruling by the Commissioner, indeed, petitioner did not have a cause of action under N.J.S.A. 18A:30-2.1 until such time as the nexus between his injury and his employment was definitively established through compensation proceedings. Hern, supra; Mulford, supra; Angelo Bracoloni v. Board of Education of the Princeton Regional School District, Mercer County, Commissioner's decision of March 15, 1990 As petitioner's filing with the Commissioner was made within one month of his Workers' Compensation determination, it was timely filed under N.J.A.C. 6:24-1.2.

With regard to petitioner's entitlement on the merits, the Commissioner initially notes the Board's objection to petitioner's raising the issue of his inability to return to light duty. The Commissioner rejects this objection, as this aspect of petitioner's claim is clearly raised in his petition (paragraph 2), was argued before the ALJ through briefs by both parties and addressed in the Board's own statement of facts (Brief in Support of Motion to Dismiss, at p. 1), and is subject to the same timeliness considerations as discussed above.

Having set aside the Board's objection to considering this issue, the Commissioner finds the situation herein very similar to that of a prior decision (John Theodore v. Board of Education of the Town of Dover, Morris County, decided March 15, 1983) wherein he addressed at length (through affirmance of the ALJ) the question of entitlement to benefits under N.J.S.A. 18A:30-2.1 after Workers' Compensation payments had ceased:

> ***The only thing in dispute at this juncture is whether the Board should pay Mr. Theodore the prorated amount of his annual salary from August 21, 1980 to February 15, 1981, since he was no longer receiving Workers' Compensation

benefits after August 21, 1980. That is to say, was Mr. Theodore still "eligible" to receive such benefits after they had ceased? The court has reviewed the arguments posited by both counsel and agrees with petitioner's attorney that statutes in support of workers who have been accidentally injured on the job should be liberally construed to the fullest extent allowable. To accept the Board's interpretation that Mr. Theodore's salary would be payable pursuant to N.J.S.A. 18A:30-2.1 only while Workers' Compensation benefits were being received, because cessation of benefits equals ineligibility, absent such an express limitation in the law, would lead to an absurd result, which is not favored in the law. See State v. Provenzano, 34 N.J. 318 (1961); Gardiner v. Jersey City, 67 N.J. Super. 435 (App. Div. 1961); LaPolla v. Bd. of Chosen Freeholders of Union City, 71 N.J. Super. 264 (Law Div. 1961).

In order to determine whether Mr. Theodore was still eligible to receive Workers' Compensation benefits, even though they had been terminated, this judge has reviewed N.J.S.A. 34:15-38, which states, in pertinent part:

> To calculate the number of weeks and fraction thereof that compensation is payable for temporary disability, determine the number of calendar days of disability from and including as a full day the day that the employee is first unable to continue at work by reason of the accident, including also Saturdays, Sundays and holidays up to the first working day that the employee is able to resume work and continue permanent thereat....

A review of Mr. Theodore's affidavit, attached to his brief, indicates that in the 12-month period following the February 1980 accident, he was never able to continue to work or be employed permanently. He was employed temporarily for a one-month period as a security guard, earning $1,126.64. Furthermore, he was not able to continue at work for the Dover Board of Education because of the disability received from the on-the-job accident. The trial court so found and the Appellate Division did not disturb that finding. It is fact that he did not work for the Board, it is fact that the Board did not rehire

> him, it is fact that the reason the Board did not rehire him was because of his disability, and it is fact that the only job he had was of a temporary nature.
>
> ***
>
> Accordingly, I construe the second sentence of N.J.S.A. 18A:30-2.1 to mean that Mr. Theodore was eligible to receive a temporary disability benefit for the 12 months from February 15, 1980 to February 15, 1981, as he could not continue his work for the Board because of the 1980 accident. This judge concludes that Mr. Theodore is entitled to his full year's salary, minus his Workers' Compensation payments, minus salary received from the Board and minus the salary he received for the one-month temporary job as a security guard, because he should not be permitted to be unjustly enriched at the expense of the Board***. (Theodore Slip Opinion, at pp. 8-10)

Based on this precedent, to which no further discussion need be added here, the Commissioner holds in the present matter that petitioner's entitlement to salary under N.J.S.A. 18A:30-2.1 extends to one full year from the date of his second injury on January 24, 1989 (i.e., to January 24, 1990), as he was undisputedly unable to return to work for the Board after this date and the Board ultimately terminated him (effective September 1, 1990) expressly based upon his inability to perform the duties of his job despite having reached maximum medical recovery. As in the case of Theodore, supra, however, petitioner's entitlement to full salary is to be mitigated by Workers' Compensation benefits, salary already paid by the Board and any salary he may have received from temporary work during his period of eligibility for the sick leave benefits.

Accordingly, for the reasons expressed herein, the initial decision of the Office of Administrative Law is reversed.

Petitioner's appeal is deemed timely filed, and the Elizabeth Board of Education is directed to pay him the amounts owed in accordance with the parameters set forth above. Any dispute which may arise as to the exact calculation of these amounts may be brought before the Commissioner as a new cause of action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 11, 1991

DATE OF MAILING - OCTOBER 11, 1991

Pending State Board

BOARD OF EDUCATION OF THE TOWNSHIP OF ROCHELLE PARK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE TOWNSHIP OF ROCHELLE PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner, Antimo A. Del Vecchio, Esq. (Beattie, Padovano, Esqs.

For Respondent, Richard J. Donohue, Esq.

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board on June 18, 1991, seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Council in the current expense tax levy for the 1991-92 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 30, 1991 and after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed tax levy adopted by the district board of education		Amount of tax levy certified by the governing body or bodies	
Current expense	$3,963,941.00	Current expense	$3,763,941.00

Amount of reduction in budget by governing body or bodies

Current expense	$ 200,000.00

Amount of reduction in dispute before the Commissioner

Current expense	$ 200,000.00

The reductions at issue were effectuated by the Council in the manner stated in Resolution No. 91-146 dated May 20, 1991 for the reasons expressed verbally in the presence of Board members as reflected in the minutes of the meeting:

> ***NOW THEREFORE, BE IT RESOLVED by the Mayor and Council of the Township of R.P. that the following amount be certified to the Bergen County Board of Taxation, the Bergen County Superintendent of Schools, the Board of Education of the Township of R.P. and the Assessor of the Township of R.P. as being the amount necessary to be appropriated for the aforementioned item appearing in the budget to provide a thorough and efficient system of schools in the district and that the amount shall be raised by taxation for school purposes for the school year 1991-92:
>
> 1. Current Expenses:
>
> | | |
> |---|---|
> | Original Amount | - $3,963,941.00 |
> | Amount of Reduction | - 200,000.00 |
> | Amount Certified by Governing Body | - 3,763,941.00 |
>
> 2. Capital Outlay:
>
> | | |
> |---|---|
> | Original Amount | - $ 50,000.00 |
> | Amount of Reduction | - -0- |
> | Amount Certified by Governing Body | - $ 50,000.00 |
>
> AND, BE IT FURTHER RESOLVED that the reductions to the current expenses be as follows:
>
> | | |
> |---|---|
> | line 49 - $177,415 lowered to | $127,415.00 [administrative salaries] |
> | line 114- $1,148,752.00 lowered to | $1,108,752.00 [tuition] |
> | line 261- anticipated surplus was balance increased to | $.00 - no $110,000.00***. |

Attest : Irene McDermott

Motion by Comm. Salvini seconded by Comm. LoCascio that the foregoing resolutions be approved. Motion carried on roll call vote - all voting "Aye".

On Resolution No. 91-146-School Budget - they all voted "Aye" but members of the Board of Education were present and the Township Committee also had questions.

Mr. Ray Kelly, County Superintendent, stated the action of our Board in sharing the proposed reorganization plan with him is most appreciated. He also told Mayor Cannici there was no mandate for a third Administrator at Midland.

The Township Committee stated they did not want to hurt the children in any way. Comm. Salvini had concerns over the money held in surplus account, projected Hackensack High School tuition costs and the plan for three administrators.

Mayor Cannici also questioned the need for three administrators. The vote to cut $200,000 was unanimous.

Comm. Scarpa suggested the Board consider regionalization in the area of custodial services. Mr. Scarpa stated it was not a question of by how many votes the budget was defeated. The cuts were the result of the Board's overbudgeting for high school tuition, a high surplus and an extra administrator's salary. There was no cut to the children's programs.

Comm. LoCascio noted the Township Committee must listen to the people who voted down the budget.

Mr. Cromarty, Pres. of the Bd. of Education, voiced his objections. Stated it was impossible to say a $200,000 cut would not impact on the students.***

On July 2, 1991, the Mayor and Council filed an Answer admitting the amounts set forth above, but denying that its actions in making the reductions were arbitrary and that restoration of the disputed funds was necessary to enable the district to provide a thorough and efficient education. Together with this answer was filed the Mayor's certification, since the Council's reasons had not

been committed to writing in the actual body of the resolution cited above, setting forth the basis for the Council's action as follows:

> ***4. The amount certified by each of the major accounts are:
>
> (1) Current expenses certified by the governing body $3,763,941.
>
> (2) Capital Outlay certified by the governing body $50,000.
>
> (3) Line item budget with deductions and supporting statements:
>
> Line 49 - Administration Salaries
> the addition of a new Vice Principal was not justifiable for our school population
> - Savings - $50,000. [includes $45,000 for Vice Principal and $5,000 for secretarial cost increase]
>
> Line 114 - Tuition costs
> these costs were based on 109 [sic; actually 107 as confirmed by certification of Robert Salvini, Township Committee member, at p. 5] students attending sending district when it was determined we only have 96 students presently registered
> - Savings - $40,000.
>
> Line 261 - Surplus
> anticipated surplus was (0) zero in the current budget. We suggest using $110,000. of their $350,000. to offset expenditures
> - Savings - $110,000.
>
> ***5. Line item No. 49 relates to the fact that we were advised by the Board of Education that Dr. Kelly, the County Superintendent of Schools, mandated that Rochelle Park must have three administrators (Vice Principal). I personally spoke to Dr. Kelly and he advised me that he never mandated such action. All he did was approve the Rochelle Park Board of Education's resolution which provided for three administrative positions. (emphasis in text)

6. When I sought an explanation of this [vice principal] matter from the members of the Board of Education, I received inconsistent explanations from various members.

7. The Board of Education sought a $6,000. increase for a secretary and approximately $45,000. for a new Vice Principal. The Township Committee rounded off the reduction to $50,000.

8. Line item No. 114 related to tuition costs and the Board of Education advised that they were anticipating 109 [sic; actually 107, see supra] sending students to the Hackensack High School. In light of the fact that there are only 96 graduating students from Rochelle Park, it was felt that this number was inflated. The Board of Education attempted to explain this figure by stating there would be new students moving into the municipality. The Township, in an effort to be fair and reasonable, reduced the number by 4 students with an allowance of $10,000. for each student. It was felt that this was a compromise and it probably represented a more realistic figure than the figure of the Board of Education.

9. Line item 261 - Surplus. With a surplus of $350,000, the Township Committee was of the opinion that some of the budgetary expenses could be offset by a transfer of surplus. In light of the fact that it appeared that the Board of Education would be receiving approximately $70,000 to $75,000 in reimbursement from the Hackensack Board of Education, it was felt that some provision should be made for these items.

10. When the Township Committee attempted to elicit facts from the Board on the amount of reimbursement from Hackensack, the answers were evasive. It should be noted that the Rochelle Park Board of Education, in fact, has just received $80,000. from the Hackensack Board of Education.

11. There have been the following expenditures by the Board of Education from surplus in approximately the last six weeks:

(a) $39,600. for furniture
(b) 24,000. for text books
(c) 8,000. for graduation
(d) 3,500. for computer
(e) 9,000. for painting
(f) 2,400. for Board secretary's vacation

12. I will just advise the Commissioner that although there was one meeting on May 15, 1991 with the entire Township Committee and the Board of Education, I personally spoke to the President of the Board, Warren Cromarty, on other occasions and prior to the passage of the Township Committee's resolution relating to the reduction on May 20, 1991, an informal conference was held in the Municipal caucus room.

13. The petition of the Board of Education indicates that the municipality has not provided a statement of reasons to accompany each of the reductions. In fact, extensive explanations have been given and an informal conference was held as per Dr. Kelly's request at which time the entire Township Committee appeared.***

Position papers were subsequently filed by the parties pursuant to N.J.A.C. 6:24-7.8, followed by replies and summations. Upon receipt of the last such filing on August 26, 1991, the record of this matter was closed by the Commissioner.*

Upon careful review of the arguments of the parties, which are incorporated herein by reference, the Commissioner determines that the standard by which the within appeal must be reviewed is that set forth in Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966), namely, whether the Board has shown that the amount of moneys available to

---

* The Commissioner here notes petitioner's objection to a news article submitted with the Mayor and Council's answer, on the general topic of administrative salaries and "top heavy" administrative structures in small districts. This article was considered by the Commissioner during the present proceeding only to the extent that it served to identify the general perceptions that underlay the municipality's reduction in administrative salaries.

The Commissioner further observes that the parties' position statements and subsequent filings included much information which, while shedding some light on the parties' respective attitudes, had virtually no bearing on the specific line items in dispute in this appeal. This information is here noted for the record, but is not reflected in the decision which follows.

it as a result of the Council's actions is sufficient for provision of a thorough and efficient education. He makes this determination notwithstanding the Board's argument that pursuant to Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, Gloucester County, 116 N.J. 305 (1989), the burden of proof in this matter must shift to the Mayor and Council by reason of their failure to apprise the Board in writing of the specific reasons for their reductions. The Commissioner rejects this contention because it is clear from the parties' various submissions that the fundamental reasons for the Council's three line item reductions were known to the Board through verbal conveyance at numerous meetings including that one at which the above-noted resolution was adopted. While it is preferable that reasons be committed to paper at the earliest point possible, nothing in Deptford explicitly requires the governing body's reasons to be given in writing at the time of certification; indeed, regulations adopted to implement Deptford do not provide for the burden of proof in budget appeals to shift to the governing body unless it fails to provide the Board with written reasons at the time of its position statement. N.J.A.C. 6:24-7.8 In the matter herein, the reasons previously stated orally were both memorialized in the Mayor and Council's answer (Minutes and Certification of Robert Cannici above) and discussed in their position statement. Accordingly, the Board's argument that the municipality's actions were presumptively invalid for failure to meet Deptford requirements fails at the outset.

The pertinent standard of review having been established, the Commissioner makes the following determinations with respect to the specific line items reduced by the Mayor and Council.

1. Administrative Salaries (lines 49 and 58*)

The Commissioner finds the Board to have demonstrated that the vice principal position proposed for elimination by the municipality (line 58) is in fact necessary for the district's provision of a thorough and efficient education. It is clear from the Board's submissions that its present three-person administrative structure, which the proposed budget does not alter, was a direct response to needs that formerly kept the district from being certified. While it may be that the presence of a third administrator was not specifically mandated by the County Office, this method of resolving the serious educational problems identified in the 1987 monitoring process was approved by the County Superintendent and appears to be working well. While the municipality's "common sense" perception that so small a district does not need three administrators--a perception exacerbated by some apparent confusion over whether the position in question was a new one--is not unreasonable on its face, the fact remains that in the absence of a viable alternative (which the municipality has not coherently articulated) the vice principal's position is essential to ensure that disaffected and disruptive pupils are consistently

---

* The Commissioner here notes the municipality's error in making its total reduction from line 49, when in fact the vice principal's salary is included in line 58. He declines, however, to deem this error indicative of arbitrariness as argued by the Board, since the Mayor and Council's intent was abundantly clear and the error merely one of technical effectuation.

and effectively dealt with. Accordingly, the $45,000 cut by the municipality for this position is restored.

With respect to the $5,000 (rounded down from $6,000, See Mayor's certification No. 7) reduction from the salary account (line 49) for an increase in the cost of secretarial services, however, the Commissioner notes that the Board contracted a secretary at the cost of $26,000 in July 1991, with full knowledge of the reduction in this account by the municipality. It cannot therefore rely on contractual obligation to seek restoration of this amount. Further, while the Commissioner notes that the municipality evidently arrived at its reduction figure by erroneously subtracting the initial 1990-91 estimated expenditure in this area ($20,000) from the proposed 1991-92 appropriation ($26,000), the fact remains that the Board has made no showing in these proceedings that the $5,000 reduced from this account is necessary for a thorough and efficient education. Accordingly, the reduction is sustained.

2. Tuition Costs (line 114)

The Board has herein demonstrated that its method of estimating the number of students for whom tuition to Hackensack High School may be anticipated is a reasonable and prudent one, allowing for inevitable flux in enrollment and the contingency of additional payments and adjustments; the Commissioner would not, therefore, support a reduction in the Board's estimated numbers of students. However, in view of the undisputed fact that the rate of tuition finally negotiated for these students was substantially lower than anticipated in the proposed budget, resulting in a savings of $78,752, the Commissioner is unpersuaded by the Board's argument that the municipality's $40,000 reduction in this line item

should not be sustained because the money should be set aside in case of higher Audited Tuition Rates (ATRs) from prior and current years. Potential ATR adjustments are ordinary and anticipated factors in any sending district's budget, and the Board's method of estimating numbers of tuition students amply accounts for all but the most extraordinary potential expenditures (which in turn would customarily be accounted for by maintenance of a reasonable surplus). Indeed, the Board itself admits that it could survive the municipality's reduction in view of Hackensack's lower than expected tuition rate (Position Statement, at p. 15). Accordingly, the $40,000 reduction to this account is sustained as not preventing the district from providing a thorough and efficient education.

3. Surplus (line 261)

It is clear from their various submissions that the Mayor and Council's reductions in this area are based on a general perception that the district has had a history of holding excessive surplus and using it to fund expenditures which either are inappropriate or should have been budgeted as line items. It is also clear that there was some misunderstanding on the Council's part as to the amount of surplus actually available from which to make the proposed $110,000 reduction. The Board had anticipated an estimated balance of $338,295 on 6/30/91 (line 262), from which it appropriated $131,200 toward 1991-92 expenditures (line 263) leaving a balance of $207,095 (line 264). The municipality appears not to have understood the line 263 appropriation and to have believed (see Certification of Mayor Cannici, Nos. 4 and 9, and respondent's position statement cover letter) that the full amount on line 262 remained as surplus. The municipality further appears (ibidem, Nos.

9 and 10) to have believed that the lower tuition rate referenced above would result in a lump sum payment of approximately $80,000 to the district, rather than merely requiring a less than budgeted expenditure in line 114 (to which a $40,000 reduction had already been proposed by the municipality). Based on these factors, the Mayor and Council sought to take $110,000 from surplus and add it to the budget as additional revenue (line 261), an act which appears to have been intended to leave around $240,000 in surplus, but which in fact would have left only $97,095, or approximately 2.3% of the proposed current expense budget.

Both in prior case law and in regulation, the Commissioner has held 3% as the amount of surplus to be generally regarded as reasonable and necessary. N.J.A.C. 6:20-2.14 In review of this guideline and the district's particular needs and circumstances, notably the possibility of tuition adjustments over and above those budgeted in line 114 and an impending teacher contract settlement (the district was at impasse during these proceedings and did not line-item budget for negotiated increases), the Commissioner judges the $97,095 left in line 264 after the municipality's recommended cut insufficient in itself for reasonable surplus needs.

In determining the amount of surplus to be maintained, however, the Commissioner must also note that even after the $40,000 cut sustained to line 114 (tuition) above, the district will have available to it $38,752 raised in tax levy as a result of budgeting $78,752 more in line 114 than actually proved necessary. There is no reason why this unanticipated savings, which effectively translates into unanticipated revenue since it is being raised by local taxes, cannot be applied to unanticipated expenditures in the

same manner as surplus. The tuition overage, when added to the amount of surplus left in line 264 after the municipality's reallocation to offset current expenses, results in $135,847, or about 3.26% of the current expense budget set herein, available to the district to meet unforeseen expenses and contingencies. As this amount is both reasonable and sufficient to provide for thorough and efficient operations, the Commissioner sustains the municipality's $110,000 reduction of the local tax levy as a result of surplus allocation.

The Commissioner also notes that the municipality has raised allegations regarding the type of expenditures made by the Board from surplus in the past, which allegations were either disputed or explained away by the Board. Although it is not necessary to reach to these allegations herein in view of the determination made above, the Commissioner advises the Board that surplus is properly used for unforeseeable expenses and that expenditures of the type complained of by the municipality are inappropriately funded through surplus under all but the most unusual circumstances. Therefore, to the extent that the municipality's allegations may be true, in the absence of such circumstances the Board should discontinue this practice forthwith. The Commissioner further notes that the Board acted at its own peril in relying entirely on surplus to fund the results of its contract negotiations, and that any negotiated increases not covered by ordinary surplus and unanticipated revenues may be funded by reallocating funds from other line items as the Board deems fit.

* * * *

Accordingly, for the reasons expressed herein, the Commissioner restores $45,000 of the municipality's $50,000 cut from administrative salaries. He sustains, however, $5,000 of the cut from administrative salaries, the full $40,000 cut from tuition, and the full $110,000 reallocation from surplus so as to reduce the local tax levy by this amount.

Consequently, the Bergen County Board of Taxation is directed to make the necessary adjustments to reflect a local tax levy for the Township of Rochelle Park's 1991-92 school year current expense purposes as set forth below:

	TAX LEVY CERTIFIED BY GOVERNING BODY	AMOUNT RESTORED	TAX LEVY AFTER RESTORATION
CURRENT EXPENSE	$3,763,941	$45,000	$3,808,941

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 23, 1991

DATE OF MAILING - OCTOBER 23, 1991

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3308-89
AGENCY DKT. NO. 45-3/88
(EDU 8840-88 & EDU 2971-88
ON REMAND)

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,
Petitioner,
v.
LEON WILBURN,
Respondent.

Sidney A. Sayovitz, Esq., for petitioner (Greenwood, Young, Tarshis, Dimiero & Sayovitz, attorneys)

Stephen B. Hunter, Esq., for respondent (Klausner & Hunter, attorneys)

Record Closed: June 18, 1991 Decided: August 22, 1991

BEFORE EDITH KLINGER, ALJ:

The Board of Education of the Township of Teaneck (Board), Bergen County, filed tenure charges of inefficiency and insubordination against Leon Wilburn, a tenured teaching staff member in its employ. The Board alleged that these charges, if credited, were sufficient to warrant dismissal as provided in the Tenured Employee's Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.* Respondent was suspended without pay on February 23, 1988, and the charges were certified to the Commissioner of the Department of Education on February 25, 1988.

In his answer, filed on April 18, 1988, respondent denied the charges as specified and raised separate defenses thereto. Subsequently, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) on April 25, 1988, for hearing and determination as a contested case in accordance with *N.J.S.A.* 52:14F-1 *et seq.*

The matter was assigned to Administrative Law Judge James A. Ospenson under OAL DKT. EDU 2971-88. Judge Ospenson issued an Initial Decision -- Settlement on October 7, 1988. In a decision dated November 23, 1988, the Commissioner of Education rejected the settlement of the parties and remanded the matter to the OAL for hearing. The matter on remand was assigned to the undersigned under OAL DKT. EDU 8840-88. The parties once more attempted to resolve the matter, and an Initial Decision -- Settlement was issued on March 9, 1989. In a decision dated April 25, 1989, the Commissioner again rejected the settlement of the parties and remanded the matter back to the OAL for hearing, where it was assigned to the undersigned under its present docket number.

As part of the Stipulation of Settlement incorporated in the the initial decision of March 9, 1989, Wilburn tendered his resignation to the Board, which accepted it. Following the Commissioner's decision to reject the initial decision and remand the matter, Wilburn attempted to rescind his action and filed a new petition of appeal seeking to void his letter of resignation. The parties requested that the undersigned place the present matter on the inactive list until the question of petitioner's resignation was resolved. The matter remained inactive until May 3, 1990, during which time the Commissioner rendered a decision in favor of petitioner.

A prehearing conference was held in the present matter on May 4, 1990, when it was determined that the following were the issues to be resolved:

1. Was petitioner guilty of inefficiency as charged by the Board?

2. Was petitioner guilty of insubordination as charged by the Board?

3. If the Board proves either or both of the charges by a preponderance of the credible evidence, what is the appropriate sanction?

The hearing was scheduled for September 18 and 19, and October 19 and 31, 1990. The first hearing date was adjourned at respondent's request. The hearing was held on October 19, October 31, November 19, 1990, and January 31, 1991. The final hearing date was delayed because of respondent's health. The record closed on June 18, 1991, following receipt of the last submission of the parties. By order dated August 7, 1991, the time limit for filing this initial decision was extended until September 16, 1991.

STIPULATIONS

At the time of prehearing, the parties entered into the following stipulations:

> The charges of inefficiency were specified as five instances of deficiencies during 1986-87 and part of the 1987-88 school years; the charge of insubordination resulted from respondent's conduct during the 90-day correction period following notice of deficiencies.

REVIEW OF EVIDENCE AND FINDINGS OF FACT

Leon Wilburn was certified as an elementary school teacher by the New Jersey State Department of Education in October 1971. Between 1971 and 1983, he served as an elementary art teacher in the Teaneck Public School System.

At the close of the 1982-83 school year, it came to the attention of A. Spencer Denham, acting superintendent of schools, that Wilburn's certification did not permit him to teach art for more than 40 percent of his teaching time. He informed Wilburn of this in a letter dated June 10, 1983, and suggested that Wilburn explore the possibility of becoming certified in art as well as elementary education at the expense of the District.

According to Denham, the District was in the process of being monitored by the State Department of Education and wanted to make sure that its teachers were teaching under the proper certifications as required by law. He stated that all teachers in the District who were found to be teaching without the appropriate endorsement or certification were notified of the problem and informed that they might possibly be reassigned for the following school year.

After some discussion with the superintendent of schools, Denham advised Wilburn in a letter dated August 19, 1983, that he would not be reemployed for the 1983-84 school

year in his present capacity but would be placed instead on the elementary substitute list and called upon to substitute throughout the year on an "as needed" basis. Wilburn filed a verified petition with the Commissioner of Education alleging that this assignment violated his tenure and seniority rights. As a result of the litigation, he was assigned to teach the second grade at Whittier School on January 23, 1984, to replace a teacher whose resignation became effective on February 1, 1984. The following year, he was assigned to teach the fourth grade at Whittier School; he remained with the District in this assignment until the present tenure charges were filed.

Teaching History: Review of Documentary Evidence

In February 1974, Wilburn served as an art consultant to the District and taught two and one-half days per week in the Hawthorne School. His principal evaluated him highly and noted Wilburn's excellent rapport with his students and his ability to foster creative expression. He did observe that Wilburn had some problems meeting scheduled requirements on time but added that he had discussed the problem with Wilburn and was pleased with the response. He recommended rehiring Wilburn for the 1974-75 school year, "thereby placing him on tenure in the Teaneck School System."

Wilburn's annual summary evaluation of March 1, 1973, as a teacher consultant was satisfactory. He was described as "truly a gifted artist" and a "highly creative teacher," and his good relationship with his students was noted. The director of elementary education who prepared the evaluation suggested that Wilburn needed to be more prompt in arriving at school and to his classes, more efficient in ordering and checking art supplies, and more responsible in the care and maintenance of the supply closets in the schools to which he was assigned. "In addition, he needs to work on preparing written lesson plans. This is one area where he has been seriously derelict."

In the annual summary evaluation dated February 24, 1975, Wilburn was rated unsatisfactory. The evaluator described him as effective and creative as an art teacher and noted the fine rapport which Wilburn established with the administrators, teachers, and students with whom he worked. He then commented that Wilburn had been "remiss in completing tasks and obligations as required by the Department of Elementary Education." Specifically, he had failed to complete a required report on his attendance at a conference of art educators in New Jersey, he had failed to submit an inventory of art materials due on December 20, 1974 until February 11, 1975, after a letter of reprimand

was sent to him, and he had failed, except in November 1974, to submit his plan book on the 30th of every month as required of all teacher consultants. The evaluator recommended that Wilburn be rehired; however, he also recommended that his annual salary increment be withheld. In a mid-year observation report dated December 15, 1975, Wilburn was found to be satisfactory in all areas except that "he does have some difficulty in the areas of written plans and reports and often requires reminders to complete his responsibilities."

In the annual summary evaluation dated March 29, 1976, Wilburn was rated satisfactory. However, the evaluator again noted that he had "not been completely dependable in terms of meeting all obligations in that he was occasionally late in reporting to school, class, and/or meetings and failed, in spite of repeated reminders and assistance, to complete his lesson plans as directed." It was recommended that he be reappointed and receive his annual increment. However, the evaluator reserved the right to alter Wilburn's rating for the year if he did not continue to prepare lesson plans.

On December 1, 1976, Wilburn was observed by his supervisor and was deemed satisfactory in his teacher/pupil relationships, his teaching techniques, and his knowledge of the subject matter. The observer suggested that Wilburn needed some improvement in classroom organization and management; he recommended rearranging the art materials to improve the physical setting of the room and suggested a different format for exhibiting the work of students. In his summary for the 1976-77 school year, Wilburn expressed satisfaction with his performance and indicated that he had started a master's program in human development where he learned ideas which he had incorporated in his teaching.

An observation report, dated January 13, 1978, of a lesson in which Wilburn taught art enrichment was enthusiastic. The observer described the lesson as "an excellent experience" and noted that Wilburn was well-prepared.

In his annual summary evaluation dated March 21, 1978, Wilburn was rated satisfactory. His creativity and rapport with the students were again stressed. However, the evaluator commented on Wilburn's continuing failure to fulfill "other obligations relating to overall performance." He specified that Wilburn was late to school and class on several occasions and missed "deadlines regarding administrative requirements," such as completing reports and responding to administrative requests.

In October 1978, Wilburn was praised several times by the director of the Department of Elementary Education of the District for the bulletin board exhibits which he prepared. An observation of October 26, 1978, was highly positive and found Wilburn well-prepared for the lesson.

Wilburn was observed on February 19, 1980, and the evaluator found Wilburn's performance satisfactory and approved the planning and organization of the lesson. In October 1980, Wilburn was again praised by the director for the bulletin boards which he had prepared.

In a teacher evaluation of May 23, 1982, Wilburn was rated satisfactory in all areas. The Professional Improvement Plan, which was a part of this evaluation, sets as a goal of both Wilburn and his supervisor to have Wilburn report promptly for his assignments as part of his professional responsibilities. Other goals include attending courses at Pratt Institute to continue his studies and to pursue further courses in the master's program in human development.

Wilburn was assigned to teach the second grade at Whittier School as of January 23, 1984. There is in the record an enthusiastic letter from a parent written on March 21, 1984, praising Wilburn's teaching ability. He was given a satisfactory evaluation and a letter dated May 4, 1984, from Alfred J. Mitchell, principal of the Whittier School, informed Wilburn that his assignment for the following school year would be to teach the fourth grade in the Whittier School. There are no documents in the record related to the 1984-85 school year.

On October 29 and December 17, 1985, Wilburn was observed by Mitchell, who found the lessons satisfactory and made no suggestions for improvement. Mitchell observed Wilburn again on February 20, 1986, and was completely satisfied with his performance. There was a satisfactory annual evaluation of Wilburn for this school year.

On October 24, 1986, Mitchell spoke to Wilburn about concerns expressed by at least three parents of students in his class. This conversation was memorialized in a memorandum from Mitchell to Wilburn dated October 27, 1986. Among the problems which the parents called to the attention of Mitchell were that Wilburn assigned homework to the students, including book reports, which the children prepared and which he did not collect. They further complained that Wilburn gave spelling tests which he did

not collect, check, or return to the students. The parents also advised Mitchell that their children spent time each afternoon in art activities not related to specific curriculum offerings and that students who asked for assistance in mathematics were given the teacher's editions of the textbooks and told to find the answers themselves.

Mitchell stressed the seriousness of these allegations and instructed Wilburn to prepare written detailed lesson plans for each day's activities and to turn them in to Mitchell's office by 8:20 a.m. each morning. He was ordered to stop all art activities unless they were directly related to the subject matter being taught and the relationship was described in Wilburn's lesson plans. He was not to allow the students to have free play during the school day. He was to collect, mark, and show to Mitchell all pupil assignments for homework before returning them to the children, in addition to collecting, checking, and returning to students the work done in class. He was directed not to send students to Mitchell's office for committing minor infractions of the rules. He was asked to encourage the students to keep the room in a neater and cleaner condition. Mitchell ended his memorandum by informing Wilburn of his willingness to provide him with any help that he might need to correct these deficiencies and informed him that he would be visiting his classroom on a regular basis to verify that he was carrying out Mitchell's directives.

On October 31, 1986, Mitchell sent a memorandum to Wilburn at 1:30 p.m. calling to his attention that his daily lesson plan for that day had not been submitted to him by 8:15 a.m. as directed. The memorandum continued:

> Please be reminded that I consider this to be a serious failure on your part to comply with my directives. These directives are not issued casually but are requirements that I feel you must comply with at the the present time. Failure on your part to comply with these directives will have serious repercussions.

A written policy of the District, adopted by the Board on October 13, 1978, requires that a teacher prepare lesson plans for at least one week in advance and meet the requirements with respect to plan books which are established by the principal. The policy further directs that the teacher make thorough preparation for all daily lessons and prepare written plans reflecting this preparation. The plan books were to be left in the classroom to be available to a substitute teacher if necessary.

Mitchell sent a memorandum to Wilburn reminding him of Mitchell's memorandum of October 31, which Wilburn had received on Monday, November 3, concerning submission of Wilburn's daily lesson plans. The memorandum also stated that as of 2:30 p.m. on November 4, Wilburn had failed to submit his lesson plan for that day. Mitchell also reminded Wilburn that he was waiting to receive corrected copies of homework assignments which he had requested to see before Wilburn returned them to students. He warned Wilburn that his continued failure to comply with Mitchell's request could place him in a position of insubordination.

Mitchell observed Wilburn's class in fourth-grade reading between 9:15 and 9:45 a.m. on November 4, 1986, and found the lesson to be unsatisfactory. Mitchell went to the observation expecting to find Wilburn teaching a mathematics lesson, based upon the schedule which Wilburn had given Mitchell at an earlier time; as noted above, he had failed to provide a lesson plan that morning as Mitchell directed. According to Mitchell, "This digression is not permitted since it directly negates the purposes of daily lesson plans in order to check for proper curriculum progression."

The reading class which Mitchell observed consisted of Wilburn and his students reading orally from the text and discussing questions at the end of the chapter. The discussion then wandered without any apparent direction from the subject matter of the lesson. Mitchell noted in his observation report that many of the students were not directly involved in the lesson and, although they were generally well-behaved throughout, "their attention span regressed during the lesson." Mitchell requested a conference with Wilburn to discuss his concerns.

At 2:30 p.m. on November 5, 1986, Wilburn delivered a copy of his plan book covering activities over the prior three days to Mitchell's office. Mitchell sent Wilburn a memorandum on the same day stating that what Wilburn had done did not conform to Mitchell's directive since it did not provide him with the information needed in order to evaluate the effectiveness of his instructional program each day. Mitchell warned, "Your blatant refusal to turn in to me your daily plan cannot continue to be tolerated. I advise you in the strongest manner that I can to comply with the directives I have given you on this matter." Mitchell once more requested that Wilburn give him the corrected homework assignments from his students, which had not been supplied as requested, and again offered to provide any assistance that Wilburn needed. He also offered the help of subject area supervisors if Wilburn need assistance in specific subject areas.

On November 18, 1986, the school day was shortened so that the teachers could arrange to meet with parents on that day. Mitchell informed Wilburn on that morning that he noticed that Wilburn had not set up any conference appointments with the parents of his students. Mitchell chastised Wilburn for this failure in a memorandum and directed him to make available to Mitchell by 8:00 a.m. on the morning of November 19 his parent conference schedule for Thursday, November 20, and Monday, November 24.

On December 3, 1986, Mitchell sent Wilburn a memorandum stating that he had not received any lesson plans from him during that week. Mitchell reminded Wilburn that his request was still in effect and that he wanted the lesson plans provided on a daily basis as previously ordered. On December 4, 1986, Mitchell had not received the lesson plan book and warned Wilburn that, "I thought I made it clear to you that I was prepared to support your art activities so long as you could validate them with prepared lesson plans. You have failed to carry out your part of the agreement." Mitchell again requested that the daily plans be provided.

Pearl Schweitzer, the supervisor of the mathematics instruction area for the District during the relevant time, observed Wilburn on December 9, 1986 between 9:35 and 10:30 a.m. and found his mathematics lesson unsatisfactory. Wilburn's plan book indicated that the lesson of the day was to divide a four-digit number by a one-digit number. She suggested that he teach the students how to "check" their results, present them with alternative notations for division, and provide them with more than one example of the operation. The only one he presented involved no remainder in the solution, but the problems assigned for practice included some with remainders. She also suggested that he could use the lesson as an opportunity to sharpen the students' skills at estimation.

Schweitzer's observation caused her to recommend that complete daily lesson plans be developed, including specific instructional objectives, classroom activities appropriate to the needs and interests of the students, and, in support of the objectives, the teacher resource materials and appropriate homework assignments to be used. She directed his attention to the teacher's edition of the mathematics text and its companion resource manual for suggested lesson plans, including objectives and teaching strategies.

Schweitzer further proposed that Wilburn develop a "math activity center" with various mathematics-related activities to be used by the students depending on their needs

and interests. She also advised grouping students according to their academic needs, abilities, and interests so that different activities and teaching strategies could be employed to teach these students the subject matter on more individualized levels.

Schweitzer listed the following reasons why she found Wilburn's lesson unsatisfactory: his written lesson plan was minimal and did not indicate any plan beyond the one for that day; the classroom visitation form which Wilburn prepared at her request prior to her visit did not provide her sufficient information to prepare for the observations; the objective taught in the lesson of that day should have been accomplished a month earlier; no formal homework assignment was announced to the class or noted anywhere on the board (Schweitzer could not determine whether a "practice worksheet" was a homework assignment and, if so, whether it was one from a prior day or one to be used subsequently); Wilburn's large group lecture-discussion presentation of the concept followed by textbook practice were the only two teaching activities in evidence, and these offered little challenge or diversity to the students; Wilburn used the student fourth-grade textbook as the sole instructional material for the lesson and, except for two students using flash cards, there was no evidence of his employment of any other approaches to learning, such as manipulatives or games, that might encourage student involvement through a creative approach; he gave no review or summary of the lesson objective or of the observations made while working with the class, nor was there a follow-up assignment; and, although he taught the specific instructional objective, "its achievement is only realized when students can apply the skill correctly in a problem-solving application or situation," which he did not provide.

Schweitzer was concerned with Wilburn's sole use of the large group lecture-discussion method of teaching which did not adequately present the subject matter or hold the attention of the students. She also commented on the general impression of disorganization in the physical condition of Wilburn's classroom.

Edwin Reynolds, the social studies supervisor for the District, observed a social studies class taught by Wilburn on December 15, 1986, and rated his performance as unsatisfactory. The focus of the lesson was upon the development of map skills in relation to the "county." Reynolds noted that the lesson plans prepared by Wilburn were incomplete and inadequate. They lacked specific details and were too brief to be of any practical value and none existed beyond the day of the observation. The classroom visitation form which Wilburn prepared for him prior to the observation lacked sufficient

information. Reynolds noticed that students were inattentive and he remarked upon their noticeable "cross-chatter" and general "restlessness" with Wilburn reprimanding them, sometimes harshly.

Reynolds suggested better preparation by Wilburn, stressing the importance of specific lesson plans and suggesting what these plans should include. He advised that student behavior could be improved if the lesson plans were more interesting and more motivating to the students. He commented further on difficulties which he perceived in Wilburn's teaching strategies. He noted confusion in the "focus of the lesson, a lack of clarity about the subject matter," and the presentation of some inaccurate information by Wilburn to his class, "such as Hackensack being the capital of Bergen County, the Gulf of Mexico being called a bay, Chicago having direct access to the Mississippi River, etc." Reynolds made a number of detailed specific suggestions on the manner in which Wilburn's performance could be improved.

On December 17, 1986, Mitchell sent a memorandum to Wilburn informing him that his performance as a fourth-grade teacher for the school year was thus far unsatisfactory because he had failed to follow Mitchell's directives, such as producing his lesson plans in a timely and systematic manner, because he had failed to carry out procedures related to student assignments which he had agreed in a conference with Mitchell on November 19, 1986 to undertake, because he had failed to provide for the different levels of ability within his classroom, particularly in academic areas, because he had failed to familiarize himself and follow the curriculum for the fourth grade, and because he had failed to schedule parent conferences on November 18, 1986, a school day which had been shortened for that purpose. Mitchell put Wilburn on notice that he was considering recommending that his salary increment be withheld for the 1987-88 school year and that a copy of this letter would be placed in his personnel file.

On December 31, 1986, Denham sent Wilburn a memorandum confirming a conversation he had with Wilburn and Mitchell on December 23, 1986, in which Wilburn was informed that the District had hired Barbara Meyers, an experienced teacher, to assist him in his fourth-grade class:

> It is understood that you are the teacher in charge (responsible for the preparation of lesson, plans, grade reports, parent conferences, presentation of new concepts, etc.). Ms. Meyer's primary function is to assist you as follows: planning, organizing the room, grouping and

> regrouping students, suggesting and developing teaching strategies, serving as another pair of hands, bringing continuity to lessons, helping establish clear daily objectives for each lesson, etc. Mr. Mitchell will discuss this with you further.
>
> In addition, Mr. Mitchell and the Subject Supervisors will be meeting with you periodically to assist you in their areas of expertise. All of this will be scheduled through Mr. Mitchell.

Wilburn's Professional Improvement Plan was revised on January 15, 1987, to require that he meet on a bimonthly basis with subject area supervisors to improve his areas of weakness. Wilburn was instructed to independently read the curriculum and teaching guides in each of the disciplines in which he taught. He was also required to meet with Meyers on a daily basis to review curriculum areas as outlined in the elementary curriculum guides. He was further directed to maintain a log of his meetings with Meyers and the subject area supervisors containing the dates of the meetings and a brief summary of the discussions. This log was to be submitted to Mitchell on the last day of school of each month.

In regard to upgrading his skills for classroom management, Wilburn was instructed to meet daily with Meyers to develop lesson plans, and the manner in which these lesson plans were to be structured was described. He was instructed to follow Meyers's suggestions for improving the learning environment in his classroom and specific suggestions were made in the plan in this regard. In order to make sure that his classroom management skills were being addressed, Wilburn was to meet with Mitchell each Friday afternoon to inform him of his progress in these areas. Wilburn was directed to prepare a complete week's lesson plans by February 20, 1987, and each week thereafter and Mitchell was to observe and evaluate each of the lessons described in Wilburn's plans.

Furthermore, it was "strongly recommended" to Wilburn that he improve his skills and teaching methodology by taking a course at Fairleigh Dickinson entitled Improving Reading Instruction, ED 6512.01, the cost of which would be paid by the District. In addition, he was to pursue summer courses which were to be completed by August 1987. Wilburn was also told to improve his knowledge of the subject matter areas by reading the basic textbooks and supplemental sources, such as magazines and newspapers, and to develop a thorough knowledge of the subject content areas outlined in the curriculum guides. The improvement plans ends with the following warning:

Mr. Wilburn is reminded that it is his responsibility for the instructional program in his class. It is imperative that he remains clear on this point. Mrs. Meyer is there to support and help him but the ultimate responsibility for his class rests with him.

Schweitzer observed Wilburn teach a mathematics class on January 29, 1987, and found his performance in need of improvement. The class was conducted by Wilburn in his customary lecture-discussion style, while Meyers worked with students who were experiencing some difficulty with the concepts by using manipulatives. No formal lesson plan book was provided to Schweitzer, but the classroom visitation form was prepared in a satisfactory manner prior to her arrival. Schweitzer observed no concluding or culminating activity in Wilburn's lesson, and no formal homework assignment was made. She once more suggested that he develop a complete daily lesson plan, and she outlined what the plan should contain. She again recommended the use of the "teacher's edition" of the mathematics textbook and its companion resource manual. She suggested that the lesson be summarized at the end and a homework assignment made. Schweitzer urged that Wilburn implement her suggestions as soon as possible and informed him that she would be returning to his class in late March for another observation. She offered him her assistance in implementing any of her suggestions.

At a conference held on February 13, 1987 between Wilburn, Schweitzer, and Mitchell to discuss this observation, Wilburn appeared disheveled, his eyes were glassy, and he had alcohol on his breath.

On February 6, 1987, Reynolds observed Wilburn teach a social studies class and rated his performance unsatisfactory. The class that day was devoted to the subject of slavery. The lesson began with questions, which Wilburn had written on the board, about a southern plantation. The students responded to the questions, and Reynolds noted that the classroom "tone" had improved over what he had witnessed in his previous observation. A student read part of an article from a Life magazine reprint series about slavery and showed pictures to the class. Wilburn initiated a filmstrip, which was interrupted by three students entering the room to dramatize a "slave auction." Following the dramatization, Wilburn conducted what was described by Reynolds as a "rambling," "question/answer session," which ranged from aspects of slavery, the plantation, weaving, and to the importance of textiles.

Reynolds deemed the lesson to be unsatisfactory because there was no daily lesson plan available and the classroom observation form which Wilburn was to have filled out prior to the scheduled observation was only partially filled out by Wilburn after the class began. Reynolds noted a repressive atmosphere in the classroom as Wilburn reprimanded students harshly for some behavior. He found the lesson without focus and "generally quite confusing." Reynolds reported that some of the lesson content was inaccurate. For example, Wilburn told the students that the underground railroad had ended in Philadelphia although it actually had terminated in Canada. Reynolds also recorded that Wilburn was unprepared to use the filmstrip and was unable to coordinate the sound with the pictures. Specific, concrete suggestions were offered by Reynolds to Wilburn as to the manner in which his performance could be improved.

On February 18, 1987, Wilburn responded to this evaluation in a memorandum to Denham with copies sent to Mitchell and Reynolds. He stated that he had thoroughly thought through the lesson and that his plan book was in order, although it was never reviewed by Reynolds. He explained that the primary purpose of his lesson was to demonstrate the activity and the subsequent result and effect on a slave family through live dramatizations and to motivate the students through the use of the filmstrip. He claims that in this manner, he accomplished the primary instructional goal and effectively used the lesson time. Wilburn took issue with Reynolds's comments that the atmosphere in his classroom was repressive and that he was harsh with his students, stating that he always treated his students with respect and firmness when needed to maintain order in his class. He concluded by stating that he had established a "working relationship" with his students and requested a further review of the unsatisfactory rating.

At a meeting with Denham on February 19, 1987, Wilburn was advised to implement the suggestions made by Reynolds in his observation report. Wilburn expressed concern that his creativity would be stifled. Denham reassured him that planning his lessons more carefully would enable him to increase his creativity by providing him with "a variety of options that will reach more of your students." In order to accomplish this goal, Denham recommended that Wilburn use the techniques and suggestions of Reynolds and Schweitzer and observe and confer with Meyers.

On March 19, 1987, Mitchell observed Wilburn and rated his performance as in need of improvement. The homework assignment dealt with "coded" decimals. Wilburn used the whole class instruction technique to review the homework with his students but did

not collect their work for correction. The focus then shifted to an explanation by Wilburn of decimal fractions related to a chapter review test which the children were scheduled to take at some time during the lesson. After 30 minutes, Wilburn reviewed two problems and asked the class to do problems one through nine of the review test even though they had only 10 minutes in which to complete it before they had to leave the classroom for their art instruction.

Mitchell was satisfied that Wilburn had completed the lesson outlined for the class in his plan book for the week. He commented that the whole-class method of instruction employed by Wilburn did not address the various rates of learning of the students in his class and suggested that he employ a more individualized instructional program. He noted that the lesson was not directly related to the test that the children would be asked to take during the period and that the class time was not effectively planned to give the children time to take the test. Mitchell suggested that Wilburn needed to improve his planning and to focus more directly on specific topics so that he did not digress from "the plotted course." He stated that Wilburn's classroom climate had improved and he seemed better organized, which Mitchell attributed to the guidance that Meyers had provided to Wilburn in this regard. He informed Wilburn that he would observe him again in two weeks.

In the teacher evaluation of April 28, 1987, Mitchell found Wilburn to be unsatisfactory in 13 out of 19 possible categories, satisfactory in five, and unrated in one. Instead of completing the prepared evaluation form, Mitchell attached a two-page memorandum directed to Wilburn outlining the problems which he found Wilburn to be experiencing and stated that "many of these difficulties have been caused by his continuing failure to adequately plan and prepare his lessons." Mitchell outlined the history of his requests over the school year to have Wilburn provide him with daily lesson plans and Wilburn's repeated failures to comply with his requests. He mentioned the series of unsatisfactory observation reports from Schweitzer, Reynolds, and himself, each referring specifically to Wilburn's lack of adequate preparation and his failure to have a detailed lesson plan. Mitchell reminded Wilburn that his mid-year evaluation of December 17, 1986 had indicated the same areas of weakness and that Mitchell had planned to recommend that Wilburn's salary increment for the 1986-87 school be withheld if there was no improvement.

Mitchell reminded Wilburn that in January 1987, an experienced, full-time cooperating teacher was employed by the District to assist him in his classroom. He also

reminded Wilburn of his failure to implement the suggestions in his Professional Improvement Plan of January 15, 1987, including regular meetings with subject matter supervisors to review the areas of weakness outlined in their evaluation reports and regular meetings with Meyers, his cooperating teacher, to develop lesson plans in all areas and eventually develop weekly lesson plans. These weekly plans were to have been prepared by February 20, 1987 to be checked by Mitchell, but they had not been submitted as of April 28, the date of Wilburn's annual evaluation. Mitchell concluded his memorandum as follows:

> Based on the above documented facts I feel that Mr. Wilburn has in a repeated and systematic manner failed to carry out his responsibilities with regard to effective preparation and planning. I, therefore, recommend that his salary increment for the 1987/88 school year be withheld.
>
> If Mr. Wilburn is to achieve a satisfactory evaluation for the year 1987/88 school year he must closely adhere to this Professional Improvement Plan.
>
> 1. Mr. Wilburn is to begin preparing weekly lesson plans to be submitted to my office on Friday of each week until the close of this school year. These plans are to be prepared with the cooperation of Mrs. Meyer, his cooperating teacher.
>
> 2. Immediately upon the opening of the 1987/88 school year he is to continue this practice and procedure.
>
> 3. Mr. Wilburn is to read and study all of our current curriculum guides during the summer so as to be totally knowledgeable about the fourth grade curriculum.
>
> 4. Mr. Wilburn is to continue to follow the suggestions of Mrs. Meyers with regard to the structure of his learning environment by:
>
>   a. Maintaining subject area interest centers around his classroom.
>
>   b. Maintaining a neat and orderly classroom.
>
>   c. Working directly with his students on more effective pupil self-control techniques.
>
>   d. Using a variety of teaching techniques in his classroom instruction rather than only uniform instruction; e.g. small group instruction, teaming, etc.
>
>   e. Maintaining a consistent practice with his students of:

1) Reviewing their assignments for outside or at home assignments.
2) Collecting these assignments when due.
3) Correcting these assignments by himself.
4) Returning these corrected assignments to his students.

On May 12, 1987, Wilburn was observed teaching reading, mathematics, and spelling by Dr. John Cowen, director of Curriculum and Instruction K - 12 for the District. Cowen found Wilburn's performance in need of improvement. Wilburn was again using the teacher-directed, whole-class approach with no provision for individual differences. During the spelling lesson, Wilburn instructed the class on how to use spelling words to make a crossword puzzle; however, several of the students did not understand what was expected and appeared to be lost. Wilburn became impatient with them and told them to complete the activity for homework. Oral book reports were given by three students and Wilburn asked the group to critique the reports but, according to Cowen, he had not provided them with guidelines in advance to "assist them in evaluative techniques which lead to critical thinking skills development"; consequently, little critiquing occurred. During the reading lesson, 11 students read a story aloud from the Basal reader, but there were no follow-up questions and Cowen could not tell whether the goals of the lesson had been achieved.

In July 1987, Mitchell received inquiries from several parents of students in Wilburn's class concerning his failure to provide them with end-of-year report cards, which were to be mailed to them. Mitchell's office contacted Wilburn in mid-July and was assured that all had been mailed. At the end of July, when Mitchell returned from vacation, he learned that these parents had still not received report cards. He met with Wilburn in his office on August 7, 1987, at which time Wilburn produced one of the report cards and said that he had hand-delivered the others; Mitchell told him to hand-deliver that one immediately. Mitchell formally reprimanded Wilburn for this neglect in a letter dated August 11, 1987, in which he reminded Wilburn that a copy of each child's report card was to be placed in their permanent record folders.

Wilburn failed to report to a staff meeting scheduled for 1:00 p.m. on September 2, 1987 until 1:40 p.m. without excuse. His lateness was deemed by Mitchell to be insubordination and he was warned in writing on September 9, 1987 that any further failure by him to carry out his assigned duties would result in a "substitute minimum daily

salary deduction from your salary." He was also warned that if he continued this type of behavior, his employment could be jeopardized.

On September 4, 1987, Mitchell inspected the classrooms to determine their state of readiness for the opening of school; Wilburn was the only teacher who had made no provision for the return of the children. He cautioned Wilburn again that he expected to receive detailed daily lesson plans from him each morning by 8:00 a.m. and failure to do this would be considered insubordination. He expressed his confidence that Wilburn was now capable of doing this because of the assistance he received during the prior year from Meyers.

Wilburn was observed by Mitchell teaching social studies on September 18, 1987, and was rated unsatisfactory. Mitchell found the lesson disorganized, the concepts introduced without development, and little time allotted for adequate discussion and comprehension by the students. No summary of the material was given nor was any homework assigned. The students appeared bored and unenthusiastic. Mitchell again pointed out that Wilburn was not adequately planning his lessons. Wilburn did provide a lesson plan outline to Mitchell for this class, but it was not sufficiently detailed to be adequate. Mitchell also remarked on the cold, unattractive physical condition of the classroom. He reminded Wilburn that he was continuing to ignore requests for a weekly outline and detailed lesson plan and noted that this failure was a direct violation of his Professional Improvement Plan and central office policy. He warned that Wilburn would continue to receive unsatisfactory ratings until he complied with the policy.

On September 21, 1987, Cowen observed Wilburn teaching a mathematics lesson and rated the performance unsatisfactory. Cowen noticed that Wilburn's lesson plans were incomplete with no entries in the area of language arts or social studies. He pointed out that it was the second week of the national celebration of the constitutional bicentennial, but there was no mention of this in Wilburn's plans. He reminded Wilburn of his obligation to maintain weekly plans and attach a lesson plan. He noted that Wilburn did not seem to have given homework assignments. He characterized the mathematics lesson by Wilburn as teacher-directed using a whole-class approach exclusively, which did not make any attempt to account for individual differences. The class seemed restless and inattentive during the last 15 to 20 minutes of the one hour of teacher-directed instruction. Cowen also called attention to the fact that Wilburn's classroom was bare and unattractive and failed to provide the children with a stimulating environment. His suggestions to Wilburn

for improvement were specific and directed to the problems above which Cowen stated in his observation report.

Mitchell reminded Wilburn on September 29, 1987 that he still had not as yet submitted his daily lesson plans as instructed. Mitchell was still trying to get Wilburn to submit daily lesson plans in October. He approved a sample outline of a lesson plan submitted to him by Wilburn on October 5, 1987, and he received three lesson plans from Wilburn on October 5, 6, and 7. No lesson plans were submitted on October 8 and 9, and Wilburn's plan book was unavailable when Mitchell requested to see it.

In October 1987, Denham learned that Wilburn had failed to take a course in social studies curriculum at Bank Street College, for which Denham had approved payments. The subject matter of the course covered Wilburn's areas of weakness which were touched upon by Reynolds in his observation report of February 1987. Denham expressed his disappointment that Wilburn also failed to take advantage of District staff development programs dealing with instructional strategies.

On October 15, 1987, Wilburn was told that tenure charges alleging inefficiency had been filed against him on October 13, 1987.

On October 28, 1987, Wilburn failed without explanation to attend an "in-service" training session for the Whittier School staff to introduce the new K - 5 social studies revised curriculum.

In a letter of November 11, 1987, Wilburn responded to the Teaneck Board of Education concerning events unrelated to these tenure charges. Wilburn, who is black, complained about a racist attitude in the Teaneck school system. He cited an instance during the prior school year when a student with learning disabilities was placed in his class, which, he said, contributed to his present problems. He also complained that after teaching art successfully for 14 years in the system, his job was taken away from him and given to the daughter of another teacher in the District.

Following open-school night, two sets of parents of children in the Whittier School wrote to Mitchell to praise the job that Wilburn was doing in teaching their children.

On November 17, 1987, Mitchell learned that Wilburn had failed to provide his class with reports cards the day before; he was the only teacher who had not done so. He reminded Wilburn that he had not handed in his detailed lesson plans that week.

On November 19, 1987, Mitchell observed Wilburn teaching a mathematics class and found his performance unsatisfactory. The day's lesson was construction of "Napier's rods," but this was not indicated in Wilburn's lesson plan book. In fact, the plan book stated that a reading lesson would be taking place at the time of the observation. Mitchell reported that the children were cutting and pasting pieces of colored paper together for more than 45 minutes while Wilburn attempted to maintain order by raising his voice and calling out children's names. Mitchell concluded that the lesson had not been planned. At the end of the period, the children had to leave their classroom to go to physical education without sufficient time to tidy up their desks. Mitchell noticed the next morning that the children were still cutting and pasting paper.

Mitchell found the lesson unsatisfactory because there was insufficient information in the following week's lesson plan on how the rods would be used for a homework assignment, considering the "inordinate amount of time that Mr. Wilburn had the children work on this project." There was no provision for any additional work for the day. There were no activity learning centers despite the fact that Meyers had shown Wilburn how to develop them during the prior winter and spring. Mitchell noticed that Wilburn had finally made his classroom more attractive by decorating the bulletin boards. However, no student's work was displayed upon them.

In the section of the observation report labeled "suggestions for improvement," Mitchell stated that Wilburn's "major problem continues to be his failure to adequately and consistently plan the contents and execution of his lesson." He reported that there was some improvement when Wilburn was advised that tenure charges were being planned against him but that, after some progress, he reverted back to "original slipshod manner of preparation and the quality of his instructional program has effectively diminished." Wilburn had received an "enormous amount of help and assistance" from Mitchell, the subject matter supervisors, and Meyers in planning and executing his lessons, but did not draw upon this help in improving his performance. He once more criticized Wilburn's sole use of whole-class or universal instruction for all of his teaching activities.

Mitchell warned Wilburn on November 23, 1987 that his lesson plans had not been submitted as directed on November 17.

On November 24, 1987, Cowen observed Wilburn teaching a mathematics class and found his performance to be unsatisfactory. For several minutes, the students took turns reading their homework answers aloud and checking to see if any mistakes had been made. Other students were working at the rear of classroom at a round table and at a small chest, neither of which were provided with chairs. These children also appeared to Cowen to be helping each other to correct their mathematics homework assignments. When they had finished verbally correcting the homework, Wilburn handed out paper and told the students to rewrite their corrected examples on the paper, and students who did not do the homework previously were told to do so at the time. Cowen pointed out that Wilburn's lesson plan book called for "problem solving in math with two groups," but no problem-solving lesson took place. Only the correction of homework and work in the mathematics workbook was observed for the duration of the lesson, which lasted nearly 55 minutes. Wilburn walked up and down the rows, stopping to answer individual student's questions. If students became restless and noisy, he would raise his voice and call out their names.

When the children left the room to go to their art class, Cowen described to Wilburn the problems which he found with the lesson. Wilburn explained that he could not teach problem-solving because the students did not yet know their multiplication facts and they were not doing their homework. Cowen suggested that Wilburn find creative ways to stimulate the students to learn. He also pointed out that it was unfair to the students who had done their homework to be held back by those who had not, since Wilburn made no attempt to separate students to accomplish his teaching objectives. Cowen observed that the plan written in Wilburn's plan book lacked objectives and merely listed page numbers in the text or workbook and concluded that this inadequate planning was reflected in Wilburn's teaching style.

In his observation report, Cowen made specific suggestions as to the way Wilburn could improve his work, including planning, preparing daily detailed lessons with objectives, material, and instructional methods, and following these plans to the best of his ability, grouping students with an objective or purpose and not trying to teach to the entire class but by the rearrangement of the furniture to "provide for better classroom

management, the activity centers and flexible grouping of students." He also encouraged Wilburn to create a positive atmosphere and not discipline students in a punitive manner.

On December 15, 1987, Wilburn was observed by Schweitzer and Dr. Shirle Moone-Childs, Cowen's assistant, teaching a mathematics class. His performance was rated as unsatisfactory by these observers. Their suggestions for improvement were the same as those made repeatedly in every prior observation report: developing lesson plans on a daily basis, including specific instructional goals and objectives, appropriate homework assignments, employing teaching strategies other than whole group instruction, making use of other materials, addressing the individual learning styles of the students, engaging in more creative teaching methods, focusing the activity on a specific goal or objective, preparing and motivating the students as to the significance of what they are learning, and summarizing the material at the end of the lesson.

In Wilburn's Mid-Year Evaluation report dated December 22, 1987, Mitchell rated him as being in need of improvement. He commended Wilburn on his involvement in school-related activities, and he recommended that Wilburn take advantage of in-service offerings in curriculum and/or graduate programs in teaching methodology and content areas. He criticized Wilburn for failing during the 1987-88 school year to comply with parent requests for the mailing of their children's report cards; he had also failed to place file copies of the report cards in the students' guidance folders. He failed to comply with Mitchell's repeated requests for lesson plans. Finally, Mitchell reminded Wilburn that tenure charges had been filed against him in October 1987 and directed him to improve in the area of planning and lesson execution. He warned that, since the filing of the charges, Wilburn received three unsatisfactory evaluations and advised him again that he had until the middle of January 1988 to correct the deficiencies alleged.

Wilburn was observed on January 11, 1988 by Cowen and Childs and his performance was rated unsatisfactory. When the observers entered the room at 10:25 a.m, the class was involved in a total group lesson. There appeared to be some disorganization and confusion before Wilburn was able to get down to the subject matter, which was pronouns. As part of the lesson, Wilburn attempted to warn the students that the substitution of a pronoun for a noun could result in some ambiguity. However, he pronounced the word as "ambigarity" and gave the students the wrong definition of the word. He continued to mispronounce it throughout the lesson.

The observers also noted that Wilburn's replies to comments by the students were not always responsive. As an example, Wilburn wrote on the blackboard, "Susan pats the mother cat." He then wrote, "She likes the cat." When a student asked, "How do you know what she likes?", Wilburn responded, "That's what makes it definite." In the sentence examples written on the board, Wilburn wrote "pats" for "pets" and "warm" for "worn." The observers attributed some but not all of their inability to understand the dialogue between Wilburn and the students to the fact that they had not been provided with a copy of the text so they could follow the examples.

At 10:45 a.m., Wilburn announced that the students would complete the sentence examples for practice and told them to work independently at their desks. He did not walk around the room to observe what they were doing. At 11:00 a.m., when the assignment was to have been completed, some students had finished with time to spare and some were still working on the second example. The observers did not notice Wilburn giving them any guidance. Following a review of the practice exercises at 11:15 a.m., Wilburn immediately moved into spelling, a new subject matter area, without closing the language arts lesson.

In their report, Childs and Cowen wrote that Wilburn's plan book showed no entries for the week of January 4, 1988, even though he had been reminded by Mitchell several times that this was required. Other entries in the plan book were perfunctory and did not demonstrate adequate planning of the lesson to be presented. The observers attributed the confusion in the lesson which they had just seen to Wilburn's lack of preparation. They commented on his use of the whole-class method and his failure to address individual needs, all of which had been directed to Wilburn's attention in previous evaluations. They observed confusion among the students as to what their homework assignment was and stated, "Careful planning of assignments would also preclude the presentation of confusing and inappropriate homework." The observers commented on the lack of attention by some students. They also wrote that Wilburn raised questions but did not provide students with enough time to answer them or did not correct students who called out the wrong answers. They noted Wilburn's failure to close the lesson appropriately or to integrate it with other instructional areas, such as creative or expository writing.

Teaching History: Review of Testimony

Both Reynolds and Schweitzer testified that lesson plans should include, at a minimum, specific and clearly stated objectives of the lessons and motivating and high-interest activities and procedures to be implemented in carrying out these activities. This helps a teacher to focus on the lesson so that the required material is presented in an interesting and effective manner to the students. A lesson plan should also contain some means of evaluating the effectiveness of the lesson and assessing the students to see how well they have absorbed the material. The lesson plan may also be used by a substitute teacher to carry through with the curriculum organization in the event the regular teacher is absent.

When an observation is scheduled, the teacher to be observed is notified in advance and requested to fill out a pre-observation form. The teacher is also asked to present his plan book for the day when the administrator appears for the observation. These requirements allow an observer to know in advance the subject and scope of the lesson which they are to observe and decide whether the teacher is meeting the curriculum objectives for the period of observation. Both Reynolds and Schweitzer testified that Wilburn either failed to fill out the pre-observation form or filled it out in a sketchy manner. Any notations present in his lesson plan book were minimal.

When Cowen spoke to Wilburn about his incomplete lesson plans, Wilburn said that he had shared them with Mitchell, implying that Mitchell knew and approved of them. When Cowen consulted with Mitchell, he learned that this was not the case.

Following their observations, Reynolds and Schweitzer held detailed post-observation conferences with Wilburn. They discussed the results of the observation and offered suggestions and assistance in implementing their suggestions. Reynolds brought Wilburn new materials that were available to assist him with his teaching. He came periodically into Wilburn's room informally to offer further suggestions and assistance. Schweitzer frequently stopped in Wilburn's classroom with suggestions and offers of help. She brought him new materials and suggested alternative teaching strategies to him. Schweitzer observed other strategies being implemented only when Meyers was assigned to Wilburn's room; when she was no longer there, none of these strategies were employed.

A new mathematics program was implemented in the District in 1984-85. All of the staff in the District teaching mathematics, including Wilburn, were provided with a teacher's edition of the text, which included lesson plans for the material. They were also provided with problem-solving procedures, notebooks, worksheets, and so forth.

All of the observers remarked on the dullness of Wilburn's classes. His children were inattentive. Cowen noticed two students reading novels in the back of the classroom during one observation. The observers remarked upon Wilburn's inability to distinguish active participation by the students from behavior requiring discipline and, consequently, discipline was often inappropriately administered.

Wilburn has alleged that he was singled out for harassment because of his race. Denham, however, testified that the District did everything possible to keep a black male teacher in the classroom as a role model for the students. In pursuit of this goal, he explained, they conceived a "bold plan," which was to take an experienced classroom teacher and place her into the room with Wilburn to serve as a model, an assistant, and a support person. According to Denham, this concept was modeled after the method used for teachers who were taking the alternate route to classroom teaching; that is, to develop classroom skills in teachers with subject matter expertise.

During the first 20 days, Meyers was to serve as a model and work with Wilburn to develop his skills. For the rest of the term, Wilburn was to resume control of his classroom and Meyers would then serve as a resource person available for eight hours a day. Denham stated that it was very unusual for a school district to go to the trouble and expense of placing a fellow teacher in the classroom to help and develop basic teaching skills which should already have been present in a classroom teacher.

What happened in practice was that Meyers helped Wilburn prepare his lesson plans for the first few weeks, but when she was not actively doing so, he returned to his old habits. For the first few weeks, Meyers taught the class so that Wilburn could observe her, but often when she began to teach, he left the room without a satisfactory explanation. When Meyers assumed her role as a support person and turned the responsibility of the class back to Wilburn, he did not use what she had tried to show him in regard to teaching or lesson plans.

Wilburn characterized Meyers as a first-year, untenured teacher who was a colleague and knew no more about teaching than he did. He explained that he walked out when she was teaching because this was his preparation time to which he was entitled as a teacher and that Meyers was actually there to take turns teaching with him. He described her teaching methods as antiquated and said that he preferred his own to the ones which she had demonstrated. He also felt that Meyers was hired by the administration and placed into his classroom to appease the parents of students who were "out to get him" and that she was not sincere in wanting to help him. He stated that he remained firm in his attitude of resisting her influence.

Wilburn denied that anyone made any recommendations to help him improve his performance. According to him, he was given no assistance in preparing lesson plans and received no model in teaching methods. He discounted Meyers's presence and insisted that the subject matter supervisors did not offer him any help, although he admitted that he never asked any of them for assistance because he knew that he was competent.

Wilburn said that he used the lesson plans that were in the textbooks. However, when pressed, he could not recall any specific one that he had used or describe the format of any of them. In any case, he did not feel that it was necessary for him to submit lesson plans because there were other teachers that did not and he was being singled out for this treatment.

Wilburn explained that some of his students did not receive report cards, although he had them on the last day of class, because they ran out of the room too quickly. He said that it was not his responsibility to mail them to the parents.

Wilburn denied that he received any assistance during the 90-day remediation period, which ran between October 15, 1987 and January 15, 1988. One of his major requests during this time was to have his lessons videotaped, and this request was denied by the administration. When questioned at hearing as to the purpose of videotaping, he stated that it was to demonstrate how well he taught and to rebut the criticisms leveled at him by the observers.

Wilburn also explained that he had family problems during the relevant time, including the death of his father, which negatively impacted upon his performance. There

is nothing in the record to indicate that this explanation was offered to the school administration until the time of hearing on the tenure charges.

According to Mitchell, in all of his discussions with Wilburn, he found him to be polite but he seemed to fail to grasp the significance of what was being discussed. Wilburn was usually passive and tended to agree with suggestions made. He gave the impression that he was "just going through the motions."

FINDINGS OF FACT

The following inefficiencies included in the tenure charges against Wilburn were uncorrected as of January 15,1988, 90 days from the date that he was informed of their filing:

I. You have failed to demonstrate effective techniques of lessons planning, in that:

   (a) You have failed to prepare and submit weekly lesson plan outlines as required in your Professional Improvement Plan;

   (b) You have consistently failed to prepare and submit detailed daily lesson plans as required by district, and stipulated in your Professional Improvement Plan.

II. You have failed to properly organize, manage, and control your classroom, in that:

   (a) You have failed to establish and maintain an environment conducive to learning and self motivation;

   (b) You have failed to use class time in an effective manner;

   (c) You have failed to demonstrate proper control of your students;

   (d) (Corrected.)

III. You have failed to utilize positive and effective teaching techniques in your classroom, in that:

   (a) You have consistently failed to achieve instructional goals;

   (b) You have failed to adequately meet the individual needs of your students.

IV. You have demonstrated a lack of knowledge and ability in the areas of curriculum and student evaluation, in that:

(a) You have failed to stimulate your students in the learning process;

(b) You have failed to demonstrate an adequate command of the subject matter;

(c) You have maintained a superficial level in your teaching, thereby failing to provide substance in your lessons;

(d) (Corrected.)

(e) (Corrected.)

(f) You have failed to follow the established Teaneck curriculum.

V. You have failed to adequately implement administrative recommendations.

On January 20, 1988, the Board notified Wilburn of his failure to correct the deficiencies set forth in the tenure charges except as noted above and, in addition, informed him that they were also filing charges alleging insubordination. The charge of insubordination as stipulated by the parties resulted from Wilburn's conduct during the 90-day correction period following the notice of deficiencies.

Based upon a review of the testimony and the documentary evidence, I FIND that the Board has proved by a preponderance of the credible evidence that Wilburn was guilty of the inefficiencies charged against him by the Board on October 15, 1987, as listed specifically above. He failed and refused repeatedly to prepare and submit weekly or daily lesson plans even though these were required. His lessons were unplanned even though he was repeatedly criticized from his earliest teaching days for this omission. His classes suffered from his failure to plan by their disorganization, their lack of focus, his lack of knowledge of the subject matter, and his refusal to meet the individual needs of his students. In spite of repeated offers of assistance and concrete suggestions by administrative observers and in spite of the District actually taking an experienced teacher and placing her in the classroom to assist Wilburn, he passively and successively resisted every single attempt made to improve his teaching skills to a sufficient degree to allow him to be retained as a teacher in the District.

I further **FIND** that the District offered Wilburn every avenue of assistance possible, not only in the 90 days following the filing of the tenure charges on October 15, 1987, but also at all times before. Wilburn, however, deliberately chose to ignore every offer of help. It is his own testimony that he did not ask any of the subject matter supervisors for help because he was so confident of his own competence. He did not feel that it was necessary for him to submit lesson plans. Despite the extensive documentation on the record for the 90-day period, he denies that anyone made any recommendations to help him improve his performance; he admits that his only request for assistance was for a video camera to justify, not improve, his performance. It is inconceivable that any board of education could possibly offer a teacher more assistance than that offered to Wilburn.

I further **FIND** that it has been the written policy of the District since October 13, 1976, that teachers are required to make thorough preparation for all daily lessons and prepare written lesson plans for at least one week in advance; they must also meet the requirements with respect to plan books as required by their principal. As the principal of Whittier School, it was Mitchell's duty to carry out the Board policy with respect to planning and preparation of the teachers' implementation of the District curriculum in his school. Prior to October 15, 1987, Mitchell repeatedly requested that Wilburn adequately plan and prepare his lessons and submit daily lesson plans to Mitchell, Wilburn's immediate supervisor, to insure that Wilburn was carrying out his teaching responsibilities.

The record shows that in February 1975, there was a recommendation that Wilburn's annual salary increment be withheld because, among other reasons, of his failure to submit his plan book as required. In March 1976, it again appears that Wilburn's annual increment was in jeopardy for failure to prepare lesson plans.

In October 1986, Mitchell began to warn Wilburn that he risked disciplinary action for failing to provide him with daily lesson plans as directed. Mitchell's persistent requests and Wilburn's equally persistent failures to comply with the requests are apparent throughout the 1986-87 school year. Mitchell again threatened to withhold Wilburn's salary increment for the 1986-87 school year unless his performance, including production of lesson plans, improved. On September 18, 1987, Wilburn was told by Mitchell that his failure to provide weekly outlines and detailed lesson plans was a direct violation of his Professional Improvement Plan and the central office policy of the District. Wilburn was warned by Mitchell on several occasions in November 1987 that he was not submitting lesson plans. This lack of lesson plans, or at least adequately prepared plans, was noted by Cowen,

Childs, and Schweitzer in their observations of Wilburn in December 1987 and January 1988. As far back as November 1986 and September 4, 1987, Mitchell warned Wilburn that his failure to provide the requested lesson plans would be deemed to be insubordination.

Based upon the record, I **FIND** that Mitchell was the direct supervisor of Wilburn, that it was Mitchell's responsibility to implement the Board's policy concerning the planning of lessons, that in accord with his responsibility he directed Wilburn to provide him with lesson plans so that he could monitor Wilburn's performance and insure that he was carrying out the curriculum goals of the District, that he warned Wilburn that his failure to comply with Mitchell's request would be deemed insubordination, and, finally, that Wilburn substantially refused to comply with Mitchell's legitimate order, with only the excuse that he did not need to submit lesson plans and some other teachers were not required to do so.

DISCUSSION OF LAW AND CONCLUSIONS

The evidence in this case is overwhelming that Leon Wilburn did not perform effectively as a teacher and resisted -- in fact, resented -- any attempts which the District made to assist him to improve his teaching skills. It is clear from his testimony that he knew, in spite of all of the negative feedback that he received, that his way was the right way and the only help that he wanted from the District was the use of a video camera so that he could demonstrate that he was right and those who criticized him were wrong. I **CONCLUDE** that the nature of the charges proved by the Board against Wilburn are clearly a showing of inefficiency. *Rowley v. Bd. of Ed. of Manalapan-Englishtown*, 205 *N.J. Super.* 65, 70 (App. Div. 1985).

During the 90-day period provided for by *N.J.S.A.* 18A:6-11, Wilburn improved for a short period of time and then his performance deteriorated to a point where it was as bad or worse than before the charges were brought. Not only did he refuse assistance, he denied that it was offered, in spite of the elaborate framework that was established to provide him with help. It is required that the school administration "render positive assistance to the teacher in an effort to overcome his inefficiencies." *Rowley* at 72. If ever a Board has carried this "heavy responsibility," *Id.* at 72, it was the Teaneck Board of Education in the case of Leon Wilburn, and it did so to an extent almost beyond reason.

N.J.S.A. 18A:6-10 allows a Board to dismiss a tenured employee for inefficiency, provided that the employee is allowed at least 90 days in which to correct and overcome the inefficiency under *N.J.S.A.* 18A:6-11, as interpreted by *Rowley, supra*. I **CONCLUDE** that the Teaneck Board of Education has proved charges of inefficiency against Leon Wilburn and has carried its burden of providing him with the positive assistance required by *Rowley*. I further **CONCLUDE** that even with this assistance, Leon Wilburn could not and would not improve his performance as a teacher and, therefore, is subject to dismissal from employment pursuant to *N.J.S.A.* 18A:6-10. In Wilburn's case, any other penalty must be deemed futile.

I further **CONCLUDE** that Wilburn was guilty of acts of insubordination committed between October 15, 1987 and January 15, 1988 when he willfully failed to comply with the legitimate request of his supervisor to provide him with lesson plans as required by the policy of the District and the Professional Improvement Plan to which he agreed. These acts further constitute grounds for Wilburn's dismissal pursuant to *N.J.S.A.* 18A:6-10, and I **CONCLUDE**, based upon Wilburn's prior disciplinary record for the same underlying omission, that dismissal is the only appropriate sanction. Anything less has already failed.

ORDER

Accordingly, it is **ORDERED** that the tenure charges of inefficiency and insubordination against Leon Wilburn be **SUSTAINED**, and it is further **ORDERED** that Leon Wilburn be **DISMISSED** from his position as teacher in the Teaneck School District.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF**

THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 22, 1991
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

9/3/91
DATE

DR. MAUREEN KELLER
DEPARTMENT OF EDUCATION
ACTING DIRECTOR

Mailed to Parties:

SEP 05 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

WITNESSES

For Petitioner:	For Respondent:
A. Spencer Denham	Leon Wilburn
Alfred Mitchell	
Edwin Reynolds	
Pearl Schweitzer	
Dr. John Cowen	

EXHIBITS

B-1	Tenure charges
B-2	Teacher Observation Report, November 4, 1986
B-3	Teacher Observation Report, December 9, 1986
B-4	Teacher Observation Report, December 15, 1986
B-5	Teacher Observation Report, January 29, 1987
B-6	Teacher Observation Report, February 6, 1987
B-7	Teacher Observation Report, March 19, 1987
B-8	Teacher Observation Report, May 12, 1987
B-9	Teacher Observation Report, September 18, 1987
B-10	Teacher Observation Report, September 21, 1987
B-11	Teacher Observation Report, November 19, 1987
B-12	Teacher Observation Report, November 24, 1987
B-13	Teacher Observation Report, December 15, 1987
B-14	Teacher Observation Report, January 11, 1988
B-15	Teacher Evaluation, April 28,1987
B-16	Mid-Year Evaluation Report, December 22, 1987
B-17	Prepared Memorandum, October 27, 1986
B-18	Prepared Memorandum, October 31, 1986
B-19	Prepared Memorandum, November 4, 1986
B-20	Prepared Memorandum, November 5, 1986

B-21 Prepared Memorandum, November 18, 1986
B-22 Prepared Memorandum, December 3, 1986
B-23 Prepared Memorandum, December 4, 1986
B-24 Prepared Memorandum, December 17, 1986
B-25 Prepared Memorandum, December 31, 1986
B-26 Prepared Memorandum, January 15, 1987
B-27 Prepared Memorandum, February 24, 1987
B-28 Prepared Memorandum, February 25, 1987
B-29 Prepared Memorandum, March 4, 1987
B-30 Prepared Memorandum, July 29, 1987
B-31 Prepared Memorandum, August 11, 1987
B-32 Prepared Memorandum, September 9, 1987
B-33 Prepared Memorandum, September 9, 1987
B-34 Prepared Memorandum, September 29, 1987
B-35 Prepared Memorandum, October 6, 1987
B-36 Prepared Memorandum, October 9, 1987
B-37 Prepared Memorandum, October 21, 1987
B-38 Prepared Memorandum, October 29, 1987
B-39 Prepared Memorandum, November 11, 1987
B-40 Prepared Memorandum, November 17, 1987
B-41 Prepared Memorandum, November 23, 1987
B-42 Affidavit of Alfred J. Mitchell
B-43 Affidavit of A. Spencer Denham
B-44 Affidavit of Pearl A. Schweitzer
B-45 Affidavit of Edwin W. Reynolds
B-46 Affidavit of John E. Cowen
B-47 Affidavit of Shirle Moone-Childs
B-48 Teaneck Policy - Teaching Methods
B-49 Teaneck Policy - Student Progress Reports to Parents
B-50 Certificate
B-51 History of Wilburn's teaching assignments
B-52 Tenure charges
B-53 Tenure charges, January 15, 1988
B-54 Tenure charges, January 20, 1988
B-55 Schedule for 90 days
B-56 Teacher Evaluation, May 20, 1986

B-57 Annual Summary Evaluation, 1973
B-58 Annual Summary Evaluation, February 29, 1973
B-59 Annual Summary Evaluation, December 15, 1975
B-60 Annual Summary Evaluation, March 29, 1976
B-61 Second Grade Evaluation, 1989

R-1 Teacher Observation Report of Leon Wilburn, October 29, 1985
R-2 Teacher Observation Report of Leon Wilburn, February 20, 1986
R-3 Principal's Evaluation of Leon Wilburn, February 1974
R-4 Classroom Observation Report of Leon Wilburn, December 1, 1976
R-5 Summary Evaluation of Leon Wilburn for the School Year 1976-77
R-6 Classroom Observation Report of Leon Wilburn, January 13, 1978
R-7 Annual Summary Evaluation of Leon Wilburn, March 21, 1978
R-8A, B Letters from Lucy Stamilla, October 12, 1978 and October 24, 1980
R-9 Classroom Observation Report of Leon Wilburn, October 26, 1978
R-10 Teacher Observation Report of Leon Wilburn, February 19, 1980
R-11 Teacher Evaluation of Leon Wilburn, May 23, 1982
R-12 Letter, A. Spencer Denham to Leon Wilburn, August 19, 1983
R-13 Verified Petition of Appeal filed on behalf of Leon Wilburn, October 24, 1983
R-14 Letter, A. Spencer Denham to Leon Wilburn, June 10, 1983
R-15 Letter, Cecil J. Banks to A. Spencer Denham, September 16, 1983
R-16 Letter, A. Spencer Denham to Leon Wilburn, January 5, 1984
R-17 Letter, Julia Salpeter to Alfred Mitchell, March 21, 1984
R-18 Letter, Alfred J. Mitchell to Leon Wilburn, May 4, 1984
R-19 Letter, Leon Wilburn to Teaneck Board of Education, November 11, 1987
R-20 Letter, Mr. and Mrs Gerald Henry to Mr. Mitchell, November 18, 1987
R-21 Letter, Denise F. Millman to Alfred Mitchell, November 18, 1987
R-22 Letter, Mr. and Mrs. William Matteo to Mr. Mitchell, November 23, 1987
R-23 Letter, Mr. and Mrs. Gerald Henry to Dr. Morris, Superintendent of Schools, March 2, 1988
R-24 Response to Evaluation of February 18, 1987

IN THE MATTER OF THE TENURE	:	
HEARING OF LEON WILBURN, BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION OF THE TOWNSHIP	:	DECISION ON REMAND
OF TEANECK, BERGEN COUNTY.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

Respondent's exceptions contend, inter alia, that

1. The Administrative Law Judge failed to address any of respondent's defenses and legal arguments;

2. The Administrative Law Judge ignored the evidence that the Board failed to make any reasonable efforts to provide meaningful assistance to respondent during the 90-day improvement period;

3. The Administrative Law Judge erred in not concluding that the Board failed to sustain its burden of proof regarding the pending tenure charges filed against respondent;

4. The Administrative Law Judge erred in failing to conclude that there was no basis for the certification of inefficiency tenure charges against respondent;

5. The Administrative Law Judge failed to properly sustain respondent's arguments that the Board did not properly develop professional improvement plans for him during the apposite time period and to make all but the most perfunctory efforts to remediate his instructional performance.

6. Assuming arguendo that the tenure charges were proven, administrative and judicial precedent mandates the conclusion that the penalty of dismissal is not appropriate.

In support of the above exceptions, respondent relies upon his post-hearing brief.

The Board's reply exceptions urge affirmance of the ALJ's recommended decision, averring, inter alia, that the record more than amply supports the decision and that respondent's exceptions merely reiterate arguments presented to, considered by, and rejected by the ALJ. By way of example, the Board points to the extensive discussion in the initial decision where the ALJ discusses the Board's efforts through its subject supervisors to provide assistance to respondent. The Board also avers that respondent's exceptions ignore the unprecedented action taken by the Board to place a full-time, certified teacher into respondent's classroom to demonstrate how to conduct lessons.

Upon independent review of the record, the Commissioner concurs with the findings and conclusions of the ALJ that the Board has proven by a preponderance of the credible evidence that respondent was guilty of the inefficiency charges filed against him as set forth on pages 27 and 28 of the initial decision. The record more than amply supports that respondent repeatedly failed and refused to prepare and submit lesson plans despite being specifically directed to do so time and time again by his superiors. The record likewise more than amply supports the ALJ's conclusion that respondent's classes suffered as a result of his failure to adequately plan lessons, his disorganization, lack of focus and lack of knowledge of subject matter.

Contrary to respondent's arguments otherwise, the record firmly establishes that on numerous occasions he was provided assistance and concrete suggestions for improvement by administrative and supervisory staff. That the Board assigned a certified teacher to his classes to provide assistance and to model proper teaching strategies appears to have insulted respondent rather than the assistance being accepted as a means to help him improve. Unfortunately, the record demonstrates that instead of benefitting from the assistance provided by the Board, respondent was resistive and resentful.

In determining the appropriate penalty to levy in this matter, the Commissioner has duly weighted respondent's years of service in the district prior to his assignment as a fourth grade teacher. Respondent's service, although not unblemished given concerns regarding planning, tardiness and meeting administrative requirements reflected in a number of his evaluations since his initial employment, was satisfactory and, frequently, more than satisfactory in art. However, the documented inefficiencies and insubordination which characterized respondent's teaching in his fourth grade assignments during the 1986-87 and the 1987-88 school years were serious and repetitive, particularly in light of the well-documented extent of the efforts undertaken to assist respondent to improve.

The serious concerns regarding respondent's teaching performance were identified through multiple evaluations conducted by a variety of supervisory staff over nearly a two-year period. Whether due to unwillingness or inability, respondent clearly failed to reach an acceptable level of instructional performance

notwithstanding extensive constructive assistance provided through a variety of resources. Consequently, it is determined that dismissal from the Board's employ is appropriate. The Board has not only the legal right but the duty to employ teaching staff members who are well-prepared, efficient and capable in their instructional performance and who respond to constructive assistance in a cooperative and collaborative manner.

Accordingly, respondent is terminated from his tenured teaching position in the Teaneck School District as of the date of this decision. The matter shall be transmitted to the State Board of Examiners pursuant to the requirements of N.J.A.C. 6:11-3.6(a)1 for action against respondent's certificate as it deems appropriate.

COMMISSIONER OF EDUCATION

OCTOBER 15, 1991

DATE OF MAILING - OCTOBER 15, 1991

Pending State Board

BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY, RESPONDENT.	:	DECISION

For Petitioner, Jeffrey I. Baron, Esq.
(Barbara E. Riefberg, Esq., of Counsel)

For Respondent, Orlando, Kearney & Brady
(John B. Kearney, Esq., of Counsel)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Borough of Lindenwold on June 11, 1991 appealing a $384,187 reduction in its tax levy for current expense for school year 1991-92, restoration of which it contends is necessary for the district to provide a thorough and efficient system of education for its students.

The aforestated reduction was imposed by the Mayor and Borough Council of the Borough of Lindenwold (hereinafter Council) after consultation with the Board on May 8, 1991 pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following the voters' rejection of the Board's proposed budget for current expense on April 30, 1991. The proposed 1991-92 tax levy and reduction are set forth below:

	PROPOSED TAX LEVY	TAX LEVY CERTIFIED	DIFFERENCE IN CONTENTION
CURRENT EXPENSE	$3,913,235	$3,529,048	$384,187

The Council filed an Answer to the petition with the Commissioner on June 21, 1991 and, thus, the pleadings were joined. Said Answer admitted the amounts as stated above, but denied the Board's allegation that such $384,187 reduction in the current expense budget would prevent the Board from fulfilling its constitutional obligations to provide a thorough and efficient education. Council added in its Answer that by the Board's failure to meet with Council on May 16, 1991 to further discuss the budget is a violation of its obligation pursuant to N.J.S.A. 18A:22-37 to consult with the governing body. It claims that the Board's appeal is thus barred by its failure to meet on May 16, 1991.

Council's reduction in tax levy is to be accomplished by twenty-three (23) line item reductions, which were set forth along with its statement of reasons in Resolution #91:103 as follows:

LINE ITEM	AMOUNT REDUCED
18. Other contracted services	$ 8,000.00
REASON: Amount allotted for 1990-91 was $5,200. The proposed increase was not needed.	
22. Institutes and Workshops	4,000.00
REASON: Total amount expended was $587.50 through April 1991. Increase is not needed and does not contribute to the thorough and efficient education.	
11. Assistant Superintendent	31,488.00
REASON: Position of Assistant Superintendent was just created during the 1990-91 school year as a temporary position while the Board Secretary was out sick. The Board Secretary has returned, the position should be abolished.	

LINE ITEM	AMOUNT REDUCED
23. Expenses of the Board Secretary	$ 1,500.00

REASON: It appears the amount to be spent in 1990-91 is $5,000.00. The increase of $1,500.00 is not needed.

24. Travel Board Secretary	1,000.00

REASON: Less than $1,000.00 will be spent in 1990-91.

9. Salary Superintendent	7,992.00

REASON: The School Superintendent was grossly negligent in failing to fulfill his function as School Superintendent. His negligence and carelessness resulted in the School District overspending its budget for two years in a row, placing a grave burden on the taxpayers. It is outrageous to reward this Superintendent with a $7,992.00 raise.

3. School Board Secretary	4,132.00

REASON: School Board Secretary also was grossly negligent in failing to perform her duties and responsibilities as Board Secretary leading the School District to overspend its budget two years in a row. This places the school district in a grave crisis. It is also outrageous to give this individual a $4,132.00 raise.

28. Travel Expenses Superintendent	1,000.00

REASON: An adequate amount remains in the budget to cover any necessary travel expenses by the School Superintendent.

38. B/S Coordinator Salary	30,000.00

REASON: During the 1990-91 school year $1,425.00 was expended in this line item. In the 1989-90 budget $1,600.00 was expended for this line item. There is therefore no reason for this line item to be $30,000.00.

53. Psychologist	25,000.00

REASON: It is anticipated that during the 1990-91 school year $48,000.00 will be expended for a psychologist. There is no need for another psychologist.

62. Secretaries	20,000.00

REASON: An additional secretary is not needed.

40. Salary Teacher	144,000.00

REASON: By evenly distributing the students among the three schools within the District, six classes, consequently six teachers, could be eliminated. It should be noted that certain students are already being bused among various schools.

LINE ITEM	AMOUNT REDUCED
1010. Student Activities Salary	3,300.00

REASON: No monies were expended for this item during the 1990-91 school year.

68. Kindergarten Aides	10,000.00

REASON: Some aides can be eliminated without exceeding class size.

101. Nurses Salaries	5,000.00

REASON: It is projected that $55,000.00 will be spent on Nurses Salaries during the school year 1990-91. Even with the reduction it still permits two nurses plus an increase in salary.

133. Custodian Salaries	17,000.00

REASON: One custodian position can be eliminated.

140. Heat for Building #3	2,500.00

REASON: Building is vacant and does not meet state standards and is up for sale. Hence no need to heat the building.

146. Water for Building #3	275.00

REASON: Building is vacant and does not meet state standards and is up for sale. Hence no need to supply water to the building.

176. Service Equipment	10,000.00

REASON: Expenditures have not been used for current allotted budget, even with reduction the same amount is being budgeted as last year.

181. Burglar Alarm	15,000.00

REASON: Expenditures for 1990-91 are projected at $55,000.00. Even with reduction it represents an increase of $4,000.00

182 Other Expenses Maintenance	2,500.00

REASON: It is projected that $2,000.00 will be expended on this item in 1990-91. Even with a decrease it represents a $500.00 increase.

190. Insurance	35,000.00

REASON: Represents decrease due to lessening number of employees.

210. Cafeteria Clerk	5,500.00

REASON: Funds were not used previously. Hence the position must not be necessary.

Commissioner's Determination

The Commissioner has carefully reviewed the position papers, responses to such position papers and final summations of the parties, which are incorporated herein by reference. In so undertaking this budget appeal, it bears noting that the standard of review that prevails is whether the amount of monies available to the Board as a result of the Council's actions is sufficient for the provision of a thorough and efficient education to the pupils of the Borough of Lindenwold for the 1991-92 school year. Board of Education, East Brunswick v. Township Council of East Brunswick, 48 N.J. 94 (1966) As petitioner in this matter, the Board bears the burden of persuading the Commissioner that restoration of the funds cut by the Council is necessary for the provision of a thorough and efficient education. East Brunswick.

The Board's position statement begins by observing the litigation pending between the Board and Council concerning the Board's 1989-90 deficit. It notes the Commissioner has recently ruled that the Council must certify to the Camden County Board of Taxation an additional tax levy of $262,379.19, the amount of deficit for the 1989-90 school year. The Board notes that the Council has appealed the Commissioner's decision of June 17, 1991 to the State Board of Education and has applied to the Commissioner for a Stay of his Decision. The Commissioner takes official notice that such Motion for Stay was denied on July 17, 1991.

The Board proffers such information because it believes the deficit litigation is relevant to the instant matter. It claims the animosity between it and the Council has resulted in a "spill-over effect" (Board's Position Statement, at p. 2) on this year's budget

process. Moreover, the Board claims, many of the economies put in place by the Board during the 1990-91 school year have led to the need for certain expenditures in the 1991-92 budget as elaborated upon in its position statement.

By way of response to these allegations, the Council charges that the Board seeks to blame the present dispute on "the bugaboo of 'politics'." (Council's Final Summation, at p. 1) The Council claims the Board declines to accept responsibility for past budget shortfalls and wants to reward administrators for past poor performances. The Council further claims the Board ignores the record as to actual expenditures in years past.

Moreover, the Council further claims that neither the Board nor any administrators appeared at a scheduled meeting on May 16, 1991, when they were fully aware of the scheduled meeting. The Council advances the position that the Board failed its statutory obligation to meet and discuss the budget.

Regarding the Council's charge that the Board failed in its duty to discuss the budget as required by N.J.A.C. 6:24-7.1 et seq., the Commissioner notes that section of the regulations pertaining to the obligation of the parties in a budget appeal in a type II district:

> 6:24-7.2(b)2 states:
>
> The governing body or bodies of the municipality or municipalities involved shall as soon as immediately practicable, consistent with N.J.S.A. 18A:22-37, consult with the district board of education for purposes of arriving at a tax levy sufficient to assure the provision of a thorough and efficient system of education.
>
> N.J.S.A. 18A:22-37 states, in pertinent part:
>
> ***The governing body of the municipality, or of each of the municipalities, included in the

> district shall, after consultation with the board, and by April 28, determine the amount which, in the judgment of said body or bodies, is necessary *** to provide a thorough and efficient system of schools in the district***.

The Board's position statement makes plain in its recitation of the procedural background of this matter that it met with the Council on May 8, 1991 in an attempt to agree on a tax levy sufficient to assure the provision of a thorough and efficient education. Thus, the statutory mandate was met. That the Council did not meet again in an attempt to resolve the budget is not a failure to conform with statutory or regulatory requirements but, rather, is a demonstration of the fractious relationship between this Board and the municipal governing body. The Commissioner thus dismisses the Council's charge that the Board has failed to carry out its statutory mandate as being without merit.

Having reviewed the procedural stance of the parties in this matter, the Commissioner will now consider individually each of the reductions and the arguments of the parties.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
18. OTHER CONTRACTED SERVICES	$8,000	$14,000

The Council harkens back to the 1990-91 budget year, stating that as of May 14, 1991 the Board had expended $4,465.44 of the $5,200 it had budgeted for that year. In the current budget year, the Council contends that the $8,000 reduction it made would leave $6,000 for other contracted services, an $800 increase over the prior year. It claims the Board's assertion that the additional $8,000 is needed is "suspect" (Council's Position Statement, at p. 1) first, because the Council claims there is no reason why members of the Board, together with administration, cannot negotiate

the contract. Second, the Council claims a significant rise in legal fees has occurred in the past two years and that such fees can be reduced by using in-house administrators and the Board attorney for these negotiations. Finally, the Council claims this reduction still leaves the Board with $800 more than it expended last year.

The Board claims that $14,000 is needed for the contract negotiations with the Lindenwold Education Association (LEA). It claims the current contract is due to expire in June 1992. It claims said figure is well within range of other boards for similar services, and submits that because LEA uses professional negotiators, the Board must too. As to the Council's reference to legal fees, the Board claims that line item is not relevant to this one. The increase in legal fees is due to the litigation regarding a construction project and the 1989-90 budget deficit.

The Commissioner determines that the Line Item #18 reduction should be sustained. The Board has failed to present figures justifying rates for such negotiators that would amount to $14,000. Moreover, the Commissioner notes that only one contract is subject to renegotiation. The Board has not presented arguments to the effect that the contract to be negotiated is so complex or extraordinary to explain why in-house administration cannot satisfactorily perform the task at hand. Finally, the Commissioner notes that there remains $6,000 in this line item to cover such needs.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#22 INSTITUTES AND WORKSHOPS	$4,000	$5,000

The reduction in this line item involves training for board of education members. The Council claims that even with the

reduction, there is money in this line item for workshops in the amount of $1,000, and that the Board needs closer monitoring and more day-to-day involvement with the district, not more money for workshops.

The Board advances the contention that the 1990-91 limited expenditures reflected the district's fiscal crisis, not need. It poses the point that since the Council is critical of the Board members' performance, it should support training through this line item.

The Commissioner determines that the line item #22 reduction should be sustained. Again, the Board's burden is to persuade the Commissioner of the necessity of the funds sought toward the provision of a thorough and efficient education for the children of the district. Its contentions lack specificity in declaring that an additional $1,000 increase over what was budgeted from last year is warranted. Moreover, the Commissioner notes with approval the Council's argument that as of May 1991, only $587.50 had been expended in this line item. With the reduction, $1,000 still remains in the budget for institutes and workshops, a figure double that spent in the preceding year.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#11 ASSISTANT SUPERINTENDENT	$31,488	$-0-

The Council advances the position that the Board never had an assistant superintendent until 1990-91, and that the position ostensibly was created because the Board secretary was ill. The Council states that the Board secretary has returned so the Board's assertion that the position is that of a curriculum coordinator is specious. In response to the Board's contention that the position

is necessary to satisfy duties assigned to this job title under the State's Corrective Action Plan (hereinafter CAP), the Council rebuts that the assistant superintendent has been assigned only one duty among 13 in said CAP.

The Board advances the position that this line item does not represent an increase in personnel. Rather, the district's previous curriculum coordinator transferred to the position of reading specialist. Thus, it claims, the curriculum coordinator's position was expanded to include duties as an assistant superintendent, which results in savings for the district. The Board claims the position is an essential one in that the CAP shows the assistant superintendent position has responsibilities to assist in almost half of the recommendations made in that report.

The Commissioner determines that the Line Item #11 reduction should be restored. In so finding, the Commissioner has considered Exhibit D affixed to the Borough Council's Statement, the CAP dated January 28, 1991, which lists 13 items for district improvement approved by the Board, as well as listing the person responsible for implementing such improvements. Indeed, it is noted that the assistant superintendent position is required to assist the Board secretary in almost half of the 13 items mentioned and is solely responsible for overseeing the basic skills budget.

However, restoration of the assistant superintendent salary line item is made only with extreme reluctance, and with due consideration of the abysmal financial straits in which Lindenwold has found itself in the last few years as a result of mismanagement within the district. The Commissioner notes the language incorporated in his decision of June 17, 1991 wherein he

observed that the Board failed to conduct its fiscal operations in a manner necessary to ensure that its pupils were provided a thorough and efficient education. He further faulted the Mayor and Council for failing to provide a tax levy sufficient to ensure a thorough and efficient education as was its obligation under East Brunswick, supra. In that decision which dealt with the budget deficit of 1989-90, the Commissioner strongly admonished both the Board and Council and directed the County Superintendent of Camden to take such steps as necessary to assure the implementation of the district's CAP and to ensure that future budgets are adequately funded. (See Decision dated June 17, 1991, at p. 10.)

The Commissioner notes that the CAP upon which the Board relies for its suggestion that the assistant superintendent's position is necessary to implement said plan called for all conditions to be met by no later than May 31, 1991. The Board's contention that the services of an assistant superintendent remain necessary beyond such date thus becomes questionable. While the Commissioner further notes that on April 16, 1991, a month after the submission of the Board's CAP, the Acting Director of Compliance, New Jersey State Department of Education, addressed a letter to the then President of the Lindenwold Board of Education to address a corrective action plan within 15 days of the date of his letter to the County Superintendent. No further CAPs were incorporated in this budget appeal. However, with the assumption that continuation of the position of assistant superintendent, as spoken of in the CAP dated and signed by the Board on January 29, 1991, is intended to serve throughout the 1991-92 school year at issue, the Commissioner reluctantly restores the salary for the position of assistant

superintendent to facilitate the Board's meeting its obligation to the children of the district to a thorough and efficient education.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#23 EXPENSES OF BOARD SECRETARY	$1,500	$6,500

The Council claims that the Board seeks a $500 increase over the 1990-91 budget, while it spent only $4,753.12 last year. It submits that the Board has not furnished any factual data in support of its conclusion that certain essential supplies need to be purchased. The Council believes $5,000 is an appropriate amount to spend based on last year's expenditures.

The Board submits its office supply expenses were curtailed in 1990-91 because of the Board's financial dilemma. It claims certain essential supplies such as stationery, postage stamps and computer paper have been depleted necessitating their purchase next year.

The Commissioner determines that the Line Item #23 reduction should be sustained for failure of the Board to specify in detail the need for a $1,500 increase in this account from last years expenditures. Thus, the Commissioner is without a basis for justifying the restoration.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#24 TRAVEL BOARD SECRETARY	$1,000	$2,000

The Council harkens back to the 1990-91 budget expenditures in this line item which were $946.59. It argues that because the Board secretary was not fulfilling her duties properly last year, she breached any contract clause which the Board claims necessitates satisfying the increase in this line item. The Council claims the

Board secretary should not be rewarded with additional monies and that based upon the CAP duties she must fulfill, she will have no time to travel.

The Board posits that this item is controlled by a negotiated agreement, which includes Board-related travel and attendance at meetings. It argues that since the CAP requires the Board secretary to perform certain duties, the Board allowed time for her to implement them. The Board feels compelled to honor the contract, which it affixes as Exhibit D to its position statement.

The Commissioner determines that the Line Item #24 reduction should be sustained. While the Board affixes the Board Secretary's contract dated April 2, 1990, nowhere does said contract specify an amount to be received for travel. Instead there is an amount noted for "Expense Money" for 1990-91 in the amount of $650 and for 1991-92 in the amount of $900. The Board fails to explain the need for a $1,000 increase in travel for the Board secretary. Neither is it clear from the CAP recommendation why the Board argues that implementing her duties thereunder requires that the Board "allow time for her to implement these improvements" (Board's Reply Statement, at p. 4) by granting her more travel money.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#9 SALARY SUPERINTENDENT	$7,992	$87,919

The Council submits that the superintendent's performance has been "abysmal." (Council's Position Statement, at p. 6) It places the primary responsibility for the budget deficits suffered by the district in recent years with the superintendent, whose job it is, Council avers, to be responsible for the day-to-day management and operation of the school system. It claims that to

reward the superintendent's conduct with a 10% increase is shocking. It claims the Board itself gave the superintendent a verbal reprimand, but that more should be done. The Council submits to withhold his increment "is a minimal sanction when compared to the failings and inefficiency of the school system occasioned by the neglect and ineptitude of the school Superintendent." (Id., at p. 7)

The Board submits the superintendent should be given his raise. It rebuts the Council's position by suggesting that the Council is attempting to place the entire blame for the Board's fiscal problems onto the shoulders of the superintendent. According to its authority pursuant to N.J.S.A. 18A:29-14, the Board claims its prerogative to determine whether an employee's salary increment should be withheld, and it avers the superintendent's increment should not be withheld. It claims the fiscal problems were a result of many factors, and that the superintendent has been working diligently to correct the fiscal problems, as evidenced by the school year 1990-91 ending without a deficit. It claims its discretion as to whether to discipline its employees or administrators should not be supplanted by the Borough Council.

The Commissioner determines the Line Item #9 reduction should be restored. In looking to a specific salary reduction, the Commissioner must examine whether the Board has demonstrated that the restoration of that line item is necessary to satisfy the requirements of East Brunswick, supra. Thus, the Commissioner does not attempt to substitute his judgment for that of the Board in deciding whether a salary increment is appropriate, as the Board avers. Rather, it is the Council's duty in the first instance in a budget appeal and, thereafter the Commissioner's, to decide whether

there is sufficient money in the budget to provide that which the Board avers is a necessary expense for a thorough and efficient education. In this case, the expense concerns a raise in the superintendent's salary. The Council in fact may be correct in suggesting that the superintendent does not deserve a raise. It is well established that salary increments are to be awarded for meritorious service and are not an entitlement. See North Plainfield Educ. Ass'n on Behalf of Koumjian v. Board of Educ. of Borough of North Plainfield, 96 N.J. 587 (1984). However, it must be stressed that under N.J.S.A. 18A:29-14 only a board of education may act to withhold a salary increment. The Commissioner's role under that statute is an appellate one. The Council has no role whatsoever.

Moreover, the Commissioner is without authority to abrogate the Board's duly executed contractual commitments. In reviewing the contract for the superintendent, affixed as Exhibit E to the position statement, the Commissioner observes the contract in question was negotiated before the budget year in question, specifically in June 1989, and included three years' salaries, 1989-90, 1990-91 and 1991-92. As the Board negotiated such contract in good faith, and because the Board's assertion that the raise is appropriate under the circumstances, the Commissioner finds that such monies should be restored.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#3. SCHOOL BOARD SECRETARY	$4,132	$45,454

The Council submits that the Board secretary must share responsibility with the superintendent for the past fiscal deficits, and the Board should not reward her poor performance. The Council argues that her increase can be withheld by the Board pursuant to N.J.S.A. 18A:29-14.

The Board contends that this item is controlled by a negotiated agreement, submitted as Exhibit D. The Board avers it must honor its contract. It further argues that the Board's discretion as to whether or not to discipline the Board secretary should not be undermined. It claims in making its decision, the Board was in a position to evaluate her performance throughout her many years of service to the district, as well as the health problems she has suffered in recent years.

The Commissioner determines that the Line Item #3 reduction should be restored. See discussion above. Despite what may have been in the Council's judgment abysmal performance, as in the case of the superintendent's salary, the Board secretary's salary was established in advance of this year's budget, specifically on April 12, 1990. Said agreement established two years' salary for her, 1990-91 and 1991-92. As the Board negotiated such contract in good faith and claims it is necessary, the Commissioner finds he has no choice but to restore.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#28 TRAVEL EXPENSES SUPERINTENDENT	$1,000	$2,000

The Council observes that during the 1990-91 school year, $1,000 was budgeted for this line item and $821.65 was expended as of May 14, 1991. The Council believes its reduction brings the amount budgeted into line with the preceding year. It states that it finds no justification for a 100% increase over the preceding year's expenditures. It eschews the Board's contention that the matter is governed by a negotiated agreement for two reasons. First, it believes by the superintendent's poor performance, the negotiated agreement with the superintendent has been breached. Second, it claims that the superintendent's job duties could not justify such a dramatic rise in travel expenses.

The Board contends this line item only covers reimbursement for travel and related expenses incurred by the superintendent in connection with the performance of his duties and is governed by contract. It claims the meetings he attends are a necessary and integral part of the duties of the position and compensation for out-of-pocket expenses is completely reasonable.

The Commissioner determines that the Line Item #28 reduction should be sustained.

Although the Board contends that the amount budgeted reflects an amount established in a negotiated agreement, it fails to specify what travel expenses justify a 100% increase in the travel expenses of the superintendent. Insofar as last year's expenditures were under $1,000, and the Council has allowed $1,000 to remain in the budget for such expenses, the reduction is appropriate and is therefore sustained.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#38 BASIC SKILLS COORDINATOR SALARY	$30,000	$36,630

The Council referred to the 1990-91 budget in reducing this amount. It claims as of May 14, 1991, $1,425.60 had been expended for this line item. It avers that the $6,000 remaining in the budget is three times more than was spent in 1990-91.

The Board contends that this salary had previously been paid through State Compensatory Education funding, but that the Quality Education Act (QEA), N.J.S.A. 18A:7D-1 et seq., requires that the entire salary for this position must be shown as a line item on the budget. The Board advances the position that the program requires a qualified coordinator to supervise a total of 410 students with special academic needs. It claims this line item represents a continuation of the same position.

The Commissioner determines that the Line Item #38 reduction should be restored. In so deciding, the Commissioner notes that while the QEA eliminated state compensatory education funding, it replaced it with at-risk funding, which is not tied to a particular child's needs, as was compensatory aid. Moreover, N.J.S.A. 18A:7D-1 et seq. provides other state aid in the form of transition aid and foundation aid which a board might tap in order to fund basic skills programming. Thus, there is no requirement expressed in QEA per se, that this line item, in particular, be shown as a line item on the budget; it depends on what source of money a district deems appropriate in order to employ such a basic skills coordinator. The Board's burden in this budget appeal is to persuade the Commissioner that said position is requisite to the provision of a thorough and efficient education. Upon its statement

that the position is a continuation of that which has been provided to supervise a total of 410 students with special academic needs, the Commissioner deems this amount should be restored.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#53 PSYCHOLOGIST	$25,000	$78,763

The Council notes that during the 1990-91 school year $57,510 was appropriated for this item. As of May 14, 1991, $41,866 was spent with another $16,439.59 encumbered. The Council claims this reduction brings the budget line item into conformity with the 1990-91 spending practice.

The Board suggests that the extended illness of a psychologist reduced this cost for 1990-91. It asserts that if this item is reduced, there will be a loss of federal grant money and additional personnel would be lost. It claims the same number of psychologists (2) is being maintained.

The Commissioner determines that the Line Item #53 reduction should be restored. Whether federal grant money is lost is irrelevant if the position cannot be justified under the East Brunswick standards. However, the Board notes that its budget in 1990-91 reflected lesser costs for this item because of the illness of one of its psychologists. Because the Board is merely maintaining the number of psychologists employed toward the provision of services for a thorough and efficient education of the pupils of the district, the Commissioner determines that this amount should be restored.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#62 SECRETARIES	$20,000	$68,325

The Council asserts that in 1990-91, the Board appropriated $43,627. The Council asserts that this year's projected budget figures represent an increase of greater than 50% over the prior year. The Council claims there is no need for additional personnel and that there is still $48,325 available for salaries for two secretaries, including a salary increase.

The Board submits that this account pays for special services secretaries, and that their positions are partially funded by grants. A reduction would cause a loss of grant funds, the Board contends, and it further claims that this is not a new position but rather a continuation of an existing one. The Board makes no response to the Council's query that if it is not a new position, why there is an increase of $24,698. Further, the Board makes no response as to why the line item increased by $24,698.

The Commissioner determines that the Line Item #62 reduction should be sustained. As mentioned above, the issue of whether Federal Funds are lost is an irrelevant inquiry in a budget appeal. In this matter, the Board offers no explanation as to why, if the position was one merely being continued from last year, the amount budgeted is equivalent to another salary. Without explanation as to why such amount is necessary for a thorough and efficient education, the Board fails to meet its burden.

LINE ITEM	AMOUNT REDUCED
#40 TEACHER SALARIES	$144,000

The Council submits that in its present fiscal atmosphere, the Board must make prudent use of its resources, including teachers. The Council eliminated six classes based on two different projections the Board presented to it of student enrollment for the 1991-92 school year. The Council claims, using the higher projections, that significant staff reductions can be achieved by leveling the number of students in each class throughout the three schools in the district.

The Board's position is that the Council's approach to class sizes is an oversimplification and completely lacking in educational analysis.

The Board attaches exhibits to explain why the kindergarten and first grade classes are of varying sizes. It also attaches an exhibit which contains the projected enrollment figures as of May 3, 1991. The Board explains that enrollment is running higher than anticipated, and explains that there are educationally sound reasons for the different kinds of kindergarten and first grade classes, which the Council has ignored in simply "lumping" (Board's Reply Statement, at p. 8) all of the children together and dividing them into classes solely on a mathematical basis. The Board also charges that the Council ignores the preference of parents for neighborhood schools and the increased costs attendant to transporting children between schools. The Board summarizes by stating its belief that larger class sizes are not educationally sound and, further, that it is not in the best interest of the students to have increased busing between schools. The Board also states it does not wish to

eliminate special area programs such as art, music or physical education.

The Commissioner determines that the line item #40 reduction should be restored. With larger than anticipated enrollments and the Board's justification for grouping students as presented in its petition, the Commissioner finds that the Board has met its burden of demonstrating the need for the six teacher positions included in this line item.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#214 STUDENT ACTIVITIES SALARY	$3,300	$6,600

Noting that the $6,600 was the same amount requested in the 1990-91 budget and the fact that no amounts were spent for this line item during the 1990-91 school year, the Council cut the amount requested in half since nothing had been spent in the prior year. The Council contends the Board fails to explain the use of these funds or what was actually spent in 1990-91.

The Board's position is that when the Council reviewed the 1990-91 budget, the money had not yet been expended because these contracted stipends for teachers are paid at the end of the school year only. It affixes the teachers' contract in support of its contention that such stipends are provided for in its negotiated agreement. It contends elimination of these funds would necessitate the loss of valuable extracurricular programs and would be violative of the collective bargaining agreement.

The Commissioner determines that the Line Item #214 reduction should be restored. Plainly, the negotiated agreement provides for remuneration to staff for extracurricular activities. See Exhibit C, at p. 20, although it does not specify at that clause

of the contract when such stipends are to be disbursed. The Commissioner finds, however, that to reduce by half such line item because no money had yet been disbursed is not a persuasive reason for eliminating said amount in the line item. Accordingly, the Commissioner finds that the Board has met its burden regarding this account.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#68 KINDERGARTEN AIDES	$10,000	$22,205

Referring to the 1990-1991 school year, the Council submits that $15,950 was budgeted, later reduced to $11,935. It asserts that as of May 14, 1991, $8,346.24 has been expended, leaving a balance of $2,086.56. The Council notes that the amount budgeted for the 1991-92 budget represents an approximate 100% increase from last year. It claims that if class sizes are evened out as it proposes, there would not be a need for any aides. It submits that the reduction suggested is in line with what was expended during the 1990-91 school year and may even be generous since there may be no need for kindergarten aides.

The Board submits that aides are needed for certain kindergarten classes that will exceed 25 students and for the developmental kindergarten classes as mandated by regulation when exceeding 25 students. It claims that at least four sections will exceed this number of students.

The Commissioner determines that the Line Item #68 reduction should be restored, based upon his findings related to the need for additional classes of developmental kindergarten as adopted in his restoration of the funds for Line Item #40.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#101 NURSES SALARIES	$5,000	$64,175

The Council asserts that during the 1990-91 school year, $44,723.25 was expended as salary for school nurses as of May 14, 1991, with another $12,895.19 encumbered, for a total of $57,000. By reducing the amount by $5,000 the Council believes the amount in the account is more in line with the 1990-91 expenditure. It further cites the 1989-90 budget for another comparison. In that school year, $41,996 was appropriated and $41,989.75 was expended. Thus, it contends, even with the amount as reduced, there is still a $17,000 increase for nursing salaries in two years. Finally, it submits there is also budgeted $18,761 for part-time nurses.

The Board submits that the Council fails to recognize that one nurse was ill during the 1990-91 school year. The Board contends this line item represents maintaining the same level of nursing services with the appropriate contractual salary increases. The Board does not believe a reduction in nursing services would be in the best interest of the students. It submits there are two full-time nurses and one who is at three-fourths time for three elementary schools.

The Commissioner determines that the Line Item #101 reductions should be restored. Based on the Board's assertion that the same number of nursing staff is being maintained, and particularly in light of the fact that one nurse's illness affected the amount expended in the 1990-91 school year, the Commissioner finds the Board has met its burden of persuasion in providing nursing staff for its three elementary schools.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#133 CUSTODIAN SALARIES	$17,000	$275,771

The Council claims that in the 1990-91 school year, $269,395 was budgeted. In 1989-90, $205,000 was budgeted and spent. The Council explains that this year's budget reflects a $70,000 increase in two years. The Council asserts that the Board could function and not affect the education of the children by eliminating one custodian. It claims the Board has not justified the $6,376 increase over last year's budget either.

The Board submits that due to its fiscal problems, a vacant position was not filled in this line item in 1990-91, and that many maintenance projects were deferred or left uncompleted. Reinstatement of this position is necessary to avoid more expensive problems which may arise in the future from inadequate maintenance. The Board claims the problem is especially significant in light of the elimination of the position of district maintenance supervisor, leaving such duties to be the responsibility of other custodial personnel. The Board stresses that it is only requesting $6,376 more than was spent in 1990-91, and its belief that it is important for the children to be in facilities that are clean and free of safety hazards.

The Commissioner determines that the Line Item #133 reduction should be sustained. Albeit that there is one vacant position in this line item, the Board has failed to present concrete figures to justify the need for the $6,376 increase in this area, except to make broad statements as to the kinds of projects that need attention, such as tree removal. No figures were presented to justify why such amount is sought in light of a $70,000 increase in

this account over the last two years either. Accordingly, the Board fails to meet its burden of justifying this amount.

LINE ITEM	AMOUNT REDUCED
#140 HEAT FOR BUILDING #3	$2,500

The Council asserts that heat is not needed to maintain this building since it is vacant and up for sale. It claims the lack of heat will in no way affect the structural integrity of the building, nor will it decrease the ability to market the structure. Further, the Council claims that whether or not the building is heated does not affect the education of the children.

The Board claims heat is needed to maintain the condition of the building and to aid salability.

The Commissioner determines that the Line Item #140 reduction should be restored. It cannot be gainsaid that heat is necessary to ensure against damage to a building when it is unoccupied. Accordingly, the Board has met its burden of persuasion in budgeting for heat for this building until it is sold.

LINE ITEM	AMOUNT REDUCED
#146 WATER FOR BUILDING #3	$275

The Council also eliminated the allocation for water because the building is vacant and is up for sale. It believes water is not necessary.

The Board submits that water is needed to maintain the condition of the building and to aid salability.

The Commissioner determines that the Line Item #146 reduction should be restored. As with heating a vacant building, the Commissioner is convinced that water is necessary to ensure against damage to the structure until it is sold.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#176 SERVICE EQUIPMENT	$10,000	$38,000

The Council claims that in the 1990-91 budget the Board expended $18,743.66 for service equipment through May 14, 1991. Consequently, even with a $10,000 reduction, there is a $10,000 increase over the amount actually spent during the prior school year, which represents a 50% increase over the amount spent in the previous year. The Council claims the Board fails to detail the reasons for a nearly $20,000 increase.

The Board contends service of essential equipment was one area where the Board economized in 1990-91 due to financial difficulties. Many pieces of equipment such as lawn mowers and a tractor are inoperable or in need of maintenance, which cannot be postponed any longer.

The Commissioner determines that the Line Item #176 reduction should be sustained. Other than broad statements that equipment needs repair, the Board fails to meet its burden of persuasion that these funds are necessary because it fails to itemize specific cost estimates or appraisals to justify the amount budgeted.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#181 BURGLAR ALARM	$15,000	$64,000

The Council asserts that with a $15,000 reduction, the amount appropriated is $49,000. In 1990-91, $40,000 was appropriated, and as of May 14, 1991, $31,565.39 was expended, with another $3,358.05 encumbered. Even with its reduction the Council notes a $9,000 increase.

The Board submits that this line item includes equipment rental and leases on photocopiers which are scheduled for renewal.

The additional funding is also needed to update equipment and to maintain the Board office computer. The computer in the Board office is essential to comply with the Corrective Action Plan and to properly maintain all of the Board's financial records.

The Commissioner determines that the Line Item #181 reduction should be sustained. Once again, the Board has failed to offer anything more than vague generalities in suggesting why the amount budgeted is necessary for a thorough and efficient education. Moreover, absolutely no explanation is presented as to why repair work for rental for office duplicating and computer equipment is itemized under the line item for a burglar alarm. While maintenance of equipment may be justifiable expense, without specific information as to appraisals for such maintenance and servicing of business equipment itemized under the proper line item, the Board fails to meet its burden of persuasion.

LINE ITEM	AMOUNT REDUCED	AMOUNT BUDGETED
#182 OTHER EXPENSES MAINTENANCE	$2,500	$5,000

The Council trimmed the amount appropriated by the Board in half because it is in accordance with the 1990-91 experience which reflects approximately $2,500 will be spent on this line item. The Council contends the Board fails to explain why the $2,500 left after the reduction would not cover the anticipated projects.

The Board explains that this was another area where the Board economized in 1990-91, but that certain essential maintenance projects must be completed, including asbestos removal, repairs to a heater at School #1 and repairs to the school truck.

The Commissioner determines that the Line Item #182 reduction should be sustained. Here again, the Board has failed in

its burden of presenting specific figures to justify its having allocated $5,000 for this account.

LINE ITEM	AMOUNT REDUCED
#198 INSURANCE	$35,000

The Council claims its reduction represents the amount expended for insurance which will be saved by the elimination of teachers, a secretary, a psychologist, a nurse, an assistant superintendent and a custodian in accordance with its reduction in those line items. It believes this is a modest reduction, and the savings in this area will be dependent upon staff reductions.

The Board does not believe that a thorough and efficient education can be maintained with the reduction in employees proposed by the Council and that, therefore, savings should not be derived from this line item.

The Commissioner determines that the Line Item #198 reductions should be restored in part because such restoration is consonant with his determination that the salaries for all but the special services secretary and the custodian should be restored. An amount of $5,000 in insurance cuts is sustained to cover insurance for the above sustained cuts.

LINE ITEM	AMOUNT REDUCED
#210 CAFETERIA CLERK	$5,500

Because the Board concurs with the Council that this amount can be eliminated from the budget because NutriServe, a contracted management company will be responsible for this amount, the Commissioner determines that the Line Item #210 reduction should be sustained.

* * * *

Consequently, the Commissioner restores $293,687 of the cuts recommended by the Mayor and Council as set forth on the following chart:

LINE ITEM	REDUCTION	STATUS OF REDUCTION	AMOUNT RESTORED
18	$ 8,000	sustained	$ -0-
22	4,000	sustained	-0-
11	31,488	restored	31,488
23	1,500	sustained	-0-
24	1,000	sustained	-0-
9	7,992	restored	7,992
3	4,132	restored	4,132
28	1,000	sustained	-0-
38	30,000	restored	30,000
53	25,000	restored	25,000
62	20,000	sustained	-0-
40	144,000	restored	144,000
214	3,300	restored	3,300
68	10,000	restored	10,000
101	5,000	restored	5,000
133	17,000	sustained	-0-
140	2,500	restored	2,500
146	275	restored	275
176	10,000	sustained	-0-
181	15,000	sustained	-0-
182	2,500	sustained	-0-
198	35,000	restored in part	30,000
210	5,500	sustained	-0-
			$293,687

Accordingly, the Camden County Board of Taxation is hereby directed to strike a tax rate which shall add an additional $293,687 to the 1991-92 current expense tax levy for the Borough of Lindenwold. The aforestated increase shall raise the 1991-92 tax levy for current expense as set forth below:

	TAX LEVY CERTIFIED BY GOVERNING BODY	AMOUNT RESTORED	TAX LEVY AFTER RESTORATION
CURRENT EXPENSE	$3,529,048	$293,687	$3,822,735

COMMISSIONER OF EDUCATION

OCTOBER 23, 1991

DATE OF MAILING - OCTOBER 23, 1991
Pending State Board

- 30 -

BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

For the Petitioner, Jeffrey I. Baron, Esq.
(Barbara E. Riefberg, Esq., of Counsel)

For the Respondent, Kearney & Brady
(John B. Kearney, Esq., of Counsel)

This matter has been opened before the Commissioner by the Borough Council of Lindenwold through the filing of a Notice of Motion for a stay on November 18, 1991 of the Commissioner's decision dated October 23, 1991 followed by the Lindenwold Board of Education's Memorandum of Law opposing a stay filed November 26, 1991. The Commissioner's decision is currently pending on appeal before the State Board of Education.

The Borough seeks a stay of the Commissioner's decision directing the Camden County Board of Taxation to strike a tax rate which shall add an additional $293,687 to the 1991-92 current expense tax levy for the Borough of Lindenwold, following the Commissioner's restoration of $293,687 in cuts while sustaining

$90,500 in cuts made by the Borough to the 1991-92 school budget after it was defeated by the voters.

The Borough's affidavit in support of its motion observes that an earlier appeal by the Board involving the 1989-90 school budget deficit wherein the Commissioner directed the Camden County Board of Taxation to certify an additional tax levy of $262,379.19 to offset the deficit accrued during that school year is on appeal to the State Board. It further observes that the Legal Committee of the State Board issued a report dated November 6, 1991 calling for a remand to the Commissioner of the Commissioner's decision on the budget deficit. Recognizing that while a Legal Committee Report is not a decision of the State Board, the Borough submits there is good indication from such report that the State Board is indicating that the subject of the 1991-92 school budget appeal shall be remanded to the Commissioner to be reviewed in connection with the remand of the 1989-90 budget. The Borough thus claims a likelihood of prevailing on the merits of the instant appeal.

On the standard of irreparable harm, the Borough contends that if the Commissioner's decision is implemented, it will be impossible to undo. It also claims there are substantial questions as to how it will be implemented since the tax bills for 1991-92 are already out. The Borough claims that the irreparable harm would be the expenditure of tax dollars which cannot be recovered, and as such the public interest compels granting of a stay. It further submits that the hardships that the Borough will experience if the stay is denied are certainly greater than the Board will experience if the stay is granted. It claims the Board has been operating to date without the additional funds.

Finally, the Borough notes that this case is different, in terms of implementation, from the 1989-90 case, in that the decision of the Commissioner in the earlier case came in time for the added taxes to be included in the 1991-92 tax bills.

The Borough seeks a stay of the Commissioner's decision of October 23, 1991 pending action by the State Board of Education on the appeal and motion of the Borough Council.

The Board opposes the grant of a stay on the basis that the Borough has failed to meet the standard for the grant of injunctive relief as set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982). The Board urges that the Borough has failed to establish that it will suffer irreparable harm if the stay is denied, it making only generalized allegations of increased cost and inconvenience. The Board further argues that the effect of granting a stay would also undo all the good that was accomplished by having budget appeals adjudicated on a more expedited basis. It adds that if the funds are reinstated now pursuant to the Commissioner's decision, the second half of the year can be operated in a thorough and efficient manner, whereas having the funds reinstated in late spring will have caused the children to be deprived of certain services and programs for virtually an entire school year.

The Board further contends that the Borough has not shown there is a reasonable probability of ultimate success on the merits. It states that there is every reason to believe that the State Board will adopt the Commissioner's fully analyzed review of the 1991-92 school budget. Moreover, the Board contends the Borough has not articulated any specific basis upon which it believes the

State Board would reject the Commissioner's decision, nor has it cited any legal errors therein. The Board claims the Legal Committee Report has not been adopted by the State Board and at the time of its determination the Legal Committee was unaware of the Commissioner's decision on the 1991-92 budget appeal. Because there is no reason to believe that the State Board would reject the Commissioner's decision in this case, the Borough lacks another of the critical elements for the granting of a stay of the Commissioner's decision.

The Board claims also that the law is well settled that the Commissioner had the authority to act as he did in the case. It further claims that the Board has failed to specify any error, either procedurally or substantively in the Commissioner's determination.

Finally, the Board argues that balancing of the relative hardship to the parties weighs in favor of the stay being denied because of the devastating impact on the school district and students if the request for a stay is granted. It claims that by being deprived of the funds the Commissioner has decided the Board needs, the Board is compelled to operate at a funding level that is far less than adequate. Thus, the Board contends, after weighing the relative hardships to the respective parties and all other factors, the conclusion is mandated that the stay should be denied.

Upon careful review of the arguments of the parties in this matter in light of the standards set forth by the New Jersey Supreme Court for the grant of injunctive relief in Crowe, supra, it is determined that the Borough's request for a stay is herein DENIED in that the Borough has failed to demonstrate that (1) it will suffer

irreparable harm if the stay is denied; (2) it has a likelihood of prevailing on the merits of the matter; (3) the relative hardship it would experience if the stay is denied is greater than that which the Board will experience if the stay is granted; or (4) the public interest compels the grant of the stay.

IT IS SO ORDERED this 6th day of December 1991.

COMMISSIONER OF EDUCATION

DECEMBER 6, 1991

DATE OF MAILING - DECEMBER 9, 1991

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4983-91
AGENCY DKT. NO. 145-5/91

K.L.,
Petitioner,
v.
BOARD OF EDUCATION OF MATAWAN/ ABERDEEN HIGH SCHOOL DISTRICT, ROGER TUCILLO, DR. KENNETH HALL, MARILYN BRENNER, MARY FRANK HAUSER, BARBARA HORL, WILLIAM MARTIN, JAMES SMITH, ARTHUR EUMABOLA, DEE ALLEN, BARBARA PIESZCYNSKI, AND MONMOUTH COUNTY,
Respondents.

Gary M. Weiss, Esq., for petitioner (Jannarone and Weiss, attorneys)

Vincent C. DeMaio, Esq., for respondents (DeMaio & DeMaio, attorneys)

Record Closed: September 9, 1991 Decided: September 17, 1991

BEFORE JOSEPH LAVERY, ALJ:

This is an appeal by K.L. (petitioner) from his expulsion from Matawan/Aberdeen High School (Matawan High).

The respondent Matawan/Aberdeen High School District Board of Education (Board) first suspended and then expelled petitioner from Matawan High for alleged assault of a teacher. It left open to him attendance at Matawan Adult/Alternative High School (Alternative High).

PROCEDURAL HISTORY

After timely emergent appeal to the Commissioner of Education, pursuant to N.J.A.C. 6:24-1.5, filed May 13, 1991, the Commissioner declared this matter a contested case, pursuant to N.J.S.A. 52:14B-9 and 10. He thereafter forwarded this motion for emergent relief to the Office of Administrative Law (OAL) for disposition pursuant to N.J.A.C. 1:1-12.6.

Once filed in the OAL on May 15, 1991, the matter was scheduled for oral argument on May 20, 1991, and convened on that date in the Trenton hearing rooms of the OAL. It was continued to May 22, 1991, to accommodate settlement discussions. The hearing convened on that date in the same location and, at the conclusion of brief testimony and argument, the record closed.

Additionally, plenary hearing convened on June 6, 1991, in Aberdeen Municipal Court. Following hearing, the parties briefed the issue of whether or not further expert testimony should be taken during continued hearing. During an on-the-record telephone conference of July 30, 1991, petitioner's motion to hear such testimony was denied.

Briefs then followed on the main case, the last of which was filed on August 26, 1991. On that same day, the parties were advised that petitioner had forwarded a personal letter. That letter was returned without reading for the reasons expressed in a letter to counsel, of even date. Counsel were given an opportunity to submit comments on petitioner's letter. The last comment, by the Board, was filed here on September 9, 1991. On that date the record closed.

ISSUES

The issues are:

(a) whether petitioner's suspension should be overturned, and, even if unsuccessful on this issue,

(b) whether petitioner should be permitted to return and finish his education at Matawan High, rather than as presently, at Alternative High.

FACTUAL BACKGROUND

Uncontroverted Facts:

On March 14, 1991, petitioner was an 18 and 1/2-year-old student at the Matawan High School, in the Matawan/Aberdeen Regional High School District. He was in his junior year. Petitioner was also a student in the Italian class taught by Mr. Orazio Tanelli. The class was comprised of freshman students, and approximately three sophomores. Those students' ages were mostly 14 years, with a few 15-year-olds.

While in class on this date, petitioner became involved in a flare-up with the teacher, Mr. Tanelli. After some dialogue between the two, petitioner left his seat, and pushed Mr. Tanelli's desk, to a degree in dispute. Petitioner was afterward taken from the classroom, the police were called, and he was then taken from the school under arrest.

Later, pending Board action, petitioner was permitted to return to the school, and Mr. Tanelli's class. During that time, he apologized to Mr. Tanelli. He stayed at Matawan High approximately 11 days, without incident. Thereafter, as noted above, he was expelled by the Board at a public hearing of April 18, 1991.

These proceedings followed.

Facts in Dispute:

The following findings are meant to resolve those facts in dispute:

1. On March 14, 1991, while in class, petitioner threatened recriminations against his Italian teacher, Orazio Tanelli. He did so because the latter had sent a "progress report" home to his parents. Other than petitioner, the class is comprised of freshman students, and approximately three sophomores. The ages range from 14 to 15 years.

2. After the threat, petitioner wrote an offensive statement on the blackboard. Mr. Tanelli responded in kind on the same board. Later, while he was seated, petitioner then chewed tobacco taken from a box in his pocket, and spit it into an empty soda can.

3. In response, Mr. Tanelli prepared a slip for referral to the front office. While doing so Mr. Tanelli asked petitioner why he was so angry. He then inquired of petitioner, "Did your father kick your ass?"

4. After this reference to his father, petitioner became angry, his face reddened, and he sat bolt-upright in his seat, and threw a pen at the teacher. In a state of angry agitation, petitioner then left his seat, and told Mr. Tanelli in a loud voice that he should not speak of his father.

5. In front of the other students, petitioner pushed the desk behind which Mr. Tanelli was seated against the teacher. He did so until Mr. Tanelli was forced, in his chair, against the wall. Mr. Tanelli's chair was pushed back a distance of approximately three feet.

6. Petitioner persisted in pushing the chair, despite the continuing direction by Mr. Tanelli to stop, and despite his exclamation to petitioner that he was being hurt. Mr. Tanelli could be seen at that time to have an expression of fear on his face.

7. After the incident, an aide, Mrs. Pucciarelli, came and took Mr. Tanelli's place. No teaching followed the disruption by petitioner, although the class stayed to the closing bell.

8. Off-color language, in a bantering fashion, was customarily used by the students in the Italian class, and occasionally by Mr.Tanelli.

9. Petitioner then ran back to his seat, and threw the soda can containing the residue of chewed tobacco out the window.

10. Mrs. Pucciarelli was called to the class from her post in the hallway, and she in turn called Mr. Smith and Mr. Hart from the front office.

11. Mr. Tanelli complained of pain, and was taken to the nurse's office. He eventually went to the cafeteria, and had coffee and donuts. Later, he was sent home by the building principal to rest. Mr. Tanelli did not go to a doctor, but complained of pain for about a week.

ARGUMENTS OF THE PARTIES

Petitioner's Argument:

Petitioner argues that the conduct of the Board in expelling him was an excessive reaction, out of proportion to the nature of the admitted offense. Petitioner was used improperly as an "example" to other students. Further, petitioner complains, he was treated no differently than a criminal who had committed a serious crime, rather than a school infraction. That being so, the Board must be considered to have acted arbitrarily, capriciously, and unreasonably.

Addressing the testimony of the witnesses, petitioner contends that the entire set of circumstances on March 14, 1991, must be taken into account. Viewing the incident from this holistic vantage point, it should be concluded that petitioner was a potentially superior student whose grades were improving. The incident itself was vastly overblown. It emerged in an atmosphere of total indiscipline, where foul language was routinely used by teacher and students alike. Petitioner's brief and limited outburst was triggered by Mr. Tanelli himself, when the teacher made the inflammatory statement, "Your father kicks your ass." This provocative accusation plainly caused the incident.

Petitioner's reaction, he argues, though unquestionably improper, was nonetheless limited and controlled. The mere pushing of a desk differs significantly from the more serious offense of pushing or striking a teacher. The act was intended more to gain Mr. Tanelli's attention. At no time, petitioner contends that the testimony shows, was he out of control. Petitioner's behavior was in marked contrast to that of school officials. The latter, beginning with a panicked hall aide, enlarged the inherent seriousness of the encounter to the point where police were called. Petitioner was then publicly led out in manacles, before his fellow students. This was an unnecessary humiliation of devastating impact. The approach taken by the school was thus completely unreasonable.

Noting that he was barred at hearing from exploring penalties imposed in other, more violent altercations, petitioner asserts that this would have demonstrated for the record the Board's discriminatorily excessive punishment of petitioner. Relevant to what treatment is appropriate, petitioner urges that the report of Dr. Emmett Wilson, Jr., be given great weight. Dr. Wilson stressed that the school bears a great responsibility to nurture gifted students such as petitioner. So

far, in withholding third-quarter grades, the Board has effectively barred petitioner from education for the entire second half of the 1990-91 school year.

Even if the Board's expulsion is upheld, the most efficient method for educating petitioner is not the Alternative High School. As argued previously, home instruction most nearly mirrors the education provided at Matawan High. The description of the Alternative High School, provided by testimony from its officials, is suspicious at best. "Locator" tests are analogous to a specious reliance on SAT results to assign courses. The Board would apparently disregard both petitioner's grades and his aptitude.

In sum, petitioner contends finally, he has been punished enough. Denial of an education to be completed at Matawan High School will have a damaging effect on him. More importantly, it will significantly and adversely alter the remainder of his career in high school, and college as well.

Board's Argument:

The Board insists that the conduct of petitioner more than warrants expulsion, in view of all the charges which have been proven. It traces key testimony of the student witnesses, the teacher, and petitioner himself. It contends that the incident began with the initial threat to Mr. Tanelli by petitioner, and was followed by reading an unrelated text in class. Petitioner's misconduct that day included chewing tobacco, which he placed in a soda can and eventually tossed out the classroom window. The tension between the teacher and petitioner then escalated when petitioner threw his pen at Mr. Tanelli, and shoved him to the wall by pushing the desk. The Board emphasizes that: (a) the force of petitioner's push drove Mr. Tanelli to the wall, (b) the teacher was clearly frightened and shocked, and (c) the class was also alarmed and disrupted.

The Board disagrees that petitioner has exhibited any of the recently developed maturity which he claims. In its view, nothing in his history of behavior would justify reinstatement to Matawan High. The Board charges that petitioner is unable to accept authority, even from teachers he ostensibly likes, including Mr. Tanelli and his art teacher. The Board finds it incongruous that petitioner would protest an educational setting in the Alternative High School, which includes older students. This position is inconsistent with his demand, as an 18 and 1/2-year-old junior, to continue attending Matawan High with students much younger.

Against this background, the Board states, the applicable law supports and demands expulsion. The defiance of authority, disregard of school regulations, and assault of a teacher are valid and reasonable causes for expulsion. Moreover, the burden rests on petitioner to show, on these facts, that the Board's action was arbitrary, capricious and unreasonable. He has failed to do so.

ANALYSIS

As noted above, the burden of proof is petitioner's. The evidentiary test to be satisfied, no one disputes. It was set forth in the order of this tribunal promulgated May 23, 1991:

> An action of a local school board which lies within the area of its discretionary powers may not be upset, unless patently arbitrary, without rational basis, or induced by improper motives, Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). [at p. 7]

Applying that test does not leave discretion in this tribunal to recommend, or in the Commissioner of Education to decide, that a new judgment should be substituted. Mere disagreement, if any, with the Board is insufficient legal grounds for doing so. The Board must first be found to have been arbitrary, capricious or unreasonable for reversal or modification to occur. Such a finding is not possible.

It is fully believable that the atmosphere in Mr.Tanelli's class fell well short of the mark. Similarly, it has been found that the teacher did make the provocative comment of which petitioner rightly complains. However, the competence or incompetence of the teacher is not at issue. Petitioner's behavior is. More importantly, the extent to which petitioner retaliated, as found above, justifies the Board's penalty. The Board's decision takes into account not only the offense, but the need for good order and a secure learning environment for all students. Petitioner had other avenues to pursue a remedy, outside physical force, not the least of which was to have his parents bring a formal complaint to school authorities. The Board's response, under these circumstances, cannot be seen as arbitrary, capricious or unreasonable. Petitioner's emphasis on his aptitude does not mitigate his misconduct. Neither would his marks, even if they were found to be superior.

The inescapable fact is that petitioner resorted to physical aggression against a teacher. He did so in a classroom, taking a course he had failed twice before, in front of students considerably younger. His history in Matawan High, as demonstrated without persuasive rebuttal on the record, is consistent with past defiance of lawful direction. It is also consistent with believable testimony describing inappropriate and unwanted horseplay with younger students, and on one occasion, outright fighting. Against this background, expulsion is neither unreasonable, arbitrary nor capricious.

As to what should follow expulsion, the decision to assign petitioner to the Alternative High School also satisfies the evidentiary test, and is within the scope of discretion in the Board. This issue was fully explored during the plenary hearing, and during the emergent motion hearing. Both hearings form the record in this matter.

In denying petitioner's motion, it was held in the May 23, 1991, order that:

> Given the foregoing, and reflecting on the facts, petitioner's other arguments do not advance the motion. If return to Matawan High is inappropriate, petitioner on this record must be found to be better served by Alternative High. The population of the latter, which petitioner would rarely have cause to encounter, is no threat to petitioner, in any sense. No stigma attaches to persons seeking a high school diploma later in life. It is significantly relevant that approximately 30 of his peers have voluntarily chosen Alternative High as an alternative method of education. Instruction is individualized, "seat time" is within almost total control of petitioner, and the testing process gives petitioner more of an opportunity to succeed than Matawan High itself.
>
> Though petitioner seeks the company of his fellow students, he cannot reasonably complain that he finds that option unavailable. He himself was the cause of his present discipline. Only the severity is in dispute. Alternative High would place him virtually in the same condition as the home instruction he seeks. Arguably, he would be better off. The HI program follows the mass teaching lesson plan of the Matawan High teacher. There is some question whether HI would enable him to regain lost ground, or conversely, allow him to acquire all the instruction which a full year would provide. Additionally, the measurement of his progress after HI would be through a sudden-death test procedure, as compared to the retrain-and-retest approach at Alternative High. Taken as a whole, his interests are better served by the latter, rather than HI. That option should begin immediately. [at p. 8]

That analysis remains apt today. Petitioner is almost 19 years old. He is an intelligent adult, and with focused effort can adequately recover from his mistake.

The Alternative High School offers the same degree as does Matawan High. The order of May 23, 1991, included the information that 20% to 30% of its graduates go on to college. Progress in the Alternative High School is at the pace the student sets. Petitioner, with diligent effort, can recover the time he asserts has been lost. He may do so through the simple expedient of serious application. To the extent he wishes to be physically present in the school, that option is available.

It would be of no little value to petitioner to pursue his studies with students of all ages, who voluntarily, and no doubt, at some sacrifice, pursue a high school degree. It most assuredly would not be harmful. For these reasons, the Board cannot be held to have acted arbitrarily, capriciously, or unreasonably by restricting petitioner to this mode of education. Therefore, this tribunal may not recommend otherwise.

CONCLUSION

I **CONCLUDE**, therefore, based on my review of the transcript of April 18, 1991 (Exh. J-1), assessment of the credibility of witnesses appearing at the hearings of May 22, 1991, and June 6, 1991, and consideration of all oral argument and letter briefs, that:

1. The decision by the Matawan/Aberdeen BOE to expel petitioner from Matawan High School was not arbitrary, capricious, or unreasonable.

2. The decision by the Matawan/Aberdeen BOE to make only the Alternative High School available to petitioner for the completion of his education was not arbitrary, capricious, or unreasonable.

ORDER

I **ORDER** therefore that the actions taken by the Matawan/Aberdeen BOE with respect to petitioner K.L., be, and hereby are, **AFFIRMED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 17, 1991
DATE

Joseph Lavery ALJ
JOSEPH LAVERY, ALJ

Receipt Acknowledged:

Sept 13, 1991
DATE

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 24 1991
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ml/E

K.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL HIGH SCHOOL DISTRICT ET AL., MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the decision of the Matawan-Aberdeen Board of Education to expel petitioner from Matawan High School was not arbitrary, capricious or unreasonable. The Commissioner further agrees with the determination of the ALJ that the decision by the Board to make only the alternative high school available to petitioner for the completion of his education was not arbitrary, capricious or unreasonable.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

OCTOBER 24, 1991
DATE OF MAILING OCTOBER 24, 1991

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5897-90
AGENCY DKT. NO. 172-6/90

IN THE MATTER OF THE
TENURE HEARING OF
DAVID BORRELLI,
SCHOOL DISTRICT OF
WATERFORD TOWNSHIP.

Robert E. Birsner, Esq., for petitioner (Maressa, Goldstein, Birsner, Patterson, Drinkwater and Oddo, attorneys)

Saul J. Steinberg, Esq., for respondent (Steinberg and Ginsberg, attorneys)

Record Closed: August 1, 1991 Decided: September 16, 1991

BEFORE BRUCE R. CAMPBELL, ALJ:

The Waterford Township Board of Education (Board) has filed charges of conduct unbecoming a teacher against David C. Borrelli (respondent), a physical education teacher in its employ. The Board seeks the respondent's dismissal pursuant to N.J.S.A. 18A:6-10.

The respondent denies all charges, counterclaims for costs under N.J.S.A. 18A:16-6.1 and counterclaims that his salary and adjustment increments for 1991 were improperly withheld.

Indictable complaints signed by a Waterford Township patrolman and a Camden County Prosecutor's investigator and based on the alleged misconduct were no-billed or administratively dismissed in the summer of 1989 (R-20a, R-20b).

A set of tenure charges was dismissed, without prejudice, in early 1990 because of procedural deformities.

Tenure charges again were filed by the superintendent of schools with the Board secretary on May 18, 1990. A copy of the charges was delivered on the following day to the respondent's home and accepted by his wife. On June 6, 1990, the Board determined that there was probable cause to credit the evidence in support of the charges and that the charges and the evidence in support of them were sufficient, if true in fact to warrant dismissal or reduction in salary.

The Board certified the charges on June 6, 1990 and suspended the respondent from his teaching duties, without pay, effective the next day. On June 7, 1990, the Board secretary forwarded a Certificate of Determination to the Commissioner of Education. He also sent a copy to the respondent.

The respondent filed an answer and counterclaim on June 29, 1990. The Board answered the counterclaim on July 18, 1990. The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case on July 26, 1990. On December 3, 1990, the Board filed a more detailed response to the respondent's counterclaim as directed by this judge. The respondent filed a notice of motion with the court on March 23, 1991. The Board responded thereto on April 11, 1991. Hearing was held on April 16, 17, 18, 19, 29 and 30, 1991 at the Tabernacle Municipal Court. The record closed on August 1, 1991.

The specifics of the charges are that the respondent is guilty of insubordination by virtue of wearing clothing which was inappropriate and revealing, in direct contravention of the superintendent's directions in 1985 and 1988 that such clothing was inappropriate. On the third day of hearing, the petition was amended, deleting the insubordination charge. It is also charged that the respondent, over an extended period, engaged in conduct unbecoming a teacher toward several female students. The respondent denies all allegations.

A list of exhibits, witnesses and transcript designations is appended to this decision.

PAROL AND DOCUMENTARY EVIDENCE

The respondent was in charge of a cocurricular hockey program in which most six grade pupils participated. At the end of the regular schedule, two teams were only one point apart. A playoff game was scheduled, but was cancelled because school was closed on account of snow. Pupils and the respondent discussed rescheduling that game several times. However, the respondent's other responsibilities and the problems of scheduling a bus prevented the game from being played. The respondent insists that cancellation of the game generated ill will against him to the point that false charges were levied against him.

Three adult witnesses testified that while they were in the fifth and sixth grades in the Waterford district, the respondent wore gym shorts that exposed his genitals. One of the adult witnesses recalled that the respondent touched children's buttocks, sometimes with his hand and sometime with his foot, as children were doing certain exercises. Another of the adult witnesses testified to her dislike of and her discomfort in doing an exercise called the butterfly, which required pupils to spread their legs. While pupils were in this position, the respondent would walk among them and observe them.

In addition to this testimony, several former female pupils, now in eighth grade and no longer in the Waterford district, testified to events that occurred when they were in sixth grade and in the respondent's gym class.

Sixteen children testified. All were or recently had been the respondent's pupils. Pupil witnesses were sequestered. Only the pupil testifying was present in the hearing room.

C.C. testified that when she was in the sixth grade the respondent touched her sweatshirt on the nipple area of her left breast, rubbed her back and the backs of other female pupils.

M.W. testified that she observed the respondent's genitals on several occasions while she was in the fifth and sixth grades and that the respondent rubbed the backs of pupils.

D.M. testified that while she was in sixth grade she had problems with the respondent. He would pull girls' bra straps and wrestle with them. He would rub the backs of the "safeties," members of the school safety patrol. The respondent was in charge of the safety patrol at the time. The respondent pulled the witness' bra strap once. She "just walked away." She recalled telling the principal about it. The witness did not tell her mother right away. She stated she "felt like it was my fault." This witness also stated that she saw, while pupils were exercising, the respondent push one girl down and pin her. He would not let her up. The respondent did not do this to the witness. The respondent did not pin the witness. The witness also stated that the respondent never touched boys "that way."

D.D. also testified of female classmates who had their bra straps snapped. She stated the petitioner would sometimes be too friendly with some girls. He would put his arm around the girl, hold her close and say,"how are you?" She saw the petitioner wrestle with girls in the class. She recalled that the petitioner wore very short shorts. On one occasion she saw "half of his butt." The witness never spoke to the respondent about this. So far as she knows, no one did until several girls complained by way of a letter to a female staff member.

This witness also objected to a "walk up the wall" exercise. In this exercise, pupils would place their heads on a mat near a wall and proceed to walk into an inverted position. While doing this, shirts would fall. Because the body was nearly inverted, shirts would fall up, that is, toward the neck, and expose midriff and chest areas. She refused on at least one occasion to do the exercise. She believes she received a zero for that day's work. The witness also recalled that although the respondent would wrestle girls and be "like rough with them," he only joked with boys and touched boys little if at all.

A.B. testified that while she was in the sixth grade, the respondent rubbed her back and tugged at her bra. She stated she saw the respondent wrestling with a female pupil and that she and other girls objected to the walk the

wall exercise because of shirts that could not be tucked in and would expose the chest area. The witness said nothing to school people. She did discuss at least one incident with her mother and discussed others with classmates.

A.G. testified that she wrote the letter concerning the respondent to a female staff member in May 1989. The witness now is in eighth grade. While in grades four, five and six, she had the respondent for physical education and health. The witness testified that the respondent pulled her bra strap on one occasion, but she did not say anything to him. She saw the respondent "misbehave" toward her friends. She observed the respondent wrestle with some girls, snap bra straps and put his hand up the back of one girl's shirt. She spoke to no school official before writing the letter that is Exhibit P-1. She believed the respondent was a respected staff member and didn't think that anyone other than her mother would believe her. However, friends also complained that they didn't like the way the petitioner touched them. The witness' mother advised her that, if she were having problems, to go to her counselor. The witness was afraid she might not be believed if she went alone, but thought that if other girls made similar reports, their complaints might get attention. The witness then wrote Exhibit P-1. The witness occasionally was in the respondent's office alone with him. He did not touch her, approach her or do anything untoward. The witness saw nothing untoward when other girls entered the office.

S.B. testified that the respondent pulled her bra straps several times, wrestled with her and other pupils and rubbed the backs of female pupils. She could not say how many times the respondent had wrestled with her. It usually occurred during warmup drills. The witness told no one of her feelings until A.G. wrote to the staff member. S.B. signed the letter to protest the respondent's actions and to protect her younger sister. She saw the same things that happened to her happen to other pupils.

A.M. testified for the respondent. She signed the letter, Exhibit P-1. She knew it was directed toward the respondent. She was interviewed by Waterford Township police but did not know a criminal case was pending. She also testified before the grand jury.

A.M. also stated she could recall no wrestling or bra snapping. She recalled the hockey program and that there was no championship game, but could

recall no argument because there was no championship game. She recalls the charge that the respondent touched her breast, but recalls no other incident.

On cross-examination, however, the witness stated that the respondent put his hand in the front pocket of her shirt and felt her breast. She also recalled telling the Prosecutor's investigator that she saw the respondent's hand on L.R.'s breast.

During the course of this witness' examination, some inconsistencies between her statements to the Prosecutor's investigator, the Grand Jury and the school principal were brought out.

J.S., now in ninth grade, testified. She had the respondent for gym for three years while in the Waterford district. She now babysits for the respondent. She stated she never had any difficulty or felt uncomfortable about any of the exercises done in class. She stated she occasionally saw the respondent wrestle with pupils. However, she stated she never saw him wrestle with a girl, pull a bra strap or rub a girl's back. The witness recalled a conversation among four girls who testified in this matter and signed exhibit P-1. The witness stated:

> I had heard that they had a petition out because they said that Mr. Borrelli had touched them in a way that they didn't like. And after I heard about it, I saw them, and so I asked them about it.
>
> I said, "Well, what's going on at school?" And [A] said to me, "Well, we had a hockey game that we couldn't make up and it was the championship." . . . It was our championship game. We really wanted to play it, and we had an argument with Mr. Borrelli because he wouldn't let us. He didn't have time to make it up. . . .
>
> Well, we're just getting back what was ours, and we are getting our revenge on him because he didn't let us play that game.

The Board's hearsay objection to this testimony was noted.

Three pupils testified on the respondent's behalf. Two of them signed a petition (R-11) supporting the respondent.

All three said they could recall no untoward incidents involving the respondent while they were in his classes. One witness, S.M., recalled argument

between the respondent and several members of the class, including A.G., because the snowed out hockey game was not made up.

The respondent produced several other character and fact witnesses. Former students, five minors and three adults, stated they had never seen the respondent wrestle with female pupils, pull bra straps, touch pupils inappropriately or wear inappropriate clothing. These witnesses also said they never heard complaints from classmates concerning the respondent's actions toward female pupils.

The respondent's former principals each testified as to his overall performance as a teacher based on both formal and informal observations. Each testified that they had never heard anyone voice complaints concerning the respondent's dress or conduct with his pupils. All attested to his reputation for honesty and his good character. Two teaching colleagues testified similarly. Former college classmates, who are now physical education teachers in other districts, also attested to the respondent's good character. One of these testified to his experience with nonverbal contact with pupils. He confirmed instances of appropriate use of nonverbal contact as well as the tendency of sixth graders to be rambunctious with a physical education teacher.

The respondent testified he always wore a particular type of corduory shorts (R-10). This was confirmed by several other witnesses.

The publisher of the Central Record, which has employed the respondent as a part-time photographer for approximately 12 years testified. She is aware of the respondent's "main job." The respondent works more in summer. However, the witness sees the respondent two or three times per week during the school year. He often arrives at 3 or 3:30 p.m. on his way to school activities to get photo assignments and deliver photographs. He often came to the paper dressed in shorts. She never regarded his clothing as inappropriate and has never received negative comments about him or his garb.

A citizen who worked with the respondent on a Tabernacle Historical Society booklet about three years ago testified that she had never heard negative comments about the respondent before the allegations in this matter.

Sergeant John F. Bekisz, Waterford Police Department, testified . In May 1989 he was a patrolman and investigated alleged criminal conduct by the respondent. On or about May 30th, a parent complained and Bekisz was assigned to investigate. He was given copies of the pupils' letter to the school counselor. He and an investigator from the Camden County Prosecutor's office contacted parents of the girls who had signed the letter and set up interviews. If girls substantiated the allegations, the two took statements on tape. Each girl was interviewed individually. In early June, they contacted 19 families and conducted several taped interviews. At some later time, probably a week to ten days later, he received information concerning a similar incident with a fourth grade pupil. The superintendent called the appropriate building principal. The principal said he had determined the allegation was false.

The policeman signed complaints against the respondent. He can recall no allegation of misconduct off school premises. All allegations referred to gym classes or, at least, areas on school premises. The witness believes seven complaints were signed and forwarded to the Camden County Superior Court. They ultimately were no billed or dismissed.

The superintendent testified that he hired the respondent as a physical education teacher. The respondent has received all required evaluations and all evaluations were good. In 1989, the witness learned of allegations against the respondent from the respondent's building principal. The principal sent the superintendent the letter signed by 19 girls (P-1). The superintendent met with the respondent, the principal and other administrators that day or the next day. The respondent was shown the petition. He asked for identification of the accusers. The superintendent had reservations about revealing the names. The respondent insisted that the names be made known to him.

During the course of the meeting, the respondent said he touched pupils' backs and wrestled with some boys and girls. There should have been some record of this in the respondent's personnel file, but there is not. Nor is a letter from the principal to the respondent advising that the accusations are serious and that the respondent should not question pupils concerning them.

The superintendent identified Exhibit R-11, a petition in support of the respondent. He did not interview the girls who signed that petition. He

stated that criminal charges "took over" and he made no further investigation. He made no determination of innocence or guilt when the charges surfaced, but did express disappointment at the respondent's statements concerning back rubbing and wrestling. The witness could recall no conversation with the respondent when the respondent returned to school to pick up his belongings. He does recall, however, that in the earlier meeting he advised the respondent to get a good lawyer if he were innocent and to think of his family and himself if he were guilty. By the latter statement he meant that the respondent should resign.

The superintendent spoke to the respondent's father-in-law, who also is a superintendent of schools. He suggested that the father-in-law use his contacts to help the respondent get another job elsewhere. The witness stated he backed the respondent at this time.

The superintendent learned in or about September that all charges were dropped. He and the Board had done no investigation through the summer of 1989. After September 1989, the Board directed him to investigate to make sure that there was no truth to the allegations and that no problem existed.

In July 1989, the district did advertise for a physical education teacher. The Board had no idea how the criminal charges would progress and it was the superintendent's view that he had to "cover the position." When the respondent asked the superintendent if the advertisement concerned his position, the superintendent said yes.

The superintendent sought help from the Board attorney in the investigation he was ordered to conduct. He received a discovery package from the Camden County prosecutor. The witness was hesitant to interview the girls who had signed the original letter. After another consultation with the Board attorney, the superintendent and Board determined to certify charges based on the Prosecutor's information. The charges were filed before the Commissioner of Education who then ordered the Board to interview the subject girls. Shortly after charges were filed against the respondent, the parents of K.S. filed a tort claims notice under the New Jersey Tort Claims Act. In February 1990, the charges were dismissed for procedural deficiencies.

The Board and superintendent decided that the subject girls must be interviewed. In or about April 1990, the superintendent began interviews of the girls, which interviews were recorded by a stenographer (J-1, J-2). The witness knew that there were pupils who supported the respondent and he knew of the one accusation of bra snapping that had been proven false. The witness did not look into possible motivations for the charges. His questions, however, revealed no improper motivation.

At about this time a parent group was organized and attended two or three Board meetings. The group clearly wanted the respondent removed.

After interviewing the girls, the superintendent was convinced that the respondent had touched children inappropriately. As set forth above, charges were again filed.

Other testimony tended to show that when the subject pupils were interviewed, they were interviewed in small groups by the school principal (male) and supervisor of special education (female); that administrators at one point early in the situation considered transferring the respondent to another school in the hopes of quieting concerned parents; that the superintendent initially balked at providing information to the Prosecutor; that only one of the pupils who signed a letter supporting the respondent was interviewed by school officials, and that on June 15, 1990, the Board notified the respondent it would vote on a motion to withhold his employment increment at its June 20, 1990 meeting.

The respondent hired a clinical psychologist who reviewed certain records relating to the case. She stated she would have conducted the investigation differently from the way the Prosecutor's office and school officials conducted their investigations. She stated that the more times the girls were interviewed together or indeed talked about the allegations together, the more bias would be introduced.

DETERMINATION

Preliminarily, the respondent argues that the charges should be dismissed on procedural and contractual grounds. First, because he was not

provided the identity of his accusers as required by his union contract, he did not immediately have the opportunity to tell his superiors of the accusers' "revenge motive." He was prejudiced by this contractual violation.

The pertinent section of the collective bargaining agreement states:

> Any complaints regarding a teacher made to any member of the Administration and/or the Board of Education by any parent, student or other person may, if made in writing, be promptly investigated and called to the attention of the teacher. The teacher will be given an opportunity to respond to and/or rebut such a complaint. The complainant shall be identified to the teacher. If the complaint is verbal, the person making the complaint will be referred to the teacher for a teacher-parent conference (Article IV, SE).

Although it is now well settled that public employees have a ligitimate interest in engaging in collective negotiations, the scope of negotiations in the public sector is limited. In re: IFPTE Local 195 v. State, 88 N.J. 393, 401 (1982). It is not likely that the Legislature would authorize negotiation of a matter that might be contrary to existing law. Specifically, the release of pupil names under certain circumstances is prohibited. However, that is a matter to be determined by the Public Employment Relations Commission under N.J.S.A. 34:13A-1 et seq. It is not properly before the Commissioner and, therefore, I may not reach it. Plainfield Bd. of Ed. v. Plainfield Ed. Assoc., 144 N.J. Super. 521 (App. Div. 1976). I note, however, the respondent had the names soon thereafter and seems to have suffered no inability to defend himself.

The respondent testified that no notice was posted 48 hours prior to the June 6, 1990 meeting. He further testified there was no publication of the agenda of this meeting in the appropriate newspapers. The Board offered testimony that such notice was in fact posted. I note that the Commissioner's order of February 23, 1990 directs any further action to be in accordance with the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. The Board argues that it did not rely on the annual notice of regularly scheduled board meetings and posted the agenda for the June 6, 1990 meeting at three schools in the district, the public library, the municipal building, and two post offices (certification of Earl Vassallo, April 11, 1991).

This is a matter congnizable by the Commissioner. Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979).

The Commissioner's direction to the Board that it not consider tenure charges in a caucus session meant that it might not be a meeting closed to the public, as required by N.J.S.A. 18A:6-11, without agenda notice to the public that tenure charges would be considered. Whether the meeting is called an executive session or a closed session is irrelevant provided proper notice is given to the public.

I **FIND** that proper notice was given to the public and, accordingly, **DENY** the motion to dismiss. The Board's minutes should have set forth that a motion was made to go into closed session. The Board is admonished to adhere strictly to the Open Public Meetings Act requirements in the future. This omission, however, is not fatal and the motion based on it cannot succeed.

The respondent's protest concerning delivery of the May 18, 1990 letter advising him of the tenure charges also must fail. The main question is whether the respondent had notice, not how the respondent received notice. Form cannot be exalted over purpose. I **FIND** and **CONCLUDE** that the respondent had clear notice via the letter of May 18, 1990. The motion to dismiss on grounds of improper notification is **DENIED.**

The respondent also claims that his increment was improperly withheld. From a review of the entire record, I **FIND** that proper notice of the June 20, 1990 meeting was given to the public. I also **FIND** that the contract with the education association was satisfied. The language was clearly intended to deal with situations in which teachers might be denied an increment for inefficiency. The contract, at page 28, recites that the employee must receive written notice of the alleged cause or causes "for the recommendations specifying the nature thereof with such particulars as to furnish the teacher an opportunity to correct and overcome the same." The respondent's interpretation simply does not accord with common experience and common sense. Reading the subsection a whole, it is clear that it applies to inefficiency charges. The charges against the respondent are not inefficiency charges and the respondent clearly knows now and knew in June 1990 what the nature of the charges against him is. No reading, however strained, can produce the result the respondent requests. The motion to dismiss is **DENIED.**

The respondent's request for attorney's fees in connection with the dismissed criminal matter, per N.J.S.A. 18A:16-6.1, must be denied. The statute requires reimbursement of any person holding office, position or employment under the jurisdiction of a board of education for defense of a criminal action that is dismissed (as here) or results in a final disposition in favor of the person. The statute must be read with N.J.S.A. 18A:16-6, which clearly says the action must be brought for an act or omission arising out of and in the course of the performance of the duties of such office, position or employment. "A criminal charge of the nature here asserted is not of that quality or character." McCorkle v. Pittsgrove Tp. Bd. of Ed. (App. Div., June 2, 1983, A-5550-81T2) (unreported) at 2. The panel refused to consider the nature of the disposition of the charges. Similarly, the disposition is irrelevant here.

I am shown no authority to support reimbursement for defense of tenure charges and accordingly **DENY** the request for fees in that regard.

Turning to the main question, I **FIND** and **CONCLUDE** that the preponderance of the credible evidence shows that David C. Borrelli engaged in conduct unbecoming a teacher, specifically the improper touching of female pupils. Even one such incident would be indefensible and I **CONCLUDE** that the respondent must be dismissed from his position as of the date of his suspension by the Board.

To a great extent, this case turns on credibility. I believe that the persons who testified for the respondent believed everything they said. I am aware that the testimony against the respondent is inconsistent. The inconsistencies, however, do not rise to a level that casts this testimony in doubt. Rather, the minor inconsistencies enhance rather than detract from the testimony.

I particularly credit the testimony of the three adult witnesses who testified for the Board. Contrary to the petitioner's assertion, I believe that matters of the type to which they testified would remain clearly in the memory.

The great weight of the credible evidence supports the charges. I cannot find enough in this record to support defenses of heightened sensitivity to abuse because of comtemporaneous television programs or of a prank that got out

of hand. It is important to note that the findings here are based on competent evidence and supported by reliable hearsay evidence, not vice versa.

Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514 (1950). In an administrative proceeding, testimony may be disbelieved but it may not be disregarded. Middletown Tp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). For this reason, the testimony in this matter was examined extensively.

The best evidence, of course, is a credible witness coupled with credibile testimony. State v. Taylor, 38 N.J. Super. 6 (App. Div. 1955). The trier of fact may accept or reject, in whole or in part the testimony of any witness. Application of Howard Sav. Bank, 143 N.J. Super. 1 (App. Div. 1976).

One factor that must be considered in a determination as to which party's version of an incident has the "reasonable probability of the truth" is that "the interest, motive, bias or prejudice of a witness may effect his credibility and justify the [trier of fact], whose providence it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952) (citations admitted), certif. den. 10 N.J. 316 (1952). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tenured hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). The Board's witnesses generated the requisite belief.

While aware of the seriousness of this matter to the respondent, this tribunal is also aware of the rights of pupils to be free of harassment. The bra snapping incidents and the unwanted touching were solidly proved. The respondent may have been doing these acts for several years. He may not have perceived them as improper. His perceptions, however, are not relevant. In light of the strong position against improper touching of pupils as expressed by the Commissioner, the State Board of Education and the courts in a long line of cases that are now black letter law, I **ORDER** that David C. Borrelli be removed from his position as a tenured teaching staff member of the Waterford Township Board of Education effective as of the date of his suspension by the Board of Education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

16 SEPTEMBER 1991
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

9/16/91
DATE

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 17 1991
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

WITNESSES

Melissa R. Petrides
Donna Hill
Heather Campbell
C.C.
N.W.
D.M.
D.D.
L.A.B.
A.G.
S.B.
A.M.
J.S.
Theresa Scull
Nancy Decker
T.P.
S.M.
M.M.
Charles Del Camp, III
Patricia Haughey
Patricia Pollock
John F. Bekisz
Richard Salimena
M.W.
A.F.
Clarence Lynn
S.J.S.
S.L.S.
Robert D. Elder, Jr.
Bartholomew Caterino
Theresa Valenti
Daniel Stanley
James Lilley, Jr.
Louis DePalma

Annette Low
Kathleen McHugh
Stephen McHugh
David C. Borrelli
Leslie Dicker
James Source
Gregory Source
David Rauenzahn
Dr. Kathryn Hall
Murray N. Suffin
Earl Vassallo
Saul J. Steinberg
Gloria E. Van Sciver
Paul Leahy
Gary L. Dentino
Robert Birsner
Judith Thounot
Michael J. Casey

EXHIBITS

Petitioner's

Exhibit No.	Description
P-1	Letter Petition addressed to Ms. McGonigal, undated
P-2 through P-7	Statements of minors to Investigator Arnoyo
P-8	Closed session minutes of 4-18-90 meeting
P-9	Agenda from 6-6-90 meeting
P-10	Minutes of 6-6-90 meeting
P-11	Article from Courier Post, 12-17-89
P-12	Rebuttal to article in Courier Post, 1-9-90
P-13	Judith Thourot's statement to the Camden County Prosecutor's office, 6-1-90

Respondent's Exhibit No.	Discription
R-1A	Contract 1986-1989
R-1B	Contract 1989-1992
R-2A	Teacher Evaluations-Classroom Performance
R-2B	Annual Written Performance Reports
R-3	Hockey Score Sheets
R-4	6th Grade Roll Book
R-5A	Gymnastics Text Excerpts and Sample Plans
R-5B	5th and 6th Grade Gymnastics Lesson Plans
R-5C	District Physical Education Curriculum Guide and Revised Guide
R-5D	College Notebook Excerpts - Gymnastics
R-5E	USGSA Certificate
R-6	Medical Evaluation - Kevin Fleming, M.D., 3-29-90
R-7	Psychological Report - Kathryn Hall, Ph.D, 4-5-91
R-8A	Notification of Dismissal of Criminal Charges, 9-6-89
R-8B	Notification of No Bill of Indictment, 8-30-89
R-9A	Help Wanted - Physical Education Teacher, 7-12-89
R-9B	Notification of Withholding Increment and Guide Step, 6-21-90
R-9C	Letter Requesting Contractual Rights be Adhered To, 5-25-90
R-9D	Wilson Letter to DelCamp, 5-22-90
R-10	Pair of corduroy O.P. shorts
R-11	Petition, undated
R-12	Letter dated 5/25/89, Borrelli to Salimena and Dentino
R-13	Letter dated 5/25/89, Dentino to Borrelli
R-14	Discovery dated 1/18/90
R-15	Tenure Charges dated 10/30/89
R-16	Response to Tenure Charges, 11/15/89
R-17	Board Meeting Action Brief
R-18	Excerpt from Phildelphia Inquirer, 5-22-89
R-19A	Warrant, 6-8-89
R-19B	Warrant, 6-8-89
R-19C	Warrant, 6-8-89

R-D	Warrant, 5-8-89
R-19E	Warrant, 6-8-89
R-19F	Warrant, 6-8-89
R-19G	Warrant, 6-8-89
R-20A	Administrative Dismissal, 9-6-89
R-20B	Notification of No Bill, 8-30-89
R-21	Photograph of Notice of 3-2-90
R-22	Letter dated 5/18/90
R-23	Photograph of Notice, Vassallo to Borrelli
R-24	Letter dated 6/15/90, Vassallo to Borrelli
R-25	Letter dated 6/21/90, Vassallo to Borrelli
R-26	Hockey highlights, first edition
R-27	Minutes for 4-3-91 meeting
R-28	Agenda for 4-17-91 meeting
R-29	Letter dated 4-22-91, Vassallo to Borrelli
R-30	Agenda for 4-18-91 meeting
R-31	Addendum, agenda for 4-18-91
R-32	Minutes for 4-18-91 meeting
R-33	Bill from Mr. Steinberg

J-1	4-18-90 Transcript
J-2	4-19-90 Transcript

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID C. BORRELLI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WATERFORD, CAMDEN COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The exceptions submitted by the parties were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

The Board notes by way of exception that the ALJ observed that witness J.S. now babysits for the respondent. (Board's Exceptions, at p. 1) The Board submits that J.S. testified that she had been babysitting for respondent for a period of two years, and cites Tr. II 154 in support of this point.

Further, the Board observes that S.B. testified that the conversation related by J.S. (Tr. II 158-159) never transpired.

Respondent's exceptions are a reiteration of the detailed arguments presented to the ALJ in his post-hearing brief and are incorporated herein by reference. More specifically, respondent avers the ALJ dismissed major inconsistencies in the testimony as minor, finding that such inconsistencies enhanced rather than detracted from the testimony. He objects to the ALJ's scant analysis of the details of the alleged inconsistencies, and he further claims the ALJ did not acknowledge the requirement that

testimony of complaining child witnesses is to be viewed with great caution. Respondent thus finds the initial decision critically flawed, relying on his post-hearing submission for an analysis of said inconsistencies.

Respondent would have the Commissioner discount the testimony of D.D. because A.M. denied that her bra had been snapped. She also denied before a Waterford Township officer and a representative of the Camden County Prosecutor's Office that she had either been a victim of any untoward action by respondent or that she had witnessed any such incidents. Respondent also states that D.D.'s testimony that on one occasion she saw half of respondent's "butt" was not corroborated by any of her classmates. Moreover, this incident was alleged to have occurred after respondent suffered a severe knee injury so that the testimony about having seen respondent's "butt" while he was jumping a hurdle is inconsistent with proven fact.

Similarly, respondent characterizes A.G.'s testimony as unreliable because A.M. denied that respondent wrestled with her, although A.G. said he had. He also claims A.G.'s testimony is inconsistent as to her own jealousies and insecurities, referring to his brief at pages 28-30 in support of this point. Respondent also believes that S.B.'s testimony and that of D.M. was inconsistent insofar as what each told the other and what was observed by each. He further claims S.B. to have been incredible in her description of respondent's allegedly pulling her bra strap while he was in a wheelchair in front of the entire class. He claims no one corroborated this allegation.

Respondent refutes the ALJ's sole reference to inconsistencies related to A.M.'s testimony. Respondent points out that the ALJ did not discuss that on redirect examination A.M. admitted that she told the superintendent that she was never touched, notwithstanding what she had told the prosecutor's office to the contrary. Respondent excepts to the ALJ's having failed to discuss any other inconsistencies of any of the witnesses who testified for the Board, notwithstanding the great caution with which such testimony must be viewed. As a last note on the issue of inconsistencies of testimony, respondent objects to the ALJ's characterization of N.W.'s testimony. Respondent claims that N.W.'s testimony that she observed respondent's rubbing the backs of pupils was not corroborated by any other student, and that what she actually said was that she could just see an arm moving until led into concluding that a back was being rubbed. With respect to N.W.'s testimony that she observed respondent's genitals on several occasions while in the fifth and sixth grades, respondent states:

> ***apparently the [ALJ] while merely reciting that testimony, did not determine that to constitute conduct unbecoming in that at p. 13 of the Court's decision the Court stated, "I find and conclude that the preponderance of the credible evidence showed that David C. Borrelli engaged in conduct unbecoming a teacher, specifically the improper touching of female pupils." (emphasis in text)
>
> (Respondent's Exceptions, at p. 8)

Respondent also reasserts his contention that the ALJ simply ignored or never considered the compelling evidence of bias, particularly in regard to the ALJ's conclusion that he found insufficient evidence in the record to support respondent's defenses of heightened sensitivity to abuse because of contemporaneous television programs or of a prank that got out of hand. He cites

his post-hearing brief in support of his arguments related to bias, particularly noting the testimony of A.G., D.D., C.C. and H.C. as evincing elements of jealousy, resentment, revenge and bias.

Concerning the ALJ's assigning particular credit to the testimony of the adult witnesses, respondent submits that the ALJ did not consider that two of the three adults were municipal court clerk employees in the Township of Waterford as evidence of their bias. He notes that H.C. is the sister of one of the girls who signed the petition, and the third adult witness is a friend of one of the other adult witnesses and is also a municipal court clerk in a neighboring town. Respondent finds it interesting that each of these witnesses could recall only a single incident each where respondent allegedly wore shorts which exposed his genitals and notes that none of the three voiced any complaint concerning this alleged conduct until approximately eight years after such alleged conduct occurred. Respondent suggests that the mere lapse of time should have made such testimony not worthy of credit. He adds that the passage of that extreme amount of time lends further support to the conclusion that the testimony of the three adult witnesses was motivated by consideration of interest, bias and prejudice.

On the testimony concerning the butterfly exercise, respondent takes exception to the ALJ's apparent conclusion that his observations of the students while doing said exercise was somehow improper. He further avers that the apparent embarrassment of the three adults as to the butterfly renders their testimony further suspect.

Respondent's last exception regarding bias notes the ALJ's failure to consider N.W.'s dislike of respondent, which he claims is

ample reason for what would have prompted her to complain about alleged exposure only after she saw the television show mentioned as an alleged prompter of these tenure charges.

Respondent's exceptions further except to the ALJ's failure to consider testimony favorable to him. He first cites to evidence of prior false allegations levied against him which were later dismissed as being false. Referring to the testimony of the police officer who handled that matter, respondent submits that the fourth grade student who reported such false accusation also told the police officer that she had been advised by an older student that revenge against a teacher could be accomplished by an allegation of bra snapping. Respondent avers the ALJ did not consider this testimony and he advances the argument in exceptions that the ALJ was outcome determinative in favor of findings of unbecoming conduct as opposed to requiring the burden of proof to remain with the Board. Respondent also suggests that the police officer's testimony was not considered in determining whether to credit the allegations of bra snapping by the students and whether such allegations are suspect.

Further, respondent submits that the testimony of M.M. is supportive of his position. He claims she stated, in essence, that she never observed him wrestle with female students, nor did she see him pull a bra strap of any student. Respondent suggests M.M. testified that she signed the petition because of peer pressure.

At his last exception that the ALJ failed to consider testimony favorable to him, respondent objects to the fact that the subject pupils were interviewed in small groups by the principal and supervisor of special education. He further objects to the ALJ's

having failed to note testimony of some of his witnesses including a clinical psychologist, who spoke to peer pressure. He objects to the ALJ's failure to discuss the testimony of Dr. Hall, one of respondent's expert witnesses, who spoke of the need for neutrality of an examiner conducting student interviews. Finally, respondent objects to the ALJ's failure to consider the experience of Nancy Decker, one of his prior principals, whom he claims testified as to her having experience whereby students conform what they might say to a principal in advance of being interviewed.

In other exceptions, respondent objects to the ALJ's reliance on In the Matter of the Tenure Hearing of Richard Wolf, School District of the Borough of National Park, Gloucester County, decided by the Commissioner July 1, 1987, aff'd State Board December 2, 1987, rev'd/rem'd N.J. Superior Court App. Div. 231 N.J. Super. 365 (App. Div. 1989), cert. den. 117 N.J. 138 (1989), Commissioner Order June 21, 1990. Respondent says the ALJ below did not reconcile the inconsistencies present in this case from the facts of Wolf.

Further, respondent suggests the ALJ did not discuss his own testimony or its corroboration. Respondent believes the failure of the ALJ to elaborate on his witnesses' testimony is evidence of the outcome determinative view with which the ALJ rendered his decision.

Also, respondent avers that the ALJ did not consider the implausibility of the testimony of the complaining witnesses, noting that said complaints were made after the passage of months and in most cases, years. Neither, respondent claims, did the ALJ consider that the complaints all came from a basic clique of girls, who were

friendly with one another. He notes again that even the adult witnesses are connected.

Respondent further disagrees with the ALJ's disposition of his argument relative to reimbursement of legal fees in connection with his criminal defense. Respondent disagrees with the ALJ's conclusion that the actions did not arise out of and in the course of employment and, thus, that no reimbursement was warranted. He submits that the ALJ failed to consider the testimony of the police officer and the students that all of the alleged actions occurred while respondent was teaching gym class and outside.

Respondent further objects to the ALJ's conclusion that his findings were based on competent evidence and supported by reliable hearsay evidence. Respondent excepts to such finding because he avows that the ALJ did not indicate the nature of the reliable hearsay to which the ALJ refers in making such finding. If he is referring to J-1 and J-2, the transcripts of the children's statements taken by the superintendent on April 18 and 19, 1990, respondent avers, then the ALJ improperly considered those transcripts since the parties stipulated that the sole purpose for admission of said documents was to furnish some of the documents upon which Dr. Hall relied in her consideration as to whether or not the questioner, Dr. Salimena, was biased in his approach.

Last, respondent submits that the imposition of the penalty of removal from his tenured position is contrary to the Court's suggestion at footnote 11 of Wolf, supra, that Wolf's penalty of dismissal was not warranted. Respondent contends that in Wolf, the Court noted that the McClelland decision (1983 S.L.D. 225) may be misplaced in that McClelland had been warned on several occasions as

to the impropriety of his conduct. He distinguishes this case from McClelland, claiming there is no proof whatsoever that he was ever warned of alleged unbecoming conduct or in fact that any complaints had ever been made to teachers, principals or any other person about unbecoming conduct.

For the above reasons, as those expressed in his post-hearing submission, respondent submits that the initial decision should be rejected and the Commissioner should dismiss the charges against him.

Upon a careful and independent review of the record of this matter, the Commissioner affirms the initial decision for the reasons expressed therein. In so doing, the Commissioner emphasizes that in his consideration of a tenure matter such as this, where credibility determinations depend on the testimony of students, he is assiduously aware that the decision will have a profound effect on respondent's livelihood and reputation in the community, in the teaching profession and on his family. In so recognizing, the Commissioner has conducted a thorough review of the record, including careful scrutiny of the transcripts in relation to the extensive arguments set forth in respondent's post-hearing brief and exceptions, particularly regarding the alleged inconsistencies in the witnesses' testimony.

Such careful review first leads the Commissioner to comment on the charges extant in this tenure matter. Respondent is charged with conduct unbecoming a teaching staff member. See tenure charges, sworn statement of evidence submitted by Mr. Vassallo, Assistant Superintendent for Business/Board Secretary. Such allegations include counts of unbecoming conduct based on alleged

bra strap snapping by respondent, wrestling with female students and respondent's wearing clothing inappropriate and revealing. The Commissioner notes that a charge of insubordination related to respondent's attire was dropped during the third day of hearing of this matter due to lack of testimony by Mr. Salimena, the Superintendent, to Mr. Borrelli with respect to clothing to the extent that a charge of insubordination was fashioned or was based upon mandates that have been given to Mr. Borrelli. (Tr. III 5) The Commissioner emphasizes that it is solely the charge of insubordination that has been dropped, not the issue of whether respondent's attire in school constituted unbecoming conduct. The latter issue remains a part of the charges currently before the Commissioner.

In thus reviewing the counts of this matter, the Commissioner agrees with the ALJ that there is ample testimony both from students and adults to convince him that respondent is guilty of unbecoming conduct on all counts of the charges brought against him.

The Commissioner will first consider respondent's exceptions regarding credibility of individual students. While it is true that A.M. denied that her bra had been snapped, as D.D. testified, D.D.'s testimony remains credible as to her own first-hand experience. The Commissioner finds her testimony as to what she herself was subjected to credible. She testified that respondent rubbed her back, with which she felt uncomfortable. See Tr. I 193-194. She also refused to perform an exercise against a wall which would cause her shirt to fall, exposing her chest area. See Tr. I 191-192, 215. For such refusal, she received a zero.

(Id., at 192) D.D. also testified credibly as to her own experience having seen respondent expose not only "half of his butt," but also his scrotum on one occasion. See Tr. I 188, 190, 202 and 219. The Commissioner's review of D.D.'s testimony reveals that D.D. was unable to specify when during her sixth grade year she observed this incident, beginning, middle or end, despite repeated attempts from respondent's counsel, as well as the Board's, to affix a specific time to the occurrence. See Tr. I 190-191, 202, 220. Hence, the Commissioner dismisses respondent's exception that D.D.'s testimony regarding respondent's inappropriate exposure of himself occurred during specific months of D.D.'s sixth grade year when respondent suffered a knee injury that prevented him from jumping in the manner D.D. described as leading to his being exposed.

Similarly, even if the Commissioner were to discount A.G.'s testimony that she saw respondent wrestle with A.M. because A.M. denied it, A.G.'s testimony reached to her own experience with respondent, and included allegations that he snapped her bra. See Tr. II 45, 69. She also testified that she saw respondent pull S.B.'s bra strap (Tr. II, 69-70) which S.B. corroborated. See Tr. II 116, 117, 124, 130, 131 and 136. Moreover, S.B. corroborated A.G.'s testimony that respondent wrestled with her, among other female students. See Tr. II 118-119, 120, 121 and 139.

As to A.G.'s insecurities and jealousies providing a basis for assessing her testimony as incredible or unreliable, the Commissioner finds tenuous, at best, what relevance A.G.'s being concerned that "she wanted to be noticed as just a regular girl and not a shrimp" (Respondent's Brief, at p. 29, quoting Tr. II 80-81) has to do with the reliability of her testimony regarding

respondent's behavior toward her. Respondent's brief notes that even after she finally admitted that she felt jealous, disregarded and left out, "she put herself in a position to be alone with Borrelli as a hockey helper (citation omitted)." (Id.) It is not clear how respondent would have the Commissioner construe the vagaries of early adolescent behavior in assessing A.G.'s credibility. However, even if A.G.'s testimony were to be assessed as altogether biased or incredible, which the Commissioner does not find to be the case, there remains the testimony of those other girls which corroborates A.G.'s experience as to bra-strap pulling.

As to S.B.'s testimony being inconsistent with that of D.M., respondent's exceptions merely allege that their testimony was inconsistent insofar as what each told the other and what was observed by each. Such exception likewise lacks specificity, but even so, as noted by the ALJ, some inconsistency in the testimony of children does not necessarily diminish, the credibility to be assigned. Further, unlike respondent, the Commissioner finds entirely credible S.B.'s account of respondent's allegedly pulling her bra strap while he was in a wheelchair in front of her class. That no one corroborated this episode does not mean that it did not occur. Neither was such an incident hard to imagine as respondent infers, because respondent was then in a wheelchair, nor was it the only occasion when he pulled her bra strap (Tr. II 129) or that of other students (Tr. II 120-121).

Finally, as to N.W.'s testimony and respondent's exception that her testimony was inconsistent because while she said respondent rubbed the backs of pupils, what she actually said was that she could just see an arm moving until led into concluding that

a back was being rubbed, the Commissioner's review of such testimony indicates that while such was the case in one particular incident, N.W. went on to testify that she had in fact seen him rubbing students' backs on more than one occasion. See Tr. I 130-131. The Commissioner finds such testimony particularly strong, in that the pupil was able to distinguish in her own mind when she actually saw such back rubbing, and when on another occasion, she saw only his arm moving up and down near a student. Moreover, the bulk of N.W.'s testimony related to her having seen, as stated by other pupils and adults in this case, respondent's genitalia exposed while in the course of his instructing classes. The Commissioner fully credits N.W.'s testimony in this regard as well as that pertaining to his rubbing the backs of pupils.

The adult testimony elicited at hearing corroborates the testimony of such minor pupils as N.W. that respondent exposed his genitals to his students through the course of his teaching years. Like the ALJ, the Commissioner finds such testimony credible. See D.H.'s testimony at Tr. I 40; H.C.'s testimony at Tr. I 56 and 68; and M.P.'s testimony at Tr. I 11. Despite respondent's protestations regarding bias among these three women, the Commissioner is unpersuaded that the coincidence that they all work as municipal court clerks has any bearing upon their recollections of such incidents. Neither does the Commissioner find it remarkable that each such witness could recall only a single incident of respondent's having exposed himself in class, or that they failed to voice any complaint concerning this conduct until the passage of

approximately eight years. While it might be argued that the fact that one such adult witness is the older sister of one of the student witnesses might lend itself to a demonstration of bias, H.C.'s testimony corroborates the testimony of minor students' similar observations, students to whom H.C. has no relationship or acquaintance.

On the matter of requiring students to execute an exercise known as the butterfly, the Commissioner finds that while their embarrassment may have been appropriate and understandable under the circumstances, respondent committed no breach of his professional duties in requiring students to practice such exercise. That respondent may even have "poked" with his foot any such female pupil to assure that the exercise was performed correctly may not necessarily demonstrate conduct unbecoming a teaching staff member. As noted in the case captioned In the Matter of the Tenure Hearing of Douglas Nogaki, School District of the Borough of New Milford, Bergen County, 1983 S.L.D. 890, rev'd State Bd. 1984 S.L.D. 1986, "***gym class*** by its nature is an active setting and allows for physical interaction among students and teachers.***" (at 1986) However, use of a hand to assure that a female student's muscles were tautly constricted might rise to the level of conduct unbecoming. Yet, in this regard the Commissioner finds the record inconclusive as to whether any such touching of a female student to see if the exercise known as the butterfly was being properly performed occurred. Thus, the Commissioner makes no finding of conduct unbecoming a teaching staff member regarding respondent's technique of supervising the butterfly exercise.

The Commissioner does note, nonetheless, his very grave disapproval of respondent's inappropriate contact with female students, regarding bra snapping, be it through a layer of clothing or by reaching up under clothing to touch the skin as well, wrestling with female students and inappropriate sexual touchings, such as that related by A.M. wherein on cross-examination she reported that respondent put his hand in her front shirt pocket and felt her breast. See Tr. II 148-149, 150-151. The Commissioner found this testimony particularly credible insofar as A.M. had denied that respondent had snapped her bra, despite her knowing that another student had testified that she had witnessed respondent's snapping A.M.'s bra strap. See Tr. II 145. In regard to this testimony, the Commissioner emphasizes that certain forms of student contact may not be deemed inappropriate, due to the physical nature of the subject. See Nogaki, supra. However, certain other physical contact is unquestionably improper, such as bra snapping, and may even rise to yet an even more serious category of circumstances, that of sexual contact, which is always inappropriate in a student-teacher relationship. See, In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, 1966 S.L.D. 185, 187, wherein the Commissioner stated:

> ***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.

See also, In the Matter of the Tenure Hearing of Dennis Cooke, School District of the Borough of East Rutherford, Bergen County, decided by the Commissioner August 30, 1991.

In the Commissioner's considered opinion, the record of this matter clearly establishes that respondent is guilty of conduct unbecoming a teaching staff member by snapping the bras of, and engaging in wrestling matches with, his female charges. Moreover, the Commissioner concludes that respondent is also guilty of very serious unbecoming conduct in his having also touched the breasts of A.M. and of C.C. (Tr. I 77, 86, 89, 115). He also finds as unbecoming conduct respondent's having dressed in such a manner as to have exposed his genital area to students in his various classes over the course of his years of teaching in respondent's district.

In so concluding, the Commissioner has painstakingly reviewed the evidence of bias alleged by respondent. While the facts cannot be denied that the complaining students and the adult witnesses are known to one another and, further, that the students in question were players or officials in an extracurricular intramural hockey program for sixth graders, any such inferences of bias among those who signed the petition that resulted in the certification of these tenure charges must be weighed against the testimony brought to the record. A careful review of the record supports a finding that the claims of the students outweigh the claims of respondent that the students who signed the petition were prejudiced by their common association or were motivated by revenge for his failing to schedule an intramural game. The episodes elaborated upon by the pupils, confirmed by the testimony of similar events brought by the adult witnesses from years earlier, were simply more persuasive than the claims of revenge, collusion or promptings from television shows averred by respondent. The Commissioner so finds, having carefully reviewed respondent's

testimony and that of his witnesses. Respondent's blanket denials were plainly implausible when measured against the charges, testimony and circumstances suggested by the Board's witnesses.

Given such credibility determinations as established by the ALJ, as amplified herein, the Commissioner finds and determines that Respondent David C. Borrelli is guilty of conduct unbecoming a teaching staff member for improperly touching A.G., S.B. and D.M. by snapping their bra straps. He also finds respondent guilty of conduct unbecoming a teaching staff member for improper sexual contact toward A.M. and C.C. in touching their breast areas. He further finds respondent guilty of conduct unbecoming a teaching staff member resulting from his inappropriate attire that permitted exposure of his genitalia.

In so deciding, the Commissioner must next address the appropriate penalty. In considering the matter of penalty, the Commissioner notes that he had considered similar charges in such cases as In re Wolf, supra, and In re Cooke, supra. However, any reference to Wolf is premature in that the Appellate Division has rejected the decisions of the Commissioner and State Board and remanded the matter for a de novo hearing on the merits of that case. Likewise, the Commissioner finds the Court's footnote in Wolf relative to warning constitutes dicta and may not be relied upon by respondent for the proposition that warning or counseling is required before a termination of a tenured teaching staff member for inappropriate touching may occur. The instances of touching at issue herein such as bra snapping or wrestling are improper; in the case of the breast touchings, of a highly inappropriate sexual

nature. As the ALJ determined in Cooke, to require that a teacher be warned about such conduct prior to removal is to suggest that a teacher must be told that such action is improper. The Commisssioner thus rejects respondent's reference to the Appellate Division's dicta in McClelland as being without merit under the facts of this case. Under the instant circumstances, as found in such cases as Cooke, nothing less than dismissal is sufficient or warranted. See Cooke, at p. 26. See also, In the Matter of the Tenure Hearing of Carl Gregg, School District of the City of Atlantic City, decided by the Commissioner June 2, 1989. The Commissioner has always held that teaching is a public trust, and its violation requires a heavy penalty. Indeed, the Commissioner has held that even a single incident of conduct unbecoming a teaching staff member can result in dismissal. See In re Fulcomer, 93 N.J. 404 (App. Div. 1967). In this case, however, several incidents have been demonstrated, which, together, suggest a pattern of conduct sufficiently flagrant to warrant dismissal. The Commissioner so finds.

As to respondent's contention that he is entitled to attorney's fees pursuant to N.J.S.A. 18A:16-6 because the circumstances arose in the course of his duties. The Commissioner emphatically states that inappropriate touching in no manner can or should arise in the course of respondent's duties as a teaching staff member. Accordingly, pursuant to Thadeus Pawlak v. Board of Education of the Borough of Hopatcong, Sussex County, decided by the Commissioner January 27, 1988, aff'd/mod. State Board June 1, 1988, aff'd Super. Ct. July 12, 1990. See also Powers v. Union City Bd. of Ed., 124 N.J. Super. 590, (Law Div. 1973), aff'd o.b., 127 N.J.

Super. 294 (App. Div. 1974), certif. den. 65 N.J. 575 (1974), charges of sexual assault and endangering the welfare of children could not, under any circumstances, have arisen out of the scope of respondent's duties as a teaching staff member.

Accordingly, for the reasons expressed in the initial decision as amplified herein, respondent as of this date is dismissed from his tenured position as a teacher in the Waterford Township school district. A copy of this decision shall be forwarded to the State Board of Examiners pursuant to the requirements of N.J.A.C. 6:11-3.6 for action it deems appropriate with respect to respondent's certification.

COMMISSIONER OF EDUCATION

OCTOBER 25, 1991

DATE OF MAILING - OCTOBER 25, 1991
Pending State Board

BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner, John C. Scannell, Esq.
(Gerald L. Dorf, P.C.)

For Respondent, Sheri K. Siegelbaum, Esq.
(Scarinci & Pelio, Esq.)

The Board of Education of the Borough of New Milford (Board) appeals to the Commissioner of Education from an action taken by the Borough Council of the Borough of New Milford (Council) pursuant to N.J.S.A. 18A:22-37 certifying to the Bergen County Board of Taxation a lesser amount for current expense costs for the 1991-92 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate a proposal to raise $12,459,934 by local taxation for current expense costs of the school district. After the voters' rejection of the proposal, the Board submitted its budget to Council for its determination of the amounts necessary for

the operation of a thorough and efficient school system in New Milford for the 1991-92 school year pursuant to the mandatory obligation imposed on Council by N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Bergen County Board of Taxation an amount of $11,320,454 for current expense costs. The amount in dispute is shown as follows:

	CURRENT EXPENSE
Proposed Tax Levy	$12,459,934
Tax Levy Certified	11,320,454
Amount Reduced and In Dispute	$ 1,139,480

This total reduction is set forth more specifically below:

Current Expense	$ 439,480
Transfer to Capital Outlay	600,000
Surplus	100,000
Total reduction	$ 1,139,480

The Board asserts that the action taken by Council in reducing the budget for the 1991-92 school year was arbitrary and capricious so as to effectively destroy any educational continuity within the school district. The Board asserts further that Council's actions were based on a need to justify the vote to reject the budget for the 1991-92 school year and that its determination was not properly related to educational considerations but was in reaction to the voters.

The Council argues that its budget reductions do not cut any educational programs, teachers or supplies; neither do the reductions compromise a thorough and efficient education for the school children of New Milford.

This matter has been submitted to the Commissioner on the papers pursuant to N.J.A.C. 6:24-7.1 et seq. A review of these moving papers together with their supporting documentation shows

that Council has satisfactorily met its obligation to the Board pursuant to N.J.S.A. 18A:22-37 and the dicta set forth in Bd. of Ed. of the Twp. of Deptford v. Mayor and Council of the Twp. of Deptford, 116 N.J. 305, 313 (1989).

The supporting documentation identifies the line item reductions as follows:

SALARIES

ACCOUNT NUMBER	LINE ITEM	BOARD'S PROPOSAL	COUNCIL'S PROPOSAL	REDUCTION
110A	Admin. Salaries	$249,200	$228,555	$20,645
110B-D	Admin. Staff Salaries	172,800	169,968	2,832
211	Principals Salaries	414,700	410,679	4,021
212A	Supervisors Salaries	67,840	64,000	3,840
212B	Other Supervisors Salaries	113,460	112,147	1,313
510	Bus Drivers Salaries	87,000	84,504	2,496
610	Custodians Salaries	804,500	796,370	8,130
710	Maintenance Salaries	205,100	203,175	1,925
			Total Salary Reductions	$45,202

OTHER EXPENSES

ACCOUNT NUMBER	LINE ITEM	BOARD'S PROPOSAL	COUNCIL'S PROPOSAL	REDUCTION
120	Purchased Services	$ 103,100	$ 98,608	$ 4,492
130	Administrative Other	60,100	55,461	4,639
220	Textbooks	90,115	81,091	9,024
230	Library A.V.	45,365	37,819	7,546
240	Teaching Supplies	155,384	144,375	11,009
250/60	Office Expense	216,100	174,929	41,171
420	Health Supplies	6,000	2,582	3,418
520	Trans. Contracts	405,900	384,886	21,014
530	Bus Replacement	30,000	-0-	30,000
630	Heating Oil	102,000	97,125	4,875
640	Utilities	300,000	283,500	16,500
650	Custodial Supplies	98,920	90,117	8,803
720	Maint. Ser. Contracts	447,000	429,713	17,287
820	Medical Insurance	1,470,000	1,255,500	214,500
880*	Transfer to Capital	600,000	-0-	600,000
-	Additional Surplus	-	-0-	100,000
			Total Expense Reductions	$1,094,278

* The Council refers to this line item as 888; the Board's proposed budget refers to it as 880.

These tables show that Council's reductions for Salaries and Other Expenses total $1,139,480.

Based on the above reductions effectuated by Council, it is observed that the cuts have been made in three main groups: they are (1) Wages/Fees; (2) Expenses/Supplies; and (3) Capital Improvement. Nevertheless, by utilizing the documentation submitted by the litigants, the line items in question have been examined, and the conclusions regarding these line items are set forth below. To begin, an overview of the positions taken by both litigants is necessary so that their respective tactics may be better understood.

WAGES/SALARIES-GENERAL

The Board used the Consumer Price Index as a guide to determine the kinds of salary increases it was prepared to offer in its negotiations with its employees. That index was 6.1% for 1990 (Exhibit 2, 3, Rickert-Affidavit). Generally the Board applied a 6% increase to the wages/salaries of the employees represented by the Board's five collective negotiations' units. They are the -

New Milford Educational Association
New Milford Administrators Association
New Milford Association of Educational Secretaries
New Milford Custodial Association
New Milford Cafeteria Workers

Each of the agreements with these units expired on June 30, 1991, and required renegotiation.

Council asserts that a general increase in salaries, using 6.1% as the pertinent figure as the proper cost-of-living increase in salaries, is inappropriate. Rather, Council asserts that a more appropriate figure to use is 5.3% as set forth in the Bureau of Labor Statistics wage index for July/90-June/91. Accordingly, Council believes that its overall reduction of 6.6% does not represent a debilitating cut in the Board's budget.

A line item analysis of the reductions follows.

SALARIES

Accounts 110A, 110B-D, 211, 212A, 212B, 510, 610, 710

The Board's position of a 6% overall increase in each of its salary accounts is entirely reasonable. It is not important that Council suggests the use of a different index on which the Board should base its salary increases. The increases are in accord with the salaries paid in comparable positions in the area, according to the documentation. Consequently, each of these increases will be restored to the budget.

Account 120, Purchased Services

No reasonable suggestions are offered for the reduction in this line item. Council did suggest that audit fees should be bid, if necessary, and that legal fees should remain at the 1990-91 levels.

The Board asserts that it is exempt from the requirement to bid for professional services such as auditors and attorneys (N.J.S.A. 18A:18A-5).

Finding no reasonable basis for the reduction in this account, the $4,492 will be restored to the budget.

Account 130, Administrative Expenses

The budgeted amount in this account is $60,100. Council cut $4,639 arguing that the budgeted amount represented an 8.4% increase. The Board seeks no increase over the amount budgeted for the 1990-91 budget; however, it concedes a reduction of $2,360 which would still allow for a 6% increase. The Board's reasoning is unpersuasive since there is no showing that a 6% increase is necessary in this account.

The $4,639 reduction is sustained.

Account 220, Textbooks

The Board requests that it be allowed to sustain the same level of support in this area as it had in the 1990-91 school year. No other reason is given as a need for textbooks; further, the Board agreed to a reduction of $4,085. However, the use of last year's funding as a basis for this year's needs, is not a valid reason to set aside Council's reduction; consequently, the $9,024 reduction by Council will be sustained.

Account 230, Library/Computer

Council contends that the Board does not need the increase suggested in this account. By extrapolation of a known dollar amount on May 1, 1991, Council concluded that the increase in this account was 26%. The Board denies this allegation and asserts that its requested increase is only $388, or 1% over the its 1990-91 budget for this line item. Based on the above, the reduction of $7,546 is restored to the budget.

Account 240, Teaching Supplies

A thorough and efficient educational opportunity certainly demands adequate teaching supplies. Council argues that the Board is seeking a 13% increase; however, the Board's documentation shows a 5% increase over the amount expended in 1990-91. This is an entirely reasonable expenditure; consequently, the $11,009 reduction by Council will be restored to the budget.

Account 250/260, Office/Professional Expense

The Board asserts that Council's reduction in these accounts failed to consider three newly established drug programs at an additional cost of $37,000. Additionally, it lost $7,000 in QEA

transportation aid to the Region 5 Special Education Consortium. Nevertheless, it concedes that it can absorb a reduction in this account of $7,171 and, therefore, requests a partial restoration of $34,000 of the $41,171 reduction. Council's reasons for the reduction merely suggest a 5% increase over last year's budget. In this case, the Board's need has been established and $34,000 is restored to the budget.

Account 420, Health Supplies/Other Expenses

Council reduced this account by $3,418 from the total budget of $6,000. The Board concedes to a reduction of $2,613; therefore, $805 will be restored to the budget and a cut of $2,613 is sustained.

Account 520, Transit Contracts

Account 630, Heating Oil

Account 640, Utilities

At the time of its budget preparation, the Board anticipated sizable increases in energy costs because of the Persian Gulf war. Those increases did not materialize; consequently, the Board does not object to Council's reductions in these accounts.

Accordingly, the $21,014, $4,875, and $16,500 reductions will be sustained.

Account 530, Bus Replacement

Council asserts that the Board may be able to afford a new bus by using reasonable care in the negotiating contracts with its employees. Reduction is $30,000.

The Board, citing N.J.A.C. 6:21-1.4(b), states that buses must be retired after 12 years. This particular vehicle (#123425) was manufactured in 1979 and must be retired in June 1992.

Based on the above, the need for a new bus has been established; therefore, $30,000 is restored to the budget.

Account 650, Custodial Supplies

The Board documents show a 4% increase in this line item over last year's budget. It asserts that the increase is needed to maintain the level of supplies budgeted in 1990-91. Council's assertion that the line item increase is 15% cannot be demonstrated by any of its documentation. The $8,803 reduction is restored to the budget.

Account 720, Maintenance Contracts

Council gave no reason for its reduction of $17,287. Rather, it expressed its belief that the increase in the budgeted item had nothing to do with a thorough and efficient system of schools in New Milford. The Board argues that its increase of $1,000 over the amount budgeted last year is necessary to maintain the services it provided in 1990. However, it requested a restoration of only $16,287 of the $17,287 reduction. Finding Council's reasons for the reduction unpersuasive, $16,287 will be restored to the budget.

Account 820, Medical Insurance

The Board's budget for this account is $1,470,000 which was reduced $214,500 by Council. Council argues that the Board's employees should pay part of the cost of their own medical insurance coverage, arguing further that the Board must make this a necessary topic in its negotiations with the employees union. Council believes that the Board is acting irresponsibly in not demanding co-payment from its employees, and requests that the entire reduction be sustained.

The Board asserts that it is required to negotiate in good faith with its employees pursuant to N.J.S.A. 34:13A-1 et seq. and that it cannot go to the negotiating table with a fixed position on mandatory employee contributions as set forth by Council.

The entire process of collective negotiations is between the Board and its employees. Although Council suggests that the medical benefits provided by the Board require an employee co-payment, this is a matter that must be left for determination by the negotiating parties. Consequently, the Commissioner finds no grounds for a reduction in this account as demanded by Council. On the other hand, the Board has adequately demonstrated its need for full funding in this account. The $214,500 is restored to the budget.

Account 880, Transfer to Capital

The litigants argue heatedly about the need for additional classroom space. It appears that the Board had previously gone to the voters for funds for construction of additional classroom space and has been turned down. In the instant matter, $600,000 was placed in the budget in the current expense account and designated for immediate transfer to the capital account.

The Quality Education Act of 1990, L. 1990, C. 44, eliminated the prior prohibition against the transfer of monies from current expense into capital outlay. Thus, the Board's action herein to transfer $600,000 from current expense to capital outlay is permitted under the newly revised N.J.S.A. 18A:22-8.2. What remains to be decided is whether the Board has demonstrated that the additional classroom space is necessary for the provision of a thorough and efficient education.

It is the Council's position that the $600,000 for four additional classrooms is not necessary because it believes that space is underutilized in the district. As to this, it contends that adequate classroom space already exists within the district for what it terms an "historically declining population." It also points to the fact that the voters have twice rejected the request for monies to be spent for this capital outlay and that even if there is a need for the space, fulfillment of that need should be deferred until the 1992-93 school year since construction could not begin until next year.

The Board, on the other hand, argues that the State Department of Education has denied further use of portable classrooms at the Berkley Street School. Exhibit 3 of the Superintendent's affidavit confirms this point.

The affidavits of the Superintendent and Assistant Superintendent and exhibits attached thereto more than amply document the need for additional classrooms to remedy the overcrowding at the Berkley Street School. In particular, the Superintendent's affidavit sets forth well the Board's rationale for selecting the option of constructing additional classrooms at this school as opposed to other alternative courses of action. The Board's rationale is based on sound educational reasons. Further, the construction of the additional classrooms would appear to provide the least disruption to the students in the New Milford district in that no new configuration of grade organization would be necessary.

Consequently, the $600,000 reduction is ordered restored.

Account, N/A - Utilize Additional Surplus

Council refers to the budgeted figures and the encumbrances reported by the Board, and asserts that there is sufficient surplus in the budget to further offset the current expenses as proposed. Council believes that only actual expenditures can be reviewed to determine the amount of surplus, and that a review of Board expenditures shows that an additional $100,000 is available to be utilized for current expenditures.

The Board defends its need for an adequate surplus arguing that Council's reduction is not supported by reasons; rather, its action is untenable and related to voter reaction merely to reduce the budget.

A review of the Board's supporting documentation shows that its surplus is within the guidelines set by the Commissioner as reasonable for boards to carry.

It is well-established in decisional law that a board of education is empowered to maintain a reasonable surplus to meet unforeseen contingencies. Fair Lawn Bd. of Ed. v. Mayor and Council of Fair Lawn, 143 N.J. Super. 259 (Law Division 1976), aff'd 153 N.J. Super. 480 (App. Div. 1977) See, also, N.J.A.C. 6:20-2.14 and Bd. of Ed. of the City of Perth Amboy v. Council of the City of Perth Amboy, Middlesex County, decided by the Commissioner December 2, 1987.

From his review of the record, the Commissioner finds no justification for further reductions in this budget. Accordingly, the $100,000 reduction by the Council is restored.

A recapitulation of the amounts restored to the budget is set forth as follows:

SALARIES

Accounts 110A, 110B-D, 211, 212A, 212B, 510, 610, 710

A full restoration of $45,202 is made so that each of the above salary accounts is fully funded.

OTHER EXPENSES

ACCOUNT NUMBER	LINE ITEM	AMOUNT OF REDUCTION	AMOUNT RESTORED	AMOUNT NOT RESTORED
120	Purchased Services	$ 4,492	$ 4,492	$ -0-
130	Administrative Other	4,639	-0-	4,639
220	Textbooks	9,024	-0-	9,024
230	Library A.V.	7,546	7,546	-0-
240	Teaching Supplies	11,009	11,009	-0-
250/60	Office Expenditures	41,171	34,000	7,171
420	Health Supplies	3,418	805	2,613
520	Trans. Contracts	21,014	-0-	21,014
530	Bus Replacement	30,000	30,000	-0-
630	Heating Oil	4,875	-0-	4,875
640	Utilities	16,500	-0-	16,500
650	Custodial Supplies	8,803	8,803	-0-
720	Maint. Ser. Contracts	17,287	16,287	1,000
820	Medical Insurance	214,500	214,500	-0-
880	Transfer to Capital	600,000	600,000	-0-
-	Additional Surplus	100,000	100,000	-0-
	Totals	$1,094,278	$1,027,442	$66,836

Combining the results of the salary restorations ($45,202) with those shown in the above table ($1,027,442) the total restoration in the current expense account is, therefore, $1,072,644. The $100,000 in additional surplus has been restored to the budget and is included in the total current expense restoration above.

Based on the above, the reductions sustained total $66,836, and $1,072,644 has been restored to the budget.

Accordingly, the Bergen County Board of Taxation is directed to add to the local tax levy for the Borough of New Milford, $1,072,644 for current expenses of the school district for the 1991-92 school year.

Amount of Tax Levy Certified by the Governing Body	$11,320,454
Amount Restored by the Commissioner	1,072,644
Total Tax Levy After Restoration	$12,393,098

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 1, 1991

DATE OF MAILING- NOVEMBER 1, 1991

Pending State Board

BOARD OF EDUCATION OF THE BOROUGH OF NETCONG, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF NETCONG, MORRIS COUNTY, RESPONDENT.	:	DECISION

For the Petitioner, Rand, Algeier, Tosti & Woodruff (Russell J. Schumacher, Esq., of Counsel)

For the Respondent, Mudge, Rose, Guthrie, Alexander & Ferdon (John P. Jansen, Esq., of Counsel)

This matter was opened before the Commissioner of Education by the filing of a Petition of Appeal on the part of the Board of Education of the Borough of Netcong (Board) appealing the reduction in the 1991-92 budget imposed by the Borough Council of the Borough of Netcong (Council) pursuant to the provisions of N.J.S.A. 18A:22-37. The aforesaid reduction consisted of a $128,570 reduction in Current Expense and a $4,623 reduction in Capital Outlay. As a result of these reductions the amounts in dispute before the Commissioner are summarized below:

	Proposed Tax Levy Adopted by District Board of Education	Amount of Tax Levy Certified By Governing Body
Current Expense	$1,408,891	$1,280,321
Capital Outlay	4,623	-0-

Amount of Reduction by Governing Body

Current Expense	$ 128,570
Capital Outlay	4,623

Amount of Reduction in Dispute

Current Expense	$ 128,570
Capital Outlay	4,623

On July 1, 1991 the Council filed its Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6 and 7.7. On July 22, 1991 the Board filed its written submission in support of its Petition of Appeal and the Council filed its position statement on July 18, 1991. A Rebuttal was filed on July 29, 1991 by the Board. No further papers were filed by either party.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the

amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, the Council upon defeat of the 1991-92 budget by the electorate did confer with the Board as required by N.J.S.A. 18A:22-37 and established a tax levy to be used for school purposes. The aforesaid tax levy was established by imposing the following line item reductions:

CURRENT EXPENSE REDUCTIONS

All line items of the Current Expense portion of the budget remain unchanged except as noted below.

Acct.	From	To	Reduction	Rationale for Reduction
120d	$ 5,000	$ 2,000	($ 3,000)	Elimination of professional union negotiator. Negotiations can be handled by the Board of Education and the Superintendent.
130m	3,300	2,700	(600)	Elimination of printing and publishing costs for additional public relations.
130n-1	2,400	1,900	(500)	Elimination of extra postage and envelopes for additional public relations.
211b	55,578	19,578	(36,000)	Reduction in position of full time principal due to declining enrollment and sufficient administrative staff to handle principal's responsibilities.
230c	6,245	5,000	(1,245)	Reduction justified based upon prior year expenditures and current year commitments.
410a	47,696	44,696	(3,000)	Reduction justified since amount was paid in prior school year.
550a	500	100	(400)	Reduction justified based upon prior year expenditures and current year commitments.

Acct.	From	To	Reduction	Rationale for Reduction
550b	$ 50	$ 25	($ 25)	Reduction justified based upon prior year expenditures and current year commitments.
550c	300	-0-	(300)	Reduction justified based upon prior year expenditures and current year commitments.
630	37,000	35,000	(2,000)	Reduction justified based upon prior year expenditures.
640b	26,680	25,180	(1,500)	Reduction justified based upon prior year expenditures.
640c	300	100	(200)	Reduction justified based upon prior year expenditures and current year commitments.
640d	5,800	5,300	(500)	Reduction justified based upon prior year expenditures and current year commitments.
650d	550	150	(400)	Reduction justified based upon prior year expenditures and current year commitments.
660d	500	200	(300)	Reduction justified based upon prior year expenditures and current year commitments.
720a	1,000	400	(600)	Reduction justified based upon prior year expenditures and current year commitments.
720b	13,000	10,000	(3,000)	Reduction justified based upon prior year expenditures and current year commitments.
870a	150,000	125,000	(25,000)	Reduction justified based upon prior year expenditures and current projections.
880a	150,000	100,000	(50,000)	Reduction based upon information furnished by the Board of Education on projected costs for removal and cleanup of underground storage tanks.
TOTAL REDUCTION			$ 128,570	

CAPITAL OUTLAY REDUCTION

Acct.	From	To	Rationale for Reduction
1230c	$4,623	-0-	Replacement of rugs can be deferred.
TOTAL REDUCTION		$4,623	

In addition to the aforesaid tax levy reductions, the Borough also reduced an appropriation of $50,000 from free balance meant to carry out a underground storage tank removal project under line item 880a.

BOARD'S POSITION

Account 120d - Professional Negotiator Reduction: $3,000

The Board by way of Affidavit of Dr. Vincent M. Togno, Netcong Superintendent, attached to the Board's Statement of Position contends that it requires the services of a professional negotiator due to a changing climate in labor relations and newly enacted laws expanding the scope of negotiations. The Board contends that a small district like Netcong finds it difficult to participate directly in protracted negotiations. The Board contends that direct participation in negotiations undermines relationships between the administration and the teaching staff.

Account 130m - Printing and Publishing Reduction: $600

The Board requests full restoration of the amount reduced in this account in order to upgrade its public relations program. It cites the State Department of Education Monitoring Manual for the proposition that an effective public relations program is an integral element in a successful public school operation.

Account 130n-1 - Postage and Envelopes Reduction: $500

The amount of reduction in this line is requested to be restored in order to carry out the public relations campaign indicated above.

Account 211b - Principal's Position Reduction: $36,000

By way of Dr. Togno's Affidavit, the Board argues for the retention of the principal's position contending that the elimination of a full-time principal would leave the superintendent as the only administrator in the district. Dr. Togno points out that in addition to his duties as superintendent he serves as the district's business administrator. He argues that the other duties which he is required to carry out prevent him from carrying out the many duties of principal which are listed in paragraph 9 of Dr. Togno's Affidavit and incorporated herein by reference.

Dr. Togno further argues that as a District Factor Group "D" district it has many students who have special educational needs which require the additional attention of the principal. He contends that to require the superintendent to provide these services in addition to districtwide administrative and business functions would be an injustice to the Netcong School District.

Finally, Dr. Togno notes the district's report card and that Netcong's administrator/student ratio is in accord with comparable districts.

Account 230c - Audio Visual Materials Reduction: $1,245

The Board contends that the amount reduced in this account is necessary in order to introduce mathematics manipulatives and other electronic programs into the district's programs. It also cites additional needs due the adding of a third grade class necessitated by increasing enrollment.

Account 410a - School Nurse Salary Reduction: $3,000

The above amount which equals the nurses' salary increase for the 1991-92 school year is required according to the Board, to meet its negotiated agreement obligations.

Account 550a - Gasoline Reduction: $400

The monies budgeted in this account, contends the Board, are necessary to fuel its gasoline powered equipment. The Board argues that the budget contains insufficient funds for this purpose.

Account 550b - Lubricants Reduction: $25

This amount is necessary, contends the Board, to provide oil and filters for its equipment.

Account 550c - Tires and Tube Replacement Reduction: $300

Again the Board argues that the money by which this account was reduced is necessary to meet contingencies in this area.

Account 630 - Heat Reduction: $2,000

The Board argues that since it will convert from oil to gas it is necessary to adequately budget for anticipated costs. It submits that its amount budgeted is reasonable.

Account 640b - Electricity Reduction: $1,500

The Board argues that the amount budgeted in this area is reasonable and no more than adequate to meet its electricity costs.

Account 640c - Gas Reduction: $200

The Board submits that the amount originally budgeted in this account is reasonable and needed to preheat.

Account 640d - Telephone Reduction: $500

The Board contends this amount is necessary to meet increased costs.

Account 650d - Custodial Supplies Reduction: $400

The Board submits that the entire $500 in its original budget is necessary in order to purchase a costly gym floor seal. The Board contends that the purchase of this seal will exceed the entire amount originally budgeted.

Account 660d - Miscellaneous Expenses Reduction: $300

The Board argues that the entire amount originally budgeted in this account is necessary to meet contingencies in the area of plant operations.

Account 720a - Grounds Upkeep Reduction: $600

The amount budgeted in this account is required for upkeep of school grounds. The amount originally budgeted in this account is deemed reasonable by the Board.

Account 720b - Repair of Buildings Reduction: $3,000

In 1990-91 the Board contends that it expended $16,407.71 for building repair. It contends that it anticipates additional needed repairs and therefore believes the entire $13,000 contained in its original budget is reasonable.

Account 870a - Tuition, Special Education Reduction: $25,000

The Board points out that tuition costs in this area are mandated. The Board disputes the Council's contention that the reduction is based upon prior year expenditures. The Board contends that it informed the Council at its conference that it faced the necessity for additional out-of-district placements. Dr. Togno contends that it is now evident that special education tuition costs will exceed the original $150,000 budgeted in this line item.

Account 880a - Storage Tank Removal Reduction: $50,000

The Board contends that the entire amount of $150,000 is necessary to meet the cost of removal of underground fuel oil storage tanks. The Board proposed to transfer $150,000 from free balance to cover the cost of this project. The $50,000 reduction leaves only $100,000 for purposes of completing this project when its consultant has indicated a total projected potential cost of $166,250. (See Exhibit A, Board's Response Brief.)

CAPITAL OUTLAY

Account 1230c Reduction: $4,623

The amount in this account was budgeted for purposes of installing new carpeting in the 1925 wing of the school building. The Board contends that the replacement need was identified by the County School Business Administrator in a pre-monitoring inspection. The Board contends that its consultation with a rug repair firm produced an opinion that the carpeting is irreparable. The Board contends that it has been engaged over a number of years in replacement of carpets. The amount budgeted in this area would continue this project.

In its concluding argument, the Board urges the Commissioner to consider that its proposed budget was $64,703 under cap and that the reductions imposed by the Council will adversely affect the education provided by the Netcong Public Schools.

COUNCIL'S POSITION

Account 120d - Other Contracted Services Reduction: $3,000

The Council contends that nothing was expended in this account for 1989-90 and points out that it reduced this account because the Board has always conducted its own negotiations.

Account 130m - Printing and Publishing Reduction: $600

The Council argues that the Board did not expend the entire $2,700 budgeted in this account in 1989-90 yet budgeted the same amount in 1990-91. The Council points out that the $3,300 budgeted in 1991-92 is $600 above previous years and that the Board has never budgeted more than $2,700.

Account 130n-1 - Postage and Envelopes Reduction: $500

The Council advances the same argument for justifying the reduction in this account, namely the failure of the Board to expend its entire budget in 1989-90.

Account 211b - Principal' Position Reduction: $36,000

The Council argues that the duties of the principal can be administered by a teacher/administrator at a lesser salary than a full-time principal. It argues that such a configuration would not adversely affect a thorough and efficient system of education since it contends many of the duties of the principal and superintendent overlap and data from other districts indicate that both positions are not necessary. (See Council's Rationale at pages 2 and 3 of its Statement of Reasons contained as part of its Position Statement.)

Account 230c - Audio Visual Materials Reduction: $1,245

The Council argues that the reduction imposed in this account is reasonable by virtue of the fact that the Board expended only $2,418.54 out of $5,470 budgeted in 1989-90 and only $2,853.45 as of March 1991. Therefore, since previous years' expenditures have been held under the amount budgeted, the Council requests sustaining the reduction imposed in this account.

Account 410a - School Nurse Salary — Reduction: $3,000

The Council points out that the school nurse's salary was budgeted at $32,724 in 1989-90 and $36,663 in 1990-91. In increasing the budgeted amount by $11,033 for 1991-92 when the actual contracted increase is only $8,000, the Council contends that the Board is seeking to recoup an underbudgeting of $3,033 for 1990-91 which it had to transfer from other accounts.

Account 550a, b, c - Gasoline; Lubricants; Tires and Tube Replacement — Reduction: $725

In these three accounts, Council's reductions are based upon the fact that either a tiny fraction of the amount budgeted in previous years was actually spent or nothing was appropriated for the purpose indicated.

Account 630 - Heat — Reduction: $2,000

The Council's position in this account mirrors that taken in previous areas of the budget. It is its contention that since the Board spent only $30,000 out of the $35,000 budgeted in 1989-90 for fuel oil and has spent only half of the $35,000 budgeted for 1990-91, the $2,000 reduction in this account is reasonable.

Account 640b - Electricity — Reduction: $1,500

The Council charges that the Board has not expended the amounts budgeted in 1989-90 and 1990-91 for electricity. It therefore contends that the $1,500 reduction it imposed in this account still permits a $1,980 increase over 1990-91 which represents an 8.5% increase.

Account 640c - Gas — Reduction: $200

The Council's position in this account is the same as in the accounts discussed above, namely the Board's failure to expend the funds budgeted in previous years.

Account 640d - Telephone Reduction: $500

In 1989-90 only $4,537 was expended out of $5,800 budgeted and only $2,994.24 had been expended by March 1991. The Council therefore contends its $500 reduction will not impair services in this account.

Account 650d - Other Operational Supplies Reduction: $400

Based upon an expenditure of only $56.35 out of $500 budgeted in 1989-90, the Council believes its cut is reasonable.

Account 660d - Miscellaneous Expenses for Operation of Plant Reduction: $300

The Council's rationale in this account is the same as for previous accounts, namely failure to expend amounts budgeted in previous years.

Account 720a - Upkeep of Grounds Reduction: $600

Of $1,000 budgeted in 1989-90 only $8.96 was expended, while only $150 was expended by March 1991 out of $1,000 budgeted.

Account 720b - Repair of Buildings Reduction: $3,000

The Council points out that only $6,841.66 was expended in 1989-90 out of $13,000 budgeted. Of the $13,000 budgeted in 1990-91 only $12,550.74 had been expended by March 1991.

Since the only contemplated repair for the 1991-92 school year was replacement of the water meter at a cost of $3,000, the Council contends the $3,000 reduction should be sustained.

Account 870a - Tuition, Special Education Reduction: $25,000

The Council argues that only $91,850.11 was expended in 1989-90 out of $187,000 budgeted and only $67,281.74 was expended as of March 1991 in the 1990-91 school year despite a reduction in the

budgeted amount by the Board to $150,000. It therefore contends that based upon past year expenditures its $25,000 reduction is reasonable.

Account 880a - Transfer to Capital Outlay Reduction: $50,000

The Board transferred $150,000 from surplus to capital outlay for purposes of offsetting the costs of underground storage tank removal and possible cleanup of contaminated soil. The Council contends that information provided by the Board in its budget presentation indicated that the total capital outlay including removal of the heating oil tanks, rug replacement and conversion from oil heat to gas were included within the $150,000. The Council therefore contends that the $150,000 appropriation was an overestimation and that $50,000 of that amount should be used to offset the tax levy for current expenses.

COMMISSIONER'S DECISION

Prior to rendering his decision in this matter, the Commissioner notes the arguments raised by the Council in its Statement of Position filed July 18, 1991, which in effect contends that the Commissioner should consider the actual reductions imposed by the Board after the Council had enacted its reductions upon defeat of the budget. Those reductions, argues the Council, actually exceeded the reductions imposed by the Council in Accounts 220, 230c, 630, 640b and 720b.

The Board, for its part, contends the reduction that it has made to comply with the lower tax levy certified by the Council are not at issue in this matter since the Board by law is required to make the reductions imposed pending the determination of the appeal.

In weighing the arguments presented in this regard, the Commissioner agrees with the Board's assertion relative to its legal responsibilities to reduce its budget in conformity with the total reduction in the tax levy until the appeal is decided. The Commissioner notes that the Board is under no obligation to make those reductions in the areas recommended by the Council, but it is obligated to meet the sum total of the reductions.

Account 120d - Other Anticipated Services Reduction: $3,000

In weighing the arguments as presented by the parties as to whether the Board requires the services of a professional negotiator to conduct its collective bargaining, the Commissioner determines that the reduction in this account of $3,000 should be sustained. While he is sympathetic to the Board and superintendent's concern regarding the impact on staff relations of superintendent and Board directly negotiating, he must find such services, while highly desirable, do not meet the standard of being necessary for a thorough and efficient system of education.

Account 130m - Printing and Publishing Reduction: $600

The Commissioner finds that the Board has failed to meet its burden that the $600 reduction in this account would deprive it of its ability to provide a thorough and efficient system of education. The $600 reduction is sustained.

Account 130n-1 - Postage and Envelopes Reduction: $500

The Commissioner upon review of the parties' positions reaches the same conclusion as indicated in 130m. The reduction of $500 is sustained.

Account 211b - Elementary Principal Reduction: $36,000

The Commissioner has carefully reviewed the arguments of both parties in this most critical area of the budget appeal. After such review, the Commissioner finds the Council's arguments as to the overlap of the responsibilities of the superintendent and principal to be without merit. The Commissioner agrees with the Board's argument found on page 2 of its Response Brief that the areas of what appear to be overlap are in effect responsibilities at different levels. While, as pointed out by the Board, the principal is responsible for supervision of standardized test administration, the superintendent is responsible for analyzing, interpreting and reporting on test results to the Board and public.

In this particular circumstance the Commissioner is particularly mindful that the superintendent also serves in the capacity of school business administrator. It defies credulity that he would be able to effectively carry out the duties of chief school administrator, school business administrator and elementary school principal.

The Commissioner also notes that the district has no guidance counselor or director of its child study team, all of which roles in addition to teacher supervision require the presence of a full-time principal.

Consequently, the Commissioner directs the restoration of $36,000 to the principal's salary account.

Account 230c - Audio Visual Materials Reduction: $1,245

After an examination of the arguments of the parties and the record of expenditures by the Board in this area, the Commissioner sustains the $1,245 reduction in this account.

Account 410a - School Nurse Salary — Reduction: $3,000

The Commissioner finds and determines that the Board has met its obligation in demonstrating its need for the entire $47,696 budgeted in this account. Since the amount budgeted is undisputably what is required to meet the Board's contractual obligation to pay the salary of the school nurse, the underbudgeting of this account in previous years is immaterial. It is obvious that the Board met its obligations in the past by transferring funds. Whether the Board can accomplish this same purpose in 1991-92 will be dependent upon the totality of this budget appeal.

The Commissioner directs the restoration of the $3,000 reduction to this account.

Miscellaneous Accounts — Reduction: $9,225

The Commissioner sustains the combined reductions of $9,225 in the following accounts on the grounds that the Board has offered no compelling reason for their restoration:

550a Gasoline	$ 400
550b Lubricants	25
550c Tires and Tube Replacement	300
630 Heat	2,000
640b Electricity	1,500
640c Gas	200
640d Telephone	500
650d Other Operational Supplies	400
660d Miscellaneous Expenses for Operation of Plant	300
720a Upkeep of Grounds	600
720b Repair of Buildings	3,000
TOTAL	$9,225

Account 870a - Tuition, Special Education — Reduction: $25,000

In weighing the arguments presented by the parties in this account, the Commissioner is mindful of the difficulties involved in precisely determining special educational needs since evaluations and placements are ongoing throughout any given school year.

Therefore, in light of the unrebutted contention of the Board that its current special education tuition needs presently exceed the $150,000 in its original budget, the Commissioner directs the restoration of the $25,000 by which this account was reduced.

Account 880a - Transfer to Capital Outlay Reduction: $50,000

This is an amount by which the tax levy is proposed to be reduced by the Council through reducing the transfer of $150,000 from current expense to capital outlay by $50,000 and reducing the current expense tax levy by that amount. The $150,000 transfer is meant to cover the cost of underground storage tank removal and possible removal of contaminated soil.

The Commissioner has considered the arguments presented to him by the parties. Notwithstanding the contentions of the Council, the Commissioner upon examination of the worst case cost estimates of the Board's consultant, concludes that the entire $150,000 may be necessary in order to carry out the mandated removal of the storage tanks and the replacement of contaminated soil. While the cost may prove to be less than anticipated, it would be imprudent to budget less then required. (See Exhibit A, Board's Response Brief.) The Commissioner therefore directs the restoration of the $50,000.

CAPITAL OUTLAY

Account 1230c - Rug Replacement Reduction: $4,623

The Commissioner has reviewed the pre-monitoring inspection report of the Morris County School Business Administrator dated August 9, 1990 and appended as Exhibit B of the Board's Response Brief. Based upon the recommendation of the county office that the ripples in the rug be repaired to eliminate a safety hazard, the Commissioner finds and determines that the $4,623 for replacement of said carpet be restored to the capital outlay account.

SUMMARY

Capital Outlay	Reduction	Sustained	Restored
Account 1230c	$ 4,623	-0-	$ 4,623
Current Expense	**Reduction**	**Sustained**	**Restored**
Account 120d	$ 3,000	$ 3,000	-0-
Account 130m	600	600	-0-
Account 130n-1	500	500	-0-
Account 211b	36,000	-0-	36,000
Account 230c	1,245	1,245	-0-
Account 410a	3,000	-0-	3,000
Account 550a	400	400	-0-
Account 550b	25	25	-0-
Account 500c	300	300	-0-
Account 630	2,000	2,000	-0-
Account 640b	1,500	1,500	-0-
Account 640c	200	200	-0-
Account 640d	500	500	-0-
Account 650d	400	400	-0-
Account 660d	300	300	-0-
Account 720a	600	600	-0-
Account 720b	3,000	3,000	-0-
Account 870a	25,000	-0-	25,000
Account 880a	50,000	-0-	50,000
TOTALS	$125,570	$14,570	$114,000

In light of the foregoing the Commissioner directs the Morris County Board of Taxation to strike a tax levy which shall afford the Netcong Board of Education an additional $114,000 for current expense and $4,623 for capital outlay so that the total 1991-92 tax levy for the aforesaid purposes shall be:

Current Expense: $1,394,321

Capital Outlay: 4,623

IT IS SO ORDERED.

NOVEMBER 1, 1991

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 1, 1991

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6816-90
AGENCY DKT. NO. 269-7/90

JACQUELINE PIROZEK,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,
Respondent.

Robert P. Glickman, Esq., for petitioner
(Greenberg Margolis, attorneys)

Russell J. Schumacher, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: August 6, 1991 Decided: September 19, 1991

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an action by petitioner seeking tenure and seniority rights to a supervisory position in respondent school district, challenging the abolition of her position and alleging violations of the Open Public Meetings Act. Petitioner filed a verified petition with the Commissioner of Education on July 13, 1990, and respondent filed an answer on August 15, 1990. Thereupon, the matter was transmitted to the Office of Administrative Law (OAL) on August 27, 1990, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 et seq., and N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was held on November 16, 1990, and resulted in the entry of a prehearing order on November 26, 1990, which

settled the procedures to be followed at the hearing of this matter. Hearings were held on March 6, 7, and 28, 1991. At the conclusion of the hearing, the attorneys for the respective parties requested that the record remain open to allow them to make submissions 45 days after their receipt of the transcript. The record was closed on August 6, 1991, after the receipt of submissions by the attorneys for the respective parties.

FACTUAL DISCUSSION

Petitioner is presently employed by respondent as a basic skills instructor and has been so employed since September 1, 1990. The dispute in this matter deals with petitioner's employment prior to September 1, 1990.

Petitioner was first employed by respondent on September 1, 1969, as a supplemental teacher. She left respondent's employment from January 29, 1971 until September 1, 1975, in order to raise a family. On September 1, 1975, petitioner returned to respondent's employment as a supplemental teacher, a position she held until June 30, 1988, when she commenced serving as acting coordinator of the special services program. On September 1, 1988, petitioner was appointed special services program coordinator. Prior to September 1, 1988, no position of coordinator of special services programs existed in respondent district, this being an unrecognized title.

During virtually her entire period of employment by respondent, petitioner was under the supervision of John Tanzola. Mr. Tanzola served as director of student personnel services for respondent for approximately 21 years and performed supervisory duties. During the course of the hearing it was established that Mr. Tanzola did not receive a supervisor's certificate until May 1990. He explained that the lack of a supervisor's certificate was due to the fact that his certificate as director of student personnel services made a supervisor's certificate unnecessary from 1960 until 1976.

Petitioner's testimony was to the effect that she performed duties in a supervisory and administrative capacity from 1978 until her appointment as acting coordinator of the special services program in June 1988. In support of her contention, she relies upon a

letter of recommendation written by Mr. Tanzola sometime after July 1, 1988 (P-1) which indicates that petitioner "has served and performed administrative/supervisory duties on a part-time basis, more than half-time, without title for at least ten years." In addition, petitioner relies upon a number of evaluation reports indicating that she performed duties over and above her position as supplemental teacher. Finally, petitioner relies upon her own testimony with regard to the duties she performed during this ten year period to support her contention.

To summarize petitioner's testimony, she indicated that she performed the following duties and undertook the following responsibilities over the ten years prior to 1988:

1. She organized the basic skills improvement (BSI) program, the needs assessment and worked on curriculum for the program to comply with State requirements.

2. She evaluated test results in order to determine areas of weaknesses of children who required the services of the BSI program and to determine what material should be ordered to meet the needs of the children.

3. She attended various workshops regarding the BSI program.

4. She conducted in-service meetings and workshops for the BSI program teachers to familiarize them with the curriculum.

5. She did scheduling for the students who qualified for the BSI program.

6. She familiarized parents and parent groups with the BSI program as required by law.

7. She researched various tests such as the criteria and reference test which was used in September of each year, and conducted in service workshops for the BSI teachers regarding the tests.

8. She wrote individualized student plans for students in the BSI program to remedy their areas of weakness.

9. She conducted evening programs for parents of nursery school children to familiarize them with the curriculum in kindergarten.

10. She worked on Project Discovery which identified youngsters who are eligible for BSI programs in incoming kindergarten classes.

11. She ran district wide parent council meetings by holding two meetings each year with parents to inform them and keep them abreast of new laws and regulations applicable to the BSI program.

12. She did the groupings of BSI students.

13. She did scheduling for the BSI teachers.

14. She created and distributed comprehensive monthly information newsletter for the BSI teachers.

15. She held approximately four in-service meetings per year with the BSI teachers.

In addition to the foregoing, petitioner testified that she performed her duties as a supplemental teacher for handicapped students who are part of the special education program of respondent district. According to petitioner, her duties as a supplemental teacher were separate and apart from her duties in the BSI program and her BSI program duties are not included in the position specifications for supplemental teacher (P-42).

Petitioner indicated there were five to eight BSI teachers employed in the district during the years in which she was involved with the program.

By way of general explanation, petitioner testified that she was involved in writing news releases and newletters, preparing booklets and distributing them and organizing registration for the incoming kindergarten classes for the following September. She indicated she was involved with the Geselle screening and testing, and ran in-service workshops with the teachers for such screening. She prepared screening for approximatey 150 to 160 students. After the testing, petitioner would review the results of the tests.

In September over a period of several years, petitioner indicated that she would travel around to the various kindergarten teachers to obtain input with regard to children who might be eligible for the BSI program. She assisted with the preparation of the BSI program budget and this involved making a determination of what money would be applied to teachers salaries, supplies, instructional materials, consumables and nonconsumables. She also prepared an assessment book and a catalog of materials which would be assigned to the different schools. In addition, petitioner testified that she prepared and kept an assessment book for the materials listed for supplemental teachers of the district in the elementary schools.

Petitioner testified that, prior to 1988, she assisted Mr. Tanzola in preparing certain applications such as applications for State block grants. She also served on a committee for special education for the needs assessment for the special education program and represented one of the schools in the district for that purpose.

Petitioner testified that she worked with Mr. Tanzola in connection with home instruction, and in 1988 she assumed full responsibility for home instruction for the district. This involved coordinating the paperwork, the administration and scheduling of home instruction, but did not involve actual teaching.

Petitioner also testified that she attended county and State meetings with regard to BSI. She also set up individual folders for each BSI student in order to keep up to date materials dealing with that student's assessment of cognitive and noncognitive skills. She indicated that she was involved in organizing local remedial programs for grades K-12 and in establishing forms for all students who fell below minimum levels of proficiency.

Petitioner also testified that in connection with her duties as a special education teacher, she organized and developed materials and assessed plans for perceptually impaired (PI) students. She attended a workshop with Mr. Tanzola and organized a needs assessment for all the materials and reading, language arts and math that were used in the district for the three PI classes at Valley View School.

During the summer 1988, petitioner served as acting coordinator of special services. In this position, she worked many nights until midnight on State monitoring. During the same period, petitioner, without supervision, but with the help of the State Department of Education, worked on grant applications, the entire basic skills application of 125 pages, the English as a second language (ESL) application and curriculum with others, she prepared the addenda to the curriculum for special education, organized all curriculum guides for special education including BSI, worked on the administrative function of seeing that the curriculum for all phases of special education were up to date, working with and revising the special education folders so that they would meet monitoring criteria, and attending monitoring meetings.

Between 1975 and 1988, evaluations of petitioner were conducted by her supervisor. It is again to be noted that Mr. Tanzola did not have a supervisor certificate during this period and that he only obtained this in May 1990. Petitioner relies upon these evaluations to support her contentions. An examination of these evaluations reveals a progression of additional duties imposed upon petitioner over the years. The earliest evaluation in December 1981 (P-13) indicates that in addition to all of her regular duties, petitioner "provided additional duties in connection with the Title I (BSI) program." A similar comment is found in the March 1982 evaluation (P-14).

The evaluation of December 1982 (P-15) indicates that petitioner provided "in-service for staff and presentations for parent groups" and further indicates that she assisted in coordination of programs under Chapter I (BSI). It further indicates that petitioner did testing for evaluation of some BSI students.

The evaluation of March 1983 (P-16), indicates that petitioner assisted in providing in-service for regular staff and for Chapter I teachers, that she performed individual and program testing for BSI purposes and she assisted in keeping accurate updates of the BSI inventory as well as participated in Project Discovery. The evaluation of December 1983 (P-2) indicates that petitioner participated in an in-service program of supplemental and BSI teachers and that she provided much valuable assistance in the BSI program including some activity on her own time.

The evaluation of March 1984 (P-3) indicates that petitioner provided much assistance in the implementation of the BSI program in the form of in-service for staff, inventory of instructional materials, newsletters to BSI teachers and ongoing supportive input. In connection with BSI monitoring, petitioner's efforts were recognized and complimented. It was also indicated that petitioner provided assistance in relation to in-service of BSI teachers and test administration in relation to Geselle testing. Similar comments are found in the evaluation of December 1984 (Exhibit P-4).

The evaluation of March 1985 (P-5) indicates that petitioner participated in the BSI program in addition to carrying a full supplemental teaching schedule. It indicates that she assisted in providing orientation for BSI teachers at the beginning of the school year, that she participated in parent BSI meetings, maintained communication with BSI teachers especially through informative newsletters, and assisted others in the training of BSI teachers to administer the Geselle development test for Project Discovery. The evaluation of December 1985 (P-6) contains similar comments but also indicates that petitioner continued to provide assistance in the coordination of the BSI program and also provided BSI teachers with needed materials and instructional assistance on an ongoing basis. It further indicates that petitioner effectively participated with Mr. Tanzola in the annual BSI meeting, and that petitioner performed these duties on her own time over and above requirements. Finally, it indicates that petitioner performed post-testing of the kindergarten children in BSI for evaluation purposes and adds the comment that petitioner provided effective assistance. Similar comments are included in the evaluation of March 1986 (P-7), the evaluation of December 1986 (P-8), and the evaluation of March 1987 (P-9).

The Professional Improvement Plan dated October 28, 1987 (P-10) indicates that petitioner has contributed significantly to the special education department which includes her involvement with the BSI program and that she provided valuable administrative assistance which enhances the BSI program. The evaluation of December 1987 (P-11) indicates that in addition to her role as a supplemental teacher, petitioner provided valuable assistance to the BSI program. Similar comments are contained in the evaluation of March 1988 (Exhibit P-12).

It should be noted that with regard to the BSI program, petitioner did not teach any of the students but rather worked in an administrative capacity.

In connection with her salary claim, petitioner testified that she received a salary based on the teachers' salary guide for a supplemental teacher as follows:

Year	Amount
1978	$15,932
1979	17,047
1980	18,240
1981	20,009
1982	22,270
1983	23,940
1984	25,855
1985	28,324
1986	30,873
1987	33,700
1988	44,600 (pro-rated)
1989	48,837
1990	50,000

Petitioner alleges that between 1978 and 1988, she earned $10,000 less per year than if she were paid as a supervisor, and claims that she is entitled to payment of a total of $100,000 by respondent school district. During the summer 1987, petitioner was employed for a period of two weeks to perform duties in the BSI program at a salary of $3,370 with a final salary pending completion of negotiations with the teachers' union (Exhibits R-10 and P-20).

Petitioner indicated that she agreed with Mr. Tanzola's statement in his letter (Exhibit P-1) to the effect that in addition to performing her duties as a supplemental teacher, she also performed additional duties more than half-time of an administrative and supervisory nature for at least 10 years.

Petitioner testified that she spoke to Mr. Tanzola, as well as the assistant superintendent and superintendent of schools and other individuals in a supervisory position at least 100 times over the ten years seeking to be paid for the administrative and supervisory duties she was performing for respondent over and above her duties as a supplemental teacher.

With regard to the issue of bad faith, petitioner testified that she spoke to Dr. Bozza, superintendent of schools on March 27, 1990, as to whether her position as coordinator of special services was in jeopardy. She related that Dr. Bozza stated that he did not feel that her position was in jeopardy. However, on June 21, 1990, petitioner was advised by Dr. Bozza that her position was being abolished.

In this regard, petitioner's husband, Michael Pirozek, testified that he served as a Board of Education member for nine years, with his term ending May 1, 1990. According to Mr. Pirozek, he spoke to Dr. Bozza on March 28, 1990, and was advised by Dr. Bozza that petitioner's position was secure. Eventually, petitioner's position as coordinator of special education was abolished on July 5, 1990, and the duties which petitioner previously performed are now being performed by Susan Henzel Glickman. It is undisputed that Ms. Glickman, the elementary supervisor, earns $59,500 and that petitioner earned $48,600 as coordinator of special services programs.

Petitioner testified that the reorganization approved by the respondent, Board of Education, resulting in the abolition of petitioner's position as program coordinator of special services, costs the district an additional $100,000. This testimony was not disputed by respondent. Petitioner also testified that there was never any public discussion by the respondent Board dealing with the reorganization or with the abolition of her position.

It was the testimony of Michael Pirozek that after Dr. Bozza was appointed as superintendent of schools, neither Mr. Pirozek or any other Board member directed Dr. Bozza to study the reorganization of the district. Mr. Pirozek testified that there was no discussion by the Board of Education prior to May 1, 1990, authorizing or directing such reorganization study. It should be noted that the reorganization plan is dated May 15, 1990. Mr. Pirozek testified that the first time he heard of a proposed reorganization was on or about June 21, 1990. However, he admitted that in January 1990, Dr. Bozza was directed to look at the efficiency of administrative and supervisory positions, but was not directed to study their reorganization. Mr. Pirozek testified that, according to the best of his knowledge, there was no need to accomplish any financial savings by restructuring or reorganizing the supervisory administrative and support staff in the district. Finally, it was established that when Dr. Bozza was appointed as superintendent of schools, all the Board members voted for the appointment of Dr. Bozza with the exception of Michael Pirozek who abstained.

In support of her contention that she is entitled to an additional $10,000 per year for 10 years, petitioner submitted the salary of John Tanzola which indicates that he received the following compensation for his services:

Year	Amount
1978	$29,080
1979	30,867
1980	32,417
1981	35,335
1982	38,692
1983	41,787
1984	45,546
1985	49,417
1986	53,617
1987	58,174
1988	64,910 (Includes longevity of $1,500)
1989	69,349 (Includes longevity of $1,500)
1990	74,438 (Includes longevity of $1,500)

On cross-examination, petitioner admitted that as a supplemental teacher she was constantly involved in testing or otherwise assessing and evaluating students. She also admitted that her supervisor, John Tanzola, attended approximately one-half of the district wide parent council meetings for the BSI program. She indicated that she assisted Mr. Tanzola in the preparation of the BSI applications and indicated that they worked together gathering data and documentation and that Mr. Tanzola was responsible for and signed the applications up through 1987. With regard to the BSI budget, she indicated that the ultimate responsibility for the budget was Mr. Tanzola's and hers and that Mr. Tanzola signed as the contact person.

Petitioner also admitted on cross-examination that she conducted in-service for supplemental teachers and classroom teachers in connection with classified students. She indicated that she assisted Mr. Tanzola in making a list of students who were falling below minimum levels of proficiency as shown by the California Achievement Test and submitted these lists to the principals. She admitted that Mr. Tanzola was ultimately responsible for the compiling such lists. Petitioner also indicated that part of her duties as a supplemental teacher included selecting teaching materials for classified students. She further admitted that teachers are included on curriculum committees.

Petitioner indicated that teachers perform in-service for other teachers and also provide assistance to other teachers.

Petitioner admitted and clarified on cross-examination that she characterized administrative and supervisory duties as any duties that were not within her job description as a supplemental teacher. In addition, petitioner admitted that she did not object to the two objectives set forth in her improvement plan dated October 28, 1987 (P-10). But that she considered these duties to be supervisory.

Petitioner indicated that because she assisted Mr. Tanzola in the performance of his administrative duties, she feels that she performed administrative and supervisory duties. It was her testimony that she performed all of the duties specified in the position specification for special services program coordinator prior to her appointment to that position in 1988.

The testimony of John Tanzola did not directly contradict that of petitioner. In effect, Mr. Tanzola confirmed petitioner's testimony as to the various duties and responsibilities performed by her. However, he emphasized that she was assisting him in the performance of these duties. According to Mr. Tanzola, there came a point in time when his work load became oppressive with the additional duties and responsibilities imposed by the State in connection with the BSI program. It was at this time that petitioner began performing additional duties in the BSI program. However, according to Mr. Tanzola, petitioner's performance of these duties was for the purpose of assisting him in the performance of his administrative duties. He indicated that in all respects, he continued to be responsible for the supervision of the programs and to be responsible for the oversight of petitioner in the performance of these duties. However, it was conceded by Mr. Tanzola that a number of duties performed by petitioner were accomplished with no direct supervision on his part including the preparation of the monthly newsletter informing BSI teachers of new developments in the BSI program, the conducting of a number of in-service meetings with BSI staff, preparation of the agendas for BSI in-service meetings, scheduling of and attendance at parent-council meetings, ordering of supplies, cataloging of materials, sending out material lists to the BSI teachers, reviewing and evaluating test results of BSI students, and visiting of all elementary schools in the district and preschool programs for parents. Mr. Tanzola indicated that during this ten year period, petitioner and he worked together as a team rather than in a supervisor-subordinate relationship.

Mr. Tanzola's testimony dealt with the duties and responsibilities performed by petitioner up to the time of her appointment as special services program coordinator in September 1988. Mr. Tanzola testified that the petitioner never evaluated teachers but otherwise provided him with assistance in the BSI program. She assisted him in reviewing test scores. He indicated that she participated in Project Discovery, a pre-kindergarten screening program. He testified that the petitioner did the actual testing of children for this program.

Mr. Tanzola testified that petitioner assisted with the BSI application in performing clerical functions such as compiling data and collecting materials. He testified that the

newsletter prepared by petitioner was a vehicle of communications started sometime in the mid 1980s. With regards to the BSI budget, he completely prepared it prior to 1984 and thereafter she assisted him in compiling data for the budget.

With regards to communication with nursery schools, Mr. Tanzola testified that he would communicate directly with the principals but that when they requested a speaker at parent meetings that he requested that petitioner speak at such meetings.

Mr. Tanzola testified that he was totally responsible for home instruction and that petitioner acted as a liaison between the school nurse and the parent. Finally, Mr. Tanzola testified that all of petitioner's duties prior to September 1988 were in the capacity of an assistant to him and she was never responsible as a supervisor or administrator for the performance of the duties.

Mr. Tanzola explained that the letter of recommendation written by him sometime after July 1988 (P-1) is intended to refer to administrative and supervisory duties in a broader context. He explained that petitioner was assisting him in the performance of his administrative and supervisory duties but he indicated that he was ultimately responsible for their performance. Mr. Tanzola clarified that the administrative authority and responsiblity for the performance of these duties was his and that petitioner assisted him in performing these duties.

Mr. Tanzola admitted that no other supplemental teachers did what petitioner did as part of their duties. He further indicated that he discussed with petitioner all aspects of the duties that she was performing. Mr. Tanzola admitted that the petitioner worked full-time as a supplemental teacher and half-time in the BSI program performing the additional duties.

ISSUES TO BE RESOLVED

At the telephone prehearing conference conducted on November 16, 1990, the attorneys for the respective parties agreed that the issues to be resolved in this matter were as follows:

1. Whether petitioner's tenure and seniority rights in the Montville school district entitle her to a supervisory position as program coordinator, special services and/or administrator/supervisor?

2. Whether the position held by petitioner was illegally abolished by respondent?

3. Whether petitioner has bumping rights based on seniority?

4. Whether respondent violated the Open Public Meetings Act and, if so, what is the effect of those alleged violations?

5. Whether petitioner could obtain tenure in a supervisory position without having the appropriate certificate?

At the commencement of these proceedings, counsel agreed that an additional issue in this matter is as follows:

6. Whether petitioner is entitled to damages under the circumstances of this case?

Finally, it should be noted that after the commencement of the hearing, the respondent sought to include an additional issue whether petitioner's claims for damages are untimely pursuant to N.J.A.C. 6:24-1.2? Respondent's motion was denied, subject to the authority of the administrative law judge (ALJ) to amend the prehearing order to conform with the proofs pursuant to N.J.A.C. 1:1-13.2.

LEGAL DISCUSSION AND ANALYSIS

The central issue to be determined in this matter is whether petitioner obtained tenure in a supervisory position under the facts and circumstances of this case?

It is undisputed that petitioner has tenure in her position as a supplemental teacher based upon her appointment, years of service and certification as a teacher. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). Whether petitioner has tenure in a supervisory position is another matter. N.J.S.A. 18A:28-5 provides that teaching staff members, including "such . . . employees as are in positions which require them to hold appropriate certificates issued by the board of examiners," acquire tenure after service in the district for the appropriate three-year probationary period. Thereafter, they "shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause." N.J.S.A. 18A:28-6 goes on to provide that any staff member under tenure "who is transferred or promoted with his consent to another position" obtains tenure "in the new position" after the prescribed period of employment.

In this case, the respondent agrees that petitioner, who has been continuously employed since September 1975 as a supplemental teacher, acquired tenure as a supplemental teacher. However, petitioner argues that because she performed supervisory duties for at least a 10-year period between 1978 and 1988, that she acquired tenure to the supervisory position In this connection, attorney for petitioner argues that because the supervisory position held by petitioner did not require a certificate, that a certificate was not necessary in order for petitioner to acquire tenure. However, this position misconstrues the provisions of the tenure statutes. Under the provisions of N.J.S.A. 18A:28-5, only teaching staff members who are in positions which require them to hold appropriate certificates issued by the Board of Examiners may acquire tenure. In essence, if a certificate is not required in order for a teaching staff member to hold a position, the teaching staff member cannot acquire tenure in that position. See, N.J.S.A. 18A:1-1, which defines "teaching staff member" to mean a member of the professional staff of any district or regional board of education 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. Therefore, if an individual holds an office, position or employment for which certificate is not required, he or she does not fall within the definition of "teaching staff member" and

therefore cannot obtain tenure. See, Point Pleasant Beach Teachers' Ass'n. v. Callam, 173 N.J. Super. 11 (App. Div. 1980) certif. den. 84 N.J. 469.

The burden of proving the right of tenure is upon the teacher, and ordinarily such a right must be clearly proved. Canfield v. Bd. of Ed. of Borough of Pine Hill, 51 N.J. 400 (1968). In order to attain tenure, the precise statutory requirements must be met. Zimmerman v. Newark Bd. of Ed. 38 N.J. 65 (1962). As was stated in Spiewak v. Rutherford Bd. of Ed. 90 N.J. 63 (1982), a teaching staff member of a Board of Education is entitled to tenure "if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; (3) she has served the requisite period of time." [at 74]

In order to accrue service time toward tenure as a supervisor, one must have been appointed to the supervisory position by the Board of Education with duties for such position set forth in a Board approved job description, Buehler v. Bd. of Ed. of the Township of Ocean, Monmouth County, 1970 S.L.D. 436, 441; aff'd. State Bd. of Ed., 1971 S.L.D. 660; aff'd. App. Div. Dkt. No. A-2297-70, 1972 S.L.D. 664. The holding in Buehler relies upon the provisions of N.J.S.A 18A:27-1 which provides that no teaching staff member shall be appointed except by a recorded roll call majority vote of the full membership of the board of education appointing him.

In this case respondent acknowledges that petitioner was appointed to the position of program coordinator of special services effective September 1, 1988. Respondent acknowledges that this position was a supervisory position with a Board approved job description (Exhibit P-46). However, respondent argues that no testimony or evidence was presented in this matter to establish that respondent appointed petitioner to a supervisory position with a Board approved job description prior to September 1, 1988.

In addition, respondent points out that petitioner did not obtain certification as a supervisor until September 1988 (Exhibit R-3). The possession of an appropriate certificate is an essential prerequisite to the accrual of tenure. Mahalik v. Long Branch Bd. of Ed. (Commissioner, September 8, 1980) (unreported).

In addition, possession of the appropriate certificate is one of the prerequisites of the accrual of tenure and seniority rights. See, Mirna Arnold and Helen Pappas v. Bd. of Ed. of Bridgewater-Raritan Regional School District, State Board December 1, 1988; Fischbach v. North Bergen Township Bd. of Ed., 1983 S.L.D. 1418; aff'd. State Bd. of Ed.; (N.J. App. Div., November 15, 1985, Dkt. No. A-5947-83T7 (unreported).

In order to actually attain tenure, one must serve the requisite period of time provided for by statute. N.J.S.A. 18A:28-6 sets forth the period of service required to attain tenure when one is transferred or promoted within a school district. This statute provides that any teaching staff member under tenure who is transferred or promoted to another position shall not obtain tenure in the new position until after (a) the expiration of a period of employment of two consecutive calendar years in the new position, or (b) employment for two academic years in the new position together with employment at the beginning of the next succeeding academic year, or (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years. In this case, petitioner was employed in the twelve month position of special services program coordinator from September 1988 through June 29, 1990, the date of her termination. The mere execution of the contract of employment is insufficient to confer tenure since the statute requires service in a position. Canfield v. Bd. of Ed. of Borough of Pine Hill, supra. Petitioner's period of service in the position of program coordinator of special services does not satisfy the requirements of N.J.S.A. 18A:28-6 since she was not employed for the requisite period of time provided by the statute. N.J.S.A. 18A:28-14 provides that the services of a teaching staff member who is not the holder of an appropriate certificate may be terminated without charge or trial.

Attorney for petitioner argues that respondent should be estopped from arguing that petitioner should not be paid and recognized for all of her work in the BSI program which was in the nature of administrative and supervisory because she did not have a certificate. In support of his estoppel argument, attorney for petitioner points to the fact that petitioner's immediate supervisor, John Tanzola, did not have a supervisor's certificate. Assuming for the purpose of argument that I find that petitioner performed administrative and supervisory duties and functions from 1978 through 1988, I am unsure as to the

remedy available if I find that petitioner does not have tenure. I fail to see how the doctrine of estoppel applies in this matter since the acquisition of tenure is a right given by statute. See, Levitt and Sasloe v. Bd. of Ed. of the City of Newark, 1977 S.L.D. 1063.

Petitioner argues that her position as special services program coordinator was illegally abolished by respondent. However, since petitioner did not meet the requisite conditions for tenure in that position, petitioner does not have standing to challenge the legality of abolition of the position. Under the statutory scheme, individuals in non-tenured positions have no right to the renewal of their contracts and local boards of education are vested with virtually unlimited discretion in such matters. Union County Regional High School Bd. of Ed. v. Union County Regional High School Teachers Assn., Inc. 145 N.J. Super. 435 (App. Div. 1976). The only requirement imposed upon a local board is that it grant a teacher's timely request for an informal appearance and that it give its reasons for nonretention. Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236 (1974); Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super 447 (App. Div. 1982). In addition, seniority rights apply only as between tenured teaching staff members and do not apply to nontenured teachers. Bednar v. Westwood Bd. of Ed. 221 N.J. Super. 239 (App. Div. 1987) certif. den. 110 N.J. 512.

Petitioner has submitted no proofs or evidence to establish that respondent violated the provisions and requirements of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., in any way. In effect, petitioner seeks to create the inference that there were private discussions among Board members relating to the reorganization of the supervisory and administrative staff of respondent leading to the adoption of the reorganization in July 1990. However, Michael Pirozek, testifying on behalf of petitioner, admitted that in January 1990, Dr. Bozza was directed to study the efficiency of administrative and supervisory staff. This authorization action was taken at a public meeting, as indicated by minutes of the Board meetings which were acknowledged by Mr. Pirozek. Mr. Pirozek then indicated that no discussion occurred the at Board of Education meetings up through May 1, 1990, the date he left office, concerning the reorganization. This seems logical in view of the fact that the reorganization proposal made by Dr. Bozza is dated May 15, 1990, some 15 days after Mr. Pirozek left office.

The burden of proof is on petitioner to establish a violation of the Open Public Meetings Act by showing that private meetings occurred in violation of N.J.S.A. 10:4-11. Petitioner has failed to present any testimony or evidence to establish such a violation.

In view of the findings and conclusions which are being made in connection with this matter, it is unnecessary to deal with respondent's argument that petitioner's claims for salary for the years 1978 through 1989 are time barred by the provisions of N.J.A.C. 6:24-1.2(b).

FINDINGS AND CONCLUSIONS

Based upon the foregoing, I hereby make the following FINDINGS and reach the following CONCLUSIONS with regard to this matter:

1. From September 1, 1975 until September 1, 1988 petitioner held the position of supplemental teacher, and is presently a tenured employee.

2. From approximately 1978 until September 1, 1988, petitioner performed additional duties in the BSI program of respondent over and above those duties required of her in her position as a supplemental teacher.

3. A portion of the additional duties performed by petitioner in connection with respondent's BSI program involved the formulation of plans, policies and budgets and recommendations as to staffing and curriculum for the BSI program and therefore involved administrative duties.

4. A portion of the additional duties of respondent in connection with the BSI program involved direction and guidance of the work of instructional personnel and therefore involved supervisory duties.

5. These administrative and supervisory duties were under the direction, control and guidance of petitioner's immediate supervisor who was ultimately

responsible fo their performance.

6. During the period from 1978 until September 1, 1988, petitioner was not appointed to an administrative or supervisory position with an approved job description by respondent Board of Education.

7. From 1978 until September 1, 1988, petitioner did not hold a certificate as either a school administrator or as a supervisor.

8. Since petitioner was not appointed by respondent to an administrative or supervisory position with an approved job description and did not hold a certificate as an administrator or supervisor, petitioner did not obtain tenure in an administrative or supervisory position under the provisions of N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6 at any time between 1978 through September 1, 1988.

9. On June 28, 1990, respondent terminated petitioner as special services program coodinator, and on July 5, 1990, respondent abolished the position of special services program coordinator, a position held by petitioner at that time on a nontenured basis.

10. Petitioner has no legal right to challenge her termination and the abolition of this position since she did not have tenure to the position. N.J.S.A. 18A:28-14.

11. Since petitioner did not have tenure in an administrative or supervisory position, petitioner accrued no seniority as special services program coordinator, and does not have bumping rights based on seniority in that position.

12. Petitioner has failed to establish by any credible evidence that respondent violated the provisions of the Open Public Meetings Act in any way.

DECISION AND ORDER

Based upon the foregoing it is hereby ORDERED that the petition be and the same is hereby DISMISSED.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 19, 1991
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

9/23/91
DATE

Maureen Keller
DEPARTMENT OF EDUCATION

SEP 24 1991
DATE

Mailed to Parties:
Joyce LaVecchia
FOR OFFICE OF ADMINISTRATIVE LAW

dgi/e

APPENDIX

LIST OF WITNESSES

For petitioner:

Jacqueline Pirozek
Michael Pirozek

For respondent:

John M. Tanzola

LIST OF EXHIBITS

P-1 Letter of Recommendation from John M. Tanzola
P-2 Evaluation Form for petitioner, dated December 7, 1983
P-3 Evaluation Form for petitioner, dated March 19, 1984
P-4 Evaluation Form for petitioner, dated December 10, 1984
P-5 Evaluation Form for petitioner, dated March 11, 1985
P-6 Evaluation Form for petitioner, dated December 13, 1985
P-7 Evaluation Form for petitioner, dated March 3, 1986
P-8 Evaluation Form for petitioner, dated December 12, 1986
P-9 Evaluation Form for petitioner, dated March 5, 1987
P-10 Improvement Plan for petitioner, dated October 28, 1987
P-11 Evaluation Form for petitioner, dated December 4, 1987
P-12 Evaluation Form for petitioner, dated March 1, 1988
P-13 Evaluation Form for petitioner, dated December 2, 1981
P-14 Evaluation Form for petitioner, dated March 10, 1982
P-15 Evaluation Form for petitioner, dated December 15, 1982
P-16 Evaluation Form for petitioner, dated March 10, 1983

P-17 Chapter 1 Equipment Inventory - Revised 86-87
P-18 BSI Equipment Inventory - Math - Revised 86-87
P-19 BSI Equipment Inventory - Reading - Revised 86-87
P-20 Memo, dated July 25, 1987
P-21 Memo, dated November 5, 1986
P-22 Letter from John M. Tanzola, dated May 11, 1982
P-23 Letter from John M. Tanzola, dated February 14, 1983
P-24 Letter from John M. Tanzola, dated February 24, 1984
P-25 Letter from Robert Lazar, dated February 27, 1984
P-26 Memo from John M. Tanzola, dated October 18, 1984
P-27 Letter from Montville U.M. Nursery School
P-28 Letter from John M. Tanzola, dated November 18, 1986
P-29 Letter from Estelle Heller, dated Novemerb 21, 1986
P-30 Letter from Helen Shanley, dated November 20, 1986
P-31 Letter from Allan Goldberg
P-32 Letter from Marianne Dispenziere, dated May 29, 1987
P-33 Letter from Marianne Dispenziere, dated May 9, 1988
P-34 Letter from Marianne Dispenziere, dated May 5, 1989
P-35 Memo from John M. Tanzola, dated March 14, 1989
P-36 Memo from Cliff Keezer, dated April 4, 1989
P-37 Memo from John M. Tanzola, dated June 15, 1989
P-38 Memo from John M. Tanzola, dated July 18, 1989
P-39 Current Salaries of Supervisors
P-40 Letter from County Superintendent, dated February 27, 1991
Letter from County Superintendent, dated June 13, 1988
Letter from County Superintendent, dated October 6, 1988
Letter from Interim County Superintendent, dated June 30, 1989
P-41 Employment Contract, dated April 17, 1990
P-42 Position Specification for Supplemental Teacher
P-43 1990-1991 Vacation Schedule Request

P-46 Position Specifications for Special Services Program Coordinator

P-47 Memo from James Y. Gaines, dated May 5, 1988

R-1 Employment Contract, dated June 6, 1988

R-2 Letter from Montville Superintendent to petitioner, dated July 6, 1988

R-3 Principal/Supervisor Certificate issued to petitioner in September, 1988

R-4 Letter confirming petitioner's salary for 90-91

R-5 Employment Contract, dated March 20, 1990

R-6 Employment Contract, dated October 19, 1988, with cover letter from Superintendent, dated October 20, 1988

R-9 Letter confirming petitioner's salary for 87-88

R-10 Employment Contract, dated July 30, 1987, for Chapter I, BSI; Employment Contract, dated July 30, 1987, for State Compensatory Education; Employment Contract, dated December 10, 1987, for BSI

R-11 Letter confirming petitioner's salary for 86-87

R-12 Letter confirming petitioner's salary for 85-86 (final)

R-13 Letter confirming petitioner's salary for 85-86 (pending)

R-14 Letter confirming petitioner's salary for 84-85

R-15 Letter confirming petitioner's salary for 83-84

R-16 Letter confirming petitioner's salary for 82-83

R-17 Letter confirming petitioner's salary for 81-82

R-18 Letter confirming petitioner's salary for 80-81

R-19 Letter confirming petitioner's salary for 79-80

R-20 Letter confirming petitioner's salary for 78-79

R-21 Employment Contract, dated November 8, 1977

R-22 Employment Contract, dated August 23, 1976

R-23 Employment Contract, dated July 17, 1975

R-26 Minutes of Meeting of Board of Education on August 22, 1989

JACQUELINE PIROZEK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN-SHIP OF MONTVILLE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions, although dated October 4, 1991, were not received by the Commissioner until October 10, 1991, having been sent via Federal Express on October 9, 1991. As the initial decision in this matter was mailed to the parties on September 24, 1991, pursuant to N.J.A.C. 1:1-18.4, in the absence of an extension, petitioner's exceptions are untimely filed and will not be considered herein. Respondent's reply was timely submitted, but need not be here addressed in view of the untimeliness of the exceptions to which it is directed.

Upon careful review, the Commissioner concurs with the ALJ that petitioner could not have acquired, and did not acquire, tenure as a supervisor solely by virtue of performing duties more commonly associated with supervisory positions during a period when she was employed and certificated solely as a teacher. It is well established that tenure inures to a position, and whatever extra

duties petitioner may have performed out of her own sense of dedication or by specific assignment, until September 1988 the position she held and was properly certificated for was that of supplemental teacher. Only upon her appointment to the position of coordinator and her concurrent acquisition of the necessary supervisor's certificate did she begin to accrue time that would, had the position not subsequently been abolished, have counted toward tenure pursuant to N.J.S.A. 18A:28-6.

Petitioner's contention that the Board was aware of and therefore implicitly sanctioned her performing extra duties, even if true, does not alter the fact that she was not appointed to an established supervisory position until September 1988; indeed, the position in which she claims to have obtained tenure did not even exist prior to petitioner's appointment to the post. Nor does it affect petitioner's status that the Director of Student Personnel Services under and with whom petitioner worked was himself erroneously certificated from 1976 to 1990. Notwithstanding the particular circumstances of this case and petitioner's attempt to characterize the Board's position as hypertechnical and placing form over substance, the crucial and unalterable fact remains that petitioner served in an approved supervisory position and held the appropriate certificate for that position for less than the requisite period of time for acquisition of tenure. Accordingly, she cannot have acquired tenure as Coordinator of Special Services. Spiewak, supra

The Commissioner further concurs, for the reasons stated by the ALJ, that petitioner has made no showing herein that the abolition of her position was in any way improper or that violations

of the Open Public Meetings Act occurred in connection with it. To the contrary, the record clearly demonstrates that the abolition was undertaken as part of a comprehensive, good faith administrative reorganization and that it was effectuated at a duly advertised public meeting.

The Commissioner does wish to clarify, however, that to the extent that the ALJ's discussion at p. 18 and his Finding and Conclusion No. 10 imply that nontenured teachers have no legal standing whatsoever to challenge their termination, the implication is erroneous in its failure to consider the right of appeal arising from alleged violations of constitutional or statutorily conferred entitlements.

Accordingly, with the clarification noted above, for the reasons stated by the ALJ together with the reasons set forth herein, the Commissioner affirms the decision of the Office of Administrative Law dismissing the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 1, 1991

DATE OF MAILING - NOVEMBER 1, 1991

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9059-90
AGENCY DKT. NO. 260-7/90

ANNETTE WEINSTEIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Scott T. Smith, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Harold N. Springstead, Esq., for intervenor Dr. Elaine Bettencourt (Springstead & Maurice, attorneys)

Robert M. Schwartz, Esq., for intervenors JoAnn Agoglia and Christine Piscitelli (Lake & Schwartz, attorneys)

Irwin Weinberg, Esq., for intervenor Dr. Lynn Andrews (Weinberg & Kaplow, attorneys)

Record Closed: August 23, 1991 Decided: September 19, 1991

BEFORE STEVEN L. LEFELT, ALJ:

STATEMENT OF THE CASE

Annette Weinstein contends that the Old Bridge Board of Education impaired her tenure and seniority rights when, following a May 1990 reduction in

force (RIF), the Board failed to reappoint her Coordinator of the Gifted and Talented Program and failed to appoint her Supervisor of Basic Skills or Assistant Director of Special Services. The Board and the current Basic Skills Supervisor and Special Services Assistant Director claim that the RIF undertaken by the Board impaired neither Ms. Weinstein's tenure nor her seniority rights.

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on November 1, 1990, for a hearing pursuant to *N.J.S.A.* 52:14B-1 and *N.J.S.A.* 52:14F-1 *et seq*.

A hearing was initially scheduled for March 25, 26 and 27, 1991, but was adjourned by joint request of counsel because they were unprepared to proceed at that time. A telephone prehearing conference was scheduled and held on March 25, 1991, at which time an evidentiary hearing was again scheduled for May 29, 1991. This hearing, however, was also adjourned at the request of counsel because of an attorney calendar conflict and other reasons.

This matter proceeded to hearing on August 1 and 2, 1991, 9:00 a.m., at the South River Boro Hall, South River, New Jersey.

Before any testimony was presented, counsel for Ms. Weinstein announced that Ms. Weinstein was relinquishing her claim against the Elementary School Principal position held by Ms. JoAnn Agoglia and the Middle School Vice Principal position held by Ms. Christine Piscitelli. Accordingly, the petition was dismissed as to these positions and the hearing was conducted to determine Ms. Weinstein's claim to the positions entitled Supervisor of Basic Skills and Assistant Director of Special Services.

The evidentiary hearing was completed on August 1, 1991. The record remained open until August 23, 1991, to allow counsel time to file written final arguments and responses.

FINDINGS OF FACT

The parties submitted some testimony to supplement detailed stipulations. After considering the credible testimony and stipulations I believe that

the evidence is largely undisputed and accordingly I **FIND** all of the following as **FACT**:

The Old Bridge Township school district has approximately 9,000 students housed in 16 school facilities including 11 elementary schools, 2 high schools, 2 middle schools and a preschool. The district has 800 special education students, 1,400 basic skills students and 275 students in English as a Second Language programs.

Ms. Weinstein began employment with the Board as a teacher on March 2, 1970. She achieved tenure and taught until June 30, 1978.

On September 1, 1978, Ms. Weinstein was appointed to a supervisory position as the first Coordinator of the Old Bridge Gifted and Talented Program. Ms. Weinstein served as Coordinator beginning in July 1978. The primary function of the job, as detailed in the position's job description, is coordinating the development and implementation of the Gifted and Talented Program at the elementary, middle and high school levels. Ms. Weinstein supervised the development of the curriculum, helped select students and evaluated and supervised some of the Gifted and Talented Program teachers. Ms. Weinstein also served as the district representative to a county committee dealing with the needs of gifted and talented students.

On May 29, 1990, the Board effectuated a reduction in force and abolished, consolidated and created various supervisory positions. Pursuant to this RIF, the Board abolished Ms. Weinstein's Coordinator position. Consequently, Ms. Weinstein served as the Coordinator from July 1978 until June 30, 1990.

Pursuant to the RIF, the Board returned Ms. Weinstein to the classroom as a teacher effective September 1, 1990. At the time of this reassignment, Ms. Weinstein, therefore, had tenure as a teacher and as a supervisor and had 12 years of seniority in a supervisory position. Although Ms. Weinstein possesses an Administrative Certificate with principal and supervisor endorsements, she has never utilized her principal's endorsement. Consequently, Ms. Weinstein has neither tenure nor seniority as a principal.

The Basic Skills Supervisor position to which Ms. Weinstein claims entitlement had been eliminated for one year, but was reinstated as part of the May 1990 RIF. This position requires applicants to possess three years of teaching experience and a supervisor's endorsement. Therefore, Ms. Weinstein was qualified for the position.

Ms. Weinstein and three other tenured supervisors who had also been affected by the RIF were invited to apply for the Basic Skills Supervisor position. Ms. Weinstein was interviewed, but effective October 1, 1990, without considering seniority rights among the RIF affected supervisors, the Board appointed Dr. Elaine Bettencourt to this position.

Dr. Bettencourt is tenured as a teacher and has principal and supervisor endorsements. From October 1, 1981, until June 30, 1990, Dr. Bettencourt had been Chair of the Business Department. Dr. Bettencourt has tenure as a supervisor with 8.9 years of seniority as a secondary supervisor and an additional .9 years of seniority as Supervisor of Basic Skills, for a total of 9.8 years seniority as a supervisor.

The Basic Skills Supervisor, according to the job description, administers and supervises State Compensatory Education, Chapter I, ECIA, and English as a Second Language/Bilingual activities, as outlined in the fiscal year Application for the Basic Skills Improvement Program and the annual Bilingual and ESL Education Program Plans.

Also as part of the May 1990 RIF, the Board created the position of Assistant Director of Special Services. When created, this position required that applicants possess a principal's endorsement. However, it was not until July 29, 1991, that the position was recognized by the Middlesex County Superintendent's Office and determined to require a principal's endorsement. Since Ms. Weinstein possesses a Principal's endorsement, she was also qualified for this position.

On October 16, 1990, however, the Board appointed Dr. Lynn Andrews to the Assistant Director position. Dr. Andrews possesses tenure as a teacher and as a learning disabilities teacher consultant (LDTC) and holds principal and supervisor endorsements. She also has endorsements for teacher of the handicapped, reading specialist and LDTC. Dr. Andrews served the district as an LDTC from September 1, 1982, until June 30, 1989. She thereafter served for approximately one year as an Acting Principal of Pupil Services and for four months as Supervisor of Special Education, a position which was abolished pursuant to the 1990 RIF. She began service as Assistant Director of Special Services on October 17, 1990. She does not possess tenure as a principal or as a supervisor.

According to the position's job description, the Assistant Director of Special Services develops programs and curriculum under the direction of the Director of Special Services and observes and evaluates special education teachers in cooperation with the building principals. In this district's special education program there are 83 special education teachers, eight child study teams, approximately 25 aides and 10 speech teachers.

LEGAL CONTENTIONS, ANALYSIS and CONCLUSIONS

Preliminarily, when a position is abolished pursuant to a RIF the occupier of the abolished position has tenure rights to any newly created, substantially similar position. *Christie v. East Orange Bd. of Ed.*, OAL DKT. NO. EDU 6535-84 (January 18, 1985), aff'd, Comm'r of Ed. (March 11, 1985). The actual duties performed and not just the job title will determine whether two positions are substantially similar. *Boeshore v. North Bergen Bd. of Ed.*, 1974 *S.L.D.* 805. There is no serious claim here that the targeted positions are substantially similar to Ms. Weinstein's former position since the duties of the targeted positions are not even remotely similar to those of Coordinator of Gifted and Talented Education. Consequently, Ms. Weinstein cannot assert any tenure rights to these positions on this basis.

Instead, Ms. Weinstein contends that she has 2.2 more years of seniority in a supervisory position than Dr. Bettencourt. Even though both Ms. Weinstein and Dr. Bettencourt are tenured supervisors, Ms. Weinstein cites *Capodilupo v. W. Orange Tp. Ed. Bd*, 218 *N.J.Super.* 510 (App. Div 1987), and argues that when all else is equal, seniority will rank tenured teachers.

With regard to Ms. Weinstein's claim against the Special Services Assistant Director position, Ms. Weinstein asserts that Dr. Andrews does not have tenure as a principal or as a supervisor. Furthermore, as of the date Dr. Andrews assumed her new position, she, like Ms. Weinstein, never worked in a principal's position. Ms. Weinstein further contends that *N.J.A.C.* 6:11-9.3(b) does not require a principal's endorsement for this position and that the Assistant Director's functions are akin to a supervisory position. Consequently, since Ms. Weinstein has both tenure and 12 years seniority as a supervisor, she has a superior claim to Dr. Andrews.

Therefore, Ms. Weinstein actually contends as to both positions that she has attained tenure and seniority as a supervisor. "Her rights are not limited only to Coordinator of Gifted and Talented Education" (p. 5 of petitioner's brief). Rather,

Ms. Weinstein asserts superior rights to any nontenured supervisor or any supervisors having less seniority than she.

With regard to the claim against the Supervisor of Basic Skills position, *Capodilupo* does not support Ms. Weinstein's argument. Unlike the situation in *Capodilupo*, here both Dr. Bettencourt and Ms. Weinstein are tenured supervisors. When considering two tenured supervisors, seniority is determined "in specific categories," *N.J.A.C.* 6:3-1.10(b), and each approved supervisory title is a separate category. *N.J.A.C.* 6:3-1.10 (l) 12. Therefore, contrary to Ms. Weinstein's argument, she cannot assert a seniority claim against Dr. Bettencourt for the Supervisor of Basic Skills position since she has no seniority as to that position. As between Dr. Bettencourt and Ms. Weinstein, two tenured supervisors, the Board was free to select the candidate it believed most qualified.

With regard to the claim against the Assistant Director of Special Services, at first blush it might seem that Ms. Weinstein would have a stronger claim since she is tenured as a supervisor and Dr. Andrews is not.

However, the County Superintendent has determined that the Assistant Director position requires a principal's endorsement. Even though Ms. Weinstein appears to make a persuasive argument that an "Assistant Director" is not included within the clear language of *N.J.A.C.* 6:11-9.3(b), a contrary determination has been made by the County Superintendent. I do not believe that this case is an appropriate forum to challenge this determination. Not only is the County Superintendent not a party to this litigation, but also *N.J.A.C.* 6:11-3.3 appears to authorize the County Superintendent to exercise discretion in making this decision. This rule further provides that "Decisions rendered by county superintendents regarding titles and certificates for unrecognized positions shall be binding upon future seniority determinations on a case-by-case basis." *N.J.A.C.* 6:11-3.3(b). Accordingly, I believe that in this case I must apply the County Superintendent's determination that the Assistant Director position requires a principal's endorsement.

The facts show that neither Dr. Andrews nor Ms. Weinstein acquired tenure in a principal's position. Accordingly, with regard to this position they are both untenured. Since the dispute is between two non-tenured individuals for a principal's position, Ms. Weinstein's claim is not superior to Dr. Andrews. *DeCarlo v. South Plainfield Bd. of Ed.*, OAL DKT. NO. EDU 6111-87 (June 20, 1988), adopted,

Comm'r of Ed. (August 4, 1988). As between Dr. Andrews and Ms. Weinstein, the Board can select the candidate it determines to be most qualified for the position.

Accordingly, for the reasons explained above, I **CONCLUDE** that Ms. Weinstein's tenure rights have not been impaired by the Old Bridge Board of Education and I **DISMISS** her petition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/11/91
Date

STEVEN L. LEFELT, ALJ

Receipt Acknowledged:

9/23/91
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 25 1991
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

WITNESSES

FOR THE PETITIONER:
Ms. Annette Weinstein

FOR THE RESPONDENT:
Peter Delaney
Elaine Bettencourt

EXHIBITS

JOINT EXHIBITS:
Stipulation of Facts with Exhibits A-E as modified at the hearing.

ANNETTE WEINSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to the dictates of N.J.A.C. 1:1-18.4, as were intervenor's and the Board's reply exceptions.

Petitioner addresses her exceptions solely to the ALJ's determination that she does not have a superior claim to the position of Supervisor of Basic Skills over that of Dr. Bettencourt. Petitioner reasserts that argument raised below that the actual duties she performed as Coordinator of Gifted and Talented are substantially similar to those performed by the Supervisor of Basic Skills. She notes again both her own certification and seniority as a supervisor and those of Dr. Bettencourt, and reiterates her contention that the actual duties performed by both positions were in the categories of administrator and supervisor as well as teacher and coordinator.

Relying on the decision in Capodilupo v. West Orange Board of Education, 218 N.J. Super. 510 (App. Div. 1987), and conceding

that this matter differs slightly from Capodilupo in that both she and Dr. Bettencourt are tenured, petitioner claims that by virtue of her greater number of years of seniority, she has a superior claim to the position over Dr. Bettencourt.

The Board's reply exceptions express its accord with the ALJ's decision, noting that in a RIF situation between two tenured individuals, seniority is determinative only if the applicants have accrued seniority in the same seniority category. It stresses that in this case seniority is not determinative because supervisory positions are considered separate and distinct for seniority purposes, and also that seniority is accrued only in the specific supervisory position in which the individual has served. It cites Dullea v. Board of Education of the Borough of Northvale, Bergen County, 1978 S.L.D. 638, 641 in support of this proposition.

Finally, the Board adds that Capodilupo, supra, is inapposite to this matter because that case did not involve a position entitlement dispute between two tenured employees.

Intervenor's reply exceptions, like the Board's, support the ALJ's determinations. She avers there is total lack of similarity between the position of Supervisor of Basic Skills and that of Coordinator of Gifted and Talented. Thus, she claims, pursuant to Timko and Mikush v. Board of Ed. of the Bridgewater-Raritan Regional School District, decided by the Commissioner June 19, 1991, the determination of ALJ LeFelt must be sustained.

Upon a careful and independent review of the record of this case, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner's tenure rights

have not been impaired by the Old Bridge Board of Education. The Commissioner concurs with the ALJ that each supervisory title is a separate category under the seniority regulations. N.J.A.C. 6:3-1.10 et seq. Albeit that both Dr. Bettencourt and petitioner are tenured supervisors, neither has accrued seniority in the position of Supervisor of Basic Skills because neither has served in that specific category pursuant to N.J.A.C. 6:3-1.10(b) and N.J.A.C. 6:3-1.10(1)12. Thus, petitioner enjoys no superior seniority claim to such position. Given that the Board held tenured supervisors on a preferred seniority list as a result of their having been riffed in June 1990, it could not fill such supervisory position with a nontenured employee. Rather, it was compelled pursuant to Nathan Schienholz and Wayne Fuller v. Board of Education of the Township of Ewing, Mercer County, decided by the Commissioner June 19, 1989, St. Bd. aff'd in part/rev'd in part February 7, 1990, aff'd Superior Court, Appellate Division November 19, 1990 to fill the position with one of the riffed tenured supervisors, although which one it chose from among those on the preferred eligibility list was a Board prerogative.

Similarly, the Commissioner concurs with the ALJ's conclusion that because petitioner has not served in a position requiring a principal's certificate, she has not acquired tenure under her principal's certificate. Hence, petitioner has no tenure claim to the position of Assistant Director of Special Services, which position requires the holder to serve under a principal's certificate. Thus, the holding in Capodilupo, supra, has no application to this fact pattern.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

NOVEMBER 1, 1991

DATE OF MAILING - NOVEMBER 1, 1991

Pending State Board

BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH MATAWAN AND MAYOR AND COUNCIL OF THE TOWNSHIP OF ABERDEEN, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

For the Petitioning Board, Andrew J. DeMaio, Esq.
(DeMaio and DeMaio)

For the Respondent Council (Aberdeen) Leonard S. Needle, Esq. (Zager, Fuchs, Kauff and Needle)

For the Respondent Council (Matawan)
Frederick J. Kalma, Esq.

This matter was opened before the Commissioner of Education by the filing of a Petition of Appeal by the Board of Education of Matawan-Aberdeen Regional School District (Petitioner) appealing the reductions in the 1991-92 budget imposed by the Mayor and Council of the Borough of Matawan and the Mayor and Council of the Township of Aberdeen (Respondents) pursuant to the provisions of N.J.S.A. 18A:22-37. The aforesaid reductions consisted of a $750,000 reduction in current expense and a $210,000 reduction in capital outlay. As a result of these reductions the amounts in dispute before the Commissioner are summarized below:

Proposed Tax Levy Adopted by District Board of Education		Amount of Tax Levy Certified By Governing Bodies	
Current Expense	$21,981,586	Current Expense	$21,231,586
Capital Outlay	390,480	Capital Outlay	180,480
Amount of Reduction Certified By Governing Bodies		**Amount of Reduction in Dispute before Commissioner**	
Current Expense	$ 750,000	Current Expense	$ 750,000
Capital Outlay	210,000	Capital Outlay	210,000

On June 24, 1991 respondents filed the Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6 and 7.7. On July 16, 1991 petitioner filed its written submission in support of its Petition of Appeal and respondents filed their Position Statement on July 5, 1991. Rebuttals were filed on July 30, 1991 and July 25, 1991, respectively. Neither party filed a final summation.

Initially, the Commissioner notes the Matawan-Aberdeen Regional Board of Education in its Petition of Appeal contends that the reductions imposed by the Mayor and Council of the Borough of Matawan and the Mayor and Council of the Township of Aberdeen are presumptively invalid in that respondents, at the time of the enactment of the reductions which are the subject matter of this appeal, did not provide a statement of reasons supporting the reduction as required by case law and regulation. By way of Affirmative Defense respondents argue that all attempts on their part to consult with the Board and to receive information necessary to meet their responsibilities under law were ignored. The specifics of respondents' allegation are set forth on pages 2-3 of the Answer and are incorporated herein by reference.

As a consequence of the alleged refusal of petitioner to provide the information requested, respondents contest that

petitioner comes to these proceedings with unclean hands and therefore should be estopped from asserting a claim that respondents' budget cuts are invalid.

While the Commissioner will deal with the substance of the charges raised by each of the parties to this dispute in a later portion of this decision, he notes the New Jersey Supreme Court in Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989) held that the governing body in a budget dispute is required to provide its statement of reasons to the board of education at the time the reductions are made. In so ruling in a matter in which the Commissioner and the State Board of Education had granted summary decision in favor of the board, the Court went on to rule that while the Commissioner is entitled to assign a greater presumption of arbitrariness the longer the governing body delays in providing its reasons, he should not grant summary decision absent an opportunity to consider the merits. The Commissioner further notes that respondents did file a statement of reasons as part of their Answer to the Petition. (See Exhibit C.) Consequently, the Commissioner shall consider the merits of the arguments of the parties relative to the specific line item reductions set forth in respondents' Answer, as well as the contention of respondents relative to the alleged failure of the Board to provide the information requested.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the authority for providing such thorough and efficient

system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner to review and decide appeals brought by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of the Township of East Brunswick v. Mayor and Council of the Township of East Brunswick, 48 N.J. 94 (1966) and Deptford, supra.)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter respondents, upon defeat of the 1991-92 budget by the electorate and after consultation with the Board of Education as prescribed by N.J.S.A. 18A:22-37, recommended the following line item reductions:

CAPITAL OUTLAY

Line Item	Respondents' Reduction
Buildings	$210,000

CURRENT EXPENSE

Line Items

Roof Repair	$130,000
Architect/Engineering Fees	50,000
Other Purchased Services	109,000
Instructional/Other Supplies	70,000
Other Employee Benefits	20,000
Equipment Repair Services	20,000
Legal/Negotiation Services	7,500
Test Scoring Services	15,000
Transportation Vehicles	25,000
Custodial/Maintenance Supplies	25,000
Textbooks/Disposable Texts	15,000
Vehicle Repairs	10,000
Staff Travel	60,000
Other Utility Services	5,000

Line Item	Respondents' Reduction
Dues and Fees	11,500
Grounds/Asphalt Repairs	12,000
Building Maintenance	2,500
Miscellaneous Services	7,500
Fuel Oil	20,000
Gasoline/Motor Oil	10,000
Equipment and Furniture	125,000
Total Reduction	$960,000

PETITIONER'S POSITION

By way of background to the dispute herein, the Board urges the Commissioner to take note of the fact that its share of state aid allocated to it has dwindled over the last four years from 42.2% of the 1987-88 school budget to 27.2% of the 1991-92 budget. As a consequence of the aforesaid decline in state aid, petitioner contends that it has not been able to maintain a minimal free balance of 3% to guard against contingencies. Further petitioner contends that it has attempted to keep the 1991-92 budget down by increasing it by only 5.5% of the 1990-91 budget despite having a budget cap of 7.75%. In order to accomplish the foregoing, petitioner asserts that it has reduced staff by 47 total positions including 3 administrative positions, 23 teaching positions, 4 secretarial positions, 8 instructional assistant positions and 9 cafeteria workers. It further claims to have reduced its textbook account by $100,000 and its summer basic skills remedial program by 38%. Classes, it is asserted, will increase at all levels to an average of 25 per class at the lower grades and an average of 30 at the higher levels.

In response to the Affirmative Defense raised by respondents, petitioner states that its inability to consult at an early stage of the budget development process was an outgrowth of the delay until March 15, 1991 of receipt of state aid figures

occasioned by revisions in the Quality Education Act and the requirement that a completed budget be forwarded to the County Superintendent by March 28, 1991. At this point, a completed budget was presented to respondents.

Petitioner further alleges that it provided all materials requested by respondents where and when such information was available. The Commissioner particularly notes that petitioner contends that its inability to provide expenditure reports beyond April 30, 1991 was a result of computer problems occasioned by a changeover to a new computer service. The specific and elaborate details of petitioner's arguments are set forth in its Position Statement dated July 16, 1991 and are incorporated herein by reference.

Finally, petitioner's general arguments take exception to respondents' use of the 1989-90 budget as a point of comparison to indicate percentage increases and further asks the Commissioner to consider new mandates imposed upon boards of education by the State Environmental Protection Agency (EPA), the State Department of Health, the State Department of Education and state and federal governments.

Having summarized petitioner's general arguments, the Commissioner shall consider petitioner's reasons for restoration by individual line item.

CAPITAL OUTLAY

Buildings — Reduction: $210,000

The item in dispute within the capital outlay portion of the budget is $210,000 for purposes of removal of asbestos ceiling

tiles in the Cambridge Park Administration Building (formerly Cambridge Drive School) which houses both administrative and support staff and the district's Adult High School.

Petitioner contends that a sample testing of the ceiling tiles in question conducted by its environmental consultant indicated that the tiles were 1-3% amosite asbestos and that Federal regulations consider any material containing more than 1% asbestos fibers be considered as positive for asbestos.

It is petitioner's contention that since the tiles were installed to facilitate maintenance of the plumbing, heating and electrical systems they emit particles whenever they are removed for maintenance operations. These particles are hazardous to the health of persons in the building.

Further, petitioner contends should these tiles fall due to water leaks or wear and tear, a major asbestos cleanup would be required and would necessitate the removal of all staff and students from the building until EPA was assured that the air quality was safe.

CURRENT EXPENSE

1. Roof Repair — Reduction: $130,000

Petitioner contends that it has deferred roof replacement for three schools due to previous years' reductions in its budget despite a program for systematic replacement of roofs built in the early sixties. Petitioner contends that its architect has recommended replacement of the roofs in question rather than repair.

2. Architect/Engineering Fees — Reduction: $50,000

Reductions in this area by respondents were based upon the assumption that roof replacement would not be undertaken.

Petitioner contends that only $32,000 of this amount is budgeted for roof repairs, not $50,000 as estimated by respondents. Further, petitioner contends that the monies budgeted under this account are necessary to accomplish the task of roof repair.

3. Other Purchased Services Reduction: $109,000

Petitioner alleges that none of the myriad services which are reflected in this line item and which are enumerated in detail in petitioner's Position Statement at page 11 are expansion of services. Petitioner protests the practice of respondents to utilize 1989-90 figures to calculate rates of increase. It contends that a more accurate comparison would be between the 1990-91 budgeted figure of $497,580 and the 1991-92 budgeted figure of $521,010, representing an increase of less than $24,000.

Petitioner contends that the increase is based upon estimates taking into account current contracts and past experience.

4. Instructional/Other Supplies Reduction: $70,000

Petitioner argues that the items contained within this account represent consumable supplies required for instructional activities including such items as pencils, paper, crayons and tape and also required in art, science, home economics, industrial arts and vocational programs.

Petitioner points out that this line item was already reduced from $722,577 after the public hearing on the budget.

5. Other Employee Benefits Reduction: $20,000

This account contains monies for the implementation of an early retirement incentive adopted by petitioner which includes $70,000 for terminal leave pay and $300,000 for unused sick leave. Petitioner estimates that 50% of both administrative and teaching

infringe upon basic materials. District curriculum needs to be realigned with National Council of Teachers of Mathematics standards and new textbooks for such purpose are being purchased.

Basic skills and special education programs require specialized texts which must be bought in small quantities and therefore reflect a high per copy cost.

12. Vehicle Repairs — Reduction: $10,000

The district's current vehicle fleet consists of 8 buses, 6 vans, 8 maintenance vehicles and 2 commercial lawn mowers ranging in age from 2 to 12 years.

Petitioner contends a reduction in this area would affect pupil transportation and increase costs for bus or van rentals.

13. Staff Travel — Reduction: $60,000

Petitioner contends that the amounts budgeted in this account include all costs associated with attendance at workshops, as well as intra-district travel and other staff travel which is mandated by contract. Curriculum and programmatic related workshops are for the purpose of meeting district T&E goals.

14. Other Utility Services — Reduction: $5,000

Petitioner alleges that the 1990-91 expenditures when the books are closed will be slightly higher than budgeted. The 1991-92 budget was prepared by adding in a small 2 to 3% increase based upon current usages.

Petitioner claims the slight increase in this account is warranted because of a decision to convert two schools to natural gas heat. It was petitioner's intention to convert only one school, but the bid received was so favorable that it was possible to convert two schools. This will result in considerable savings in future years.

Petitioner contends that the second school's conversion will leave the natural gas budget $24,700 short which can be accommodated by transferring money from the fuel oil account where the second school is budgeted.

15. Dues and Fees — Reduction: $11,500

Petitioner points out that $24,886 in dues to the New Jersey School Boards Association is mandated by law. (N.J.S.A. 18A:6-45) Administrators by contract are compensated for professional dues.

The remaining amounts are for fees to athletic events, student activities fees and fees for specialized clubs and activities in special education, business education, vocational education and basic skills.

16. Grounds/Asphalt Repairs — Reduction: $12,000

Petitioner contends that asphalt repairs which are budgeted in this account have been deferred year after year and thus require greater repair. The specifics of such repair and maintenance requirements are set forth in detail in petitioner's Statement of Position on pages 30 and 31 and are incorporated herein by reference.

17. Building Maintenance — Reduction: $2,500

Petitioner sets forth in this account those maintenance activities which are ongoing requirements and the estimates of the costs of such activities are based upon past experience. Among those items cited by petitioner as requiring particular maintenance are carpets and gym doors which are excessively used for recreational, as well as school, purposes.

18. Miscellaneous Services Reduction: $7,500

The specific services provided in this account are plaques for retired workers, flowers for deceased employees and athletic awards.

Petty cash for small purchases is also included in this account as are shoes, slickers and uniforms for custodians. Banquets for student athletes are likewise included here.

19. Fuel Oil Reduction: $20,000

Because of the conversion of an additional school to natural gas, $24,700 from the fuel oil account will have to be transferred to Other Utility Services as noted previously in this decision. Based upon the past year's experience when gas usage in two existing gas fueled buildings cost $58,691, petitioner estimates that conversion of two other buildings as contemplated elsewhere in this decision will require the transfer of the above-cited $24,700 to the Other Utility Services account.

20. Gasoline/Motor Oil Reduction: $10,000

Petitioner contends that the amount actually spent on gasoline and motor oil for 1990-91 was $53,000, an amount $5,000 more than what petitioner has budgeted in 1991-92. This lower figure was based upon the lowering of gas prices after the conclusion of the Middle East War.

Based upon the uncertainty of Middle Eastern politics, petitioner contends further reductions are not possible.

21. Equipment and Furniture Reduction: $125,000

Petitioner points out that the amount budgeted in this account represents significant reductions over the amounts budgeted for 1990-91 ($191,521) and 1989-90 ($201,486.41).

Petitioner points out that approximately half of the amount budgeted is for replacement equipment. Petitioner argues that in an age of electronics students should experience hands-on learning with computers, VCR's, and tape recorders, particularly among students experiencing learning problems.

Petitioner contends that since $33,500 in this account was reduced in the 1990-91 budget by respondents many of the items considered for purchase this year have been deferred from past years.

RESPONDENTS' POSITION

CAPITAL OUTLAY

Buildings — Reduction: $210,000

Respondents contend that the failure of petitioner to provide an asbestos removal schedule indicates that the proposed asbestos removal may be desirable but not essential at this time.

CURRENT EXPENSE

1. Roof Repair — Reduction: $130,000

Respondents contend that inspection of the roofs at two schools by the Township Building Inspector determined that only 15 to 20% of the roof surfaces required repair and that therefore a simple patching of the roof would add an additional five years to the life of the roof and thus justifying the $130,000 reduction imposed.

2. Architect/Engineering Fees — Reduction: $50,000

Based upon the assumption that the asbestos removal and the roof replacement will be postponed, a reduction of architect and engineering fees is warranted.

3. Other Purchased Services Reduction: $109,000

Respondents contend that the increase budgeted in this account represents a 34.2% increase over expenditures in 1989-90 (from $394,856 to $529,898 in 1991-92). The $109,000 reduction recommended by respondents represents a figure more consistent with the rate of inflation since 1989-90. Respondents further argue that petitioner has not provided a detailed schedule of services warranting an increased expenditure.

4. Instructional/Other Supplies Reduction: $70,000

Respondents contend that the $722,577 budgeted in this account represents a 19.55% increase over the amount, $604,420, expended in 1989-90. Respondents further contend that since no justification for the increase in expenditures was provided, the 7.97% increase over 1989-90 which remains after the proposed reduction is reasonable.

5. Other Employee Benefits Reduction: $20,000

Respondents urge that the increase of 69.81% over the 1989-90 actual amount expended is unreasonable. Notwithstanding the fact petitioner is engaged in negotiations, respondents contend a $20,000 reduction is reasonable.

Respondents further contend that should the State's early retirement incentive be passed, the need for the $360,171 increase over 1990-91 will be obviated and result in a surplus.

6. Equipment Repair Services Reduction: $20,000

Respondents argue that the $20,000 reduction in this line item will produce a 6.15% increase over the amount expended in 1989-90 which they believe to be more reasonable than the 24.39% increase projected by petitioner.

7. Legal/Negotiation Services — Reduction: $7,500

Respondents contend that the $7,500 reduction in this account still permits an approximately $20,000 increase over the 1990-91 budgeted figure which is reasonable and within the control of petitioner.

8. Test Scoring Services — Reduction: $15,000

While respondents recognize the change in petitioner's testing procedures, they argue that the proposed $15,000 reduction in this account still leaves $25,000 in the budget for this purpose which they deem to be reasonable.

9. Transportation Vehicles — Reduction: $25,000

Respondents contend that petitioner purchased a school bus during the 1990-91 school year and indicated at the budget hearing for that year that no more purchases were contemplated for the foreseeable future. The proposed reduction in this account still leaves $34,000 in this line item.

10. Custodial/Maintenance Supplies — Reduction: $25,000

Respondents argue that the amount budgeted in the account represents a 44.50% increase over actual expenditures in 1989-90. The proposed reduction of $25,000 will still permit an 18.22% increase over 1989-90. Respondents contend that no statement has been received which would indicate that the remaining $112,437 would prevent the district from meeting its operational needs.

11. Textbooks/Disposable Texts — Reduction: $15,000

Respondents contend that this account has increased by 16.32% over the 1989-90 expenditures and therefore the proposed $15,000 reduction would still permit a 5.75% increase over the 2 year period. No information has been received which would indicate how the district would be impaired by the reduction contemplated.

12. Vehicle Repairs Reduction: $10,000

Respondents argue that the $66,600 figure remaining after the $10,000 reduction effectuated in this account is sufficient to meet the district's needs since this is a controllable item.

13. Staff Travel Reduction: $60,000

Respondents argue that given the fact that there has been a considerable reduction in staff, the 36.31% increase over the amount expended for 1989-90 is unwarranted.

14. Other Utility Services Reduction: $5,000

Respondents contend the 1% reduction contemplated here is reasonable.

15. Dues and Fees Reduction: $11,500

Respondents contend the reduction in this item is justified by the reduction in staff.

16. Grounds/Asphalt Repairs Reduction: $12,000

The increase in this line item represents a 106.66% increase over the amount expended in 1989-90. The reduction effectuated, respondents urge, still permits a 45.68% increase. Respondents aver that petitioner has failed to indicate how this reduction impairs its ability to provide a thorough and efficient system of education.

17. Building Maintenance Reduction: $2,500

Respondents contend the reduction in this account is a modest one in an area where expenditures are controllable.

18. Miscellaneous Services Reduction: $7,500

Respondents contend that they have received no indication of the nature of these services. Although the reduction represents a lesser expenditure over previous years, respondents believe that petitioner can sustain such a reduction.

19. Fuel Oil Reduction: $20,000

Respondents believe that petitioner's budget overstates the cost of fuel since the budget was prepared prior to the end of the Middle East War. The remaining amount still represents a 18.06% increase over 1989-90 expenditures.

20. Gasoline/Motor Oil Reduction: $10,000

Respondents set forth the same argument as presented above and find a $10,000 increase reasonable.

21. Equipment and Furniture Reduction: $125,000

Respondents contend that petitioner has failed to provide a fixed asset inventory and thus no determination can be made as to what furniture and equipment needs to be replaced and when. Since respondents believe that this is a controllable expense and in the absence of an inventory they believe petitioner can sustain the $125,000 decrease recommended in this line item account.

COMMISSIONER'S DECISION

Prior to ruling on the specific line item reductions which are the subject matter of this appeal, the Commissioner wishes to address the issue raised by respondents relative to whether or not they had been provided with sufficient information with which to make a reasoned judgment as to what was necessary in order to provide a thorough and efficient system of education. The Commissioner has carefully reviewed the allegations of uncooperativeness and lack of information raised by the respondents as well as the response to such allegations from petitioner.

Based upon such review the Commissioner cannot but conclude that much of the problem inherent in this issue is a result of petty

squabbling and an atmosphere of obvious poor relations among the three bodies involved. Notwithstanding the above, the Commissioner does conclude that the information other than a more recent update of actual expenditures for the 1990-91 school year was available to them, albeit such information in some instances such as record of transfers and a district inventory had to be obtained by going to the Board offices. In the final analysis, the Commissioner notes that while it is the responsibility of petitioner to provide the information necessary, respondents also have a responsibility to seek out that which they need and to seek further discovery from the Commissioner if it is not forthcoming. In the future, the Commissioner calls upon all parties to this dispute to approach the budget review process in a greater spirit of cooperation directed toward fulfilling their joint constitutional responsibilities.

CAPITAL OUTLAY

Buildings — Reduction: $210,000

The Commissioner has carefully reviewed the arguments in this matter. While he notes that respondents contend that no imminent health hazard exists which would require the removal of all asbestos tiles from the Cambridge Park Administration Building, the Commissioner believes it to be both prudent and in the best interest of the health and well-being of the occupants of the building to undertake the removal of the hazardous or potentially future hazardous condition. The Commissioner finds merit in petitioner's argument that waiting until the ceiling becomes an actual hazard will require a more expensive and complicated clean-up process. The Commissioner therefore directs that the $210,000 reduction effectutated by respondents be restored.

CURRENT EXPENSE

1. Roof Repair — Reduction: $130,000

Upon review of the reasons presented by the parties in this matter, the Commissioner determines that the $130,000 for roof repair eliminated by respondents in this matter be restored. In so ruling, the Commissioner notes that respondents do not challenge the fact that the roofs in question need repair. They merely seek to substitute their judgment for that of petitioner.

In considering that judgment, the Commissioner concludes that it is fiscally more prudent to replace roofs which are 20 to 25 years old at current costs rather than to pay a lesser amount to patch those roofs immediately, only to be faced with the necessity of replacing them 2, 3 or 5 years later at a much higher cost.

As to respondents' argument that petitioner has failed to demonstrate how this project relates to its ability to provide a thorough and efficient system of education, the Commissioner finds such assertion to be without merit since the components of a thorough and efficient education include within it the right to attend schools which provide a healthful and safe environment.

2. Architect/Engineering Fees — Reduction: $50,000

Since the Commissioner has restored to monies dedicated to the roof repair, he likewise directs that the $50,000 reduction in this line item be restored. This determination is based upon the reasoning of respondents that the reduction in this area was predicated on the elimination of the roof replacement and asbestos projects.

3. Other Purchased Services Reduction: $109,000

Initially the Commissioner notes that the amount budgeted by petitioner in this account is $521,010 and not $529,898 since a reduction was made after the budget hearing. The Commissioner also notes the argument presented by respondents as to the lack of information provided by petitioner as to what was budgeted in each of the specific areas of purchased services prior to their being aggregated by petitioner in its Position Statement, at page 11. After having reviewed the budget, the Commissioner notes that while the enumerated purchased services are listed in the budget they are widely scattered and difficult to aggregate. Nonetheless, the Commissioner does find that respondents also have a responsibility to seek out further information at or before the statutorily required conference with the Board.

Having so concluded, the Commissioner does find that petitioner has not provided sufficient information as to how much of the 1990-91 amount budgeted was actually spent and/or committed by the time of the submission of its Position Statement or its response.

In light of the foregoing the Commissioner concludes that petitioner has not fully met its burden; however, he likewise believes that the extent of the reduction imposed by respondents does raise the spectre of leaving petitioner with an insufficient amount to meet its obligations. The Commissioner therefore believes it appropriate to permit petitioner an increase in this account equivalent to the percentage increase in the overall budget, namely 5.5%. Thus the Commissioner directs that $27,367 be restored to this account and the remainder of the reduction, or $81,633, be sustained.

4. Instructional/Other Supplies Reduction: $70,000

The Commissioner again notes for the record that the amount budgeted in this account is $718,902 and not $722,577, as contended by respondents, since a reduction was made after the budget hearing. The Commissioner again notes the argument presented by respondents as to the lack of information as to actual expenditures in 1990-91 and the percentage increase in this item when compared to the 1989-90 actual expenditures. In this instance, where the items in question relate to direct instructional supplies and given the continuing increase in costs experienced by school districts in keeping their library, reference books and periodicals up to date, the Commissioner believes the approximately $21,000 amount of increase over the 1990-91 budgeted figure projected by petitioner is not unreasonable. The Commissioner therefore directs that the $70,000 reduction in this line item be restored.

5. Other Employee Benefits Reduction: $20,000

The Commissioner has carefully reviewed the arguments presented by the parties in reference to this line item. Even considering the contractual obligations as to tuition reimbursement, terminal leave and sick pay, the Commissioner finds that petitioner has not demonstrated that it cannot meet its obligations while absorbing the minimal $20,000 reduction in this account. Therefore respondents' reduction is sustained.

6. Equipment Repair Services Reduction: $20,000

In reviewing the arguments presented by the parties relative to the items requiring repair and recognizing that making a precise judgment as to what equipment may fail or require service is not possible, the Commissioner believes that the reduction of

$20,000 imposed by respondents in this account can be sustained without harm to the district's ability to maintain its equipment efficiently.

7. Legal/Negotiation Services Reduction: $7,500

The Commissioner notes that the amount which would be available to petitioner in this account after the reduction imposed would be significantly less than was actually expended in 1989-90. In light of the fact that petitioner itself budgeted an amount less than its 1989-90 expenditures and the acknowledgement on the part of respondents that negotiations with all units will be ongoing at some stage during 1991-92, the Commissioner finds that the entire amount budgeted by petitioner is warranted and therefore directs the restoration of the $7,500 reduced by respondents.

8. Test Scoring Services Reduction: $15,000

As noted by respondents in their Reply Brief at page 9, petitioner's own Position Statement acknowledges its actual cost for test scoring for 1991-92 would be $33,620, rather than the $40,000 budgeted in this account. The Commissioner therefore directs that a reduction of $6,380 be sustained and $8,620 be restored to this account.

9. Transportation Vehicles Reduction: $25,000

In reviewing the reduction imposed in this account as well as the vehicle information provided by petitioner in Exhibit E of its Reply Brief of July 30, 1991, the Commissioner believes that the reduction of $25,000 in this account can be sustained while still permitting petitioner to continue in modified fashion the replacement cycle for its transportation vehicles with the remaining $34,000.

10. Custodial/Maintenance Supplies Reduction: $25,000

After careful review of the arguments of the parties and the specific contention of respondents that petitioner has not demonstrated that the amount remaining after the reduction imposed is insufficient to meet its needs, the Commissioner agrees that petitioner has not met its burden and therefore directs that the $25,000 reduction imposed be sustained.

11. Textbooks/Disposable Texts Reduction: $15,000

In reviewing the amounts budgeted in this account, the Commissioner notes that the amount budgeted for 1991-92 is approximately $105,000 less than that budgeted in 1990-91. He further notes that the account was further reduced by petitioner after the public hearing on the budget in order to restore teaching positions. The Commissioner finds the $15,000 reduction imposed by respondents to be unsupportable. The Commissioner therefore directs that $15,000 be restored to this account.

12. Vehicle Repairs Reduction: $10,000

Petitioner advances the argument that in-house repairs as suggested by respondents are not possible to be accomplished due to the unavailability of garage space. Further, in response to respondents' assertion that no estimate of 1990-91 costs for vehicle repair has been provided, petitioner alleges that its budgeted amounts are based upon bids received in July 1990. In light of the foregoing and in consideration of the importance of having safe, well maintained transportation for pupils, the Commissioner directs that the $10,000 reduction be restored to this account.

13. Staff Travel — Reduction: $60,000

In reviewing the arguments presented by the parties, the Commissioner finds merit in respondents' position that the amount budgeted in this account should reflect to a greater degree the reduction in staff which has occurred in the district. Notwithstanding the fact that mileage reimbursement rates rise annually by IRS regulation and the reimbursements are contractual, the amounts budgeted for such services appear excessive.

The Commissioner, while acknowledging the importance of Board members to receive training, also notes that travel in this category can likewise be reduced during periods of fiscal restraint by limiting the number of Board members attending conventions.

Having so noted, however, the Commissioner believes that the amount of reduction imposed by respondents representing almost two-thirds of the travel budget is excessive. The Commissioner therefore directs that $30,000 of the reduction be restored and $30,000 be sustained.

14. Other Utility Services — Reduction: $5,000

The Commissioner notes that respondents in their Reply Brief raise no objection to the rationale of petitioner in arguing for its full budgeted amount. In light of such apparent acquiescence, the Commissioner directs the restoration of $5,000 in this account.

15. Dues and Fees — Reduction: $11,500

Respondents likewise have offered no reply to petitioner's position in this account. The Commissioner therefore directs the restoration of $11,500 in this account.

16. Grounds/Asphalt Repairs Reduction: $12,000

After careful examination of the projects set forth in this account and in consideration of the importance of maintaining safe conditions and the removal of safety hazards for students, the Commissioner finds the projects outlined on page 30 of petitioner's Statement of Position to be consistent with the maintenance of a thorough and efficient system of education. The $12,000 reduced by respondents in this account is restored.

17. Building Maintenance Reduction: $2,500

While the amount originally budgeted by petitioner in the account is less than actual expenditures for 1989-90 and the amount budgeted in 1990-91, the Commissioner does not believe that petitioner has adequately met its burden. The $2,500 reduction is sustained.

18. Miscellaneous Services Reduction: $7,500

The Commissioner in reviewing the nature of disbursements in this account cannot agree with petitioner's contention that the reduction imposed here will interfere with the ability to provide a thorough and efficient educational system. The Commissioner agrees with respondents that reductions can be made in the area of plaques and awards without jeopardizing the district's ability to meet its constitutional responsibilities. The reduction of $7,500 in this account is sustained.

19. Fuel Oil Reduction: $20,000

The Commissioner notes that $24,700 in this account is needed for transfer to the Other Utility Services account to meet the added cost for natural gas caused by the conversion of an additional school to natural gas. Based upon the acknowledgement of

such necessity on the part of respondents, the $100,300 amount remaining in this line item does not appear to be excessive given the uncertainties of weather conditions and oil prices. The Commissioner therefore directs that the $20,000 reduction imposed by respondents in this account be restored.

20. Gasoline/Motor Oil — Reduction: $10,000

The Commissioner notes petitioner's contention that its expenditures for 1990-91 for gasoline and motor oil were $53,000 which represents a figure greater than the amount budgeted for 1991-92. Petitioner's argument relative to paying a higher price for its fuel and oil due to a lack of storage facility likewise has merit. The Commissioner therefore directs the restoration of the $10,000 by which this account was reduced by respondents.

21. Equipment and Furniture — Reduction: $125,000

The Commissioner has considered the arguments set forth by respondents relative to the absence of a fixed assets inventory and petitioner's rebuttal that such inventory was available for review. Based upon his consideration of the voluminous nature of such an inventory in a school district the size of Matawan-Aberdeen, the Commissioner finds that petitioner has met its obligation for information by making such inventory available for review in its offices.

On the other hand, the Commissioner does find merit in respondents' argument that petitioner has not fully met its burden of providing sufficient data to demonstrate its need. Such a conclusion on the Commissioner's part is tempered by a belief that the size of the reduction directed by respondents would seriously impact upon the educational program, particularly in light of

petitioner's assertion that approximately half of the amount budgeted is for replacement equipment. Consequently, the Commissioner directs that $50,000 of respondents' reduction in this account be sustained and that $75,000 be restored.

SUMMARY

CAPITAL OUTLAY	REDUCTION	SUSTAINED	RESTORED
Buildings	$210,000	-0-	$210,000
Subtotal			$210,000

CURRENT EXPENSE	REDUCTION	SUSTAINED	RESTORED
Roof Repair	$130,000	$ -0-	$130,000
Architect/Engineering Fees	50,000	-0-	50,000
Other Purchased Services	109,000	81,633	27,367
Instructional/Other Supplies	70,000	-0-	70,000
Other Employee Benefits	20,000	20,000	-0-
Equipment Repair Services	20,000	20,000	-0-
Legal/Negotiation Services	7,500	-0-	7,500
Test Scoring Services	15,000	6,380	8,620
Transportation Vehicles	25,000	25,000	-0-
Custodial/Maintenance Supplies	25,000	25,000	-0-
Textbooks/Disposable Texts	15,000	-0-	15,000
Vehicle Repairs	10,000	-0-	10,000
Staff Travel	60,000	30,000	30,000
Other Utility Services	5,000	-0-	5,000
Dues and Fees	11,500	-0-	11,500
Grounds/Asphalt Repairs	12,000	-0-	12,000
Building Maintenance	2,500	2,500	-0-
Miscellaneous Services	7,500	7,500	-0-
Fuel Oil	20,000	-0-	20,000
Gasoline/Motor Oil	10,000	-0-	10,000
Equipment and Furniture	125,000	50,000	75,000
Subtotal	$750,000	$268,013	$481,987

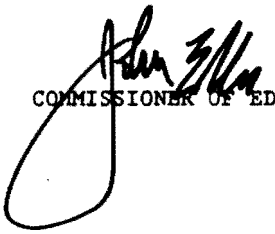
CURRENT EXPENSE AND CAPITAL OUTLAY			
TOTAL	$960,000	$268,013	$691,987

In light of the foregoing, the Commissioner directs the Monmouth County Board of Taxation to strike a tax levy that shall increase the tax levy for the Matawan-Aberdeen Regional School District by $210,000 in capital outlay and by $481,987 in current expense so that total tax levy for school purposes in such district shall be:

Current Expense: $21,713,573

Capital Outlay: 390,480

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

NOVEMBER 4, 1991

DATE OF MAILING - NOVEMBER 4, 1991

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES KUBICA, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF FORT	:	DECISION
LEE, BERGEN COUNTY.	:	
	:	

For the Petitioning Board, Robert T. Tessaro, Esq.

This matter has come before the Commissioner of Education by way of tenure charges of inefficiency received by the Commissioner on August 9, 1991 certified by the Borough of Fort Lee against James Kubica, a tenured custodial employee in its district. Said charges aver respondent has been deficient in the performance of his duties on a regular basis, and include a statement of evidence signed under oath by the Board Secretary, and also include a resolution and certificate of determination of the Board certifying the instant tenure charges to the Commissioner of Education.

By notices dated August 12 and September 9, 1991, and by certified letter notice dated October 1, 1991, the Commissioner of Education, apprised respondent of his receipt of said tenure charges and further sought an Answer to such charges. However, despite the fact that the notice dated October 1, 1991 was received and signed for by respondent, no Answer has been forthcoming. Said notice of October 1, 1991 also apprised respondent that failure to respond to

such charges within ten days of his receipt of that notice would result in each count of the petition being deemed to be admitted, whereupon the Commissioner would grant summary judgment to the Board.

Accordingly, for failure to respond to the tenure charges lodged against him, and pursuant to N.J.A.C. 6:24-1.4(e), the Commissioner finds and determines that each count of the tenure charges certified to him in the above-captioned matter are deemed to be true. Consequently, the Board has met its burden of persuasion that the instant tenure charges constitute grounds for dismissal pursuant to N.J.S.A. 18A:6-10 et seq.

Now therefore, on this 2 day of November 1991, the Commissioner determines that James Kubica has forfeited his tenured employment with the School District of the Borough of Fort Lee as a tenured custodian, effective the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 2, 1991

DATE OF MAILING - NOVEMBER 4, 1991

BOARD OF EDUCATION OF THE BOROUGH OF SOMERDALE, PETITIONER, V. MAYOR AND COUNCIL OF THE BOROUGH OF SOMERDALE, CAMDEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

Mitnick, Vogelson, Josselson & DePersia, for the Petitioner, (M. Allan Vogelson, Esq., of Counsel)

Gerald A. Sinclair, Esq., for the Respondent

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Borough of Somerdale, hereinafter "Board," on June 18, 1991. The Board is seeking a restoration of current expense appropriations reduced in the local tax levy by Mayor and Council, hereinafter "Council," for school purposes for the 1991-92 school year. The reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 30, 1991.

The total proposed and certified budgets, as well as the amount in dispute in this matter, are as follows:

Proposed tax levy adopted by the district board of education		Amount of tax levy certified by the governing body	
Current expense	$1,628,493	Current expense	$1,556,993

Amount of reduction in budget by governing body

Current expense $ 71,500

Amount of reduction in dispute before the Commissioner

Current expense $ 71,500

(See Board's Petition, Exhibit B.)

The line item reductions as they appear in Council's Resolution 91:63 and filed with the Board on May 29, 1991, without reasons, accompany the Board's Petition appended as "Exhibit C." Council in its Answer filed with the Commissioner on July 9, 1991, did, however, produce its reasons for each of the current expense line items controverted herein which are set forth below.

a) 90 (630): As admitted by Petitioner in Paragraph 8 of the Petition of Appeal, Petitioner is closing the No. 1 School by September, 1991. $5,000.00 was reduced from "Heat" to account for the anticipated reduction in this line item due to the closure of this facility.

b) 91 (640): Likewise, the closing of No. 1 School should similarly reduce utility costs; $10,000.00 was reduced from the "Utilities" line item, as follows:

640A: Water and Sewer - $3,500.00
640B: Electricity - $5,000.00
640C: Telephone - $1,500.00

c) 92 (650): Again, with the closing of one of the two facilities, less supplies for the operation of said facility will be needed; $4,000.00 was reduced from "Supplies."

d) 97 (720): $25,000.00 was reduced from this line item for "Contracted Services," based upon the following breakdown:

i. (720A): $18,000.00 allocated for the parking lot should be done through a change order under the bond issue.

ii. (720B): $5,000.00 was reduced for building and repairs due to the closure of one facility; it was pointed out that this line item increased by $7,500.00 over the 1990/1991 appropriation.

iii. (720C): $2,000.00 reduced from Miscellaneous provision, again with notation that this appropriation increased by $4,000.00 over prior budget.

e) 52 (130): As the administration had not expended the prior budgeted monies, $4,000.00 was cut from "Administrative-Other Expenses" line item to reflect the actual needs based upon past experience.

f) 51 (120D): The "Other Professional/ Technical Services" line item was reduced $1,500.00, as no architectural services are needed; $500.00 amount (same as prior budget) should be sufficient for any need.

g) 55 (213.2): $2,000.00 was reduced from "Salary-Bedside Instructor" line item, as the child that received such instruction is no longer in the district, but has moved to Laurel Springs; this item was not cut entirely.

h) 63 (220): $2,000.00 was reduced from "Textbooks," with the notation that this item nevertheless increased by $2,478.00 more than the 1990/1991 budget, so there was still a substantial increase allocated.

i) 65 (240): Again, $3,000.00 was reduced from "Teaching Supplies," but this line item still increased by $2,000.00 over the prior year's budget.

j) 66 (250): The $2,000.00 reduction results in this line item ("Other Expenses") being funded at exactly the same amount as the prior budget.

k) 100 (740C): $5,000.00 was reduced from "Snow Blower/Sign," which again resulted in this line item being funded at exactly the same amount as the prior budget.

l) 74 (420C): $1,000.00 was reduced from "Other Expenses-Health," to reflect the actual expenditures; the money appropriated in prior years was not utilized.

m) 119 (920): Although $7,000.00 was reduced from "Food Services-Other Expenses," still this line item increased $6,322.00 over the 1990/1991 budget.

*** (Council's Answer, at pp. 2-4)

It must be noted at this juncture that both parties in their initial pleadings claim that the other was responsible for failing to provide sufficient information or timely reasons giving rise to the specific line item reductions controverted herein. Without further comment on this issue, the Commissioner is satisfied that those reasons which address the specific line reductions as they appear above make the matter ripe for determination.

The Commissioner's findings and conclusions hereinafter set forth are made after giving due consideration to the respective positions advanced by the parties in their initial pleadings with attachments, as well as their position papers filed subsequent thereto.

The Commissioner is mindful that in arriving at final determination of the budget appeal now before him, the standard of review in rendering his decision is whether the monies available to the Board as a result of Council's actions are sufficient for the provision of a thorough and efficient education to the pupils of that school district for the 1991-92 school year. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) In arriving at his findings and determinations with respect to each of the line item reductions controverted herein, the Commissioner incorporates by reference Council's reasons for its reductions recited ante. The Board's responses to each of Council's reductions will therefore be addressed in summary form below before the Commissioner renders his findings and determination with respect to these reductions of the line items in question.

A. Heat - line 90 (630) Reduction $5,000

The Board opposes Council's reduction in this line item relying on the fact that physical facilities in the Park School have been expanded to accommodate the classrooms and pupils who previously attended School No. 1. The Board also points out that it has already made a corresponding reduction in this line item appropriation for the 1991-92 school year. The Board maintains that its original appropriation must, however, reflect normal increases in the cost of fuel which must be taken into account during the 1991-92 school year.

The Commissioner has reviewed the line item budget (Exhibit Df) attached to the Board's Petition. He notes that the amount budgeted by the Board for the 1991-92 school year is $20,000. This he finds represents a $9,000 reduction from the amount of $29,000 which was previously budgeted for the 1990-91 school year. Moreover, the $20,000 budgeted in this line item is only $4,623 more than the Board had expended for heat during the 1990-91 school year. The Commissioner finds therefore that Council's reduction of $5,000 in this line item cannot be sustained essentially for the reasons advanced by the Board herein.

Accordingly, the entire $5,000 reduced by Council is directed to be restored.

B. Utilities - line 91 (640) Reduction $10,000

This line item actually includes three sub-accounts each of which has been reduced by Council as follows:

640a Water and Sewer	Reduction	$ 3,500
640b Electricity	Reduction	5,000
640d Telephone	Reduction	1,500
	Total	$10,000

The Board reiterates its reasons advanced in line 90 (630) Heat, ante, in opposing Council's reductions herein. Additionally, the Board maintains that Council failed to consider the fact that the Park School has central air conditioning and more equipment, such as a FAX machine and computers, not present in School No. 1 which was closed at the end of the 1990-91 school year.

The Commissioner observes that the Board in its line item budget (Exhibit Df) has reduced its 1991-92 line item appropriation $2,000 in 640a, $5,000 in 640b, over the 1990-91 school year budget. Line item 640d, however, reflects a $4,500 increased appropriation for telephone cost.

The Commissioner finds and determines that Council's reduction in the Board's budgeted appropriations for the 1991-92 school year in line item account 640a Water and Sewer and 640b Electricity cannot be sustained.

The Commissioner further finds, however, that the Board's appropriation in line item 640d Telephone is excessive. He, therefore, sustains Council's reduction of $1,500 in this line item appropriation.

Accordingly, the Commissioner hereby directs that the $3,500 and $5,000 of Council's reduction be restored to line items 640a and 640b respectively.

Council's $1,500 reduction in line item 640d is, however, sustained.

C. Supplies - line 92 (650) Reduction $4,000

The Board cites increased costs and needs for supplies as having mandated an increase in this account. The Commissioner

observes that there is no significant increase in the amount appropriated in this account for the 1991-92 ($12,150) over the 1990-91 school year ($11,400).

He finds the Board's 1991-92 budget appropriation for this line item to be reasonable.

Accordingly, the Commissioner directs that the entire reduction of $4,000 reduced by Council in the area of supplies be restored.

D. Contracted Services - line 97 (720) Reduction $25,000

This line item includes specific reductions by Council in three sub-accounts:

720a Upkeep of Grounds	Reduction	$18,000
720b Repair of Buildings	Reduction	5,000
720c Repair of Equipment	Reduction	2,000
	Total	$25,000

The Board maintains that the $18,000 budgeted in the 720a account for the 1991-92 school year was used for the parking lot because of delays in State approvals, problems with drainage, footing and soil, and insufficient monies in its bond contingency fund.

The Commissioner finds such reasoning advanced by the Board as being totally unacceptable. In the first instance, the Board conveys the impression that it expended this sum of money before its 1991-92 budget was approved.

Moreover, the Board's line item budget (Exhibit Df) establishes that while the Board had budgeted $20,000 in the 720a account during the 1990-91 school year, none of this amount was expended during that school year. Accordingly, the Commissioner

hereby sustains Council's reduction of $18,000 in account 720a budgeted by the Board for the 1991-92 school year.

The Commissioner, however, agrees with those supporting reasons advanced by the Board to restore Council's reduction of $5,000 to the 720b Repair of Buildings. In this regard, the Board maintains all of the funds appropriated in this account are required to maintain the Park School which include electrical wiring, a new roof and general maintenance at the Park School. Accordingly, the Commissioner directs that the entire reduction of $5,000 in account 720b be restored.

Conversely, the Commissioner finds the Board's request to restore Council's reduction of $2,000 to line item 720c Repair of Equipment to be unacceptable. In the Commissioner's view, the rationale presented by the Board to restore the $2,000 reduction in this account is unjustified because it does not refer to the repair of equipment. ($6,000 for copier, $1,500 for fire alarm, $1,500 for cafeteria equipment, and $2,000 for any other equipment which might be needed throughout the year) Accordingly, the Commissioner hereby sustains Council's reduction of $2,000 in line 720c.

E. Other

The Commissioner has examined both Council's and the Board's positions with regard to a $1,500 reduction imposed on line item 51 (120d) or 51 (120c). He finds and determines that he is unable to identify or attribute the $1,500 reduction imposed by Council in either of these accounts.

Accordingly, the Commissioner directs that the entire $1,500 reduction by Council be restored to the Board's 1991-92 budget appropriation.

The Commissioner has reviewed the remaining reductions imposed by Council in the following line item accounts:

		Reduction
52 (130)	Administration - Other Expenses	$ 4,000
55 (213.2)	Salary Bedside Instructor	2,000
63 (220)	Textbooks	2,000
65 (240)	Teaching Supplies	3,000
66 (250)	Instruction - Other Expenses	2,000
100 (740c)	Repair of Equipment - Other Expenses	5,000
74 (420c)	Health - Other Expenses	1,000
119 (920)	Food Services - Other Expenses	7,000
	Total	$26,000

With regard to line items 52 (130), 55 (213.2), 63 (220), 66 (250), 100 (740c) and 119 (920), the Commissioner has reviewed the Board's responses set forth in its position papers in conjunction with the 1991-92 line item budget (Exhibit Df) and its advertised budget (Exhibit Da) for the 1991-92 school year. He finds and determines that although the Board should have provided more specificity with regard to its reasons for the restoration of these reductions to its 1991-92 current expense budget appropriations, he cannot disagree with those reasons, however limited in nature, offered by the Board which outweigh Council's reasons for making such reductions.

In the Commissioner's view, to sustain Council's reductions in those specific line items cited above, could result in preventing the Board from carrying out its statutorily prescribed mandate to provide a thorough and efficient program of education for its pupils. The Commissioner is constrained to point out, however, that he is deeply concerned about the efforts made by the Board in this regard to more fully and specifically justify its needs for the restoration of the funds in question.

Accordingly, the Commissioner, hereby directs that the entire amount of Council's reductions imposed in line item accounts 52 (130), 55 (213.2), 63 (220), 66 (250), 100 (740c) and 119 (920), which total $22,000, be restored to the Board's 1991-92 local tax levy appropriations.

Conversely, the Commissioner finds and determines that the Board has failed to present any sound educational reason which would justify the restoration of Council's reductions in line items 65 (240) or 74 (420c) amounting to $4,000.

The Commissioner hereby directs that the Council's reduction of $4,000 in these line item accounts can be and is hereby sustained.

Accordingly, for the reasons expressed herein, the Commissioner directs the restoration of $46,000 of Council's current expense tax levy reduction. He sustains, however, $25,500 of its reduction to current expense.

Consequently, the Camden County Board of Taxation is directed to make the necessary adjustments to the local tax levy which shall add an additional $46,000 to the 1991-92 current expense tax levy for school purposes in the Borough of Somerdale School District.

This increase shall raise the 1991-92 tax levy for current expense as set forth below:

	TAX LEVY CERTIFIED BY GOVERNING BODY	AMOUNT RESTORED	TAX LEVY AFTER RESTORATION
CURRENT EXPENSE	$1,556,993	$46,000	$1,602,993

NOVEMBER 4, 1991

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 4, 1991

BOARD OF EDUCATION OF THE BOROUGH OF FREEHOLD, PETITIONER, V. MAYOR AND COUNCIL OF THE BOROUGH OF FREEHOLD, MONMOUTH COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

DeMaio & DeMaio, for the Petitioner (Vincent C. DeMaio, Esq., of Counsel)

Cerrato, Dawes, Collins, Saker & Brown, for the Respondent (John I. Dawes, Esq., of Counsel)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Borough of Freehold, hereinafter "Board," seeking restoration of a current expense tax levy reduction imposed by Mayor and Council of the Borough of Freehold, hereinafter "Council," upon the Board's 1991-92 school budget appropriation which was rejected by the voters at the annual school election held on April 30, 1991. These reductions were made pursuant to the applicable provisions of N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amount in dispute in this matter, are set forth below:

Proposed tax levy adopted by the district Board of Education		Amount of tax levy certified by the governing body	
Current expense	$3,200,000	Current expense	$3,146,941

Amount of reduction in budget by governing body

Current expense	$ 53,059

Amount of reduction in dispute before the Commissioner

Current expense	$ 38,059

(See Schedule B, Petition of Appeal.)

Initially, the Commissioner observes that the Board in its resolution of May 23, 1991 (Schedule C) accepted a $15,000 reduction imposed by Council in two specific current expense line items:

(1) Line 91 - Utilities - $ 5,000
(2) Line 90 - Heat - 10,000

(Schedule C, at p. 1)

The Board, however, maintains that the remaining current expense line item reductions imposed by Council, which total $38,059 for the 1991-92 school year, are necessary to provide a thorough and efficient education and seeks restoration of those reductions before the Commissioner.

On July 1, 1991 Council filed its Answer asserting that its budget reductions as set forth in its resolution dated May 21, 1991, which was attached to the Board's Petition as Schedule A, is valid for the reasons set forth therein. Position papers were subsequently filed by the parties pursuant to the provisions of N.J.A.C. 6:24-7.8 and, thereafter, the record was closed by the Commissioner.

The Commissioner observes that the pertinent line item reductions are set forth in detail in Council's Position Statement filed August 15, 1991 which appears below.

2. A reduction in Line Items #49 of [$2,493.00], #57b of $21,690.00, #58 of $1,410.00, #59 of $380.00, #60 of $2,875.00, #61 of $938.00, #73 of $985.00, #88 of $1,576.00, #118 of $725.00, #143 of $597.00, #146 of $813.00, #155 of $295.00, #170 of $1,855.00, #176b of $524.00, #182 of $697.00, and #189 of $1,260.00 can be accomplished without affecting in any way the various salary accounts as indicated in the budget of the Board of Education. The Mayor and Council contend that the budget clearly indicates an overstatement of the required amounts to pay salaries of the employees of the Board of Education. (Council's Position Statement, at p. 2)

Upon a careful review of the respective positions advanced by the parties, which are incorporated herein by reference, and being mindful that the standard upon which budget appeals must be judged pursuant to Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) is whether the amount of moneys available to the Board as a result of Council's actions is sufficient for provision of a thorough and efficient system of education, the Commissioner makes the following determinations.

Current Expense Reductions - 1991-92

LINE ITEM	DESCRIPTION	1991-92 PROPOSED BUDGET	1991-92 COUNCIL'S REVISED BUDGET	1991-92 AMOUNT OF REDUCTION
49-110	Sal.-Adm.	$ 243,900	$ 241,407	$[2,493]
57b-213	Sal.-Teachers	2,169,023	2,147,333	21,690
58-211	Sal.-Principals	141,000	139,590	1,410
59-212	Sal.-Supervisors	38,000	37,620	380
60-214	Sal.-Other Inst. Staff	287,500	284,625	2,875
61-215	Sal.-Secretaries	93,800	92,862	938
73-410	Sal.-Nurses	98,500	97,515	985
88-610	Sal.-Custodians	157,600	156,024	1,576
118-910	Sal.-Food Service	72,500	71,775	725
143-9-210	Sal.-N.I.	59,700	59,103	597

LINE ITEM	DESCRIPTION	1991-92 PROPOSED BUDGET	1991-92 COUNCIL'S REVISED BUDGET	1991-92 AMOUNT OF REDUCTION
146-10-210	Sal.-P.I.	81,300	80,487	813
155-13-210	Sal.-C.H.	29,500	29,205	295
170-18-210	Sal.-R.R.	185,500	183,645	1,855
176-20-210	Sal.-P.S.H.	52,400	51,876	524
182-22-210	Sal.-Speech	69,700	69,003	697
189-24-210	Sal.-B.S.I.	126,000	124,740	1,260
			Total Reduction	*$[39,113]

(Board's Position, Attachments 3a-3p)

*ACTUAL REDUCTION

The Commissioner observes from the above line item chart of reductions that while the parties have indicated in their pleadings that the amount in dispute is $38,059, the actual amount of current expense line item reductions contemplated by Council totals $39,113. However, it is clear that the $1,054 differential in the above totals was not considered in Council's tax levy certification and, therefore, will not be considered herein.

The Commissioner notes from the position taken by Council in its answer and written position filed with him that it is Council's view that the current expense line item reductions which it imposed on employee salaries totaling $38,059 "represent excessive wage settlements agreed to by the Board of Education." (Schedule A, at p. 2)

The Board, on the other hand, in rejecting the argument raised by Council maintains that such reductions in the various salary accounts are arbitrary and capricious and will not allow it to honor its contractual obligations to its employees now in their second year of a 3-year contract agreement. (Board's Position, Attachment 2a)

The Commissioner observes from the record that except for the position that Council has taken above with respect to its $38,059 line item reductions in employee salaries, the record is barren of any persuasive evidence or specific recommendations as to why they should be sustained.

The Commissioner therefore concurs with the Board's position that the salary line items in question are based upon negotiated contractual agreements already in place and may not be set aside. The Commissioner so holds.

Accordingly, for the reasons expressed herein, the Commissioner finds and determines that the current expense line items totaling $38,059 in negotiated employee salary reductions imposed in the local tax levy by Council for the 1991-92 school year are therefore set aside.

The Monmouth County Board of Taxation is hereby directed to include the amount of $38,059 in current expense for school purposes in the Freehold Borough School District for the 1991-92 school year. This amount when added to the current expense tax levy appropriation previously certified for the 1991-92 school year shall be as follows:

	TAX LEVY CERTIFIED BY GOVERNING BODY	AMOUNT RESTORED BY COMMISSIONER	TOTAL TAX LEVY
CURRENT EXPENSE	$3,146,941	$38,059	$3,185,000

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 4, 1991

DATE OF MAILING - NOVEMBER 4, 1991

BOARD OF EDUCATION OF THE TOWN OF NEWTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWN COUNCIL OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Rand, Algeier, Tosti & Woodruff (Robert M. Tosti, Esq., of Counsel)

For the Respondent, Trapasso, Dolan & Hollander (Sanford L. Hollander, of Counsel)

This matter was opened before the Commissioner of Education by the filing of a Petition of Appeal from the Board of Education of the Town of Newton (Petitioner) appealing the reduction in the 1991-92 budget imposed by the Town Council of the Town of Newton (Respondent) pursuant to the provisions of N.J.S.A. 18A:22-37. The aforesaid reduction consisted of a $217,000 reduction in the current expense tax levy. As a result, the amount in dispute before the Commissioner is summarized below:

Proposed Tax Levy Adopted by the District Board of Education	Amount of Tax Levy Certified by Governing Body
Current Expense $4,422,238	$4,205,238

Amount of Reduction by Governing Body

Current Expense $217,000

Amount of Reduction in Dispute before the Commissioner

Current Expense $217,000

On June 25, 1991, Council filed the Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6 and 7.7. On July 15, 1991 the Board filed its written submission in support of its Petition of Appeal and the Council filed its position on July 10, 1991. Rebuttals were filed on July 25, 1991 and July 26, 1991, respectively, with final submissions being received on August 5, 1991 and July 30, 1991 at which point the record before the Commissioner was formally closed.

In rendering judgment relative to budgetary appeals, the Commissioner notes the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the authority for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals brought by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, upon defeat of the 1991-92 budget by the electorate and after consultation with the Board as prescribed

by N.J.S.A. 18A:22-37, Council recommended the following line item reductions with the rationale for same as indicated below:

CURRENT EXPENSE REDUCTIONS

Acct.	From	To	Total	Rationale
2702-2	$ 12,000	$ -0-	$ 12,000	Sufficient Reserve in SUI Account to cover all contingencies.
2702-2	245,010	195,010	50,000	Review of backup documentation reveals the reduction of $50,000 will leave sufficient budget funds to cover all possible contingencies that may have to be met within the 1991-92 school year.
1103-5 1104-5 1205-5 1212-5 1213-5 1219-5 2101-5 2102-5 2103-5 2104-5 2201-5 2202-5 2301-5 2302-5 2401-5 2502-5 2503-5 2602-5	140,560	70,560	70,000	Review of backup documentation reveals the remaining $70,560 in various programs for equipment purchases is sufficient to meet existing instructional needs.
2301 2302 2401 2501	37,785	27,785	10,000	Conference and workshop expenses should be curtailed because they have no direct impact on any instructional programs.
2701-8	550,000	475,000	75,000	The support for increase in tuition rates or increase in the number of students to support this large budget increase is too speculative.
		TOTAL	$217,000	

BOARD'S POSITION

Generally, the Board argues that the actions of the Council in effectuating the reductions detailed above with one exception were arbitrary and capricious and inhibit the district from providing a thorough and efficient system of education. Specifically, the Board argues as follows:

State Unemployment Insurance - Account No. 2702-2

Reduction: $12,000

The Board concedes that the above-cited account contains a sufficient reserve and it therefore accepts the reduction of $12,000 imposed by the Council.

Other Employee Benefits - Account No. 2702-2

Reduction: $50,000

The Board argues that the entire $50,000 by which this account was reduced by the Council is necessary to meet its obligations to compensate staff and that the $195,010 remaining in this account is insufficient to permit it to provide a thorough and efficient system of education since the amounts required in this account would force reductions elsewhere in the district's programs.

The Board contends that $15,000 of the $245,010 fully budgeted is necessary to compensate teachers who move to different salary guide levels as a result of degree advancement.

Additionally, the Board contends that $115,010 was placed in the Other Employee Benefits account as a means of "hiding" additional monies which might become necessary to meet a salary agreement with teachers and secretaries which was then in process of being negotiated and which was subsequently concluded with a increase of 6.3%. The Board argues that the $115,010 budgeted in

this account represented the additional 2.3% increase above and beyond the 4% increase contained in the regular salary accounts. Because of the highly sensitive and confidential nature of this particular aspect of the budget, the Board asserts it was unable to discuss this in open public session when the conference with the Council took place.

Finally, the Board contends that it has been directed by the Commissioner to restore the back pay of a teacher who was legally and properly suspended without pay upon indictment but who was found to be not guilty of the aggravated sexual assault for which he had been indicted. The amount of salary involved in the Commissioner's directive was $62,850. Additionally, tenure charges were subsequently filed in June 1991 against the individual involved and he was suspended without pay for the 120 days permitted by law, which period expired in September 1991. Should the Commissioner find the charges to be unproven, the teacher would be entitled to the restoration of approximately $5,136 per month for the period of the suspension without pay, in addition to the salary to which he is entitled by law for the period of suspension beyond the 120 days. His annual salary entitlement for 1991-92 is $51,360. The Board consequently argues that the $245,010 budgeted in this account contains the $115,000 set aside to meet the possible salary obligations to the aforesaid teacher. (See Exhibit A of the Board's Position Statement.)

Equipment - Account Nos. 1103-5, 1104-5, 1205-5, 1212-5, 1213-5, 1219-5, 2101-5, 2102-5, 2103-5, 2104-5, 2201-5, 2202-5, 2301-5, 2302-5, 2401-5, 2502-5, 2503-5, 2602-5

Reduction: $70,000

The Board by way of its Superintendent's Affidavit argues that the $70,000 by which the Council reduced its equipment budget will seriously curtail its ability to provide the equipment necessary to assure a thorough and efficient system of education. It contends that its purchases of equipment, both new and replacement, were severely reduced prior to submission of the budget to the voters due to the restrictions imposed by the budget cap. Therefore, the equipment remaining in the budget which is set forth in the Superintendent's Affidavit in Exhibits B-J attached to the Board's Position Statement is absolutely essential.

Travel - Account Nos. 2301, 2302, 2401, 2501

Reduction: $10,000

The Board in its Position Statement and Exhibit K in the Superintendent's Affidavit attached thereto contends that the reduction effectuated in this account by the Council inhibits the ability of the Board and its administrative staff to obtain the training and professional development necessary to meet its responsibilities in a changing educational environment.

The aforementioned Exhibit K sets forth the specific amounts budgeted for travel for the separate categories of administrators and Board members and points out that the total amount of travel allocated in the full budgetary allotment prior to the Council's reduction represents a grossly insufficient average allotment of $1,251 per each of the 17 persons involved. Further reduction, contends the Board, would eliminate all leadership training.

Tuition - Account No. 2701-8

Reduction: $75,000

The Board contends that the entire amount of $550,000 budgeted in this account is necessary to meet mandated special education tuition costs. Elimination of these funds will require reduction of other educational programs in order to meet the state and federal mandates in special education. Exhibits L and M of the Superintendent's Affidavit set forth the confirmed special education tuition requirements as of July 5, 1991 and the additional placements for 9 currently enrolled classified students whose placements were projected but not yet effectuated at the time of the budget's development.

COUNCIL'S POSITION

Initially, the Council after expressing regret over the statutory scheme which requires its involvement asserts that its actions in effectuating the reductions in the line item accounts at issue in this matter were in all respects consistent with its responsibilities to assure a sufficient amount to provide a thorough and efficient system of education for the Newton Public Schools. Pursuant to the requirements of N.J.A.C. 6:24-7.8 the Council set forth its position as follows:

State Unemployment Insurance - Account No. 2702-2

Reduction: $12,000

The Council argues that an unemployment insurance savings account in excess of $200,000 is more than sufficient to cover unemployment payments in the 1991-92 school year and urges affirmance of the entire $12,000 reduction.

Other Employee Benefits - Account No. 2702-2

Reduction: $50,000

Initially the Council expressed frustration at what it conceived as the Board's failure to provide sufficient information upon which to base a reasoned judgment. The Council contends that it was only able to determine that the amounts in question consisted of $15,000 budgeted for teachers moving across the guide as a result of advanced degrees and undisclosed amounts for purposes of settling a claim in litigation and for salary negotiations which were then ongoing.

The Council alleges that although the Board argues in a memorandum from Kenneth Hart, Assistant Superintendent/Board Secretary, set forth as Exhibit E of the Council's Position Statement that it expended nearly $12,500 for salary guide movement in 1990-91, the revised appropriation column for the said 1990-91 budget indicates only a $25 expenditure in that account. It is the Council's position that such payments will again be paid from regular salary accounts making it possible to reduce this line item account by the entire $15,000 budgeted by the Board.

While arguing that the Board's reluctance to provide documentation concerning the amounts necessary for litigation purposes made it difficult to perform its statutory function, it contends that since the litigation referred to by the Board is still not concluded, it is perfectly appropriate for the Board to structure any settlement over a multi-year period.

As to the, at that time, undisclosed amount in reserve for negotiations, the Council contends that a reduction in this area from a management perspective would have had a positive effect on salary negotiations which were at that time not completed.

Therefore, in light of what it contends is incomplete documentation from the Board as to the amounts in question in this account, the $50,000 reduction imposed by the Council is reasonable and should be sustained.

Equipment - Account Nos. 1103-5 - 2602-5

Reduction: $70,000

The Council again expressed frustration relative to the equipment accounts herein contested with the lack of documentation provided by the Board to justify the expenditures budgeted. That frustration, contends the Council, was multiplied by the fact that the Board and its central administration did not itself have available at the time of its budget preparation as of May 16, 1991, the date of its meeting with the Council, either documentation of what specific equipment was being budgeted for nor which portions of that budget were for new or replacement equipment.

In support of its position, the Council cites a letter of May 9, 1991 from Kenneth Hart to Camille Furgiuele, Town Manager, in response to a request from the Council for documentation of its equipment expenditures in which Mr. Hart acknowledges that building principals merely submit totals for each budget category. (See Council's Statement of Position, at page 10.)

Based upon the aforesaid admission by Mr. Hart, the Council contends that the Board established its budget of $140,560 in the equipment account without sufficient documentation to justify the expenditures on the basis of instructional needs.

Travel - Account Nos. 2301, 2302, 2401, 2501

Reduction: $10,000

The Council contends that until the Board has provided a significant amount of back-up documentation, that documentation merely indicates that the budgeted travel expenses are desirable but not necessary. (See Exhibit F of Council's Statement of Position.)

Tuition - Account No. 2701-8

Reduction: $75,000

In justifying the reduction imposed in this line item account, the Council discusses at length past difficulties experienced by the Board in accurately predicting both anticipated tuition revenues received from sending districts and its own tuition appropriations necessary for sending pupils outside the district. In support of its position the Council points out that the Board overstated its tuition revenues in 1989-90 by $429,984 and in 1990-91 by $90,347. (See Council's Statement of Position, at page 13 and Exhibit G.)

While acknowledging that past errors in budgeting should not be used to evaluate the current budget, the Council argues that such errors do call into question Board credibility despite the assurances from Mr. Hart that the 1991-92 budget estimates are conservative and past errors will not be repeated. However, the Council notes that $49,238 in anticipated adjusted tuition revenues from Green Township were not included as anticipated revenues in the 1991-92 budget thus making those revenues available to the Board within the 1991-92 budget year.

The Council further argues that the Board's documentation provides no substantiation for a significant increase in tuition

rates or for a significant increase in the number of students. While the Council acknowledges that some increases in both students and tuition rates are to be anticipated, there is no support to justify an increase from $298,427 budgeted in 1990-91 to $550,000 budgeted in 1991-92.

In further justifying its reduction, the Council points out that the testimony of Dr. Judith Ferguson, Superintendent of Schools, and Mr. Hart indicated that the 1991-92 budget appropriation for tuition expenses was determined by adding an anticipated 15% increase to the amount actually appropriated for 1990-91. However, the amount actually included in the budget is, according to the Council, some $41,543 in excess of a 15% increase.

The Council also challenges the $165,255 budgeted by the Board as part of the total expenditure of $550,000 in this account for future pending classifications as set out in Exhibit G of the Council's Position Statement. The Council contends that Mr. Hart's statement at the May 16, 1991 meeting between the parties that the Superintendent had on that date signed three classifications for $60,000 still leaves $105,255 unencumbered in that account.

Thus, the Council argues that based on the information presented to it on May 16, 1991 there was $41,543 unaccounted for in the category of existing special education students and $105,255 for potential special education students for a total of $146,798 in Account No. 2701-8 for which no justification had been provided. In light of this fact and the fact that the Board will have an additional unbudgeted revenue of $49,238 from Green Township due to the aforementioned tuition adjustment, the $70,000 reduction in this account should be sustained.

In summation, the Council alleges that the Board has been less than forthright in providing information to the public and the Council. It charges the Board with having failed to fully take into consideration that fact of the public's defeat of the budget and argues that the only basis for overriding the expression of public concern is a showing that a specific reduction is strictly related to fulfilling the constitutional mandate of providing a thorough and efficient system of education. It is the Council's contention that its own actions represented thoughtful consideration of the budget with full recognition of its constitutional responsibilities, while the Board has failed to meet the high standard required by the Commissioner in his review.

COMMISSIONER'S DECISION

The Commissioner has carefully considered the arguments presented by the parties in this matter as set forth in their position statements, response briefs and final summaries. Based upon that review the Commissioner sets forth below his finding in each of the controverted line item accounts. Prior to doing so, however, the Commissioner feels constrained to address issues raised by the Council in its Response Memorandum of July 25, 1991. The Commissioner notes that the Council questions whether the Commissioner has the right to consider facts which existed on May 16, 1991 and were not disclosed by the Board and whether he has the right to consider facts which were not in existence on May 16, 1991 but arose subsequent to that date.

In response to the foregoing, the Commissioner notes that his statutory and constitutional responsibility is to make certain that a board of education has available to it a budget which is

sufficient to ensure the ability of that board to provide a thorough and efficient system of education.

In that context, the Commissioner has the authority and responsibility to take into consideration whatever facts may be necessary for him to arrive at a conclusion relative to such statutory and constitutional mandate, whenever such facts may arise. Further, such conclusion on the Commissioner's part does not require him to review the entire budget including those items not singled out for reduction by the governing body as suggested by the Council in this matter.

State Unemployment Insurance

Reduction: $12,000

Inasmuch as both parties agree, the $12,000 reduction directed by the governing body is sustained.

Other Employee Benefits

Reduction: $50,000

In reviewing the $15,000 which the Board has budgeted in this account to compensate teachers moving to different salary guide levels, the Commissioner finds that, while the argument that the Council makes relative to the Board's failure to lay out in more explicit and specific terms how many teachers based upon contract language would be moving from one guide to another, as of the time of its meeting with the Council on May 16, 1991, has merit, the fact that the Board is obligated by contract to provide for such movement is undisputed. Nor, the Commissioner notes, is the fact that the Board had expended approximately $12,500 for this purpose in 1990-91 in real dispute. Further, the fact that in past years the monies in that account have been transferred and expended in the regular

salary account does not mitigate against the Board's need for such funds to meet its contractual obligation. Consequently, the $15,000 required for such salary guide movement is deemed by the Commissioner to be justified.

As to the $115,000 the Board has budgeted in this account for purposes of meeting its obligation to carry out a decision of the Commissioner to compensate by way of back pay an employee suspended without pay upon indictment but subsequently acquitted, the Commissioner has carefully noted the Board's figures as to the amount of money owed to the teacher in question as a result of his decision. Based upon such review, the Commissioner determines that the $62,850 owed to the teacher in question for the period from June, 1989 to December 20, 1990 is legally mandated. While the salary of the aforementioned teacher for the 1991-92 school year is $51,360, the Commissioner notes that he has been suspended without pay upon the certification of tenure charges to the Commissioner at the end of June 1991 and that pursuant to N.J.S.A. 18A:6-11 such suspension without pay is for 120 days' duration. Based upon the aforesaid suspension, the teacher's salary would therefore resume approximately on November 1, 1991.

Inasmuch as the decision in the aforesaid matter is unlikely to be rendered prior to the expiration of the 1991-92 school year, based upon the Commissioner's experience in such matters, the $5,136 per month withheld for his salary for September and October 1991 by way of his suspension is unlikely to be required during this academic year. The Commissioner directs that a reduction of $10,272 from the $115,000 budgeted by the Board for this contingency purpose be sustained. The amount of $10,272 is

based upon only 2 months' salary since the 120 day suspension without pay by virtue of case law precedent begins on the day of suspension. (See In the Matter of the Tenure Hearing of Gertrude Lennon, School District of the Borough of Spotswood, Middlesex County, 1983 S.L.D. 784, aff'd State Board of Education 1984 S.L.D. 1954.)

Finally, the Commissioner finds and determines that the additional $115,010 which constitutes the Board's appropriation of $245,010 in this account involved an amount necessary to fund an additional 2.3% of a negotiated salary increase which eventually was entered into between the Board and its teachers and teacher aides. While the Council makes an effective argument that the Board failed to provide it with the details of its salary negotiations and with its further contention that the reduction of $70,000 in this account would have afforded the Board a strong argument to keep the eventual salary settlement within the effective cap percentage, the Board has, as of June 1991, entered into a contractual obligation which requires it to fund a 6.3% salary increase. In light of that reality, the Commissioner is moved by the Board's argument that the requirement to take those funds necessary to meet their salary obligations would impact directly on existing education programs.

Therefore, the Commissioner finds such expenditure to be justified.

Equipment

Reduction: $70,000

The Commissioner has carefully reviewed the arguments of the parties as presented in their various submissions. He has also reviewed the documentation belatedly provided by the Board in its written submission of July 15, 1991. Based upon that review, he

finds merit in the Council's argument that it did not have before it, at the time of its deliberations on May 16, 1991, any documentation upon which to make a reasoned judgment as to what equipment was necessary for the Board to have in order to ensure its ability to provide a thorough and efficient system of education. Nor, the Commissioner must agree, does the belated submission of the list of equipment required by school and location included within the Board's Position Statement as Exhibits B-J provide any basis for determining what equipment being requested is absolutely essential and what equipment is merely desirable. There is no reference to existing inventory or to the state or condition of equipment being replaced. The Commissioner's own review of the specifics contained within those lists convinces him that some of the items, such as the $15,000 allocated in Account No. 2502-5 for completing a locker replacement project and replacement of a hot water heater at $3,400 within the same account, are clearly justified, as is the $13,500 budgeted in Account No. 2201-5 for meeting the second year payment on a bus lease purchase plan.

Unfortunately, the Commissioner has been forced to make such judgment without benefit of specific justification by the Board. Further, the Commissioner is particularly unpersuaded by the argument presented by Superintendent Ferguson that a list of equipment to be purchased and justification for such purchases was unavailable to share with the Council because of the district's policy of site based management. Site based management does not relieve the central administration and the Board from their responsibility to require firm justification from site managers for all expenditures.

Having said that, the Commissioner notes that the $70,000 reduction imposed by the Council is one-half of the original amount requested by the Board in its various equipment accounts. Such a precise reduction likewise raises the spectre of whether the Council's actions in deciding how much to reduce the equipment budget resorted to an arbitrary percentage figure. In raising such question, the Commissioner is not unmindful of the fact that the Board gave the Council no information or basis for making an informed judgment.

Consequently, the Commissioner is left with the choice of either accepting an undocumented budgetary request or accepting an understandably arbitrarily established cut in equipment which, if fully imposed, may deprive the children of the district of equipment necessary for ensuring a thorough and efficient system of education. The Commissioner therefore directs the restoration of $10,000 to meet such equipment needs which may be truly urgent and sustains $60,000.

Travel

Reduction: $10,000

While the Commissioner recognizes the importance of providing for the training and the upgrading of skills and knowledge for both Board members and administrators, given the defeat of the budget by the district's electorate and the nature of current economic circumstances he must concur with the Council's assessment that the reduction of $10,000 in this account does not represent an impediment to the provision of a thorough and efficient system of education. The reduction of $10,000 by the Council in the travel accounts is sustained.

Tuition

Reduction: $75,000

The Commissioner has reviewed the figures of the actual special education placements as of July 5, 1991 and the actual tuition commitments of $434,014 as presented in Exhibit L of Superintendent Ferguson's Affidavit attached to the Board's Statement of Position. In response to the question raised by the Council in its Response Brief relative to whether the above-cited actual figure includes tuition for special education pupils placed in State facilities, the Commissioner notes that the Board asserts in its final summation that the $434,014 does not include monies allocated for tuition in State facilities which are found in a separate account.

The Commissioner further notes that the Board, as contained in Exhibit M of Superintendent Ferguson's Affidavit attached to the Boards Statement of Position, projects an additional $134,131 in estimated tuition costs resulting in what it claims will be an $18,145 deficit in its tuition account.

The Commissioner also notes the argument of the Council that the Board has available to it an additional unanticipated revenue amount of $49,238 as a result of a prior year tuition adjustment.

In weighing each of the arguments presented by the parties, the Commissioner must accept as valid the actual tuition costs as projected by the Board. Additionally, given the number of actual classified students currently enrolled for whom placements and actual tuition costs had not been determined as of the time of the filing of this matter and given the trend toward rising tuition

costs, the Commissioner accepts as reasonable the projection of additional costs as contended by the Board.

In addressing the Council's complaint that the Commissioner should limit his assessment based upon the documentation available to the Council at the time of its May 16, 1991 meeting, the Commissioner notes, as he did earlier in this decision, that his obligation to assure the availability of sufficient funds for a thorough and efficient system of education permits him to consider any and all evidence presented to him which enables him to best ascertain the level of funding necessary to meet that constitutional requirement.

Having so ruled, however, the Commissioner does find merit in the Council's argument that the unanticipated revenues of $49,238 to be realized from a tuition adjustment should be applied to the tuition requirements in this account. While the Commissioner does not quarrel with the Board's argument that under ordinary and less severe fiscal circumstances the $49,238 could reasonably be applied to surplus to bolster a small unappropriated free balance account, he believes that under current economic circumstances the unanticipated revenues should be used to reduce the tax burden of the community.

Consequently, in consideration of the Board's projection of an approximately $18,000 deficit in its special education tuition account, the Commissioner directs that $45,000 of the Council's reduction be restored and the remaining $30,000 reduction be sustained.

SUMMARY

Account	Reduction By Council	Sustained	Restored
State Unemployment Insurance	$ 12,000	$ 12,000	-0-
Other Employee Benefits	50,000	10,272	$ 39,728
Equipment	70,000	60,000	10,000
Travel	10,000	10,000	-0-
Tuition	75,000	30,000	45,000
TOTALS	$217,000	$122,272	$ 94,728

In light of the foregoing, the Commissioner directs the Sussex County Board of Taxation to strike a tax levy which shall afford the Newton Board of Education an additional $94,728 for current expense purposes in tax revenue and which shall result in a 1991-92 tax levy for current expense purposes of $4,299,966.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 4, 1991

DATE OF MAILING - NOVEMBER 4, 1991

BOARD OF EDUCATION OF THE BOROUGH OF ALLENHURST, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COMMISSIONERS OF THE BOROUGH OF ALLENHURST, MONMOUTH COUNTY, RESPONDENT.	:	DECISION

For the Petitioner, Sanford D. Brown, Esq.
(Cerrato, Dawes, Collins, Saker & Brown)

For the Respondent, William J. O'Hagan Jr., Esq.
(Stout & O'Hagan)

The Board of Education of the Borough of Allenhurst (Board) appeals to the Commissioner of Education from an action taken by the Mayor and Commissioners of the Borough of Allenhurst (Commissioners) pursuant to N.J.S.A. 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount for current expense costs for the 1991-92 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate a proposal to raise $123,445 by local taxation for school purposes. The proposal was rejected by the voters. Thereafter, the Board submitted its budget to the Commissioners for their determination of the amounts necessary for the operation of a thorough and efficient school system in the

Borough of Allenhurst for the 1991-92 school year pursuant to the mandatory obligation imposed on the Commissioners by N.J.S.A. 18A:22-37.

After consultation with the Board, the Commissioners made their determination and certified to the Monmouth County Board of Taxation $118,945 for current expense costs, thus reducing the tax levy by $4,500. The amount in dispute is as follows:

	BOARD'S PROPOSAL	COMMISSIONERS' PROPOSAL	REDUCTION
Current Expense	$123,445	$118,945	$4,500

The amount in dispute is slightly more than 3.6% of the Board's proposal to the electorate.

DISCUSSION

The Commissioners assert that the amount they provided is sufficient revenue for the thorough and efficient education of the Borough's pupils. In five separate line items, they defended their reductions ranging from $500 to $1,250, for a total reduction of $4,500. The Commissioners adequately set forth supporting reasons and gave several suggestions to the Board relative to cutting costs. The Commissioners offered assistance in purchasing some materials and supplies and further offered the services of the Borough's Business Administrator, as well as making available Borough equipment.

The Board asserts that the amount provided by the Commissioners is not sufficient to operate a thorough and efficient system of public schools pursuant to the obligation imposed on it by the New Jersey Constitution and the applicable New Jersey statutes. The Board concludes that the Commissioners' reductions fail to take into account educational considerations and contractual obligations

and, therefore, those reductions are arbitrary and capricious. The Board defends its need for the reduced funds in more detail provided by Exhibit A attached to the Board Secretary's affidavit.

After the appeal submission appeared to be completed, the Board filed, on July 8, 1991, an affidavit by its Board Secretary attesting to the fact that it is responsible for the education of a classified high school pupil. That pupil, on recommendation of the Child Study Team, is to be transferred from his present program to one better suited to meet his needs. The cost of this program change from the county vocational school to a new private school will increase the Board's financial obligation to this pupil from $8,069 to approximately $21,000, a difference of nearly $13,000. That transfer was confirmed by Board counsel's letter dated August 15, 1991.

Additionally, by letter dated August 27, 1991, this office was notified that another pupil, a 3½-year-old preschool handicapped child, was registered who will be educated at a program offered by the Asbury Park Board of Education at a cost of approximately $7,500. The previous year's cost was $7,260. The education of both of these pupils will add approximately $20,000 of unanticipated expenses to the budget.

In examining this budget, the Commissioner is cognizant of the landmark decision in Board of Education, East Brunswick Township v. Township Council, East Brunswick, 48 N.J. 94 (1966). In that decision "***the Court emphasized that the process of setting local educational budgets involves 'pervasively educational determinations' over which the Commissioner of Education has overriding responsibility. Id. at 103. Accordingly, it held the Commissioner has the power to review the municipality's proposed

reductions***." Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305, 313 (1989) The Court held, also, in In re Upper Freehold Regional School District, 86 N.J. 265 (1981), that the Commissioner of Education has the power to direct a local school district to issue bonds to fund a capital project even after the voters have rejected the referendum to finance the project.

In the instant matter, the Commissioner must consider a situation where the Board faces the problem of having insufficient funds to meet all of its obligations. In a similar situation where a board of education faced inadequate funding, the Commissioner held that "***[t]he problem is one of total revenues available to meet the demands of a school system***." Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County, 1968 S.L.D. 139, 142

That is the precise situation faced by the Allenhurst Board of Education. Because of the statutory and constitutional obligations of the Board and the Commissioners to provide a thorough and efficient education for all pupils, the budget reduction is set aside. It is quite clear that all of the funds are needed.

Accordingly, the Commissioner of Education directs that the Monmouth County Board of Taxation add to the amount of $118,945 previously certified for current expenses, an additional amount of $4,500, so that the total tax levy for the 1991-92 school year shall be $123,445.

IT IS SO ORDERED.

NOVEMBER 7, 1991

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 7, 1991

BOARD OF EDUCATION OF MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF ENGLISHTOWN AND MAYOR AND TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MANALAPAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

For the Petitioner, John I. Dawes, Esq. (Cerrato, Dawes, Collins, Saker & Brown)

For the Respondents, Robert F. Munoz, Esq. (Lomurro, Davison, Eastman & Munoz, P.A.)

The Board of Education of the Manalapan-Englishtown Regional School District (Board) appeals to the Commissioner of Education from an action taken by the Mayor and Council of the Borough of Englishtown and Mayor and Township Committee of the Township of Manalapan (Respondents) pursuant to N.J.S.A. 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount for current expense costs for the 1991-92 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate a proposal to raise $15,696,738.06

by local taxation for current expense costs of the regional school district. After the voters' rejection of the proposal, the Board submitted its budget to respondents for their determination of the amounts necessary for the operation of a thorough and efficient school system in the regional district for the 1991-92 school year pursuant to the mandatory obligation imposed on Council by N.J.S.A. 18A:22-37.

After consultation with the Board, respondents made their determination and certified to the Monmouth County Board of Taxation an amount of $15,238,822.06 for current expense costs. The amount in dispute is shown as follows:

	CURRENT EXPENSE
Board's Proposal	$15,696,738.06
Respondents' Certification	15,238,822.06
Amount Reduced	$ 457,916.00

The Board asserts that respondents' reductions are arbitrary and capricious and requests that the entire amount be restored to the budget.

Respondents deny that the reductions are arbitrary or capricious and state that sufficient funds have been provided to assure a thorough and efficient education to the pupils in the regional school district. They assert further that their budget reductions take into account educational concerns, contractual obligations and are based on previous spending patterns and expenditures by the Board and proper business practices.

The following chart sets forth the line item reductions by the governing bodies.

TABLE A

Account Number	Line Item	Board's Proposal	Respondent's Proposal	Reductio
110L10	Salary/Legal	$ 30,000	$ 26,000	$ 4,000
110N10	Salary/Negotiator	4,200	3,500	700
120D10	Other Contracted Services	45,000	40,000	5,000
120E10	Other Service Consultants	3,000	-0-	3,000
130A10	Board Expense	41,000	33,000	8,000
130I03	Business Office Expenses	20,000	17,000	3,000
130M	Printing & Publishing	32,825	26,025	6,800
130P09 & 10	Personnel Exps./Postage/ Copy Machine	44,000	41,500	2,500
213	Teacher Salaries	8,215,085	8,189,085	26,000
215A08	Sals., Clerical/Curric.	5,200	3,200	2,000
216A10	Sals., Tchr. Aides	13,400	-0-	13,400
216A80	Special Ed. Aides(1)	5,900	-0-	5,900
216A24	Basic Skills Aides	36,000	20,000	16,000
220	Textbooks	109,060.44	91,060.44	18,000
230C	A.V. Aides	39,450.80	33,450.80	6,000
250B	Travel Expenses	62,550	55,000	7,550
510A05	Sals., Supervisors	116,640	111,640	5,000
510B05	Sals., Bus Drivers	632,350	592,350	40,000
510C05	Sals., Van Drivers	252,635	192,635	60,000
520A05	Contracted Trans.	226,125	216,125	10,000
535B05	Trans. Equip.	3,750	2,000	1,750
540A05	Vehicle Insurance	155,000	144,600	10,400
545A05	Student Activity Trips	7,500	5,000	2,50[illegible]
545B05	Student Activities	25,000	20,000	5,00[illegible]
550C05	Maintenance	48,500	38,500	10,000
610A18	Sals., Substitute Custodians	5,000	4,000	1,000
630A	Heating	144,610	134,110	10,500
640B	Electric	251,000	236,000	15,000
660	Other Expenses	15,000	9,000	6,000
710C100	Sal., Maintenance	49,916	-0-	49,916
720C	Contr. Equip. Repair	113,260	93,260	20,000
730A	Replace Instr. Equip.	60,000	44,000	16,000
730B	Replace Non-Instr. Equip.	77,095	60,095	17,000
730C	New Equipment	125,753	110,753	15,000
740B	Other Exps. Bldg. Repair	85,000	75,000	10,000
820	Insurance	2,943,973	2,938,973	5,000
870B80	State Facilities Tuition	68,517	53,517	15,000
J0930	Cafeteria Expenses	15,000	10,000	5,000
	TOTAL	$14,128,295.24	$13,670,379.24	$457,916

(1) An error was made in Account 216A80. The Board's Exhibit A attached to Schedule D of the Petition of Appeal shows a $5,900 reduction in the above account. The correct amount is $15,900 (Board's budget); however, the amount discussed must be $5,900 because it adds up to the tax levy certification.

The Board asserts that the amount certified by the governing bodies is not sufficient to enable the school district to provide a thorough and efficient education to its pupils pursuant to the obligation imposed on it by the New Jersey Constitution and the applicable New Jersey statutes. The Board states, further, that the budget reductions fail to take into account its educational concerns and contractual obligations; therefore, Respondent's reductions are arbitrary and capricious.

Respondents deny that their actions are arbitrary or capricious and filed three affidavits, with voluminous back-up materials in support of their position. These affidavits set forth several arguments designed to demonstrate that there is much "fat" in the budget. Among respondents' assertions are the following:

1. many other cuts were recommended other than the ones eventually agreed upon;
2. respondents had conversations with Board officers and the superintendent where specific dollar amounts for reductions were preliminarily agreed upon;
3. there were several failed attempts to compromise on budget reductions;
4. the Board used threats to reduce its sports programs as a lever to support its total budget;
5. the Board transferred funds in and out of accounts in an attempt to prove that more money was needed in those specific accounts; and
6) many of the Board's line items show excessive surpluses.

The Superintendent filed an affidavit also which denied each of the specific allegations above. He argued that the portion

of the tax dollar allotted to the Board has declined steadily over the past 20 years. He offered a rational explanation for each of the assertions set forth in the affidavits filed by respondents. Additionally, he states that there was no agreement by the full Board to any suggested overall reduction of the budget. He asserts that this budget is $655,000 below its cap and that the Manalapan-Englishtown school district is one of very few in the state where its employees are required to make significant contributions to its medical plan. Consequently, the Board had no alternative except to file a Petition of Appeal on the entire budget to the Commissioner of Education.

The Commissioner has often stated that one basis for the restoration of money is proof of need rather than the desirability for an item or a program. Based on this criteria and for other reasons which will be articulated, an analysis of the line item budget appears below.

Account 110L10 - Salary/Legal Reduction - $4,000

Respondents argue that no more than $25,000 has been spent in this account for the past three years. The Board asserts that only $26,000 has been budgeted and that it faces several extraordinary litigations in the coming school year. These are set forth specifically in the Board's Exhibit A.

For these reasons the $4,000 reduction is restored.

Account 110N10 - Salary/Negotiator Reduction - $700

Respondents' cut in this account is $700. Even with this modest cut the line item is approximately $500 more than that budgeted last year. For this reason the $700 reduction is sustained.

Account 120D10 - Other Contracted Services Reduction - $5,000

The Board budgeted $45,000 in this account and a reduction of $5,000 was effected by respondents who assert that $8,000 has been transferred to another account. The Board estimates that coming arbitration and PERC cases may cause a need for full funding for this line item.

Based on the above, it is determined that the Board has failed to demonstrate a need for restoration of this reduction; consequently, the $5,000 reduction is sustained.

Account 120E10 - Other Service Consultants Reduction - $3,000

The Board proposed this item to hire an insurance consultant to review its coverages and to make recommendations. It states that this is a cost savings expenditure designed to save taxpayers money in the future. Respondent believe that projected savings in insurance premiums should be sufficient to hire a consultant.

This $3,000 reduction is sustained.

Account 130A10 - Board Expense Reduction - $8,000

The Board argues that it needs full funding in this account to meet its expenses; however, its documentation fails to show an expenditure in the last two years equal to the amount allowed by respondents even after their reduction.

This $8,000 reduction is sustained.

Account 130I03 - Business Office Expenses Reduction - $3,000

$3,000 was cut in this account which was budgeted at $20,000. Expenditures for the past two years have been less than $20,000. Further, the Board has failed to show a need for more money in this line item. Consequently, the $3,000 cut is sustained.

Account 130M - Printing and Publishing — Reduction - $6,800

The Board budgeted $32,825 in this account for the 1991-92 school year. Respondents' reduction of $6,800 leaves a balance of $26,025 which is more than the $18,600 budgeted last year according to respondents. The Board's documents fail to show that this balance will be insufficient to take care of its needs in 1991-92; therefore, the $6,800 reduction is sustained.

Account 130P09 and P10 - Personnel Expenses/Postage/Copy Machine Expenses — Reduction - $2,500

Of the $44,000 budgeted in this account, the $2,500 reduction leaves a balance of $41,500. Although money was transferred into this account last year ($3,900, according to respondents) a balance of $3,332 remained.

The Board was unable to show that it could not sustain this minimal reduction. The reduction of $2,500 is sustained.

Account 213 - Teacher Salaries — Reduction - $26,000

Respondents state that the Board has failed to spend the amount budgeted in this account for the past two years. In fact, money was transferred out of this account for both of those years. Respondents believe that flexibility is needed here in the hiring of teachers and the need to attract quality educators; however, they also believe that the reduction of $26,000 is minimal and that it will not prevent the Board from offering a thorough and efficient educational opportunity to its pupils.

The Board asserts that all new programs have been eliminated and that any additional staff which may be required will have to come from surplus within the account. It expects that the district will grow by 125 pupils and it emphasizes the point that

its 213 account has increased by only 2.9%. Further evidence of the need for full funding in this account is the fact that this school district is one of the very few in this state in which employees pay some part of their medical insurance.

The above analysis must be construed in favor of the Board. Accordingly, $26,000 is restored to the budget.

Account 215A08 - Salaries, Clerical/Curriculum Reduction - $2,000

Respondents have allowed $3,200 for this line item even after the $2,000 reduction. According to the budget, this balance is more than has been required in the past two years. The Board does not deny this; however, it states that the cost of this summer position will offset monies that the district will have to absorb in labor and paper costs in the fall if it is not fully funded.

Based on the above, the $2,000 reduction is sustained.

Account 216A10 - Salaries, Teacher Aides Reduction - $13,400

Respondents assert that this is a new position which is not needed. The Board states that this is the district's share of cost for federal and state funded programs.

This rationale is not convincing. There is no showing of need for this item. The $13,400 reduction is sustained.

Account 216A80 - Special Education Aides Reduction - $5,900

An error was made in this account which contributed to the tax levy certified by the governing body. The Board's Exhibit A shows a reduction of $5,900. The amount shown in the budget, and the amount reduced by respondents is $15,900. The $10,000 difference is reflected in the total amount reduced, $457,916. Utilizing respondents' reduction of $5,900, the actual amount of the budget reduction would be $467,916. For the purpose of explaining

this line item, and the chart above showing line item monies, the Board's $5,900 figure will be used. This figure is selected because it comports with the actual tax levy certification.

Respondents argue that this is a new position that is not needed. The Board denies that this is a new position and states that the funds are needed as the local share for the English as a Second Language program and must be budgeted to meet state guidelines.

Based on the above need, the $5,900 is restored to the budget.

Account 216A24 - Basic Skills Aides — Reduction - $16,000

Respondents aver that this is another new "split account" position which is not needed. The Board's rationale for its inclusion is not convincing. There is no evidence that a thorough and efficient system of schools cannot be provided without this line item; therefore, the $16,000 reduction is sustained.

Account 220 - Textbooks — Reduction - $18,000

It cannot be questioned that proper up-to-date textbooks are a requirement for a thorough and efficient educational opportunity. However, the record shows a substantial increase in this account over that expended or budgeted in the past three years.

The Board has failed to demonstrate a need for such a large increase.

For this reason the $18,000 reduction is sustained.

Account 230C - Audio Visual Aids — Reduction - $6,000

Respondents' reduction of $6,000 will still allow a modest increase in this line item. Respondents assert also that the Board did not spend the amount budgeted last year. The Board does not

deny this statement; however, it asserts that it has begun a five-year plan to meet affirmative action goals.

This plan is laudatory; however, the Board should begin by spending those monies already allocated. Respondents' reduction of $6,000 is sustained.

Account 250B - Travel Expenses — Reduction - $7,550

Respondents believe that an increase in this account is more than the Board needs to meet its obligations and therefore reduced this line item by $7,500. The Board asserts that it is obligated to pay travel expenses for teachers, administrators and itinerant teachers for in/out district travel and workshops.

Respondents have failed to show that the amount budgeted is excessive; consequently, the $7,550 will be restored to the budget.

Accounts 510A05, 510B05, 510C05 - Salaries Supervisors, Bus Drivers, Van Drivers — Reduction - $105,000

Respondents' reductions in these accounts are $5,000, $40,000 and $60,000, respectively. Although seemingly large reductions, the total budget in these accounts as set forth by Council is $896,625. The actual budget shows an allocation of more than a million dollars. Respondents assert that their reductions still allow for adequate increases so that the Board can meet its obligations.

The Board requests restoration of each reduction. It is interesting to note that the rationale used to request restoration of the funds is nearly exactly phrased for all three accounts. This certainly gives the appearance of some duplication. Nevertheless, respondents' reductions allow for modest increases; therefore, the reductions of $5,000, $40,000 and $60,000 are sustained.

Account 520A05 - Contracted Transportation Reduction - $10,000

Respondents state that this account increased by more than 10% over that budgeted last year and that the reduction of $10,000 will still allow a modest increase for this contracted transportation. Although the Board asserts that this account is mandated by state law, it concedes that its budget is based on best estimates of registered students, plus past history. Finding no evidence that the $216,125 allowed by respondents is insufficient to meet the Board's needs, the $10,000 reduction is sustained.

Account 535B05 - Transportation Equipment Reduction - $1,750

According to respondents, this account was to be used to replace radios on two busses. One bus was removed from the budget; therefore, only one radio is justified. Respondents reduced the budget by $1,750. The Board asserts that it has many radios more than 16 years old and that it plans to replace one or two each year.

Using this criteria and based on the rationale used by respondents, the $1,750 reduction is sustained.

Account 540A05 - Vehicle Insurance Reduction - $10,400

Respondents' assertion that one-half of the budgeted monies in this account last year was transferred out is not denied by the Board. Nevertheless, the Board seeks an increase based on new vehicles and industry approved rate increases. This reasoning is not persuasive because respondents' reduction will allow an expenditure of $144,600. This is more than was expended last year.

Consequently, the $10,400 reduction is sustained.

Account 545A05 - Student Activity Trips Reduction - $2,500

Account 545B02 - Student Activities Reduction - $5,000

The Board's assertion that these line items are smaller than those budgeted in the 1989-90 school year is confirmed when compared to the ballot budget. They are directly student related; therefore, the $2,500 and $5,000 reductions are restored to this budget.

Account 550C05 - Maintenance Reduction - $10,000

According to the ballot budget this account appears to be 550G05, not 550C05, as shown in the Board's Exhibit A. The Board contends that this account was increased due to the addition of special education vehicles each year.

Respondents contend that funds were transferred out of this account last year. The Board makes this concession; however, it states also that funds were transferred back to this account to cover the cost of repairs.

The Commissioner is convinced that respondents' modest reduction will allow the Board sufficient funds for maintenance. Accordingly, the $10,000 reduction is sustained.

Account 610A18 - Salaries, Subst. Custodians Reduction - $1,000

Respondents assert that a reduction of $1,000 from the budgeted $5,000 is negligible since the entire 610 account increased by more than $100,000. The Board is unable to show that it cannot absorb this reduction. Therefore, the $1,000 reduction is sustained.

Account 630A - Heating — Reduction - $10,500

Account 640B Electric — Reduction - $15,000

Based on the ballot budget, it appears that the Board has made only modest increases in these accounts. Energy costs are not predictable since they are influenced by many factors. According to past expenditures, these budgeted amounts are needed and are reasonable. Therefore, $10,500 and $15,000 will be restored to the budget.

Account 660 - Other Expenses — Reduction - $6,000

The record shows that this line item was budgeted at $5,000 in the 1990-91 school year and at $15,000 in the 1991-92 school year. The Board will see a $4,000 increase in this line item after respondents' reduction. No satisfactory explanation has been offered showing a need for more. The $6,000 reduction is sustained.

Account 710C100 - Salary, Maintenance — Reduction - $49,916

Respondents state that this is a new position which is not needed. The Board asserts this is not a new position; merely a transfer from the 100 series accounts.

Accordingly, the $49,916 is restored to the budget.

Account 720C - Contract Repair of Equipment — Reduction - $20,000

Account 730A - Replacement of Instructional Equipment — Reduction - $16,000

Account 730B - Replacement of Non-Instructional Equipment — Reduction - $17,000

Account 730C - New Equipment — Reduction - $15,000

These line items have been reduced by respondents $20,000, $16,000, $17,000, and $15,000, respectively. The total budgeted amount is $376,108, so the $68,000 reduction leaves a balance of $308,108. The budget shows a very substantial overall increase over

the amounts budgeted last year for these line items. In this regard, the Court has established the standard by which monies are to be allocated for school purposes. In Board of Education, East Brunswick v. Township Council, East Brunswick, 48 N.J. 94 (1966) the Court held in part that the governing body had a duty to provide sufficient funds essential for a thorough and efficient education in the school district. That rationale is applicable here. The Commissioner finds the budget as modified by respondents in these four line items adequate for the Board's needs.

For these reasons, the reductions of $20,000, $16,000, $17,000 and $15,000 will be sustained.

Account 740B - Other Expenses Building Repair Reduction - $10,000

This item increased by more than 22% over the amount budgeted for last year. Respondents' reduction of $10,000 leaves a balance of $75,000 in this account, $5,500 more than was budgeted last year. This is a modest and reasonable increase for the building repair account.

Accordingly, the $10,000 reduction is sustained.

Account 820 - Insurance Reduction - $5,000

A reduction of $5,000 out of the budgeted $2,943,973 is miniscule. The remaining balance still provides a substantial increase for the Board and there is no showing that it cannot absorb this cut.

The $5,000 reduction is sustained.

Account 870B80 - State Facilities Tuition Reduction - $15,000

The Board contends that this line item amount is set by the state and cannot be changed. It concedes that erroneous transfers were made this year; however, its mistakes have been corrected and

funds were transferred back to this account. The ballot budget shows a modest increase over the amount budgeted last year.

For the reasons stated by the Board, the $15,000 will be restored to the budget.

Account J0930 - Cafeteria Expenses — Reduction - $5,000

Respondents contend that a $5,000 expenditure has historically been sufficient to fund the cafeteria; therefore, it recommends a $5,000 reduction from the $15,000 amount budgeted.

The Board asserts that the cafeteria equipment is twenty years old and that breakdowns and emergencies must be met immediately.

The Board's argument is persuasive. The $5,000 is restored to the budget.

Having made a determination concerning each of the thirty-eight line items in dispute, a recapitulation follows:

TABLE B

Account Number	Line Item	Amount of Reduction	Amount Restored	Amount Not Restored
110L10	Salary/Legal	$ 4,000	$ 4,000	$ -0-
110N10	Salary/Negotiator	700	-0-	700
120D12	Other Contracted Services	5,000	-0-	5,000
120E10	Other Service Consultants	3,000	-0-	3,000
130A10	Board Expense	8,000	-0-	8,000
130I03	Business Office Expenses	3,000	-0-	3,000
130M	Printing & Publishing	6,800	-0-	6,800
130P09 & 10	Personnel/Postage/Copy Machine	2,500	-0-	2,500
213	Teacher Salaries	26,000	26,000	-0-
215A08	Sals., Clerical/Curric.	2,000	-0-	2,000
216A10	Sals., Tchr. Aides	13,400	-0-	13,400
216A80	Special Ed. Aides	5,900	5,900	-0-
216A24	Basic Skills Aides	16,000	-0-	16,000
220	Textbooks	18,000	-0-	18,000
230C	A.V. Aides	6,000	-0-	6,000
250B	Travel Expenses	7,550	7,550	-0-
510A05	Sals., Supervisors	5,000	-0-	5,000
510B05	Sals., Bus Drivers	40,000	-0-	40,000

TABLE B (continued)

Account Number	Line Item	Amount of Reduction	Amount Restored	Amount Not Restored
510C05	Sals., Van Drivers	60,000	-0-	60,000
520A05	Contr. Trans.	10,000	-0-	10,000
535B05	Trans. Equip.	1,750	-0-	1,750
540A05	Vehicle Insurance	10,400	-0-	10,400
545A05	Student Actvity Trips	2,500	2,500	-0-
545B05	Student Activities	5,000	5,000	-0-
550C05	Maintenance	10,000	-0-	10,000
610A18	Sals., Subt. Custodians	1,000	-0-	1,000
630A	Heating	10,500	10,500	-0-
640B	Electric	15,000	15,000	-0-
660	Other Expenses	6,000	-0-	6,000
710C100	Sal., Maintenance	49,916	49,916	-0-
720C	Contr. Equip. Repair	20,000	-0-	20,000
730A	Replace Instr. Equip.	16,000	-0-	16,000
730B	Replace Non-Instr. Equip.	17,000	-0-	17,000
730C	New Equip.	15,000	-0-	15,000
740B	Other Exps. Bldg. Repair	10,000	-0-	10,000
820	Insurance	5,000	-0-	5,000
870B80	State Facilities Tuition	15,000	15,000	-0-
J0930	Cafeteria Expenses	5,000	5,000	-0-
	TOTAL	$ 457,916	$146,366	$311,550

The chart (Table B) shows that $146,366 must be restored to the budget.

Accordingly, the Monmouth County Board of Taxation is directed to add to the local tax levy for the Manalapan-Englishtown Regional School District $146,366 for current expenses for the 1991-92 school year.

SUMMARY

Amount of Tax Levy Certified by the Governing Bodies	$15,238,822.06
Amount Restored by the Commissioner	146,366.00
Total Tax Levy after Restoration	$15,385,188.06

IT IS SO ORDERED.

NOVEMBER 7, 1991

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 7, 1991

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10820-90
AGENCY DKT. NO. 378-11/90

NEW JERSEY DEPARTMENT OF HUMAN SERVICES, GREYSTONE PARK PSYCHIATRIC HOSPITAL,
Petitioner,
v.
ANGELINA PESCATORE,
Respondent

Bruce L. Velzy, Deputy Attorney General, for petitioner
(Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Edward F. Broderick, Jr., Esq., for respondent
(Broderick, Newmark & Grather, attorneys),

Record Closed: August 13, 1991 Decided: September 26, 1991

BEFORE **JOSEPH F. MARTONE**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner seeks to terminate respondent as a tenured employee as a result of several alleged incidents which occurred during July and August, 1990. On October 17, 1990, Syril Sedlacek filed tenure charges against respondent (Ex. J-2).

On October 18, 1990, petitioner notified respondent that, pursuant to *N.J.S.A.* 18A:28-5, *N.J.S.A.* 18A:60-2 and *N.J.A.C.* 10:11-1.8, petitioner intended to seek respondent's suspension without pay and her dismissal (Ex. J-3). On November 7, 1990, respondent filed an affidavit denying the allegations (Ex. J-4). On November 19, 1990, a Certificate of Determination of tenure charges was entered and the tenure charges were filed with the Department of Education on November 26, 1990 (Ex. J-7). Respondent filed an answer to the charges on December 19, 1990 (Ex. J-8). The matter was then transmitted to the Office of Administration (OAL) on December 31, 1990, for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.*, and *N.J.S.A. 52:*14F-1 *et seq.*

On December 14, 1990, respondent requested a stay of the suspension without pay. Oral argument on the request was scheduled for February 17, 1991 at the OAL, Newark, New Jersey. An Order denying respondent's request for a stay of her suspension without pay was entered on February 27, 1991.

A telephone prehearing conference was held on April 2, 1991, and a prehearing order settling the procedures to be followed at the hearing of this matter was entered on April 9, 1991

Hearings were held on July 17 and 22, 1991. At the conclusion of the hearings, the record remained open at the request of attorneys for the parties in order to allow for written submissions. After receipt of written submissions from the attorneys, the record was closed on August 13, 1991.

UNDISPUTED FACTS

It has been stipulated that respondent is employed by the State of New Jersey, Department of Human Services (DHS), Greystone Park Psychiatric Hospital (Greystone) and has been so employed since 1985. Greystone is a hospital for adults with mental, emotional and psychiatric illnesses.

It has been stipulated that respondent is employed at Greystone as a teacher, Level 2, in the Activities Unit of the Rehabilitation Department. It has been stipulated that respondent was granted tenure within DHS pursuant to *N.J.S.A.* 18A:60-1.2.

It has been stipulated that respondent's responsibilities include planning, executing and evaluating appropriate programs for patients at the Medical Services Unit of Greystone. It has been stipulated that these responsibilities involve daily contact with patients at Greystone.

The original charges included allegations that on July 19, 1990, respondent acted in a loud, abusive and threatening manner toward another employee and, in addition, that this incident disturbed a religious service being attended by Greystone patients in an adjacent area. At the commencement of the hearing of this matter, petitioner withdrew this particular charge and no proofs or evidence were submitted in support thereof at the hearing.

The charges include a second incident, which allegedly occurred on August 3, 1990, and involved the allegation that respondent was inattentive in supervising patients under her care and, as a result, a patient obtained scissors and caused injury to her fingers. With respect to this alleged incident, it is stipulated that on August 3, 1990, Angelina Pescatore was on duty with her group. It is also stipulated that one member of her group obtained a set of safety scissors and used them on her nails, cutting her fingers It is also stipulated that the patient required medical attention as a result of her use of the scissors

Another charge in this matter is that on August 3, 1990, it is alleged that respondent's inattentiveness led to a patient, T K., escaping from his unit despite the fact that T. K. was to be watched as a potential escape risk. With respect to this alleged incident, it is stipulated that patient, T. K., suffers from severe chronic obstructive pulmonary disease. It is stipulated that on July 26, 1990, T. K. was admitted to Morristown Memorial Hospital as a result of respiratory failure due to the disease. It is stipulated that on July 30, 1990, patient, T. K., returned to the Medical Services Building at Greystone, Wing C. It is stipulated that on July 31, 1990, patient, T. K., attempted to leave Wing C. It is stipulated that respondent was on duty on the afternoon on August 3, 1990. Finally, it is stipulated that T. K. was on "elopement alert" and respondent was aware that he was on "elopement alert."

The fourth incident giving rise to the charges in this matter allegedly occurred on August 22, 1990, and was allegedly caused by respondent's actions in allowing a patient, F. K., to elope from the facility. With respect to this alleged incident, it is

stipulated that on August 18, 1990, F. K. developed an acute asthmatic attack with difficulty in breathing, and was transferred to Morristown Memorial Hospital. It is stipulated that on August 22, 1990, F. K. was returned to Greystone, Medical Services Building, Wing C. It is stipulated that on August 22, 1990, respondent was on duty at Greystone. Finally, it is stipulated that on August 22, 1990, F. K. eloped from Greystone but returned that evening.

FACTUAL DISCUSSION

1. Scissors Incident

The first incident giving rise to these charges involves respondent's alleged inattentiveness resulting in a patient injuring herself with a pair of scissors. Scarlet Rawls, Supervisor of Nursing at Greystone, testified as to this incident. She testified that respondent entered Wing A, and left her cart containing supplies unattended. She indicated that respondent gave patients scissors to cut their nails and that one patient, attempting to cut her finger nails, cut the tips of four fingers. Ms. Rawls further indicated that a nurse applied a pressure dressing to stop the bleeding. On cross-examination, Ms. Rawls testified that the patient, L. P., did not need stitches, did not lose any portion of the bone of her fingers, and did not need surgery. Ms Rawls testified that she knew the type of scissors used and that they had an orange handle and sharp edges with metal tips She indicated that these were not authorized scissors and that they were confiscated. She testified that she personally observed five to ten scissors on respondent's work cart.

Respondent testified on her own behalf in connection with this incident. She stated that she arrived at Wing A at 2:00 p.m. with her cart containing her supplies and went to the Wing A dayroom where L. P. was one of eight patients in the group. Patient L. P. had recently joined the referred group. Respondent testified that no one else came to the dayroom with her to supervise patients. There were a total of eight to ten patients in the dayroom at the time.

Respondent testified that the cart is a metal cart and that there is a coffee can on the lower shelf of the cart. She testified that there were five or six child's safety scissors in the coffee can, and she produced an example of the safety scissors (Ex. R-19). Respondent also produced metal scissors which are in the Greystone storage

area in the main building (Ex. R-20). However, she testified that she never used metal scissors. She also testified to various attempts to requisition safety scissors and testified that safety scissors (Ex. R-19) were the type of scissors involved in this incident.

Respondent also testified that she spoke to Mr. Soloway about a locked tray and that Mr. Jaffe, the hospital safety officer, recommended that she use a locked tray. Also on the cart were construction paper, paints and other art supplies. The incident occurred when the group was seated at a table involved in their activities. Respondent testified that she was at the head of the table. After 20 or 25 minutes had passed, L. P. asked to be excused to go to the bathroom. At that time, the cart with the supplies and scissors was against the wall with the scissors in the coffee can on the bottom shelf. Respondent was standing at the table, and she turned when she did not see L. P. walking down the aisle heading toward the bathroom. It was only a matter of seconds after she turned and that she observed L. P. cutting her nails with the scissors. She testified that L. P. simply cut her fingers and that the fingertips were bleeding, but that there was not a tremendous amount of blood. She then brought L. P. to the nurses' station for treatment where she remained filling out an incident report. She testified that no one came to her at that time and told her that she had acted improperly in connection with this incident.

2. Elopement of T. K.

The second incident giving rise to a charge in this matter, involves the elopement of patient, T. K. As previously indicated, it is stipulated that T. K. was on elopement alert and that respondent was aware of this. It is also stipulated that respondent was on duty with her group on the afternoon of the elopement of T. K. The only witness to testify that respondent was involved in this incident was Scarlet Rawls. She testified that the doors leading into Wings A and C are locked at all times. She also testified that at around 10:00 or 10:30 a.m., respondent left the entrance door to the Wing open. However, on cross-examination, Ms. Rawls testified that she did not personally observe any of the incidents set forth in the tenure charges. She talked to respondent about the door being left open, but respondent denied that she left the door open. Thus, it appears that the only evidence to support this contention is the fact that respondent was present on Wing C on or about the time of the elopement.

Respondent also testified in connection with this matter. She indicated that on August 3, 1990, which was a Friday, she reported in for work at 8:30 a.m., but actually arrived at 8:00 a.m. She testified that her first activity was from 9:30 to 10:30 a.m., a personal care session in Wing A. This ended at 10:30 a.m., and that she then had a noon remotivation interest group program in Wing C. She was then in Wing A from 1:00 to 2:00 p.m. and went back to Wing C. from 2:00 to 3:00 p.m.

Respondent testified that she noticed T. K., but that she had no encounter with T. K. on August 3, 1990. He is located on Wing C, but is not in a referred group.

Respondent testified that she went to Wing A from 1:00 to 2:00 p.m. and that T. K. did not participate in the program.

Respondent testified that the doors to the Wings are metal doors secured by a metal bar. She testified that she was alone and had the cart with her. She went to the corridor, inserted a key into the wall to unlock and then relock the door. Accordingly, respondent denied that she left open any doors to any of the Wings.

3. Elopement of F. K.

The final incident leading to these tenure charges involves the August 22, 1990 elopement of patient, F K. Edith M Dickerson, a residential living specialist employed by Greystone, testified in connection with this matter. Ms. Dickerson testified that respondent came to Wing C to escort F. K. together with two other patients from Wing C to attend a group session. Respondent signed out the three patients, but later returned with only two patients. F. K. was missing. When Ms. Dickerson asked respondent what happened to F. K., respondent responded "Isn't he here?"

On cross-examination, Ms. Dickerson testified that respondent signed the escort slips for the three patients which indicated that they were going to the "hide-a-way" and that she saw them leave. She also testified that respondent returned one and one-half to two hours later and that the patients had to be back before 8:00 p.m. for their scheduled medication. Ms. Dickerson testified that she saw respondent return with only two patients. She testified that respondent then left the Wing. She also indicated that no one searched the building for F. K., but that F. K. was returned two hours later by the police.

Diane Grossweiler, Supervisor of Activities Therapy, who was respondent's supervisor, also testified. .She indicated that she was off duty at the time of the incident and that she came in the next morning and was advised of F. K.'s elopement. She then conferred with respondent, but respondent denied that F. K. left her group. Respondent told her that F. K. attended an expressive art program from 6:15 to 8:00 p.m.

Ms. Grossweiler then interviewed F. K., the patient who eloped. F. K. related to Ms. Grossweiler that respondent escorted him and two other patients from Wing C to the dining room for an expressive art program. He further indicated that while respondent was busy, he left the group. He indicated that respondent did not see him leave. He indicated that he then proceeded to leave the building through the exit door by Wing C. Two other employers of petitioner witnessed F.K. giving his statement to Ms. Grossweiler(Ex. P-7).

On cross-examination, Ms. Grossweiler indicated that she does not know who is responsible for the security of the exterior door through which F. K. eloped. She also indicated that she does not know if the door can be opened without a key, and that she does not know when F. K. eloped.

In response to the foregoing, respondent testified that on August 22, 1990, she came in at approximately 5:30 p.m. She had 14 or 15 patients to gather for a program she was to conduct in the dining room. She gathered the patients from Wings A, B and C. She testified that she went to Wing C first and picked up F. K. and two other patients. Respondent testified that F. K. remained with her while she picked up the patients from Wings B and A, and then went to the dining room.

Respondent testified that F. K. was not on elopement precaution. F. K. went out onto the patio during the program and was there for approximately 45 minutes. He then came back after the 45 minutes and the dining room door was closed after he came back in. She testified that F. K. was with her the entire time.

Respondent testified that she brought F. K. back to Wing C with the other two patients. When she and the three patients returned to Wing C, no one was at the nursing station, the entire staff was taking care of patients. Respondent

testified that she brought F. K. back to the Wing and went over to retrieve the escort slip. She then exited the Wing, but did not leave the Wing C door unlocked. She testified that the outside doors are kept locked at all times. When she was leaving Wing C, someone yelled out at her, she does not know whom, questioning whether all of the patients had been returned. Respondent testified that she simply responded "Yes, they are all back."

Richard T. Soloway, Supervisor of Activity Therapies in the Rehabilitation Department, also testified. Most of his testimony concerned respondent's prior disciplinary record. That portion of his testimony relative to the incident of August 22, 1990 is as follows. Mr. Soloway has been respondent's supervisor at various times in the past. He also testified that he is aware that an orientation program is conducted for all new staff members. This involves a two-week orientation advising new staff members of their obligations and responsibilities to patients. Mr. Soloway also identified the Greystone Procedures Memorandum regarding escorting patients to off-ward activities (Ex. P-1).

Dr. James F. Gleeson also testified in this matter. He indicated that over the last two years there has been a severe reduction in staff. He testified that while the patient population at Greystone has gone down, the number of patients in medical services has stayed constant, that is, at capacity. The number of staff has been reduced and the evening staff is limited and a staff member who should have been with respondent during the conducting of the expressive art program was not there.

LEGAL DISCUSSION AND ANALYSIS

The prehearing order entered in this matter lists the issues to be resolved as follows:

1. Whether these particular incidents occurred and, if so, whether they endangered patients' safety and/or interfered with the functioning hospital?

2. If the allegations as to the incidents are true, whether they are sufficient cause or grounds for dismissal?

A determination as to whether the particular incidents forming the basis of the tenure charges occurred, involves an examination of the testimony of the witnesses and the documentary evidence submitted by the parties. The burden is upon the petitioner as the charging party to establish the truth of the charges by a fair preponderance of the credible evidence. *In re Polk*, 90 *N.J.* 550 (1982). Therefore, it is necessary that the trier of fact examine the testimony and documentary evidence in this matter for the purpose of determining: 1) Whether there is any evidence whatsoever in support of one or more of the charges; 2) If so, whether there is any evidence contrary to the evidence in support of the charges; and 3) Whether the evidence preponderates in favor of or against the charges.

In connection with the scissors incident, respondent is charged with inattentiveness resulting in a patient injuring herself with a pair of scissors. The fact that a patient injured herself with scissors while cutting her fingernails is not disputed. Respondent's alleged inattentiveness, however, is disputed. The only witness on behalf of petitioner, Scarlet Rawls, established that the patient was injured and that a pressure dressing was necessary to stop the bleeding. Mrs. Rawls also testified that the type of scissors used were scissors with an orange handle and sharp edges with metal tips, and that they were not authorized scissors. However, Ms. Rawls did not observe the incident, but only observed the after-effects, that is, the injury to the patient.

With regard to the scissors incident, respondent's own testimony established that she was aware of the potential hazard created by the availability of scissors to patients. Respondent testified to her own efforts to obtain a locked cart. However, respondent also testified that the scissors used by the patient in cutting her fingernails were child safety scissors (Ex. R-19). Respondent additionally testified to momentary inattentiveness when she believed that the patient was on her way to the bathroom.

Based upon the foregoing, I **FIND** that respondent was aware of the hazard to Greystone patients created by the availability of scissors of any type. I **FIND** that on August 3, 1990, respondent was momentarily inattentive as to the whereabouts of a patient within her charge. I **FIND** that during this period of momentary inattentiveness, the patient obtained a pair of scissors from respondent's supply cart and injured her fingers while attempting to cut her nails. I **FIND** that the injury

caused to the patient required a pressured dressing to stop the bleeding, but was otherwise not a serious injury. I **FIND** that the failure on the part of petitioner to have available proper safety scissors and proper equipment to secure hazardous items, such as scissors, which are able to cause injury, were contributing factors leading to the injury of the patient. I **FIND** that an additional contributing cause of the injury to the patient was the lack of adequate staffing at the hospital to assist in the supervision of patients.

The second incident giving rise to charges in this matter involves respondent's involvement in the elopement of a patient, T. K., on August 3, 1990. It is alleged that respondent left open the doors leading to T. K.'s Wing and, as a result, T. K. eloped from the facility. However, the only witness to testify against respondent testified that she did not personally observe any of the incidents set forth in the tenure charges. This witness simply observed that respondent was present at approximately the same time that the elopement occurred. She also testified that respondent left a Wing door open. However, no one has testified that it was a direct result of respondent leaving the door to the Wing open that the patient T. K. eloped from the facility.

On the other hand, respondent denies ever having left open the doors to any of the Wings. Respondent testified as to the procedure that she used to unlock and relock the doors to the Wings. Therefore, the only competent and credible evidence in this matter, specifically dealing with the elopement of T. K., is the testimony of respondent denying any wrongdoing.

Based upon the foregoing, I **FIND** that there is insufficient evidence to support the allegation that on August 3, 1990, respondent left open the door to a Wing resulting of the elopement of patient T. K.

The final incident involves the August 22, 1990 elopement of a patient, F. K. It is undisputed from the testimony of Edith M. Dickerson and from the testimony of respondent that on August 22, 1990, respondent was responsible for escorting patient F. K. from Wing C to a program, and that she was responsible for returning F. K. from the program to Wing C at the conclusion of the program. Ms. Dickerson testified that respondent signed out the three patients, but later returned with only two patients, F. K. was not returned. Respondent denies this and asserts that she

returned all three patients to Wing C. Respondent testified that when she returned F. K. to Wing C, no one was at the nursing station to observe F. K. It is stipulated that on that date, F. K. did, in fact, elope from Greystone but was returned later than evening by the police. Finally, in support of its contentions, there is the statement made by F. K. to three employees of petitioner, including respondent's supervisor that F. K. eloped the facility while in the care and custody of respondent. While this statement is unsworn, and is clearly hearsay under the evidence rules, it can be used to corroborate other legally competent evidence.

After considering the testimony and evidence with regard to this third incident, I **FIND** that on August 22, 1990, respondent was responsible for escorting a patient, F. K. from Wing C to attend a group session. I **FIND** that at the conclusion of the group session, respondent was responsible for escorting F. K. back to Wing C. I **FIND** that during the course of the group session, F. K. left the group and eloped from the facility. Based upon the testimony of Edith M. Dickerson as corroborated by the hearsay statement of F. K. to other hospital employees I **FIND** that respondent did not escort F. K. back to Wing C. I **FIND** that the elopement of F. K. was the result of several factors including a reduction of staff and the lack of a staff member who should have been with respondent during the expressive art program from which F K. eloped, the excessive number of patients included in respondent's expressive art program, and the lack of security at petitioner's facility which would have prevented F. K. from eloping from the facility after leaving respondent's program. I **FIND** that while respondent may have been inattentive, that her inattentiveness was a minimal factor leading to the elopement of F. K.

Based upon the foregoing, I **FIND** that respondent's momentary inattentiveness in supervising a patient, together with other contributing factors not within respondent's control, resulted in a patient injuring herself when she obtained access to scissors on August 3, 1990. I **FIND** insufficient evidence to establish that on August 3, 1990, respondent was inattentive thereby leading to a patient, T. K., eloping from Greystone. Finally, I **FIND** that while respondent was inattentive on August 22, 1990 as to the whereabouts of patient T. K., but that her inattentiveness was a minor contributing factor to T. K.'s elopement on that date.

PENALTY

The final issue to be resolved in this matter is if one or more of the allegations as to the incidents are true, whether they are sufficient cause or grounds for dismissal. The Commissioner of Education and the State Board of Education have recognized situations in the past where a teacher, upon being found guilty of tenure charges, receives a penalty less than dismissal. *Tenure of Tenney*, 1983 *S.L.D.* 836, *aff'd State Bd. of Ed.* 1984 *S.L.D.* 2042, *Tenure of Johnson*, 1979 *S.L.D.* 267. There is no question in my mind that finding respondent guilty of momentary inattentiveness leading to a patient injuring her fingers and inattentiveness together with other more significant contributing factors leading to the elopement of a patient, should not be considered sufficient grounds for dismissal of respondent. The imposition of a penalty upon respondent should be designed to remind respondent of her serious responsibilities to the patients at Greystone who are entrusted to her care. The penalty should be sufficient to remind respondent that even a momentary lapse of attention may lead to dire consequences, even if that momentary lapse is only one of many contributing factors. *See, Atkinson v. Parsekian*, 37 *N.J.* 143, 155 (1962); *Cresse v. Parsekian*, 81 *N.J Super.* 536, 549 (App. Div. 1963), *aff'd* 43 *N.J.* 326 (1964) However, the penalty should not be so harsh as to make respondent the scapegoat for lack of budget funds, reduction in staff because of inadequate funding and poor working conditions, and the ineptitude and inefficiency of other individuals.

In weighing the imposition of an appropriate penalty, I have taken into account respondent's prior disciplinary record. Respondent's prior evaluations do not comprise a disciplinary record and therefore have not been considered, other than to establish that respondent has generally been a satisfactory employee at Greystone. The one reprimand issued to respondent on January 23, 1990 (Ex. P-3) is considered to be minimally significant since it does not involve any allegation of respondent's inattentiveness.

Accordingly, after considering the respondent's lack of any significant prior disciplinary record, her prior generally satisfactory performance as an employee of Greystone, the nature of the charges sustained, and the fact that the conduct of respondent was only one of many factors contributing to the incidents complained of, I **FIND** that a penalty of a six-month suspension from her teaching duties is an

appropriate penalty to impose upon respondent in this matter. This penalty is sufficiently significant to remind respondent of her obligation to patients at Greystone. However, this penalty allows respondent to resume her duties as a teacher who I believe is dedicated to helping the patients at Greystone.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that respondent is found guilty of inattentiveness on August 3, 1990, which, together with other factors, caused a patient to injure herself by cutting her fingers with scissors. It is further **ORDERED** that charge of inattentiveness on August 3, 1990 leading to the elopement of a patient, be and the same are hereby **DISMISSED**. It is further **ORDERED** that respondent is found guilty of charge of inattentiveness which was one of many circumstances leading to the elopement of a patient from Greystone on August 22, 1990. Accordingly, it is hereby **ORDERED** that a penalty of six-months suspension shall be imposed on respondent as a result of finding her guilty of the aforesaid charges.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 26, 1991
Date

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

9/30/91
Date

Maureen Kaier
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 02 1991
Date

Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

le

APPENDIX

LIST OF WITNESSES

For Petitioner:
Richard T. Soloway
Edith M. Dickerson
Weniag Ren
Diane Grossweiler
Scarlet Rawls
James F. Gleeson

For Respondent:
Angelina Pescatore

LIST OF EXHIBITS

C-1	Stipulations of Facts dated July 17, 1991
J-1	Affidavit of Syril Sedlacek, dated October 17, 1990
J-2	Tenure Charges, dated October 17, 1990
J-3	Letter, dated October 18, 1990
J-4	Affidavit of Respondent, dated November 5, 1990
J-5	Certificate of Determination of Tenure Charges, dated November 19, 1990
J-6	Letter dated November 19, 1990
J-7	Department of Education Acknowledgement
J-8	Acknowledgement of Receipt of Answer, dated December 19, 1990
P-1	Greystone Park Psychiatric Hospital Procedures regarding escorting patients
P-2	Memorandum, dated December 13, 1989
P-3	Notice of Official Reprimand, dated January 22, 1990
P-4	Memorandum, dated August 22, 1990
P-5	
P-6	Certification of Respondent
P-7	Statement, dated August 24, 1990
P-8	
R-1	Observation Notes, dated May 31, 1986
R-2	Interoffice Memorandum, dated February 28, 1990
R-3	Assessment Review, dated May 17, 1990
R-4	Interoffice Memorandum, dated February, 1990
R-5	Interoffice Memorandum, dated May, 1990
R-6	
R-7	Individual Assessments of Respondent, dated July 1986 to June 1990
R-8	Record of Counseling or Oral Warning form
R-9	Interoffice Memorandum, dated January 23, 1990
R-10	Personal Schedule or Respondent
R-11	Sketch of Wing C

R-11A	Sketch of Wing A day room
R-12	Inserts from State Vendor Catalogue
R-13	Statement of Karen Gonzalez, dated November 5, 1990
R-14	Statement of B. Hickey, dated December 1990
R-15	Statement of Linda Hartmann, dated January 16, 1991
R-16	Statement of Jean Rohmer, dated November 2, 1990
R-17	Thank you notes
R-18	Statement of Don White, dated November 15, 1990
R-19	Safety Scissor
R-20	Metal Scissor
R-21	Performance Assessment Reports

IN THE MATTER OF THE TENURE	:	
HEARING OF ANGELINA PESCATORE,	:	
GREYSTONE PARK PSYCHIATRIC	:	COMMISSIONER OF EDUCATION
HOSPITAL, NEW JERSEY STATE	:	DECISION
DEPARTMENT OF HUMAN SERVICES.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed, as have exceptions filed by petitioner (hereinafter "the State") pursuant to N.J.A.C. 1:1-18.4. Respondent's replies were untimely filed and are not considered herein.

The State excepts to the ALJ's findings and conclusions regarding each of the three incidents underlying the tenure charges, as well as to the ultimate penalty imposed, which it regards as insufficient in view of the threat to patient safety posed by respondent's conduct.

With respect to the incident of August 3, 1990 wherein patient L.P. cut herself with scissors, the State argues that the ALJ should have found as fact that the scissors in question were non-safety scissors based on the testimony of Scarlet Rawls and the extent of L.P.'s injuries, which could not have been caused by safety scissors. The State further excepts to the ALJ's having found that less than optimum staffing and supply situations at Greystone were factors in respondent's conduct. Rather, the State

argues, respondent was solely responsible for placing non-safety scissors in her cart and for failing to exercise the extra diligence she knew was necessary due to the cart's being open. On the question of staffing, the State argues that reduced resources are a reality with which staff must be able to cope and that respondent's inability to do so actually enures against her return to employment at Greystone rather than militating against her dismissal. Finally, the State notes that even if respondent's inattentiveness was momentary, the nature of the facility is such that lapses of this kind simply cannot be permitted in a tenured employee without jeopardizing the safety and welfare of patients.

With respect to the August 22, 1991 incident of elopement involving F.K., the State reiterates the arguments above and further observes that the supervising teacher, not support or other personnel, is responsible for patients attending and being escorted from class and that respondent's inability to properly monitor a group of three patients is indicative of unfitness to continue in her tenured capacity. With respect to the elopement of T.K. on August 3, the State references its filings before the ALJ and urges the Commissioner to conclude therefrom that sufficient evidence exists to establish respondent's culpability in that matter. Altogether, the State contends, respondent's conduct clearly warrants dismissal, or at the very least a one-year suspension, from tenured employment at a facility housing mentally, emotionally and psychiatrically incapacitated patients who would routinely be entrusted to her care and custody.

Upon careful review of this matter, the Commissioner concurs with the ALJ's findings of fact with respect to respondent's actual conduct and rejects the State's claim that sufficient

evidence was presented to warrant the findings proposed above regarding use of non-safety scissors and the elopement of T.K. Moreover, to the extent that the State's proposed findings would require credibility determinations differing from those of the ALJ, the Commissioner notes the absence of a hearing transcript and finds no reason to reverse the trier of fact who had first-hand opportunity to observe witnesses.

With respect to the penalty imposed for the sustained charges, however, the Commissioner concurs with the State that the ALJ overemphasized mitigating factors and that a six-month suspension is insufficient under the circumstances. The respondent in this matter does not work for a public school district; she works in a custodial facility housing mentally and emotionally incapacitated adults, where care and supervision of students takes on a dimension which is not present in the ordinary school setting. To be even momentarily negligent, careless or casual in this environment compromises the very purpose of custodial care, as the facility's strict, comprehensive procedures for escorting patients (Exhibit P-1) make abundantly clear. In the Matter of the Tenure Hearing of Robert Vaughn, New Jersey State Department of Corrections, decided January 9, 1990, affirmed State Board July 5, 1990

In this instance, notwithstanding staff absences or other contributing circumstances, respondent has demonstrated a serious lack of awareness of the importance of her custodial responsibilities and, at least in the case of the elopement of F.K., clearly failed to follow procedures established for patient protection. That F.K. was returned unharmed to the facility later that day by the police was fortunate, but does not lessen the potential harm

that might have come to him through respondent's negligence. Under these circumstances, the Commissioner cannot concur that a six-month suspension is a sufficient deterrent for conduct of this type in a custodial facility, particularly where present staffing circumstances require the utmost care and attention to safety procedures and where militating factors such as a long, otherwise exemplary prior employment record are lacking. However, neither can he concur with the State that the charges ultimately sustained herein warrant dismissal from tenured employment on grounds of unbecoming conduct, particularly where respondent's prior disciplinary record consists only of one letter of reprimand arising from a problem with cancellation of classes.

Accordingly, the initial decision of the Office of Administrative Law is modified to the extent that respondent's individual culpability in the incidents underlying the sustained tenure charges is deemed sufficient to warrant, as a penalty and deterrent to future conduct of the same type, a loss of compensation for one full academic year. This loss is to represent the full extent of the salary which would have been due her for her services during the 1990-91 academic year, and in the event that the compensation previously withheld during respondent's suspension does not amount to the prescribed penalty, the Commissioner directs that respondent be suspended without pay for an additional period so that she sustains, in total, one full year's loss of compensation as prescribed herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1991
DATE OF MAILING - NOVEMBER 12, 1991

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10370-90
(OAL DKT. NO. EDU 3533-89 - Remanded)
AGENCY DKT NO. 59-3/89

PAUL NORMAN BOWER,
Appellant,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,
Respondent.

Sanford R. Oxfeld, Esq. for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Ronald S. Sampson, Esq. for respondent
(Love & Randall, attorneys)

Record Closed: July 2, 1991 Decided. September 27, 1991

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

Statement of the Case

This is a remand of a matter involving a teacher's claim for indemnification of criminal defense costs under *N.J.S.A.* 18A:16-6.1. Petitioner Paul Norman Bower ("Bower") seeks payment of his legal expenses for defending against criminal charges of aggravated sexual assault and endangering the welfare of young children.

At the time of the prior administrative hearing, the original criminal indictment against Bower had been dismissed but he had been subsequently reindicted on the exact same charges. Since then, a Superior Court judge has dismissed the second indictment, "with prejudice." In light of this later event, the State Board of Education ("State Board") returned the matter to the Commissioner of Education ("Commissioner"), who, in turn, forwarded the case to the Office of Administrative Law ("OAL") for reconsideration.

Procedural History

On June 20, 1990, the OAL issued an initial decision, recommending denial of petitioner's claim. Subsequently, on August 10, 1990, the Commissioner issued an agency decision which adopted the recommended factual findings and legal conclusions. Meanwhile, on July 3, 1990, the Court had dismissed the pending criminal charges. On August 22, 1990 Bower appealed to the State Board from the Commissioner's decision.

By order entered on December 5, 1990, the State Board remanded the matter, along with the following instructions:

> On remand, [p]etitioner has the burden of establishing 1) a nexus between the alleged conduct forming the basis of the charges and the performance of his duties in the district so as to support a finding that the criminal actions against him involved alleged acts or omissions arising out of and in the course of performance of his duties, and 2) a favorable disposition of the criminal charges.

Accordingly, the OAL offered both parties an opportunity to present further testimony at a hearing held on May 13, 1991. Neither side chose to present any

witnesses, but the parties agreed to supplement the record with additional documents. These new exhibits are listed in the appendix. Since the exhibits include copies of a confidential grand jury transcript, investigative police reports and statements by witnesses in a criminal investigation, the OAL entered an order sealing portions of the record.

Both parties filed legal briefs by June 24, 1991. Afterwards, petitioner moved to reopen the record for submission of certain attorney's letters and hospital records. On July 2, 1991, the OAL sustained respondent's objection to the admissibility of these proposed exhibits. The record closed on July 2, 1991. Time for preparation of the initial decision has been extended to September 30, 1991.

Findings of Fact

(1) Nexus With the Performance of Petitioner's Teaching Duties

During the relevant time period, Bower was a kindergarten teacher at the Ashland Elementary School in East Orange, New Jersey. Each of the defunct criminal charges pertained to events which allegedly occurred on school premises. The three alleged victims were all students in Bower's class in the 1985-86 school year. Grand jury testimony by a seven-year old boy, identified here as D.G., implicates Bower in the commission of oral and anal sexual acts. D.G. claimed that these incidents occurred "in the bathroom" located "right besides the desk."

Another little boy, designated A.P., made a similar accusation of anal abuse by Bower, and told an investigating detective that the physical assault on him had taken place "in the bathroom attached to the school classroom itself." Det. Anthony Woodson visited the scene and described a vent in the bottom of the door, through which children said they had "peeked . . . and [could] see what [was] going on inside the bathroom." In a separate sworn statement, A.P. contended that his teacher "had put his hand over my mouth so no one could hear me screaming" and had threatened retaliation if he told anyone. A.P. advised the police that Bower stored items used in connection with his attacks in "a secret hiding place" in the book room. Later, A.P. suggested that other incidents involving one or more of his classmates may have occurred upstairs in "the big men's bathroom."

A third youngster, M.E., who was only five years old at the time, also claimed that Bower had performed anal penetration on him "in the bathroom" at school.

Even though there is no longer any possible risk of self-incrimination, Bower failed to take the witness stand to explain why he had apparently accompanied these young men into the bathroom or to clarify how his actual activities were legitimately related to his teaching responsibilities. Significantly, Bower never denied the truth of the children's stories or offered a different version of what really happened.

I FIND that petitioner has not satisfied his burden of showing that the charges against him originated out of the performance of his duties as a teacher. At most, the only thing that can be said is that Bower's accusers are his former students and that the locale of the alleged misconduct is on school property. None of the proofs supply the crucial element that the charges are connected with his teaching assignment or that Bower was engaged in carrying out his official duties.

(2) Favorable Disposition of the Criminal Charge.

It is clear from the expanded record that the dismissal of the first criminal indictment did not represent a determination on the merits. Transcripts of the oral argument before Judge Joseph Falcone on October 11, 1988 disclose that the Prosecutor had not notified his adversary of his expert witnesses sufficiently in advance of the trial date and was not ready to proceed without his experts. Since the case had been previously marked "try or dismiss," Judge Falcone denied the Prosecutor's request for an adjournment. Instead, he dismissed the indictment, preserving the State's right to apply to another Grand Jury for a superseding indictment. No finding was made of Bower's guilt or innocence.

Unfortunately, the record is less clear about the reasons for dismissal of the second indictment. At a hearing before Judge Harry Hazelwood Jr. on July 3, 1990, the Prosecutor moved to dismiss the criminal case against Bower, saying only that the "the paper work . . . has been completed." Bower's attorney was not even present in court. Although the transcript refers to various reports and statements which supplement the actual dismissal form, neither party here was able to furnish copies of those relevant documents. Thus, it is uncertain whether the Prosecutor

exercised his discretion to dismiss the charges for insufficient proof; whether the parents simply did not want their children to endure the trauma of reliving the experience; whether important witnesses were unavailable or memories had faded; or whether some other reason existed. What is definitely known is that the order entered by Judge Hazelwood was "with prejudice."

I **FIND** that the charges were dismissed with finality at the State's request. Bower was never convicted of the criminal charges.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Bower is not entitled to indemnification of the costs of his criminal defense.

The earlier decision contains a thorough discussion of the controlling law, which need not be repeated. Suffice it to note that *N.J.S.A.* 18A:16-6.1 requires not only that the criminal action involve an act or omission "*arising out of* the performance" of duties, but also that such act or omission must have occurred "*in the course of*" the same. *Powers v. Union City Bd. of Ed.*, 124 *N.J. Super.* 590, 597 (Law. Div. 1973), *aff'd* o.b. 127 *N.J. Super.* 294 (App. Div. 1974), certif. den. 65 *N.J.* 575 (1975). Assuming that the circumstances of this case satisfy the first prong of this double-edged test because the events occurred in the school house and involved his pupils, petitioner has nevertheless failed to satisfy the second prong, namely that that he was acting within the scope of his authorized duties.

Recent developments do, however, undermine the rationale that an alternate ground for denial of relief is the absence of any final favorable disposition of the criminal charges. In a somewhat different context, the Appellate Division held that an administrative dismissal of a criminal complaint constitutes "a favorable termination of a criminal proceeding for purposes of a malicious prosecution action." *Rubin v. Nowak*, 248 *N.J. Super.* 80, 84 (App. Div. 1991). Speaking in terms of a "presumption of favorable termination," the Court found nothing in the record to suggest that the prosecutor acted "for any reason other than a careful determination of plaintiff's innocence." 248 *N.J. Super.* at 84. In language which seems equally appropriate here, the Appellate Division commented "the irony . . . is that it is precisely in those cases where the proof of probable cause is most wanting

that the prosecutor will probably be inclined to invoke an administrative dismissal, thus denying the accused a remedy when it is most deserved." (at 85).

Applied to the present matter, this persuasive reasoning suggests that the final dismissal of all criminal charges against Bowers should be treated as a favorable disposition. It is a moot point, however, since Bowers fails to qualify under the other conditions of the indemnification statute.

Order

It is ordered that the relief requested by petitioner is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 27, 1991
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

OCT 1, 1991
Date

Maureen Keller
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 03 1991
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

List of Exhibits

No.	Description
J-8	Copy of voluntary statement of M.E., dated June 12, 1986
J-9	Copy of voluntary statement of D.G., dated June 23, 1986
J-10	Copy of voluntary statement of A.P., dated June 12, 1986
J-11	Copy of voluntary statement of A.P., dated June 12, 1986
J-12	Copy of administrative report of the Essex County Prosecutor's Office, dated June 20, 1986
J-13	Transcript of proceedings before the Essex County Grand Jury, Indictment No. 615-2-87, dated January 16, 1986
J-14	Copy of an order in the matter entitled State v. Bower, Superior Court of New Jersey, Law Division, Ind. No. 89-03-1313, entered on July 3, 1990
J-15	Copy of a transcript of the proceedings before the Hon. Joseph A. Falcone in the matter entitled State v. Bower, Superior Court of New Jersey, Law Division, Ind. No. 87-02-615, held on October 11, 1988
J-16	Transcript of the proceedings before Hon. Harry Hazelwood in the matter entitled State v. Bower, Superior Court of New Jersey, Criminal Division, Ind. No. 1313-03-89

J-17 Copy of an order by Judge Serina Perretti in the matter entitled State v. Bower, Superior Court of New Jersey, Law Division, Ind. No. 615-2-87, entered on August 25, 1988

P-1 id. Copy of a letter to the Essex County Prosecutor from Stanley F. Friedman, dated May 31, 1988

P-2 id. Copy of a letter to the Essex County Prosecutor from Stanley F. Friedman, dated July 14, 1988

P-3 (a)id. Copy of medical records from United Hospitals Medical Center, dated June 11, 1986

(b)id. Copy of medical records from United Hospitals Medical Center, dated June 19, 1986

OAL DKT. NO. EDU 10370-90
(EDU 3533-89 ON REMAND)

PAUL NORMAN BOWER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board's reply exceptions, however, were untimely filed. The initial decision was mailed to the parties on October 3, 1991. Pursuant to N.J.A.C. 1:1-18.4(a) within 13 days from said date the parties could file written exceptions. Said time period expired on October 16, 1991. N.J.A.C. 1:1-18.4(d) permits reply exceptions to be filed within five days from the opposing party's receipt of exceptions. Permitting three days for mailing, the Board's replies should have been filed with the Commissioner by October 25. The Bureau of Controversies and Disputes received such replies on October 29.

Petitioner excepts to the ALJ's conclusion that petitioner failed to meet his burden of showing that the charges against him originated out of the performance of his duties as a teacher. He notes that the charges against him involving improper touching of a student in the school during the course of the school day were

dismissed with prejudice. Relying [illegible]

City Board of Education, 124 N.J. Super. 590, 597 (Law Div. 1973),
aff'd o.b. 127 N.J. Super. (App. Div. 1974), cert. den. 65 N.J. 575 (1975) which states:

> The fact, however, that the alleged criminal acts were obviously beyond the prescribed duties of a Board member does not in itself immunize the Board from the statutory liability; for such a construction would exclude all criminal conduct and frustrate the express intent of the legislature.
> (Exceptions at p. 4, citing Powers at 595)

Petitioner urges the Commissioner to recognize the flaws of the indemnity statute and the concerns expressed by the Powers court regarding the flaws he perceives exist in N.J.S.A. 18A:16-6.1 that is, that in order for the Board to indemnify one of its agents, the claimant must demonstrate not only that the alleged criminal action involved an act or omission "arising out of the performance" of the employee's duties, but also that such act or omission must have occurred "in the course of" such duties.

Petitioner reasserts his contention that with regard to the "in the course of" requirement, the facts indicate that petitioner was at the school, which is the place of his employment, and he was taking care of his students, which is his job. Petitioner goes on to state that because the charges against him concerned allegations which took place on school property during school time, the "in the course of" requirement is clearly met. Such statements are submitted as exceptions to the ALJ's finding that "***it is difficult to imagine any circumstances where sexual assault against a child could be legitimately characterized as having occurred in the course of carrying out teaching duties.***" (Initial Decision dated June 20, 1990, at p. 4)

Thereafter petitioner's exceptions recite nearly verbatim those arguments advanced to the State Board on appeal of this matter, then summarized again in his submission to ALJ Springer on May 24, 1991 based on the legislative history of N.J.S.A. 18A:16-6.1, which were made a part of the record and were fully considered by the ALJ below. Such arguments are incorporated herein by reference.

Upon a careful and independent review of the record of this matter, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law concluding that "[a]ssuming that the circumstances of this case satisfy the first prong of this double-edged test because the events occurred in the school house and involved his pupils, petitioner has nevertheless failed to satisfy the second prong, namely that he was acting within the scope of his authorized duties." (Initial Decision on Remand, at p. 5) A careful review of the exhibits submitted pursuant to the State Board remand fails to reveal any facts which could, in any manner, establish the required nexus between the criminal conduct alleged and the performance of the duties of a teaching staff member. The evidence tendered alleges that on three separate occasions, between petitioner and three separate kindergarten victims, each child was sexually assaulted in the bathroom adjacent to petitioner's classroom. See Initial Decision, at p. 3. See also Exhibits J-8, J-9 and J-10. Like the ALJ, the Commissioner notes the absence of testimony from petitioner, despite the fact that the dismissal of the second set of charges against him were dismissed with prejudice, thereby removing any possible risk of self-incrimination, explaining why he was in the bathroom with any or all

of the three boys in question. Neither is there any testimony or evidence proffered in this remand suggesting how his behavior in regard to any of these charges, or denial of same, is legitimately linked to his bona fide teaching responsibilities.

Accordingly, the Commissioner concurs fully with the ALJ below that petitioner has failed to satisfy his burden of demonstrating that the charges against him originated out of the performance of his authorized duties as a teacher. Without such nexus firmly established in the record, indemnification is not appropriate. N.J.S.A. 18A:16-6.1 The Commissioner so finds accepting that the statute in question may indeed have been contemplated by the Legislature as a remedial one, intended to provide protection to teachers who meet its two-pronged test. However, under the circumstances of this matter, petitioner has failed to satisfy the second criterion of the statutory requirement.

Accordingly, for the reasons expressed in the initial decision, as augmented herein, the Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

NOVEMBER 12, 1991

DATE OF MAILING - NOVEMBER 12, 1991

Pending State Board

R.D., a minor by his guardian ad litem, L.C.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

For Petitioner, Robin G. Marks, Esq., (Hartman, Marks & Nugent)

For Respondent, Michael J. Herbert, Esq., (Picco, Mack, Herbert, Kennedy, Jaffe & Yoskin)

This matter was brought before the Commissioner of Education by way of Petition of Appeal and Notice of Motion for Emergent Relief dated October 16, 1991 pursuant to N.J.A.C. 6:24-1.5 seeking an order staying the determination of the NJSIAA Eligibility Appeals Committee (EAC) of October 9, 1991 which denied a waiver of the six-day academic credit rule as set forth in Article V, Section 4E of the NJSIAA Bylaws for R.D., a senior at Audubon High School. Said determination rendered him ineligible to play football in the fall of 1991 at said high school because he had failed a course in sociology in his junior year spring term.

The six-day academic credit rule provides that all academic credits required to be eligible for athletic competition must be completed no later than six days before the start of the school year

in question. Because R.D. did not take a makeup course during summer school preceding his senior year, he fell short of the required number of credits for participation in sports his senior year.

Petitioner further sought a hearing on the merits of his claims and a declaration that R.D. is eligible to play football at Audubon High School commencing immediately and continuing beyond a hearing on the merits of the case.

Oral argument on the Motion for Emergent Relief was conducted by telephonic conference call on October 17, 1991 by Dr. Leo Klagholz, Acting Deputy Commissioner of Education, the Commissioner of Education having designated his authority to do so pursuant to N.J.S.A. 18A:4-33.

Petitioner argued irreparable harm would befall R.D. if he is not permitted to participate in football because the only way he will be able to attend college is by acquiring a football scholarship, the possibility of which will be denied him if he is unable to participate.

Petitioner further argued a likelihood of success on the merits of his case in that the principle of detrimental reliance is well-established in law and is applicable to the instant case because R.D. detrimentally relied on the advice of his guidance counselor at Audubon High School. R.D.'s counselor advised him that he should save his money and not attend summer school because he had 24 credits accumulated, which number, according to the rules of NJSIAA, was inadequate for him to play football in his senior year.

Petitioner further argued a reasonable probability of success on the merits of his case because the reason R.D. failed

sociology at the end of his junior year was because his home situation had been reduced to a condition where he had no electricity in his home because his mother had abandoned him to live with his 21-year-old brother who has a drug problem, thus, relegating R.D. to unsatisfactory living conditions.

Petitioner also claimed that the balancing of hardship weighed in his favor in that NJSIAA applied a strict interpretation of its rules, disallowing a waiver in a situation that was not R.D.'s fault, when it could have done so under circumstances that were beyond his control.

Respondent NJSIAA argued in response to the Motion for Emergent Relief that petitioner has failed to demonstrate irreparable harm in that case law has established that there is no entitlement to participate in athletics and that petitioner's argument that R.D. is being denied a scholarship to college because the waiver was refused is purely speculative.

NJSIAA also contended that petitioner failed to make a showing of likelihood of success on the merits in that the case entitled Burnside et al. v. NJSIAA, decided by the Commissioner 1984 S.L.D. 1677, aff'd N.J. Superior Court Appellate Division 1695, cert. den. 101 N.J. 236 (1985) has held that whether or not a local school district member of NJSIAA has conveyed misinformation to a pupil is not grounds for a waiver because to allow a waiver under such situation would reward schools who fail to abide by the NJSIAA Bylaws and rules while penalizing those schools who followed those rules.

NJSIAA further argued against a showing of likelihood of success on the merits in that even if the Motion for Emergent Relief

were granted, because R.D. has not been practicing, he would be foreclosed from participating in a game this week for health and safety reasons pursuant to NJSIAA's six-day practice rule as set forth at Rule 2, Section 7, which requires that a student shall not be permitted to participate in a scrimmage or game in any strenuous sport until he or she has completed six days of practice in that sport.

NJSIAA also rebutted petitioner's claim that NJSIAA applied a strict interpretation of its rules in failing to grant a waiver by stating that it grants waivers to those students who genuinely have no control over their circumstances due to handicap or illness but that R.D. presents no such circumstance insofar as he failed a course in sociology, a matter over which he did have control.

NJSIAA further contended that contrary to petitioner's position, the transcripts of the hearing before the EAC on October 9, 1991 make plain through the testimony of the Superintendent of Audubon Schools that the NJSIAA rules were properly displayed in the schools, albeit that the student handbook may have included inaccurate information regarding credit requirements, thus, negating petitioner's argument that R.D. was misinformed as to the requirements or was misled.

Moreover, NJSIAA suggested that Audubon High School could have provided tutorial help to the student to meet the six-day academic rule although it chose not to, thus, suggesting that the school itself did not provide special consideration for the student's academic plight.

NJSIAA added that the balancing of equities enures in favor of the Association insofar as many other students are not

participating in sports currently for failure to meet the academic standards and that to permit R.D. to do so would undermine the efforts of the organization and other students who strive to raise their academic standards.

The Acting Deputy Commissioner heard and considered the arguments of the parties and having weighed the standards to be met for the provision of the extraordinary remedy of a stay as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), he determined that petitioner failed to demonstrate irreparable harm in that the Commissioner and the Courts have held that participation in sports is a privilege not a right. See, e.g., B.C., on his own behalf and on behalf of his minor son, C.C. v. Board of Education of the Cumberland Regional School District et al. and NJSIAA, decided by the Commissioner May 19, 1986, aff'd N.J. Superior Court, Appellate Division September 23, 1987 and Burnside, supra.

The Acting Deputy Commissioner further found that petitioner failed to demonstrate a likelihood of prevailing on the merits of his case because it is well-established in law that student-athletes who fail to meet the academic requirements of the Association, even under circumstances where individual notice was not provided, are not entitled to a waiver of such academic standards set by the Association. See, Burnside, supra, at 1698.

The Acting Deputy Commissioner also found that even if emergent relief were granted, R.D. would not be allowed to play in this week's competition for health and safety reasons pursuant to the six-day practice rule as set forth at Rule 2, Section 7, p. 73 of the NJSIAA Bylaws, because he has not been practicing, even though the October 9, 1991 determination of the EAC allowed that he might so practice with the team.

The Acting Deputy Commissioner further found that the balance of equities and likelihood of success enured on behalf of NJSIAA, which has a greater interest in preserving academic standards for all participating students than the interests suggested by R.D. in seeking a waiver of the six-day academic credit rule because it is uncontested that R.D. failed sociology in his junior year. Accordingly, the Acting Deputy Commissioner determined petitioner failed to meet his burden of demonstrating irreparable harm, a likelihood of success and that the balance of equities lies in his favor. The Acting Deputy Commissioner ordered that the matter proceed on the papers to be filed on the merits of the case no later than Tuesday, October 22, 1991, so that this matter might proceed expeditiously to a final adjudication before the Commissioner.

On October 29, 1991, one week past the submission date provided, petitioner's counsel filed an additional submission to those arguments advanced on R.D.'s behalf on emergent relief. In said submission, petitioner notes that several decisions have held that even though a mistake was made by the institution that led to credit ineligibility, the child had parents who were aware of the possible ramifications of failing a subject. In this matter, petitioner claims R.D. had no one except the school to guide him. Petitioner asserts R.D. was willing to go to summer school and offered to do so, but was then misinformed by the school.

Petitioner contends that it is difficult to see the logic in punishing a student whose academic failure was beyond his control in order to maintain the letter of the eligibility rules. He claims that, as the situation is presently, R.D.'s valiant struggle to

remain in school, despite hardship, while at the same time playing football, goes unrecognized. He acknowledges that R.D. failed a course. Yet, he argues that it is the guidance counselor's directive not to take the makeup course which has become the basis for R.D.'s punishment. Although such punishment was directed at Audubon High School for its mistake, it is the one R.D. feels.

Petitioner also acknowledges that the primary purpose of an Association like NJSIAA is to teach, and that maintaining academic standards is certainly a linchpin of such teaching. He submits, however, that there is no purpose in maintaining academics if the total teaching experience is "sending the wrong message." (Petitioner's Letter Brief, dated October 29, 1991, at p. 2). Moreover, he avers it is to place form over substance to suggest that the rules and policy concerning the granting of a waiver for academic eligibility should override the efforts of R.D. to stay in school and to secure a potential college career with a college football scholarship. He claims that such policy seems to ignore the backbone of New Jersey law which holds that in all matters, it is the best interest of the child which should prevail.

NJSIAA filed an Answer and Letter Brief in opposition to the Application of R.D. on October 22, 1991. Additionally, NJSIAA provided complete transcripts of the hearing afforded R.D. before the EAC of NJSIAA held on September 11, 1991 and again on October 9, 1991. Said brief reiterates the arguments NJSIAA advanced at the oral argument on Motion for Emergent Relief, but adds transcript citations from the hearings before the EAC to bolster its position. Citing Burnside, supra, and D.J.K. and H.J.K. v. NJSIAA, decided by the Commissioner February 3, 1987 for the proposition that if due

process has been granted and there is an adequate basis for the decision reached by NJSIAA, the Commissioner will not substitute his judgment even when he would judge otherwise in a de novo review, NJSIAA reasserts its claim that the EAC's decision not to waive the six-day eligibility rule in this case was neither arbitrary nor capricious and, therefore, should be sustained by the Commissioner.

NJSIAA argues that its decision not to waive the eligibility rules was neither arbitrary nor unreasonable because after affording R.D. two hearings, the EAC based its decision on the record and conviction that a member school cannot be permitted to profit from its own negligence. It further avers that this conclusion is particularly apt in an Association which relies on its own members to enforce the rules. NJSIAA summarizes by stating that R.D. has been given an opportunity to participate with the team practices, and if he completes his credits, he will be eligible for winter and spring sports. It submits that the EAC's decision should not be overturned.

Upon a careful and independent review of the record of this matter, the Commissioner finds and determines that petitioner has failed to demonstrate that the decision of the EAC was arbitrary, capricious or unreasonable. Although the Commissioner is sympathetic to the hardships endured by R.D. and commends his laudable perseverance to acquire his education in the face of such adversity, the NJSIAA rules on academic requirements were included in a chart in the student handbook, albeit that the narrative interpreting the chart was incorrect. Moreover, the transcript of the hearing below makes plain that the NJSIAA guidelines were also posted in three other locations in Audubon High School. See Tr.

(9-11-91) 165 and Tr. (10-9-91) 41. Hence, it may not be seriously argued that R.D. did not have proper notice of the rules, albeit that his guidance counselor misconstrued the language in the handbook and thereupon misinformed R.D. that he had adequate credits without summer school to participate in fall athletics.

Most importantly, however, the Burnside case has held under facts whereby students averred they had no notice of changes in the NJSIAA academic eligibility standards, that even under circumstances where individual notice was not provided, student-athletes are not entitled to a waiver of those academic standards established by the Association and enforced by its member schools. (See Burnside, supra, at 1698.)

Additionally, case law has plainly established that each pupil in New Jersey does not have a right to participate in interscholastic athletics but, rather, that "[p]articipation is subject to eligibility requirements or other preconditions." (See Burnside, supra, at 1697.) In this matter, R.D. was afforded an opportunity to participate in interscholastic sports but he failed to meet the academic eligibility requirements as set forth in the NJSIAA Bylaws at Article V, Section 4E.

Despite petitioner's arguments to the contrary, the Commissioner finds no grounds in the record before him to grant a waiver of the aforestated academic credit rule to afford R.D. an opportunity to play football while he makes up the failed sociology course through 60 hours of tutoring especially because the local school district itself, which could have provided a waiver of its own academic standards, refused to do so. Its superintendent persuasively argued before the EAC that the Board's concern with

maintaining the academic standards of the district outweighed consideration of granting R.D. a waiver of its own standards. See, Tr. (10-9-91) 40, 43.

Accordingly, the Commissioner finds and determines that R.D. has been afforded due process before the EAC of NJSIAA. He further finds that petitioner has failed to bear his burden of demonstrating that the determination of the EAC was arbitrary, capricious and unreasonable. Accordingly, the Commissioner adopts as his own the findings and conclusions of the EAC below and dismisses the instant Petition of Appeal for the reasons expressed by the EAC as augmented herein.

COMMISSIONER OF EDUCATION

NOVEMBER 14, 1991

DATE OF MAILING - NOVEMBER 14, 1991

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY ,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MAYOR AND COUNCIL OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,	:	
RESPONDENT.	:	
	:	

For the Petitioner, Greenberg, Ferrara, Covitz, Turitz, Harraka & Goldberg (Stanley Turitz, Esq., of Counsel)

For the Respondent, DeCotiis & Pinto (John S. Langan, Jr., Esq., of Counsel)

This matter was opened before the Commissioner of Education by the filing of a Petition of Appeal by the Board of Education of Little Ferry (Board) appealing the reductions in the 1991-92 budget imposed by the Mayor and Council of the Borough of Little Ferry (Council) pursuant to 'the provisions of N.J.S.A. 18A:22-37. The aforesaid reductions consisted of a $736,085 reduction for current expense. As a result of these reductions the amounts in dispute before the Commissioner are summarized below:

Proposed Tax Levy Adopted by the District Board of Education	Amount of Tax Levy Certified by Governing Body
Current Expense $5,956,603	$5,220,518
Amount of Reduction By Governing Body	**Amount of Reduction in Dispute before Commissioner**
Current Expense $ 736,085	$736,085

On June 26, 1991 Council filed its Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6 and 7.7. On July 15, 1991 the Board filed its written submission in support of the Petition of Appeal and Council filed its position on July 19, 1991. Rebuttals were filed on July 29, 1991 with final summations being submitted on August 1, 1991, respectively, and August 7, 1991 at which point the record before the Commissioner was formally closed.

In rendering judgment relative to budget appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

In the instant matter, Council, upon defeat in the 1991-92 budget by the electorate, did confer with the Board as required by N.J.S.A. 18A:22-37 and established a tax levy to be used for school purposes. The aforesaid tax levy was established by imposing the following line item reductions:

Line Item:		Amount
ADMINISTRATION		
110	Salaries	
	Board Secretary	$ 6,615
	Treasurer of School Monies	180
	Superintendent's Office	9,409
	Administration salaries for 1991-92 were reduced back to 1990-91 levels	
120b	Legal Fees	35,000
	Reduction is based upon the Board's actual budget requirements over the past several years. The revised budget anticipates providing similar and equal services to those currently being provided. Furthermore, the Board of Education did not present a need for additional legal services for 1991-92.	
120d	Purchase Other Professional Services	
	Auditor	8,000
	Architect	20,000
	Reduction is based upon the Board's actual budget requirements over the past several years. The revised budget anticipates providing similar and equal services to those currently being provided. Furthermore, the Board of Education did not present a need for additional auditing and architectural services for 1991-92.	
130	Other Expenses	
	Board Secretary's Office	6,000
	Printing & Publishing	5,000
	Reduction is based upon the Board's actual budget requirements over the past several years. The revised budget anticipates providing similar and equal services to those currently being provided. Furthermore, the Board of Education did not present a need for administrative publishing and printing	

expenses as well as miscellaneous expenses relating to the Board Secretary's office for 1991-92.

INSTRUCTION

211	Salaries - Principals	$ 57,130
	It is recommended that a principal's position be eliminated. The principal's duties may be assumed by other administrative personnel. The remaining principals were provided with a 7.5% increase for 1991-92.	
212	Salaries - Supervisor of Instruction	1,005
	The reduction is based upon providing a 7.5% increase to existing staff complement.	
213	Salaries - Teachers	138,719
	The reduction is based upon providing a 7.5% increase to existing staff complement. Also, the Board of Education, at our meeting, did not express the need for any additional teaching positions.	
214	Salaries - Other Instructional Staff	1,317
	The reduction is based upon providing a 7.5% increase to existing staff complement.	
215	Salaries - Secretaries	29,027
	It is recommended that the secretary to the principal can also be eliminated if, in fact, the principal position is abolished as recommended in A/C 211. The remaining secretaries were provided with a 7.5% increase for 1991-92.	
216	Other Salaries for Instruction	93,155
	After careful analysis, it was determined that the Board's request for a $105,000 increase for teacher aides was unjustified. The Board actually spent $25,647 in 1989-90 and is projected to spend $30,417 in 1990-91. As such, even after the proposed reduction of $93,155, the remaining appropriation of $50,000 provides additional monies over prior years to fund new teacher aide positions.	

230	School Library and Audio Visual Material	$ 14,000

Reduction is based upon the Board's actual budget requirements over the past several years. The revised budget anticipates providing similar and equal services to those currently being provided. Furthermore, the Board of Education did not present a need for additional library services and audio visual services for 1991-92.

240	Teaching Supplies	22,135

Our analysis revealed the Board expended $79,851 in 1989-90 and has projected to spend $42,109 in 1990-91. After giving effect to the $22,135 cut, the Board will still have a budget of $80,000 for teaching supplies for 1991-92. This represents approximately a 100% increase. Furthermore, the Board did not present a need for any additional teaching supplies.

250	Other Instructional Expenses	9,000

Reduction is based upon the Board's actual budget requirements over the past several years. The revised budget anticipates providing similar and equal services to those currently being provided. Furthermore, the Board of Education did not present a need for additional instructional other expenses for 1991-92.

ATTENDANCE AND HEALTH SERVICES

320	Other Expenses - Attendance	500

The Board of Education did not expend any funds in this category in the past. As such, this account has been eliminated.

410	Salaries - Health	30,412

This reduction was determined by eliminating the funds associated with hiring an additional nurse for 1991-92. This budget cut does not eliminate any present services and, in fact, provides for a 7.5% raise.

TRANSPORTATION

520	Contracted Services and Public Carriers	$ 80,000
520c	Trips Other Than To/From School	2,000

Reduction is based upon the Board's actual budget requirements over the past several years. The revised budget anticipates providing similar and equal services to those currently being provided. Furthermore, the Board of Education did not present a need for additional transportation for 1991-92.

OPERATION OF PLANT

610	Salaries	2,221

The reduction is based upon providing a 7.5% increase to existing staff complement.

MAINTENANCE OF PLANT

710	Salaries	149

The reduction is based upon providing a 7.5% increase to existing staff complement.

720	Contracted Services 90,000	

The school district budgeted $140,000 for repair of buildings in 1990-91; of this amount $90,000 remains unencumbered. As such, it is recommended the Board utilize the monies still available in 1990-91 rather than requesting additional funds.

730	Replacement of Equipment	7,000

Reduction is based upon the Board's actual budget requirements over the past several years. The revised budget anticipates providing similar and equal services to those currently being provided. Furthermore, the Board of Education did not present a need for additional equipment for 1991-92.

SPECIAL EDUCATION

09 210	Neurologically Impaired - Salaries	1,946
18 210	Resource Room - Salaries	767
21 210	Supplementary Instruction - Salaries	63
22 210	Speech - Salaries	285

The reduction is based upon providing a 7.5% increase to existing staff complement.

20A-210	Preschool Handicapped - Full Time	$ 65,050

The proposed preschool handicapped program provides services to out of town school districts. Only 3 students from Little Ferry attend this program. As such, it is recommended that only the Borough's share of costs be budgeted. The costs associated with the sending districts should be accounted for in the "clearing account" since these costs will be reimbursed to the Board of Education. This proposed budget cut does not affect the program whatsoever - it only affects the method of budgeting for the program.

Total Current Expense Budget Cuts for 1991-92	$736,085

BOARD'S POSITION

The Board's general position asserts that the amount as originally budgeted by it and presented to the voters for the 1991-92 school year was itself inadequate despite budgeting to cap and obtaining two cap waivers to meet the minimum requirements of a thorough and efficient education as defined by the Quality Education Act (QEA). Based upon the minimum support level by grade level category, it is the position of the Board that the amount originally budgeted by the district was some $481,085 less than the minimum support level needed to satisfy the requirements of the QEA. While the Board contends that a district may legitimately fund at a lower level, it can only do so upon certification that the budget is sufficient to provide a thorough and efficient education. It is the Board's contention that it cannot so certify any such amount as sufficient other than that which was originally budgeted.

The Board further argues for restoration of the entire amount by which Council reduced its budget by pointing out that it was the recipient of a $528,454 cap waiver which can only be granted by the Commissioner if the district meets established criteria. In

Little Ferry's case, the Board was able to demonstrate the need for a cap waiver because of increasing enrollment and special education costs which could not be met within the cap.

Based upon the foregoing the Board argues that the budget can only meet the QEA standard if the amount originally budgeted is restored.

The Board's individual line item position is set forth below.

Account No. 110 Administration - Salaries Reduction: $16,204

The reduction in this account was accomplished by holding the salaries of central office administrators and their secretaries at the same level as in 1990-91.

The Board argues that such an approach is unreasonable and arbitrary since it allots a 7.5% salary increase to all other staff members including the secretaries of building principals. It further argues that the cost of administration in the district has risen by less than 1% annually over the last four years and contends that its superintendent and business administrator stand at the lower end of the county in terms of their salaries.

Account No.		Reduction
120b	Legal Fees	$35,000
120d	Other Professional Services	
	Auditor	8,000
	Architect	20,000
130	Other Expenses Administration	
	Board Secretary's Office	6,000
	Printing and Publishing	5,000

The Board argues for the restoration of the above amounts based on increased legal costs resulting from the appeal herein, continuing negotiations for settlement of the 1990-91 and 1991-92 contract with its NJEA affiliate, as well as negotiations with its

custodians whose contract expires in June 1992, and withdrawal from its sending-receiving relationship with the Ridgefield Park Board of Education.

In response to the reduction of the fees for Other Professional Services, the Board argues that the amounts originally budgeted are necessary to respond to the problems of severe overcrowding including plans for double sessions in 1992-93, developing lease purchase documents and construction plans.

Account No.		Reduction
211	Salaries - Principals	$57,130
212	Salaries - Supervisor of Instruction	1,005

The Board argues that elimination of a principal not only prevents the presentation of a thorough and efficient system of education, it is also contrary to N.J.A.C. 6:8-3.3(b) which mandates a full-time nonteaching principal for each school unless a waiver is obtained from the Commissioner of Education upon advice of the chief school administrator. The Board contends that its administrative and supervisory staff is too small at present to meet its needs.

The Board argues that Council's suggestion that the principal's responsibilities be assumed by other administrative personnel is impossible since the only other individual who could assume such duties is the supervisor of instruction who could only do this by neglecting those duties assigned to his/her position.

Finally, the Board contends that increasing enrollment is likewise increasing the responsibilities of the two building principals rather than enabling the decrease of administrative services.

Account No.		Reduction
213	Salaries - Teachers	$138,719
214	Salaries - Other Instructional Staff	1,317
216	Other Salaries for Instruction	93,155

The Board argues that its most current contract expired on June 30, 1990 and it is therefore still engaged in negotiations for a successor agreement. Since the actual salary increase to which the Board will eventually agree has not yet been determined, it argues that it cannot be held to the 7.5% increase which Council has suggested. The Board argues the amount budgeted reflects a 8.6% salary recommendation contained in a fact-finder's report. While the Board contends that it will seek a lesser settlement, the recommendation remains at this time the maximum estimate the Board can use.

In regard to its needs for additional teachers, the Board asserts that increasing preparation time increases the need for additional staff since teachers need to be away from students in order to prepare.

The Board further argues that it made clear to Council its need for an additional physical education teacher to prevent the increased enrollment from requiring that an uncertified elementary teacher assume the responsibility of meeting the State health, physical education and safety mandate of N.J.S.A. 18A:35-8.

As for its requested restoration under Account No. 216 Other Salaries for Instruction, the Board points to what it contends is a "lean" ratio of 75 professional staff per 1000 students as compared to a Bergen County average of 98.8 professional staff per 1000 and a statewide average of 92.1 per 1000. Since the Board cannot increase regular teaching staff due to an absence of teaching

stations, (other than the physical educational teacher and an additional school nurse), the Board has sought to meet its needs through paraprofessional assistance to "overburdened" teachers. (Board's Position Statement, at pp. 11-12)

Account No. 215 Salaries - Secretaries Reduction: $29,027

Since Council's recommendation in this line item is based upon the elimination of a principal's position, it has eliminated the position of the principal's secretary. The Board argues that such position becomes even more necessary in the absence of a principal. If a principal were missing, it would only increase the administrative burden on all remaining personnel particularly the secretary.

Account No.		Reduction
230	School Library and AV Material	$14,000
240	Teaching Supplies	22,135
250	Other Instructional Expenses	9,000
730	Equipment	7,000

The Board contends that Council's recommendations in the above accounts are predicated solely upon previous years' expenditures which fail to consider increasing enrollment. Additionally, the Board argues that it entered the 1990-91 budget year with no free balance due to a number of factors set forth on page 11 of its Position Statement and incorporated herein by reference. Based upon these facts, the Board feels that it must have an additional cushion to guard against emergencies.

Given the 6% consumer price index increase and enrollment increases, the 1990-91 estimates will not suffice for 1991-92 according to the Board.

Account No. 410 Salaries - Health Reduction: $30,412

Based upon the mandated programs which must be carried out with the assistance and participation of the school nurse, the Board argues that the increase in enrollment has expanded the duties of the existing single school nurse to the point where it is no longer possible for that individual to meet the Board's obligations under law. The Board contends that the addition of a nurse is essential to the health, safety and welfare of its students and to meeting the requirements of a thorough and efficient system of education.

Account No.		Reduction
520	Contracted Services - Transportation	$80,000
520c	Trips Other than To/From School	2,000

The Board contends the monies in this account arise from a need to transport students to and from the receiving high school. These are statutorily required services and the costs of these services are established by contractual agreements already established or in the process of negotiation. The Board argues that since there is no courtesy busing involved, any reduction in this account would result in not being able to meet a mandated requirement.

Account No.		Reduction
610	Salaries - Operation of Plant	$2,221
710	Salaries - Maintenance	149

The Board takes the position that salaries in this account are a result of rates previously determined by the collective bargaining agreement. Any additions to the above are "verified estimates" of necessary overtime and emergency services. (Board's Position Statement, at p. 13)

Account No. 720 Contracted Services Reduction: $90,000

The Board avers that it is obligated by regulation (N.J.A.C. 6:8-4.3(a)5i) to develop and implement a five-year comprehensive maintenance plan. This plan was forwarded to the Department of Education in conjunction with its 1991-92 budget with the notation that the budget cap and cap waivers were inadequate to fully fund the five-year maintenance plan.

It is the Board's position that it requires more funds in this area not less and Council's recommendations lack any specificity as to what can be left undone. It further argues that the fact that its 1990-91 budget in the Spring of 1991 showed $90,000 in unencumbered funds in this account is a reflection of the Board's having to operate the entire year without a free balance and its postponement to the end of the fiscal year of any services which could not reasonably be postponed.

Account No.		Reduction
09 210	Neurologically Impaired - Salaries	$1,946
18 210	Resource Room - Salaries	767
21 210	Supplementary Instruction - Salaries	63
22 210	Speech - Salaries	285

The Board presents the view that salaries in these accounts are subject to the same protracted collective bargaining process as discussed earlier in relation to the regular teaching staff in Account No. 213.

Account No. 20A 210 Preschool Handicapped Reduction: $65,050

Since this is a program which the district hosts as part of the Bergen County Special Education Region VI on behalf of 12 public school districts, the $65,050 reduced by the Council is offset by a like amount of anticipated tuition revenue. Therefore, there is no

effect on the tax rate whether both the revenue and expense are in the budget or if they are removed from the budget.

In final summation, the Board contends that there are no unnecessary funds contained within this budget. It further accuses Council of "lavishing" a greater proportion of the Equalized Property Tax Rate on itself than is the case for other municipalities in the county and state. (See Table in the Board's Statement of Position, at page 15.)

COUNCIL'S POSITION

Council set forth its general belief that the budget after reduction is sufficient to provide for a thorough and efficient system of education. It is Council's contention that at its conference on May 16, 1991 with the Board it provided substantiation of its position in great detail while it did not receive similar cooperation from the Board, nor did the Board attempt to support its original budget as presented to the voters.

In addition to the Statement of Reasons already presented herein, Council sets forth further reasoning in support of specific line item reductions as follows:

Account No. 110 Administration - Salaries	Reduction
Board Secretary	$6,615
Treasurer of School Monies	180
Superintendent's Office	9,409

Council argues that due to the severe economic distress in the Borough and the State all non-unionized personnel should be forced to accept a pay freeze and thus it has reduced the administrative salary accounts to the 1990-91 levels.

Account No. 211 Salaries - Principals Reduction: $ 57,130

Council contends that with two principals, a superintendent and a supervisor of curriculum there are four administrators for approximately 750 students which it deems to be excessive in times of "economic conservatism." It therefore recommends the elimination of one principal while providing the remaining administrators in this area with a 7.5% salary increase for 1991-92.

Account No. 720 Maintenance Contracted Services Reduction: $90,000

In addition to the reasons presented in its Statement of Reasons, ante, Council contends that the Board has failed to present additional need for its original budget requirement of $140,000.

COMMISSIONER'S DECISION

The Commissioner has carefully reviewed the record in this matter and the arguments as presented by the parties in their Position Statements, Responses and Summaries. Based upon the foregoing review the Commissioner sets forth his findings below.

Prior to rendering such determination, the Commissioner must address the argument raised by the Board that the entire reduction imposed by Council must be restored, because the budget presented to the voters was deficient by $481,085, despite a cap waiver based upon the Board's projections of the QEA minimum support levels by grade. In response to such argument, the Commissioner notes, as the Board acknowledges, that a district may spend below such level if it receives the approval of the County Superintendent. In the instant matter, the Bergen County Superintendent, upon review of the budget presented to the voters, found such budget to be sufficient for purposes of providing a thorough and efficient system of education. Consequently,

notwithstanding the Board's contentions to the contrary, the Commissioner shall examine the individual line item accounts and the rationale presented by both parties to determine the impact such reduced accounts may have on the ability of the Board to provide a thorough and efficient system of education.

Account No. 110 Administration - Salaries	Reduction
Board Secretary	$ 6,615
Treasurer of School Monies	180
Superintendent's Office	9,409
Total	$ 16,204

The Commissioner has carefully examined the rationale of Council in denying the Board's central office staff, both professional and non-professional, any salary increase. While the Commissioner recognizes that economic circumstances are difficult at this particular time, he finds it unrealistic to take the position that all other employees of the district should be entitled to a 7.5% increase while denying any increase to the entire central office staff.

The Commissioner therefore directs the restoration of the entire $16,204 set aside for central office salaries and reduced by Council.

Account No. 120b Legal Fees — Reduction: $35,000

The Commissioner notes that Council argues that its reduction in this account is based upon the Board's actual requirements in past years; however, the budget presented herein in this case indicates that the Board appropriated the same $50,000 for 1991-92 as it did for 1990-91. Further, the Commissioner finds merit in the Board's position that the amount remaining in this account, $15,000, after the reduction would be insufficient to meet its needs for legal advice and litigation and thus the monies for such needs would be drawn from instructional programs. Having so

concluded, the Commissioner does believe that the Board could sustain a token reduction of $10,000 without substantially impacting upon other areas of the total program. Therefore, the Commissioner directs that $25,000 be restored to this account and a $10,000 reduction be sustained.

Account No. 120b Other Professional Services		Reduction
Auditor		$ 8,000
Architect		20,000
	Total	$ 28,000

Upon review, the Commissioner again finds that the amount by which Council has chosen to reduce this line item account leaves the Board precariously low in its ability to provide the professional services required to meet its responsibilities. While Council argues that it is providing an amount equal to past year requirements, an examination of the budget document does not substantiate that contention.

The Commissioner therefore directs that $20,000 be restored and $8,000 be sustained.

Account No. 130 Other Expenses		Reduction
Board Secretary's Office		$ 6,000
Printing and Publishing		5,000
	Total	$ 11,000

Based upon a review of the previous year's budget appropriation in this account, the Commissioner concludes that the Board can provide a similar level of services within the reductions imposed. The Commissioner therefore sustains the $11,000 reduction in this account.

Account No. 211 Salaries - Principals Reduction: $ 57,130

Upon careful review and in conformity with regulation (N.J.A.C. 6:8-3.3), the Commissioner concurs with the arguments

presented by the Board that the principal's position is necessary to provide the kind of teacher supervision and evaluation consistent with the provision of a thorough and efficient system of education. If the district curriculum coordinator were to assume the functions of the building principal, that individual would not be able to fulfill the responsibilities of his/her own position as delineated on page 7 of the Board's Statement of Position.

Therefore, the Commissioner directs the restoration of the $57,130 by which Council reduced this account.

Account No. 212 Salaries - Supervisor Reduction: $1,005

The Commissioner finds this $1,005 reduction capable of being sustained by the Board without injury to its ability to provide a thorough and efficient system of education.

Account No. 213 Salaries - Teacher Reduction: $138,719

The Commissioner has given extremely careful consideration to the arguments proposed by the parties in this matter. After such review, the Commissioner cannot agree with the Board's position that it must maintain a salary account sufficient to accommodate a fact-finder's report recommending an 8.6% salary increase for teachers. One must note that a fact-finder's report is based upon a certain set of given circumstances and that individual's perception of what the Board can afford to pay. Those factual circumstances have been drastically altered by both the budget defeat and the reduction imposed by Council.

Additionally, the Commissioner has examined the arguments presented by the Board for an increase in physical education teacher time and found such argument to be persuasive. Therefore, in light

of the foregoing conclusions, the Commissioner directs that $100,719 of the reduction imposed by Council in this account be sustained and $38,000 be restored.

Account No. 214 Salaries - Other Instruction Reduction: $ 1,317

The reduction of $1,317 is sustained for the reasons provided above.

Account No. 215 Salaries - Secretaries Reduction: $29,027

This reduction was predicated on the elimination of a principal's position which has been restored elsewhere in this decision. Further, the Commissioner finds merit in the Board's position that even if the principal's position had been eliminated, that would not justify the elimination of a secretary. Therefore, the Commissioner directs that the $29,027 in this account be restored.

Account No. 216 Other Salaries for Instruction Reduction: $ 93,155

After careful review of all the documents, the Commissioner finds no justification on the Board's part for a $105,000 increase in this account over the 1990-91 budget. The Commissioner must therefore conclude that the Board has failed to meet its burden and the $93,155 reduction in this account is sustained.

Account No. 230 Library and AV Materials Reduction: $ 14,000

In light of the Board's argument relative to increasing enrollment and in consideration of the Board's position that its expenditures in this area for 1990-91 were constrained by a legitimate need to act cautiously due to unavailability of surplus and the need to settle matters of litigation between itself and its receiving district, the Commissioner considers that the reductions

imposed by Council cannot be sustained with invoking the strong possibility of denying students necessary library and audio visual supplies.

The Commissioner therefore directs the restoration of the $14,000 reduction imposed in this account.

Account No. 240 Teaching Supplies Reduction: $22,135

The Commissioner has weighed the arguments raised by the Board relative to this account which are the same as the rationale proposed in Account No. 230. He further notes that, notwithstanding the reduction imposed by Council, the remainder of the amount in this account will still result in a $7,000 increase over the amount budgeted in 1990-91 which should be sufficient to account for increase in enrollment projected by the Board. The Commissioner therefore sustains the reduction of $22,135 in this account.

Account No. 250 Other Instructional Expenses Reduction: $9,000

Based upon the same rationale as outlined above, the Commissioner determines that the reduction imposed by Council in this account is reasonable and therefore the reduction of $9,000 is sustained.

Attendance and Health Services

Account No. 320 Other Expenses - Attendance Reduction: $500

The reduction of $500 in this account is sustained since the Board offered no argument for its restoration.

Account No. 410 Salaries - Health Reduction: $30,412

With increased enrollment and two buildings to be served, an increase in nursing services is not inconsistent with the requirements of a thorough and efficient system of education. While no state mandate exists, other than providing sufficient nursing

services to meet student needs, the Commissioner believes that the decision of when the addition of a nurse is required to meet that mandate rests with the Board. If the Board in these circumstances believes that an additional nurse is necessary for the provision of a thorough and efficient education, that judgment should be honored. Consequently, the Commissioner directs the restoration of the $30,412 by which this account was reduced.

Transportation

Account No.		Reduction
520	Contracted Services	$ 80,000
520c	Trips - Other Than To/From School	2,000
	Total	$ 82,000

Council argues that the $82,000 total reduction in these two accounts is sufficient to provide a level of services equal to that budgeted in previous years. The Commissioner notes, however, that the above-cited reduction would actually permit the Board a lesser amount for 1991-92 than that budgeted in 1990-91. The Board for its part argues that the amount budgeted herein is necessary to meet actual contractual agreements but no evidence of such agreements has been provided. In light of the foregoing, and in consideration of the fact that transportation costs are continually rising, the Commissioner deems some increase over the previous year's budget to be reasonable. The Commissioner directs that $40,000 of the reduction imposed by Council in account 520 be sustained and $40,000 be restored. The $2,000 in account 520c being the same as budgeted in 1990-91 is restored.

Operation of Plant

Account No. 610 Salaries — Reduction: $2,221

Maintenance of Plant

Account No. 710 Salaries — Reduction: $149

The reductions imposed in these two accounts, $2,221 and $149, are restored since they are based upon existing contractual obligations with a reasonable margin for meeting emergency needs.

Account No. 720 Contracted Services — Reduction: $90,000

Inasmuch as the Board has offered no rebuttal to the charge that $90,000 of funds budgeted for 1990-91 remained unencumbered as of the filing of the petition in this matter, the Commissioner sustains the reduction of $90,000 imposed by the governing body.

Account No. 730 Replacement of Equipment — Reduction: $7,000

Upon review of the position statements proffered by the Board, the Commissioner must conclude that the Board has failed to meet its burden of demonstrating the need for replacement equipment in the amount budgeted for 1991-92.

In arguing for restoration, the Board relies solely upon the contention that increasing enrollment justifies the restoration of the monies in this account without delineating specific equipment needs.

Therefore, the Commissioner directs that the $7,000 reduction in the account be sustained.

Special Education - Salaries

Account No.		Reduction
09 210	Neurologically Impaired	$ 1,946
18 210	Resource Room	767
21 210	Supplementary Instruction	63
22 210	Speech	285
	Total	$ 3,061

The Commissioner sustains the reduction of $3,061 for the reasons cited in his determination relating to Account No. 210 - Salaries, Instruction.

Account No. 20A 210 Preschool Handicapped Reduction: $65,050

Inasmuch as the bulk of the cost of this program is funded from tuition received, the Commissioner sustains the reduction of $65,050 imposed.

SUMMARY

Account No.		Amount of Reduction	Amount Not Restored	Amount Restored
Administration				
110	Salaries	$ 16,204	-0-	$ 16,204
120b	Legal Fees	35,000	$ 10,000	25,000
120d	Professional Services	28,000	8,000	20,000
130	Other Expenses	11,000	11,000	-0-
Instruction				
211	Salaries - Principals	57,130	-0-	$ 57,130
212	Salaries - Supervisor	1,005	1,005	-0-
213	Salaries - Teachers	138,719	100,719	38,000
214	Other - Salaries	1,317	1,317	-0-
215	Salaries - Secretaries	29,027	-0-	29,027
216	Other - Salaries	93,155	93,155	-0-
230	Library & AV	14,000	-0-	14,000
240	Teaching Supplies	22,135	22,135	-0-
250	Other Expenses	9,000	9,000	-0-
Attendance and Health Services				
320	Other Expenses	500	500	-0-
410	Salaries - Health	30,412	-0-	30,412
Transportation				
520	Contracted Services	80,000	40,000	40,000
520c	Trips - Other	2,000	-0-	2,000
Operation of Plant				
610	Salaries	2,221	-0-	2,221
710	Salaries - Maintenance	149	-0-	149
720	Contracted Services	90,000	90,000	-0-
730	Replacement of Equipment	7,000	7,000	-0-
Special Education				
210	Salaries	3,061	3,061	-0-
20A 210	Preschool Handicapped	65,050	65,050	-0-
	Totals	$736,085	$461,942	$274,143

The Commissioner therefore directs the Bergen County Board of Taxation to strike an additional tax levy of $274,143 for the support of schools in Little Ferry Borough for the 1991-92 school year which when added to the amount of $5,330,518 previously certified by the governing body will result in a total tax levy for current expense purposes of $5,494,661.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 19, 1991

DATE OF MAILING - NOVEMBER 19, 1991

BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK,

PETITIONER,

V.

MAYOR AND COUNCIL OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Joseph J. Rotolo, Esq. (Morrissey, Rotolo & DiDonato, Counselors At Law)

For the Respondent, Stanley Turitz, Esq. (Greenberg, Ferrara, Covitz, Turitz, Harraka & Goldberg, P.C.)

The Board of Education of the Borough of Palisades Park (Board) appeals to the Commissioner of Education from an action taken by the Mayor and Council of the Borough of Palisades Park (Council) pursuant to N.J.S.A. 18A:22-37 certifying to the Bergen County Board of Taxation a lesser amount for current expense and capital outlay costs for the 1991-92 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate proposals to raise the following amounts by local taxation:

Current Expense	$8,531,991.00
Capital Outlay	150,213.00
Cap Waiver	149,787.00

The proposal was rejected by the voters. Thereafter, the Board submitted its budget to Council for its determination of the

amounts necessary for the operation of a thorough and efficient school system in the Borough of Palisades Park for the 1991-92 school year pursuant to the mandatory obligation imposed on Council by N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Bergen County Board of Taxation $7,490,741* for current expense and $100,000 for capital outlay costs for school year 1991-92, thus reducing the tax levy by $1,241,250. The amounts in dispute are shown as follows:

	BOARD'S PROPOSAL	COUNCIL'S PROPOSAL	REDUCTION
Current Expense	$8,531,991	$7,490,741*	$1,041,250
Capital Outlay	150,213	100,000	50,213
Cap Waiver	149,787	-0-	149,787
Totals	$8,831,991	$7,590,741	$1,241,250

* This represents the amount specifically for the 1991-92 school year and does not include the $200,000 additional amount cited in Council's Resolution relative to the 1990-91 school year.

The above tabulation shows that the current expense account has been reduced by $1,041,250 and the capital outlay account by $50,213. Under the circumstances presented in this appeal, the $149,787 cap waiver reduction will not be considered for restoration. Neither party argued that the cap waiver in the instant matter is a disputed amount cognizable by the Commissioner.

Council's total reduction of $1,091,463 is divided into two categories which will be addressed below:

Category I, Non-Educational	$ 725,000
Category II, Educational	366,463
Total Tax Levy Reduction	$1,091,463

Category I, Non-Educational

Council states that the Board owns several parcels of land and buildings which have no educational value. Council believes that these parcels will have no educational value for the foreseeable future. It asserts that at least two of these parcels have been lying fallow for several generations and that they serve no educational purpose, nor have they ever served any practical or educational purpose. Council asserts that it would be in the best interests of the taxpayers of Palisades Park if this property were sold and the revenue derived from its sale used to reduce the local tax levy.

However, Council identified one parcel that the Board should not sell because it is several acres in size and large enough to serve some educational purpose in the future. This property is identified by location between Brinkerhoff Avenue and East Homestead Avenue between 9th, 10th and 11th Streets.

Council contends that there are three isolated full size building lots, too small to serve any educational purpose, either present or future, which are not contiguous or adjacent to any school buildings. There are, also, two buildings owned by the Board which do not serve any educational purpose and are maintained and kept by the Board at great expense to the taxpayers.

Council, therefore, recommends that the Board dispose of the following properties:

	Suggested Prices Subject to Appraisal
1. Move the Administrative Offices from the building at 270 1st Street to the high school and lease the 1st Street building (without the playground area) on an annual basis.	$ 50,000

2. Sell the Girl Scout House/Louis Katz Center on 4th Street.	$225,000
3. Sell the 50 x 100 lot the Board owns on 2nd Street.	$150,000
4. Sell the two (2) 50 x 100 isolated lots the Board owns on the South side of East Brinkerhoff Avenue between 10th and 11th Streets.	$300,000
Total tax levy reduction in school year 1991-92	$725,000

Responding to these suggestions, the Board argues that the action described above in compelling it to sell property is illegal and improper. No appraisals were conducted of the property nor was any valid consideration given to the question of whether said properties could be sold or, if sold, whether they could be sold at the amount set forth in Council's resolution. Furthermore, this portion of Council's resolution did not list reductions in the school budget, nor did it contain a statement of reasons for any such reduction. Accordingly, Council's action pertaining to Category I, Non-Educational reductions flies in the face of prior decisions of the Commissioner and the courts which hold that budget reductions must be supported by reasons taking into consideration the educational impact on the school district. Therefore, this reduction of $725,000 is arbitrary, capricious, ultra vires and improper.

Council denies that its action is arbitrary, capricious or improper in any manner. It cites the statute authorizing boards of education to dispose of property and states that even after the budget reductions, the Board will be left with sufficient funds to provide a thorough and efficient education for its pupils. Council

states that the Board is diverting at least a quarter of a million dollars from surplus by landbanking properties and buildings which serve no educational purpose nor any foreseeable future educational purpose. The Board cannot reconcile this waste of funds; consequently, it demonstrates that an equal amount of funding is required by the Board to provide a thorough and efficient educational opportunity. Therefore, if these funds are needed, the Board must not be permitted to divert these funds from surplus in order to obtain them through an increased tax levy.

DISCUSSION

In response to these arguments it is noted that guidelines have been established for municipal governing bodies considering reductions in a budget proposed by a local board of education when that budget has been rejected by the voters. In that regard, the court stated in part as follows:

> ***The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.***(Board of Education of East Brunswick Township v. Township Council, East Brunswick, 48 N.J. 94, 105-6 (1966))

In Board of Education of the Morris Hills Regional District v. Municipal Council of the Township of Denville et al., Morris County, decided by the Commissioner, March 15, 1989, the

Commissioner adopted the findings and conclusions of an administrative law judge which held that a flat three percent reduction in line item accounts was arbitrary and contrary to East Brunswick. The action of the governing bodies in the Morris Hills decision was considered akin to a lump sum reduction, or an across-the-board reduction, without consideration of each line item affected. The Commissioner and the courts have held such reductions arbitrary and invalid. Such is the case in this budget dispute now before the Commissioner.

Without discussing the merits of Council's suggestion that the Board should dispose of some of its property, it is quite apparent that its Category I, Non-Educational reductions fail to meet any of the guidelines established for municipalities by the court.

Here, Council created a device as a source for revenue to avoid raising money by taxation. This is the "artificially inflated income" the Commissioner discussed in Board of Education of the City of Paterson v. Mayor, Municipal Council and Board of School Estimate of the City of Paterson, Passaic County, decided by the Commissioner June 24, 1982. Therein the board was directed to increase anticipated miscellaneous revenues in the budget, the sole purpose of which was to reduce, by the same amount, the money to be raised by taxation.

The Commissioner finds Council has clearly acted beyond its authority in reducing the Board's budget by its Category I, Non-Educational reduction. The court held in Board of Education of the Borough of Fair Lawn v. Mayor and Council of the Borough of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976), aff'd 153 N.J. Super. 480 (App. Div. 1977) where the municipal governing body failed to

transmit moneys to the local board of education pursuant to the statutorily described manner, as follows:

> ***The school districts are now, perhaps more than ever, beset with serious and legitimate financial, administrative and personnel problems. They clearly ought to be protected from gratuitous and officious intrusions by municipal governing bodies attempting to act beyond their stated authority. (at 270)

Here, as in Fair Lawn, Council has acted beyond its legislative authority by directing the Board to sell certain properties, thereby reducing its obligation to raise taxes by an amount it set as the worth of the properties it listed. This lump sum reduction is arbitrary and capricious. See East Brunswick, supra, generally.

Accordingly, the $725,000 reduction is restored to the budget.

Category II, Educational

In this category, Council asserts that the Board "appears" to be directing its priorities toward jobs and patronage rather than toward the best interest of its students. In support of its assertion, Council compared six salary and expense accounts with six instructional accounts. (Council's Resolution, May 21, 1991, at pp. 9-10) These accounts purport to show that the Board is rewarding financially certain individuals or expense accounts, while at the same time severely cutting those instructional line items which are designated for the education of its pupils. It listed, also, four accounts wherein it is alleged that the Board is adding personnel, teachers and others, in the face of declining enrollment. Council concludes that it appears the Board is determined to spend its increase in state aid on jobs and patronage, rather than on the education of its pupils. Based on its assertion

of misallocated funds, Council made eight specific reductions and a ninth general salary reduction. These reductions are set forth below with Council's explanation:

Reductions - Educational

1. CAP WAIVER This item was rejected by the voters at the polls and may not be reinstated in whole or in part by either the Mayor and Council or the Commissioner of Education in accordance with State Law.	$	149,787
2. CAPITAL OUTLAY This cut will leave the Board with $100,000 to do the most pressing capital improvements projects it deems appropriate.		50,213
3. NEW POSITIONS Eliminate three (3) of the six (6) new positions proposed by the Board.		52,000
4. VICE PRINCIPAL Abolish the position of vice principal in the high school. Responsibilities will be picked up by the remaining vice principal who will cover both schools.		28,000
5. RETIREMENT A 4th grade teacher is scheduled to retire this year -- do not replace her -- combine her class with other small size classes.		60,000
6. MAINTENANCE Reduce the maintenance staff by one person.		30,000
7. HOME ECONOMICS Reduce the home economics staff by one member.		23,000
8. CIE/SHOP CIE/SHOP coordinator has indicated he may retire this year. If he retires, do not replace him -- (if he does not retire, then		

eliminate one shop teacher and combine the two classes into one with a savings of only $30,000).	$ 60,000
9. SALARY OVERRIDE	
25% reduction in salary override expenses in all positions which were either eliminated or reduced ($253,000 x 25%).	63,250
Total Tax Levy Reduction for Category II - Educational	$ 516,250

SUMMARY

Reductions in Category I - Non-Educational	$ 725,000
Reductions in Category II - Educational	516,250
Total Tax Levy Reduction	$1,241,250

Each of these nine items will be examined, post.

1. Cap Waiver

This $149,787 reduction was the result of voter rejection at the polls. As explained above, this amount is not on appeal to the Commissioner.

2. Capital Outlay

The Board budgeted $150,213 in this account which Council reduced by $50,213, leaving a $100,000 balance for capital outlay projects. The Board argues that it needs at least $105,000 for several projects at various school buildings. It supports this request with nearly two dozen photographs showing the deteriorating conditions at these schools.

Based on these photographs and the Board's assertion that some of these projects have been delayed for several years, $5,000 of the $50,213 reduction will be restored to the budget. A reduction of $45,213 will be allowed.

3. New Positions;

4. Vice Principal;

5. Retirement;

6. Maintenance;

7. Home Economics;

8. CIE/Shop;

9. Salary Override.

Each of the above-listed items calls for the elimination of positions or reduction of salary based on Council's assertion that small class sizes and declining enrollment, together with projected future pupil enrollment, demonstrate no further need for these salaries or new positions. Specifically, Council states that the Board proposes the hiring of four new professional staff members, one clerk and one aide, and it merely seeks the elimination of only three of these six new positions at a savings of $52,000. Also based on the criterion of school size (population), Council asserts that the high school is too small to warrant full-time positions for a vice principal and a principal. It asserts that the other vice principal can assume the duties for both who are now serving in the school district.

Council also proposes the elimination of a home economics teaching position and proposes not replacing a retiring elementary teacher and the CIE/Shop Coordinator (or eliminating one shop teacher if the CIE/Shop Coordinator does not retire). Due to declining enrollment and, in some cases, the minimal class sizes, there would be no difficulty in reducing the teaching staff without an adverse effect on the quality of education.

The position of Council regarding the maintenance staff is that the elimination of one position will not affect the district's

ability to satisfy state monitoring requirements and that sufficient staff will remain to do the custodial work required.

The salary override savings are based on the proposed savings in the above accounts. In other words, if the proposed savings are effected in items 3, 4, 5, 6, 7 and 8, the total ($253,000) may be further reduced by 25 percent ($63,250) because of other money benefits which accrue to salaried employees.

Based on these nine listed items, Council made its $516,250 reduction. The Commissioner again notes that the $149,787 cap waiver reduction will not be considered for restoration.

Regarding the six new positions, the Board asserts that Council has established no sound educational basis for their elimination. Council has not even been specific as to the positions to which they refer. Nevertheless, the Board states that three positions are positions for which it receives state funding or reimbursement.

Accordingly, Council's $52,000 reduction will be sustained.

Nothing in the record shows any underlying determination or supporting reason for the elimination of the vice principal position, other than saving money. On the other hand, the Board asserts that this position has been evaluated and found to be a critical need in the district. Its elimination would cause a vice principal to serve part-time in the elementary school and part-time in the high school.

For the rationale stated by the Board, the elimination of the vice principal position will not be allowed and $28,000 will be restored to the budget.

Contrary to Council's assertion, the Board states that enrollment has actually increased (Exhibit F). Council's reduction

for a retiring fourth grade teacher cannot be allowed because a new teacher has been hired to replace her, but at a lower salary not stated by the Board. Accordingly, the state minimum salary will be allowed for this new fourth grade teacher ($18,500) and Council will be allowed a reduction of $41,500.

Council provides no rationale at all for the elimination of one maintenance position; consequently, the reduction of $30,000 will be restored. Neither has it provided any rationale for the elimination of a home economics position. That position will also be restored ($23,000). However, the Board concedes a $45,000 savings of the $60,000 reduced for the CIE/Shop position; therefore, a $45,000 reduction will be allowed.

The salary override reduction is clearly a mechanical action proposed reduction. It is, therefore, arbitrary and capricious and cannot stand. The $63,250 reduction is restored.

The reductions and restorations, as discussed above, have been allowed according to the standards set forth in East Brunswick, Morris Hills and Fair Lawn, supra. A tabulation shows the reductions and restorations as follows:

Item	Council's Reduction	Amount Restored	Amount Not Restored
Capital Outlay	$ 50,213	$ 5,000	$ 45,213
New Positions	52,000	-0-	52,000
Vice Principal	28,000	28,000	-0-
Retirement	60,000	18,500	41,500
Maintenance	30,000	30,000	-0-
Home Economics	23,000	23,000	-0-
CIE/Shop	60,000	15,000	45,000
Salary Override	63,250	63,250	-0-
TOTALS*	$366,463	$182,750	$183,713

* It is noted that these totals do not include the $149,787 reduction relative to the cap waiver rejected by the voters.

The tabulation below shows a total of $182,750 to be restored to the budget from reductions to the Category II, Educational account. Of this amount, $177,750 represents current expenses and $5,000 represents capital outlay.

	Board's Proposal	Council's Reduction	Amount Restored	Amount Not Restored
Category I, Non-Educational	-0-	$ 725,000*	$725,000	$ -0-
Category II, Educational	$366,463	366,463	182,750	183,713
TOTALS	$366,463	$1,091,463	$907,750	$183,713

SUMMARY

	Council's Reduction	Amount Restored	Amount Not Restored
Current Expense	$1,041,250	$902,750	$138,500
Capital Outlay	50,213	5,000	45,213
TOTALS	$1,091,463	$907,750	$183,713

* This $725,000 reduction is based on revenue anticipated by Council's demand that the Board sell some of its property.

Based on all of the above, the Commissioner directs the Bergen County Board of Taxation to add to the amounts previously certified for tax purposes of the school district, the amounts of $902,750 for current expenses and $5,000 for capital outlay. Accordingly, the total tax levy for school district purposes for the 1991-92 school year is as follows:

	Current Expense	Capital Outlay
Council's Tax Levy	$7,490,741	$100,000
Commissioner's Restoration	902,750	5,000
Total Tax Levy	$8,393,491	$105,000

IT IS SO ORDERED.

NOVEMBER 19, 1991

COMMISSIONER OF EDUCATION

DATE OF MAILING - NOVEMBER 19, 1991

BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY, RESPONDENT.	:	DECISION

For the Petitioner, Richard K. Sacks, Esq.

For the Respondent, Joseph L. Foster, Esq. (Russo, Foster, Secare & Ford)

The Board of Education of the Borough of Manchester (Board) appeals to the Commissioner of Education from an action taken by the Mayor and Council of the Township of Manchester (Council) pursuant to N.J.S.A. 18A:22-37 certifying to the Ocean County Board of Taxation a lesser amount for current expense costs for the 1991-92 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate a proposal to raise the following amounts by local taxation:

Current Expense	$16,754,482
Capital Outlay	168,000

The proposal was rejected by the voters. Thereafter, the Board submitted its budget to Council for its determination of the

amounts necessary for the operation of a thorough and efficient school system in the Township of Manchester for the 1991-92 school year pursuant to the obligation imposed on Council pursuant to N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Ocean County Board of Taxation $16,391,982, a reduction of $362,500 in current expenses. There was no reduction in the capital outlay account.

	Board's Proposal	Council's Certification	Reduction
Current Expense	$16,754,482	$16,391,982	$362,500
Capital Outlay	168,000	168,000	-0-

The Board has determined to appeal only $329,700 of the $362,500 reduction; consequently, an initial reduction of $32,800 is allowed while $329,700 is the amount disputed by the litigants. The listed reductions follow:

ACCOUNT NUMBER	ITEM	AMOUNT REDUCED
110*	Salary, Director of Special Services	$ 70,000
215	Salaries, Secretaries-Substitutes	70,000
520	Transportation	6,000
540	Pupil Transportation	10,000
610	Salaries, Operation of Plant	60,000
630	Heat	50,000
640	Telephone	100,000
	Subtotal	$366,000
1010**	Intramural Program	- 3,500
	Total	$362,500

* The Board states that the salary for the Director of Special Services is not contained in the 110 line item account but rather in the 212 account. Nevertheless, it must be analyzed as listed by Council.

** Council added $3,500 to the budget for the intramural program.

The Board does not contest Council's reductions of line items Account No. 520, $6,000; Account No. 540, $10,000; and $16,800 of Account No. 215, Salaries for Secretary Substitutes. Generally, the Board asserts that Council's reductions are arbitrary, capricious and unreasonable and have no basis in fact. An analysis of the $329,700 in dispute follows.

Account No. 110 Salary, Director of Special Services

Council has concluded that the title of Director of Special Services may be eliminated and that the functions described under that job title may be performed by other administrative staff. Therefore, the $70,000 reduction is attributable to the elimination of the above position.

The Board asserts that it is obligated by state and federal legislation to provide education for the handicapped. Additionally, the district has been chosen as one of ten pilot projects in the State of New Jersey. With respect to its obligation to handicapped pupils, the Board has employed three Child Study Teams and speech therapists whose duties and responsibilities are monitored by the Director. The district has 463 classified pupils in its schools and 29 more placed in outside facilities. All placements of handicapped pupils are facilitated by the Director. Other duties and responsibilities of the Director are set forth fully in a two-page document submitted in support of this position.

The decision to employ the certified personnel it believes are required for the thorough and efficient operation of a system of public schools rests solely with the local board of education. Whether or not another organizational structure could carry out the duties of the Director is not the question. The organization in

place includes the position of Director and that position has been chosen and filled by the Board. The responsibility of the local school district to employ personnel for the education of handicapped pupils is set forth in N.J.A.C. 6:28-1.1(f) as follows:

> Each district board of education, independently or through joint agreements, shall employ child study teams, speech correctionists or speech-language specialists and other school personnel in numbers sufficient to ensure provision of required programs and services pursuant to this chapter.

Based on all of the above, including the size of the handicapped population, the number of Child Study Teams and the many duties assigned to the Director, the Commissioner finds that the position is required in this instance for the operation of a thorough and efficient system of public schools.

Accordingly, the $70,000 in Account No. 110 is restored to the budget.

Account No. 215 Salaries, Secretaries-Substitutes

Council reduced this line item by $70,000 stating that its action eliminates "overtime substitute secretaries" in the budget.

The Board asserts that only $16,800 has been budgeted for overtime and substitute secretaries and documents that fact in its account 215 submission which shows that it contains salaries for the entire secretarial staff in the amount of $522,585. It does not object to a reduction of the $16,800; however, it states that the remainder of the budget represents negotiated salaries. No new positions have been established despite the fact that the Board is opening an additional school in January 1992. Secretaries for that new facility will come from existing programs.

The Board requests restoration of $53,200 and, based on the above, that request is granted.

A reduction of $16,800 is sustained and $53,200 is restored to the budget.

Account No. 610 Salaries, Operation of Plant

Council reduced this item by $60,000 to maintain the current number of custodians. The Board added four new custodial positions to care for the new school it intends to open in January 1992. Council maintains that the present staff can do the work required in the new school without the addition of new custodians.

The Board asserts that the national average for custodial square footage is 13,500 per person exclusive of supervisory/head custodians. Its district custodians clean 14,318 square feet per person including a supervisory/head custodian. The Board concludes that the addition of the new building with 70,000 square feet, without adding new custodial positions, would have a negative impact on the health and safety of the pupils and staff of the schools.

The conclusion of the Board is reasonable. The schools must be kept clean and in proper condition. Each district must provide "***suitable educational facilities including proper school buildings***." (N.J.S.A. 18A:33-1) Further, each board "***may provide such equipment, supplies, and services as in its judgment will aid in the preservation and promotion of the health of the pupils***." (emphasis added) (N.J.S.A. 18A:40-6)

The rationale presented by the Board is supported by its documentation. There is ample evidence to hold that the four new custodial positions are necessary.

Consequently, the reduction effected by Council is set aside and $60,000 is restored to the budget.

Account No. 630 Heat

Council asserts that its $50,000 reduction in this line item reduced this account from $504,750 to $454,750. Council asserts further that this reduced amount represents an increase of $18,000 over the amount appropriated in the last budget to meet the needs of the new school.

The Board asserts that $446,260 was appropriated for the 1990-91 school year and that this amount with transfers is $435,260 with a balance of $4,401.52 in the account as of May 30, 1991.

Based on these figures, Council's argument is convincing and it appears that $454,750 is a reasonable appropriation for the 1991-92 school year.

Accordingly, the $50,000 reduction is sustained.

Account No. 640 Telephone

Council reduced this item by $100,000 stating that its action eliminated the planned purchase of a new telephone system. It is Council's belief that the Board can maintain its current operations with its present telephone system.

The Board asserts that there is nothing in this line item for the purchase of telephone equipment. The 640 line item total for electricity, propane gas, MUA services and telephone is $354,025. Of that amount $112,825 is budgeted for telephone service. The 1990-91 budget was $100,900 and the new 1991-92 budget contains $5,000 for the new elementary school; therefore, the increase is only $6,925. Purchase orders at $30,000 each have been issued for telephone equipment for the High School and the Middle

School using 1990-91 funds. The telephone system for the new elementary school will be paid for out of construction funds; therefore, the $100,000 reduced by Council is required to pay the Board's normal bills.

Regarding the above argument, the Board has increased this account by only $6,925. However, a reduction in this amount will be allowed and $93,075 will be restored to the budget.

Account No. 1010 Intramural Program

There was no reduction in this item; rather, Council increased the amount allocated by $3,500. Accordingly, $3,500 is restored to the budget.

A recapitulation of the itemized reductions is shown below:

ACCOUNT NUMBER	ITEM	AMOUNT RESTORED	AMOUNT NOT RESTORED
110	Salary, Director of Special Services	$ 70,000	$ -0-
215	Salaries, Secretaries-Substitutes	53,200	16,800
520	Transportation	-0-	6,000
540	Pupil Transportation	-0-	10,000
610	Salaries Operation of Plant	60,000	-0-
630	Heat	-0-	50,000
640	Telephone	93,075	6,925
	Subtotal	$276,275	$89,725
1010	Intramural Program	+ 3,500	-0-
	Total	$279,775	$89,725

Based on the above, the reductions sustained total $89,725, and $279,775 is restored to the budget.

Accordingly, the Ocean County Board of Taxation is directed to add to the local tax levy for the Township of Manchester $279,775 for current expenses of the school district for the 1991-92 school year as set forth below:

Current Expense Tax Levy Certified by the Governing Body	$16,391,982.00
Current Expenses Restored by the Commissioner	279,775.00
Total Tax Levy after Restoration	$16,671,757.00

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 19, 1991

DATE OF MAILING - NOVEMBER 19, 1991

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

For the Petitioner, Russell J. Schumacher, Esq.
(Rand, Algeier, Tosti & Woodruff)

For the Respondent, Robert E. Yadlon, Esq.

The Board of Education of the Borough of Wharton (Board) appeals to the Commissioner of Education from an action taken by the Borough Council of the Borough of Wharton (Council) pursuant to N.J.S.A. 18A:22-37 certifying to the Morris County Board of Taxation a lesser amount for current expense costs for the 1991-92 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate a proposal to raise the following amount by local taxation:

Current Expense	$2,797,672

The proposal was rejected by the voters. Thereafter, the Board submitted its budget to Council for its determination of the

amount necessary for the operation of a thorough and efficient school system in the Borough of Wharton for the 1991-92 school year pursuant to mandatory obligation imposed on Council pursuant to N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Morris County Board of Taxation $2,684,471, a reduction of $113,201 in current expenses.

Board's Proposal	Council's Certification	Reduction
$2,797,672	$2,684,471	$113,201

The amount in dispute before the Commissioner is $113,201.

The Board asserts that the action of Council in making the reductions is arbitrary, capricious, unreasonable and not in the best interest of the people of the Borough of Wharton or the pupils in the school district. The reductions will preclude the Board from providing a thorough and efficient education for its pupils in accordance with the constitutional and legislative mandate imposed upon it by the laws of the State of New Jersey. It is the Board's contention that Council's reductions were not logically derived nor rationalized as required by law. Therefore, the Board requests restoration of the entire amount.

Council argues that its reductions are reasonable and in the best interests of the citizens and pupils of the Borough of Wharton and will not preclude the Board from providing its pupils with a thorough and efficient education. Council asserts that its reductions primarily deal with the removal of a vice principal and teaching aides and that they were derived logically and rationally as required by law. Council concludes that the Board must establish

the necessity for restoration of the reductions in its budget. Council accordingly reduced the following accounts.

SALARIES

Account Nos. 2101, 2202, 2301, 2302, 2401, 2409, 2501, 2502, 2503

Council asserts that it limited its raises to municipal employees to 5% and that the Board disregarded this fact and negotiated 7% raises for some of its employees. Council states that limiting salary increases to 5% rather than 7% will not affect the ability of the Board to provide a quality education. The Board should be compelled to re-negotiate with those employees who have a 7% increase in order that they come in line with the remainder of municipal employees. Council concludes by stating that it "has been mandated by the taxpayers to cut the budget" and that it recognizes "its obligation to make cuts in a manner that would not impair the thorough and efficient education to its students." (Council's Response, filed July 24, 1991) Attached to a letter from its attorney dated July 16, 1991, Council articulates its determination as follows:

> REASONS FOR REVISIONS IN 1991-1992 SCHOOL BUDGET
>
> Proposed salary increases of 7% were reduced to 5% in keeping with the increases given to all Municipal employees not under contract and in accordance with cost of living increases given in other sectors.

Guidelines for the reduction of school budgets have been set forth in many decisions by the Commissioner and the courts. In a landmark decision the Supreme Court held in Bd. of Ed. of East Brunswick Tp. v. Tp. Council, East Brunswick, 48 N.J. 94 (1966) as follows:

> ***The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably, and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.*** (at 105)

In Board of Education of the Township of Old Bridge v. Mayor and Council of the Township of Old Bridge, 1985 S.L.D. 1684, it is stated:

> In this case, the governing body purported to effectuate a lump sum reduction of one percent across-the-board. The resolution making the reduction does not indicate how or why the governing body determined that such a reduction could be made in each line item. The resolution does contain a conclusory statement that the governing body has determined that each item of the current expense budget should be reduced by one percent and further that the governing body believes that the proposed budget, as reduced, will provide a thorough and efficient [education] system of the school and the district... Therefore, the action of the governing body is arbitrary, capricious and unreasonable under standards set forth in Paterson [decided January 18, 1982], Union [decided July 9, 1981] and Keansburg [decided October 29, 1982]. (emphasis added) (at 1692)

Further, in Board of Education of the Morris Hills Regional District v. Municipal Council of the Township of Denville et al., decided by the Commissioner, March 15, 1989, the Commissioner found that a flat three percent reduction in line item accounts was arbitrary and contrary to East Brunswick, generally. Therein it was concluded that:

> ***[A]cross-the-board reductions, like lump sum reductions, without individualized consideration of each line item affected, have been held arbitrary and invalid. Such factoring is radical surgery, mechanical and not fact-, issue- or line item-sensitive, and is thus the anthithesis of the "individualized educational analysis" spoken of by the court in Deptford. Id. at 86. It suggests instead nonintuitive, automatic reaction to voter mandate rather than the independent, individualized analysis that the court in East Brunswick enjoined***. (Slip Opinion, at pp. 6-7)

The action of the governing bodies in the Morris Hills decision was considered to be arbitrary and invalid. Such is the case in this budget dispute now before the Commissioner. Here, Council admittedly made a flat 2% reduction in salaries in keeping with its raises for its municipal employees.

Based on the above, Council's reductions will be set aside. Accordingly, the reductions will be restored to the budget with the exception of those items where the Board has conceded reductions. Those reductions and restorations are shown as follows:

ACCOUNT NUMBER	ITEM	AMOUNT RESTORED	AMOUNT NOT RESTORED
2101	CST Coordinator and Secretary	$1,373	$ -0-
2301	Board Secretary	199	-0-
2302	Executive/Administrative Services	1,540	512
2401	Office Principal Services	1,246	-0-
2501	Fiscal Services	-0-	417
2502	Operation Maintenance	-0-	1,490
2503	Pupil Transportation	487	-0-
2101	CST Aides	-0-	417
2202	Educational Media Servs. Aides	-0-	224
2409	Other Support Servs. Aides	225	-0-
	TOTAL	$5,070	$3,060

ELIMINATION OF POSITIONS ACCOUNT NOS. 2202, 2401, 2409, and 2702·

Council states that the Board refers to its school district as one containing two schools providing education for 582 pupils. The district is supervised by a superintendent, a principal and a

vice-principal and is in fact one school providing education for pupils in grades K-8. Council believes that the administration is excessive and that it can be effective with a superintendent and a principal. Therefore, its reductions include the elimination of the vice-principal and the two building secretaries. Teacher aides are also eliminated. As set forth in its reduction of Account No. 2702 - Employees Benefits, if the positions are eliminated, the group insurance benefits become unnecessary.

The Board defends its need for the vice-principal and the two building secretaries identified by Council in Account No. 2401 - Office of Principal Services. The Superintendent's Affidavit supports the need for these positions stating that they are essential if the Board is to provide a thorough and efficient system of education for the district's pupils. He attests that their employment in the school district with nearly 600 pupils is reasonable and consistent with the administrative organization of other schools in the county. The Board rejects Council's apparent position that a teacher could be assigned, part-time, to handle vice-principal duties. (In its reductions, Council added a new teacher position, at a salary of $26,173, which the Board did not request.) The Superintendent submitted, also, a list of the schools in the county showing their administrative organization of principals and vice-principals compared to the number of pupils in their respective districts.

An examination of the job description of vice-principal, the rather static enrollment pattern, the fact that the position has been filled for eighteen years, and the convincing documents submitted by the Superintendent leads to the conclusion that the

vice-principal position is needed in order to assist the district in carrying out its mandate to provide a thorough and efficient system of schools for its pupils. Further, a thorough and efficient system of schools cannot be maintained without the secretarial assistance now provided by the Board. The decision to employ the personnel it believes are required to provide a thorough and efficient system of schools rests solely with the local board of education. Its decision in regard to the aforementioned positions is entirely reasonable. Consequently, these positions are restored to the budget.

Account No. 2202 Educational Media Services Aides

Account No. 2404 Other Support Services Aides

Council asserts that it cannot afford to fund these positions and that the aides' duties can be met by the librarian without impairing the quality of the education provided to the pupils in the district.

This rationale is directed at Council's objective to save money without any analysis of the impact it will have on the district's pupils. It does not address the Superintendent's statements in his Affidavit, as follows:

- In 1990-91, the librarian spent sixty-three percent of her time teaching library skills to the pupils. While doing so, aides are present to assist other pupils in the library and to check out books.
- In "Other Support Services," two aides are employed. One is assigned to a handicapped class of perceptually impaired pupils to comply with state regulations which demand the employment of an aide for a class which enrolls more than thirteen pupils.

- The other aide spends five hours per week in lunchroom supervision and 14.5 hours per week in performing secretarial and clerical tasks in the Guidance Office. This aide also covers the Guidance Office when the part-time guidance counselor is not present.

Based on the above, these positions are necessary and they are restored.

Account No. 2702 Employees Benefits

This reduction was based on the assumption that positions would be eliminated. Since no positions have been eliminated, this reduction is restored to the budget.

The Board asserts that it did not request and does not need an additional teacher; consequently, this position will not be considered further.

In the tabulation above, it can be seen that $3,060 was not restored to the budget. A summary is shown as follows:

AMOUNT IN DISPUTE	AMOUNT RESTORED	AMOUNT NOT RESTORED
$113,201	$110,141	$3,060

Based on the above, the total reductions are $3,060 and $110,141 is restored to the budget.

Accordingly, the Morris County Board of Taxation is directed to add to the local tax levy for the Borough of Wharton $110,141 for current expenses of the school district for the 1991-92 school year as set forth below:

Current Expense Tax Levy Certified by the Governing Body	$2,684,471
Current Expenses Restored by the Commissioner	110,141
Total Tax Levy after Restoration	$2,794,612

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 19, 1991

DATE OF MAILING - NOVEMBER 19, 1991

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

Winne, Banta, Rizzi, Hetherington & Basralian, for Petitioner (Robert M. Jacobs, Esq., of Counsel)

James F. Brennan, Esq., for Respondent

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Ramsey Board of Education, hereinafter "Board," on June 11, 1991. The Board is seeking the restoration of a $328,500 reduction in current expense appropriations imposed by the Mayor and Council of the Borough of Ramsey, hereinafter "Council," in the local tax levy for the 1991-92 school year. This reduction was made by Council pursuant to the provisions of N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 30, 1991, and after consultation with the Board as required by law.

The total proposed and certified budget and the amount in dispute are set forth below:

	Proposed Tax Levy Adopted by Board of Education	Amount of Tax Levy Certified By Governing Body
Current Expense	$16,881,386	$16,552,886

	Amount of Reduction By Governing Body	Amount in Dispute Before Commissioner
Current Expense	$328,500	$328,500

Initially, the Commissioner observes that of Council's $328,500 tax levy reductions imposed upon the Board's current expense appropriations for the 1991-92 school year, only $78,500 has been effectuated through specific recommended line item reductions. Of the remaining $250,000 current expense tax levy reduction Council has recommended that the Board utilize a portion of its unappropriated current expense surplus balance for the 1991-92 school year.

The reductions of Council which can be attributed to specific current expense line item appropriations totaling $78,500 have been delineated in its resolution of May 22, 1991. (See Board's Petition, Schedule A.)

Council's action in further reducing the Board's current expense appropriations from the local tax levy in the amount of $250,000 is set forth in its resolution of May 22, 1991 attached to and made part of the Board's Petition. It reads in pertinent part:

> WHEREAS, the Board of Education calculation as shown in the Recapitulation of Balance, Line 50, of the 1991-1992 proposed budget reflects no increase in the surplus balance, and
>
> WHEREAS, the governing body feels that a trend analysis indicates that a reasonable amount of surplus generation should have been anticipated and that this additional surplus would have exceeded the maximum 5% allowable amount of Carry-Over General Fund Surplus permitted by the State Department of Education, and as indicated in Schedule B entitled "Current Expense Budgets" and Schedule C, a letter from Robert Marcotulli, Business Administrator/Board Secretary, Ramsey Board of Education, dated May 17, 1991 to Nicholas C. Saros, Borough Administrator, Borough of Ramsey (Question 7) and Schedule D entitled "Annual School District Budget Statement

> Supporting Documentation 1991 - 1992, Page 10 of 22, all of which schedules are attached hereto and made a part hereof, and
>
> WHEREAS, as a result thereof, the governing body recommends that an additional amount of $250,000 of surplus be utilized to offset municipal property taxes***. (emphasis added)
> (Council's Resolution of May 22, 1991, attached to Board's Petition)

On June 28, 1991, Council filed its Answer admitting the amounts of the current expense tax levy reduction for the 1991-92 school year for the reasons set forth above. Council, however, denies that its actions in making such reductions were arbitrary, capricious, invalid or that the restoration of such funds by the Commissioner is necessary to enable the Board to provide a thorough and efficient education for its pupils.

Position papers with attached exhibits and certifications were subsequently filed by each of the parties pursuant to N.J.A.C. 6:24-7.8 and on August 20, 1991, after written summations by the parties were filed with the Commissioner, the record of this matter was closed.

Upon careful review of the submissions of the parties in support of their respective positions, the Commissioner notes that the standard of review that prevails is whether the amount of monies available to the Board as a result of Council's action is sufficient for the provision of a thorough and efficient education for the pupils of the Ramsey School District for the 1991-92 school year. Board of Education, East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966)

A. CURRENT EXPENSE TAX LEVY REDUCTION OF $250,000 - COUNCIL'S RECOMMENDATION TO UTILIZE SURPLUS "FREE BALANCE" TO OFFSET MUNICIPAL PROPERTY TAXES

The Commissioner observes that it is not disputed by the parties that the $250,000 reduction imposed by Council in the local tax levy is premised upon the recommended utilization of the surplus current expense balance in the Board's 1991-92 school budget. Nor is there any disagreement between the parties that Council's action in this regard is predicated upon its desire to offset an increase in municipal taxes for the year in question. It is further observed that the dispute involving the $250,000 reduction arises between the parties over the legal interpretation contained in prior decisional case law rendered by the Commissioner and the Courts related to the conditions under which the Commissioner may consider the application of a surplus free balance by either sustaining or rejecting the use of this revenue source as it applies to the reduction in the local school district's tax levy appropriations.

In support of their respective positions both Council and the Board rely on a whole host of essentially the same decisions rendered by the Courts and the Commissioner which address the utilization of surplus revenue balances in connection with local tax levy reductions in school budget appropriations. The relevant cases relied upon by the parties are fully set forth in their position papers, exhibits and written summations filed with the Commissioner and incorporated by reference herein.

The Commissioner observes from a review of the respective school law decisions relied upon by the parties that the Board maintains that both the Commissioner and the Courts have recognized the necessity for a local board of education to maintain a

reasonable surplus in order to meet unforeseen contingencies. The Board also maintains that Council, in considering its revenues such as surplus, must not only articulate that the surplus is in excess of the Board's needs, but it must also establish a relationship between specific line items in current expense and supply specific reasons for making such line item reductions. These reasons articulated by Council must be based upon valid educational concerns.

Council, on the other hand, maintains that the Board has presented no case law or decisions of the Commissioner dealing with the specific surplus issue raised herein. Consequently, it is Council's position that the Board's argument that the governing body must establish a relationship between its current expense reduction and the amount of surplus and, further, must articulate the reasons for such reductions is not germane to Council's decision to further reduce the Board's surplus in current expense by $250,000 without delineating specific current expense line item reductions accompanied by educationally based reasons for such reductions.

More specifically, Council relies on Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305, 316-17 (1989) in claiming that:

> The factual context of Deptford clearly establishes that the Court's decision was limited to line-item reductions not surplus. When the Court referred to requiring a uniform rule applicable to all budget cuts, such statement must be read pari materia with the immediately preceding sentences of the Court referring to line item reductions. A uniform rule applicable to "all budget cuts" refers to line-item reductions large or small not to surplus. This is clearly the decision of the Court when the case is read in context. It is an unwarranted and improper ruling to also apply to a reduction of school budget surplus. Notwithstanding the Borough's position with regard to the Deptford

holding, the Borough has in the present case before the Commissioner set forth its reason for surplus reduction.

(Council's Position Statement, at p. 12)

Council argues that:

Contrary to what the Board would have one believe, there is no reference to or requirement set forth in any of the aforementioned cases that the Borough must establish a relationship between specific line items in the Current Expense Budget and the amount of surplus to be utilized. the term "linkage" is no where to be found.

The term "linkage" first arises in Board of Education of the Township of Irvington v. Mayor and Council of the Township of Irvington, Commissioner of Education Decision dated October 30, 1987. In the Initial Decision in this matter rendered by Administrative Law Judge Weiss on September 4, 1987, he determined as follows:

> First of all, no linkage has been shown between any proposed reduction by the respondent of any amount of that surplus. There has been simply a directive to take $3 million because you do not need that much, and I believe specific line item identification is required since there is no educational validation as to why that reduction will not impair the Board's ability to carry out its constitutional mandate. I believe as with the line items for current expense and capital outlay, a linkage based upon valid educational concerns has to be articulated, and this was not done.

The Commissioner adopted as his own the findings and conclusions set forth in the Initial Decision. The Borough does not agree with the position espoused therein that specific line item identification is required with regard to the surplus issue and it should be noted that in the Initial Decision written by Administrative Law Judge Weiss no cases on point are cited by him in arriving at his conclusion with regard to same.

(Council's Position Statement, at pp. 8-9)

The Board asserts that Council has respectively misconstrued the language of the Court and the Commissioner in Deptford and Irvington, supra. In this regard the Board argues:

> ***the Commissioner relied not only upon Deptford, supra, but also upon his earlier decision in Irvington which, of course, was decided prior to Deptford. In the Irvington decision, the Commissioner held that the decision of the Appellate Division in Branchburg Board of Education v. Branchburg, 187 N.J. Super. 54 (App. Div. 1983) stood for the proposition that a governing body must specifically delineate its reasons why it believes revenue items are in excess of the Board's needs and that any reduction of the tax levy through the required appropriation of revenue items may not be directed by the governing body in an arbitrary manner. (emphasis in text)
> (Board's Letter Memorandum of August 19, 1991, at pp. 4-5)

While Council relies on the findings and conclusions of the ALJ in Irvington, supra, the Board likewise relies on that part of the Commissioner's decision affirming the ALJ which holds:

> Finally, the Commissioner agrees that Branchburg, supra, stands for the proposition that a municipal governing body, in the review of a defeated school budget, may consider the Board's anticipated income, the unappropriated free balance and investment income in reaching its determination as to the amount of taxes necessary to provide a thorough and efficient system of education. However, the Commissioner does not agree that any reduction of the tax levy through the required appropriations of such revenue items can be directed by the municipal governing body in an arbitrary manner.
>
> In order to direct such further appropriation for the purpose of tax levy reduction, the municipal governing body is obligated to specifically delineate its reasons why it believes those revenue items are in excess of the Board's needs. Clearly, in the instant matter Council has not met that burden. (emphasis added) (Irvington, supra, at 31)

Upon review of the respective arguments of the parties with regard to the application by Council of $250,000 of the Board's surplus revenues to reduce the current expense tax levy for the 1991-92 school year, the Commissioner finds and determines that Council's actions were effected in an arbitrary manner and must

therefore be set aside. In the Commissioner's judgment it is clear that the applicable provisions of N.J.S.A. 18A:22-37 et seq. legally permit Council to impose reductions on the Board's annual current expense budget appropriations which were rejected by the voters. In fact, the record clearly establishes that this is precisely what Council had done when it reduced the annual current expense budget by $78,500. In doing so, Council delineated each current expense line item upon which its reductions were made and articulated its reasons as to why it believed such reductions could be effectuated. Council then certified a current expense amount which was $78,500 less in part than the Board had originally requested for the 1991-92 school year. This action taken by Council was consistent with the applicable statutory and decisional case law. Council's decision would therefore be permitted to stand unless or until it was overturned on appeal to the Commissioner by the Board. The Commissioner's decision with regard to each of these current expense line items in dispute will be rendered subsequent to the resolution of the larger issue herein which involves a further reduction of $250,000 from the Board's 1991-92 current expense tax levy appropriation by Council without having complied with the procedures described above. In this regard Council made a direct reduction in the Board's current expense tax levy certification of $250,000 without delineating specific line items from which such reductions could be effectuated. Council also failed to present any reasons pertaining to the validity of such line item reductions premised upon educational concerns.

Instead Council maintains that its direct current expense tax levy reduction of $250,000 to afford municipal tax relief is to

be obtained from a portion of the Board's free surplus balance carried over into the 1991-92 school budget.

Council, in its written response and summation, argues that the prior decisional case law does not preclude the action it has taken herein and therefore has no relevance to the matter controverted herein. The only exception which Council addresses is the ALJ's findings and the Commissioner's determination in Irvington, supra, which Council rejects out of hand.

The Commissioner does not agree. He finds that Council has misapplied prior decisional case law and further that it has erroneously construed the intent of the Commissioner's decision in Irvington which is entirely consistent with those school law decisions as well as those decisions rendered by the Courts. In the Commissioner's judgment it is clear that the statutory provisions of N.J.S.A. 18A:22-37 and subsequent case law permit a local governing body to impose reductions on a defeated school budget rejected by the voters at the annual school election. Moreover, a local governing body may direct that the local board of education apply a portion of its surplus revenues to offset those current expense line item reductions effectuated in its annual current expense budget appropriations, provided that Council has specifically delineated its reasons for such line item reductions and, further, that such reasons are based upon valid educational concerns. Irvington, supra A governing body may also direct a reduction in surplus revenues if it determines that the amount of surplus is in excess of the demonstrated need of the district to maintain the proposed surplus amount to provide a thorough and efficient system of education, in particular for unforeseen contingencies. It is

well-established in law that a board of education is empowered to maintain a reasonable surplus to meet unforeseen contingencies. Fair Lawn Bd. of Ed. v. Mayor and Council of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976) Further, the Commissioner has held, as a general proposition, that a 3% surplus for such unforeseen circumstances is reasonable. See Bd. of Ed. of the City of Perth Amboy v. Council of the City of Perth Amboy, Middlesex County, decided by the Commissioner December 2, 1987.

Upon appeal of a reduction in surplus made by a governing body, the Commissioner must consider those reasons given by Council for the imposition of the current expense line item reductions, together with Council's recommendation or directive to the Board to apply a portion of its surplus balance to offset specific line item reductions. He must then weigh the evidence in support of those reasons and arguments advanced by the Board against the imposition of the line item reductions by Council before rendering a final determination to sustain or reject such reductions. Or if the reduction was made by the governing body on the basis of a determination that the surplus exceeds demonstrated need, the Commissioner must carefully weigh the evidence provided by the parties before determining whether the reduction allows a reasonable surplus for the Board to meet its needs.

In the instant matter it is clear that Council in effectuating direct reduction of $250,000 through the utilization of surplus balance in the Board's current expense budget for the 1991-92 school year, for the sole purpose of offsetting municipal taxes, does not comply with statutory prescription or the provision of applicable case law.

Assuming arguendo that the Commissioner were to condone Council's action complained of by the Board herein, such decision would openly invite chicanery by local governing bodies who would be inclined, without valid educational concerns, to directly reduce annual current expense appropriations requested by local boards of education solely for the purpose of reducing the municipal tax burden. This would leave local boards of education at the mercy of certain arbitrary and capricious actions of local governing bodies and impair their ability to comply with the statutory mandate to provide a thorough and efficient system of education for the pupils in their respective school districts.

The only recourse which would then be open to local boards of education would result in a continuous costly and burdensome flood of appeals to the Commissioner of Education seeking restoration of such funds to their annual school budgets.

Accordingly, for the reasons set forth herein the Commissioner declares Council's action in reducing the Board's current expense appropriation by $250,000 through the application of surplus free balance ultra vires. Such action by Council is hereby set aside. The Commissioner so holds.

B. LINE ITEM CURRENT EXPENSE REDUCTIONS - $78,500

The Commissioner observes that these current expense line item reductions imposed by Council totaling $78,500 have been delineated and the reasons for the reduction made in each line item have been articulated. Irvington, Deptford and Branchburg, supra

Listed below are the specific line item economies together with reasons determined by Council and submitted as Schedule A, attached to the Board's petition:

Line Item 2202 Educational Media - Library Books, Subscriptions

Reduction of $3,500.00

The Board of Education proposes to purchase nine film strip projectors to be used at 5 different schools at a total cost of $3,283.00. The governing body believes that Educational Media equipment should be stored at a central location and reserved when a film is reserved. Distribution of the equipment to a particular school can be achieved by utilizing the existing mail carrier who is employed by the school system. As a result, the Borough has reduced the amount for film strip projectors by $1,000.000

In addition, there is budgeted $5,000 for adder units under Furniture and Fixtures, the expense of which the governing body feels could be spent over two years. As a result, this item has been reduced by $2,500.00.

Line Item 2202 Educational Media - Supplies and Materials

Reduction of $10,000.00

The governing body of the Borough of Ramsey feels that under the Supplies and Materials category amounts for library and subscriptions were budgeted for $63,000 to 70,000 in the past 5 budgets. To regionalize the Borough's municipal library, $60,000.00 in municipal taxes have been spent to join with 60 other municipal libraries in Bergen County and the State of New Jersey, Ramapo College, which is located in the adjoining Township of Mahwah. As a result, the Ramsey school libraries are able to obtain many books that they need in a day's time and they have been utilizing this service. A reduction in this area in the amount of $10,000 will have no appreciable effect on the availability and quantity of Educational Media services.

Line Item 2301 Board of Education Services - Other - Professional Services

Reduction of $10,000.00

Last year, $25,000.00 was transferred by the Board into this account for the development of Strategic Planning, which is now complete. The Board in its discussions with the governing body has advised that the Board's Engineer has a $6,000.00 retainer and as such this would leave

the sum of $22,000 available for architectural services. There are no projected uses of architectural services of a large magnitude in this budget year. The Borough has offered to the Board of Education the services of the Borough Engineer for engineering services and the services of the Borough's Construction Code Official for building matters, both of whom are well qualified with years of experience in these areas. As a result of the savings that this would generate, the Borough has reduced this line item by $10,000.00.

Line Item 2602 Information Services - Purchased Services

Reduction of $6,000.00

This account is for the Public Relations Materials that are sent to the Borough's residents. It is the governing body's determination that the providing of these materials could be less elaborate and done in-house. Photocopies of these materials could be done by copier machine in the school which has been financed for in the budget. Also, the governing body feels that less expensive paper could be used, i.e., not glossy paper. In the 1988-89 budget, $1,487.00 was appropriated for Public Relations purposes. This appropriation has increased to $16,000.00 in the 1991-92 budget and the governing body feels that such amount is excessive and should be reduced by $6,000.00 which would leave $10,000.00 for Public Relations purposes.

Line Item 2502 Operations and Maintenance - Salaries

Reduction $5,000

The proposed budget reflects an appropriation of $85,929.00 for overtime payments for custodians and maintenance and grounds employees. The governing body feels that this amount of overtime is excessive and that the Board must increase its efforts to reduce overtime by using manpower more efficiently and restructuring schedules of employees' work hours. This reduction of $5,000 will leave $1,133,529.00 for salaries under this category.

Line Item 2502 Operations and Maintenance - General Supplies

Reduction of $10,000

The budget reflects a total amount of $44,620.00 for principal's requirements for shelving, doors, electrical outlets and miscellaneous repairs. The governing body has determined that this amount is excessive and that delaying installation of some of the shelving requirements will not adversely affect the students. The governing body, therefore, reduced this amount by $10,000 which would leave $34,620.00 for these items.

Line Item 2201 Improvement of Instruction - Purchased Services

Reduction of $10,000

The budget reflects an amount of $34,000 for conference and workshop attendance. The governing body feels that this amount is excessive and that the same results can be achieved with fewer persons attending conferences and that those attending such conferences be required to bring back the information obtained and share same with their peers in some type of formalized manner, such as a workshop. The governing body further feels that conferences and seminar presentations are now tape recorded and that the tapes of such meetings could be obtained and reviewed by Board personnel which would result in a lesser cost for obtaining such information. This reduction would leave $24,000.00.

Line Item 2703 Substitute Teachers - Temporary Salaries

Reduction of $10,000.00

In the 1990-1991 budget, $167,000 was appropriated for this item and in the 1991-1992 proposed budget, the appropriation was in the amount of $164,000.00. However, in the 1989-1990 budget from the amount of $137,902.82, the sum of $27,000 was transferred out of this account. Therefore, the governing body feels that $10,000.00 should be cut from this line item and this will still leave an increase of $9,000 in this item over the amount projected to be expended during the 1991-1992 year.

Line Item 2301 Board of Education Services - Purchased Services

Reduction of $1,000.00

The Board has advised the governing body that it may not be hiring many new staff members during this budget year. This item was described as a two-day in-house orientation for new staff members and the funds were to be used to buy lunches for new staff members and to provide them with informational materials. The governing body feels that $1,800 is excessive for such purposes and therefore has reduced this item by $1,000.00. This leaves $800.00 available for lunches and for copying informational material.

Line Item 2302 Executive Administrative Services - Supplies and Materials; Staff Recruiting and Legal Ads Expenses

Reduction of $3,000.00

The sum of $1,000.00 has been budgeted for this item, but the governing body has been advised by the Board that they will not be recruiting any new staff during this budget year. In addition, $3,962.00 is budgeted for legal ads for recruitment of new staff members. Likewise, little recruitment is anticipated during this budget year. Therefore, the governing body has reduced this item by $3,000, leaving $1,962.00 for recruiting purposes.

Line Item 2502 Operations and Maintenance - Buildings and Grounds

Reduction of $10,000.00

There is budgeted $41,350.00 for materials for general repairs, plumbing, roofing, carpentry, and vandalism and $27,750.00 for emergency repairs. The Board has insurance for major vandalism and service contracts for many routine maintenance items such as fire alarm systems, intercom systems, telephone lines, emergency lights and sprinkler systems. The governing body feels that these items are excessive and can be reduced by $10,000 which would result in $31,350 remaining for materials for general repairs and $27,750 for emergencies.
(Board's Petition of Appeal, Schedule A)

The Commissioner observes that certain documentation with respect to the reductions controverted in each of the above line items of current expense for the 1991-92 school year have not been

included in the record of this matter. Namely, a copy of the Board's advertised current expense budget for the 1991-92 school year has not been included in the record.

Moreover, while it is possible to determine those amounts budgeted for the year in question from a review of the Trend Analysis submitted by Council (Schedule A, attached to Certification of Timothy M. Vrabel, Municipal Accountant, filed July 19, 1991), Council's exhibit is deficient by virtue of the fact that it fails to present what balances, if any, remained in those line items at the conclusion of the 1990-91 school year. Similarly, the Board in its letter memorandum with attached certification and exhibits filed on July 19, 1991 fails to present any information in regard to the prior year balances.

Additionally, it is further observed from a review of the reasons given by the Board for the retention of the amounts budgeted in these line items that in many instances there is a lack of specificity with regard to certain statistical data which would provide the Commissioner with sufficient information to make an informed decision with respect to certain of these line item reductions. Consequently, any doubt which remains in the Commissioner's mind regarding these line items will result in a determination not to restore the amounts in dispute. The submissions upon which the Commissioner will rely in arriving at his findings and conclusions are:

- Council's line item reductions containing its reasons (Schedule A, Board's Petition);
- Council's Trend Analysis of the Board's budget (Schedule A, Council's Answer, Certification of Timothy M. Vrabel); and
- Board's Letter Memorandum with attached exhibit filed July 19, 1991.

Line Item 2202 - Educational Media - Library Books, Subscriptions

Reduction: $3,500

Upon review of the reasons advanced by the Board rejecting Council's recommendation to locate and store educational media equipment at a central location to be distributed by an existing mail carrier in the Board's employ, the Commissioner accepts the Board's justification that this method would cause extra wear and tear on this equipment, increased salary expense, as well as problems with the inventory, security and distribution of such equipment. Accordingly, the Commissioner directs the restoration of $1,000 to the local tax levy as part of this line item reduction.

With regard to the Board's request that $2,500 of the $5,000 budgeted for this account be restored for the purpose of providing additional shelving in the high school library during the 1991-92 school year, rather than over a two-year period as Council recommends, the Commissioner cannot concur. Upon review of this line item request, the Commissioner cannot make an informed decision because the Board has failed to quantify what it means by a "considerable backlog of books which are 'double stacked' in the high school library." Additionally, from the evidence presented in the record, the Commissioner has no way of determining the actual amount budgeted by the Board for this purpose.

Accordingly, Council's reduction of $2,500 for this line item account is sustained.

Line Item 2202 Educational Media - Supplies and Materials

Reduction: $10,000

The Commissioner accepts the Board's request for the restoration of these funds on the grounds that at least 5 to 8

copies of trade books are required for distribution to each of the classrooms on a given grade level for the purpose of implementing its new literature based reading program.

The Commissioner is also persuaded by the Board's representation that it has obtained a response from the Head Librarian of the Ramsey Public Library to the effect that the public library cooperative program system is not designed to supply multiple copies of a given book to the school district. The Commissioner therefore directs that the $10,000 tax levy reduction attributed to this line item account be restored.

Line Item 2301 Board of Education Services - Other - Professional Services

Reduction: $10,000

The Commissioner observes that the Board's request for the restoration of $10,000 to this line item account is predicated upon several proposals for a school restructuring plan which, at the time of this appeal, would not be finalized until September 1991 for implementation in September 1992 (1992-93 school year). Given the fact that the Board's estimates for professional services are premature and, further, that the Board has sufficient sums of free balance accumulated for that purpose, the Commissioner hereby sustains Council's reduction of $10,000 in this line item account.

Line Item 2602 Information Services - Purchased Services

Reduction: $6,000

The Commissioner accepts the Board's rationale for the restoration of $6,000 to this line item account. The amounts budgeted by the Board in this account for the 1990-91 and 1991-92 school years appear to be entirely consistent with the perceived needs of the school district in implementing a policy to disseminate

timely information to the voters regarding the educational program changes and the physical needs assessment currently under way in the district.

The Commissioner hereby directs that the $6,000 reduction in this account be restored.

Line Item 2502 Operations and Maintenance - Salaries

Reduction: $5,000

In the Commissioner's judgment the Board has failed to provide specific salary information with respect to the extent, amount of time or personnel utilization in the overtime activities for this budgeted line item. Council's reduction of $5,000 in this line item is hereby sustained.

Line Item 2502 Operations and Maintenance - General Supplies

Reduction: $10,000

The Commissioner concurs with the Board's request to restore $10,000 to this line item account. It is evident from the Trend Analysis presented by Council that the Board has made an effort to reduce expenditures budgeted in this account by approximately $41,168 in the 1991-92 school budget appropriation request.

The Commissioner directs that Council's $10,000 reduction in this line item account be restored.

Line Item 2201 Improvement of Instruction - Purchased Services

Reduction: $10,000

Absent any evidence to the contrary that attendance at conferences and workshops by the professional teaching staff is not part of a current negotiated agreement between the Board and its

teaching staff members, Council's reduction of $10,000 in this line item account is hereby restored by the Commissioner.

Line Item 2703 Substitute Teachers - Temporary Salaries

Reduction: $10,000

Upon review of the evidence presented by Council in recommending that its reduction in this line item be sustained, the Commissioner is persuaded that such reduction can be sustained especially in view of the fact that the Board, by its own admission, has not concluded contractual salary negotiations with the Ramsey Teachers Association at the time of this appeal. Therefore, any assumption that the amount of the reduction in this line item negatively impacts upon the Board's ability to hire substitute teachers is premature and purely speculative. The Commissioner hereby sustains Council's reduction of $10,000 in this line item account.

Line Item 2301 Board of Education Services - Purchased Services

Reduction: $1,000

The Commissioner accepts the Board's reasons for the restoration of the reduction of $1,000 to the $1,800 which was originally budgeted as part of this line item appropriation for teacher orientation during the 1991-92 school year. He hereby directs that $1,000 be restored to the local tax levy for this line item appropriation.

Line Item 2302 Executive Administrative Services - Supplies and Materials; Staff Recruiting and Legal Ads Expenses

Reduction: $3,000

The Commissioner accepts the Board's justification for the tax levy restoration of $3,000 to this line item account. Notwithstanding Council's contention that new staff will not be

recruited during the 1991-92 school year, the Commissioner concurs with the Board's projected new staff recruitment by virtue of additional retirements and teacher resignations. In this regard the Board's estimate of 12 to 18 staff members per year is not excessive.

The amount of $3,000 in reductions recommended by Council in this line item account is hereby restored.

Line Item 2502 Operations and Maintenance - Buildings and Grounds
Reduction: $10,000

Upon review of this line item reduction, the Commissioner finds that the Board has failed to delineate any specific costs over the previous school year or for the 1991-92 school year which would establish the need for the restoration of the reduction herein. In the Commissioner's view, reasoning presented by the Board lacks a statistical cost basis which would demonstrate the need for the restoration of the funds in question.

Council's reduction of $10,000 for this line item account is sustained.

Accordingly, for the reasons expressed herein, the Commissioner directs that the following restorations to the 1991-92 school budget of the School District of the Borough of Ramsey are to be effectuated and reductions sustained:

Line Item	Amount Reduced	Amount Restored	Amount Not Restored
Surplus	$250,000	$250,000	$ -0-
2202 Educational Media-Books	3,500	1,000	2,500
Supplies	10,000	10,000	-0-
2301 Professional Services	10,000	-0-	10,000
2602 Information Services	6,000	6,000	-0-
2502 Operations & Maintenance - Salaries	5,000	-0-	5,000
General Supplies	10,000	10,000	-0-
2201 Improvement of Instruction	10,000	10,000	-0-
2703 Substitute Teachers	10,000	-0-	10,000
2301 Board of Education Services	1,000	1,000	-0-
2302 Executive Admin. Services	3,000	3,000	-0-
2502 Buildings and Grounds	10,000	-0-	10,000
TOTALS	$328,500	$291,000	$37,500

Consequently, the Bergen County Board of Taxation is directed to strike a local tax levy for the Board of Education of the Borough of Ramsey for current expense purposes for the 1991-92 school year reflecting restorations as indicated below:

	Original Tax Levy Certified by Governing Body	Amount Restored By Commissioner	Tax Levy After Restoration
Current Expense	$16,552,886	$291,000	$16,843,886

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 19, 1991

DATE OF MAILING - NOVEMBER 20, 1991

Pending State Board

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

For the Petitioner, Russell J. Schumacher, Esq. (Rand, Algeier, Tosti and Woodruff)

For the Respondent, Louis P. Rago, Esq. (Wacks, Mullen, Kartzman and Craig)

The Board of Education of the Borough of Rockaway (Board) appeals to the Commissioner of Education from an action taken by Borough Council of the Borough of Rockaway (Council) pursuant to N.J.S.A. 18A:22-37 certifying to the Morris County Board of Taxation a lesser amount for current expense costs for the 1991-92 school year than the amount proposed by the Board in its budget which was defeated by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate a proposal to raise $3,139,403 in current expenses by local taxation. The proposal was rejected by the voters. Thereafter, the Board submitted its budget to Council for its determination of the amount necessary for the operation of a

thorough and efficient school system in the Borough of Rockaway for the 1991-92 school year pursuant to the mandatory obligation imposed on Council pursuant to N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Morris County Board of Taxation $3,039,354, a reduction of $100,049 in current expenses.

Board's Proposal	Council's Certification	Reduction
$3,139,403	$3,039,354	$100,049

The amount in dispute before the Commissioner is $100,049.

The Board asserts that the action of Council in making the reductions is arbitrary, capricious, unreasonable and not in the best interest of the people of the Borough of Rockaway or the pupils in the school district. The reductions will prevent the Board from providing a thorough and efficient education for its pupils in accordance with the constitutional and legislative mandate imposed upon it by the laws of the State of New Jersey. It is the Board's contention that Council's reductions were not logically derived nor rationalized as required by law. Therefore, the Board requests restoration of the entire amount.

Council denies that its action was arbitrary, capricious, unreasonable and not in the best interest of the citizens and pupils in the school district. It asserts that the revised budget is sufficient to assure the provision of a thorough and efficient system of education in the local school district. All of its reductions were made after having given serious and careful review of the proposed budget.

A tabulation of the specific items in dispute is shown below:

ACCOUNT NO.	ITEM	COUNCIL'S REDUCTION
410	Salaries - Health	$ 31,338
213	Salaries - Teachers Grades 6-8	25,746
110	Student Activities - Salaries	8,185
1020	Student Activities - Expenses	4,645
545	Curricular Activities	3,500
215	Salaries - Secretarial/Clerical Asst.	18,500
213	Salaries - Teachers Grades 1-5, 6-8	8,130
	Total	$100,044

Although the litigants agree and Council's certification clearly shows a budget reduction of $100,049, the line item reductions above total $100,044, a difference of $5 which will be restored to the budget.

Account No. 410 Salaries - Health

Council has eliminated the salary for one of three nurses reasoning that two nurses are adequate to handle the district's needs. It supports its decision because of the proximity of two schools (Thomas Jefferson and Lincoln) which are only a few hundred feet apart; the closeness of the schools allows one nurse to travel between them in a few minutes and emergencies can be attended to at either school quickly and efficiently.

The Superintendent attests to the fact that the district has had three full-time nurses for the last 25 years and that employment of one nurse in each school must continue for the benefit of the pupils in the district. The Superintendent cited the many duties performed by the district's nurses. Some of those duties are: administering medication and first aid; caring for the daily health needs of pupils; serving as teachers of the K-8 health curriculum which includes instruction in family life, drug education and aids education. Only a nurse is authorized to administer medication to pupils. The nurse helps maintain a safe and

comfortable environment for pupils, and her/his presence is important to insure the well-being of pupils.

Council asserts that there is sufficient time in the school week for the nurse to carry out these duties. A review of the relevant statute shows that a full-time nurse is not required. A district may meet its statutory obligation by providing nursing services. N.J.S.A. 18A:40-1 In the instant matter, Council has determined that one nurse is to be eliminated and Council has the statutory and discretionary authority to make that determination. Absent any showing of an arbitrary or capricious action, Council's determination will stand. The elimination of this position will not preclude the Board from providing a thorough and efficient system of schools.

Consequently, the reduction of $31,338 is sustained.

Account No. 213 Salaries - Teachers Grades 6-8

Council has eliminated the Board's Spanish Foreign Language and associated Literature Program stating that not all of the sending districts to the Morris Hills Regional High School District have these programs and that the benefit of this program to the pupils is uncertain. The programs are carried out during part of the pupils' lunch period for a duration of 25 minutes whereas regular classes in the district are 43 minutes in duration. Council asserts that not all pupils now taking Spanish will continue to pursue it in high school and that Spanish is not considered acceptable by many engineering and technically oriented colleges and universities. Also, many pupils need the full lunch hour to make a smooth transition from the morning to the afternoon school routine.

The Board states that the reduction by Council is an indication that its offering of a foreign language program is a frill. Being aware that the world is becoming a global society, the development of fluency in more than one language is a skill which will further one's overall education and preparation for future life. The Board's program is not a full-time program; rather, it is offered 25 minutes per day for four days each week. Both instructors for the program have been hired part-time and do not receive the benefit package offered to full-time teachers; thus, the Board has provided exposure to a foreign language and literature program in a very cost efficient manner. If the foreign language program, which is presently scheduled for one-half of the pupils' 50 minute lunch period, is eliminated, the Board would have to provide the pupils with additional free time or another course offering which would not effect the cost savings sought by Council.

The Board's reasoning is educationally sound and demonstrative of its effort to provide a thorough and efficient system of schools for its pupils. For the reasons expressed by the Board in its documentation, the $25,746 reduction is restored to the budget.

Account No. 110 Student Body Activities - Salaries
Account No. 1020 Student Body Activities - Expenses
Account No. 545 Curricular Activities

Council believes that the Board's sports activities, such as basketball, baseball and any others that are offered by the recreation program currently carried out by Rockaway Borough's Recreation Commission, should be eliminated. All pupils in the school are invited to the Borough's programs, thus eliminating duplicative programs offered by the Board. The elimination of the

sports programs would effect savings in Expenses (Account No. 1020) and Curricular Activities (Account No. 545) which are transportation costs to athletic events.

The Board asserts that Council has determined that it should not offer an athletic program for its pupils. The Board disputes this contention and maintains that an athletic program is an integral co-curricular activity which greatly benefits the many pupils who participate in the various athletic programs offered. The cost of $8,185 in salaries for coaches for baseball, softball, boys' basketball, girls' basketball, cross-country and cheerleading is a minimal expense for the benefits received by the pupils in these programs.

The allocation of $4,645 in Account 1020 is for the expenses for these programs, while the $3,500 allocation in Account 545 provides for the required transportation to participate in these many interscholastic activities.

An examination of the documents regarding these programs shows quite clearly that they are part of the overall educational and co-curricular activities offered by the district. These activities should remain in the school setting where organized programs and interscholastic competition is held.

Accordingly, the total reduction of $16,330 in these three items will be restored.

Account No. 215 Salaries - Secretarial and Clerical Assistants

Council asserts that school enrollment has decreased substantially over the years. Additionally, teaching staff has decreased while computer assisted automation has increased. Efficiency gained in office automation and centralized processing

would permit the reduction of one position involving a secretarial and clerical assistant. This reduction would not affect the district's ability to provide a thorough and efficient system of schools.

The Board concedes that enrollment in its schools has decreased in the past several years. During this period, however, the mandates imposed upon the Board by state and federal agencies have increased significantly, thereby generating substantial paperwork and record keeping. The Board asserts that the elimination of any secretarial position would jeopardize the Board's ability to keep up with the ongoing requirements imposed upon it.

The positions of the litigants have been reviewed. Although the Board's position is understandable and reasonable, there is no showing that it would be unable to provide a thorough and efficient system of schools because of the elimination of this position.

Accordingly, Council's reduction of $18,500 is sustained.

Account No. 213 Salaries - Teachers Grades 1-5
Account No. 213 Salaries - Teachers Grades 6-8

Both the Board and Council agree that this account provides for a part-time teacher, at a salary of $8,130, for its gifted and talented program. They also agree that this is a state-mandated program; however, Council asserts that this program can be delivered by utilizing regular classroom aides while the teacher is working with gifted and talented pupils.

The Board believes that it is handling the program in the most efficient way. Further, it has no classroom aides and if they were provided, the cost would exceed the $8,130 now allotted to the program.

Based on the above, the Board's rationale is persuasive and compelling. Accordingly, the $8,130 reduction will be restored to the budget.

A recapitulation is set forth below.

ACCOUNT NO.	ITEM	AMOUNT RESTORED	AMOUNT NOT RESTORED
410	Salaries - Health	$ -0-	$31,338
213	Salaries - Teachers Grades 6-8	25,746	-0-
110	Student Activities - Salaries	8,185	-0-
1020	Student Activities - Expenses	4,645	-0-
545	Curricular Activities	3,500	-0-
215	Salaries Secretarial/Clerical Asst.	-0-	18,500
213	Salaries - Teachers Grades 1-5, 6-8	8,130	-0-
	Total	$50,206	$49,838

Based on the above, the total reductions sustained are $49,838, and $50,206 is restored to the budget. Additionally, $5 is restored to the budget because of the arithmetic error explained in the text. Therefore, the total restoration will be $50,211.

Accordingly, the Morris County Board of Taxation is directed to add to the local tax levy for the Borough of Rockaway $50,211 for current expenses of the school district for the 1991-92 school year as set forth below:

Current Expense Tax Levy Certified by Council	$3,039,354
Current Expenses Restored by the Commissioner	50,211
Total Current Expense Tax Levy After Restoration	$3,089,565

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 19, 1991

DATE OF MAILING - NOVEMBER 19, 1991

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 7428-90
AGENCY REF. NO. 251-7/90

LUCIA C. MILLER,
Petitioner,

v.

HOBOKEN BOARD OF EDUCATION,
Respondent.

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

David F. Corrigan, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: September 23, 1991 Decided: October 2, 1991

This is a transcript of the Administrative Law Judge's Oral Initial Decision rendered pursuant to *N.J.A.C.* 1:1-18.2

BEFORE **ELINOR R. REINER**, ALJ

On July 20, 1990, petitioner Lucia C. Miller filed a petition of appeal with the Commissioner of Education, alleging that her tenure and seniority rights had been violated by respondent. Respondent filed its answer on September 10, 1990, denying petitioner's allegations. On September 18, 1990, this matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14b-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.* A prehearing conference was held on December 1, 1990, at which time the issues

were isolated; the hearing was scheduled for April 30 and May 1, 1991, at the OAL. Prior to the hearing in this matter, the parties determined that the case could be decided on cross-motions for summary decision and that a hearing was not necessary. A briefing schedule was established and the record closed on September 23, 1991, when it was determined that all submissions were complete.

UNDISPUTED FACTS

The relevant facts in this matter are undisputed and are set forth in the joint stipulation of facts (JJ-1) submitted by the parties. The parties also submitted the following documents, which are undisputed: the certification of petitioner, certification of counsel for petitioner (certifying that no one has requested permission to intervene in this case), and certification of Francis E McCorty, Assistant Superintendent of Schools for the Hoboken School District In addition, counsel for respondent submitted a letter dated August 8, 1991, attaching additional documentation, which information is undisputed

The relevant facts may be summarized as follows

1. Petitioner, Lucia C. Miller (Miller), possesses an instructional certificate with the following endorsements:
   Teacher of home economics (5/71) (J-1)
   Nursery school (3/79) (J-2)
   Elementary school teacher (8/79) (J-3)

   The Hoboken Board of Education contends that it was not aware that Miller possessed an elementary school teacher certificate until Miller introduced it through discovery.

2. Miller has been employed by the Hoboken Board of Education (Board) as follows.

   1/28/74 - 1/31/74
   Home economics (per diem)

2/1/74 - 6/30/74
Junior high school home economics
(Grades 7 and 9) (J-4)

1974-75
Junior high school home economics
(Grades 7 and 9) (J-5, J-6)

1975-76
Junior high school home economics
(Grades 7 and 9)

1976-77
Junior high school home economics
(Grades 7 and 9) (J-7, J-8, J-9)

1977-78
Junior high school home economics
(Grades 7 and 9)

1978-79
High school home economics
(Grades 9 to 12)

1979-80
Home economics, grades pre-kindergarten to 8
(J-10, J-11)

1980-81
Home economics, grades pre-kindergarten to 8

1981-82
Home economics, grades pre-kindergarten to 8

1982-83
Home economics, grades pre-kindergarten to 8

9/1/83 - 1/31/84
Home economics, grades pre-kindergarten to 8

2/1/84 to 2/1/85
Maternity leave of absence
(J-12, J-13, J-14, J-15, J-16, J-17, J-18)

2/1/85 - 6/30/85
Home economics, grades pre-kindergarten to 8

1985-86
Home economics, grades pre-kindergarten to 8

9/1/86 - 1/31/87
Maternity leave of absence (J-19, J-20, J-21)

2/1/87 - 6/30/87
High school home economics
(Grades 9 to 12)

1987-88
High school home economics
(Grades 9 to 12)

1988-89
High school home economics
(Grades 9 to 12)

1989-90
High school home economics
(Grades 9 to 12)

3. As the result of her employment in the Board's school district and possession of the certification and endorsements required for such employment, Miller gained tenure pursuant to *N.J.S.A.* 18A:28-5

4. By letter dated April 30, 1990, the Board's Superintendent of Schools recommended a reduction in force (RIF) due to budgetary constraints and declining enrollment. Miller was among the staff members recommended for termination (J-22)

5. On April 30, 1990, the Board adopted a resolution conducting a RIF among tenured teaching staff members. Miller was among the staff members subjected to this reduction in force (J-23).

6. By letter dated April 30, 1990, Miller was notified that she would not be reemployed for the 1990-91 school year (J-24).

7. By letter dated September 24, 1990, the Board's Superintendent of Schools made a recommendation to the Board for the reemployment of three teachers including Miller (J-25).

8. On September 24, 1990, the Board adopted a resolution reemploying Miller for the 1990-91 school year.

9. By letter dated September 27, 1990, Miller was notified that the Board had rescinded her termination notice, effective September 25, 1990 (J-27).

10. For the 1990-91 school year, Miller is being paid at the annual salary rate of $54,036. This amount has been prorated for the time when she was not working in the district (September 1, 1990 - September 24, 1990).

11. Miller has continued to work for the Board since her reemployment, effective September 25, 1990.

12. A copy of Miller's employee record card is attached hereto as Exhibit J-28.

13. Anna Marie Simone (Simone), Mary Drexel (Drexel), and Rosemary Purwin (Purwin) are employed by the Board as nursery school teachers for the 1990-91 school year.

    (a) Simone started working for the Hoboken School District on September 16, 1978 and has worked full-time and continuously since then. She holds the following certificates: elementary education, issued 6/74; nursery school, issued 3/76; and reading specialist, issued 2/85. She taught elementary school from 1978 until 1990 at the Connors School. In 1990, she started teaching pre-kindergarten at the Connors School, where she remains to date.

    (b) Drexel started working as a full time elementary education teacher on September 1, 1970. She was on maternity leave from 3/16/81 through 9/82. She taught elementary school continuously from 1970 through 1982. She has been teaching pre-kindergarten at the Wallace School since 1982, except for six months when she taught basic skills. Ms. Drexel holds the following certificates: general elementary (K-8), issued 5/24/70, and nursery school, issued 7/74.

(c) Purwin was appointed to the Hoboken School District on October 16, 1977, and has worked full-time and continuously since then. She was issued an elementary/nursery school certificate in 5/76. She taught as an elementary education teacher from 1977 until 1990. From 1980 to the present, she has been teaching pre-kindergarten at the Brandt School.

14. The stipulation of facts contains petitioner's complete employment history in the school district. This employment history indicates that during the following school years, she was assigned to teach home economics in grades pre-kindergarten to eight: 1979-80; 1980-81; 1981-82; 1982-83; 9/1/83 to -1/31/84; 2/1/85 - 6/30/85; and 1985-86.

15. When assigned to a school with a pre-kindergarten program, petitioner's pre-kindergarten responsibilities consisted of teaching the morning and afternoon pre-kindergarten classes one or two periods per week. This amounted to 40 or 80 minutes of instruction per week for each pre-kindergarten class in the school.

16. Petitioner's instructional responsibilities to pre-kindergarten children consisted of units of arts and crafts, family life, health, nutrition, foods (simple cooking), shopping, clothing, basic sewing, and textiles.

17. Francis E. McCorty is the Assistant Superintendent for Schools for the Hoboken School District. The Hoboken Board of Education pre-kindergarten curriculum for 1990 ("1990 curriculum") is followed by Hoboken pre-kindergarten teachers (Exhibit A).

18. The 1990 curriculum was adopted by the Hoboken Board of Education by resolution dated June 21, 1990 (Exhibit B).

19. The 1990 curriculum is used by the Board to implement its pre-kindergarten program.

20. The 1990 curriculum has been followed by the Hoboken School District since approximately September 1, 1990.

21. The 1990 pre-kindergarten curriculum objectives include the following:

I Language arts.

(a) oral language
(b) listening skills
(c) reading readiness
(d) pre-writing
(e) creative writing

II Mathematics

(a) matching
(b) shapes
(c) counting and numbers
(d) reading and writing numerals
(e) number concepts
(f) classification
(g) money and time
(h) measuring

III Affective developing

(a) personal/emotional
(b) social

IV Physical development
(a) gross-motor control
(b) fine-motor control
(c) eye - hand coordination

V Health and safety

(a) health
(b) indoor safety
(c) outdoor safety

VI Science

(a) living things
(b) our senses
(c) physical world

VII Social studies

(a) talk about the family structure
(b) describe people in the community
(c) discuss the difference between city and country living
(d) talk about different modes of transportation
(e) discuss designated holidays and celebrations

22. Pre-kindergarten teachers in the Hoboken school district are required to incorporate the 1990 curriculum into their classes.

23. The pre-kindergarten program consists of a morning and afternoon session. The morning session commences at 8:30 a.m. and ends at 12 noon for a total of three and one-half hours, five days per week. The afternoon session commences at 12:30 p.m. and ends at 2:35 p.m. for a total of two hours and five minutes, five days per week.

24. Midway through the year, the children who attend the morning session are transferred to the afternoon session and vice-versa so that all the children receive the same number of hours of instruction for the whole year.

25. The 1986 pre-kindergarten curriculum guide for the Hoboken public schools ("1986 curriculum") was used until approximately September 1990 (Exhibit C).

26. The 1986 curriculum included the following objectives:

I Language

(a) listening exercises
(b) expressive language
(c) psycho-motor language development activities
(d) reading readiness

II Mathematics

(a) counting and recognizing numbers from 1 to 10
(b) each number has its own symbol and value
(c) matching (1-1 relationship)
(d) simple measuring

(e) classification
(f) shape discrimination - circle, square, rectangle, triangle
(g) spatial concepts and time
(h) concept of money

III Science

(a) living things
(b) physical science

IV Safety and Health

(a) classroom safety concepts
(b) outdoor safety concepts
(c) concepts relating to home safety
(d) health concerns and concepts

V Affective development

(a) self-concept
(b) relationships with others

VI Arts and crafts

(a) teach basic colors
(b) awareness of forms and textures
(c) manipulative skill development
(d) crafts
(e) photography
(f) aesthetic appreciation
(g) expression of feelings through art, music, and dance

VII Music

(a) appreciation of many different cultures through music
(b) a variety of instrumental sounds
(c) names of rhythm instruments
(d) rhythmic movement to records
(e) simple sounds to be learned by rote
(f) discrimination of high and low (xylophone; loud and soft; drum)
(g) socialization through dance
(h) imitate sounds

VIII Social studies

(a) the individual child
(b) the family
(c) friends
(d) the city
(e) the country
(f) holidays and celebrations

27. A pre-kindergarten teacher in the Hoboken School District devotes approximately five hours and 35 minutes total teaching time per day to the morning and afternoon sessions.

28. Petitioner's personnel file does not contain a copy of her elementary education instructional certificate.

29. There has been no request to intervene by three individuals notified of the proceeding: Drexel, Purwin, and Simone.

30. The Hoboken Board of Education does not have a specific job description for home economics or nursery school teacher. The Board uses a position description for "teacher" (Exhibit D).

31. There is no information in respondent's files as to why petitioner obtained a nursery school endorsement. The file contains a letter dated August 30, 1979, from the Board Secretary to petitioner advising her that she had been reinstated to her teaching position because she had fulfilled all of her certification requirements. There is no correspondence in the file relative to obtaining the nursery school certificate.

32. The Board's seniority list is used by the Board in determining which teachers will be "RIFFED" and which teachers will be reinstated (Exhibit E).

33. The seniority list is divided by categories such as art, elementary classroom teacher, home economics, and other subjects. After each employee's name, the years and months of service in that category are listed. The next two columns show all other areas in which a teacher has worked and the corresponding years and months of service. The last column shows the date of hire.

34. The seniority list for home economics teachers is on page 14 of the seniority list. According to the list, as of January 16, 1991,

petitioner had 15 years and one month of service as a home economics teacher. There is nothing listed under "other" for petitioner.

35. Anna Marie Simone is listed under elementary classroom teacher (p. 7). It indicates she has 12 years of service as an elementary classroom teacher.

36. Rosemary Purwin is listed under nursery school teacher (p. 20). It indicates 10 years of service and 13 years of service as an elementary classroom teacher.

37. Mary Drexel is listed under nursery school (p.20). It indicates eight years of service under nursery school and 19 years as an elementary classroom teacher.

DISCUSSION

At issue in the instant case is whether petitioner's petition is moot by virtue of her reinstatement to the position of home economics teacher on September 25, 1990. In addition, at issue is whether petitioner's seniority rights were violated when her employment was terminated pursuant to a RIF prior to the 1990-91 school year. More particularly, at issue is whether petitioner's seniority rights relative to her nursery school endorsement were violated by respondent's failure to take into account petitioner's pre-kindergarten experience in determining her seniority rights.

I. Is petitioner's seniority claim moot?

It is well established that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review. *Anderson v. Sills*, 143 *N.J. Super.* 432, 437 (Chanc Div 1976), citing *Oxfeld v. N.J. State Bd. of Ed.*, 68 *N.J.* 301, 303-304 (1975); *In re Geraghty*, 68 *N.J.* 209, 212-213 (1975); *Sente v. Clifton Mayor and Mun. Coun.*, 66 *N.J.* 204, 206 (1974).

> There are two basic reasons for this doctrine. First, for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief,

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

(i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.

(j) If he or she have insufficient seniority in the category to which he or she shall revert, he or she shall, in like manner, revert to the next category in which he or she held employment immediately prior to his or her employment in the category to which he or she shall have reverted, and shall be placed and remain upon the preferred eligible list of the next preceding category, and so forth, until he or she shall have been employed or placed upon all the preferred eligible lists of categories in which he or she formerly held employment in the school district.

Petitioners' contention is further buttressed by the conscious deletion of the language in the prior *N.J.A.C.* 6:3-1.10(1), which limited seniority entitlements to the category in which the individual spent the greatest portion of his or her time.

Further, it may be noted that the State Board provided additional proof of its intent to provide full seniority in all categories or subject area endorsements served when it further amended the regulations at its November 1983 meeting to strike a sentence concerning the seniority rights of teaching principals because that sentence was inconsistent with the intent of the full paragraph. The sentence removed was as follows:

> The seniority rights of principals who teach shall be counted in the appropriate principal's category.

Such further deletion makes absolutely clear the State Board's intent that principals who teach should receive seniority both as principals and teachers. The Commissioner further adopts petitioners' reasoning as it relates to the acquisition of a full year's seniority in each category or subject area endorsement taught, provided such teacher was a full-time teacher. The Commissioner agrees with petitioners' reasoning that the limitation of "[n]ot more than one year of employment may be counted toward seniority in any one academic or calendar year" was meant to assure that no more than one year's seniority in any category was acquired in any one year. . . . Any other conclusion would result in the actual punishment of versatility and flexibility. The teacher, as illustrated by petitioners, who actually taught in more than one subject field or category would be disadvantaged by virtue of such versatility. Further,

(k) In the event of his or her employment in some category to which he or she shall revert, he or she shall remain upon all the preferred eligible lists of the categories from which he or she shall have reverted, and shall be entitled to employment in any one or more such categories whenever a vacancy occurs to which his or her seniority entitled him or her.

(l) The following shall be deemed to be specific categories, not necessarily in order of preference:

1-18 . . . [Deals with administrative categories]

19. Secondary. The word "secondary" shall include grades nine through 12 in all high schools, grades seven and eight in junior high schools and grades seven and eight in elementary schools having departmental instruction.

i. Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served.

---

proration of seniority under such circumstances would provide opportunities for abuse wherein seniority could be manipulated to the advantage or disadvantage of one individual as opposed to another. *Id.* at 1422-1423.

Please note that this ruling was based upon the following illustration:

> [A] teaching staff member who had been employed six years, assigned half-time as a guidance counselor and half-time as a social studies teacher . . . would have three years seniority in each category. Suppose than [*sic*] a RIF occurred in each category, there were no nontenured teachers employed, but one tenured person employed in each category, with three years and one day service (the minimum for tenure). Both of those persons, although employed only three years and one day, could bump the six-year employee, who would have been employed nearly twice as long in a full-time capacity. Similarly, the same individual could be employed nine years, serving one-third as a guidance counselor, one-third as a social studies teacher, and one-third as an LDTC. In the same situation, that person could be bumped in each category by a person who had been employed three years and one day, just bearly [*sic*] one-third of the time that person had been employed. This in effect would result in a person having served many years and acquired tenure, but, having only a few years seniority in any category. This was not the intent of the new regulations, and is inconsistent with the seniority regulations generally. See for example *N.J.A.C.* 6:3-1.10(h), which provides that when a person changes categories, he continues to accrue seniority in all categories in which he previously held employment, and *N.J.A.C.* 6:3-1.10(1)(15), which prevents a person from acquiring seniority under a subject endorsement until he has served under such endorsement, but counts all subsequent service, even under new endorsements, towards seniority under those endorsements under which he previously has served. Surely a person serving in two categories simultaneously is entitled to no less than a person no longer serving in a category. . . . *Id.* at 1417-1418.

ii. Whenever a person shall be reassigned from one subject area endorsement to another, all periods of employment in his or her new assignment shall be credited toward his or her seniority in all subject area endorsements in which he or she previously held employment.

iii. Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special subject field endorsement.

iv. Persons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis.

20. Elementary. The word "elementary" shall include kindergarten, grades one through six and grades seven and eight without departmental instruction.

i. District boards of education who make a determination to reorganize instruction at grades seven and eight pursuant to these rules must do so by adoption of a formal resolution setting forth the reasons for such reorganization.

ii. Any person employed at the elementary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such educational services certificate or special subject field endorsement.

iii. Persons employed and providing services on a district-wide basis under a special endorsement or an educational services certificate shall acquire seniority on a district-wide basis.

iv. Persons serving under elementary endorsements in departmentally organized grades seven and eight prior to September 1, 1983 shall continue to accrue seniority in the elementary category for all such service prior to and subsequent to September 1, 1983. In addition, such persons shall accrue seniority in the secondary category but limited to the district's departmentally organized grades seven and eight and the specific subject area actually taught in such departmentally organized grades, subsequent to September 1, 1983.

It is the Department of Education's view that the seniority rules

should be limited to simply providing an orderly and qualitative process for distinguishing between which teachers will remain and which teachers will be released in a reduction in force. The

> Department has done so by providing a process whereby those persons who were interviewed, hired, and actually served in a particular subject area endorsement or grade level designation are the exclusive recipients of seniority credit in that subject area endorsement or grade level designations.
>
> 15 *N.J.R.* 1017.
>
> [See also, *Revision of Seniority Regulations: A Position Statement of the New Jersey State Department of Education* (June 1983), at page 3. "The essential purpose of the proposal is to limit each teacher's seniority entitlement in a district to those subject fields or levels at which the teacher has actually taught."]

It is reasonable to conclude from the foregoing that petitioner's seniority rights were not violated when she was not employed as a pre-kindergarten teacher in the 1990-91 school year since she never functioned specifically as a pre-kindergarten teacher. Petitioner only taught home economics at the pre-kindergarten level and, thus, only accrued seniority credit under her home economics endorsement. A review of relevant case law supports this conclusion.

In *In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Edison Township Board of Education*, Comm'r of Ed. Dec. (June 3, 1986), aff'd State Bd. (Dec. 3, 1986), (N.J. App. Div., Dec. 14, 1987, A-2792-86-T1) (unreported), the propriety of the Board's action in reducing its teaching force as a result of abolishing the district's driver education program was at issue. The Board placed three teachers "endorsed in health and physical education and driver education, whose entire service was in driver education, on the seniority list for health/physical education. This resulted in the 'bumping' of three other teachers whose service was entirely within health/physical education. At issue is entitlement to positions as health/physical education teachers for the 1985-86 school year." *Id.*, Comm'r of Ed. Dec. at 1.

The Commissioner started his analysis by stating that "what needs to be answered is whether or not the Board acted properly in assigning petitioners Bjornsen, Hohnstine and Reiter to teach such courses (health/physical education) for 1985-86. To reach a determination, it is necessary to establish the seniority entitlement of these three teachers." *Id.* at 7. All three petitioners had accrued 13 years seniority in the secondary category. "What remains to be determined is to which subject area endorsement(s) that seniority attaches."

The Commissioner said

> [i]t is clearly and unambiguously established in regulation that seniority accrues only in those endorsement areas under which one actually serves. Further, seniority entitlement extends to all subjects within the endorsement(s) served. *Camilli . . . [v. Board of Education of Northern Highlands Regional School District*, dec'd by Comm'r of Ed. Jan. 3, 1985, aff'd State Board, May 1, 1985[2]] and *Hudson Co. Area Voc-Tech Association, et al [v. Board of Education of Hudson County Voc-Tech*, dec'd by Comm'r of Ed. Jan. 27, 1986]. . . . It is undisputed that Bjornsen taught driver education courses exclusively. In order to teach driver education, be it classroom driver education theory, behind-the-wheel, or simulation driving training, one must possess a driver education endorsement. . . . Endorsements in health, physical education, or health and physical education do not authorize one to teach driver education (*N.J.A.C.* 6:11-6.2), nor are such endorsements a prerequisite for obtaining a driver education endorsement. (*N.J.A.C.* 6:11-6.3(b)(2).)
>
> *In the Matter of the Seniority Rights of . . .*, Comm'r of Ed. Dec. at 8

Hence, the Commissioner determined that "petitioners Bjornsen, Hohnstine and Reiter accrued 13 years seniority in the secondary category under the driver education endorsement which they served. No seniority accrued under their health/physical education endorsements; therefore, any seniority entitlement to a position within the health/physical education department is limited to subject matter authorized to be taught under the driver education endorsement." *Ibid.*

---

2. In *Camilli v. Northern Highlands Regional High School Board of Education*, 1985 *S.L.D.* ____ (Jan. 3, 1985), petitioner, a tenured teaching staff member who possessed a physical science endorsement on his instructional certificate and whose assignment was at all times to teach chemistry, alleged the Board improperly reduced his full-time chemistry assignment to half-time while assigning a nontenured teacher to a full-time physics position. Petitioner alleged that the Board violated his seniority rights by not granting him the full-time physics position. The Commissioner, in applying the seniority regulation, held:

> Petitioner is correct, however, in his argument that the current regulations entitled him to the physics position. The language of *N.J.A.C.* 6:3-1.10(1)(15) is clear and unambiguous that seniority accrues in the subject area endorsements(s) in which one actually serves. Petitioner has been a chemistry teacher for his entire service with the Board. Thus, his seniority attaches to the physical science endorsement, not merely chemistry. The physical science endorsement includes not only chemistry but physics and earth and space science other than geography, therefore, petitioner is unquestionably entitled to the physics position to which the non-tenured teacher was assigned. *Camilli*, 1985 *S.L.D.* at 9.

The Commissioner noted that the

> "fact that the driver education program/courses are totally integrated into the health and physical education curriculum has no bearing whatsoever on the matter. There is certainly nothing to preclude a board of education from so integrating driver education. . . ." [Citation omitted.] Nonetheless, such integration does not alter in the least the determination as to where one's seniority accrues, namely, driver education, not health/physical education. It is by virtue of a driver education endorsement that one is authorized to teach any driver education course, not by virtue of a health and/or physical education endorsement.
>
> To explain further, a driver education endorsement may be obtained by any holder of a valid New Jersey instructional certificate who fulfills the other specified requirements. Thus, a teacher with an instructional certificate endorsed in health/physical education, social studies, Russian or any other subject area endorsement who acquires a driver education endorsement would be authorized to teach driver education courses irrespective of where in the district's curriculum the courses were placed. Under the current regulations, seniority for such service would accrue solely under the driver education endorsement. . . .
>
> *Id.* at 8-9.

The Commissioner concluded that had the "Bjornsen petitioners taught any health or physical education course under their other endorsements, seniority would then have accrued in those areas as well. However, such is not the case herein." *Id.* at 9.

Similarly, in *Walliczek v. Bd. of Ed. of the Township of Holmdel, Monmouth County,* OAL DKT. EDU 3762-84 (April 24, 1985), aff'd Comm'r of Ed. (June 7, 1985), petitioner appealed from a decision by the Board to reduce his full-time position as a teacher of German to a part-time position (3/5 of full-time). He also challenged the "Board's refusal to acknowledge his tenure as a Spanish teacher. He asserts that other with less entitlement have been retained or appointed full-time in the latter positions [Spanish] despite his overriding seniority." *Id.* at 1.

The relevant facts for our purposes are as follows:

(1) Petitioner was a tenured teaching staff member who had been employed as a teacher by the Board since 1974. Petitioner possessed endorsements as both a teacher of Spanish and German.

(2) Petitioner had been employed as a teacher of German on a full-time basis for the 1974-75, 1975-76, 1978-79, 1979-80, 1980-81, 1981-82, 1982-83, and 1983-84 school years. During the 1976-77 school year, petitioner was employed as both a teacher of German and as a teacher of Spanish.

The Administrative Law Judge stated that

> With tenure established . . . the issue now becomes "seniority rights exercisable upon a reduction in force, not tenure rights." Seniority is a concept which only comes into play during a reduction in force. Those rights are set out at *N.J.A.C.* 6:3-1.10. Rights thereunder are allocated in accord with the categories or endorsements to which an employee may validly lay claim. In this case, there is no disagreement that the particular category in which petitioner has spent his career is "secondary." *N.J.A.C.* 6:3-1.10(a)(15). . . .
>
> *Id.* at 7-8.

The ALJ concluded that the Board should have awarded seniority rights to petitioner for all time dating from the beginning of the 1974 school year, when petitioner was employed as a teacher instructing under the German language endorsement, and for all time dating from the beginning of the 1976-77 school year, when petitioner was called on to teach Spanish (endorsement followed in August of 1977). The import of this analysis is that petitioner (who "has actually served" as a Spanish teacher) was entitled to full-time employment as a German and/or Spanish teacher during the 1984-85 school year. *Id.* at 8-9.

In applying the rationale put forth in *In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Edison Township Board of Education* and *Walliczek* to the present situation, it is reasonable to conclude that petitioner did not accrue seniority under her nursery school endorsement as a result of her teaching home economics[3] to pre-kindergarten children. Moreover, the case

3. As was stated by the Commissioner in *McAneny v. Bd. of Ed. of the School District of the Chathams, Morris County,* OAL DKT. NO. EDU 5970-89 (April 11, 1991) aff'd Comm'r of Ed. (May 28, 1991), the precise language of . . . [the home economics] endorsement is no different in 1991 than it was in 1976. *N.J.A.C.* 6:11-6.2(a)12 reads:

> Home economics: This endorsement authorizes the holder to teach home economics in all public schools. Home economics normally includes: Homemaking and consumer education, foods and nutrition, family living and parenthood education, child development and guidance, housing and home furnishings, home management, clothing and textiles, and family health and safety. *McAneny*, Comm'r Dec. at 18.

relied upon by petitioner, *Lundy v. Bd. of Ed. of Township of Montclair, Essex County*, 1984 *S.L.D.* ____ (Nov. 16, 1984), aff'd Comm'r of Ed. (Dec. 31, 1984), when viewed in its entirety is actually contrary to petitioner's position that she accrued seniority under her nursery school endorsement.

In *Lundy*, petitioner alleged that the Board had assigned teachers who were improperly certified to its early childhood program, in contravention of the requirement for nursery school certification, had the Board actually established a nursery school. Thus, the only issue that had to be determined was "whether the Board's two-year kindergarten program necessarily included a nursery program for which assigned teachers are improperly certified, contrary to *N.J.S.A.* 18A:26-2."

At the hearing, the personnel administrator testified that "there are four-year-old students in an Early Childhood-Primary Unit program in four elementary schools in the district. . . ." *Id.* at 3. In 1982, the personnel administrator

> wrote the State Department of Education . . for clarification of a certification situation raised by teaching staff and the local education association of the district. The letter said the district had a full-day instructional program for four-year-old students, funded fully by the Board. In addition to regular classroom activity taught by teachers certificated N-K the students received instruction in art, music and physical education by teachers certificated K-12 in their respective areas. At the time, it was said, the certificate endorsement of K-12 authorized the holder to teach physical education in all public schools but gave no indication of grade/age level. Schaefer's [*i.e.*, the personnel administrator] question was whether teachers holding certificates in art, music and physical education K-12 were eligible to teach four-year-olds.
>
> Lundy, OAL DKT. NO. EDU 5426-84 at 3.

The Director of the Bureau of Teacher Education and Academic Credentials, in a letter dated December 10, 1982, noted that "the Department was in [the] process of revising certification regulations and suggested by way of recommendation that the teachers in question (art, music, physical education) be exceptions and qualify under 'all grades' instead of K-12." *Ibid.* The personnel administrator also testified that he suggested to the Superintendent of Schools that Ronald Kulik, who was certified as a "secondary physical education and social studies teacher, but who was not certified under a nursery school endorsement, be considered appropriately

certified to teach physical education in the public schools, and, presumably, in the Primary Unit encompassing four-year-olds." *Ibid.*

The County Superintendent responded to Shaefer's inquiry, by letter dated February 28, 1975, and said

> [i]f an early childhood program is conducted as part of the regular program of a public school district and this program is coordinated with the K-12 program of the school there, it is logical and permissive to permit specialized teachers to teach their specialties in the early childhood four-year-old program in that school district.
>
> Since the Montclair program is designed to be educationally oriented, and continuous, I therefore give you permission for the following 12 certified individuals to be considered appropriately qualified to teach their specialities in your early childhood four-year-old program. . . . *Id.* at 4.

The ALJ then heard testimony from Ronald Kulik, a teacher who holds a basic instructional certificate with endorsements in social studies and physical education. He testified that he was assigned to teach physical education to pre-kindergarten students, ages 3, 4, and 5, without having held a nursery school certification. Additional testimony was taken from the Superintendent of Schools describing the nature of the Early Childhood - Primary Unit Program of the district.

> To petitioner's question whether there is in the district an established "nursery school," she said, there is no nursery school incorporated as such in the Primary Unit Program. That is, she said, the district does not compete with any private nursery school program. The district program is an academic one with a written curriculum, which differentiates it, commonly, from many private nursery school programs. That, she said, was one reason why parents preferred it. To the question whether there is in the district a "pre-kindergarten" program, she noted that expression is part of the common language of the district, one used commonly with "Primary Unit Program" interchangeably. She gave it as her view that the term "pre-kindergarten" was not synonymous with "nursery school." *Lundy*, OAL DKT. NO. EDU 5426-84 at 5.

The ALJ started his discussion by stating that

> [p]etitioner's claim . . . depends primarily on his having proven precisely what it was the Board "established" in its Early Childhood - Primary Unit Program. Certainly, it should be noted, a board of education may establish a nursery school or a nursery department in any school under its control and shall admit to such nursery

> school or department any child under the age at which children are admitted to other schools or classes in the district. *N.J.S.A.* 18A:44-1. On the other hand, a board of education from any district may establish a kindergarten school or kindergarten department in any school under its control and may admit to such kindergarten school or department any child over the age of four and under the age of five and shall admit to such kindergarten school or department any child over the age of five and under the age of six year who is a resident of the district. *N.J.S.A.* 18A:44-2. And, as suggested above, no teaching staff member shall be employed by the Board unless he/she be the holder of a valid certificate to teach, administer, direct or supervise the teaching instruction, or education guidance of pupils in the public schools and of such other certificate, if any, as may be required by law. *N.J.S.A.* 18A:26-2. Every kindergarten teacher shall be properly certified. *N.J.A.C.* 6:26-2.2. *Id.* at 7.

The ALJ then said that the

> [r]ules of the State Board of Education for nursery school certificate endorsements require 24 semester hour credits in professional education. *N.J.A.C.* 6:11-6.3(e)(3). The specific field endorsement for nursery school certification demands a specific program of college studies in history, principles and philosophy of education, child development from birth to 12 years, and related courses in psychology, mental hygiene, child health and nutrition, nursery school methods and curriculum including literature, story-telling, music, art, and science for children 2-5 years old, child, family and community life. *N.J.A.C.* 6:11-8.4(b)(13). Each teaching endorsement is required for the corresponding teaching assignment. Each endorsement is valid for all levels, except that nursery school endorsement is valid in nursery schools and kindergarten and the elementary endorsement is valid for grades kindergarten through 8. *N.J.A.C.* 6:11-6.2(a). The word "elementary" shall include kindergarten, grades 1-6 and grades 7-8 without departmental instructional. *N.J.A.C.* 6:3-1.10(1)(16). *Id.* at 7-8.

The ALJ noted *in dicta* that

> not all of the teachers assigned by the Board to the Primary Unit Program were certified for nursery school assignment. . . . Thus, it may be hypothesized, had the Board established and implemented a nursery school under the name of its Primary Unit, it would presumptively have been in violation of certification requirements of the regulations and of *N.J.S.A.* 18A:26-2. And presumably, therefore, petitioner would have established his case. But the evidence of what was done, in my view, in no way showed nursery school establishment but instead showed establishment merely, permissible under *N.J.S.A.*18A:44-2, of a kindergarten school or pre-kindergarten department for receipt and education of children

> over the age of four and under the age of five for lawful purposes. . . . *Id.* at 8.

As noted, *Lundy* was cited by petitioner in support of her argument that she had accrued seniority under both her nursery school endorsement and home economics endorsement when she was teaching home economics to pre-kindergarten children. Petitioner relied on the one line of dicta (*i.e.*, stated above) to conclude that she was required to have a nursery school endorsement in order to teach the prekindergarten children home economics.[4] However, the pre-kindergarten program established by the Hoboken Board of Education appears to be similar to that established in *Lundy*. If so, then petitioner was not required to have a nursery school endorsement to teach her specialty (*i.e.*, home economics) to pre-kindergarten children. (See Exhibit A & C, The Hoboken Board of Education, Pre-kindergarten Curriculum Guide, wherein the District sets forth its philosophy and beliefs about Early Childhood Education. The Hoboken pre-kindergarten program appears to be "an academic one with a written curriculum, which differentiates it, commonly, from many private nursery school programs." *Lundy*, at 5.)

Additionally, it is interesting to note that in February 1990, the State Board of Education eliminated the nursery school endorsement altogether. Currently, *N.J.A.C.* 6:11-6.1 reads as follows:

> (a) Each teaching endorsement is required for the corresponding teaching assignment. Each endorsement is valid for all levels, except that the elementary endorsement is valid for grades nursery through eight.
>
> (b) Teachers with elementary endorsements are not permitted to devote more than one-half time to teaching art, music, health, home economics, industrial arts, or physical education in elementary grades. Teachers with elementary endorsements are authorized to teach the common branch subjects, such as reading, writing, arithmetic, and spelling in the secondary school, grades seven through 12.

---

4. Please note that if the Hoboken Board of Education required petitioner to have a nursery school endorsement to teach her speciality to pre-kindergarten children, then she would have accrued seniority under both her nursery school endorsement and home economics endorsement. However, the record does not contain such information

In the proposal to eliminate the nursery school endorsement, the State Board of Education commented that the "certification reforms adopted by the Board in 1984 have produced an anomalous situation in the certification of nursery teachers." 21 *N.J.R.* 3209.

> The requirements [for a nursery school endorsement] are more rigorous than those that they replaced. However, the transition to a common body of professional entry-level knowledge eliminated all distinctions between the requirements for Nursery Teacher Certificate and those for the Elementary Teacher Certificate. The requirements for these two different certificates are now identical. The proposed amendments would resolve this duplication by eliminating the nursery certificate and by authorizing elementary teachers to teach in grades N-8. . . .
>
> The current anomaly results from the fact that the nursery certificate has always been superfluous within New Jersey's overall certification structure. Indeed, although the sole purpose of certification is to regulate public school employment, the nursery certificate was created at a time when nursery grades were relatively uncommon in public schools. It was interjected mainly in response to the perceived need of private nursery schools for special certification. Therefore, the relationships of the nursery certificate to the broader system of public school certification system was not resolved.
>
> Specifically, the work authorization of the nursery certificate (nursery and kindergarten grades) was permitted to overlap with those of other certificates. Under New Jersey's certificate and job structure, holders of subject certificates are authorized and, therefore, must be trained to teach at all levels in all public schools. A legal decision rendered in 1984 affirmed that these specialist cannot be barred from teaching their individual subjects (for example, art or music) to young children in schools that desire their services. [Emphasis added.]
>
> 21 *N.J.R.* 3209.

Thus, as this comment makes clear, holders of subject certificates (*i.e.*, home economics) are authorized and therefore must be trained to teach at all levels in all public schools. Hence, petitioner was not required to have a nursery school endorsement to teach her "speciality" to pre-kindergarten children.

CONCLUSION

Petitioner is a tenured teaching staff member of the Hoboken Board of Education. With petitioner's tenure established, the issue becomes her "seniority rights exercisable upon a reduction in force . . . ." *Walliczek,* OAL DKT. EDU 3762-84 at 7. "Those rights are set out at *N.J.A.C.* 6:3-1.10. Rights thereunder are allocated in accord with the categories or endorsements to which an employee may validly lay claim." *Ibid.*

However, the rules, rulemaking history, and case law make it clear that unless petitioner "has actually served" as a nursery school teacher, she is not entitled to seniority rights under her nursery school endorsement simply because she is the holder of such endorsement. Hence, since petitioner only taught home economics to the pre-kindergarten children, she only accrued seniority under her home economics endorsement as opposed to her nursery school endorsement. Thus, since petitioner did not accrue seniority credit under her nursery school endorsement, her rights were not violated when she was not reemployed for the 1990-91 school year as a pre-kindergarten teacher.

ORDER

It is therefore **ORDERED** that petitioner's appeal is **DISMISSED** and the relief requested by petitioner is **DENIED**.

END OF TRANSCRIPT

I, Jane R. Pearson, hereby certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision rendered in the above matter.

October 2 1991
Date

Jane R. Pearson
JANE R. PEARSON

I hereby **FILE** this oral decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Receipt Acknowledged:

10/4/91
Date

DEPARTMENT OF EDUCATION

OCT 08 1991
Date

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

jrp/e

LUCIA C. MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions and the Board filed timely reply exceptions pursuant to N.J.A.C. 1:1-18.4.

Petitioner's exceptions are a verbatim reiteration of her post-hearing brief, excepting to the conclusion of the ALJ that she did not gain pre-kindergarten seniority and, consequently, that her seniority rights were not violated. She also excepts to the ALJ's conclusion, for the reasons expressed in her post-hearing brief, that she did not use her nursery school endorsement when teaching pre-kindergarten pupils in respondent's school district.

Replying on its post-hearing submission, the Board reiterates its position that petitioner did not gain seniority in pre-kindergarten because she never actually served as a pre-kindergarten teacher. The Board further replies that petitioner did not need a nursery school certificate to teach home economics to pre-kindergarten children. It cites the ALJ's initial decision in support of its position.

Upon a careful and independent review of the record of this matter, the Commissioner affirms the decision of the Office of Administrative Law substantially for the reasons expressed in the thorough decision of the ALJ below. As noted by the ALJ, this matter hinges on a threshold determination as set forth in the decision captioned Patrick Lundy v. Board of Education of the Township of Montclair, Essex County, decided by the Commissioner December 31, 1984. as to whether the pre-kindergarten program in place in the Hoboken School District may be considered a nursery school. If such were the case, according to the dicta in Lundy, the Board would be in violation of certification requirements if it were to assign other than a teacher with a nursery school endorsement to teach in such a program. Like the ALJ, the Commissioner finds that the program offered by Hoboken is similar to that established in Lundy, that is, "an academic one with a written curriculum, which differentiates it, commonly, from many private nursery school programs." (Initial Decision, at p. 24, quoting Lundy Slip Opinion, at p. 5) See Exhibits A and C, Pre-kindergarten Curriculum Guide, wherein the district's philosophy and beliefs and curriculum about early childhood education are set forth.

Because the program under consideration herein is not a nursery school but, rather, pursuant to N.J.S.A. 18A:44-2 a kind of "pre-kindergarten department for receipt and education of children over the age of four and under the age of five***" (Initial Decision, at pp. 23-24 quoting Lundy, at p. 8), petitioner was not required to hold a nursery school endorsement to teach home economics to such pre-kindergarten children. Hence, petitioner has not accrued seniority under her nursery school endorsement, and may

not lay claim to a position based on nursery school seniority since she has not served under that endorsement. In so deciding, however, the Commissioner does not accept as part of his decision, the footnote at the bottom of page 24 of the initial decision wherein it is stated that "***if the Hoboken Board of Education required petitioner to have a nursery school endorsement to teach her speciality to pre-kindergarten children, then she would have accrued seniority under both her nursery school endorsement and home economics endorsement. However, the record does not contain such information." Such determination is based upon the fact that no nursery school endorsement was required for the instruction provided.

Accordingly, for the reasons expressed in the initial decision, as amplified herein, the instant Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

NOVEMBER 18, 1991

DATE OF MAILING - NOVEMBER 20, 1991

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANFORD, UNION COUNTY, RESPONDENT.	:	DECISION

For Petitioner, Anthony P. Sciarrillo, Esq.

For Respondent, Ralph P. Taylor, Esq.

The Board of Education of the Township of Cranford (Board) appeals to the Commissioner of Education from an action taken by the Cranford Township Committee (Committee) pursuant to N.J.S.A. 18A:22-37 certifying to the Union County Board of Taxation a lesser amount for current expense costs for the 1991-92 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate a proposal to raise $19,639,377 by local taxation for current expense costs of the school district. After the voters' rejection of the proposal, the Board submitted its budget to the Committee for its determination of the amount necessary for the operation of a thorough and efficient school system in Cranford for the 1991-92 school year pursuant to the mandatory obligation imposed on the Committee by N.J.S.A. 18A:22-37.

After consultation with the Board, the Committee made its determination and certified to the Union County Board of Taxation an amount of $19,198,250 for current expense costs.

Board's Proposal	Committee's Proposal	Amount Reduced
$19,639,377	$19,198,250	$441,127

The Board appeals the $441,127 reduction, asserting that it cannot provide the students of the Township of Cranford a thorough and efficient system of public schools during the 1991-92 school year unless the entire amount is restored to the budget.

The Committee denies that its reductions will impair the Board's ability to provide a thorough and efficient education for its students. Neither will its reductions have any effect on the ability of the Board to carry out its mandated functions.

Finding no allegation that the action of the Committee was arbitrary or capricious, the budget will be analyzed according to the line item reductions made by the Committee. The Board considered the $441,127 reduction and took action to comply with $247,148 of the reductions recommended by the Committee. Specifically, the Board has consented to the following reductions:

Account No.	Description	Amount
120D	Purchased Other Professional Technical Services	$ 6,825
220	Text Books	5,000
660	Other Expenses	29,000
720	Contracted Salaries*	126,323
820	Insurance	80,000
	TOTAL	$247,148

* The Committee's description "Contracted Salaries" is in error. It should be "Contracted Services." The Committee requests a reduction of $150,000. The Board consents to a reduction of $126,323 and requests a restoration of $23,677.

Therefore, the pertinent amounts in the budget dispute herein are shown as follows:

Proposed Tax Levy Adopted by Board	Amount of Tax Levy Certified by Governing Body
Current Expense $19,639,377	$19,198,250
Amount of Reduction by Governing Body	$ 441,127
Amount of Reduction Accepted by Board	247,148
Amount of Reduction in Dispute before Commissioner	$ 193,979

The position of the parties and the Commissioner's determination in regard to the following disputed reductions are set forth below.

Account No.	Item	Reduction
110	Salaries - Administration	$ 22,324
120B	Legal Fees	6,501
130	Other Expenses	9,000
212	Supervisor of Instruction	74,886
610	Salaries - Operations	24,560
640	Utilities	20,000
710	Salaries - Maintenance	13,031
720	Contracted Services	23,677
	TOTAL	$193,979

Account 110 Salaries - Administration Reduction: $22,324

This reduction in the amount of $22,324 is designed to eliminate the position of Board of Education Courier. The Committee believes that the position is unnecessary and that the duties performed by the courier could be assigned to other personnel already employed.

The Superintendent's Affidavit, attached to the Board's Letter Memorandum filed July 11, 1991, states that the Board would be at an incredible disadvantage without a Board courier. The duties include the delivery of educational equipment and supplies throughout the district. Other duties, too numerous to describe

here, are set forth in the Affidavit and are incorporated herein by reference. (Affidavit, at pp. 3-4)

The Commissioner is convinced from his review of the Mayor's Affidavit (attached to the Township Committee's Letter Memorandum filed September 3, 1991), which proposes that the courier's job could be shared by the 40 custodians now on the payroll, and the job description provided by the Superintendent that the position is needed as requested by the Board. Therefore, the $22,324 reduction is restored to the budget.

Account 201B Legal Fees — Reduction: $6,501

The Committee asserts that this account is overbudgeted stating that in prior years it was inflated because of protracted contract negotiations. Since there will be no contract negotiations in the current budget year, the budgeted legal fees should be reduced.

The Board asserts that it reduced its budgeted expenses in this account from $95,000 to $50,000 and that a further reduction of $6,501 is arbitrary, capricious and unreasonable. It projects attorneys' fees on an annual basis at approximately $40,000, and it has several outstanding cases from prior years which will cost an additional $10,000. Accordingly, a further reduction would leave the account underbudgeted and would be fiscally irresponsible.

The Commissioner finds that, based on the documentation contained in the Superintendent's Affidavit, the legal fees are necessary. (Affidavit, at pp. 4-5) Therefore, the $6,501 reduction is restored to the budget.

Account 130 Other Expenses Reduction: $9,000

The Board defends its need for these office expenses arguing that they are required for stationery, forms, advertising and recruitment. The Committee believes that the Board can carry out it responsibilities by spending judiciously so as to remain within the reduced amount.

The Commissioner finds the Committee's statement reasonable that a $9,000 reduction in this account can be sustained without impairing in any way the legislative mandate to provide a thorough and efficent education for the students of Cranford. Therefore, the $9,000 reduction in this account is sustained.

Account 212 Supervisor of Instruction Reduction: $74,886

The reduction of $74,886 in this account would eliminate the position of Supervisor of Instruction. The Committee asserts that the functions assigned to this position could be carried out by the Superintendent, Assistant Superintendent, Principals, Vice Principals, and Department Heads. The Committee feels that this is another layer of unneeded administration and that it can be eliminated without any adverse impact on the ability of the Board to deliver a thorough and efficient education for the students of Cranford. The Committee recommends that the Board assign the Supervisor of Instruction position to the vacant principal's position.

The Board defends its needs for the Supervisor's position stating that it is not a new position as averred by the Committee; rather, it is a replacement for an Assistant Superintendent for Personnel who retired two years ago after service of more than 25 years. The position incorporates expanded duties beyond personnel to include curriculum and instruction.

Based on this Board rationale and its further explanation of the duties required of this position, the Commissioner finds that the position is necessary as utilized in the district. Therefore, the $74,886 reduction is restored to the budget.

Account 610 Salaries - Operations Reduction: $24,560

The Committee asserts that proper scheduling by the Board would eliminate excess overtime and the need for substitute custodians; therefore, it reduced this account by $24,560. It based this determination partially on the Affidavit of the Director of Parks and Recreation who alleged that a former employee left his job so he could be employed in a similar maintenance position by the Board because he was "guaranteed" overtime pay.

The Board secured a letter from the named employee who acknowledges that he was aware of the potential for overtime and that it was a factor in his change of positions; however, he denies that he was ever promised any dollar amount or hourly amount of overtime as charged.

The Board argues further that the elimination of the monies for substitute custodians would cost the district more money because it would be forced to pay overtime to its regular custodians at $17.50 per hour, whereas substitute custodians are hired at $6.50 an hour.

Based on the above, it is clear that the Board rationale is reasonable, and no substance to the charge by the Director of Parks and Recreation has been found. Accordingly, the $24,560 in this account is restored.

Account 640 Utilities — Reduction: $20,000

The Board acknowledges that it had an unexpended balance in its electricity account of $3,510.60; however, it asserts that a $20,000 reduction is not justified based on the predictions of Public Service Electric and Gas Company. The Committee argues that the Board is unable to justify its increase in this item and the Commissioner concurs.

Therefore, the $20,000 reduction is sustained.

Account 710 Salaries - Maintenance — Reduction: $13,031

The Committee reduced this item by $13,031 to eliminate overtime pay for cutting grass on Saturdays. The Board asserts that the reduction has nothing to do with cutting grass on Saturdays and that, for the most part, grass is cut during the regular week. However, the Committee and the Board attempted a joint venture to bid for grass cutting services which failed; therefore, the individuals involved cannot be released from grass cutting services.

There is no question that the grass has to be cut, and the position of the Board is sensible and reasonable; therefore, the $13,031 is restored to the budget.

Account 720 Contracted Services — Reduction: $23,677

The Committee asserts that its reduction of $150,000 relates to capital outlay items that the Board has included in its current expense budget. The Board has used this method to avoid seeking voter approval for the expenditures. Additionally, the Board could seek other funding methods, such as lease purchase.

The Board disagrees that large scale maintenance upgrades such as roofs and heating systems should be subjected to voter approval through capital outlay budgets or separate bond referenda

on a continuing basis. However, the Board agrees to explore the possibility of lease purchase for capital renovations and has already done so for several projects. Nevertheless, it asserts that it needs restoration of $23,677 of the $150,000 reduction so that it can complete these projects through a capital leasing program and have sufficient funds to pay the interest and principal required under the leasing program.

For the reasons expressed by the Board, the $23,677 is restored to the budget.

A recapitulation follows:

Account No.	Item	Council's Reduction	Amount Restored	Amount Not Restored
110	Salaries - Administration	$ 22,324	$ 22,324	$ -0-
120B	Legal Fees	6,501	6,501	-0-
130	Other Expenses	9,000	-0-	9,000
212	Supervisor of Instruction	74,886	74,886	-0-
610	Salaries - Operations	24,560	24,560	-0-
640	Utilities	20,000	-0-	20,000
710	Salaries - Maintenance	13,031	13,031	-0-
720	Contracted Services	23,677	23,677	-0-
	TOTALS	$193,979	$164,979	$29,000

With regard to the Committee's current expense reduction of $441,127, the Board conceded reductions in the amount of $247,148 and the Commissioner directed an additional reduction of $29,000, making the total reduction $276,148. The amount restored to the budget by action of the Commissioner is $164,979.

Accordingly, the Union County Board of Taxation is directed to add $164,979 to the local tax levy for the Township of Cranford for current expense purposes of the school district for the 1991-92 school year as follows:

Amount of Tax Levy Certified by the Governing Body	$19,198,250
Amount Restored by the Commissioner	164,979
Total Tax Levy after Restoration	$19,363,229

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 20, 1991

DATE OF MAILING - NOVEMBER 20, 1991

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9221-90
AGENCY DKT. NO. 342-10/90

GLORIA BENSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF ROCKAWAY, MORRIS COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Cige, attorneys)

Ellen S. Bass, Esq., for respondent (Rand, Algeier, Tosti & Woodruff, attorneys)

Louis P. Bucceri, Esq., for intervenor Phyllis Flanigan (Bucceri and Pincus, attorneys)

Record Closed: August 23, 1991 Decided: October 4, 1991

BEFORE EDITH KLINGER, ALJ:

On October 1, 1990, Gloria Benson (petitioner) filed a petition of appeal with the Department of Education, Bureau of Controversies and Disputes, alleging that the Board of Education of the Borough of Rockaway, Morris County (Board), had violated her tenure rights pursuant to *N.J.S.A.* 18A:28-5 and her seniority and employment rights under *N.J.S.A.* 18A:28-11 and *N.J.S.A.* 18A:28-12 by employing Phyllis Flanigan (intervenor) in a full-time elementary teaching position for the 1990-91 school year to which petitioner alleges greater entitlement by virtue of seniority. The respondent Board filed its answer on October 9, 1990, and on November 8, 1990, the Department of Education transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A telephone conference was held with the parties, at which time it was determined to give the potential intervenor notice of the hearing and the opportunity to intervene.

Following the intervention of Flanigan and the completion of discovery, the parties determined that the facts in this matter were not in dispute and could be jointly stipulated. Based upon the stipulation, the parties filed cross-motions for summary decision and the matter proceeded to resolution on the papers. The record closed on August 23, 1991, following receipt of the final submission.

STIPULATED FACTS

1. At all times relevant to the petition, respondent, the Board of Education of the Borough of Rockaway, operated a kindergarten through eighth grade public school district. Seventh- and eighth-grade students in Rockaway Borough are "grouped for instruction."

2. The employment history of petitioner, Gloria Benson, is as follows:

    a) January 12, 1983 through June 30, 1983: ten hours per week, supplemental instructor.

    b) Reduction in Force (RIF) at the end of the 1982-1983 school year.

    c) Reemployed effective May 1, 1984 through June 30, 1984: 19 hours per week, supplemental instructor (maternity leave replacement).

    d) 1984-1985: 19 hours per week, supplemental instructor.

    e) September 1, 1985 through February 5, 1986: 19 hours per week, supplemental instructor.

f) February 6, 1986 through June 30, 1986: full-time elementary classroom teacher (maternity leave replacement).

g) 1986-1987: full-time teacher.

h) 1987-1986: 19 hours per week, supplemental instructor (due to RIF).

i) 1988-1989: 19 hours per week, supplemental instructor.

j) 1989-1990: full-time sixth-grade teacher.

k) 1990-1991: 19 hours, supplemental instructor.

The teacher who petitioner replaced in the 1983-84 year did not return to the District. The teacher she replaced during the 1985-86 year did return to her position.

When petitioner served as a supplemental instructor, she served in grades one through five (Lincoln School and Washington School).

3. Intervenor Phyllis Flanigan's employment history in the District is as follows:

a) September 1, 1981 through June 30, 1988: 19 hours per week, supplemental/basic skills instructor.

b) 1988-1989: full-time replacement for a sixth grade teacher on a leave of absence.

c) 1989-1990: 19 hours, supplemental instructor.

d) 1990-1991: full-time sixth-grade teacher.

The intervenor served as a supplemental instructor in grades six through eight (Thomas Jefferson School).

4. Benson holds certification as an elementary school teacher. She holds no other certification.

5. Flanigan holds certification as an elementary school teacher. She holds no other certification.

6. Flanigan's service as a full-time teacher during the 1988-1989 school year was pursuant to a contract dated September 16, 1988.

7. Elementary school teacher JoAnn Devaney retired from the Rockaway Borough schools effective June 30, 1990, even though her letter of resignation is erroneously dated June 28, 1991.

8. By letter dated July 15, 1990, Benson expressed an interest in full-time employment for the 1990-1991 school year.

9. By letter dated July 2, 1990, intervenor Flanigan expressed interest in full-time employment for the 1990-1991 school years.

10. At a public meeting held on April 17, 1990, the Board approved Benson for the 1990-1991 school year as a 19-hour-per-week supplemental instructor.

11. Benson was notified of the Board's action by letter dated April 19, 1990. On April 25, 1990, Benson acknowledged that she would continue her employment with the Board.

12. By letter dated April 19, 1990, the Board had advised Benson that her employment status would be discussed on April 17, 1990. It so advised because her appointment to a 19-hour position was a RIF from the full-time status she held during 1989-90.

13. On April 17, 1990, the Board approved the continuance of intervenor Flanigan's employment as a 19-hour-per-week supplemental instructor.

14. By letter dated April 18, 1990, Flanigan was advised of this offer of continued employment.

15. On April 24, 1990, Flanigan accepted continued employment with the Board.

16. On or about July 25, 1990, Flanigan served a petition of appeal on the Board challenging its determination to continue her part-time employment and asserting a seniority entitlement to a full-time position with the Board.

17. On August 21, 1990, the Board passed a resolution appointing Flanigan to a full-time teaching position for the 1990-1991 school year. By letter dated August 28, 1990, Flanigan was advised of this appointment. In view of the Board's determination to appoint Flanigan to a full-time position, she withdrew her petition before the Commissioner of Education.

18. A seniority list was duly prepared by the Board as of September 1990 in accordance with the requirements of Title 18A. This list shows that Flanigan was first employed by the Board in September 1981 and that she has seniority status of 6.04 years; Gloria Benson was first employed on December 1, 1982 (part-time) and she has seniority status of 4.98 years; both have elementary certification.

19. A full-time teacher employed by the Board works 30 hours per week.

20. Both petitioner and intervenor assert a seniority entitlement to the full-time position vacated by JoAnn Devaney's resignation. This position is currently held by the intervenor.

The documents evidencing the stipulated facts were attached by the parties to the stipulation and admitted into evidence by consent.

POSITIONS OF THE PARTIES

Petitioner claims that she is entitled to summary decision as a matter of law on the grounds that the intervenor, Phyllis Flanigan, was not entitled to a full-time teaching position for the 1990-1991 school year because she was never subject to a RIF within the Rockaway Borough School District. Even if Flanigan was subject to a RIF in the past, she was

still not entitled to full-time employment within the District during the 1990-1991 school year because she was not the subject of a RIF at the end of the 1989-90 school year. Further, assuming for the sake of the motion that Flanigan had been the subject of a RIF at any time during the course of her employment with the District, Benson still had greater seniority than Flanigan and, therefore, greater entitlement to the full-time teaching position given to intervenor.

The Board claims that it is entitled to summary decision against petitioner on the grounds that it was forced to fill a vacancy based upon the seniority of staff members in the relevant employment category and, on the basis of seniority, Flanigan was entitled to the position created by the resignation of a full-time teacher. The Board further urges that the petition of Benson be dismissed on the grounds that she did not file her petition within 90 days from the date of her RIF as required by *N.J.A.C.* 6:24-1.2. The intervenor moves for summary decision on the basis of her entitlement to the full-time position because of her alleged greater seniority and joins the Board in moving for dismissal of the petition on the basis of the 90-day rule.

RELEVANT STATUTES AND REGULATIONS

The following statutes and regulations are pertinent to the resolution of the issues presented by this matter.

A teacher's right to tenure is governed by *N.J.S.A.* 18A:28-5, which provides in relevant part that

> The services of all teaching staff members, including all teachers . . . serving in any school district or under any board of education . . . shall be under tenure during good behavior and efficiency and they shall not be *dismissed or reduced in compensation* except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by [*N.J.S.A.* 18A:6-9 *et seq.*], *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 . . . ;
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years;
>
> [Emphasis added.]

An exception to the tenure statute is set forth in *N.J.S.A.* 18A:16-1.1. This provides as follows:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee. . . . The act of any person so designated shall . . . be legal and binding as if done . . . by the officer or employee for whom such designated person is acting *but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.* [Emphasis added.]

Petitioner was subject to a RIF pursuant to *N.J.S.A.* 18A:28-9 following the 1989-90 school year. Her rights following such a reduction are governed by *N.J.S.A.* 18A:28-10:

> Dismissals resulting from any such reduction . . . shall be made *on the basis of seniority* according to standards to be established by the commissioner with the approval of the state board. [Emphasis added.]

Following a RIF, the board of education must determine the seniority of the persons affected according to the standards developed by the Commissioner and notify each person affected as to his or her seniority status. *N.J.S.A.* 18A:28-11.

The regulations governing seniority, which are mandated by *N.J.S.A.* 18A:28-10, are codified in *N.J.A.C.* 6:3-1.10, and provide in relevant part:

> (b) Seniority, pursuant to *N.J.S.A.* 18A:28-9 *et seq.*, shall be determined according to the number of academic or calendar years of employment, or a fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.
>
> * * *
>
> (l) the following shall be deemed to be specific categories . . . :
>
> * * *
>
> 20. Elementary
>
> * * *
>
> (ii) Any person employed at the elementary level in a position requiring an educational services certificate . . . shall acquire seniority only in the elementary category and only

> for the period of actual service under such . . . certificate....
>
> (iii) Persons employed and providing services on a district-wide basis under an educational services certificate shall acquire seniority on a district-wide basis. . . .

A teaching staff member dismissed pursuant to a RIF as authorized by *N.J.S.A.* 18A:28-9 must be placed and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which the staff member is qualified. *N.J.S.A.* 18A:28-12.

THE 90-DAY RULE

A threshold question was raised by the Board and the intervenor in their cross-motions for summary decision. These parties claim that the petitioner's case should be dismissed because it was not filed within the time mandated by *N.J.A.C.* 6:24-1.2. This regulation requires that:

> (a) To initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall serve a copy of a petition upon each respondent. . . .
>
> * * *
>
> (c) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . which is the subject of the requested . . . hearing. . . .

It is argued that petitioner was notified on April 18, 1990 of the RIF which resulted in the reduction of her working hours and compensation, but that she did not file her appeal until September 19, 1990, more than 90 days after the notice. Therefore, under *N.J.A.C.* 6:24-1.2, her petition should be dismissed.

Benson is not here appealing the RIF. She is appealing the appointment of another teaching staff member whom she alleges has less seniority to a full-time position for which she applied. The position, according to the Board, was filled following its determination of the relative seniority of the candidates for the vacant position. This determination was not made until after the position became vacant on June 30, 1990. The Board's decision that the intervenor was the more senior staff member was made sometime between that date

and August 21, 1990, when she was awarded the position. Therefore, Benson's present cause of action challenging the crediting of seniority could not have accrued prior to June 30, 1990, a date which is within 90 days of September 19, 1990, when her petition of appeal was filed with the Commissioner. Her cause of action could not have arisen more than 90 days prior to the filing of her petition. *See, Meyer v. Bd. of Ed. of Tp. of Wayne, Passaic Co.*, State Bd. of Ed. Decision (Mar. 5, 1986) at 6-10; *Ackerman v. Bd. of Ed. of Oakland*, OAL DKT. EDU 7017-85 (July 15, 1986), mod. on other grounds Comm'r. of Ed. (Aug. 25, 1986).

I therefore **CONCLUDE** that the petition of Gloria Benson is not barred by the operation of the 90-day rule.

CAN FLANIGAN ASSERT SENIORITY ENTITLEMENT TO THE POSITION IF SHE WAS NOT THE SUBJECT OF A RIF?

It is undisputed that petitioner was affected by a RIF at the end of the 1989-90 academic year. Although it did not result in her dismissal it did cause a reduction of her working hours and, consequently, her compensation, thus, it was properly characterized as a RIF *See, Ackerman, supra*.

Petitioner argues that because she and not the intervenor was the subject of the RIF, she is the one who was entitled to the full-time position for the 1990-91 academic year. In essence, petitioner is asserting that in order for otherwise inchoate seniority rights to become effective, the possessor thereof must have been directly affected by a RIF. An employee who has not been so affected does not, according to the petitioner, possess any special entitlement to any other position of employment.

Petitioner's argument is without merit. At the time a RIF occurs, seniority determinations are to be made as to all staff members. In this way, teaching members may be affected by the RIF on the basis of seniority as required by *N.J.S.A.* 18A:28-10. When the full-time position became vacant, the Board made a determination of seniority and awarded the position to the intervenor on the basis of her greater seniority.

Benson may have been the teaching staff member on the Preferred Eligible List with the greatest seniority. While this would give her preference over a nontenured teacher to fill a vacancy, *Lichtman v. Bd of Ed. of Ridgewood*, 93 *N.J.* 362 (1983), it gives her no preference over a tenured teacher with greater seniority appointed to the position.

If Flanigan has greater seniority than Benson and is equally qualified to hold the full-time position, petitioner should not be allowed to improve her position with respect to intervenor as a candidate simply by virtue of having been subject to a RIF.

The State Board in *Panarotto v. Bd. of Ed. of Emerson*, OAL DKT. EDU 4674-84 and EDU 5296-85 (May 27, 1986), aff'd Comm'r. of Ed. (July 8, 1986), rev'd State Bd. (Apr. 6, 1988), aff'd (N.J. App. Div., May 22, 1989, A-4369-87T2) (unreported), concluded that the teaching staff member with the most seniority at the time of the RIF is the one entitled to full-time employment. This is true even if that person's own employment status was not affected by the RIF. *Panarotto* at 7-9. In *Ackerman, supra,* the ALJ decided that a vacant full-time position had to be filled with the most senior employee qualified for the position. In that case, it meant that a part-time teacher was entitled to the position at issue, even though that teacher had not been directly affected by the most recent RIF as had been the board's appointee, a less senior teacher who was on the Preferred Eligible List awaiting reemployment.

I therefore **CONCLUDE** that a seniority determination would control whether petitioner or the intervenor had a seniority entitlement to the full-time position created by the June 1990 resignation without the requirement that Flanigan must also have been subject to a RIF.

CAN FLANIGAN ASSUME THE FULL-TIME POSITION IF SHE HAS NEVER HELD SUCH A POSITION IN THE PAST?

One of the arguments advanced by Benson in support of her motion for summary decision and her claim to the position in issue is that Flanigan is not entitled to the full-time position because she has never served as a full-time employee in the past. Actually, the intervenor did serve as a full-time teacher during the 1988-89 academic year when she replaced a teacher who was on a leave of absence.

In *Lichtman, supra,* at 368, the court observed that *N.J.A.C.* 6:3-1.10(b) allows a

> *pro rata* calculation of seniority based upon the total accumulated service in a specific category. In this way, actual service can be duly recognized and relevant experience and seniority of all tenured employees within a single category can be readily ascertained and compared.

In a footnote to this statement, the court observes that the regulation "makes distinctions between jobs for seniority purposes only on the basis of explicit categories and without reference to any other distinctions such as part-time or full-time employment."

I therefore **CONCLUDE** that it is only the prorated seniority of petitioner and the prorated seniority of the intervenor which will determine which of the two is entitled to fill the vacant full-time position; the fact that one or the other may have held a full-time position in the past is irrelevant to this determination.

DETERMINATION OF SENIORITY

Benson argues that she is entitled to the full-time position based on the fact that she has accumulated greater seniority than the intervenor. The past teaching record of both the intervenor and petitioner have been stipulated by the parties and, based upon the regulations and applicable case law, it is possible to make a determination from these records as to which of these two teachers should prevail.

N.J.A.C. 6:3-1.10, the regulation governing the calculation of seniority, is set forth in relevant part above. As noted in *Lichtman,* the regulations governing the determination of seniority rights do not indicate any intent to distinguish between full-time and part-time positions. *Lichtman* at 367.

The court in *Lichtman* did provide guidance with respect to the calculation of seniority for part-time employees. It is to be a *pro rata* calculation of seniority based upon the total accumulated service in a specific category. The Commissioner of Education provided further clarification in his decision in *So. River Ass'n v. Bd. of Ed. of So. River,* 1984 *S.L.D.* 1531, 1544, when he approved the local board's method of calculation, a proration of seniority based upon a comparison of the total assigned duty of part-time teachers to that of full-time teachers. In this matter, it was stipulated that a full-time teacher works 30 hours per week. In order to calculate the seniority credit due to Benson and Flanigan, their hours of service must be compared to the 30 hours a week worked by full-time teachers in the District.

Employment service which cannot be counted towards the acquisition of tenure likewise cannot be counted towards the accumulation of seniority. *Gruber v. Bd. of Ed. of*

Fair Lawn, OAL DKT. EDU 6001-80 (April 1, 1981), aff'd Comm'r. of Ed. (May 2, 1981). *See also, Sayreville Ed. Ass'n v. Bd. of Ed. of Sayreville,* 193 *N.J. Super* 424, 434 (App. Div. 1984). *N.J.S.A.* 18A:16-1.1 excludes from the time used to calculate the acquisition of tenure that time which a teacher spends substituting for another on temporary leave.

In determining the relative seniority of the two parties, it is also necessary to determine when tenure was actually acquired by employees. *N.J.S.A.* 18A:28-1 to 18, the Tenure Act, as interpreted by the Supreme Court in *Spiewak v. Bd. of Ed. of Rutherford,* 90 *N.J.* 63, 74 (1982), states that an employee of a board of education is entitled to tenure if he or she works in a position for a which a teaching certificate is required, holds the appropriate certificate, and has served the requisite period of time, provided that he or she does not fall within a statutory exemption to tenure acquisition.

Applying the rules above to the respective employment history of the petitioner and the intervenor, it appears that petitioner acquired tenure in late January 1988 and the intervenor acquired tenure at the beginning of the 1984 1985 academic year.

N.J.S.A. 18A:16-1.1, which contains the exception to tenure acquisition, also acts as a limitation on the accrual of seniority. *Gruber, supra*. However, seniority credit is proper where *N.J.S.A.* 18A:16-1.1 is not applicable; that is, where a given teacher was serving as a "permanent substitute" or filling in a vacancy as opposed to replacing a temporarily absent teaching staff member. *Sayreville Ed. Ass'n* at 428; *Ujhely v. Bd. of Ed. of Linden*, OAL DKT. EDU 5939-84 (July 10, 1985), mod. on other grounds Comm'r of Ed. (Aug. 26, 1985). For purposes of determining the nonapplicability of *N.J.S.A.* 18A:16-1.1, a "vacancy" is found to exist when the return of the absent teacher is not contemplated by the board. *Sayreville Ed. Ass'n* at 428.

From this, it appears that no seniority credit was accumulated by Benson on the two occasions when she served as a replacement for teachers who were on maternity leave. On neither of these occasions, May 1 to June 30, 1984 and February 6 to June 30, 1986, can it be said that she was "filling in a vacancy" within the meaning of the relevant case law. On both occasions, the "opening" was created by a maternity leave, not something in the nature of a resignation or retirement where the return of the teacher could not be contemplated. On the other hand, the service rendered by Benson from January 13 to June 30, 1983 was not as a temporary replacement. As such, this service falls outside of the scope of *N.J.S.A.* 18A:16-1.1, and she should receive credit towards seniority for this service.

The intervenor is entitled to seniority credit for those periods in which she served as a replacement teacher. *N.J.S.A.* 18A:16-1.1 precludes the acquisition of tenure in temporary positions but is not preclusive of the accrual of seniority in such positions when filled by an employee who is already tenured. ***Meyer v. Bd. of Ed. of Wayne***, OAL DKT. EDU 9036-82 (Aug. 19, 1983), mod. on other grounds Comm'r. of Ed. (Oct. 7, 1983), aff'd in part, rev'd in part State Bd. of Ed. (March 5, 1986), aff'd (N.J. App. Div., Sept. 24, 1987, A-3175-85T6) (unreported). Flanigan acquired tenure at the beginning of the 1985-85 academic year. Her "replacement" service was rendered during the 1988-89 academic year. As such, the intervenor is entitled to seniority credit for that period of employment because it was rendered after she had acquired tenure. Benson's period of "replacement" service were rendered prior to her acquisition of tenure in late January 1988.

The calculation of the relative seniority of petitioner and the intervenor are set forth in the tables below and reflect the application of the principles enunciated above.

SENIORITY OF PETITIONER

Period of Employment	Level of Service (hrs./wk.)	Equivalent Full-Time Service (mos.)	Seniority Credit (yrs.)
1/12/83-6/30/83 (5.5 months)	.33 (10 hrs./wk.)	1.82 months	.182 years
5/1/84-6/30/84 (2 months) (replacement service)	.63 (19 hrs./wk.)	1.26 months	0
1984-85 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years
9/1/85-2/5/86 (5.25 months)	.63 (19 hrs./wk.)	3.31 months	.331 years
2/6/86-6/30/86 (4.75 months) (replacement service)	full-time (30 hrs./wk.)	4.75 months	0

1986-87 academic yr. (10 months)	full-time (30 hrs./wk.)	10 months	1 year
1987-88 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years
1988-89 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years
1989-90 academic yr. (10 months)	full-time (30 hrs./wk.)	10 months	1 year
	Petitioner's seniority as of June 1990 =		4.403 years

SENIORITY OF INTERVENOR

Period of Employment	Level of Service (hrs./wk.)	Equivalent Full-Time Service (mos.)	Seniority Credit (yrs.)
1981-82 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years
1982-83 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years
1983-84 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years
1984-85 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years
1985-86 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years

1986-87 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years
1987-88 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years
1988-89 academic yr. (10 months) (replacement service)	full-time (30 hrs./wk.)	10 months	1 year
1989-90 academic yr. (10 months)	.63 (19 hrs./wk.)	6.3 months	.63 years
	Intervenor's seniority as of June 1990 =		6.04 years

In light of the foregoing, I **CONCLUDE** that the intervenor had greater seniority than the petitioner at the time of the vacancy at issue and was therefore entitled to the full-time position. Given the intervenor's entitlement, I further **CONCLUDE** that the action of the Board in appointing the intervenor to fill the full-time position was proper and did not violate petitioner's seniority and tenure rights.

SUMMARY DECISION

In an administrative proceeding, the standard governing the grant or denial of a motion for summary decision is contained in *N.J.A.C.* 1:1-12.5(b), which states that

> [summary decision] may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. . . .

In this matter, there are no genuine issues of material fact, and the Board and the intervenor are entitled to prevail as a matter of law. It is therefore appropriate under *N.J.A.C.* 1:1-12.5(b) that summary decision be granted in their favor.

I therefore **CONCLUDE** that the Board and intervenor are entitled to summary decision in their favor as a matter of law. I further **CONCLUDE** that the petitioner has not demonstrated that she is entitled to summary decision.

ORDER

It is therefore **ORDERED** that the motions of the Board and the intervenor for summary decision be **GRANTED**. It is further **ORDERED** that the motion of petitioner for summary decision be **DENIED**, and her petition be **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 21, 1991
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

APPENDIX

EXHIBITS

A.	Employment record of petitioner
B.	Employment record of intervenor
C.	Certification of petitioner
D.	Certification of intervenor
E.	Contract for 1988-89 school year (Flanigan)
F.	Letter of Devaney
G.	Letter of Benson, dated July 15, 1990
H.	Letter of Flanigan, dated July 2, 1990
I.	Board resolution (Benson)
J.	Letter to Benson, dated April 19, 1990
K.	Acceptance of employment (Benson)
L.	Letter to Benson, dated April 19, 1990
M.	Board resolution (Flanigan)
N.	Letter to Flanigan, dated April 18, 1990
O.	Acceptance of employment (Flanigan)
P.	Petition of Appeal
Q.	Letter to Flanigan, dated August 28, 1990
R	Seniority list

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

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4, as were separate replies by Intervenor Phyllis Flanigan and the Board of Education.

In her exceptions, petitioner directs the Commissioner to the arguments of her prior briefs and contends that the ALJ erred in concluding that 1) Intervenor Flanigan was entitled to lay claim to the position at issue notwithstanding that she had never been subjected to a reduction in force (RIF); 2) Intervenor Flanigan accrued seniority for time spent in a "replacement teacher" capacity; and 3) Intervenor Flanigan had greater seniority than petitioner at the end of the 1989-90 school year and therefore had entitlement to a full-time position for 1990-91.

In reply, Intervenor Flanigan reiterates her prior argument that under Panarotto, supra, it is immaterial whether Flanigan was riffed, as her seniority in the category at issue is greater, and that in any event Flanigan did suffer a RIF by being employed full time in 1988-89 and part time in 1989-90. Flanigan likewise relies on her prior filings to counter petitioner's other exceptions and urges the Commissioner to uphold the initial decision. In its own separate reply to petitioner's exceptions, the Board also urges complete affirmance of the decision of the ALJ and references its prior filings.

Upon careful review of this matter, the Commissioner cannot concur with the ALJ's recommendation that petitioner's appeal be dismissed. Rather, he finds that, for the reasons set forth below, petitioner is entitled to prevail in her claim to the full-time elementary teaching position in dispute herein.

Initially, the Commissioner notes that contrary to the positions of intervenor and the Board and the holding of the ALJ above, an individual's entitlement to claim a position by reason of seniority remains inchoate unless and until that individual is affected by a reduction in force. Any seniority list prepared by a district for RIF or other purposes is to be clearly distinguished from the preferred eligibility list to be maintained pursuant to N.J.S.A. 18A:28-12, as it is from the latter list that vacancies are to be filled irrespective of there being more senior persons in the district who have not been riffed but are interested in the position. The language of the statute itself makes this abundantly clear:

> If any teaching staff member shall be dismissed as a result of such reduction [in force], such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal if and when such vacancy occurs***. (emphasis supplied) (N.J.S.A. 18A:28-12)

As pointed out by petitioner, the cases relied upon by the Board and intervenor involve situations where both petitioner and intervenor had been riffed, although not in the same year; hence, because they were both on the preferred eligible list at the time of the later RIF, one as a direct result of the current RIF and the other as a consequence of an earlier reduction, the most senior teacher was entitled to the position at issue notwithstanding that that teacher's position had not been directly affected by the particular reduction then at issue. These cases do not, as the Board and ALJ appear to hold, stand for the proposition that vacancies are to be filled by the district's most senior teacher in the affected category at the time of the RIF (the "seniority list" as opposed to the preferred eligible list) regardless of whether or not his or her employment has, or had in the past, been reduced.

Nor does the Commissioner find any merit in intervenor's contention that she suffered a RIF by moving from full-time to part-time employment in 1989-90. As a review of intervenor's employment history (summarized by the ALJ at pp. 14-15 of the Initial Decision) plainly indicates, intervenor was consistently a part-time employee except for one year's service in 1988-89 as a full-time replacement for a teacher on leave, after which she returned to her regular part-time employment. In this context,

intervenor was not appointed to a vacant position such as would entitle her to employment rights associated with that position, Sayreville, supra; rather, her full-time service as a sixth grade substitute was plainly a temporary assignment outside her ordinary employment as a part-time supplemental instructor. She cannot, therefore, fairly characterize her return to the same part-time position she had always held, and would have held had the temporary assignment not presented itself, as suffering a reduction in force. This stands in marked contrast to petitioner, whose full-time supplemental position was undisputedly reduced to part-time for 1990-91. It is this reduction which entitles her to placement on the preferred eligible list for full-time positions for which she qualifies and enables her to claim the elementary position herein.

This being so, the Commissioner holds that petitioner must prevail in her claim. In so doing, however, and notwithstanding that his disposition of this case renders the matter moot in the present context, the Commissioner notes for the record that, for the reasons stated in the initial decision, he concurs with the ALJ's determinations regarding crediting of service for tenure and seniority purposes and, hence, with the ALJ's calculations regarding the parties' respective seniority at pp. 11-15 above.*

---

* Correction: Initial Decision, page 13, paragraph one, line 7, should read "Flanigan acquired tenure at the beginning of the 1984-85 academic year."

Accordingly, the initial decision of the Office of Administrative Law is reversed with respect to its findings on petitioner's entitlement to the full-time elementary position now held by Intervenor Flanigan, and the Board of Education of the Borough of Rockaway is directed to appoint petitioner to that position retroactive to the 1990-91 school year with all benefits and emoluments of employment that would have been due her had she been so placed at the time of her entitlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 20, 1991

DATE OF MAILING- NOVEMBER 20, 1991

Pending State Board

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Sumners, Council & Inniss (Thomas W. Sumners, Jr., Esq.)

For the Respondent, Picco, Mack, Herbert, Kennedy, Jaffee & Yoskin (Michael J. Herbert, Esq.)

This matter was brought before the Commissioner of Education by way of Petition of Appeal and Motion for Emergent Relief filed on November 19, 1991 by counsel for the Trenton Board of Education seeking a stay of the decision of the Eligibility Committee of NJSIAA dated November 15, 1991. Said decision upheld the determination of the Executive Director of NJISAA that Trenton Central High School forfeited two games pursuant to Article V, Section 4K(2) of the NJSIAA Bylaws (the 30-day rule) as a result of having played a sophomore, D.C., who had transferred from a parochial school before the expiration of 30 days, in its game against West Windsor High School on September 21, 1991 and again on September 28, 1991 against Hamilton High School. Petitioner waived appeal before the NJSIAA Eligibility Appeals Committee in order to

present the dispute to the Commissioner in an expeditious manner in view of the completion and announcement of the seedings for the NJISAA Central Jersey Group IV football playoffs on November 19, 1991 and of the playoff games to be played on November 30, 1991.

NJSIAA filed its Answer and Letter Brief in Opposition to the Motion for Emergent Relief on November 19, 1991. Its submission also included the minutes of the Eligibility Committee at its hearing in this matter conducted on November 14, 1991 as well as the decision of the Committee dated November 15, 1991. Said Answer admitted that a determination was made by its Executive Director that D.C.'s participation in the games Trenton Central's football team played on September 21 and 28, 1991 required forfeiture of the two games in accordance with NJISAA Bylaw Article X.

On November 21, 1991 the Commissioner of Education designated his authority to hear and decide the Motion for Emergent Relief pursuant to N.J.S.A. 18A:4-33 to Assistant Commissioner Thomas A. Henry, who denied petitioner's motion for failure to meet the standards for pendente lite restraints as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982).

In considering petitioner's claim of irreparable harm, the Assistant Commissioner relied on Burnside et al. v. NJSIAA, unpublished decision of App. Div., November 15, 1984, Dkt. No. A-625-84T7 for the proposition that participation in interscholastic sports is a privilege, not a right in rejecting petitioner's claim that there is no manner by which it and its student-athletes can be compensated adequately by monetary damages or any other remedy for the lost opportunity to participate in this year's football playoffs.

On the standard of demonstrating likelihood of success on the merits, the Assistant Commissioner relied on two cases, Board of Education of North Arlington et al. v. NJSIAA, 1983 S.L.D. 1221 and Board of Education of the Northern Highlands Regional High School District v. NJSIAA, petition filed November 10, 1982, OAL order November 17, 1982, reversed by the Commissioner November 18, 1982, Appellate Division reversed and stay granted November 18, 1982, reversed Supreme Court and stay vacated November 29, 1982, decision on remand Appellate Division October 17, 1984 in rejecting petitioner's contention that the 30-day waiting period for students transferring schools for other than a bona fide residence change was arbitrary in failing to recognize the inability of students to afford the parochial school tuition, and is thus discriminatory on the basis of wealth in violation of N.J.A.C. 6:4-1.5. The Assistant Commissioner held that the Appellate Court of New Jersey in Northern Highlands, supra, has determined that the 30-day rule and forfeiture of games as a penalty when an ineligible player participates are reasonable. The Assistant Commissioner further noted that the North Arlington, supra, case has held that the 30-day waiting period was not an unreasonable period of time to require a transferred student to wait to participate in interscholastic athletics where there was not a bona fide parental change of address. The Assistant Commissioner also cited North Arlington for the proposition that Article V, Section 4K(2) was not discriminatory based on wealth and furthered appropriate Association interests. Thus, the Assistant Commissioner ruled that petitioner has not advanced a likelihood of success on the merits of its claim.

Finally, the Assistant Commissioner held, in balancing the interests of the parties, that the equities enure on behalf of

NJSIAA, which has a greater interest in preserving eligibility standards as well as academic standards for all participating students than the interest suggested by petitioner in seeking to participate in the playoffs for the 1991 football season in its conference. Accordingly, the Assistant Commissioner denied the Motion for Emergent Relief and ordered that the merits of petitioner's claim proceed.

Petitioner supplemented the arguments advanced in its Motion for Emergent Relief in a letter brief dated November 22, 1991, and incorporated the legal arguments set forth in its Brief in Support of the Motion for Emergent Relief filed on November 18, 1991. The Commissioner notes those legal arguments and incorporates them herein by reference.

Petitioner would have the Commissioner now revisit the decisions rendered earlier in Northern Highlands, supra, and North Arlington, supra, urging that situations concerning athletes transferring from parochial to public schools must be reexamined. Petitioner contends there is no reasonable ground for arguing that a 30-day wait in a situation where a student transfers from parochial school to public because of lack of financial resources does not violate N.J.A.C. 6:4-1.5, which states that interscholastic sports "shall be available on an equal basis to all students regardless of *** economic status.***" (Letter Brief dated November 22, 1991, at p. 3, quoting N.J.A.C. 6:4-1.5)

Petitioner submits that contrary to the ALJ's conclusions in the North Arlington case wherein the judge decided that 30 days was not an unreasonable period to wait, to require D.C. to wait 30 days before participating in competition would result in his missing 1/3 of the football season. Noting that D.C. would have remained at

Notre Dame High School had his parents been able to afford it, petitioner further states that it cannot clearly be said that there is no disparate treatment when a student-athlete has to transfer for financial reasons and must wait 30 days to compete, whereas a student who is transferred due to a residency change or is relocated by a local board of education can participate immediately. Petitioner urges the Commissioner to use his authority under N.J.S.A. 18A: 11-3, 11-4 and 11-5 to strike down this rule as contrary to the public interest, and suggests that similar to residency transfers, there should be a presumption that transfer for financial reasons is not motivated by athletic advancement. Petitioner further suggests that if the transfer is not a bona fide financial transfer, the transferring student will not be granted a waiver by the school he or she has left.

Petitioner submits that the Commissioner is not compelled by the earlier decisions in North Arlington and Northern Highlands to continue to foster different treatment in the form of a 30-day waiting period for students attending New Jersey public schools. Petitioner claims two students with a legitimate right to attend a public school and to participate in interscholastic sports should have equal opportunity to participate in the same amount of competition even though one of the students is a transfer student due to a situation beyond his control, lack of financial resources.

Thus, petitioner requests that the right to fully and immediately compete in high school sports be examined fairly and carefully to foster the spirit of competition, not restriction.

NJSIAA filed no further submission to the record.

On November 22, 1991 Freehold Regional High School District submitted a letter brief as amicus curiae in support of NJISAA's position in this matter and in opposition to the Petition of Appeal filed. The Commissioner has not considered said submission in his deliberations of this matter insofar as there is no provision in the New Jersey Administrative Code, Title Six or in the Administrative Procedures Act permitting amicus curiae status to be granted or denied before the Commissioner of Education.

Upon a careful and independent review of the record of this case, the Commissioner is compelled to reject petitioner's position. To prevail in a case charging discrimination the petitioner must first make a prima facie showing of disparate treatment to a protected class. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See also Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978). Petitioner's demonstration that the disparate treatment herein, discrimination based on economic status or wealth as the protected class, fails under the facts of the instant matter because the rule in question only distinguishes between those whose parents move, and all others, not just those who are wealthy or lack wealth. Were a wealthy child to transfer from parochial school for any reason other than a bona fide residency change, he too would have to endure the 30-day waiting period, even though his parents could have afforded to continue to send him or her to a tuition-based private or parochial school. If the Commissioner were to find the rule created a "chilling effect" upon the constitutional right of those who would transfer based on wealth, each individual transfer case would be subject to scrutiny to determine the primary motivation for the transfer to avoid the

suggestion that wealth had been a distinguishing factor in the child's ability to compete. This, in the Commissioner's opinion, would render such a rule arbitrary, unreasonable, and perhaps even unconstitutional on privacy grounds. Hence, the Commissioner will not revisit the learned and considered opinion expressed by ALJ Ospenson, affirmed by the Commissioner in North Arlington, supra.

Similarly, the Commissioner finds no basis to disturb the opinion of the Appellate Court in Northern Highlands, supra.

Under the facts of that case, a pupil, J.R., transferred voluntarily from one public high school where his father was a teacher who had a contractual right to enroll his dependent children to the high school in the district where his family resided. After registering at Northern Highlands Regional High School he participated in two football games played on September 25, and October 2, 1982, in contravention of the same NJSIAA rule at issue herein. The Commissioner reversed the Office of Administrative Law's determination which had voided the decision of NJSIAA declaring the team had forfeited two games by playing J.R. before the expiration of 30 days. The Commissioner reinstated the original determination of NJSIAA. The Appellate Division reversed the Commissioner's determination and granted a stay. The Supreme Court vacated the stay, thus reinstating the Commissioner's decision. Upon reconsideration of the merits of the appeal the Appellate Division affirmed the reasonableness of NJSIAA's 30-day rule. As in this matter, by upholding the Executive Director's determination that the district must forfeit the two games wherein it played an ineligible player, the Court's decision in Northern Highlands rendered the Board's high school ineligible for the 1982 state

football championship. The Appellate Division's October 17, 1984 decision on the merits stated:

> ***NJSIAA is charged with governing interscholastic athletics. The rules and regulations which it has adopted concerning transfer students, which have been approved by the Commissioner are reasonable as is the rule requiring forfeiture of games in which an ineligible player participates. (Id., at pp. 7-8)

On facts so similar to those at issue herein, the Commissioner finds no basis for reconsidering the higher court's determinations.

The Commissioner is acutely aware of the importance of sports in a student's growth and development. However, the Commissioner notes again the Court's holding in Burnside, supra, that participation in athletics is a privilege, not a right, as well as the Commissioner's decision in D.J.K. and H.J.K. v. NJSIAA, decided by the Commissioner February 3, 1987 which reiterates the standard of review in NJSIAA cases: that is, if due process has been provided, and there is an adequate basis for the decision being reached by the NJISAA committees, the Commissioner will not substitute his judgment even when he would otherwise decide in a de novo review. Based on these precedents, the Commissioner must reject petitioner's arguments on the merits of this matter, and dismiss the Petition of Appeal, with prejudice, for the reasons expressed herein and in his Decision on Motion dated November 21, 1991.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 27, 1991

DATE OF MAILING - NOVEMBER 27, 1991

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, RESPONDENT.	:	DECISION

For Petitioner, Sidney A. Sayovitz, Esq. (Greenwood, Young, Tarshis, Dimiero & Sayovitz, P.A.)

For Respondent, Carmine R. Alampi, Esq. (Smith, Don, Alampi & D'Argenio)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Borough of Bergenfield (Board) on June 18, 1991, seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Council (Council) in the current expense tax levy for the 1991-92 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 30, 1991 and after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

	Proposed Tax Levy Adopted By Board of Education	Amount of Tax Levy Certified By Governing Body
Current Expense	$21,498,139	$21,186,991
Capital Outlay	225,368	84,868

	Amount of Reduction By Governing Body	Amount of Reduction in Dispute before the Commissioner
Current Expense	$ 311,148	$ 278,626*
Capital Outlay	140,500	140,500

The reductions at issue were effectuated by Council in the manner stated in its resolution dated May 21, 1991:

Now, therefore, be it resolved by the Mayor and Council of the Borough of Bergenfield that *** the reductions to current expense [and capital outlay] be as follows:

Account 110F Salaries/Superintendent's Office
Reduce one (1) assistant $60,000

Account 130A Expenses/Board of Education
Reduce miscellaneous refreshments, workshops, etc.... $ 3,300

Account 130B Expenses/Board Secretary's Office
Reduce convention and travel expenses ..... $ 1,000

Account 130G Centralized Research
Reduce to 1989-90 levels ..... $ 700

Account 211 Salaries/Principals
Reduce one asst. principal as result of retirement .. $ 8,000

Account 212 Salaries for Supervisory/Administrative Personnel
Replace one retiree with entry level $10,000

Account 214B Salaries for Guidance Personnel
Replace retiree with new person ..... $ 8,000

Account 215C
Reduce one secretary $18,000

Account 520A To and From School Contract - Transportation
Delete Handicap Students/Purchase New Vehicle $32,522*

Account 610A Custodial Salaries
Reduce two positions $50,000

---

* The Board had initially appealed the entire amount reduced by the Mayor and Council. Subsequent to the filing of its petition, however, the Board determined to accept the reduction of $32,522 in Account 520A, agreeing to forego purchase of a new vehicle for transportation of handicapped students. (Position Statement, at p. 10)

Account 720B Contracted Services in repair of buildings	
Reduce, or delay, scheduled projects	$56,830
Account 1020 Other Expenses/Student Body Activities	
Reduce to 1990-1991 levels	$ 9,146
Account 1122 Other Expenses/Civic Activities	
Reduce to 1990-91 levels	$ 1,650
Anticipate Additional Miscellaneous Revenues	$52,000

CAPITAL OUTLAY

Franklin School (from $44,000 to $38,000)	
Delay New Sidewalks	$ 6,000
Hoover School (from $25,800 to $9,800)	
Reduce door expense, enabling the completion of eight (8) main doors	$10,000
Delay New Intercom	$ 6,000
Jefferson School (from $20,000 to $8,000)	
Delay New Intercom	$ 6,000
Delay Outdoor Storage	$ 6,000
Lincoln School (from $74,000 to $20,000)	
Postpone Roof	$30,000
Reduce New Doors (complete 10)	$24,000
Washington School (from $12,500 to $0)	
Delay Refinish Wood Floors	$12,500
R.W. Brown (from $15,000 to $5,000)	
Reduce Door Repairs	$10,000
High School (from $42,700 to $12,700)	
Postpone refinishing rear Gym Floor	$30,000

On July 9, 1991, Council filed an Answer admitting the amounts set forth above, but leaving the Board to its proofs in all other respects. On July 29, 1991, a position paper was filed by the Board pursuant to N.J.A.C. 6:24-7.8. Council did not file a position statement until August 19, 1991, subsequent to an August 7, 1991 letter from the Board noting the governing body's failure to file a position statement or otherwise set forth reasons for its reductions and urging the Commissioner to therefore invoke a heavy presumption against their validity pursuant to Board of Education of

the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989). The position statement filed by Council reiterated the list of reductions set forth in the resolution quoted above and claimed that the justification for them "was put forth in the substance of the past meeting between the parties." (Position Statement, at p. 3) Council further contended that the reductions would "in no way impair [the Board's] obligation to provide a thorough and efficient system of education." Ibidem Neither reply position statements nor final summations were filed by the parties and upon expiration of the time for such filings on September 6, 1991, the record of this matter was closed by the Commissioner.

Upon careful review of the arguments of the parties, which are incorporated herein by reference, the Commissioner first concurs with the Board that Council's failure to set forth written reasons for its reductions at any time during the present proceeding must cause a heavy presumption against their validity to be invoked at the outset. Deptford, supra Further, pursuant to regulations governing submission of budget appeals to the Commissioner, where the governing body fails to provide written reasons for its reductions at the time of its position statement, it shall "***bear the burden of demonstrating that its***actions were not arbitrary or capricious." N.J.A.C. 6:24-7.8

This standard, however, must be applied in conjunction with that set forth in Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966), namely whether the Board has shown that the amount of moneys available to it as a result of Council's actions is insufficient for provision of

a thorough and efficient education. Accordingly, the presumption against Council and its onus to demonstrate an absence of arbitrariness herein does not relieve the Board of its obligation to demonstrate that the restorations it seeks are necessary for a thorough and efficient education, as only on this basis can the Commissioner override the will of the electorate as expressed in the budget vote of April 30, 1991.

Mindful, then, of the balance to be applied in his standard of review, the Commissioner makes the following determinations with respect to the specific line items reduced by Council.

REDUCTIONS TO CURRENT EXPENSE

1. Account 110F Salaries/Superintendent's Office
Reduce one (1) assistant ($60,000)

The record herein shows that a 1990-91 reorganization of the district for budgetary reasons resulted in abolishment of two assistant superintendencies and several other central office positions and creation of two lesser paid administrative assistant positions, one of which is now proposed for elimination by the municipality. The Board has demonstrated, however, that the positions in question are assigned crucial programmatic, student support, personnel, operational and crisis management duties which cannot be handled by a single assistant in a district of Bergenfield's size and complexity, particularly where the Superintendent and School Business Administrator are the only remaining central office administrators. Accordingly, the Commissioner finds that Council's reduction of $60,000 for elimination of this position would significantly impair the district's ability to provide a thorough and efficient education and must therefore be rejected.

2. Account 130A Expenses/Board of Education
Reduce miscellaneous refreshments, workshops, etc. ($3,300)

The portion of this account from which Council's reduction was made is the amount remaining (approximately $12,200) over and above NJSBA dues, which are a statutory obligation pursuant to N.J.S.A. 18A:6-45. The Board contends that these miscellaneous expenses, which include about $4,700 for NJSBA convention attendance and $7,500 for subscriptions, other workshops and the like, must be maintained at their proposed level because, as the Commissioner has held in the past, the Board has a right and an obligation to attend the NJSBA workshop and other forms of inservice in order to educate itself in the discharge of its duties. Upon review, however, the Commissioner finds that the Board has failed to demonstrate that its obligation to educate itself necessitates the full Board's attendance at inservice events (including workshop) or regular receipt of subscription publications over and above those provided by NJSBA as part of its membership benefit. In view of the budget defeat, the Commissioner finds that selected Board members could attend inservice events and share the results of their experience with the full Board, and that greater economy could be exercised in attendant discretionary expenditures such as accommodations, transportation, meals and subscriptions, without impairing the district's ability to provide a thorough and efficient education. Accordingly, Council's reduction of $3,300 in this account is sustained.

3. Account 130B Expense/Board Secretary's Office
Reduce convention and travel expenses ($1,000)

Convention and travel expenses listed in this account total about $3,950, of which $1,440 represents a $120 monthly contractual travel allowance, with $3,500 remaining for supplies and about $1,250 for various dues. The Board argues that its proposed amounts are consistent with past expenditures and necessary for efficient operation of the school business office. In the Commissioner's view, however, the Board has not demonstrated that the Board Secretary could not remain properly supplied and current in expertise with a lesser expenditure, whether through attendance at fewer conventions, reduction of travel over and above that covered by the contractual allowance or through sacrifice of nonessential supplies (e.g. magazines other than those provided through professional memberships), nor has it demonstrated that funds to cover this reduction could not be allocated from other sources. Accordingly, Council's reduction of $1,000 to this account is sustained.

4. Account 130G Centralized Research
Reduce to 1989-90 levels ($700)

The Board has herein argued that the amount budgeted ($3,240) represents the exact cost of purchasing software and other materials necessary to implement middle school program innovations in writing and technology, while Council's action appears to be rooted in the $700 discrepancy between the amount appropriated and the actual expenditure in this account in 1989-90 (actual expenditure information for 1990-91 is not given). As the Commissioner deems ongoing development of programs responsive to changing educational, technological and workplace demands to be

consistent with the goals of a thorough and efficient education and Council's reduction of this account to 1989-90 levels appears to be based on the erroneous assumption that the account is overbudgeted, this reduction is rejected as arbitrary and capricious in the absence of sound educational reasons for such action.

5. Account 211 Salaries/Principals
Reduce one asst. principal as result of retirement ($8,000)

The Board has shown that it requires a total of $669,885 to meet existing contractual obligations in this account: $653,825 for salaries and $16,060 for retirement benefits. The remainder of the total amount budgeted ($701,853) is to cover anticipated salary increases of approximately 5.5%. To fully meet this anticipated commitment, the Board argues, it actually needs about $4,000 more than budgeted, or $705,845, so that Council's reduction of $8,000 would leave the Board with approximately $12,000 less than it projects to be required for existing and projected obligations. The Commissioner finds, however, that even after Council's reduction is made and existing contractual obligations are met, $23,968 would remain in this account. This amount should be sufficient, together with any additional amounts the Board may elect to transfer from other accounts, for projected salary increases which have not yet been contractually set. Accordingly, the reduction is sustained.

6. Account 212 Salaries, Supervisory/Administrative Personnel
Replace one retiree with entry level ($10,000)

The Board notes that the person hired to replace the retiring supervisor has comparable seniority and education credits, so that the Board's contractual obligation of $65,350 for this position remains unchanged. Although the record does not indicate when this person was hired and, hence, when the obligation was

incurred, the Commissioner cannot permit Council, by mandating an entry level salary, to effectively restrict the Board to selecting inexperienced candidates upon retirement of senior administrators. As choice of the best candidates for district positions is an essential component of providing a thorough and efficient education, the $10,000 reduced from this account is restored.

7. Account 214B Salaries for Guidance Personnel
Replace retiree with new person ($8,000)

The Board has shown that it requires a total of $417,414 to meet existing contractual obligations in this account: $400,980 for salaries and $16,434 for retirement benefits. The remainder of the total amount budgeted ($422,000) is to cover anticipated salary increases of approximately 5.5%. To fully meet this anticipated commitment, the Board argues, as it did with respect to assistant principals, that its actual needs are $439,000, so that Council's reduction of $8,000 would leave the Board with approximately $25,000 less than required. The Commissioner finds that, unlike the situation with respect to assistant principals above, the amount remaining after Council's reduction ($414,000) would actually be insufficient to fund existing contractual obligations. The reduction of $8,000 to this account is therefore restored.

8. Account 215C Secretarial
Reduce One Secretary ($18,000)

The Board has demonstrated that since 1989-90 it has been undertaking a systematic reduction in the number of its secretaries, and that the 1991-92 budget even without Council's reduction had provided for elimination of two positions. It is clear from the Board's submission that loss of a further position at the present time would seriously impair effective administrative operations in the district. Accordingly, this reduction is restored.

9. Account 610 Custodial Salaries
Reduce two positions ($50,000)

The Board has provided a building/square footage schedule of its custodial assignments and argued that, given the age and overall condition of its buildings, reduction in the custodial staff assigned to clean them would necessarily jeopardize the education of children. Upon review, however, the Commissioner notes that no reason has been set forth to demonstrate why the R.W. Brown and Lincoln schools have numbers of staff assigned to them beyond the proportionate level of other schools in the district according to the square footage measures offered by the Board in support of its position. In the absence of evidence to this effect, the Commissioner finds that two positions from the district's full custodial complement could be eliminated without impairing provision of a thorough and efficient education. Accordingly, Council's reduction is sustained.

10. Account 720B Contracted Services/Building Repair
Reduce or delay scheduled projects ($56,830)

During its meeting with the Board, Council provided a list of projects it believed could be eliminated or postponed. The Board, in turn, has provided the Commissioner with what it believes to be the justification for each of these items. Upon review, the Commissioner finds that the Board has demonstrated, through photographs and verbal descriptions, the necessity for the following projects in terms of safety and/or reasonable maintenance:

	Restoration
Exterior trim painting on five buildings	$ 5,000
Hall locker painting	5,000
Repave and reline Jefferson basketball courts	12,000
Repave Jefferson driveway	1,000

The Commissioner also determines to restore funds for a series of floor sandings and/or refinishings which, while they do not appear threatening in terms of immediate safety, will clearly require attention in the near future:

	Restoration
Refinish wood floor/graphic arts room	$2,200
Sand classroom floors/Middle School	6,125
Sand/refinish Lincoln gym floor	2,200

These relatively modest repairs can most efficiently and economically be effectuated in the current year because all hardwood floor work in the district's five-year maintenance plan (Exhibit D) is scheduled for 1991-92, so that deferral of this work would actually run counter to sound operations.

The Commissioner finds that the following projects, however, while they are certainly desirable and will not be deferrable indefinitely, could be delayed at least for the present year (or in the case of playground renovation, phased in over two or more years) without impairing the district's ability to provide a thorough and efficient education:

Carpet high school conference room	($ 1,080)
Carpet superintendent's office	($ 1,200)
Tile wall outside cafeteria	($ 3,025)
Carpet main office floors/middle school	($ 1,500)
Carpet Washington kindergarten floors	($ 1,500)
Renovate Washington playground	($15,000)

Council's reductions for these projects, therefore, are sustained.

11. Account 1020 Other Expenses/Student Body Activities
Reduce to 1990-91 levels ($9,146)

The Board has demonstrated that routine cost increases alone account for $4,300 of the proposed increase for 1991-92, with the remainder representing a commitment on the part of the Board to adequately fund a broad array of high school academic clubs and

teams. As the Commissioner finds that these activities have been planned as an integral part of the district's overall educational and co-curricular program, he declines to sustain Council's reduction without evidence that the reduction was based on sound educational considerations. Accordingly, $9,146 is restored to this account.

12. Account 1122 Other Expenses/Civil Activities
Reduce to 1990-91 levels ($1,650)

The proposed increase in 1991-92 levels for this account is due to the cost of additional meetings and materials associated with a concerted effort to improve parent and community outreach in the district. As parental and community involvement are essential to a thorough and efficient education and the need for them is both continually growing and increasingly recognized, the Commissioner cannot sustain Council's reduction of this modest increase in expenditure in the absence of sound reasons for such an action. $1,650 is therefore restored herein.

13. Anticipate Additional Miscellaneous Revenue ($52,000)

The Board has demonstrated that its projections in this account, which includes amounts for interest, rents, fines and gate receipts, are based on reasonable and prudent projections of interest rates and past experience, respectively. Therefore, in the absence of evidence to the contrary from Council, the Commissioner determines to restore the full amount reduced.

REDUCTIONS TO CAPITAL OUTLAY

The projects reduced or delayed by Council are itemized in its resolution as set forth above and need not be repeated here. With respect to these various projects, the Board has compellingly demonstrated their necessity through photographs and histories of

its buildings and submission of a comprehensive, carefully designed five-year maintenance plan (Exhibit D), review of which makes it abundantly clear that each project delay would have deleterious effects, both educational and fiscal, on the entire cycle. As the Board has an affirmative obligation to maintain sound, safe facilities for its students and it is clear that Bergenfield's physical plant is both aging and suffering the effects of past neglect and long-deferred maintenance, the Commissioner here finds that the entire amount budgeted by the Board for capital outlay must be restored in order to ensure that the children of Bergenfield receive the thorough and efficient education to which they are entitled by law.

Thus, for the reasons set forth above, the Commissioner determines to restore $193,021 and sustain $85,605 of the $278,626 in current expense reduction appealed herein, as summarized by the chart below:

	CURRENT EXPENSE	RESTORE	SUSTAIN
1.	Assistant to Superintendent	$ 60,000	$ -0-
2.	Board conventions, etc	-0-	3,300
3.	Board Secretary travel, etc.	-0-	1,000
4.	Centralized Research	700	-0-
5.	Replace retiree with entry level	-0-	8,000
6.	Replace retiree with entry level	10,000	-0-
7.	Replace retiree with entry level	8,000	-0-
8.	Eliminate secretary	18,000	-0-
9.	Eliminate two custodians	-0-	50,000
10	Contracted services/repair	33,525	23,305
11.	Student body activities	9,146	-0-
12.	Parent/community outreach	1,650	-0-
13.	Anticipate more revenues	52,000	-0-
	TOTALS	$193,021	$85,605

He likewise determines, as indicated above, to restore the entire $140,500 reduced from capital outlay.

Accordingly, the Bergen County Board of Taxation is directed to make the necessary adjustment as set forth below to reflect a total of $21,380,012 to be raised in tax levy for current expense and $225,368 for capital outlay purposes by the Borough of Bergenfield for the 1991-92 school year:

	CURRENT EXPENSE	CAPITAL OUTLAY
Original Tax Levy	$21,498,139	$225,368
Reduction	311,148	140,500
Tax Levy After Reduction	21,186,991	84,868
Restoration	193,021	140,500
Tax Levy After Restoration	$21,380,012	$225,368

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 26, 1991

DATE OF MAILING - NOVEMBER 26, 1991

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Charles I. Auffant (Marvin L. Comick, General Counsel, Board of Education, City of Newark)

For the Respondent, Michael J. Herbert, Esq., (Picco, Mack, Herbert, Kennedy, Jaffe & Yoskin)

This matter has come before the Commissioner by way of Petition of Appeal filed on September 19, 1991 by the Board of Education of the City of Newark seeking a reversal of the decision of the NJSIAA Executive Committee, which affirmed the determination of the Controversies' Committee holding Barringer High School responsible for an altercation that ensued on October 27, 1990 between the Bloomfield High School football players and spectators and the Barringer High School football players and spectators following a league-scheduled game. Petitioner seeks reversal of such decision as being arbitrary, capricious and unreasonable and further seeks a prohibition against NJSIAA from assessing petitioner fines in the amount of $1,000, as well as reversal of the Committee's having placed the Barringer athletic program on

probation for a period of two years during which the football team will be disqualified from championship consideration, and directing petitioner to submit a specific plan on how it intends to upgrade its athletic program and supervision and what steps it will take to prevent a repetition of the events of October 27, 1990. Newark also requests the Commissioner to direct that NJSIAA review its rules and procedures of its member leagues and conferences for the conduct of hearings to ensure that they comply with the requirements of due process and fundamental fairness and that the Commissioner of Education take all necessary action to achieve the desegregation of the various leagues, conferences and NJSIAA. Finally, petitioner asks that this matter be transmitted to the Office of Administrative Law for a hearing where the Board will be permitted to present evidence substantiating its claim.

On October 15, 1991, Respondent NJSIAA filed its Answer to the Petition of Appeal. NJSIAA contends the decision of its Controversies Committee and its Executive Committee were not arbitrary, but were based upon substantial credible evidence in the record following a two-day hearing before the former Committee establishing the following Findings of Fact:

> 1. Barringer and Bloomfield are members of the NNJIL, [comprising] seventeen large public and parochial schools in Bergen, Essex and Passaic Counties.
>
> 2. On October 27, 1990, Bloomfield hosted the Barringer football team. Bloomfield was accompanied by a head football coach, eight assistant football coaches, and the availability of twelve Bloomfield police officers, who served as security, in addition to certain faculty members at the school.
>
> 3. There was a scoreless tie, with about six minutes remaining in the contest, when a "face mask" call was assessed against the Barringer

team, resulting in a 15-yard penalty. As a result of that call, one of the Barringer players made inappropriate gestures to the Bloomfield stands, resulting in an additional 15-yard penalty being assessed against Barringer. As a result of the 30-yard penalties, the Bloomfield, team offense moved to the 10-yard line, and eventually scored the lone touchdown of the game.

4. On the ensuing kick-off, Barringer apparently fumbled and the ball was recovered by Bloomfield. A scuffle and then a series of fights broke out on the playing field, resulting in considerable delays. After a conference between the officials and coaches for both teams, it was decided with about three minutes to play that the game should be terminated, so as to avoid any further violence.

5. As the Bloomfield team was being escorted off the field by the athletic and coaching staff of that school, they were attacked by a number of members of the Barringer team. That attack was without physical provocation, and came after the attacking Barringer players ran a considerable distance to encounter the departing Bloomfield team.

6. The Controversies Committee observed various members of the Barringer football team swinging helmets, and generally attacking the Bloomfield team and some of its coaching staff. As a result of the fighting, one member of the Bloomfield coaching staff was injured, and another collapsed after the fight concluded. A Bloomfield player was taken by ambulance to the hospital, where he was held overnight.

7. While Barringer Coach Delanno and three members of the Barringer team testified that racial slurs were uttered by Bloomfield, that testimony was contradicted by the three game officials, witnesses presented by Bloomfield, and Barringer Coach Immerso. The Controversies Committee could not eliminate the possibility that racial remarks were made, but, clearly, that fact had not been established by the credible testimony.

8. Even if racial remarks or slurs were made on the playing field, under no circumstances could the Controversies Committee find that such offensive conduct could justify the otherwise unprovoked physical assault on the Bloomfield players and coaching.

> 9. The Controversies Committee found that the conduct of the Game Officials was appropriate, and believes that these Officials acted with a great deal of restraint and patience under very trying circumstances.
>
> 10. The Controversies Committee also finds that Bloomfield provided adequate security, that [its] coaching staff took commendable action in attempting to separate the fighting players; and that the Bloomfield team did not exhibit any unsportsmanlike conduct at the football contest on October 27.
>
> 11. The only sanction or punishment of any kind that was imposed on the Barringer team was the disqualification of two players, which was mandated in any event, by the filing of the Game Official's reports. The Controversies Committee finds the response of Barringer to this exhibition of unprovoked violence to be totally inadequate. (Exhibit 2, Answer, at pp. 13-15)

NJSIAA further claims that the hearing before the Controversies Committee and Executive Committee provided Newark with complete due process. It claims over the course of two days of hearing, the Controversies Committee permitted both Newark and Bloomfield High School to present evidence, examine and cross examine witnesses, and to argue their respective cases to the Committee. NJSIAA claims that both schools were represented by counsel, and Newark had full notice of the charges that had been brought against it by Bloomfield High School. In addition to taking testimony from witnesses, three game officials and one conference official, NJSIAA claims thirty-four documents were admitted into evidence, the hearing was transcribed, and a seventeen-page decision was rendered stating the Committee's findings of fact and conclusions.

NJSIAA argues that contested cases before the Commissioner of Education involving NJSIAA are based on the record before NJSIAA,

pursuant to a 1985 Attorney General's opinion, and that said procedures do not authorize a new hearing before an administrative law judge.

As explanation for the fine levied against petitioner, NJSIAA observes that it is authorized to assess fines of up to $1,000 against member schools found to have violated the organization's rules and regulations, and that such rules and regulations have been adopted by its member schools and approved by the Commissioner of Education. Moreover, NJSIAA contends the fine assessed Barringer was a result of two instances of improper conduct, the first occurring in September 1990 against its soccer coach who was cited for improperly pulling his team off the field of play in protest of a referee's decision. In the second incident, NJSIAA claims that Barringer's football team was cited for instigating a melee after the October 27, 1990 football game between it and Bloomfield High School after the game had been stopped by the officials. NJSIAA advances the position that it is therefore rational that the entire Barringer Athletic Department be put on probation for its failure to properly oversee its athletic programs.

Finally, NJSIAA asserts that the desegregation of various leagues and conferences which are members of NJISAA has already been considered by the Commissioner of Education, and plays no role in the instant matter. It contends that NJSIAA is an institution comprised of all public, parochial and private high schools which seek to become members, and is in no way limited in its membership, nor does it reflect any discriminatory intent or purposes.

NJSIAA seeks dismissal of the petition and also seeks costs and counsel fees in accordance with Article XIII, Section 8, page 57 of the Bylaws of NJSIAA as adopted by NJSIAA and Newark.

Before proceeding to a discussion of the merits of the matter, the Commissioner will first address other issues raised by the parties.

Initially, in response to Newark's prayer for relief that the matter be transmitted to the Office of Administrative Law for hearing, it has been determined pursuant to the May 15, 1985 Attorney General Advisory Opinion that where the record developed before NJSIAA is "wholly adequate" (Opinion, at p. 5), the Commissioner may determine the matter on appeal from the final decision of the Association, without additional testimony pursuant to his authority under N.J.S.A. 18A:11-3. In the instant case, the Commissioner is entirely convinced that the record developed by both the Controversies Committee and Executive Committee of NJSIAA conforms with the due process to which petitioner in this matter is entitled and, thus, the Commissioner's determination on the record before him, which includes the transcripts of the two hearings below, as well as the written decisions of those bodies, will rest on the record developed below without further hearing.

Further, the Commissioner notes among Newark's prayer for relief a request that NJSIAA review the rules and procedures of its member leagues and conferences for the conduct of hearings to ensure that they comply with the requirements of due process and fundamental fairness. The record before the Commissioner indicates that a Committee of the Northern New Jersey Interscholastic League (NNJIL) of which Barringer High School is a member, was formed and

heard from witnesses to the events. That committee reviewed a video tape of the contested football game and issued its decision on November 13, 1990. Thereafter, two hearings have been conducted by NJSIAA of this matter, the former of which was conducted before the Controversies Committee. Moreover, the transcript provided by NJISAA of that hearing indicates that Newark was provided a full opportunity to confront witnesses, to hear the charges levied against it, to examine and cross examine witnesses and to present the school's own position, witnesses, and evidence and to be represented by counsel. Further, the report prepared by NNJIL pursuant to NNJIL Regulation V:8-B serves as a predicate to the appeals before NJSIAA's Controversies Committee and Executive Committee. As a member of NNJIL and NJSIAA, Barringer has voluntarily agreed to such processes and may not be heard at this juncture to challenge the internal mechanisms of which it is a voluntary part. Therefore, pursuant to N.J.S.A. 18A:11-3, the Commissioner's authority to consider appeals from final determinations of NJSIAA, the Commissioner dismisses Newark's prayer that NJSIAA review its rules and procedures for the conduct of league and conference hearings to ensure that they comply with the requirements of due process and fundamental fairness as being without merit.

Additionally, the Commissioner recognizes and has approved the Bylaws and Constitution, Rules and Regulations of NJSIAA. Among the powers of the Association is authorization to assess fines of up to $1,000 against member schools which are found to have violated NJSIAA rules and regulations. See Bylaws, Article X, Section 3, B, page 53 of the 1991-92 Handbook. Pursuant to N.J.S.A. 18A:11-3,

upon the adoption of a resolution of membership with the Association, all local boards of education, their faculty and student participants are governed by the rules and regulations of the Association. Accordingly, by virtue of petitioner's membership in such Association, it has bound itself voluntarily to abide by the rules of the Association. It may not seek by way of prayer for relief, therefore, a finding that NJSIAA be prohibited from assessing fines against the public purse when petitioner itself has approved and agreed to become subject to said rules and regulations. Accordingly, such remedy sought by Newark on behalf of its Barringer High School in the instant Petition of Appeal is dismissed as being without merit.

The last procedural matter in this case concerns a Motion to Intervene filed on November 4, 19, 1991 by counsel for the Bloomfield Board of Education, contending it is an indispensable party to the matter pursuant to the standards set forth at N.J.A.C. 1:1-16.3. In the alternative, Bloomfield asks to participate in the hearing before the Commissioner pursuant to N.J.A.C. 1:1-16.4. Bloomfield claims it was a party to the proceedings before NJSIAA and, thus, that it has a direct interest in the outcome of this matter. Additionally, Bloomfield contends that its interest in the proper conduct of future interscholastic activities between Barringer and Bloomfield should be addressed in this matter. Because the Newark Board asks the Commissioner to take action to achieve integration of various leagues and conferences of NJSIAA, as well as a review of the NJSIAA rules and procedures, to ensure that they comply with the requirements of due process and fundamental fairness, Bloomfield submits the petition includes both the

determination regarding the Bloomfield/Barringer game and other issues relating to the conduct of those other leagues. It claims its interest in affirming the decision of NJSIAA is sufficiently different from that of NJSIAA, since collateral matters are also being addressed in the appeal. It believes it can best address its own interest in the conduct of future interscholastic sporting events. As a party below, Bloomfield asserts that it can add measurably and constructively to the scope of the case.

Because it intends to adhere to any time schedule established by the Commissioner there should be no delay arising from Bloomfield's inclusion in this matter, it claims.

Should the Motion to Intervene be denied, Bloomfield argues in the alternative that it should be allowed to participate, pursuant to N.J.A.C. 1:1-16.4, which permits a somewhat lesser degree of involvement in a proceeding where "a full determination of a case may substantially, specifically and directly affect a person or entity who is not a party to the case***." (N.J.A.C. 1:1-16.4) In this regard Bloomfield notes that the Newark Board seeks the reversal of the decision affirming Bloomfield's complaint and dismissing Barringer's cross-complaint. It also notes that Newark seeks transmittal of this matter to the Office of Administrative Law for a hearing which, if granted, will have a direct material effect on Bloomfield.

Upon a careful review of the Motion to Intervene and the brief accompanying it, the Commissioner denies such request. First, the request is belated. Newark filed its petition in this matter on September 19, 1991. Bloomfield offers no adequate explanation of why it waited 46 days to file its motion, except to note in its

submission that "***Newark refuses to consent to Bloomfield's participation in this matter, despite Bloomfield's direct involvement in the incident in issue and the proceedings below." (Brief in support of Motion to Intervene, at p. 2) Although counsel for Bloomfield called to notify the Bureau of Controversies and Disputes of its intention to file such submission by Friday, October 25, 1991, even that self-imposed deadline was not honored. With the football season coming to an end and playoffs drawing near, the Commissioner finds Bloomfield's lackadaisical filing without justification.

Even assuming, however, that Bloomfield's motion had been more timely, the Commissioner finds it has failed to meet the standards established by N.J.A.C. 1:1-16.3 for intervention. Therein it is stated:

> 1:1-16.3 Standards for intervention
>
> (a) In ruling upon a motion to intervene, the judge shall take into consideration the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters.

Upon a careful review of the matter before him, the Commissioner finds the decision of the Controversies Committee, affirmed by the Executive Committee of NJSIAA, was not arbitrary or capricious, and is thus affirmed by the Commissioner as are the penalties levied by said Organization against petitioner.

Newark's challenges to the findings of the Controversies Committee and the Executive Committee seek reversal of the penalties

assessed against it by those bodies, particularly relating to the fines levied and period of probation and exclusion from football championship consideration for two years. Bloomfield is not affected by such challenge. Petitioner's cross-appeal requesting the Commissioner to direct that NJSIAA review the rules and procedures of its member leagues and conferences for the conduct of hearings to ensure that they comply with the requirements of due process and fundamental fairness is likewise not an issue directly affecting the Bloomfield Board. In this regard, the Commissioner notes that the only two parties which are directly affected by any outcome the Commissioner might order are petitioner and NJSIAA. Bloomfield is not implicated by what Newark seeks to accomplish. Thus, the Commissioner finds that Bloomfield's request to intervene does not add measurably and constructively to the scope of such cross-claim.

Finally, that Newark asks that this matter be transferred to OAL for a hearing that might involve Bloomfield's relitigating the matter does not establish sufficient justification, in the Commissioner's judgment, to permit intervenor status for Bloomfield, in that any such hearing would have been a risk assumed by Bloomfield in originally filing its complaint before NJSIAA against Newark in the first instance. Accordingly, Bloomfield's request to intervene is rejected.

Similarly, the Commissioner finds no basis to grant the lesser inclusive participation status sought by Bloomfield. Under N.J.A.C. 1:1-16.4, participation is allowed to a third party at the Commissioner's discretion, where "a full determination of a case may substantially, specifically and directly affect a person or entity

who is not a party to the case***." For the reasons expressed above, the Commissioner finds Bloomfield has failed to demonstrate that the case herein substantially, specifically and directly affects Bloomfield. Thus, participation status is also denied.

In assessing the merits of the matter at hand, the Commissioner has read the transcripts of the appeal before the Controversies Committee, as well as that of the Executive Committee. He has also reviewed all the documents submitted, and has viewed the approximately 25-minute videotape provided by NJSIAA of the last six or seven minutes of play in the game and the melee which followed. In arriving at his independent judgment of the matter, the Commissioner is not so much swayed by the videotape of the game as he was by the witnesses presented by both sides at the hearing conducted below. The Commissioner agrees with the concern expressed by Barringer's counsel that a videotape of an event provides but one perspective. The Commissioner's consideration of this matter has been altogether more thorough, weighing the testimony of those who were eyewitnesses to the events of October 27, 1990 and the documents submitted more heavily than that provided by a one-camera videotape, albeit that such tape was made by an independent source, a cable television company.

The Commissioner's review of the testimony taken at the Controversies Committee hearing in this matter comports with that summarized in its report at pages 8-13, and the Findings of Fact that follow on pages 13-15. Moreover, the Commissioner concurs with said Committee's noting that the three Barringer student-athletes, and Barringer football Coach Delanno all suggested that Bloomfield players yelled racial slurs, and that said testimony is indeed

troubling. Equally troubling was the testimony by those students that such alleged slurs provoked the fight at the end of the game. Like the Committee, the Commissioner's careful review of the testimony, however, reveals that three game officials, Barringer Assistant Coach Immerso, and some Bloomfield representatives all testified that no such utterances were heard. Further, although one of the students indicated he reported such slurs to Coach Delanno, Tr. (1-17-91) 76, the Coach could not recount whether he informed the officials of such complaint, Tr. (1/17/91) 180 and, further, that he could only remember one athlete of his complaining of racial remarks Tr. (1-17-91) 182. Yet, the testimony of the head coach from Barringer indicates that he conducted a pep talk with his students before this game, as is his usual procedure, instructed his students to ignore any such slurs saying "don't let anybody get your goat." Tr. (1-17-91) 178 See also Tr.(2-19-91) 240 wherein Coach Delanno indicated he advised his students before the game in question, "It's a game to have fun, to ignore any comments made by anybody, just to walk away, not to get involved." Tr. (2-19-91) 240

Indeed, student-athlete Rhahjon Watson testified that after hearing racial slurs his response was "***[i]t made me feel bad but then again it made me feel hungry. I wanted to show these guys we weren't no joke. It made me feel -- but then again it made [m]e want to play harder and run and hit to do what we had to do to come out with a win so they could feel stupid." Tr. (1-17-91) 148 With such exemplary coaching encouragement and attitude demonstrated by at least one player, it would be remiss on the Commissioner's part, indeed, to do any less than condemn any suggestion that the fisticuffs which ensued during and following the game in question

could be explained away or excused by racial taunts. The Commissioner will not condone or excuse such egregious behavior.

The videotape does not make plain, in the Commissioner's judgment, who threw the first punch in the fight following the game. However, it is plain from the testimony of those present at the hearing below that the Bloomfield team was directed by their coaches to proceed to their fieldhouse at the south end of the field at the same time that the Barringer team was directed to proceed in the other direction to their buses. The record indicates that at the time such directive was given, there were approximately 40 yards between the players. See Tr. (2-19-91) 217.

Yet, one student from Barringer testified that "our team ran over there" toward Bloomfield's team as it departed for the fieldhouse after a racial slur was heard. See Tr. (1-17-91) 160. The video supports the Barringer student's position that the Barringer team moved toward the Bloomfield team contrary to the directives of their respective coaches to proceed to opposite ends of the field. The videotape also makes plain that the Bloomfield team was running to the fieldhouse, without gesticulating in any way perceivable to the viewer of the tape. Hence, the Commissioner concludes, as did the Committee below, that had Barringer proceeded as directed to its own buses, no fight would have occurred.

Similarly, the testimony elicited at the Controversies Committee Hearing made plain that the Barringer Team experienced control problems long before the melee after the game was called. Mr. Sinclair, the umpire referee in charge of defense, indicated that "***on several occasions Barringer players were hollering at each other and pushing each other in the defensive huddle, and I

told the coach on several occasions about this and that he should try to regain control of his team." Tr. (1-17-91) 135 Mr. Minervini, another of the referees at the game, indicated that he talked to the Barringer coach before he left the field for half time asking the coach to "***talk to his kids and get them together.*** They were at each other's throats calling each other names." Tr. (1-17-91) 136

The Barringer student-athletes who testified confirmed that which was clear on the video, that Barringer players demonstrated poor sportsmanship on two occasions before the game was called. Rhahjon Watson testified:

> Mr. Herbert: By "the players," are you referring to any particular team?
>
> Mr. Watson: Barringer.
>
> Mr. Herbert: Barringer. Were you one of the players that was yelling at the referee or the official?
>
> Mr. Watson: Yes. (Tr. (1-17-91) 142)

Later, when asked by the attorney for Bloomfield if he saw the student in the videotape pick up his middle finger towards the sidelines, Rhahjon Watson replied, "Yes," and further indicated that he knew who the player was who had done that. Tr. (1-17-91) 171

The Commissioner finds such uncontrolled conduct, coupled with the melee at the end of the game, even if baited, to be a serious breach of good sportsmanship as established by Article IX of the NJSIAA Bylaws.

Accordingly, the Commissioner concludes that the determinations rendered by the Controversies Committee below, based on its Findings of Fact, affirmed by the Executive Committee, were

not arbitrary, capricious or unreasonable and, thus, the penalties meted against petitioner were likewise reasonable.

Thus, for the reasons expressed by the Controversies Committee and the Executive Committee of NJSIAA, as augmented herein, the Commissioner adopts as his own the findings and conclusions of NJSIAA, affirms the penalties assessed by the Organization, as is its prerogative under its Bylaws and regulations, and dismisses the Petition of Appeal. In so deciding, the Commissioner notes that Article XIII, Section 8 of the NJSIAA Bylaws as adopted by petitioner entitles NJSIAA to be awarded costs and counsel fees in conjunction with the defense of this Petition of Appeal.

COMMISSIONER OF EDUCATION

NOVEMBER 26, 1991

DATE OF MAILING - NOVEMBER 26, 1991

Pending State Board

BOARD OF EDUCATION OF THE BOROUGH OF OCEAN GATE, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF OCEAN GATE, OCEAN COUNTY, RESPONDENT.	:	DECISION

Gelzer, Kelaher, Shea, Novy & Carr, for Petitioner
(Paul J. Carr, Esq.)

Richard S. Haines, Esq., for Respondent

This matter was opened before the Commissioner of Education by way of the filing of a Petition of Appeal by the Board of Education of the Borough of Ocean Gate (Board) on June 21, 1991 seeking a restoration of $34,550 by which the Borough Council of the Borough of Ocean Gate (Council) had reduced the 1991-92 budget after defeat by the voters of the district. The reduction and amounts in dispute are set forth below:

Proposed Tax Levy Adopted By District Board	Amount of Tax Levy Certified By Governing Body
Current Expense $610,724	$576,174
Amount of Reduction in the Budget by Respondent	**Amount of Reduction in Dispute Before the Commissioner**
Current Expense $ 34,550	$ 34,550

On August 2, 1991 Council filed an Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6.

On September 13, 1991 the Board filed its written Position Statement in support of the Petition of Appeal. On August 19, 1991 Council filed a copy of its resolution of May 21, 1991 setting forth the line item reductions imposed at such time and the reasons for such reductions. No formal Statement of Position was filed by Council. Neither party filed rebuttals or final summations. The resolution reads in pertinent part:

Acct. #	Line #	Item and reason for reduction	Original Amount	Cut	Final Amt.
110	49	Administration Salaries Salaries adequate at present level	$82,000	$ 4,750	$77,250
130	52	Other Expenses increase too high over previous year	14,840	2,000	12,840
215	61	Salaries - secty. & clerical 5% increase should be adequate	25,600	900	24,700
220	63	Textbooks 25% increase over last yr. should be sufficient. This large increase is more than warranted by number of student population estimate.	13,000	1,000	12,000
240	65	Teaching Supplies This is needed for additional 1st gr. Suggest put both 1st grades in same bldg. move 6th grade into ½ of library and move 2nd gr. into main bldg.	34,000	5,000	29,000
260	67	Purchase Prof. Ed. Servs. Feel this should be part of teachers duties.	2,500	2,500	-0-

610	88	Operation of Plant - Salaries There was a lge. incr. 1989-90 to 1990-91. Do not think another is necessary at this time.	35,600	1,600	34,000
650	92	Supplies Too large an increase over last yr.	7,000	1,000	6,000
710	96	Maintenance of Plant - Salaries Regular help should be able to handle summer work as they will not be doing things required while school is in session.	2,300	2,300	-0-
720	97	Contracted Services Recommend extend over 5 years. Not necessary to do all at one time. Feel over estimated.	39,659	9,000	30,659
730c	99	Purchase New Equipment Not enough detail. Feel should do more comparison shopping.	12,372	2,000	10,372
910	118	Food Services - Salaries Do not think pupil population increase warrant[s] additional help in this area.	5,500	1,500	4,000
210	182	Speech Instruction - Salary School Board said this was a budget error.	8,100	1,000	7,100
		Total Amount Cut		$34,550	

While the Commissioner will deal with the substance of the charges raised by each of the parties to this dispute in a later portion of this decision, he notes the New Jersey Supreme Court in Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989) held that the governing body

in a budget dispute is required to provide its statement of reasons to the board of education at the time the reductions are made. In so ruling in a matter in which the Commissioner and the State Board of Education had granted summary decision in favor of the board, the Court went on to rule that while the Commissioner is entitled to assign a greater presumption of arbitrariness the longer the governing body delays in providing its reasons, he should not grant summary decision absent an opportunity to consider the merits. It is noted that Council's reasons for its reduction are contained within its resolution.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the authority for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner to review and decide appeals brought by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of the Township of East Brunswick v. Mayor and Council of the Township of East Brunswick, 48 N.J. 94 (1966) and Deptford, supra.)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount of monies cut by the governing body is necessary for the provision of a thorough and efficient system of education.

BOARD'S POSITION

By way of an overview of its position, the Board points out that it has three buildings which pursuant to the monitoring process require either renovation or replacement. The Board has included within its Position Statement a copy of an application for continuing the use of substandard classrooms for the 1990-91 school year pending the development of plans for their replacement by way of a building program. (See Board's Statement of Position, at p. 9.)

The Board points out that it has hired an architect who prepared schematic plans for an addition to its building and is currently studying alternative views of financing a building project.

The Board further points out that it has experienced an increase of 14 in its student enrollment from 181 to 195 students and requires the addition of a first grade class. The Board contends that such class requires added start up costs as well as requiring that part of the school library be converted to a sixth grade classroom.

The Board further points out that an action plan for updating its curriculum was formulated as a result of failing monitoring in the area of curriculum. Consequently it points out that it has hired a committee of teachers at $18 per hour for summer time curriculum work. It also has purchased a drug education curriculum for implementation in the 1991-92 school year.

The Board also points out that it applied for $70,422 in discretionary aid funds from the Commissioner for which it was awarded $30,000. Finally, the Board indicates that it applied for a cap waiver in the amount of $61,555 and received approval for a waiver in the amount of $29,000.

The specific line item account reductions and the Board's response to them are set forth below:

Account 110 Administration Salaries — Reduction: $4,750

The Board points out that it has concluded its salary negotiations with the personnel whose salaries are paid out of this account. Based upon those negotiations, the Board indicates that the total salary requirement for such persons is $79,785 out of a proposed budgeted amount of $82,000. Despite the fact that the regular salary requirements fall slightly below the amount budgeted, the Board points out that the additional amounts would be necessary should substitutes be required for replacement of ill personnel.

Account 130 Other Expenses — Reduction: $2,000

This line item includes dues to the New Jersey School Boards Association which are mandated by law, as well as membership in the Ocean County School Boards Association. Also included are amounts for running school board elections and Board Secretaries' expenses, such as professional dues and tuition reimbursement for both the Board Secretary and the chief school administrator.

Account 215 Salaries - Secretarial/Clerical — Reduction: $900

The Board points out that the salary of the individual in this account has now been established at $24,608 but it contends that the $900 reduction should be restored to provide funds for substitutes should illness occur.

Account 220 Textbooks — Reduction: $1,000

The Board contends that the textbook account increase is necessitated by increased enrollment and also reflects the expanded curriculum mandated by the Department of Education.

Account 240 Teaching Supplies Reduction: $5,000

The Board contends that the $9,000 increase in this account reflects the needs of a new first grade class as well as additional costs for meeting the needs of all other teachers for supplies.

Account 260 Purchased Professional Services Reduction: $2,500

The Board argues for the restoration of the entire amount to cover the cost of compensatory teachers for curriculum work required as a result of failing monitoring. The compensation of teachers, contends the Board, is mandated by its collective bargaining agreement.

Account 610 Operation of Plant - Salaries Reduction: $1,600

The Board points out that its salary requirements have now been determined as a result of negotiations. These needs are $24,608 for the full-time custodian and $8,750 for the part-time custodian for a total of $33,358. Any remaining amount in this account, the Board contends, is necessary for purposes of hiring substitutes.

Account 650 Supplies Reduction: $1,000

The Board argues that the increase in this account reflects the additional first grade class as well as a general increase in student population.

Account 710 Maintenance of Plant - Salaries Reduction: $2,300

The Board presents the argument that the amount budgeted in this account is to compensate substitutes hired during Christmas, Easter and the summer when the full-time custodian is taking his five weeks of vacation. The amount is predicated upon a fixed rate for a fixed period of time. The Board argues that the funds here are necessary to ensure a clean, healthy and safe plant for students to attend.

Account 720 Contracted Services Reduction: $9,000

The monies budgeted in this account reflect the start up costs of the new classroom, asbestos removal and bringing a building up to fire code standards.

Account 730c Purchase New Equipment Reduction: $2,000

The Board contends that the increased amount budgeted in this account directly relates to the establishment of a new classroom. It lists many items of furniture required for this purpose. (See Board's Statement of Position, at p. 4.)

Account 910 Food Services - Salaries Reduction: $1,500

The Board argues that the salary for food services has been established at $5,400 and therefore requests the restoration of $1,400 of the $1,500 reduction in this account.

Account 210 Speech Instruction - Salary Reduction: $1,000

While the Board acknowledges that the salary of the speech instructor is fixed at $7,100, that salary is for speech instruction one day per week. It contends that such schedule is insufficient to meet the needs of the classified student population. The Board contends that the superintendent has requested the hiring of additional speech therapy time which would far exceed the $1,000 by which this account was reduced. The Board points out that speech therapy is a mandated service.

COUNCIL'S POSITION

The Commissioner notes that Council has presented no independent Statement of Position, relying solely upon its Statement of Reasons contained within its resolution imposing the reductions. Since these reasons have been incorporated in a earlier part of this decision, the Commissioner sees no need to repeat them and will therefore proceed to a determination.

COMMISSIONER'S DECISION

Account 110 Administration Salaries — Reduction: $4,750

Based upon the admission by the Board that the regular salary requirements in this account amount to $79,785 out of $82,000 budgeted, the Commissioner determines that $2,750 in this account be restored and a reduction of $2,000 be sustained. The Board's argument relative to substitute pay is without merit.

Account 130 Other Expenses — Reduction: $2,000

Upon review of the Board's arguments and the reasons provided, the Commissioner finds that the Board has failed to precisely establish why this account has risen by over $5,000. The Commissioner affirms the reduction of $2,000 imposed by Council despite the Board's contention that the reasons provided are too imprecise.

Account 215 Salaries - Secretarial/Clerical — Reduction: $900

Upon examination of the actual salary requirements, the Commissioner concludes that the $900 reduction should be sustained. The Board's argument relative to the need for possible substitutes is unconvincing.

Account 220 Textbooks — Reduction: $1,000

Although the Board argues for restoration due to increased student population and the need to implement new curricular materials, it provides no specific data to substantiate such contention. The Commissioner is not convinced that the Board cannot meet the obligations which it professes to have within the confines of the account as reduced which still permits a significant increase. The reduction of $1,000 is sustained.

Account 240 Teaching Supplies Reduction: $5,000

While the reasons presented by Council are not reasons but suggestions for alternative housing arrangements which bear no relationship to the issue of the need for teaching supplies, the Commissioner finds that the Board has likewise failed to spell out by way of specific supply needs how the new first grade class justifies a $9,000 increase in teaching supplies. For instance, what are the district's per pupil costs for supplies multiplied by the number of new students?

In light of the foregoing, the Commissioner affirms the $5,000 reduction imposed by Council.

Account 260 Purchased Professional Services Reduction: $2,500

The Commissioner finds Council's rationale that it feels curriculum development should be part of the regular duties of teachers to be not only entirely without merit but not to constitute a reason. The Commissioner therefore directs a restoration of the $2,500 by which this account was reduced.

Account 610 Operation of Plant - Salaries Reduction: $1,600

Again, while the Commissioner finds the reason presented by Council not to be responsive to the issue, the admission by the Board that its established salary needs are presently $33,358 of $35,600 originally budgeted, leads the Commissioner to find that the reduction imposed by Council can be sustained without injury to the district's ability to provide a thorough and efficient system of education. The reduction of $1,600 is therefore sustained.

Account 650 Supplies Reduction: $1,000

While the Commissioner finds no real rationale in Council's argument relative to the size of the increase being too great over the previous year, he likewise finds the Board's arguments relative to the impact of the new first grade class or the need for additional supplies to be equally unpersuasive. Under the circumstances, therefore, since the Board bears the burden of persuasion, the Commissioner affirms the reduction of $1,000 in this account.

Account 710 Maintenance of Plant - Salaries Reduction: $2,300

The Commissioner finds Council's reasoning to be reflective of a lack of understanding as to the kinds of maintenance activities which take place during summer months and vacations. The Commissioner therefore finds the Board's argument persuasive and directs the restoration of the $2,300 by which Council reduced this account.

Account 720 Contracted Services Reduction: $9,000

The Board's argument that the $9,000 increase in this account relates directly to the costs of creating a new classroom, asbestos removal and bringing a building up to fire code standards is persuasive. Council's position that too much is being done at one time does not answer the Board's need to carry out these tasks which will provide adequate facilities which are safe.

The Commissioner directs the restoration of the $9,000 by which this account was reduced.

Account 730C Purchase New Equipment Reduction: $2,000

Despite the Board's insistence that the new equipment needs directly relate to the new classroom, it offers no specific data which would convince the Commissioner that those needs could not be

met within the parameters of the $10,372 remaining in this account which still represents a very sizeable increase over previous years' appropriations. The $2,000 reduction is sustained.

Account 910 Food Services - Salaries Reduction: $1,500

Since the Board has indicated that the salary under this line item has been established at $5,400 and it requests restoration of $1,400 of the $1,500 by which Council reduced it, the Commissioner directs the restoration of $1,400 and sustains the reduction of $100.

Account 210 Speech Instruction - Salary Reduction: $1,000

The Commissioner notes that Council provides no reason for the recommended reduction other than to contend that the Board had indicated the budgeted amount as an error. If, as the Board contends, it will be hiring additional speech therapy time, then the need for the restoration of the $1,000 in this account is clearly warranted since current services require $7,100 of the $8,100 budgeted. The Commissioner therefore directs the restoration of the $1,000 in this account.

SUMMARY

Account	Amount of Reduction	Amount Not Restored	Amount Restored
110	$ 4,750	$ 2,000	$ 2,750
130	2,000	2,000	-0-
215	900	900	-0-
220	1,000	1,000	-0-
240	5,000	5,000	-0-
260	2,500	-0-	2,500
610	1,600	1,600	-0-
650	1,000	1,000	-0-
710	2,300	-0-	2,300
720	9,000	-0-	9,000
730C	2,000	2,000	-0-
910	1,500	100	1,400
210	1,000	-0-	1,000
TOTALS	$34,550	$15,600	$18,950

The Commissioner directs that the Ocean County Board of Taxation strike an additional current expense tax levy of $18,950 for purposes of support of the public schools of the Borough of Ocean Gate which when added to the amount of $576,174 previously certified by the governing body will result in a total current expense tax levy of $595,124 for 1991-92.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 2, 1991

DATE OF MAILING - DECEMBER 2, 1991

BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For Petitioner, Dennis J. Helms, Esq.
(Mathews, Woodbridge and Collins)

For Respondent, Joseph L. Bocchini, Jr., Esq.
(Bocchini and Bliss)

The Board of Education of the Township of Lawrence (Board) appeals to the Commissioner of Education from an action by the Township Council of the Township of Lawrence (Council) pursuant to N.J.S.A. 18A:22-37 certifying to the Mercer County Board of Taxation a lesser amount for current expense costs for the 1991-92 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate a proposal to raise $21,734,282 for current expense and $274,000 for capital outlay by local taxation. The proposal was rejected by the voters. Thereafter, the Board submitted its budget to Council for its determination of the amount necessary for the operation of a thorough and efficient school system in the Township of Lawrence for the 1991-92 school

year pursuant to the mandatory obligation imposed on Council pursuant to N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Mercer County Board of Taxation $21,615,782 for current expense purposes, a reduction of $118,500. The Board resolved to accept reductions in the amount of $18,500; however, it resolved to appeal the remaining reduction of $100,000 which Council recommended that it reduce from its surplus. The $100,000 surplus is the sole item in dispute.

The proposal, certification and reduction are shown below:

Proposed Tax Levy Adopted by Board	Amount Certified By Governing Body
$21,734,282	$21,615,782

Amount of reduction by governing body:

Current Expense $118,500

Amount of reduction in dispute before Commissioner:

Current Expense $100,000

The Board's Petition of Appeal was filed in this matter on June 11, 1991. Council's Answer was filed on July 1, 1991; however, no documents setting forth the reasons for Council's reductions have been filed, with the exception of its Resolution No. 262-91, attached to its Answer, which reads in pertinent part as follows:

> BE IT FURTHER RESOLVED, that these deductions and reasons for these reductions are set forth as follows:
>
> 1. Other Non-Tax Revenues; "Appropriation from surplus"
> Add $100,000.
>
> The reason for this change is that Council believes that additional surplus can be used as revenue to offset the tax impact of the 1991-1992 Board of Education Budget. Council recognizes that the Department of

> Education provides "guidelines" regarding retention of surplus, however, Council notes that these are guidelines and not State mandates. (Council's Exhibit A)

The Board filed two additional papers on August 1 and 5, 1991, and Council responded to these submissions on September 4, 1991, to argue a citation quoted by the Board in defense of its appeal. The Board filed its last submission on September 5, 1991, protesting, as it did earlier, that Council's response is out of time pursuant to the requirements of N.J.A.C. 6:24-7.8.

The Board responded to Council's Answer and its Resolution to defend its need for the $100,000 in surplus reduced by Council. The Board submits that the objections raised by Council in its Answer are the only ones it has raised and they are insubstantial for all the reasons set forth in its letter to the Commissioner dated August 1, 1991.

The Board asserts that it made a drastic cut in its staff, program and services of almost $1,000,000 prior to submitting its budget to the voters. This reduction was made in educational programs, reduction of staff in support areas and denying renewals of extra duty pay positions in six sports, cheerleading, color guard, National Honor Society, student government and stage management.

At the time of its meeting with Council, the Board estimated its surplus to be $299,425 for the 1991-92 school year. However, subsequent to that meeting the Board determined that it had outstanding obligations to an architect and bond counsel in the amount of $70,000 and unanticipated expenses from various parts of its budget in the amount of $80,000. The only way it could cover those expenses was through surplus. In the opinion of its auditor,

a surplus of $300,000 is dangerously low since it represents less than 1.5% of its current expense budget. (See Affidavit of Robert A. Hulsart, filed July 22, 1991.)

Council did not offer any reasons nor give any educational considerations for its $100,000 reduction, other than its Resolution (Exhibit A), which sets forth at page 2 the following:

> [T]he reductions do not affect instruction or impact student-related needs and [do] not impair the ability of the Lawrence Township Board of Education to provide its students with a "thorough and efficient" education***.

In examining this budget as a whole, it is apparent that the Board has been conscientious and considerate in its obligation to the taxpayers by reducing nearly $1,000,000 from the budget before it was submitted to the electorate. However, the Board failed to inform Council of its $150,000 obligation set forth, ante, at their meeting because it was unaware of such obligation at that time. Nevertheless, even without that obligation, the Board surplus would be only 3% of its current expense budget.

Although the adequacy of Council's reasons and educational considerations must be addressed, the Commissioner must also determine the adequacy of the Board's budget. As the Commissioner said in Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, Middlesex County, 1968 S.L.D. 139: "***The problem is one of total revenues available to meet the demands of a school system ***." (at 142) This is the budget crisis faced by the Lawrence Township Board of Education.

It is clear from the record that even Council refused to reduce line items, evidently convinced that each was necessary as presented. A reasonable surplus is also a necessary item ripe for

educational consideration. Consequently, the Commissioner concludes that Council's reduction of surplus is unreasonable in that it failed to take into account any educational considerations in its determination to remove $100,000 from the Board's surplus account. Board of Education of Deptford v. Mayor and Council of Deptford, 116 N.J. 305, 315 (1989). Further, the Court has stated in Board of Education of the Borough of Fair Lawn v. Mayor and Council of the Borough of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976), aff'd 153 N.J. Super. 480 (App. Div. 1977):

> ***It is also clear that the board has the right, subject to ultimate review by the Commissioner of Education, to maintain a reasonable surplus in order to meet unforeseen contingencies. [citations omitted] Patently, the whole purpose of the board's maintenance of a surplus would be defeated if it were required to be expended for regularly budgeted and appropriated purposes.*** (at 273)

Based on the above, the Commissioner determines that the restoration of $100,000 in surplus current expense funds is necessary for the operation of a thorough and efficient system of schools in the Township of Lawrence for the 1991-92 school year.

Accordingly, the Mercer County Board of Taxation is directed to add to the local tax levy for the Township of Lawrence $100,000 for current expenses of the school district for the 1991-92 school year as follows:

CURRENT EXPENSE TAX LEVY

Tax Levy Certified by Council	$21,615,782
Amount restored by the Commissioner	100,000
Total Tax Levy after Restoration	$21,715,782

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 2, 1991
DATE OF MAILING - DECEMBER 2, 1991

BOARD OF EDUCATION OF THE TOWNSHIP OF DOWNE, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF DOWNE, CUMBERLAND COUNTY, RESPONDENT.	:	DECISION

Montgomery, McCracken, Walker and Rhoads, for Petitioner
(Ralph H. Colflesh, Jr., Esq., of Counsel)

Paul Van Embden, Esq., for Respondent

This matter was opened before the Commissioner by the filing of a Petition of Appeal by the Board of Education of the Township of Downe (Board) appealing the reduction in the 1991-92 budget imposed by the Mayor and Township Committee of the Township of Downe (Committee) pursuant to the provisions of N.J.S.A. 18A:22-37. The aforesaid reduction consisted of $168,292 in current expense. As a result of this reduction, the amount in dispute before the Commissioner is summarized below:

Proposed Tax Levy Adopted by the District Board of Education	Amount of Tax Levy Certified by Governing Body
Current Expense $737,318	$569,026
Amount of Reduction By Governing Body	**Amount of Reduction In Dispute Before Commissioner**
Current Expense $168,292	$168,292

On July 23, 1991, the Committee filed its Answer pursuant to the provisions of N.J.A.C. 6:24-7.6. On September 4, 1991 both the Board and the Township Committee filed Position Statements.

Neither party filed responses nor final summations. On October 2, 1991, the Board filed a letter from its Assistant Superintendent for Business/Board Secretary indicating that it anticipated a potential boiler breakdown at its Dividing Creek School at a replacement cost of $80,000, with additional costs of $70,000 to upgrade the rest of the heating system. This letter further reported that the Board received notice of an increase in tuition costs due to Bridgeton High School for the education of its pupils grades 9-12 resulting in an alleged $75,720 shortfall in the amount budgeted for tuition purposes.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the authority for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner to review and decide appeals brought by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of the Township of East Brunswick v. Mayor and Council of the Township of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the monies cut by the governing body are necessary for the provision of a thorough and efficient system of education.

In the instant matter the Committee, upon defeat of the 1991-92 budget by the electorate and after consultation with the Board as prescribed by N.J.S.A. 18A:22-37, recommended the following line item reductions and rationale:

ADMINISTRATION

Line Item 49 Salaries Board Secretary's Office 110-b $ 18,000.00

This cut reflects eliminating the position of Assistant Superintendent, and hiring a Certified Board Secretary, at an entry level salary of not more than $30,000.00. This represents a savings of $18,000.00 to the taxpayers.

Line Item 49 Salaries Board Secretary's Office 110-b 8,704.00

Student population shows no significant increase, nor is there an increase in the administrative workload, so a full-time secretary is not justified. This represents a savings of $8,704.00 to the taxpayers.

PURCHASED PROFESSIONAL SERVICES

Line Item 50 Legal Fees 120-b 10,000.00

Line item over budgeted based on previous years expenditures. This represents a savings of $10,000 to the taxpayers.

OTHER EXPENSES FOR ADMINISTRATION

Line Item 52 Board Member Expenses 130-a 3,000.00

Line item over budgeted based on previous years expenditures. This represents a savings of $3,000.00 to the taxpayers.

Line Item 52 Superintendent's Office 130-f 1,000.00

Line item over budgeted based on previous years expenditures. This represents a savings of $1,000.00 to the taxpayers.

INSTRUCTION

Line Item 54 Salaries-Kindergarten 213-01 5,000.00

Line item over budgeted, the reduced amount still covers all contracted salaries and expenses. This represents a savings of $5,000.00 to the taxpayers.

Line Item 55 Salaries-Grades 1-5 7,000.00

Line item over budgeted, the reduced amount still covers all contracted salaries and expenses. This represents a savings of $7,000.00 to the taxpayers.

Line Item 56 Salaries-Grades 6-8 $ 20,000.00

Line item over budgeted, the reduced amount still covers all contracted salaries and expenses. This represents a savings of $20,000.00 to the taxpayers.

Line Item 56 Salaries-Grades 7-8 26,855.00

Based on the fact that there are only 39 students in the 7th and 8th grades, which presently have 4 teachers, we recommend the cutting of 1 teacher and better utilization of the remaining 3 to meet instruction needs. This represents a savings of $26,855.00 to the taxpayers.

Line Item 61 Salaries-CST Secretary 215-c 12,813.00

Since the previous budget there have been no increases in the services or responsibilities of the CST. The secretarial responsibilities of the CST should be assigned to existing secretaries. This represents a savings of $12,813.00 to the taxpayers.

Line Item 62 Aides 216 17,800.00

This is a new position and cannot be justified since there is no increase in enrollment or responsibilities. This represents a savings of $17,800.00 to the taxpayers.

Line Item 66 Travel 250-b 2,700.00

Line item over budgeted based on previous years expenditures. This represents a savings of $2,700.00 to the taxpayers.

OPERATION OF PLANT

Line Item 88 Salaries Summer 610 2,080.00

Eliminate this line item and implement more efficient use of full-time employees. This represents a savings of $2,080.00 to the taxpayers.

Line Item 90 Heat-Oil 630 3,000.00

Line item over budgeted based on previous years expenditures. This represents a savings of $3,000.00 to the taxpayers.

Line Item 90 Telephone 640-d 1,900.00

Line item over budgeted based on previous years expenditures. This represents a savings of $1,900.00 to the taxpayers.

Line Item 90 Supplies - Grounds 650-b 275.00

Line item over budgeted based on previous years expenditures. This represents a savings of $275.00 to the taxpayers.

MAINTENANCE OF PLANT

Line Item 98 Purchase of Equipment-Replacement 730-a 8,000.00

Proposed purchases should be advertised for quotes, to insure greatest return for dollars spent. This would represent a savings of at least $8,000.00 to the taxpayers.

MAINTENANCE OF PLANT

Line Item 99 Purchase of Equipment 730-c 1,165.00

Proposed purchases should be advertised for quotes, to insure greatest return for dollars spent. This would represent a savings of at least $1,165.00 to the taxpayers.

FIXED CHARGES

Line Item 106 Insurance-Employee 820-b 13,000.00

The elimination of previously mentioned positions, would reduce fixed charges by the stated amount. This would represent a savings of $13,000.00 to the taxpayers.

FOOD SERVICES

Line Item 120 Deficits-Regular 930 6,000.00

The food service program should be reviewed for cost effectiveness, and a consideration of using part-time employees, having no benefit packages, should be considered. This would represent a savings of $6,000.00 to the taxpayers.

TOTAL OF ALL REDUCTIONS $168,292.00

(Township Committee's Position Statement, Attachment)

BOARD'S POSITION

ADMINISTRATION

Account 110-b Salaries Board Secretary's Office Reduction: $18,000

The Board argues that the Committee's rationale for this reduction is without merit in that it advocates the hiring of a "Certified Board Secretary" at a salary of $30,000, thus saving $18,000. The Board points out that current state regulation does not permit the hiring of persons in the capacity of Board Secretary who are not certified as School Business Administrators.

Under the foregoing circumstances, the Board contends it would be unable to obtain the services of a properly certificated individual at a salary less than that being paid the current certificated incumbent.

Account 110-b Salaries Board Secretary's Office Reduction: $8,704

The Board contends that the Committee's position relative to the secretary to the Board Secretary position reflects a lack of understanding of the organization of the central office staff. It is the Board's contention that the position in question has been a full-time one. The Board contends that the position in question had previously been listed under the 200 account as a principal's secretary but that person had in fact been assigned 4/5th of that time to the Board Secretary's office. Those hours, contends the Board, were increased to full time in the Board Secretary's office, necessitated by the increasing complexity of school finance and an anticipation of mandated General Accounting Principles (GAP) which will require double entry bookkeeping in the future.

PURCHASED PROFESSIONAL SERVICES

Account 120-b Legal Fees Reduction: $10,000

The Board contends that the Committee has failed to acknowledge the cost of litigation. The Board contends that its 1990-91 budget for legal fees had been overexpended as a result of being forced to defend its interests in three zoning suits. It also claims that the Committee fails to take account of the cost of the current litigation in pursuing this appeal.

OTHER EXPENSES FOR ADMINISTRATION

Account 130a- Board Member Expense Reduction: $3,000

The Board contends that of the $10,000 budgeted in this account $4,692 is mandated by law as dues to the New Jersey School

Boards Association (NJSBA). The remaining $5,308 is spread over nine Board members to meet expenses for conference attendance by those Board members. The Board contends that its actual expenditures in 1990-91 were $16,821 which was greater than the $9,500 budgeted in this account.

Account 130-f Superintendent's Office Reduction: $1,000

The Board argues that this account for 1990-91 was overexpended. The money in this account pays for the conference expenses and professional dues of the Superintendent. The Board contends such expenditures are necessary to maintain the professional knowledge base of its Superintendent.

INSTRUCTION

Account 213 Salaries - Instruction Reduction: $58,855

The reductions in this account encompass line items 54-56 and involve salaries for teachers K-8. The Board points out that the amount budgeted for salaries for 1991-92 ($413,066) represents an actual reduction of $53,934 from the amount budgeted in 1990-91 ($467,000). The Board argues that the Committee's rationale is fallacious since it fails to account for the full contractual salary costs for all teachers who service pupils grades K-8. The Board points out that the Committee failed to account for the pro-rata share of teachers who provide services in physical education, music, art and substitutes at all grade levels from K-8. (See Summary of Teachers' Salaries and pro-rata share of specialists and substitutes on pages 9-12 in Board's Position Statement.)

Account 215-c Salaries - CST Secretary Reduction: $12,813

The Board contends that the Committee's position that the Child Study Team's secretarial duties be assigned to the existing secretarial staff fails to consider the separate duties performed by

the CST secretary and the rest of the secretarial staff. Since there has been no decrease in the responsibilities of the CST, the Board contends it is illogical to assume that other secretarial staff could take over the responsibilities of the CST secretary.

Account 216 Aides — Reduction: $17,800

The Board contends that the entire budget in this line item reduced by the Committee represents an attempt on its part to restore positions cut from its budget due to loss of state aid in 1988-89 and 1989-90. The Board contends that it had been its intention to assign one aide to grades one and two and a second aide to kindergarten; however, an increase in kindergarten enrollment has caused it to alter its plans and it now intends to create a second kindergarten class and allocate the funds for the second aide position to the hiring of the kindergarten teacher.

Account 250-b Travel — Reduction: $2,700

The Board contends that the monies in this account are for the purpose of meeting contractual obligations for staff travel between buildings. By May 1991, the Board contends, it spent $5,929.13 out of $7,350 budgeted for 1990-91 and that the increase in the account for 1991-92 reflects an increase in the contractual reimbursement rate from $.22 per mile to $.23 per mile.

OPERATION OF PLANT

Account 610 Salaries Summer — Reduction: $2,080

The Board contends that the position eliminated is for one summer worker who does custodial and maintenance work when pupils are not present. It avers that such function is essential to the maintenance of a clean and safe school environment.

Account 630 Heat-Oil Reduction: $3,000

The Board contends that its budgeted amount of $57,000 in this line item is $40,000 greater than 1990-91 because of the previous Board Secretary's past practice of lumping all electrical expenses with utilities, even though the district's main building is heated by electricity. For 1991-92 the Board allocated the amount of electrical cost for heating, and placed that amount, in the 630 account producing a corresponding drop in the amount budgeted in the 640 account "utilities" from $57,000 to $17,000.

Additionally, the Board projects added electrical heating costs due to the need to electrically heat additional mobile office space.

Account 640-d Telephone Reduction: $1,900

The Board reiterates its position as stated above that the previous Board Secretary had allocated telephone charges with all other utilities under 640. The Board contends that that account has been reduced for 1991-92 by $40,000.

The Board contends that its 1991-92 budgeted amount includes two additional telephone lines and service for its mobile offices, fax machines and new computers.

Account 650-b Supplies - Grounds Reduction: $275

The Board contends the amount reduced in this account is necessary because of the addition of 1300 square feet of office space which must be maintained.

MAINTENANCE OF PLANT

Account 730-a Replacement Equipment Reduction: $8,000

The Board, in rebuttal to the rationale presented by the Committee, points out that it regularly advertises for and receives bids on its purchased equipment. The Board further points out that its budgeted amount for replacement equipment in 1991-92 represents a reduction of $5,500 from the amount budgeted in 1990-91. The Board sets forth its list of replacement equipment in Exhibit G of the Certification of Board President George Ripper supporting its Statement of Position.

Account 730-c Purchase of Equipment Reduction: $1,165

The Board reiterates its position regarding the receipt of bids for the purchase of equipment. It further contends that all the new equipment set forth in Exhibit G is necessary to meet the district's needs and urges full restoration.

FIXED CHARGES

Account 820-b Insurance - Employee Reduction: $13,000

The Board's argues that the Committee's position that the above reduction can be sustained by virtue of the elimination of the positions it recommends is groundless. The Board contends that the amount budgeted cannot be reduced because the positions which the Committee recommends reducing cannot be reduced for the reasons stated earlier in this decision.

FOOD SERVICES

Account 930 Deficits - Regular Reduction: $6,000

The Board contends that the Committee's position in this area reflects confusion. In its May 21, 1991 resolution, states the Board, the Committee recommended reducing line item 114, Tuition by

$6,000 without explanation; however, in its rationale it reduced by $6,000 line item 120 in Account 930, the amount budgeted by the Board to cover a deficit in food services.

Whichever line item is meant by the Committee, the Board contends such reduction cannot be effectuated. Tuition to the receiving district is a mandated cost and cafeteria workers are under contract for 1991-92 prior to the rejection of the budget by the voters and thus cannot have their hours reduced in order to deny them benefits.

COMMITTEE'S POSITION

The Committee offers no additional rationale beyond that submitted at the time of the budget reduction. It does appeal to the Commissioner by way of a letter dated July 11, 1991 to heed the admonition of Senator Lynch that voters hold boards of education responsible for their expenditures. The letter further informs the Commissioner that the district is over administered for a 270 pupil district and that the Board has "outraged" its citizens by installing a $91,000 computer system and a new administrative building at a cost of $85,000.

COMMISSIONER'S DECISION

The Commissioner has carefully reviewed the record presented to him in this matter and sets forth the following findings:

ADMINISTRATION

Account 110-b Salaries Board Secretary's Office Reduction: $18,000

Upon careful review, the Commissioner determines that the entire amount of $18,000 be restored to this account. This determination is based upon the legal argument presented by the

Board that the current regulations require a person certified as a School Business Administrator or Assistant Superintendent for Business to fill such position.

Account 110-b Salaries Board Secretary's Office Reduction: $8,704

While the Commissioner accepts the Board's rationale that the secretary at issue herein was employed 4/5th of the time in the Board Secretary's office but was carried as a principal's secretary, a review of the 215 account does not reflect a reduction commensurate with the transfer of this individual from that account to the 110 account. Therefore, the $8,704 reduction is sustained.

PURCHASED PROFESSIONAL SERVICES

Account 120-b Legal Fees Reduction: $10,000

Upon review of the Board's position, the contention of the Committee that this account is over budgeted based upon previous expenditures, and a review of such previous expenditures in 1989-90, the Commissioner believes the reduction imposed by the Committee is arbitrary and therefore directs a restoration of the full amount of $10,000 by which this account was reduced.

OTHER EXPENSES FOR ADMINISTRATION

Account 130-a Board Member Expenses Reduction: $3,000

Account 130-f Superintendent's Office Reduction: $1,000

Upon careful review of the arguments presented by the parties, the Commissioner sustains the reduction of $4,000 on the grounds that the reductions contemplated will neither interfere with the providing of a thorough and efficient system of education nor prevent the Board and administration from obtaining the training necessary for carrying out their respective requirements.

Account 213 Salaries - Instruction		Reduction
Kindergarten		$ 5,000
Grades 1-5		7,000
Grades 6-8		20,000
Grades 7-8		26,855
	Total	$58,855

The Commissioner has carefully reviewed the arguments presented herein by the parties and concludes that the Committee has failed to consider the pro-rata share of the special teachers and substitutes. Therefore, the Commissioner directs the restoration of the entire $58,855 by which the Committee reduced the budget in this account. A careful review of the salary figures as outlined in the Board's Position Statement demonstrates the validity of its argument.

Account 215-c Salaries - CST Secretary Reduction: $12,813

After examination of the rationale presented by the Committee relative to the elimination of a CST secretary whose duties would be assumed by other secretaries in the district, the Commissioner finds such action on the Committee's part to be arbitrary and without merit. The Commissioner accepts the Board's argument that merely alleging that no increase in responsibilities are contemplated for the CST does not therefore lead to a logical assumption that the duties of the CST secretary can be taken over by other secretarial employees. The Commissioner is well aware that CST functions generate a significant workload for secretarial personnel which is particularly compounded by the tight time constraints under which CST operations must function.

The Commissioner directs the restoration of the $12,813 by which this account was reduced.

Account 216 Aides Reduction: $17,800

After examination of the Board's rationale the Commissioner is unconvinced that the Board has met its burden of demonstrating that some reduction in this area would impede its ability to provide a thorough and efficient system of education. The Commissioner does, however, recognize the Board's need for utilizing a portion of the funds allocated in this area for funding of an additional kindergarten position. The Commissioner therefore directs the restoration of $10,000 in this account while sustaining the reduction of the remaining $7,800 imposed by the Committee.

Account 250-b Travel Reduction: $2,700

The Commissioner is unconvinced that the reduction imposed in this account would impede the Board's ability to meet its contractual obligations to reimburse staff for between building travel. The reduction of $2,700 is sustained.

OPERATION OF PLANT

Account 610 Salaries Summer Reduction $2,080

The Commissioner finds that the Board has presented a reasonable explanation for the employment of summer help to carry out projects necessary for school operation. The Committee's rationale is arbitrary in that it merely asserts the ability to utilize existing staff. The Commissioner directs the restoration of the $2,080 in this account.

Account 630 Heat - Oil Reduction: $3,000

The Commissioner has examined the Board's rationale in detail relative to its shift of $40,000 from the utilities account to the 630 account for heating purposes. His examination of such documentation, however, leads him to conclude that the difference in

the amount budgeted in the 640 Utilities account for 1991-92 ($30,000) and the revised appropriation for 1990-91 ($64,000) is a reduction in that account of $34,000 and not $40,000 as contended by the Board. The Commissioner therefore concludes that the $3,000 by which the 630 account has been reduced can be sustained without injury.

Account 640-d Telephone — Reduction: $1,900

The Board's argument relative to increased telephone usage due to new lines and computer and fax capability is reasonable. The Commissioner directs the restoration of the $1,900 reduction in this account.

Account 650-b Supplies - Grounds — Reduction: $275

The Commissioner sustains the reduction of $275 in this account. It is an amount of such insignificance that the Commissioner is unconvinced that the Board cannot meet its needs despite such reduction.

MAINTENANCE OF PLANT

Account 730-a Replacement Equipment — Reduction: $8,000

While the Committee's rationale for reducing this account is indefinite in that it merely recommends seeking quotes on equipment purchases, the Board likewise fails to provide significant reasons why it cannot pick and choose from its list of intended replacements set forth in Exhibit G of the Certification accompanying its Position Statement.

In light of the Board's failure to meet its burden, the Commissioner directs that the reduction of $8,000 in this account be sustained.

Account 730-c Purchase of Equipment — Reduction: $1,165

The Commissioner directs the sustaining of the $1,165 reduction in this account for the reasons cited above.

FIXED CHARGES

Account 820-b Insurance - Employee — Reduction: $13,000

Inasmuch as the Commissioner has for the most part restored the positions sought to be eliminated by the Committee, the savings in this account cannot be sustained as contemplated by the Committee. The Commissioner therefore directs the restoration of the $13,000 by which this account was reduced.

FOOD SERVICES

Account 930 Deficits - Regular — Reduction: $6,000

In reviewing the positions of both parties relative to the reductions imposed in this area, the Commissioner is convinced that the Board is obligated by contractual agreement to employ the food service workers full time and cannot at this stage reduce their employment to a point where benefits would not be mandated. The Commissioner therefore directs the restoration of the $6,000 by which this account was reduced.

SUMMARY

Account	Amount of Reduction	Amount Not Restored	Amount Restored
110b	$ 18,000	$ -0-	$ 18,000
110b	8,704	8,704	-0-
120b	10,000	-0-	10,000
130a	3,000	3,000	-0-
130f	1,000	1,000	-0-
213	58,855	-0-	58,855
215c	12,813	-0-	12,813
216	17,800	7,800	10,000
250b	2,700	2,700	-0-
610	2,080	-0-	2,080
630	3,000	3,000	-0-
640d	1,900	-0-	1,900
650b	275	275	-0-

Account	Amount of Reduction	Amount Not Restored	Amount Restored
730a	8,000	8,000	-0-
730c	1,165	1,165	-0-
820b	13,000	-0-	13,000
930	6,000	-0-	6,000
TOTALS	$168,292	$35,644	$132,648

In light of the foregoing the Commissioner directs the Cumberland County Board of Taxation to strike an additional tax levy of $132,648 for current expense for the support of the Downe Township Public Schools for the 1991-92 school year so that the total tax levy for current expense in said year shall be $701,674, as set forth below:

Tax Levy Certified By Governing Body	Amount Restored By Commissioner	Tax Levy After Restoration
$569,026	$132,648	$701,674

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 2, 1991

DATE OF MAILING - DECEMBER 2, 1991

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 0809-89
AGENCY DKT. NO. 9-1/89

CLIFFORD F. AINSWORTH JR., GERALDINE CONVERY -BOOS, DOMINIC J. DiGIOIA, HORTENSE O. DuBOSE, PUELLA HAINES, WENDELL D. HALL, ADDIE HARDES, DEBRA M. HENDON, GEORGE HETTESHEIMER, DOROTHY HOWARD, MARIA LEIVA, CAROLE A. LINDQUIST, MARGUERITE LYLE, MAGDALENE S. NICHOLS, THOMAS REANEY, SHEILA ROONEY, LENA WHITE, VALERIE WILLIAMS, AND COLLEEN E. WILSON,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON,
Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch & Porwich, attorneys)

David F. Corrigan, Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: October 8, 1991 Decided: October 23, 1991

BEFORE EDITH KLINGER, ALJ:

On January 12, 1989, the petitioners filed their consolidated appeals from the action of the Board of Education of the City of Jersey City, County of Hudson, which withheld their increments and/or salary adjustments for inefficiency and other good cause. The 19 separate appeals were consolidated at the direction of the Commissioner of Education.

The Board of Education filed its answer to the petition on January 30, 1989, and on February 2, 1989, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

The matter was preheard by the undersigned on April 5, 1989 and was set down for hearing on September 11, 12, 13, 18, 19, 20, 25, 26, and 27, 1989.

Prior to the scheduled hearing dates, the parties notified the undersigned that the matter had been settled and that a stipulation of settlement would be provided.

On November 8, 1989, I wrote to the parties requesting that the stipulation of settlement be provided or that I be contacted immediately so that the matter could be set down for hearing.

On December 8, 1989, I received a letter dated December 5, 1989 from Karen A. Murray, Esq., of Murray, Murray, and Corrigan, representing the State-operated school district. The letter stated that the district was not aware of the settlement and planned to discuss with petitioner's attorney whether the terms of the proposed settlement were acceptable to the district superintendent.

On December 17, 1989, I sent a letter to the attorneys for the petitioners and the State-operated school district requesting the status of the stipulation of settlement and informing them that if a signed stipulation was not provided to me by January 15, 1990, the matter would be set down for hearing without further adjournment.

Upon further assurances that all of the outstanding issues had been resolved, no hearing dates were set. In February 1990, I again contacted the parties as to the status of the case. When no response was received, I again requested, on June 13, 1990, a settlement agreement and scheduled an in-person settlement conference at the Office of Administrative Law in Newark on July 3, 1990. The parties were not required to appear on that date because I was informed that there were only a few details left to work out and the stipulation of settlement was imminently forthcoming.

During the months that followed, all attempts to obtain this stipulation of settlement produced no results. On January 18, 1991, David F. Corrigan, Esq., representing the State-operated school district, wrote to advise me that the parties were close to agreement and that a stipulation of settlement would be provided shortly.

When no stipulation was received, on August 7, 1991, I wrote a letter to counsel stating that if a stipulation signed by both parties was not provided to me by September 1, 1991, the matter would be dismissed by me for failure to prosecute the appeals. No response from either party has been received to this letter as of October 8, 1991.

Based upon the above, I **FIND** that neither petitioners nor the respondent intend to pursue this appeal any further and I therefore **CONCLUDE** that these consolidated appeals should be **DISMISSED** for lack of prosecution.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 23, 1991
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 29 1991

DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

CLIFFORD F. AINSWORTH, JR., ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the ALJ that the parties no longer wish to pursue this matter, as neither settlement nor directive to proceed with hearings has been forthcoming notwithstanding the ALJ's repeated attempts to secure them. Nor did the parties respond to the ALJ's letter clearly advising them of her intention to dismiss the matter absent further action on their part.

Accordingly, the initial decision of the Office of Administrative Law dismissing this matter for failure to prosecute is affirmed for the reasons stated therein.

IT IS SO ORDERED.

DECEMBER 3, 1991

COMMISSIONER OF EDUCATION

DATE OF MAILING - DECEMBER 3, 1991

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 756-90
AGENCY DKT. NO. 1-1/90

WILLIAM A. MASSA, JAMES SEAMAN, AND WILLIAM C. GERRITY,
Petitioners,
v.
JERSEY CITY SCHOOL DISTRICT AND ELENA SCAMBIO, STATE DISTRICT SUPERINTENDENT,
Respondents.

Francis E. Schiller, Esq., for petitioners
(Schiller, Vyzas, Squeo & Hartnett, P.A., attorneys)

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

Record Closed: October 9, 1991 Decided: October 22, 1991

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

PROCEDURAL HISTORY

This contested matter was transmitted by the Department of Education to the Office of Administrative Law on January 29, 1990, pursuant to N.J.S.A. 52:14B-1 et seq., and N.J.S.A. 52:14F-1 et seq. The petition, filed by three attorneys essentially employed on a full-time basis by the Jersey City Board until the State takeover in 1989, alleged that the respondents had acted improperly by denying them certain

statutory benefits to which they were entitled as terminated employees of the former school district.

Originally, the petition consisted of three separate counts in which the former employees claimed they were deprived of: (a) 60 days' notice of termination, or equivalent payment in lieu thereof; (b) credit for their unused vacation days; and (c) termination pay. Ultimately, as the result of extended discussions, the last two claims were settled and the counts withdrawn. The issue dealing with 60 days' pay in lieu of 60 days' notice of termination remains for determination.

A prehearing conference was conducted by the undersigned administrative law judge with counsel on May 15, 1990, and hearings were scheduled to commence in January 1991. Thereafter, following a series of adjournments stemming from discovery motions and other ancillary matters, the parties entered into a joint stipulation of facts (Exhibit J-1) and counsel agreed to submit the remaining issue for determination as a matter of law based upon that joint stipulation. A schedule for the filing of briefs was established and, following the grant of extensions of time for filing, the record closed on October 9, 1991. The following constitutes my initial decision.

FINDINGS OF FACT

As noted, a joint stipulation of facts has been submitted by counsel as follows:

1. William A. Massa was employed by the Jersey City Board of Education ("Board") as an attorney from October 1960 through August 1984. He was rehired by the Board on July 10, 1985.

2. Massa worked for the Board from July 10, 1985 until he was terminated, effective October 4, 1989 by the State-operated school district ("District"), pursuant to N.J.S.A. 18A:7A-42a(3).

3. James J. Seaman was employed by the Board as an attorney on October 6, 1986 and worked in that capacity until his employment was terminated by the District, effective October 4, 1989, pursuant to N.J.S.A. 18A:7A-42a(3).

4. William C. Gerrity was employed by the Board as an attorney on July 19, 1984 and worked in that capacity until his employment was terminated by the District, effective October 4, 1989, pursuant to N.J.S.A. 18A:7A-42a(3).

5. During the period of time that they were employed by the Jersey City Board of Education, the petitioners also were permitted to engage in the private practice of law and did so outside their hours of employment.

6. During the course of their employment, the petitioners were paid by the Jersey City Board of Education on a semi-monthy basis, on the same days as all other Board employees, with checks drawn on the Board's payroll accounts.

7. Pension contributions to PERS, Social Security taxes and state unemployment insurance payments were automatically deducted from the petitioners' pay during the time they were employed by the Board.

8. The petitioners were eligible to receive Blue Cross/Blue Shield, dental and prescription insurance while employed by the Jersey City Board of Education.

9. The parties shall proceed with the above-captioned suit only on the issue of petitioners' claims for 60 days' notice of termination period.

10. The State-operated District terminated the following attorneys, effective October 4, 1989:

    Thomas Cosma, Esquire
    Brian Flynn, Esquire
    Harold Krieger, Esquire
    Margulies, Wind, Herrington & Katz, Esquire
    Robert Schwartz, Esquire
    Edward O'Connor, Esquire

Mr. O'Connor was rehired by the District to handle Workers' Compensation cases.

11. The State-operated District terminated Touche Ross & Company, as the former Board's auditor, effective October 4, 1989.

12. The attorneys named in Paragraph 10 and the auditor named in Paragraph 11 were paid by the Jersey City Board upon submission of a voucher. The Board did not make deductions for Federal and State taxes, pension contributions, Social Security or SUI.

13. The State-operated District did not give either sixty (60) days' notice or sixty (60) days' notice pay to any of the petitioners, the attorneys set forth in Paragraph 10 above, or the auditor named in Paragraph 11 above.

DISCUSSION

By virtue of the narrowing of the three issues originally involved in this matter to only one, the determination which I must make involves an interpretation of the provisions of N.J.S.A. 18A:7A-42a(3) and N.J.S.A. 18A:7A-44a and c as they apply to petitioners. According to respondents, petitioners are not entitled to the 60 days' pay in lieu of 60 days' notice of termination provided in N.J.S.A. 18A:7A-44c since they clearly were excluded from receiving that benefit under the express language of N.J.S.A. 18A:7A-42a(3), as they were not members of the noninstructional central administrative staff. That statute provides that in a State-operated school district, the superintendent of schools shall, subject to the approval of the Commissioner or his designee, "make all personnel determinations relative to employment, transfer and removal of all officers and employees, professional and nonprofessional, except that the services of the district auditor or auditors and attorney or attorneys shall be immediately terminated by creation of a State-operated school district pursuant to [N.J.S.A. 18A:7A-15]." [Emphasis added.]

In other words, with respect to the school district's auditors and attorneys, since they are terminated immediately, there is no discretion with respect to giving them notice or payment in lieu of notice. By contrast, respondents point to the provisions of N.J.S.A. 18A:7A-44a and c, which state that notwithstanding any other

provision of law or contract, although the positions of executive administrators responsible for curriculum, business, finance, and personnel (N.J.S.A. 18A:7A-44a, and central administrative and supervisory staff, N.J.S.A. 18A:7A-44c) shall also be abolished upon creation or reorganization of the State-operated school district, such individuals "shall be given 60 days' notice of termination or 60 days' pay."*

According to respondents, the drafters of the State takeover legislation therefore deliberately omitted mention of school auditors and attorneys as beneficiaries of the 60 days' pay option under N.J.S.A. 18A:7A-44a or c. If, according to respondents, the Legislature had intended terminated attorneys to be eligible for 60 days' pay in lieu of notice, it could easily have provided them with that benefit. Thus, by singling out the services of auditors and attorneys for immediate termination of services in N.J.S.A. 18A:7A-42a, and omitting any reference to them in N.J.S.A. 18A:7A-44a or c, the Legislature, say respondents, spoke directly and expressly to the contrary of petitioners' assertions in this case.

Respondents also point out that there are meaningful distinctions between attorneys on the one hand, and central administrative staff positions on the other. The latter category of employees, unlike attorneys, enjoy not only tenure, but also have seniority and "bumping" rights. Thus, petitioners had no reasonable expectation that they would be treated in a manner similar to employees who did enjoy those important entitlements.

Petitioners, on the other hand, maintain that unlike the relationship that exists between most attorneys who represent school boards and their clients, they were employed full-time by the former Jersey City Board and clearly were encompassed within the category of noninstructional persons covered by N.J.S.A. 18A:7A-44c. They maintain that the "attorney or attorneys" category mentioned in N.J.S.A. 18A:7A-42a(3) referred only to those individuals who essentially were "independent contractors" and who by no stretch of the imagination could be considered, like

*Neither side has addressed the significance, if any, of the choice of language in section (a) (abolition of positions upon creation of the State-operated school district), as opposed to the language of section (c) (abolition upon the reorganization of the staff).

petitioners, capable of inclusion in the category of noninstructional central administrative staff. Pointing to Paragraph 10 of the joint stipulation of facts, petitioners also observe that each of the attorneys mentioned there were paid by voucher on an hourly basis and were ineligible for the several entitlements which petitioners, as full-time Board employees, enjoyed, such as membership in the pension fund, vacation benefits, medical, dental and prescription coverage, etc.

Petitioners also observe that it was not the purpose of the State-takeover statute to punish the District's employees; rather, it was designed to "make way for the State-appointed management team." Thus, the Legislature was careful to provide that all full-time central administrative staff, including noninstructional personnel such as they, would receive certain benefits upon termination and were not to be deprived improperly of the same. Thus, since all other instructional and noninstructional full-time employees have received these benefits, the legislative intent, they assert, should be applied with respect to them as well, and respondents' failure to do so constitutes unlawful discriminatory conduct.

Having reviewed and considered the statutory provisions in issue, in light of the arguments put forth by the parties, I must reject petitioners' assertion and dismiss their remaining claim. Contrary to their arguments, I **FIND** in N.J.S.A. 18A:7A-42a(3) a straightforward legislative determination to exclude full-time Board attorneys, like petitioners, from the benefits of N.J.S.A. 18A:7A-44c insofar as 60 days' pay in lieu of 60 days' notice is concerned. If, as petitioners assert, it was intended that they be treated like all other noninstructional central administrative staff, there would have been no reason for the language contained in N.J.S.A. 18A:7A-42a(3) regarding immediate termination of their services without notice. Thus, I agree with respondents that petitioners deliberately and properly were treated differently since, unlike noninstructional administrators employed by the former Board, they did not enjoy the normal emoluments of such positions, including tenure and seniority.

While the Legislature could have been more explicit with respect to the exclusion of auditors and attorneys from the benefits of N.J.S.A. 18A:7A-44c, the language used in N.J.S.A. 18A:7A-42a(3) was adequate enough to make the point.

Finally, mention should be made of the contention by petitioners that contrary to respondents' own assertions in this case, the Board's former auditor, although terminated immediately, was the recipient of 60 days' pay in lieu of 60 days' notice. In particular, one Donald Sylvester, identified by petitioners as the "Board Comptroller/Internal Auditor," was, according to petitioners, afforded 60 days' pay pursuant to N.J.S.A. 18A:7A-44c. Thus, petitioners raise a question as to why they should not have received the same benefit.

In its reply brief, the Board refers to this allegation as "particularly egregious" since Sylvester was the "comptroller" and was not an "auditor." Rather, the Board's auditor was Touche Ross & Company, which was terminated without notice on October 4, 1989, as set forth in Paragraph 11 of the joint stipulation of facts.

Since there was no plenary hearing in this case, it is difficult to make factual findings with respect to the precise duties and functions of Sylvester, and the appropriateness of his title vis-a-vis the statutory language here in question. However, there being no proof that Sylvester was an "auditor" within the meaning and intent of N.J.S.A. 18A:7A-42a(3), I must agree with respondents' position concerning him. Indeed, if Sylvester was an auditor within the meaning of that statute, then he should not have received the 60 days' pay either. The fact that he was paid therefore lends no support to petitioners' position in any event.

Although other issues were discussed in the posthearing briefs, I do not believe that any of them significantly bear upon the decision which I have reached in this matter. Basically, petitioners were attorneys whose services were intended by the Legislature to be terminated immediately under N.J.S.A. 18A:7A-42a(3), and they were not members of the category of positions entitled to the benefits of N.J.S.A. 18A:7A-44c.

Accordingly, in light of the undisputed facts and my interpretation of the statutory language involved in this case, I **CONCLUDE** that the petitioners, formerly employed as full-time attorneys by the Jersey City Board of Education, were terminated immediately under N.J.S.A. 18A:7A-42a(3) and are not entitled to receive 60 days' pay in lieu of 60 days' notice of termination. Accordingly, their petition of appeal must be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 22, 1991
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

10/24/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 28 1991
Date

OFFICE OF ADMINISTRATIVE LAW

amr/e

EXHIBIT LIST

J-1 Joint stipulation of facts, with attachments

WILLIAM A. MASSA ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY AND ELENA J. SCAMBIO, STATE DISTRICT SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioners' exceptions mirror the arguments raised before the ALJ. Their position is that N.J.S.A. 18A:7A-44(c) requires that they be given pay in lieu of 60 days notice of their termination upon the district's having become State-operated, and that the language of N.J.S.A. 18A:7A-42(a)(3) was intended by the Legislature to apply not to full-time Board employees, such as they, but rather to other Board attorneys who were independent contractors, neither full- nor part-time employees of the Board.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the ALJ that petitioners were terminated under N.J.S.A. 18A:7A-42a(3) and are not entitled to receive 60 days pay in lieu of

60 days notice of termination. He so finds for the reasons expressed in the initial decision. The Commissioner would add to the careful and thorough evaluation of the statutes provided by the ALJ that nowhere in law is a distinction made between in-house attorneys and attorneys serving a board of education by means of contract or retainer. Thus, the Commissioner rejects petitioners' contention that by virtue of their being employed by the district full time as central administrative staff, their status under N.J.S.A. 18A:7A-42 is somehow distinguishable from that of any other attorney.

It is well established that the meaning of a statute first must be sought in the language of the statute. Sheeran v. Nationwide Mut. Ins. Co., Inc., 80 N.J. 548 (1979) If the language of a statute is clear and unambiguous on its face, the Commissioner may not go beyond the words of the statute in order to devine the Legislature's intent. State v. Butler, 89 N.J. 220 (1982) The Commissioner finds that the words of the statutes in question are clear and unambiguous, and that application of the language of each neither results in conflict between them nor leads to absurd or anomalous results. Robson v. Rodriguez, 26 N.J. 517 (1958)

Accordingly, for the reasons expressed in the initial decision as amplified herein, the Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

DECEMBER 4, 1991

DATE OF MAILING - DECEMBER 4, 1991

Pending State Board

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY, RESPONDENT.	:	DECISION

Gill & Cohen, for Petitioner (Neil H. Cohen, Esq., of Counsel)

Greene & Braker, for Respondent (Marvin T. Braker, Esq., of Counsel)

This matter was opened before the Commissioner of Education by the filing of a Petition of Appeal from the Board of Education of the Township of Hillside (Board) appealing the reductions in the 1991-92 budget imposed by the Hillside Township Committee (Committee) after defeat of said budget by the electorate and after consultation pursuant to N.J.S.A. 18A:22-37. The aforesaid reduction consisted of a $1,108,700 reduction in current expense and a $89,262 reduction in capital outlay. As a result of these reductions the amounts in dispute before the Commissioner are summarized below:

	Proposed Tax Levy Adopted By District Board	Amount of Tax Levy Certified By Governing Body
Current Expense	$11,970,027	$10,861,327
Capital Outlay	89,262	-0-

	Amount of Reduction By Governing Body	Amount in Dispute Before Commissioner
Current Expense	$ 1,108,700	$ 1,108,700
Capital Outlay	89,262	89,262
Total		$ 1,197,962

On June 18, 1991 the Committee filed its Answer to the Petition of Appeal pursuant to the provisions of N.J.A.C. 6:24-7.6. On September 4, 1991 the Board filed its written Statement of Position in support of its appeal. On August 29, 1991 the Committee submitted its Statement of Position. Neither party filed Responses or Summaries.

The Committee's proposed reductions and the reasons for same were set forth by way of resolution adopted May 21, 1991 and are set forth below:

BUDGET LINE	LINE ITEM	AMOUNT TO BE CUT
420	Other Expenses - Health	$10,000

The Board spent $18,623 in 1989-1990, budgeted in this school year $33,700. The 1991-1992 budget calls for the amount of $36,600; this represents a 100% increase in this budget item in two years which is on the face of the information provided blatant overbudgeting. A $10,000.00 reduction in this account is warranted.

120D	Other Professional Services	$20,000

The Board spent $26,420 in the line item in 1989-1990, budgeted $78,125 in the current budget and $62,100 for 1991-1992. It is an extraordinary increase in this category between actually spent in 1989-1990 and budgeted in the next two years. A $20,000 cut in this item clearly will not affect actual spending patterns.

520	Contracted Services (Trans.)	$40,000

Since the budget, in this line item, was increased 14% each year arbitrarily as a formula increase, the actual dollar requirements for transportation should be used to determine this line item.

BUDGET LINE	LINE ITEM	AMOUNT TO BE CUT
640	Operation of Plant (Utilities)	$10,000

This line item appears to be excessive since energy costs have not increased dramatically. Consistent with a $5,000 increase from 1989-1990 actuals to 1990-1991 revised appropriations, a $5,000 increase in this line item should be sufficient and consistent with prior years.

720	Maintenance of Plant Contracted Services	$150,000

Maintain the current level of spending in the line item -- $278,430; in 1989-1990 the actual expenditures were $277,197. The projected 1991-1992 budget reflects a line item of $430,550. Projects deferred in this account can be budgeted in the Board of Education's Year Four and Year Five of its Capital Planning Budget.

730C	New Equipment	$30,000

Maintain current level of spending. No unusual circumstances have been indicated to warrant an increase.

740	Other Expenses Maintenance of Plant	$10,000

Maintain current level of spending.

820	Insurance	$150,000

Based on past years' experience a 26% increase in insurance is excessive. In the last year, this line item has not increased dramatically.

870	Tuition Special	$110,000

Projected enrollment for special education shows a 40% increase in 1991-1992 over 1989-1990; whereas tuition appropriation shows an increase of over 107% for the same time period. This line item was $937,500 in 1989. It is now $1,943,950 in 1991-1992; this is an increase of $1,006,600 in two years. Prudent budgetary practices would indicate that this is an exorbitant budget expansion for a projected increase of fifteen children.

930	Food Services (Deficit)	$10,000

There is currently an excess in the Food Services fund balance. There is no need for a supplementary (deficit) cushion in this budget year.

10	Misc. Revenue	$44,000 (Net Effect) (Use $100,000 for Misc. Revenue amount)

Added revenue will decrease the tax share; the Board of Education realized $172,018 in 1989-1990 actual revenue.

BUDGET LINE	LINE ITEM	AMOUNT TO BE CUT
264	Current Surplus	$300,000 Use

Appropriate $300,000 of current surplus to reduce taxes (current surplus - $398,338). This is exclusive of any real earnings of the 1990-1991 school year. The Board of Education has the ability to direct the Business Administrator not to use any current surplus so that it could effect a tax savings.

35	Capital Outlay	$174,700

Since the school budget has increased over 3.6 million dollars in the last several years, it would be prudent to take several alternative measures; one, deferring the capital projects to Years Four and Five since nothing is currently planned for them.

28A	Capital Outlay	$88,560

Reduced the FREE BALANCE in the Capital Outlay Reserves; the unreserved Capital Outlay plan $88,560 and appropriate to balance page 4, line 28A. That will permit a transfer on 237B (Other Transfers to Current Expenses) and thereby reduce the amount to be raised by taxation by that amount.

REDUCE:

	Current Expenses	$1,108,700	
	Capital Outlay	89,262	
	Total	$1,197,962	
1.	Appropriations were cut		$ 590,702
2.	Surplus in Current Expense was increased from -0- to $300,000		300,000
3.	Miscellaneous Revenues Anticipated were increased from $56,000 to $100,000		44,000
4.	Current Expense will receive from Capital Outlay		
	Capital Outlay Surplus		88,560
	Capital Outlay Foundation Aid		85,438
	Sub-total		$1,108,700
5.	Capital Outlay to be raised by taxes will be decreased by $89,262		89,262
	TOTAL DECREASE		$1,197,962

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the authority for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner to review and decide appeals brought by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of the Township of East Brunswick v. Mayor and Council of the Township of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

BOARD'S POSITION

Account 420 Other Expenses - Health Reduction: $10,000

The Board details the specific areas which are encompassed within this line item including supplies for health services rendered by the school physician and nurses and miscellaneous expenses for such matters as pre-employment physicals, specialized services for evaluating special education students and drug testing.

The Board summarizes its expenses in this account indicating an actual expenditure of $29,311 in 1990-91 as opposed to

an actual expenditure of $18,623 thus providing justification for the entire $36,600 budgeted in 1991-92. The Board further points out that its classification as an urban school district is consistent with its escalating costs in this area.

Account 120D Other Professional Services Reduction: $20,000

The Board seeks to rebut the contention of the Committee's statement of reasons that the increase in this account from $26,420 in 1989-90 to $62,000 budgeted in 1991-92 is an extraordinary increase. The Board points out that its budgeted amount for 1991-92 is actually less than the actual expenditure in 1990-91.

The Board offers as an explanation of increased costs in this area between 1989-90 and the 1991-92 budget year the fact that it was not required to expend monies for architectural services and negotiation services in 1989-90.

Account 520 Contracted Services Transportation Reduction: $40,000

The Board argues that the cost of transporting students has risen and continues to rise dramatically from year to year. It outlines on pages 2 and 3 of its Statement of Position the kinds of transportation being provided and summarizes the actual expenditures for 1989-90 and 1990-91 as well as the proposed amount for 1991-92 as follows:

Actual 1989-90	Actual 1990-91	Proposed 1991-92
$689,949	$808,435	$897,000

The Board further contends that all transportation costs are provided through contracted services entered into through the joint auspices of the Union County Educational Services Commission.

Account 640 Operation of Plant - Utilities Reduction: $10,000

The Board provides the following data regarding its utilities costs:

	Actual 1989-90	Actual 1990-91	Proposed 1991-92
640A Water	$ 10,053	$ 9,445	$ 11,000
640B Electric	152,622	156,963	159,000
640C Gas	7,107	8,720	9,000
640D Telephone	65,821	70,834	76,000
	$235,603	$245,962	$255,000

In support of its requested restoration, the Board points out that the increase in actual costs between 1989-90 and 1990-91 was $10,359, or 4.4%, while the increase provided for in the 1991-92 budget was only $9,038, or 3.7%.

Account 720 Maint. of Plant - Contracted Servs. Reduction: $150,000

The Board sets forth its expenditures and proposals for 1991-92 as follows:

	Actual 1989-90	Actual 1990-91	Proposed 1991-92
720A Grounds	$ -0-	$ 795	$ 35,550
720B Buildings	226,229	231,432	348,000
720C Equipment	50,968	45,280	47,000
Total	$277,197	$277,507	$430,550

In support of the 55% increase the Board points out the age of its buildings (see page 4, Board's Statement of Position) and the fact that two bond issue referenda for renovation of these buildings were defeated in recent years. The Board further notes that pursuant to the criteria established by the Quality Education Act (QEA) items formerly budgeted under capital outlay must currently be budgeted under current expense. As proof of such change in budgetary practice, the Board points out that structured repairs to buildings at $55,000 and roof repairs at $35,500 for a total of $90,500 are now carried under 720B Buildings.

Account 730C New Equipment — Reduction: $30,000

The Board sets forth its actual expenditures and those proposed for 1991-92 in this account as follows:

Actual 1989-90	Actual 1990-91	Proposed 1991-92
$31,115	$29,213	$67,500

The Board points out that the $67,500 budgeted in 1991-92 is for purposes of providing instructional equipment for six schools as delineated on page 6 of the Board's Statement of Position and providing additional computers, as well as computerizing the high school library.

The Board argues that such budget is a minimal effort to upgrade the district's instructional technology and to meet the needs of urban students requiring additional stimulation and motivation.

Account 740 Other Expenses - Maintenance — Reduction: $10,000

The Board sets forth the following history of expenditures in this area:

	Actual 1989-90	Actual 1990-91	Proposed 1991-92
740A Grounds	$ 2,916	$ 3,729	$ 3,400
740B Building	68,632	78,310	85,000
740C Equipment	1,971	1,688	2,100
	$73,519	$83,727	$90,500

The Board argues that this account provides for meeting the costs for materials, supplies and parts utilized by the Board in maintaining grounds, building and equipment. The Board further points out that the proposed increase for 1991-92 was smaller than the increase from 1989-90 to 1990-91.

Account 820 Insurance — Reduction: $150,000

The Board sets forth the following data:

Type	Actual 1989-90	Actual 1990-91	Proposed 1991-92
General	$ 250,346	$ 264,294	$ 294,000
Medical	849,911	1,000,422	1,330,000
Prescription	154,464	163,401	210,000
Dental	114,330	131,098	166,600
	$1,369,051	$1,559,215	$2,000,600

The Board attributes the 23% increase in its insurance account to a 27% increase in the State Health Benefits Plan and 22% increase in the prescription plan.

Additionally, the Board points out that, effective with the implementation of the QEA, the benefits for former compensatory education personnel can no longer be assessed as program costs and must be reflected in the 820 account in the amount of $43,800.

Account 870 Tuition - Special Education — Reduction: $110,000

The Board sets forth its expenditures for special education tuition on page 8 of its Statement of Position for purposes of demonstrating that 40% increases in special education tuition from one year to the next are not uncommon. (See figures for 1989-90 and 1990-91.)

In support of its budgeted amount the Board points out that the QEA permits the Commissioner to grant cap waivers to districts which experience significant increases in special education tuition costs with Hillside being the recipient of such a waiver in the amount of $655,925. The Board further contends that the district has experienced dramatic increases in the number of students classified as special education as well as increases in the number of profoundly handicapped students.

Account 930 Food Services - Deficit Reduction: $10,000

The Board contends that the monies budgeted in this account are necessary to guard against possible shortfalls in state aid and/or federal aid, cutbacks in Federal Food Commodities and unanticipated expenditures. The Board points out that despite a budget for a potential deficit in the 1989-90 school year of $8,000 it actually had a deficit of $24,065.

Account 10 Miscellaneous Revenue Reduction: $44,000

In response to the Committee's reduction of the amount to be raised by tax levy through an estimated increase in the Board's anticipated revenues, the Board sets forth the following summary of its actual and anticipated revenue earnings:

Source	Actual 1989-90	Actual 1990-91	Proposed 1991-92
Investment Interest	$ 96,837	$ 79,148	$50,000
Rental Fees	2,321	3,696	2,650
Book Fines	3,145	3,784	3,000
Telephone Commissions	161	369	150
Transcripts	228	242	200
Insurance Referral	-0-	15,484	
PERS Refund	43,256		
Prior Year Cancelled Checks	18,844		
Other	8,026	4,759	
	$172,818	$107,482	$56,000

The Board points out that the major source of income earnings is from interest on investments. These investments, however, will be dramatically reduced in 1991-92 due to significant declines in interest rates. The Board contends that interest rates as of August 1, 1991 were 5.4% compared to 7.5% in August 1990. Additionally, the Board points out that the primary source of investments is Free Balance which the Board contends will be only an estimated $420,466 as of June 30, 1991, representing a $388,970 reduction from the audited free balance of 1989-90.

Finally, the Board contends that past delays in implementing capital outlay projects also provided a source of investment funds which are no longer available due to the fact that all such projects will be completed by January 1992.

264 Current Expense Surplus	$300,000
28A Capital Outlay Surplus	88,560
	$388,560

The Board contends that its total free balance at the end of the 1990-91 school year is estimated at $420,466 representing 1.9% of the $22.2 million proposed budget for 1991-92. This figure it argues is far below the 3% recommended by the State Department of Education and which is exempted from any budget cap waiver considerations under N.J.A.C. 6:20-2A.12. The appropriation of the amounts suggested by the Committee would leave the district with a total surplus of $31,906 to meet any emergency contingency which might arise during the school year.

35 Capital Outlay Appropriation — Reduction: $173,988

The Committee recommended appropriating the above amount which represents funds for the implementation of a third of the upgrading to meet State Fire Code regulations for the entire school system. The Board stated it had concluded an agreement with the Township Fire Code Official to complete this project by August 1, 1992. The schedule for this is set forth on pages 11 and 12 of the Board's Statement of Position.

Unspecified Reductions

The Board points out that the resolution of the Township Committee only identifies $1,147,260 in total reductions leaving a balance of $50,702 unidentified and without rationale.

COMMITTEE'S POSITION

The Committee did not submit a further line by line Position Statement but rather sought to re-emphasize specific points as follows:

1. As of June 30, 1991 the Committee contends that the Board's Business Administrator had $1,240,000 in investments. During fiscal 1990-91, it is contended the Board had investment activity of $72,690,000 which the Committee contends will always generate cash surplus.

2. The Committee contends that the amount of Board surplus on hand was over $550,000 rather than the $200,000 which the Board contended.

3. The Committee further contends that in Health Insurance, Utilities and Food Services the Board engaged in overbudgeting and presented no valid reason for "***increases ranging from 26% to 100%." (Committee's Supplementary Position Statement, at p. 1)

COMMISSIONER'S DECISION

Initially, the Commissioner notes the contention of the Board that the total amount of specific reductions for current expense and capital outlay identified by the Committee comes to $1,147,260, some $50,702 less than the total amount by which the Committee reduced the combined current expense/capital outlay tax levy. Consequently, the Commissioner directs the restoration of the $50,702 to the current expense tax levy.

Account 420 Other Expenses - Health Reduction: $10,000

The Commissioner has reviewed the data provided by the Board in regard to its expenditures in this account for 1990-91 and considered the argument of the Committee relative to alleged overbudgeting by the Board. Based upon aforesaid review, the Commissioner concludes that the Board can meet its needs with a budget in the area of $30,000; therefore, the Commissioner directs the restoration of $3,400 in this account and sustains a reduction of $6,600.

Account 120D Other Professional Services Reduction: $20,000

After careful consideration of the figures presented by the Board, the Commissioner concludes that the requirement for negotiating services ($5,000) and for architectural services ($30,000) which were not budgeted in 1989-90 account for the significant increase herein between 1989-90 and the 1991-92 school year. Consequently, the Commissioner directs the restoration of the $20,000 by which this account was reduced.

Account 520 Contracted Services Transportation Reduction: $40,000

After careful review of the figures presented by the Board, the Commissioner concludes that the Board has not met its burden of demonstrating by actual cost for each area of transportation for the 1991-92 school year that it cannot provide the necessary services within the $857,000 which would remain to it after the reduction recommended by the Committee. The Commissioner sustains the reduction of $40,000 in this account.

Account 640 Operation of Plant - Utilities Reduction: $10,000

Upon review of the figures presented by the Board as to an actual increase in utility expenditures for 1990-91 of $10,000 above

that of 1989-90, the Commissioner finds the same approximate estimated increase for 1991-92 to be a reasonable estimate and therefore directs the restoration of $10,000 in this account.

Account 720 Maint. of Plant - Contracted Servs. Reduction: $150,000

The Commissioner has reviewed the figures presented by the Board in justification of its $153,043 increase in this account over the amount expended in 1990-91. He finds merit in the rationale presented by the Board that $90,500 of that increase can be accounted for by virtue of the QEA's stricter guidelines on capital outlay expenditures. In light of the foregoing, the Commissioner directs the restoration of $100,000 to this account and sustains the reduction of $50,000.

Account 730c New Equipment Reduction: $30,000

Upon review of the equipment which the Board seeks to buy within this account, the Commissioner finds that the nature of the equipment detailed on page 6 of the Board's State of Position is consistent with the general need to provide students with those tools needed for functioning in the 21st century. Having so concluded, however, the Commissioner believes that the Board's program will not be materially harmed by a reduction of $10,000 in this account. The Commissioner therefore directs the restoration of $20,000.

Account 740 Other Expenses - Maintenance Reduction: $10,000

Upon review of the figures presented by the Board and in light of the fact that the Committee offers no rationale for reduction other than maintaining spending at current levels, the Commissioner deems the modest increase projected by the Board in this area to be reasonable and directs the restoration of the $10,000 by which this account was reduced.

Account 820 Insurance Reduction: $150,000

The Commissioner notes that the increase in the amount budgeted for 1991-92 over that expended in 1990-91 is $441,385 and not $358,615 as contended by the Board. The Commissioner further notes that based upon the figures presented by the Board its total increase in premiums for the insurance indicated is $419,977. Based on the foregoing, the Commissioner concludes that the bulk of the $150,000 reduction cannot be sustained without preventing the Board from meeting its obligations. The Commissioner does find, however, that a token reduction of $20,000 can be sustained and he therefore directs a restoration of the remaining $130,000 by which this account was reduced.

Account 870 Tuition - Special Education Reduction: $110,000

While the Commissioner is obviously aware of the high cost of special education tuition, he is likewise not able to discern by way of specific number of placements, students and cost of such placements the actual increase in tuition costs which the Board will be faced with in 1991-92. In light of the foregoing, but in recognition of the significant cost increases which can be realized by virtue of an increase of 15 special education students, the Commissioner directs a restoration of $55,000 to this account while sustaining a reduction of $55,000.

Account 930 Food Services - Deficit Reduction: $10,000

Upon examination of the arguments of the parties, the Commissioner determines that the Board has failed to meet its burden in demonstrating the need for these so-called emergency funds. The reduction of $10,000 in this account is sustained.

Account 10 Miscellaneous Revenue Reduction: $44,000

The Committee has directed a $44,000 reduction in the tax levy by recommending that the Board raise the amount of its anticipated miscellaneous revenues from $56,000 to $100,000. The Commissioner has carefully reviewed the estimates of earnings anticipated by the Board as listed on pages 9 and 10 of its Statement of Position for the 1991-92 school year as well as the actual earnings in 1990-91 and 1989-90. Despite the Committee's arguments that the Board earned $172,818 in miscellaneous revenues and its contention of a slightly larger unappropriated free balance at the end of the 1990-91 school year, the Commissioner notes that miscellaneous revenues for 1990-91 fell to $107,482. Given the merit of the Board's argument as to falling interest rates and the conclusion of its capital outlay projects by January 1992, the Commissioner believes it to be imprudent to anticipate an additional $44,000 in investment earnings for 1991-92. The Commissioner therefore directs the restoration to the tax levy of the $44,000 by which the Committee reduced such levy in anticipation of a like amount of revenue.

264 Current Expense Surplus Reduction: $300,000

The Committee recommended a $300,000 reduction in the current expense tax levy by directing an appropriation by the Board of a like amount from the Board's unappropriated free balance.

The Board's argument that such an appropriation from an estimated total $420,466 unappropriated free balance would leave it far below the 3% recommended by the State Department of Education as being exempt from cap waiver considerations has considerable merit. Such a reduction would be fiscally imprudent in the extreme. Even if one were to accept the Committee's argument that the Board's free

balance will be in excess of $550,000, an appropriation of the amount contemplated by the Committee would still leave the Board vulnerable to unforeseen circumstances.

Consequently, the Commissioner directs the restoration of $300,000 to the tax levy.

Capital Outlay Transfers

Capital Outlay Surplus	$ 88,560
Capital Outlay Foundation Aid	85,438
	$173,998

The Commissioner has considered the Committee's argument relative to deferring the Board's five year Capital Planning Budget to Years Four and Five. However, in light of the safety considerations involved in upgrading the district's schools relative to the Fire Code, the Commissioner deems such postponement to be ill advised. The Commissioner therefore directs the restoration of $173,998.

Capital Outlay — Reduction: $89,262

Inasmuch as the Committee makes no recommendation and provides no rationale as to what capital projects should be eliminated, the Commissioner directs the restoration of the $89,262 by which the capital outlay tax levy was reduced.

SUMMARY

Reductions in Appropriations:

Acct.	Item	Proposed Reduction	Amount Not Restored	Amount Restored
420	Other Exps. - Health	$ 10,000	$ 6,600	$ 3,400
120D	Other Prof. Servs.	20,000	-0-	20,000
520	Contr. Servs. - Trans.	40,000	40,000	-0-
640	Utilities	10,000	-0-	10,000
720	Maint. - Contr. Servs.	150,000	50,000	100,000
730C	Equipment - New	30,000	10,000	20,000
740	Maint. - Other Exps.	10,000	-0-	10,000
820	Insurance	150,000	20,000	130,000

Acct.	Item	Proposed Reduction	Amount Not Restored	Amount Restored
870	Tuition - Spec. Ed.	110,000	55,000	55,000
930	Food Servs. - Deficit	10,000	10,000	-0-
Unspecified	Reductions	50,702	-0-	50,702
	SUBTOTAL APPROPRIATIONS	$590,702	$191,600	$399,102

Free Balance Appropriations:

Acct.	Item	Proposed Reduction	Amount Not Restored	Amount Restored
10	Misc. Revenue	$ 44,000	$ -0-	$ 44,000
264	Curr. Exp. Surplus	300,000	-0-	300,000
28A	Cap. Out. Surplus	88,560	-0-	88,560
	Cap. Out. Found. Aid	85,438	-0-	85,438
	SUBTOTALS	$ 517,998	$ -0-	$ 517,998
Capital Outlay		89,262	-0-	89,262
	TOTALS	$1,197,962	$191,600	$1,006,362

In light of the foregoing, the Commissioner directs the Union County Board of Taxation to strike an additional tax levy for support of the Hillside Public Schools for the 1991-92 school year of $917,100 in current expense and $89,262 in capital outlay which when added to the amount of $10,861,327 previously certified by the governing body for current expense purposes will result in a total tax levy of $11,778,427 for current expense and $89,262 for capital outlay.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 4, 1991

DATE OF MAILING - DECEMBER 4, 1991

BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For Petitioner, Richard T. Goodkin, Esq.

For Respondent, Michael E. Benson, Esq.
(Buonadonna & Benson, P.A.)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Borough of Woodbine (Board) on June 18, 1991, seeking restoration, on grounds of necessity for a thorough and efficient education, of reductions by the Mayor and Council of the Borough of Woodbine (Council) in the tax levy for the 1991-92 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 30, 1991 and after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed Tax Levy Adopted by the District Board of Education	Amount of Tax Levy Certified by Governing Body
Current Expense: $652,445	$599,970

Amount of Reduction in the Budget by Governing Body	Amount of Reduction in Dispute Before the Commissioner
Current Expense: $52,475	$50,475*

* Although the Board initially sought to appeal Council's full $52,475 reduction, it subsequently withdrew its opposition to $2,000 of the reduction to line item 730b (Equipment Replacement) because the needed equipment had been purchased at a cost of $2,000 less than budgeted. (Board's Affidavit, at p. 7)

The reductions at issue were effectuated by Council for the reasons stated in Resolution No. 51-5-1991 dated May 20, 1991, which reads in pertinent part:

> ***NOW, THEREFORE, BE IT RESOLVED BY THE BOROUGH COUNCIL OF THE Borough of Woodbine in the County of Cape May and State of New Jersey pursuant to the provisions of N.J.S.A. 18A:22-37, that they have and do hereby determine the following respective amounts to be raised by taxation which are necessary to provide in the School District of the Borough of Woodbine and which do provide for a thorough and efficient education to wit:
>
> | | |
> |---|---|
> | For Current Expenses | $599,970.00 |
> | For Capital Outlay | $ |
> | Total Amount Ordered to be Raised | $599,970.00 |
>
> BE IT RESOLVED THAT a statement of the line item[s] to be reduced are heretofore attached.
>
> BE IT FURTHER RESOLVED that the Borough Clerk shall forthwith cause a certified copy of the within Resolution to be served upon the County Board of Taxation of the County of Cape May; the County Superintendent of the County of Cape May; and the Secretary of the Board of Education of the Borough of Woodbine.***
>
> ***

Recommended Budget Reductions as Proposed by Borough Council

		Original Budget	Proposed by Council	Change	
J-1	CURRENT EXPENSES				
	Administration				
110	Salaries	$ 112,424.00	$ 109,836.13	($ 2,587.87)	see below #2
	Instruction				
211	Salaries-Principal	24,727.00	24,157.81	(569.19)	see below #2
213	Salaries-Teachers	546,250.00	533,675.98	(12,574.02)	see below #2
214	Salaries-Other Instr. Staff	59,001.00	57,642.87	(1,358.13)	see below #2
215	Salaries-Sec. & Clerical	16,916.00	16,526.61	(389.39)	see below #2
216	Other Salaries for Instruction	27,289.00	26,660.84	(628.16)	see below #2
230	School Library & AV Material	2,635.00	2,135.00	(500.00)	see below #1
250	Other Expenses	11,000.00	9,000.000	(2,000.00)	see below #1
	Attendance & Health Services				
310	Salaries-Health	44,180.00	43,163.03	(1,016.97)	see below #2
	Operation				
610	Salaries	80,256.00	78,408.60	(1,847.40)	see below #2
	Maintenance				
720	Contracted Services	23,000.00	21,000.00	(2,000.00)	see below #1
730b	Replacement of Equipment	18,175.00	15,675.00	(2,500.00)	see below #1
730c	Purchase of New Equipment	14,490.00	12,490.00	(2,000.00)	see below #1
	Student Body Activities				
910	Salaries	7,000.00	6,838.87	(161.13)	see below #2
	Special Education				
	Salaries	318,989.00	311,646.25	(7,342.75)	see below #2
	TOTAL J-1	$1,306,332.00	$1,268,857.00	($37,475.00)	
J-6	SUMMER SCHOOL				
	Salaries	$ 4,000.00	$ 1,000.00	($3,000.00)	see below #1
	TOTAL GENERAL FUNDS	$1,310,332.00	$1,269,857.00	($40,475.00)	

#1- This reduction was reached by agreement with the Board of Education at meetings duly held on May 14th and May 15th, 1991.

#2- Salary parameter[s] as evidenced in this line are considered excessive and not reasonabl[y] related to current economic realities as they pertain to the Borough of Woodbine. The Borough has itself this year provided no salary increases for municipal employees, and in some instances has cut salaries. The reduction is deemed by Borough Council to represent a more realistic and economic figure that does no detriment to a thorough and efficient education. This represents no adverse impact by way of reduction in personnel services or equipment.
(Council's Answer, Attachment)

On July 8, 1991, Council filed an answer admitting the amounts and reasons set forth above, but denying that its actions in making the reductions were arbitrary and that restoration of the disputed funds was necessary to enable the district to provide a thorough and efficient education. Council neither admitted nor denied the Board's allegation that specific line item reductions served upon the Board amounted to only $40,475 notwithstanding that the amount certified to the County Board of Taxation reflected a reduction of $52,475, leaving the Board to its proofs on this point. Position papers in the form of certifications from the Board President and Secretary and from the Mayor were subsequently filed by the parties pursuant to N.J.A.C. 6:24-7.8 and, upon expiration on August 26, 1991 of the period for submission of responses and final summations, the record of this matter was closed by the Commissioner.

Upon careful review of the arguments of the parties, which are incorporated herein by reference, and being mindful that the standard by which budget appeals are to be reviewed pursuant to Board of Education of East Brunswick Township v. Township Council of

East Brunswick, 48 N.J. 94 (1966) is whether the amount of monies available to the Board as a result of the governing body's action is sufficient to provide for a thorough and efficient education, the Commissioner makes the following determinations.

Reductions to Salary Accounts Other than Special Education/Summer School

Accounts 110 Administration, 211 Principals, 213 Teachers, 214 Other Instructional Staff, 215 Secretarial/Clerical, 216 Other Salaries for Instruction, 410 Health [mislabeled as 310 in Council's filings], 610 Operation (Custodial and Maintenance) and 1010 Student Body Activities (Coaching and Extracurricular Activity Stipends) [mislabeled as 910 in Council's filings]

In each of the above-listed accounts, the Board has appealed Council's reductions solely on the grounds that the Board had budgeted, and needs in order to continue engaging in good faith negotiations and provide for salaries compatible with the Cape May market, funds for 9% staff increases in all of the above areas other than administration (Account 110), where the planned increase was just over 7%.

Upon review the Commissioner finds that a sufficient pool of funds remains in each of these various accounts to collectively allow for raises of approximately 7% for teachers, nurses, secretaries, custodians and administrators, so as to permit the Board to both conduct good faith negotiations with staff represented by the collective bargaining unit and offer comparable increases to administrators without in any way impairing the provision of a thorough and efficient education. While the Board may believe that the salary levels from which it intended to negotiate are defensible in terms of current market conditions and staff morale, and for this reason may wish to allocate funds from other line items to increase the pool of monies available for salary adjustments, the Commissioner

cannot overrule the will of the electorate that the budget be reduced in the absence of a demonstration by the Board that the funds remaining will not permit the district to provide for a thorough and efficient education. As such a demonstration has not been made herein, the reductions to these accounts as listed, ante, ($21,132) are sustained in full.*

Account 730b Replacement of Equipment Reduction: $500

As indicated previously the Board now appeals only $500 of Council's original reduction to this account, in which, even after reduction, there remains $15,675. While the Board indicates that this $500 represents the cost of replacing badly worn desks and chairs which are needed for a thorough and efficient education, there has been no showing that this modest need could not be met by monies remaining elsewhere in Account 730b or by reallocating a small amount of money from other account(s). Accordingly, Council's reduction is sustained.

Account 730c Purchase of New Equipment Reduction: $2,000

The Board argues that the $2,000 eliminated by Council was earmarked for purchase of three new computers to help accommodate six classes of grades 1, 2 and 3 which presently share a single

---

* The Commissioner here notes the Board's argument regarding an apparent typographical error in Council's baseline figure for Account 213 ($546,250 rather than $549,250), which it claims left $3,000 less in this account than Council actually intended. However, the error actually resulted in Council reducing slightly less from the account than it would have had it used the correct figure; that is, it multiplied its consistent salary reduction figure of about .023 by the erroneous lesser number rather than the correct greater number to arrive at the stated reduction of $12,574.02. As it is the actual reduction, not the $533,675.98 balance "Proposed by Council" in its itemized list of reductions (See Chart, ante) that is reflected in the certified tax levy, the Board's argument is without merit in the present context.

computer. The district's eventual goal is one computer per class. (Board's Certification, at p. 7)

As the Commissioner deems ongoing development of programs responsive to changing educational, technological and workplace demands to be consistent with the goals of a thorough and efficient education and the Board has shown its computer acquisition plan to be a reasonable effort to meet the district's needs in this area, and as funds for this large a purchase are not likely to be available elsewhere in the 730c account or from a surplus of approximately 1% (Board's Affidavit, Exhibit J, at p. 12), the Commissioner determines to restore the $2,000 reduced by Council.

Account 720 Contracted Services Reduction: $2,000

The amount remaining in this account, even after Council's $2,000 reduction, is $21,000 which Council judged sufficient to permit the Board to both continue with ordinary maintenance and begin a program of upgrading the heating/ventilation system. In its submission to the Commissioner, the Board indicates that past expenditures for maintenance and repair have been about $14,000, and that the full amount budgeted ($23,000, or an additional $9,000) is necessary to undertake an upgrade. While maintenance and reasonable improvement of facilities are certainly part of providing a thorough and efficient education, no information was given by the Board (e.g. price estimates, long-term facility plan) to support its contention that reasonable upgrading could not occur with funds remaining after Council's reduction. Accordingly, this reduction is sustained.

Account 250 Other Expenses - Inservice Reduction: $2,000

The Board here argues that Council's $2,000 reduction (from a total account of $11,000) would leave only $1,000 for professional development, an amount that would preclude staff from keeping abreast of the latest trends in education. Council, while not disagreeing with the need for training, notes that the amount cut includes an exchange trip to Russia (a statement which was not disputed by the Board) and argues that in a time of severe economic restraint such expenditures cannot be justified as essential.

Upon review, the Commissioner finds that the Board has presented no explanation of how the reduced funds were to have been used, other than a general statement about workshop attendance and the need for a new student handbook, or how the funds remaining in this account for purposes other than professional development (presumably $8,000, as the account totals $9,000 after Council's reduction) are allocated. Therefore, there being no showing that the reduced funds are specifically necessary for provision of a thorough and efficient education, the Commissioner sustains this reduction.

Account 230 School Library/AV Materials Reduction: $500

Of an amount of $2,635 in this account, Council reduced $500 on the grounds that library acquisitions could be scaled back in a year of severe economic limitations. In turn, the Board notes that its county AVA assessment for 1991-92 totals $1,135 and that the additional $1,500 it had budgeted would have purchased 75 library books, a number already modest and below the district's actual level of need.

Upon review, the Commissioner finds no demonstration as to how Council's reduction would affect planned library purchases beyond simply reducing the number of books to be acquired. In the absence of a showing of how Council's reduction will prevent the district from maintaining a thorough and efficient library program with the $1,000 remaining for this purpose, the reduction is sustained.

Special Education - Salaries Reduction: $7,342.75

The Board argues that Council failed to identify specific line items targeted for cutting in this item and that the salary items within the special education section of the budget (lines 134-187) do not add up to the $318,989 "original budget" figure used by Council as the basis for its determination to cut $7,342.75 (see Resolution Attachment, ante). Further, the Board notes that it received cap waiver approval from the Commissioner (Affidavit, Exhibit I) based on special education costs as set forth in the supporting documentation submitted with the cap application (Exhibit J) and that salary line items, which provided for 9% increases, were covered in the Board's application. Council, in turn, argues its .023 reduction for special education was an across-the-board figure intended to be applied to each line item within the special education budget in view of Council's fiscal situation and the lack of need to offer 9% salary increases.

Upon review, the Commissioner is unpersuaded by the Board's argument that its cap waiver approval based on special education costs protects this area of the budget from reduction by Council. While it is true that the formulaic calculation used for cap waiver requests qualifying under N.J.S.A. 18A:7D-28 on the basis of

increases in special education costs includes the district's budgeted special education costs for the current year, special education cap waiver entitlements arise from increases in prior years and use of 1991-92 total cost figures for formulaic purposes does not constitute sanctioning of the exact dollar amounts included in salary accounts where the salaries themselves are not an issue before the Commissioner.

The Commissioner does, however, concur with the Board that the baseline figure used by Council for its special education reduction has no evident justification, the total advertised costs in lines 132-187 being $285,173 with salary accounts representing $279,973 of that amount. Thus, in order to effectuate Council's apparent intent to reduce budgeted 9% increases to the approximately 7% overall level provided for other staff, its .023 reduction should have been applied to this latter figure, resulting in a reduction of $6,439.38, or $903.37 less than the amount actually reduced. Accordingly, $903.37 of Council's collective $7,342.75 reduction to the salary accounts found among line items 134-187 is restored, while $6,439.38 is sustained as not necessary for provision of a thorough and efficient education for the reasons set forth relative to the salary accounts discussed above.

Summer School - Salaries Reduction: $3,000

Council reduced the Board's advertised appropriations in this area by $3,000, bringing monies available to $1,000. While the supporting materials submitted by the Board as part of its cap waiver application list summer school as a district priority (Affidavit Exhibit J, at pp. 2, 3 and 6), the Board has elected not to address this reduction in its budget appeal filings.

Accordingly, there being neither claim nor showing that Council's reduction will prevent the district from offering its summer program, this reduction is sustained.

Reduction Unaccounted for by Line Item Designations ($12,000)

Upon review of the line item accounts reduced by Council, the Commissioner finds that the Board is correct in asserting that these reductions total only $40,475, while the current expense tax levy certified to the Cape May County Board of Taxation ($599,970) actually constitutes a reduction of $52,475 from the advertised amount of $652,445. In effect, as the Board notes, Council cut an additional $12,000 from the Board's budget without reason or even designation as to whence the reduction was to come. Such a reduction is both inherently arbitrary and unreasonable and preclusive of any attempt on the part of the Board to argue for restoration on the grounds of necessity for a thorough and efficient education. Accordingly, the $12,000 undesignated Council reduction is restored in full.

In sum, for the reasons expressed herein, the Commissioner determines to restore $14,903.37 (rounded to $14,903) of the $50,475 reduction appealed in these proceedings, $12,000 resulting from an undesignated across-the-board reduction in tax levy $2,000 from elimination of computer purchases necessary to provide a thorough and efficient education and $903.37 (rounded to $903) from Council errors in calculating reductions to special educational salary accounts. In all other respects, Council's reductions are sustained.

Accordingly, the Cape May County Board of Taxation is directed to strike a local tax levy for the Borough of Woodbine for 1991-92 school year current expense purposes reflecting adjustments as set forth below:

	TAX LEVY CERTIFIED BY GOVERNING BODY	AMOUNT RESTORED	TAX LEVY AFTER RESTORATION
CURRENT EXPENSE	$599,970	$14,903	$614,873

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 4, 1991

DATE OF MAILING - DECEMBER 4, 1991

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MAYOR AND COUNCIL OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	
RESPONDENT.	:	

Gaccione, Pomaco and Beck, for Petitioner
(Frank Pomaco, Esq.)

Lorber, Schneider, Nuzzi, Vichness and Bilinkas, for
Respondent (Vincent J. Nuzzi, Esq.)

This matter was opened before the Commissioner by way of a Petition of Appeal filed by the Board of Education of the Township of Belleville (Board) on June 11, 1991 seeking a restoration of $537,564 to its 1991-92 current expense school budget by which the Mayor and Council (Council) reduced said budget upon defeat by the electorate and after consultation pursuant to N.J.S.A. 18A:22-37.

As a result of the reduction, the amount in dispute before the Commissioner is summarized below:

	Proposed Tax Levy Adopted By Board	Amount of Tax Levy Certified By Governing Body
Current Expense	$20,080,833	$19,543,269
	Amount of Reduction By Governing Body	**Amount in Dispute Before Commissioner**
Current Expense	$537,564	$537,564

On August 5, 1991 Council filed its Answer to the Petition of Appeal. The Board filed its Statement of Position on October 4, 1991 and the Council filed its Statement on October 1, 1991. On October 23, 1991 the Board filed a Rebuttal statement.

Council's proposed reductions and the reasons therefor were set forth in a resolution dated May 21, 1991 and are reproduced below:

Elimination of four (4) new Teachers Positions: $99,880

The Board of Education has previously agreed and recognized the serious financial difficulties facing the taxpayers of the Township of Belleville in meeting with the Council. Positions have been eliminated within the Township and in light of the lower school age population and declining classroom size, elimination of four new positions will have no impact on the quality of education provided.

Deletion of Surplus in Clerical Contract: 11,000

This figure represents the excess upon settlement of the clerical contract which is an unnecessary surplus. As such, it is not necessary for continuation of present clerical services.

Reduction of Transportation Costs: 70,000

This figure represents the difference between $360,000 requested and $290,000 actually spent last year by the Board of Education for transportation of students. This over-budgeting is believed to be carried over into the projected 1991-92 costs. If this belief is incorrect and results in a cutback in services, it is recommended that the cutback in services be limited to high school students who can better manage their own transportation than younger lower grade students.

Reduction of Administrative Services Increase: 7,829

There is an increase sought for Board Members' Expenses and Superintendent's Expenses over last year's budget. The Council has taken steps to avoid excess expenses and believes that there exists no reason to increase expenses for the Board over last year given the present fiscal constraints.

Elimination of Architectural Study: $ 5,000

The Board proposes to conduct an interior space study in Belleville High School for better use of the existing facility. There exists no emergent basis for such a study. In light of the current financial constraints this expense should be deferred to another year.

Elimination of Administrative Salary Increases: 36,669

The Board proposes to increase Administrative salaries at a time when private industry is reducing salaries and benefits to employees. There has been no indication that current salaries are below statewide norms. In an effort to maintain the present employees and avoid reductions, there should be no salary increases.

Elimination of Coaching and Club [Advisors] Salary Increases: 30,701

As indicated above, salary increases are inappropriate given the present economy. This is especially true given the substantial raises the individuals have already received as teachers.

Elimination of Nine Vacant Positions: 156,485

The Board has carried over allocations for nine vacant positions for which it has functioned without. The nine vacancies can easily be consolidated so that the class size ratio will only decrease from 20 to 27 to 1, having negligible impact on the quality of education and will result in a saving of $156,485.00.

Reduction of Fuel Account: 45,000

The last actual expenditure for fuel was $140,000 which is from two years ago. The figures for actual expenditures in 1990-91 are unavailable, however, the proposed fuel account is entirely for heating oil. Given the fact that we experienced a mild winter last year and the fact that some schools have converted from oil to gas, a reduction in the account is warranted. The reduction of $45,000 should represent the savings due to milder weather, stabilization of fuel prices, and the conversions.

Reduction in Capital Leasing: $ 50,000

The Board of Education requested $200,000 last year for capital leasing, yet utilized very little of it. There was a surplus of over $50,000 which can be eliminated while leaving a significant amount for unforeseen needs.

This item should also be reduced by an additional $50,000 in light of the Municipal Capital Ordinance which can provide the Board of Education with two new trucks that they have requested and included in capital leasing account. 50,000

Increase in Account #310: +25,000

In the past this account has been reduced. It is hoped that non-resident children presently attending Township schools at our taxpayers expense can be located and removed from the school system. The amount presently budgeted is unreasonably low to accomplish this result.

The total amount of reductions to the Board of Education Budget is $537,564 which the Municipal Council has determined will not be detrimental to the children of the Township of Belleville and their thorough and efficient education.

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the authority for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner to review and decide appeals brought by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of the Township of East Brunswick v. Mayor and Council of the Township of East Brunswick, 48 N.J. 94 (1966) and Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989).)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education.

BOARD'S POSITION

Initially it should be noted that the Board argues that Council's action in reducing the budget was arbitrary and capricious in that its resolution failed to specify those line item accounts in which the reductions were to be effectuated. In so failing, the Board argues, Council is in violation of the prescription laid down by the New Jersey Supreme Court in Deptford, supra. Further, by merely referring to the aforesaid resolution without identifying specific line item account numbers, Council's Answer is also deemed procedurally defective by the Board.

The Board's responses to Council's recommended reductions are set forth below:

Elimination of Four (4) Teaching Positions Reduction: $99,880

The Board identifies the four positions referred to by Council as line item 213 for School 3, School 4 and High School mathematics teachers and line item 210 for a Basic Skills remedial teacher at the district middle school. The Board contends that the additions were required to fill the following needs:

- School 3 - 59 students in the first grades necessitated the creation of a third section.
- School 4 - 32 students at sixth grade and one teacher. A second teacher position was created to split the class into two classes of 17 and 15.

- High School - Additional teacher was needed to meet the state mandate of providing each student with three years of mathematics. This requirement has led to an increase of 155 math students.

- Middle School - The Board contends that this is not a new position but merely a replacement of an eliminated home economics position with a remedial reading position necessary to prepare students for the 8th grade early warning tests.

Deletion of Surplus in Clerical Contract — Reduction: $11,000

The Board identifies the line item accounts at issue here as being Account 110 and Account 215 which represent salaries for secretarial personnel. The Board acknowledges a surplus of $11,000 in this account due to the fact that negotiations for salaries in this area had not been completed as of the time of the budget preparation.

Reduction of Transportation Costs — Reduction: $70,000

The Board contends that the rationale of Council is "***speculative, arbitrary, capricious, unclear and based upon a false assumption that there is a $70,000.00 over-budgeting in the Pupil Transportation Account 500-570." (Board's Statement of Position, at p. 4)

The Board contends that Council offers no explanation of which portions of the Pupil Transportation area are overbudgeted and cannot identify the figures, $360,000 and $290,000, mentioned by Council. The actions of Council, argues the Board, are arbitrary since Council made no attempt to seek information as to the Board's transportation policy or the number of students transported or what routes.

The Board contends that it transported approximately 631 students on a daily basis with each bus driver and aide running three consecutive routes for elementary, middle school and high school students. Consequently, since the same drivers who transport the elementary and middle school students are the ones who transport high school students, the Council's recommendation of reducing costs by reducing transportation of high school pupils is not feasible.

The Board summarizes its 500 account in Exhibit B attached to its Statement of Position. That summary indicates an overall increase in the amount budgeted for pupil transportation of $30,735 representing a 3.21% increase over the amount budgeted in 1990-91.

Reduction of Administrative Services Increase Reduction: $7,829

The Board identifies this account as being Account 130. The Board points out that the law requires that all school boards be members of the New Jersey School Boards Association. This account also includes money for Board member attendance at conferences and workshops ($1,000 per member), as well as office expenses for the superintendent and assistant superintendent for such items as postage and contractual membership dues in professional associations. It also includes $400 for attendance at school and civic functions.

Finally, the Board argues that the cost of the district newsletter had been absorbed by the Chapter II Block Grant but funding for this grant has decreased and cannot absorb the newsletter costs. The Board summarizes the entire 130 Account as Exhibit C of its Statement of Position and points out that there is an overall decrease of $2,271 in this account between 1990-91 and 1991-92.

Elimination of Architectural Study — Reduction: $5,000

The Board argues that proliferation of small group instruction and special education classes has required it to utilize substandard classroom space. Because by law said space must be upgraded, architectural plans must be drawn up and approved by the Bureau of Facilities Planning in the Department of Education.

The Board contends that there has also been an increase of 42 students attending the high school in 1991-92.

Elimination of Administrative Salary Increases — Reduction: $36,669

The Board contends that Council's actions are arbitrary since it made no attempt to determine if the amounts involved were contractual obligations. The Board contends that all of the personnel involved in this area have salary increases which are contractually required. It summarizes the obligations in this account (Account 110) as Exhibit D of its Statement of Position.

The Board further points out that Council already has reduced this account by $9,700 in the resolution entitled "Deduction of Surplus in Clerical Account."

Elimination of Coaching and Club Advisor Salary Increases — Reduction: $30,701

The Board argues that Council ignores the fact that the salary increases in this account (Account 1010) are contractual and must be met.

Elimination of Nine Vacant Positions — Reduction: $156,485

This reduction, contends the Board, is the most glaring example of the arbitrary nature of Council's reductions since it fails to identify the appropriate line items being reduced. The Board contends that it was only able to identify the so-called vacancies after a settlement conference held with the County

Superintendent revealed that the vacancies referred to would occur if the Board closed an existing school, School 9.

The rationale offered by Council was that the aforementioned school was unnecessary because of declining overall enrollment and the small population of School 9. The Board points out that overall enrollment in the district has increased from 3,552 students to 3,659 and that School 9's population has also increased from 115 students to 131 students. The Board further argues that decisions relative to school closings remain its own sole authority which may not be infringed upon by Council. By making such a recommendation, Council is reacting to voter sentiment and not basing its recommendations on educational grounds.

Reduction of Fuel Account — Reduction: $45,000

The Board identifies this account as 630 and points out that it expended $140,378 in the 1989-90 school year to heat its facilities. In 1990-91 it contends its expenditures were $164,644 and it has budgeted only $155,000 for 1991-92. Based upon the foregoing figures, the Board contends that a $40,000 reduction is unwarranted and predicated upon speculation as to a mild winter and fuel savings due to conversion from oil to gas and stabilized fuel prices.

Reduction in Capital Leasing — Reduction: $100,000

The Board identifies this account as Account 830. The Board argues that Council ignores the fact that the Board is a participant in the Essex County Improvement Authority's Capital Lease Program and must meet an interest and principal payment schedule as follows:

September 1, 1991 - Principal: $200,000 - Interest: $35,573.75
March 1, 1992 - 30,423.78

(See Board's Statement of Position, Exhibit F)

The second $50,000 is identified by the Board as being in Account 730, Equipment. The Board assumes that such amount is predicated upon the purchase of said equipment for the Board by the municipality. While the Board questions the legality of said action, it raises no objection to this reduction if the purchase can be legally accomplished.

Increase in Account 310 Attendance Personnel Increase: $25,000

The Board argues that the intended increase is based upon a unilateral determination by Council that the Board is incapable of identifying and removing non-resident students. The Board contends that its Attendance Officer is capable of performing this function.

COUNCIL'S POSITION

Council notes that it has recently undergone a change in its form of government and is committed to more efficient and effective municipal government and services through attempting to restructure government and eliminate excessive spending. Council argues that while it has made strides in this regard, the school district has proposed a budget 21.87% greater than the previous year which it claims resulted in an overwhelming defeat by the electorate.

Council claims that its review of the budget and its recommended reductions are consistent with its own attempts to eliminate waste and inefficiency while still assuring a thorough and efficient school system. It points to a number of specific areas in which its recommended reductions would result in similar

efficiencies effectuated by Council. For more specific input, it relies upon the affidavit of its Township Manager, Bertrand Kendall. It should be noted, that Mr. Kendall's affidavit seeks to cure the deficiency of Council's Resolution which failed to identify specific line item account numbers. Mr. Kendall attributes the failure to identify the specific line item accounts to clerical error. The specific line item accounts are identified on page 2 of Mr. Kendall's affidavit, along with the amounts by which these line items were reduced.

By way of a general position, Mr. Kendall points out that Belleville is an urban community bordering the City of Newark which has undergone significant commercial and industrial decline and has suffered a declining tax base. He points out that Council has been sensitive to the political consequences of the budget defeat by an overwhelming margin while at the same time trying to meet its obligation to provide a thorough and efficient system of education.

Mr. Kendall argues that attendance information provided by the Board reflects a continual decline in the number of school age children and has led to continuing discussions concerning the closing of School 9. He contends that the current budget in question not only contains the increase indicated above, but includes the cost of maintaining a school which has been recommended for closing by the district's superintendent.

Council's position relative to specific line item account reductions is set forth below:

Account 213 Teachers - Salaries Reduction: $99,880

Council by way of Mr. Kendall's affidavit argues that the Board seeks to add new teaching positions despite the fact that it has nine (9) vacant positions. This action, contends Mr. Kendall, is unwarranted in a situation of declining enrollment.

Accounts 110 and 215 Clerical Salaries Reduction: $11,000

Mr. Kendall points out that the amount budgeted by the Board was set prior to concluding its negotiations with the secretarial and clerical units. Now that such negotiations have been completed, an $11,000 total surplus exists in the various accounts in which clerical salaries are budgeted.

Account 550 Pupil Transportation Reduction: $70,000

Council's position is that the Board's actual expenditures in this account for 1990-91 were actually $70,000 less than budgeted, yet that $70,000 overbudgeting has been carried over to the 1991-92 budget.

Account 130 Administrative Expenses Reduction: $7,829

Council believes that an increase over last year's budget is unwarranted when the municipality has cut its own expenses. Council argues that the expenses of the Board and Superintendent can be shared with those of the Secretary. Printing costs can be eliminated by use of the high school's printing facilities.

Account 120 Administrative Services Reduction: $5,000

Council believes that this expense for architectural services can be delayed without any loss to the district since there has been no demonstration of the need for expansion of facilities.

Account 110 Administrative Salaries Reduction: $36,669

Council maintains that administrative salaries should be maintained at current levels since those of private industry are being frozen or reduced.

Account 1010 Coaching and Club Advisor Salaries Reduction: $30,701

The increase of 10% for coaches and 37% for club advisors exceeds those which have been allotted to teachers or sought for administrators.

Account 630 Heating Reduction: $45,000

Council argues that budgeting the same amount for heating in 1991-92 as in 1990-91 is unwarranted since, it contends, actual expenditures in 1990-91 were approximately $15,000 less than budgeted. Further, conversion to gas should lead to further reductions in heating costs.

Account 830 Capital Leasing Reduction: $100,000
Account 730 Equipment

The past budget, contends Council, contained over $50,000 more than was actually expended. Further, it contends that the additional $50,000 reduction in Account 730 can be effectuated by making use of two new township vehicles rather than the purchasing of additional vehicles by the Board.

Account 310 Attendance Personnel Increase: $25,000

Council seeks an increase in this account in order to supply additional funds to assure that the Board has sufficient ability to deter the illegal attendance of out of district children.

COMMISSIONER'S DECISION

Initially, the Commissioner deems it appropriate to address the Board's argument as to the deficiencies of Council's Resolution and its Statement of Reasons by which it reduced the Board's Budget,

as well as its Answer to the Petition of Appeal. In doing so, the Commissioner finds that the Board has made a valid argument that Council has not complied procedurally with the specific requirements of statute, regulation and/or case law. Further, the Commissioner is not persuaded by the argument raised by Mr. Kendall in his affidavit that the shortcoming was a result of clerical error produced by the necessity of complying with a tight timeline. Assuming arguendo that such an argument could be credited relative to Council's Resolution, the failure to correct said error in Council's Answer negates any such contention. Notwithstanding the above conclusion, the Commissioner does find that Council's papers, hastily and awkwardly prepared as they have been, do provide sufficient basis for him to make findings on the merits in at least most of the line item accounts considered.

Account 213 Teachers - Salaries Reduction: $256,365*

The Commissioner has carefully considered the arguments presented by the Board in reference to the need for the four additional positions by which Council reduced the Board's budget. After such review and upon consideration of Council's argument, generally, that the district does not need additional personnel because of declining enrollment and that it has budgeted for nine vacant positions, the Commissioner finds said argument to be without merit and arbitrary. In so concluding, the Commissioner finds that the Board has reasonably justified its need for the four additional teachers whereas Council's position relative to the "nine vacant positions" seems to be predicated upon the closing of a school which

*The Commissioner has combined the two reductions, $99,880 and $156,485, in this account.

the Board has not concluded it should do. Under the circumstances, the Commissioner directs that the $256,365 by which this account was reduced be restored.

Account 110 Clerical Salaries — Reduction: $9,700
Account 215 Clerical Salaries — Reduction: $1,300

The Board has acknowledged that surpluses exist in these two accounts as a consequence of salary settlements reached with the secretarial and clerical units. The Commissioner therefore sustains the reduction of $11,000 in this account.

Account 500 Pupil Transportation — Reduction: $70,000

The Commissioner has reviewed the arguments of the parties relative to the reduction imposed in this account. Based upon that review, the Commissioner is in agreement with the Board that Council has not indicated how it arrived at its figure of a $70,000 unexpended balance in the 1990-91 transportation budget. Like the Board, the Commissioner, after review of Exhibit B of the Board's Statement of Position which summarizes the entire expenditure in the transportation Account, cannot identify the figures used by Council in its Statement of Position. The Commissioner is, however, convinced by the contention of Council that some portion of the transportation account contains an amount for courtesy busing which is not mandated by law and cannot constitute an expenditure consistent with the requirement for providing a thorough and efficient education. In so concluding, however, the Commissioner notes that Council provides no figures as to what portion of the $70,000 reduction constitutes monies expended by the Board for such purposes, if any.

Consequently, since the Commissioner lacks sufficient information relative to such allegation regarding courtesy busing, he determines that he cannot make a judgment regarding a reduction based upon said unsubstantiated allegation. He does, however, admonish the Board that, should it be providing such courtesy transportation under the circumstances of a defeated budget, it should immediately cease and desist from such a practice and utilize any savings realized from such reduction of services to reduce the tax burden of its constituents in the following year's budget.

In light of the evidence before him and based upon the failure of Council to substantiate that the Board has overbudgeted, the Commissioner directs the restoration of the $70,000 by which this account was reduced.

Account 130 Administrative Expenses Reduction: $7,829

Based upon the review of the information provided, the Commissioner is convinced that the Board can sustain the reduction in this account. While Board and administrative attendance at professional conferences are an important element in maintaining a thorough and efficient system of education, the Commissioner is not convinced from the evidence presented by the Board that its obligations in this area cannot be met. Rather than all Board members attending state and national conventions, it is possible for a delegation of Board members to attend and later instruct those who do not. The Commissioner sustains the $7,829 reductions in this account.

Account 120 Administrative Services Reduction: $5,000

Council's argument to put off an architectural study designed to correct substandard classroom space is without merit. The Board, however, likewise does not provide sufficient information relative to other Administrative Services which could conceivably absorb the cost of this study. Consequently, the Commissioner, while endorsing the study, does not accept the Board's position that the reduction in this account would prevent it from providing a thorough and efficient system of education. The reduction of $5,000 is sustained.

Account 110 Administrative Salaries Reduction: $36,669

The Commissioner has considered the recommendation of Council that administrative salaries be frozen and finds such argument to be without merit given the fact that such increases are established either by way of individual contract or negotiated agreement. In light of the foregoing, the Commissioner directs the restoration of the $36,669 by which this account was reduced.

Account 1010 Coaching and Club Advisor Salaries Reduction: $30,701

Council's recommendations are without merit since all such salaries and increases are the result of negotiated collective bargaining agreements. The Board cannot unilaterally determine not to pay the increases negotiated. The Commissioner directs the restoration of the $30,701 by which this account was reduced.

Account 630 Heating Expenses Reduction: $4,500

In light of the fact that the 1990-91 expenditure for heat by the Board was $164,644 and only $155,000 was actually budgeted for 1991-92, a $45,000 reduction as suggested by Council is totally

unrealistic. The Board's reduction of its own budget for 1991-92 seems to have already taken into account savings to be realized from conversion from oil to gas. Further savings, if demonstrated by experience, can possibly be effectuated in the next budget year. In light of the lack of a record of experience in this account, the Commissioner directs the restoration of the $45,000 by which this account was reduced.

Account 830 Capital Leasing
Account 730 Equipment — Reduction: $100,000

Based upon the letter from Bettina Bronisz, Vice President of A.G. Edwards and Sons, Inc., affixed as Exhibit F of the Board's Statement of Position, the Commissioner finds Council's reduction of $50,000 from the principal and interest owed by the Board as a result of its participation as a member of the Essex County Improvement Authority's Capital Lease Program to be without merit and arbitrary.

As to Council's offer of providing two new vehicles for the Board at municipal expense, the Commissioner finds such proposal to be a desirable method of reducing costs by virtue of eliminating duplication.

Therefore, the Commissioner directs the restoration of $50,000 in this account while sustaining a reduction of $50,000.

Account 310 Attendance Personnel — Increase: $25,000

The Commissioner finds no authority in law for the municipal governing body to increase a specific account. To do so would, as pointed out by the Board, be an attempt to substitute the governing body's judgment for that of the Board. No increase is granted by the Commissioner.

SUMMARY

Account	Reduction	Amount Not Restored	Amount Restored
213	$256,365	$ -0-	$256,365
110	9,700	9,700	-0-
215	1,300	1,300	-0-
500	70,000	-0-	70,000
130	7,829	7,829	-0-
120	5,000	5,000	-0-
110	36,669	-0-	36,669
1010	30,701	-0-	30,701
630	45,000	-0-	45,000
830/730	100,000	50,000	50,000
	$562,564	$73,829	$488,735
	- 25,000		- 25,000
	$537,564*		$463,735

In light of the foregoing, the Commissioner directs that the Essex County Board of Taxation strike an additional tax levy of $463,735 in current expense for the support of the Belleville Public Schools in the 1991-92 school year which when added to the amount of $19,543,269 previously certified by the governing body will result in a total current expense tax levy of $20,007,004.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* This represents the adjusted amount of reduction imposed by Council given the $25,000 increase it effectuated in Account 310 Attendance Personnel. While $488,735 is ordered restored by way of line item reductions, the Board is entitled to only $463,735 since $25,000 had already been certified by Council through the increase in Account 310 which the Commissioner has not granted herein.

DECEMBER 9, 1991

DATE OF MAILING - DECEMBER 9, 1991
Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 9187-90
AGENCY DKT. NO. 331-9/90

BLOSSOM S. NISSMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF LONG BEACH ISLAND,
Respondent.

Philip E. Stern, Esq., for petitioner

Peter P. Kalac, Esq., for respondent (Kalac, Newman, Lavender & Campbell, attorneys)

Record Closed: September 30, 1991 Decided: October 23, 1991

BEFORE BRUCE R. CAMPBELL, ALJ:

Blossom S. Nissman (petitioner) alleges the Long Beach Island Board of Education (respondent) has improperly terminated her employment as principal and failed to recognize her tenure status. She seeks immediate reinstatement, reimbursement for any salary loss during pendency of this matter and such other relief as the Commissioner of Education may deem appropriate.

The matter was opened by filing of a petition of appeal with the Commissioner of Education on September 21, 1990. The Commissioner determined that the matter is a contested case and transmitted it to the Office of Administrative Law for

disposition pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. This judge conducted a prehearing conference on May 17, 1991. The matter was set down for hearing on September 30, October 1 and 2, 1991. Prior to commencement of hearing, the Board moved for summary judgment and the petitioner filed papers in opposition. For the reasons that follow, the motion is **DENIED**.

Certain facts are undisputed and reveal the context of the case. In August 1987, the Board and the petitioner entered into a contract of employment under which the petitioner would serve as an elementary school principal. The contract term was September 1, 1987-August 31, 1990.

On April 23, 1990, the Board adopted a resolution not to renew the petitioner's contract or to grant her tenure. The Board sent the petitioner written notice of its action by letter dated April 24, 1990. The letter cites N.J.S.A. 18A:27-10(b). A copy of the Board's resolution was enclosed. Among other things, the letter stated :

> The Board determined not to offer you continuation of employment at the expiration of your current contract term, August 31, 1990. Therefore, your employment will terminate with the Long Beach Island School District on that date.

At the end of the workday on August 31, 1990, the petitioner informed the Board, via telefax, that she had acquired tenure in the position of principal pursuant to N.J.S.A. 18A:28-5(a) and asserted her right to return to the position the following week. See, Petitioner's Exhibit A.

On the same afternoon, the Board transmitted a letter by telefax to the petitioner stating that she "should not report to work on Tuesday, September 4, 1990, or thereafter." See Petitioner's Exhibit B. This petition followed.

ARGUMENT

Board's Arguments

The Board argues that the petition should be dismissed because it was filed more than 90 days after the petitioner received notice that the Board had acted to terminate her employment. N.J.A.C. 6:24-1.2(c).

In early 1990, the Board and the petitioner met to discuss the petitioner's evaluations and performance as an elementary school principal. Meetings were held on March 12 and March 26, 1990. The petitioner was represented by counsel and was given a full opportunity to be heard. On April 23, 1990, the Board adopted a resolution that stated in part:

> Resolved that the employment contract of Dr. Blossom Nissman expiring August 31, 1990, not be renewed and she not be offered a new contract or granted tenure.
>
> Be it further resolved that the Board Secretary direct the appropriate notice to Dr. Nissman as required by law.

On April 24, 1990, the Board secretary delivered a letter to the petitioner that indicated her employment would terminate on August 31, 1990. A copy of the resolution adopted by the Board on April 23, 1990 was enclosed with the letter. There is no dispute that the letter and resolution were delivered to the petitioner on April 24, 1990.

N.J.A.C. 6:24-1.2(c) states:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party or agency, which is the subject of the requested contested case hearing.

The petitioner filed her appeal with the Commissioner on September 21, 1990. September 21 is not within the 90-day period following April 24. The petition should have been filed on or before July 23 if the Commissioner and the Office of Administrative Law were to exercise jurisdiction. The "action" of the Board the petitioner would contest pursuant to N.J.A.C. 6:24-1.2(c) was the action taken on April 23, 1990. The Board took no action on August 31, 1990. That merely was the date the petitioner's contract expired. The petitioner then had only one "final order, ruling or other action" to contest: The resolution of April 23, 1990, served on her on April 24, 1990. The petitioner waited until September 21, 1990 to challenge the April resolution. By then, she was time barred and her petition should be dismissed.

N.J.A.C. 6:24-1.2(c) cuts off administrative review when an appeal is not timely filed. Case law consistently upholds this stringent consequence. Sorace v. Morris School Dist. Bd. of Ed., OAL DKT. EDU 7427-90 (Apr. 8, 1991), adopted Comm'r of Ed. (May 20, 1991). Sorace is predicated on well-established precedent. Riely v.

Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980); Polaha v. Buena Regional School Dist. 212 N.J. Super. 628 (App. Div. 1986).

The Board urges that Sorace is on all all fours with the present case. In Sorace, the employee also received notice on April 24, 1990. The administrative law judge found this most important to the determination.

> Respondent's notice of April 24, 1990, triggered the commencement of the 90 days which tolled July 24, 1990. . . . Given the above, I must **FIND** and **CONCLUDE** that the petitioner has not timely filed her notice of appeal and that the Department of Education and Office of Administrative Law lack jurisdiction to entertain the same. Slip opinion at 4-5.

In the present case, the petitioner received notice from the Board on April 24 and did not file her petition of appeal until after the deadline of July 23, 1990. Therefore, an initial decision should be issued ordering dismissal of the petition with prejudice.

Petitioner's Arguments

The petitioner asserts her petition was timely filed. She challenges the Board's act of August 31, 1990, barring her from her tenured position of principal. See, Petitioner's Exhibits A and B. At no time has the petitioner challenged the Board's act of April 23, 1990 in which it resolved not to renew her employment contract. Rather, her cause of action arises from the Board's refusal to acknowledge her acquisition of tenure by operation of law, which occurred on August 31, 1990.

The petitioner complied with N.J.A.C. 6:24-1.2(c) when she filed her petition of appeal on September 21, 1990, 21 days after the Board informed her by letter that she was not to report to work despite her tenure status. The Board's claim that the "action" was the action taken on April 23, 1990 is unsupported by the facts and pleadings.

In Nissman's petition of appeal filed on September 21, 1990, she explicitly challenges the Board's act of August 31, 1990, barring her from reporting from work on or after September 4, 1990, after she acquired tenure on August 31, 1990. See, Petition of Appeal, pars. 3, 4 and 5. The petitioner also states that the Board admits she worked on her tenure anniversary date.

The earliest that the petitioner could have made a claim asserting her acquisition of tenure was after her tenure anniversary date, August 31, 1990. The Board's reliance on the April 24, 1990 nonrenewal letter as the action that triggered the cause is misplaced and contrary to law. In Delk v. Pemberton Bd. of Ed., OAL DKT. EDU 8067-85 (July 8, 1986), aff'd in part, rev'd in part, Comm'r of Ed. (Aug. 19, 1986), the Commissioner stated:

> A cause of action accrues and the 90 day period begins only after receipt of notice by petitioner of the action concerning which the hearing is requested. . . .[T]he State Board stressed that the notice provided by the board of its action must be specific and definite so that a petitioner is informed both of the action taken by the Board and the fact that the individual was affected by that action. Slip opinion at 27.

In this case, the petitioner acquired tenure by operation of law on August 31, 1990. She asserted her right to her tenure position on August 31 and the Board then barred her from the district by letter dated August 31, 1990. It is the Board's August 31 letter that prompted this petition since, as set forth in Delk, the Board's actions of April 23 and 24, 1990 have no bearing on the petitioner's acquisition of tenure.

Conversely, had the Board informed the petitioner on August 31, 1990 that she should report to work on or after September 4, 1990, having acquired tenure by operation of law, the petitioner would have had no need to file a petition. Moreover, had the Board barred her from working after August 30, 1990, the petitioner would not have worked the statutorily-required three years, and would have been unable to assert her tenure claim. The Board's claim that the 90-day period began to run from April 24 is both illogical and legally indefensible.

The Board's reliance on Sorace, above, is misplaced. The cause of action in Sorace was based on the petitioner's actual nonrenewal. The petitioner Sorace claimed that her nonrenewal by the Board was "a retaliation for pursuing a workmen's compensation action against the school district." The Commissioner dismissed Sorace's petition as untimely because she failed to file within 90 days of her notice of nonrenewal.

Here, by contrast, the petitioner claims acquisition of tenure and appeals the Board's act of barring her from work after she acquired tenure. Her cause of action does not challenge the Board's decision to terminate her contract. In Sorace, the petitioner made no claim to the acquisition of tenure. Thus, Sorace is irrelevant to the present motion.

DISCUSSION AND DETERMINATION

N.J.A.C. 6:24-1.2(c), the 90 day rule, is an administrative enactment. It cannot thwart a legislative design. In Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982), our Supreme Court made clear that whether a benefit springing from a statute is to be considered a statutory entitlement of a public employee or considered a term of the employee's employment contract depends, for limitation purposes, upon the nature of the benefit and its relationship to the employment. Attention must be directed to the purpose of the statute and its relevance and materiality to employment. It is difficult to conceive of anything more relevant and material to employment as a teaching staff member than the acquisition of tenure. Under the tenure statute, all teaching staff members who work in positions for which a certificate is required, who hold a valid and appropriate certificate, and who have worked the requisite number of years, are eligible for tenure unless they come within an explicit statutory exception. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). See, also, N.J.S.A. 18A:1-1, 18A:28-5, 18A:28-9.

Although, ordinarily, the 90-day rule is strictly interpreted, Riely v. Hunterdon Central High School Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980), tenure acquisition, like credit for military service, is a creature of statute and cannot be cut short by a rule of repose. The Board points out it took no action on August 31, 1990; the action the petitioner complains of was that taken by the Board at its April 23, 1990 meeting. The petitioner received notice of that action on April 24, 1990. Thus, ordinarily, July 23, 1990 would have been the last date on which she could file her petition and satisfy N.J.A.C. 6:24-1.2(c).

The tenure statute defines the conditions under which teaching staff members are entitled to the security of tenure. The statute makes tenure a mandatory term and condition of employment. It supersedes labor contract terms and administrative convenience. Spiewak, above. Therefore, the determination here must rest on whether the petitioner achieved a tenure status. Upon consideration of the full record, case law and statutes, I **CONCLUDE** that she did.

Teaching staff members, as defined at N.J.S.A. 18A:1-1, are protected by tenure after employment in a district:

(a) For three consecutive calendar years or any shorter period set by the employing board; or

(b) For three consecutive academic years together with employment at the beginning of the next succeeding academic year; or

(c) For the equivalent of more than three academic years within a period of any four consecutive academic years; . . . N.J.S.A. 18A:28-5.

"Three consecutive calendar years" in a district has been construed as not limited to a period beginning on January 1, and ending on December 31. The meaning of the term is a full year commencing at any time so that a teaching staff member employed as of July 1, for example, acquired tenure upon the expiration of 36 months' continuous service on June 30, three years thereafter. Bd. of Ed. of Manchester Tp. v. Raubinger, 78 N.J. Super. 90 (App. Div. 1963). A teacher's right to tenure does not come into being until the precise condition prescribed in the statute has been met. Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E. & A. 1941); Zimmerman v. Bd. of Ed. of City of Newark, 38 N.J. 65 (1962) cert. den. 371 U.S. 956 (1963). Zimmerman also enunciates that, except for constitutional and statutory limitations, there is no legal duty on the part of a school board to reemploy a teacher at the end of a contract term.

It is uncontroverted that the petitioner served precisely three years in position. The Board did not by resolution set any shorter period as the term for acquisition of tenure by all persons in a petitioner's category. Rall v. Board of Ed. of City of Bayonne 54 N.J. 373 (1969). The petitioner did not serve for three consecutive academic years together with employment at the beginning of the next succeeding academic year. Neither did serve the equivalent of more than three academic years within a period of any four consecutive academic years. N.J.S.A. 18A:28-5.

Her argument is that service for precisely three years satisfies the first criterion of N.J.S.A. 18A:28-5. The Appellate Division in Manchester, above, has made clear that, although "three consecutive calendar years" in a district is not limited to periods beginning January 1 and ending December 31, a teaching staff member claiming tenure under this criterion must have been employed as of July 1, for example, upon expiration of 36 months' continuous service on June 30. Such are the facts here.

A copy of the contract between the Board and the petitioner was submitted at my request (Joint Exhibit A). The second term and condition reads:

> The terms of this contract shall commence September 1, 1987 and end August 31, 1990. The salary shall be . . . .

The eighth term and condition reads:

> The Elementary Principal shall be entitled to 23 days of vacation annually, exclusive of weekends and legal holidays, 14 days of sick leave annually, and 2 days personal leave, pro rated.

A fair reading of this contract, considering the vacation and sick leave allowance particularly, is that it is what is commonly called a 12-month contract. The petitioner was a 12-month employee. She was employed for three consecutive calendar years, September 1, 1987-August 30, 1990. The precise condition prescribed in the statute has been met. She is protected by tenure.

Manchester, Zimmerman and Ahrensfield, above, are satisfied. Sorace is inapposite. On my own motion because the petitioner did not cross-move for summary judgment, I **DIRECT** judgment for the petitioner. There are no facts in dispute and the sole legal question has been determined.

ORDER

It is **ORDERED** that Blossom S. Nissman is reinstated to the position of Elementary Principal and that she be reimbursed any salary loss, less mitigation, during the pendency of this matter. Her claim for interest on lost salary is **DENIED** as not meeting the requirement of N.J.A.C. 6:24-1.16.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

23 OCTOBER 1991
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

10/25/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 30 1991
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

EXHIBITS

Petitioner's Exhibit A:	Letter, Stern to Tramontana et al., August 31, 1990
Petitioner's Exhibit B:	Letter, Newman to Stern, August 31, 1990
Joint Exhibit A:	Contract between Long Beach Island Board of Education and Blossom S. Nissman executed August 10, 1987, 2 pp.

BLOSSOM S. NISSMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LONG BEACH ISLAND, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board and petitioner filed timely exceptions pursuant to the provisions of N.J.A.C. 1:1-18.4. Petitioner also filed timely reply exceptions.

The Board argues the ALJ erred in stating that "a creature of statute (tenure acquisition) cannot be cut short by a rule of repose." (Board's Exceptions, at p. 2, citing Initial Decision, at p. 6) Citing Danilla v. Leatherby Insurance Company, 168 N.J. Super. 515 (App. Div. 1979) for the proposition that rules of limitation must be strictly adhered to, the Board contends no such rule as expressed by the ALJ exists and no authority is offered by the ALJ for such proposition.

The Board further argues the ALJ failed to consider the intent of the Board in its April 23, 1990 resolution, suggesting he never considered the threshold question of how petitioner can acquire tenure when prior to her statutorily required period of

service, the Board took definitive and public action to specifically deny and prohibit her acquiring such tenured status. The Board claims petitioner was apprised of the Board's action in a clear and definitive manner. The Board further suggests it "did not block the door and prevent petitioner from completing her contract.***" (Exceptions, at p. 3) It avers the import of the decision not to "bar the door" (id.) has not been addressed below because it was not relevant to the Motion to Dismiss.

The Board also claims, contrary to the ALJ's conclusion, that Cynthia Sorace v. Board of Education of the Morris School District, decided by the Commissioner May 20, 1991 is relevant to this matter. It claims the cases petitioner relied upon are all tenure cases. The Board claims instead, that the issue before the Commissioner is one of the application of a rule of limitation, the 90-day rule. It avers that notwithstanding the ALJ's refusal to apply the 90-day rule, it is axiomatic that the action contested pursuant to N.J.A.C. 6:24-1.2 was the Board's action taken on April 23, 1990. August 31, 1990 was merely the date of expiration of petitioner's contract, the Board submits. Thus, the Board concludes that petitioner has but one "final order, ruling or other action" (N.J.A.C. 6:24-1.2) to contest, the resolution of April 23, 1990. Because she chose to wait until September 21, 1990, the Board submits, she was time-barred and the petition should have been dismissed. It claims that under facts similar to this matter, Sorace held that that petitioner was time-barred and thus, Sorace, is dispositive of this matter.

The Board's second exception submits the ALJ erred in granting summary judgment for petitioner because there was no motion

for summary judgment made by petitioner at the time the decision was rendered. Noting that petitioner filed such a motion the same day as the decision was rendered by ALJ Campbell, the Board believes his decision to grant petitioner summary judgment was "precipitous" (Exceptions, at p. 6) because he did not solicit briefs from either party regarding the question of summary judgment. Since no briefs were submitted to OAL on that issue, the ALJ clearly pre-judged the issue before the Board had an opportunity to research, brief or argue the subject of a motion which was not before the judge, it claims. The Board notes there is no rule in the Administrative Code governing the issue of an ALJ's latitude in issuing summary decision, and thus it cites N.J.A.C. 1:1-1.2(a) which speaks to simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Relying on the New Jersey Court Rules to bolster its position, the Board states it is clear that in New Jersey a party which files a motion to dismiss a claim of a plaintiff or petitioner cannot be in jeopardy of having summary judgment issued against it, if the opposing party has not filed a motion with the court for such relief. It also cites A&P Sheet Metal Company, Inc. v. Hanson, Inc., 140 N.J. Super. 566 (1976) in support of this proposition.

The Board submits that if its Motion to Dismiss the petition is denied, the case must be remanded so that the Motion for Summary Judgment filed by petitioner on October 23, 1991 and which was made moot by the initial decision, can be considered after proper notice and the filing of briefs by both parties. The Board claims it cannot be deprived of its right to a day in court or its

right to cross-move for summary judgment because it sought a dismissal of the petition on jurisdictional grounds.

Finally, the Board submits that if its Motion to Dismiss is not granted, the initial decision should be reversed and remanded to a different ALJ, because ALJ Campbell's deciding the matter on summary judgment without such a motion being presented to him was patently prejudiced. It claims it would thus be improper to assign this matter to ALJ Campbell on remand. It cites Hundred East Credit Corp. v. Eric Schuster, 212 N.J. Super. 350 (App. Div. 1986) for the proposition that the error of prejudice committed by a tribunal is not one that can be cured by remand of the matter to the same judge.

The Board seeks reversal of the initial decision, a finding that the petition was untimely filed, or in the alternative, a remand for briefing and consideration of petitioner's Motion for Summary Judgment under a different ALJ.

Petitioner's exceptions note that she filed a Notice of Motion for Summary Judgment before the ALJ on October 21, 1991 by mail. She further states that since the ALJ's initial decision was rendered on October 23, 1991 he did not consider said motion which was received by the Office of Administrative Law on October 24, 1991. She notes finally that the arguments set forth in petitioner's moving papers in support of summary judgment substantially mirror those of the ALJ in his decision dated October 30, 1991.

Petitioner's reply exceptions contend the ALJ correctly denied respondent's Motion to Dismiss, for the reasons expressed in the initial decision. It also avers the ALJ correctly granted summary decision because there are no essential facts in contest to

preclude the granting of summary judgment and because the Board's Motion to Dismiss is a form of summary judgment, for which the parties did fully brief all issues in contest. Finally, in the event the Commissioner remands the matter in order to hear another summary judgment motion, petitioner submits there are no grounds for disqualifying ALJ Campbell pursuant to N.J.A.C. 1:1-14.12(c) because there is no conflict preventing a fair and unbiased hearing and decision. Petitioner avers the ALJ merely applied the established law governing the acquisition of tenure to the undisputed facts in this matter. She cites Spiewak, supra, in support of this contention. The Board's failure to demonstrate any evidence of conflict including personal bias or prejudice, familiar ties to a party before the judge or prior legal representation of a party to a controversy, leaves her, petitioner, as the only person who has been prejudiced in this matter, due to the arbitrary actions of the Board in barring her from her tenured position as a principal.

Upon a careful and independent review of the record of this matter, the Commissioner affirms the findings and determination of the Office of Administrative Law for the reasons expressed in the initial decision.

It is clear from the record that the Board resolved by its April 23, 1990 action that it did not wish to continue petitioner's employment beyond the terms of the contract issued her effective from September 1, 1987 through August 31, 1991. However, by having failed to terminate the contract before the completion of three calendar years, the tenure statute applied by self-effectuation by petitioner's having worked from September 1, 1987 through August 31, 1991. Having a termination date of August 31, 1991, thus made the

Board vulnerable to a claim of tenure acquisition after that date. As such, the subject of the instant appeal before the Commissioner is one challenging the Board's failure to recognize tenure acquisition, not one of nonrenewal.

Under such conditions, as noted by the ALJ, application of the 90-day rule is not pertinent in assessing the outcome of the tenure challenge. Tenure acquisition is a statutory entitlement. Thus, the determination in this matter rests on whether petitioner achieved tenure status, and the seminal case for so determining is Spiewak, supra. As the review conducted by the ALJ notes based on his careful consideration of the facts extant in this matter, petitioner 1) did work in a position for which a certificate was required, 2) did hold a valid and appropriate certificate for such position, and, in fact, 3) did work the requisite number of years to acquire tenure under N.J.S.A. 18A:28-5(a). See Spiewak at page 81. She thus acquired tenure as a principal in the Board's district. As noted by the ALJ, because this is a tenure acquisition matter and not one of nonrenewal, Sorace, supra, is inapposite, and petitioner's claim is not time-barred because she challenges the Board's denial of her tenured status, as evidenced by its directive that she not report to work after September 1, 1991.

The Commissioner cautions this Board and all others to be assiduous in its consideration of the three means by which one might acquire tenure under N.J.S.A. 18A:28-5 and 6. Moreover, Board contracts must reflect an understanding of the nature of the employment the Board extends to such employees, recognizing the difference between contracts for 12-month employees versus 10-month employees. Under the facts of this case, it is unfortunate that the

Board did not recognize that a calendar year 12-month employee can be contracted for a period other than from January 1 to December 31. Indeed, many such 12-month employees in New Jersey have contracts extending their terms of employment from July 1 through June 30. Case law makes plain that the statute providing for teacher tenure after service of three consecutive calendar years in a district does not limit a calendar year to a period commencing January 1 and terminating December 31, but embraces within such term a full year commencing at another time. Board of Education of Manchester Township v. Raubinger, 78 N.J. Super. 90 (1963)

Finally, the Commissioner notes the Board's exception to the ALJ's having decided the matter, sua sponte, on summary judgment. He agrees with petitioner, however, that the Board's Motion to Dismiss constitutes a form of summary decision insofar as the Board's own moving papers in support of said Motion to Dismiss acknowledge that "[t]he essential facts in this matter are undisputed by the parties." (Board's Brief in Support of Motion to Dismiss, at p. 4) In accord with Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 74 (1954) and N.J.A.C. 1:1-12.5(b) which establishes the requirement that for summary judgment to be considered there must be a showing that "no genuine issue as to any material fact challenged" exists, the issue of whether petitioner is tenured has been fully briefed through the Board's own Motion to Dismiss and is thereby ripe for summary decision. In the alternative, petitioner's Motion for Summary Decision, which was filed shortly after the ALJ's decision in the matter, raises those points upon which the ALJ determined the matter on summary judgment. Such document, as well as the briefs filed on the Motion

to Dismiss, is before the Commissioner now. Because the Commissioner agrees with the findings and conclusions of the Office of Administrative Law as stated in the initial decision, a return of the matter to the Office of Administrative Law for further briefing on the Motion for Summary Decision petitioner raised would be unnecessary and irrelevant because all facts necessary for adjudication are uncontested. In so deciding, the Commissioner rejects the Board's argument that it has not been provided an opportunity to brief why it permitted petitioner to complete her contract. It is the Commissioner's judgment that why the Board allowed petitioner to work through the exhaustion of her contract is irrelevant; the Board concedes it did. Once the Spiewak criteria have been met, by operation of statute, tenure attaches. Therefore, the Commissioner finds A&P Sheet Metal Co. Inc., supra, inapposite to this matter. Accordingly, the Board's exception to the ALJ's resolving the instant matter on summary judgment is dismissed as being without merit.

The Commissioner further finds and determines that for the reasons expressed by the ALJ below, in his own motion, Summary Judgment is granted petitioner. Blossom S. Nissman is hereby directed to be reinstated to the position of elementary principal and to be reimbursed for lost salary, less mitigation, sustained during the pendency of this matter. As found by the ALJ, petitioner's claim for interest on lost salary is denied as failing to meet the requirement of N.J.A.C. 6:24-1.16.

IT IS SO ORDERED.

DECEMBER 9, 1991

COMMISSIONER OF EDUCATION

DATE OF MAILING - DECEMBER 9, 1991

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1554-91
AGENCY DKT. NO. 404-12/90

EARLY INTERVENTION PROGRAMS OF MONMOUTH AND OCEAN COUNTIES, INC.,

Petitioner,

v.

JOHN ELLIS, COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION; JEFFREY OSOWSKI, DIRECTOR, DIVISION OF SPECIAL EDUCATION; AND JAMES A. JONES, PRESIDENT, NEW JERSEY BOARD OF EDUCATION,

Respondents.

Herbert D. Hinkle, Esq., for petitioners

Arlene Lutz, Deputy Attorney General, for respondents (Robert J. DelTufo, Attorney General of New Jersey, attorney)

Record Closed: October 8, 1991 Decided: October 23, 1991

BEFORE **STEVEN L. LEFELT**, ALJ:

Early Intervention Programs of Monmouth and Ocean Counties, Inc. (EIP) and the Department of Education (DOE) entered into yearly funding contracts from 1986 to 1990 so that EIP could provide early intervention services to handicapped children. EIP requests a determination that it has properly spent various DOE funds for interest and other program costs despite the fact that these expenditures were not specifically authorized by the grant contracts. The DOE contends that these funds were improperly spent under the contracts in question and therefore must be returned.

As permitted by a June 19, 1991, prehearing order, the DOE moves to dismiss EIP's petition because it is time barred under *N.J.A.C.* 6:24-1.2(c). This rule provides 90 days to file a petition with the DOE "from the date of receipt of the notice of a final order, ruling or other action by the . . . individual party, or agency, which is the subject of the requested contested case hearing."

Preliminarily, it is important to discuss the posture of this motion. The DOE moves for dismissal of EIP's petition before any evidence has been offered. The motion papers contained the contracts and various reports and letters the parties believe relevant. Only one affidavit, that of Patricia Wolfinger, the executive director of EIP, was included in the moving papers.

Ordinarily, motions for dismissal under the 90-day rule are made on undisputed facts or after an evidentiary hearing has been conducted. I believe that for the DOE to deprive EIP of its requested hearing, the DOE must establish that there is no genuine issue as to any material fact and that the DOE is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5. Given the motion record in this matter, I decline to determine as DOE argues that Ms. Wolfinger was "less than forthright in her affidavit." Instead, I rely on all the undisputed facts which are discernible in the record and note that the only factual dispute in this case is immaterial. Even if I accept EIP's factual contentions and accord these facts the benefit of all reasonable and legitimate inferences, I nevertheless believe that EIP's petition must be dismissed.

It is undisputed that after each contract year in question, including 1985 - 86, 1986 - 87, 1987 - 88 and 1988 - 89, EIP completed a "Final Close - Out" letter or form which clearly sets forth the "Total Amount Awarded by State Contract," the "Total Amount Expended by Contract Funds," and the "Total Amount to be Returned." These forms also required the agency to indicate whether it was returning unexpended amounts to the Division of Finance or the Division of Special Education. Apparently, if a cost was not permitted by DOE, grant funds allocated to that cost were considered by DOE unexpended and returnable. All of these forms indicated to whom the form must be returned and the 1988-89 forms even specified to whom the check must be made payable. EIP acknowledged by completing each of these forms that a total of $357,147 was to be returned to the DOE.

It is also undisputed that EIP did not forward any of these funds to the DOE as it indicated it would in its Final Close - Out letters or forms. Instead, Ms. Wolfinger states in her affidavit that it was her "intention to seek to apply those funds toward costs incurred in operating early intervention programs under the contracts in question." She expected "that DOE would do an audit of the contracts and that following the audit there would be an opportunity to apply unexpended

funds toward other program costs." Assuming for purposes of deciding this motion that the chief administrator of EIP, Ms. Wolfinger, can speak for the corporation, the EIP apparently believed that the process was not final until the DOE audited EIP's program, determined the final amounts due and demanded payment.

This belief, in my opinion, is legally erroneous and therefore immaterial to this motion which solely involves an application of *N.J.A.C.* 6:24-1.2(c), the 90-day rule.

EIP claims that the statement in the Close-Out form referring to the DOE verifying "your audit" supports its construction that the DOE was to perform a final audit and that it need not return any monies until that audit was conducted. EIP further argues that paragraph E of Section XVI of the contract's Attachment A, Contract Closeout Procedures, "specifies that this procedure remains open until DOE performs a 'final audit' of the contract and that it must 'fully' consider the 'recommendations on disallowed costs resulting from [this] audit" (EIP's letter brief at p. 3). EIP also asserts that paragraph D of Section XVI allowed it to submit only the Close-Out letter while "the settlement procedure is underway" (*Ibid.*). In my opinion these arguments misinterpret the contract.

Paragraph C of Section XVI actually provides that the "contractor will, together with the submission of the final report, refund to the Department any unexpended funds or unobligated (unencumbered) cash advanced except such sums that have been otherwise authorized, in writing, by the Department to be retained." It is undisputed that EIP acknowledged that all of the funds in dispute fell within this paragraph. It is also undisputed that EIP did not obtain written authorization from the Department to retain any of these amounts. Furthermore, under the contracts, final reports were due "upon completion of the contract period. . ." Paragraph B of Section XVI.

Even though Section XV allowed contractors to seek additional funding or other budget revisions or modifications, EIP did not exercise this provision as it relates to the funds in dispute.

Paragraph D of Section XVI provides the Department with the right to adjust costs upward or downward, but only, in my opinion, after the DOE has received the monies due under paragraph C with the final report.

While paragraph E of Section XVI speaks of a final audit, this provision provides the DOE with the right to "recover any appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit." This provision does not provide the contractor with a right to recover any amounts. Instead, it contemplates DOE recovering whatever amounts may be appropriate after the contractor's audit.

In the 1985-86 Close-Out form, the DOE asked for EIP's fiscal year ending date. Beginning with the 1986-87 Close-Out form, each of the subsequent yearly forms asked EIP to indicate the month when the audit would be completed. Most of the forms also indicated that the "fiscal report amount is only final after verification of your audit by the [DOE]." The 1988-89 forms indicated that the fiscal report amount was "only final after verification of audit by the [DOE]."

The Final Close-Out forms when read with the contract in question reveal that the audits referred to are the audits performed by the grantee. In fact, EIP engaged auditors after each fiscal year in question and each acknowledged the monies due the DOE under the contract. Verification by DOE occurs under the contract after it reviews the grantee's audit and decides whether to make an upward or downward adjustment to the monies, which should have been previously returned by the grantee with its final report. If the grantee does not return unexpended funds, verification does not occur.

Accordingly, to the extent that EIP was awaiting some final audit by the DOE before paying the money in question, it misunderstood the contract. In the absence of some fraud, I believe that it is well established that a unilateral misunderstanding of this nature cannot invalidate a contract, even if the contract was not read. *Eg., Berman v. Gurwicz*, 178 *N.J. Super.* 611 (Ch. Div. 1981).

I believe it is therefore irrelevant to this motion that a compliance audit dealing with 1988-89 was finally performed by the DOE in 1990 and that EIP was successful in expanding the appeal process to include its contentions concerning the total unexpended amounts from all the prior years in question and its defenses of laches and estoppel.

Given my interpretation of the contract, contractors must return "unexpended" monies with their final reports upon completion of the contract period. If contractors have a problem with the approved budget, contractors should exercise their rights under the contract to seek a modification or may file a petition with the Commissioner.

There is no question that EIP did not file its petition in this matter until December 26, 1990, well after the contracts for 1985-86, 1986-87, 1987-88 and 1988-89 had been completed. For example, EIP's final fiscal "Close-Out Form" for 1988-89 was completed on September 29, 1989. The contract for that year ended on June 30, 1989 and EIP indicated its audit would be completed during October 1989. It was over a year later when EIP filed its petition.

While there has been no final order or ruling by the DOE in this case, I believe that the contract together with the Close-Out procedures constitutes

adequate agency action to trigger the 90-day filing requirement of *N.J.A.C.* 6.24 - 1.2(c).

In my opinion EIP should not be permitted to take advantage of the fact that DOE did not recoup monies from year to year but instead continued to deal with EIP as if all funds had been properly expended. I do not believe that the Department's failure to act in this case should permit an equitable estoppel defense. All of the DOE's compliance activity came well after the 90-day period had expired, and DOE staff did not mislead EIP. They simply did nothing. *See, W.V. Pangborne and Co. v. Dept. of Transportation*, 116 *N.J.* 543 (1989), where the agency did not deal scrupulously with the petitioner.

Under the applicable contracts, the primary obligation to return these funds or to contest the audit rests with the grantee. The delay which caused the amounts in dispute to increase to $357,147 and allegedly threaten the continuation of EIP's program was caused by EIP's failure to abide by the contract. While one could argue that the DOE should have more aggressively enforced its contract, the primary fault, in my opinion, rests with EIP.

Any delay which resulted from the DOE compliance process, which did not begin until sometime in 1989 or 1990, should not toll the time in which to file a petition in this matter. The DOE should not be required to dun grantees for funds that have not been expended under the grant terms. At best, the Department might withhold formally seeking collection in a court until after any informal compliance process has run its course. *Cf., Bernard Township Board of Education v. Bernard Township Education Association*, 79 *N.J.* 311, 326-327 n.4 (1979).

Accordingly, I grant DOE's motion and **DISMISS** the petition in this matter for failing to comply with *N.J.A.C.* 6:24-1.2(c).

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/23/91
Date

STEVEN L. LEFELT, ALJ

Receipt Acknowledged:

10/25/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 30 1991
Date

OFFICE OF ADMINISTRATIVE LAW

EARLY INTERVENTION PROGRAMS OF MONMOUTH AND OCEAN COUNTIES, INC., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN ELLIS, COMMISSIONER, NEW JERSEY STATE DEPARTMENT OF EDUCATION; JEFFREY OSOWSKI, DIRECTOR, DIVISION OF SPECIAL EDUCATION; AND JAMES A. JONES, PRESIDENT, NEW JERSEY STATE BOARD OF EDUCATION, RESPONDENTS.	:	DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were timely filed by petitioner pursuant to N.J.A.C. 1:1-18.4, as were replies by respondent (hereinafter "the Department"). Both parties incorporated their prior submissions as well as the arguments set forth below.

In its exceptions, petitioner argues that the ALJ erred in applying the 90-day rule in the instant matter, as there was no "final order, ruling or other action" from which to appeal pursuant to N.J.A.C. 6:24-1.2(c) until the Division of Compliance audit review letter of September 24, 1990; indeed, petitioner "did not hear***from DOE until the Division of Compliance performed an audit in late 1989." (Exceptions, at p. 2) Petitioner further avers that the ALJ also erred in determining that the contracts at issue were

concluded with petitioner's submission of a closeout letter to the Department, while ignoring Section XVI of the contract which provides for a closeout procedure that becomes final only after audit by the Division of Compliance. (Exceptions, at p. 3)

Petitioner next argues that the ALJ erred in determining that the Department was not estopped by its failure to previously request the unexpended funds, as he did not have the capacity to make the findings of fact necessary for this determination on a motion for dismissal. Nor did he consider petitioner's argument for relaxation of the timeliness rule, or otherwise give petitioner sufficient opportunity to demonstrate that relaxation was warranted. (Exceptions, at pp. 3-4) Finally, petitioner contends that the 90-day rule should not be applied to the 1990 contract year, which the ALJ added to the present matter on his own motion notwithstanding that petitioner had formally indicated (through a Department-provided form) its intention to invoke the closeout procedure for that year. (Exceptions, at p. 4)

In reply, the Department argues that this matter is a simple contract case which was correctly decided by the ALJ. The Department notes:

> ***In each of the years at issue, Early Intervention Programs of Ocean and Monmouth Counties (EIP) acknowledged that it had unexpended funds which it was required to return to the Department of Education. In addition, in each year the agency's auditor noted the liability. Notwithstanding that it acknowledged the funds were owed, it failed to return the money. It blatantly disregarded its obligation pursuant to the contract. Even if it is the EIP's contention that it did not understand the contractual procedures at issue here, as the judge noted, failure to comprehend the procedures does not excuse failure to comply therewith. The documents submitted by respondents, however,

> prove that EIP was aware of its responsibility to return the unexpended funds. It simply chose to ignore its liability to the Department and retain the funds, even in the face of letters from the Department requesting their immediate return.*** [EIP's] current contention that the school was waiting for the Division of Compliance is pure[ly] pretextual, an attempt to excuse its failure to challenge the requirement in each contract year that it return the funds.
>
> (Reply Exceptions, at pp. 1-2)

The Department notes that petitioner misquotes the language in Section XVI of the contract to its own advantage (the correct reading being "after final verification of your audit by the Division of Compliance") and that nothing in any of the contractual papers or other communications from the Department would have given petitioner any indication that Compliance would be conducting an audit and that monies need not be returned until it was completed. Nor, the Department argues, did the fact that Compliance allowed petitioner to argue for non-return of the monies reopen matters that should have been appealed long before or revive petitioner's claim so as to make it timely before the Commissioner.

With regard to equitable estoppel, the Department argues that petitioner did not change its position as a result of detrimental reliance on the word or conduct of the Department; indeed, petitioner simply continued in the course of conduct it had already chosen, that is, failing to return monies it knew were due and owing. The Department further contends that mere delay in seeking payment cannot serve as the sole basis for equitable estoppel, which is in any event rarely invoked against State agencies. Boyd v. Department of Institutions and Agencies, 126 N.J. Super. 273 (App. Div. 1974); Housing Authority of the City of Atlantic City v. State, 188 N.J. Super. 145 (Ch. Div. 1983), aff'd

193 N.J. 177 (App. Div. 1984) Similarly, the Department notes that no action on its part led petitioner to believe that it could wait to appeal the return of funds, so that there can be no grounds for relaxation of the 90-day rule. Finally, the Department notes that the 1990 contract year was not added to this matter sua sponte by the ALJ, but rather was raised by the Department as a counterclaim in its Answer to the Petition of Appeal.*

Upon careful review, the Commissioner fully concurs with the ALJ that the terms of the contract underlying this matter are clear on their face and that Section XVI of that contract, notwithstanding petitioner's contention to the contrary, leaves no room for doubt that any adjustments by way of review or audit to amounts calculated as unexpended by the contract's terms are to be made after these amounts have been returned to the Department. It is likewise clear, as held by the ALJ, that submission of the final report for any given year serves as the effective cause of action for any appeal a contracting agency may wish to make with respect to costs it believes should have been allowed under the contract but were not.

Notwithstanding the above, however, the Commissioner cannot concur with the ALJ that agreement by the Division of Compliance to

---

* The Commissioner notes that the 1990 closeout request form referred to in petitioner's exceptions was included neither with petitioner's filing with the Commissioner nor with the copy thereof provided to the DAG representing the Department and is hence not reflected herein. The Commissioner further acknowledges the Department's objection to petitioner's "reply" to the Department's reply brief filed before the ALJ but not considered by him. Here the Commissioner concurs that regulation makes no provision for such submission, so that it was properly excluded by the ALJ and, except to the extent that it incorporates arguments otherwise raised in petitioner's exceptions, is not considered herein.

conduct an audit that addressed amounts owing from FY 1986 through FY 1989 is irrelevant to the threshold issue of timeliness raised herein.

While there is no question that petitioner was and is obliged to return expended funds to the Department under the terms of its various contracts, those contracts did afford petitioner the right to argue for refunds resulting from downward adjustments of amounts due through an audit process. Such appeals, as the ALJ rightly finds, should properly have been made upon filing of the final closeout report and payment of the unadjusted amount due at the end of each contract year.

However, the Department, by opening the audit appeal process to amounts due from FY 1986 through FY 1989 and specifically advising petitioner, at whose behest the audit appeal process was initiated, of its right to have final audit appeal findings reviewed by the Commissioner pursuant to N.J.A.C. 6:24-1.2 (petitioner's exhibits at p. 12 et seq.) introduced an element of ambiguity as to the finality of the amounts listed in its February 1, 1990 demand letter to petitioner (petitioner's exhibits at pp. 9-10). Under the standard for finality of notice of agency action established by the State Board of Education in Board of Education of the City of Paterson, Passaic County v. Bureau of Pupil Transportation, Division of Finance, New Jersey State Department of Education and Passaic County Superintendent of Schools, decided February 6, 1991 and reversing the Commissioner's decision of September 25, 1989, this ambiguity effectively served to revive the issue of allowable expenses for the years in question as a controversy before the Commissioner. This being so, petitioner must be afforded the right to argue its disallowance claims at hearing.

In reaching his determination, however, the Commissioner stresses that the question of allowable expenses as addressed through the audit appeal is the only matter still at issue in these proceedings and that, for the reasons stated by the ALJ, the Commissioner wholly rejects petitioner's arguments of laches and estoppel with respect to the broader question of the Department's ability to collect monies due it under the clear language of the pertinent contracts.

Accordingly, for the reasons stated therein, the initial decision of the Office of Administrative Law is affirmed in its interpretation of the underlying contract and its stance that the Department was and is fully entitled to collect unexpended funds as originally calculated from the contract years in question. It is reversed, however, to the extent that it precludes petitioner from appealing the results of the audit conducted by the Division of Compliance as that audit relates to scrutiny of allowable expenditures in order to arrive at a sum certain representing the final amount to be retained by the Department following any adjustments. This matter is therefore remanded to the Office of Administrative Law for a hearing on the merits strictly limited to the questions of whether the expenditures challenged by petitioner were properly disallowed in determining the amount of adjustment to be made to the unexpended fund calculations submitted in petitioner's final reports for fiscal years 1986 through 1990.

Moreover, in view of the history of this matter, the significant accumulation of monies due and the extent of

petitioner's disallowance claims, the Commissioner also directs that petitioner's obligation to pay the amounts demanded, while continuing in full force, shall be stayed during the pendency of proceedings on remand directed herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 9, 1991

DATE OF MAILING - DECEMBER 9, 1991

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2535-90
AGENCY DKT. NO. 61-3/90

PASSAIC BOARD OF EDUCATION,

Petitioner,

v.

JAMES VIANI,

Respondent.

Matthew J. Michaelis, Esq., for petitioner

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

Record Closed: September 13, 1991 Decided: October 23, 1991

BEFORE ELINOR R. REINER, ALJ:

STATEMENT OF THE CASE

On March 19, 1990, the Passaic Board of Education certified a charge of excessive absenteeism against respondent, James Viani, an assistant custodian. On March 28, 1990, respondent filed an answer alleging that the charge did not support dismissal or reduction in compensation. On April 2, 1990, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

A telephone prehearing conference was held in this matter on May 3, 1990. At that time, the issues were isolated and the hearing was scheduled for November 1, 2, and 7, 1990, at the Office of Administrative Law. The hearing was adjourned to April 10 and 11, 1991, at the request of respondent, and it was ordered that respondent

was not entitled to his full salary between November 1, 1990 and April 10, 1991. The hearing was adjourned to June 4 and 5, 1991, due to a calendar conflict. On June 4, 1991, the parties entered into a stipulation of facts and a briefing schedule was established. The record closed on September 13, 1991, when it was determined that no additional submissions would be filed.

ISSUE

At issue in the instant case is whether respondent's absences constitute unbecoming conduct, incapacity, or other just cause in violation of *N.J.S.A.* 18A:6-10. More particularly at issue is whether respondent's absences constitute sufficient excessive absenteeism to warrant his dismissal. It is to be noted that respondent did not address the issue as stated on the prehearing order as to whether petitioner initiated this case in response to respondent's alleged on-the-job injury and subsequently filed worker's compensation claim.

STIPULATED FACTS

The parties submitted a stipulation (JJ-1), with attached exhibit (J-1), which constitutes this tribunal's findings of fact. The uncontroverted facts may be summarized as follows:

1. James Viani has been employed by the Passaic Board of Education as an assistant custodian since November 27, 1984.

2. The Board certified tenure charges of excessive absenteeism on March 8, 1990. At the time of certification, the Board determined to suspend Viani from his position without pay in accordance with *N.J.S.A.* 18A:6-14, effective March 12, 1990. Exhibit J-1 constitutes the record of Viani's absences from the beginning of his employment until his suspension of March 12, 1990. It reveals the following:

   (a) December 1984 - three absences.

   (b) 1985 - 18 1/2 absences

(c) 1986 - 43 1/2 absences

(d) 1987 - 38 1/2 absences through October 30, 1987, plus the entire period commencing November 2, 1987 through November 30, 1987, and December 1, 1987 through December 31, 1987.

(e) 1988 - January 1, 1988 through January 31, 1988, plus 100 1/2 absences commencing February 1, 1988 through December 31, 1988.

(f) 1989 - 37 1/2 absences.

(g) 1990 - January, 9 absences, February, 1 absence.

(h) Employee suspended March 12, 1990, in connection with the filing of the tenure charges herein.

4. For purposes of this hearing, the parties stipulate that the Board is relying solely on the number of absences set forth on J-1 as and for its position that the dismissal of Viani is warranted as a matter of law.

5. The Board in no manner contests the legitimacy or justification, or the lack thereof, for any of the absences set forth in Exhibit J-1.

6. Mr. Viani alleges, and the Board does not contest, that a portion of his absences were occasioned by two automobile accidents in which he required successive hospitalizations for skull fractures, post-traumatic headaches, shoulder sprains, contusions of the chest wall, rib fractures, and cervical sprains. These accidents occurred in July 1986 and October 1987.

7. Viani provided the Board letters/certification from his attending physician indicating that he was being treated for these injuries/conditions and the periods of time he would be required to

be absent from work. The last such letter was provided on September 19, 1988.

8. At the time of his suspension, Viani had returned to work as an assistant custodian, and was performing said duties.

9. Mr. Viani alleges, and the Board does not contest, that any absences subsequent to the automobile accidents were occasioned as a result of the injuries/conditions associated with the automobile accidents.

10. On January 6, 1986, Mr. Viani submitted a doctor's certification indicating that he would be required to be absent until January 13, 1986, due to a fractured nose.

ARGUMENTS OF COUNSEL

The Passaic Board of Education contends that Viani's absentee record warrants his dismissal from his employment with the Passaic Board of Education regardless of his alleged justification or lack of justification for the absences. According to petitioner, it is not relevant whether or not the absences are legitimate, since dismissal can be imposed on an employee even where the absences are medically legitimate. The Board of Education cannot be expected to run a school system properly, be it dealing with a teacher employee, a custodial employee, or any other type of employee, if said employee is excessively absent.

Respondent does not agree. Essentially, respondent points out that where teachers have been dismissed from tenured employment following a finding of excessive absenteeism, aggravating circumstances surrounded such conduct. Respondent argues that a board should not rely on sheer number of days for its action but should take into consideration the nature of the illness. Moreover, although respondent admits that the Commissioner has upheld dismissal based solely on absenteeism, in these cases the number of days absent were of an entirely different magnitude than what is involved in the instant case. Respondent essentially opines that dismissal is not appropriate where there is no allegation that any absences were other than legitimate, the level of absenteeism is attributable to

traumatic events causing temporary medical disability but not resulting in incapacity, and the Board has taken no action to address the problem before initiating tenure charges. As to the latter, according to respondent, the Board has the burden of proving that Viani received some kind of notice that his absences were of concern. The Board has not shown that Viani ever lost an increment or was suspended for his absenteeism. Moreover, respondent contends that Viani's absences would not affect the main mission of a board of education as would the excessive absence of a teacher which might affect the continuity of education.

DISCUSSION

A tenured public school custodian may not be removed or suspended from his position without justification. The suspension or dismissal of a tenured custodian is permitted if the custodian has committed "neglect, misbehavior or other offenses." *N.J.S.A.* 18A:17-3. In addition, a custodian is a tenured employee and could also be dismissed or suspended on the grounds of "inefficiency, incapacity, unbecoming conduct or other just cause." *N.J.S.A.* 18A:6-10.

It is well-settled that excessive absenteeism may constitute grounds for the removal or suspension of a tenured employee. *In the Matter of the Tenure Hearing of Marcus Miller, School District of the City of Trenton, Mercer County*, OAL DKT. EDU 8409-86 (March 6, 1987), adopted Comm. of Ed. (March 31, 1987). In *Miller*, a tenured assistant custodian was dismissed for excessive absenteeism and abandoning his position. The assistant custodian was absent from work during the period of July 4 to July 18 due to medical reasons. A doctor's note supplied by Mr. Miller indicated that he could return to work on July 21st. However, Mr. Miller never returned to his position. The ALJ dismissed the assistant custodian on the grounds that his absences from July 4 to July 18 constituted excessive absenteeism and that he had abandoned his position.

It appears that while excessive absenteeism is a basis for the dismissal of a tenured employee, a single charge of excessive absenteeism is generally not sufficient grounds for dismissal. *In the Matter of the Tenure Hearing of Willie White, School District of the City of Trenton, Mercer County*, OAL DKT. EDU 8408-86 (March 17, 1987). Mr. White was a tenured custodian who was dismissed due to his long history of excessive absenteeism. His pattern of absenteeism spanned a four-year

period. He was absent 31.5 days during the period of July 1985 to March 1986; 57 days during the period of July 1984 to June 1985; 86.5 days during the period of July 1983 to June 1985; and 27 days during the period of September 1982 to June 1983. Because of his pattern of absenteeism, the board gave the custodian 90 days to correct his inefficiencies and absenteeism. Despite the notification, the custodian failed to correct his inefficiencies and excessive absenteeism during the 90-day period. Consequently, the board filed tenure charges against the custodian seeking his dismissal. After a hearing, the ALJ determined that dismissal of the custodian was justified due to his inefficiency and excessive absenteeism which were not corrected during the 90-day period.

This position has also been adopted by the Commissioner. The Commissioner has stated that he would not hesitate to dismiss a tenured employee for chronic, persistent absenteeism even when there is no charge of illegitimate use of sick leave. *In the Matter of the Tenure Hearing of Patricia Marsden, School District of Toms River, Ocean County*, OAL DKT. EDU 1188-84 (Aug. 26, 1985), adopted Comm. of Ed. (Oct. 10, 1985). However, the Commissioner conditioned dismissal in such instances upon a demonstration by the board that it has attempted to correct the pattern of absenteeism and that such efforts failed to elicit any change. *Id.*

The *Marsden* case involved a teacher who exhibited an excessive absenteeism problem over a period of seven years. The board filed tenure charges against Mrs. Marsden, citing unbecoming conduct and chronic absenteeism as grounds for her dismissal. In deciding that the teacher's absences did not warrant dismissal, the ALJ noted that the record failed to show that the board had taken any corrective action to improve the teacher's pattern of excessive absenteeism.

In the instant case, the Board contends that the sheer number of respondent's absences justifies dismissal from his tenured position. In support of its position, the Board relies on the decision in *In the Matter of the Tenure Hearing of Mary Marshall, School District of the City of Newark, Essex County*, OAL DKT. EDU 10126-83 (July 3, 1984), adopted Comm. of Ed. (August 20, 1984). In that case, Mrs. Marshall was a tenured teacher with a chronic absenteeism problem. Because of this problem, the board filed tenure charges alleging, among other things, abuse of sick leave, physical incapacity, and excessive absenteeism.

During her tenure at the school, Mrs. Marshall exhibited a pattern of excessive absenteeism. She was absent 184 days during the 1982-83 school year, 30 days during the 1981-82 school year, and 63 days during the 1980-81 school year. Her high rate of absenteeism during the 1982-83 school year was apparently due to her full-time attendance at law school; her attendance at law school was done without the knowledge and approval of the school board. The ALJ dismissed the teacher because of her excessive absenteeism and her deliberate failure to inform the board of her attendance at law school.

It is axiomatic that a tenured teacher must be available to teach on a consistent basis if the teacher is to provide the quality of services that the school board and students have come to expect. The Commissioner has stated that:

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling.
>
> Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experience in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.
>
> *In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, Hudson County*, 1977 *S.L.D.* at 414.

However, it is evident that this rationale should not be strictly applied to a tenured member of the custodial staff. While a custodian plays an important role in the day-to-day operation of a school, the custodian does not have a direct impact on the learning experiences of the students. It is the educational benefit resulting from a close relationship between the teacher and students that mandates a teacher's regular classroom attendance. Consequently, a custodian should not be held to the same attendance requirements as a classroom teacher.

Moreover, case law reveals that a tenured employee is usually dismissed for excessive absences only where there is a concomitant finding that the underlying reasons for the absenteeism have not been abated and there is a likelihood that the conduct will continue in the future. *See, In the Matter of the Tenure Hearing of Peter Conzonier, School District of the Township of East Brunswick, Middlesex County,* 1981 *S.L.D.* ___ (April 24, 1981) (little likelihood of recovery from alcoholism); *In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, Hudson County,* 1977 *S.L.D.* 403 (severe depression); *In the Matter of the Tenure Hearing of Willie White, supra* (where tenured employee failed to correct absenteeism problem).

CONCLUSION

In conclusion, even if the assistant custodian's absences are excessive, a sole charge of excessive absenteeism without the existence of additional aggravating circumstances is generally insufficient grounds for his dismissal.

In the present case, a number of factors requisite to dismissal appear to be lacking. There is nothing in the record before me to demonstrate that the school board informed respondent that his absences were a problem. The lack of such notification has deprived respondent of an opportunity to rectify his pattern of absenteeism. Moreover, it is apparent, when one considers the pattern of absences, that the charges were brought when respondent's absences had in fact improved, not gotten worse. His absences in 1988 were obviously more significant than those in 1989. In addition, there has been no showing that the underlying reasons for the absences have not been abated and the likelihood that the conduct would continue in the future. Further, there has been no demonstration as to the adverse impact on the educational process or the ramifications that ensued as a result of the absences.

While it may be that the sheer number of absences is excessive, none of the additional factors which would substantiate dismissal, against that backdrop, are present here.

That being so, I **CONCLUDE** that petitioner has failed to prove the charge by a preponderance of the believable evidence substantiating respondent's dismissal.

However, clearly respondent is now apprised as to the impropriety of excessive absenteeism and the need to significantly improve his absenteeism or else be subject to future disciplinary action.

ORDER

It is hereby **ORDERED** that the tenure charges against respondent be **DISMISSED** and that respondent be reinstated to his position as assistant custodian.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 23, 1991
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

10/25/91
Date

DEPARTMENT OF EDUCATION

OCT 29 1991
Date

Mailed to Parties:

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

List of Exhibits

JJ-1 Stipulation of Facts

J-1 Respondent's absentee record for school years 1984-85 through 1989-1990

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES VIANI, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF PASSAIC,	:	DECISION
PASSAIC COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner concurs with the conclusion of the ALJ that dismissal of respondent following the certification of tenure charges is inappropriate in that the Board failed to provide notice of its concern for his excessive absences. See, for example, Vonita Smith v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner April 18, 1989. However, in so finding, the Commissioner notes that comment made by the ALJ that "***it is apparent when one considers the pattern of absences, that the charges were brought when respondent's absences had in fact improved, not gotten worse. His absences in 1988 were obviously more significant than those in 1989.***" (Initial Decision, at p. 8) While respondent's absences in 1989, totaling 37¼ days, were clearly fewer than the number in 1988, which total approximately 131 days, the 1989 total is still grossly excessive.

Moreover, the Commissioner notes that while there has been no demonstration in this record as to the adverse impact on the educational process or of the ramifications of respondent's absences, such impact can be demonstrated when considering the requirement set forth in N.J.S.A. 18A:7A-5(f), which states that a major element of a thorough and efficient system of free public schools shall include "[a]dequately equipped, sanitary and secure physical facilities***."

Thus, the Commissioner clarifies that statement of the ALJ below suggesting that "even if the assistant custodian's absences are excessive, a sole charge of excessive absenteeism without the existence of additional aggravating circumstances is generally insufficient grounds for his dismissal." (Initial Decision, at p. 8) The Commissioner notes that the Board's burden in a case seeking dismissal of a tenured janitor due to alleged excessive absenteeism is to demonstrate the extent of harm such performance of a custodial employee has on the provision of a thorough and efficient education in an "[a]dequately equipped, sanitary and secure physical facilities***." (N.J.S.A. 18A:7A-5(f))

With this amplification noted, the Commissioner adopts the conclusion of the Office of Administrative Law dismissing the tenure charges against respondent for failure to provide notice of his alleged deficiencies, based on excessive absenteeism. The Commissioner notes with accord the ALJ's dicta that "***respondent is now apprised as to the impropriety of excessive absenteeism and the need to significantly improve his absenteeism or else be subject to future disciplinary action." (Initial Decision, at p. 9)

DECEMBER 9, 1991

DATE OF MAILING - DECEMBER 9, 1991

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
COUNCIL OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner, Michael R. Paglione, Esq.
(Paglione & Massi)

For Respondent, Richard D. Fornaro, Esq.

The Board of Education of the Township of Hamilton (Board) appeals to the Commissioner of Education from an action taken by the Council of the Township of Hamilton (Council) pursuant to N.J.S.A. 18A:22-37 certifying to the Mercer County Board of Taxation a lesser amount for current expense costs for the 1991-92 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate a proposal to raise $54,007,015 by local taxation for current expense costs of the school district. After the voters' rejection of the proposal, the Board submitted its budget to Council for its determination of the amount necessary for the operation of a thorough and efficient school system in the Township of Hamilton for the 1991-92 school year pursuant to the mandatory obligation imposed on Council pursuant to N.J.S.A. 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Mercer County Board of Taxation an amount of $50,694,345 for current expense costs, a reduction of $3,312,670. The Board resolved to appeal to the Commissioner the sum of $1,616,634 of the total amount reduced by Council, thus conceding a reduction of $1,696,036.

Proposed Tax Levy Adopted by Board	Tax Levy Certified by Governing Body
$54,007,015	$50,694,345
Amount of Reduction By Governing Body	**Amount in Dispute Before Commissioner**
$3,312,670	$1,616,634

The Board asserts that Council's action was arbitrary, capricious and unreasonable in that it made its reduction based upon a "mandate from the voters," and not because the sum of $3,312,670 was not required to operate a thorough and efficient system of schools in Hamilton Township. The Board is requesting the restoration of $1,616,634 to the current expense portion of the budget to fund the following:

Administrative Salary Expense	$ 851,359
Additional Surplus to Appropriations	242,000
Lease/Purchase Interest Dedicated to Debt Service	417,885
Summer School	105,390
Total	$1,616,634

Council denies, generally, that its reductions are arbitrary, capricious or unreasonable, stating that more than sufficient reasons have been given to demonstrate that its reductions will not impair the Board's ability to provide a thorough and efficient system of schools for its pupils.

DISCUSSION

Administrative Salary Expense — Reduction: $851,359

Council asserts that this account is extraordinarily overstaffed and may be substantially reduced by reorganization of functional responsibilities and implementation of managerial efficiencies, resulting in concomitant savings. Council suggests also, the reestablishment of the work year, specifically adjusting the principals' 12 month work year to 10¾ months. Further, Council suggests consolidation of the curriculum assistant positions. The Board employs eleven curriculum assistants, each responsible for a separate educational discipline. Council asserts that each of these curriculum assistants performs the same function; therefore, the positions can be consolidated (reduced by two-thirds) without impairing the ability of the Board to provide a thorough and efficient system of education.

The Board defends its need for its administrative structure. At present, each of its three high schools is staffed by a building principal and three assistant principals, and each of its three middle schools is staffed by a principal and two assistant principals. Its administrative structure does not include departmental supervisors at the high schools or the middle schools, as are found in most districts; rather, the structure of the district demonstrates that all curriculum work is directed by subject matter specialists (curriculum assistants) responsible for eleven separate educational disciplines. These disciplines include the following: Science, Social Studies, Funded Programs, Health and Physical Education, Industrial Arts, Gifted and Talented, Computer Science, Guidance, Fine Arts, Language Arts, Reading and Mathematics.

Regarding the summer scheduling for its principals, the Board notes that one of the summer activities used by the principals is vacation, so that each will be available for duty during the regular school year to students and to staff. The remainder of the summer is devoted to the work to be done at the close of the school year and before the new school year begins. Many reports must be filed and scheduling must be completed for students and staff. Other summer duties are also required.

The Superintendent's affidavit attests, inter alia, that there is a demonstrable distinction in the eleven disciplines, listed above, for the curriculum assistants. Consequently, each curriculum assistant is needed for the expertise required in his/her separate educational discipline.

Having examined the arguments of both litigants, the Commissioner concludes that the elimination of positions and their further consolidation, as recommended by Council, is not grounded on sound educational considerations. According to Council, the high schools and the middle schools are staffed only 40% of the time during the summer; however, consideration must be given to the fact that this is also vacation time to which each principal is entitled. According to the Board, its schools are never closed during the summer; therefore, it is most likely that some of its principals are on duty at all times.

Regarding the many disciplines headed by the curriculum assistant positions, there is a job description for each, attached to an affidavit supplied by Council, which portends to show that "all Curriculum Assistants [perform] precisely the same duties." (Council's Reply Statement, at p. 3) However, these job descriptions clearly show that each discipline requires a

distinct area of expertise; that is, a master's degree in the subject area being supervised. Further, given the size of the Hamilton Township school population (11,000+ students) and the large number of schools in the district, eleven curriculum supervisors K-12 appear to be a reasonable and educationally sound staffing for supervisor of curriculum, particularly as there are no subject matter chairpersons in the district's schools.

Council certainly has the right to suggest a new organizational structure for the school district; however, even when a change in that structure is proposed by its paid professional, the Superintendent, only the Board has the authority to implement that change. In the instant matter, the Board has determined that the school district is served best, educationally, by the utilization of eleven curriculum assistants and the several principals employed in its high schools and in its middle schools. Therefore, those positions will remain as established by the Board.

Council asserts, also, that the Board's proposed position of environmental specialist is not needed, as the Board made substantial strides in this area during the 1989-90 school year in response to the state monitoring process, and now is in a program maintenance mode. Further, adequate provision has been made for asbestos removal activities within other budget accounts.

Council asserts that asbestos services (AHERA) and services related to fulfillment of Right-to-Know requirements are budgeted in Account 120 for $141,000, a 141% increase aver the $58,500 budgeted in this account in the 1990-91 budget. Further, no position of environmental specialist is required because standard industry practice related to asbestos removal design and monitoring, provides

for a consultant to be engaged by the contracting entity, to evaluate and design the removal work to be performed. Council contends that an Asbestos Safety Control Monitor is required and that an environmental specialist could not perform the asbestos design and monitoring services envisioned by the Board. Therefore, there is not true functional need for the environmental specialist.

The Board disagrees and states that AHERA, Right-to-Know, Underground Storage Tanks, Hazardous Waste, Medical Waste, Radon, Indoor Air Quality, Lead-in-Water, Waste Recycling and other environmental legislation has generated the need for creation of an Environmental Compliance Supervisor. The Board has estimated the salary for this position to be $40,000 per year plus $7,000 per year benefits for a total of $47,000 per year. This position will not only pay for itself, but will generate an estimated savings of $40,000. The following cost analysis illustrates this point:

Job Duty	Contract Budget	In-House Savings
AHERA Designated Person	$ 13,000	$13,000
AHERA Removal Specs.	8,000	8,000
AHERA 3 yr. Mgmt. Plan Rev. 30,000 (Lab work $3,000)	30,000	27,000
AHERA Removal Monitoring 40,000 (Lab Work 8,500 + DCA Fee 1,500)	40,000	30,000
RTK Inventory & Label 50,000 (EDS 37,000 + Program $4,000)	50,000	9,000
	$141,000	$87,000
Cost of Environmental Compliance Supervisor		-47,000
Net Savings		$40,000

Based on the written evidence, the Commissioner concludes that the Board's determination to employ an environmental specialist is well reasoned and appears to be the most efficient economic

decision regarding this position. Although Council's rationale was well reasoned, it was based on speculation as to cost whereas the Board had developed a financial guide to aid it in its determination. Further there is no evidence of a legal impediment preventing the Board from establishing and staffing this position. Neither is the Board in violation of any governmental regulations. The decision to employ an environmental specialist is approved as a current expenditure, together with approval of the principals and the curriculum specialists.

Accordingly, Council's reduction of $851,359 for Administrative Salary Expense is set aside and that reduction is hereby restored to the budget.

Additional Surplus to Appropriations

Council argues that its reduction of $242,000 will not interfere with the Board's policy to reserve 2% or approximately $1.7 million in surplus.

The Board admits having this policy and on July 1, 1991, the Board had an audited surplus of $1,242,591. Its projected unaudited surplus from the 1990-91 budget was set at $1.9 million. Surplus was thus totaled at $3,142,591 from which $1.2 million was appropriated to the 1991-92 budget.

The Board's records show that the "unaudited" $1.9 million surplus is sufficient to satisfy its 2% policy of $1.7 million with a substantial reserve, in this case, more than $242,000. . The Board's defense is that these funds are unaudited. However, it must be presumed that its own figures are not irresponsible. The Board's own policy is satisfied and the Commissioner finds no justification to restore this reduction; therefore, the $242,000 reduction is sustained.

The calculations are shown below:

Audited Surplus	$1,242,591
Unaudited Surplus	1,900,000
Subtotal	$3,142,591
1991-92 Budget Appropriation	1,200,000
Balance	$1,942,591
2% Reserve	1,700,000
Balance	$ 242,591
Council's Reduction	$ 242,000

Lease/Purchase Interest Dedicated to Debt Service*

The Board funded construction and renovation at three elementary schools through a lease purchase agreement. The interest accrued on the deposit to this construction account, minus those monies needed to pay current obligations, is $417,885. Council reduced the budget in this account by $417,885, asserting that the Board should satisfy current expense lease purchase obligations, rather than carry this balance as a restricted-use cash asset.

The Board concedes that it has this balance in the construction account; however, it argues that it has an extensive punch list** outstanding for the construction projects, with many items in dispute requiring additional expenditures. Accordingly, it is not proper to dedicate these monies from the construction account, where future use will be required, to the debt service

---

* It is the Commissioner's understanding that the parties' use of the term "debt service" regarding lease purchase funds refers to transfer of interest accrued on the deposit to this construction account to reduce rental payments for the projects in the current expense account.

** A punch list is an itemization of jobs to be completed by a company doing capital projects before payment will be made.

account. The proper use of the monies is to not make the appropriation until 1992-93 following a close-out of the project and audit of the account, avers the Board.

Council argues that the balance in question is not earmarked for any 1991-92 budget application. It asserts further that lease purchase financing guidelines enable earned interest accounts to be utilized for reducing debt service for the subject projects, which otherwise are funded out of current expenses in the budget. It is fiscally prudent to avoid inflating debt service. Council argues further that the Board has not proven the three construction projects were planned and constructed so deficiently, or mismanaged, as to pile up change orders and contractor extras that exceed project contingencies by $417,885.

Council concludes that affirmation of this reduction will not impact on the Board's ability to deliver educational services.

The Commissioner has reviewed the arguments of the litigants with respect to the proper use of the $417,885 balance in the Board's lease purchase account. The Commissioner commented on this subject in Board of Education of the Town of Dover v. Mayor and Board of Aldermen of the Town of Dover, Morris County, decided by Commissioner August 26, 1991 wherein he held that "the Board may use said surplus to reduce the tax levy or use such excess funds against future capital project[s], insofar as the revised Quality Education Act (QEA) authorizes local boards to transfer funds from current expense to capital outlay. See N.J.A.C. 6:20-2.14(b) and (c)." (Slip Opinion, at p. 15)

Left uncontested, the Board had a choice; however, Council has opted, through its legal obligation, to reduce the budget by

dedicating the $417,885 to Debt Service. Based on the above, Council's reduction is sustained.

Summer School

The Board offers a summer school program to help those students who are struggling to be academically successful. It dismisses Council's alleged assertion that it is a dumping ground for lazy students. The Board asserts that when funding for this type program is reduced, the possibility of every child receiving a thorough and efficient education is substantially reduced.

Council reduced this item by its full appropriated amount of $105,390 stating summer school is not mandated and its curriculum is not different in any way from that offered during the regular school year. Students are pursuing courses in July and August which were available from September through June. Statistically, 394 students were enrolled, 318 took courses they failed during the year and one third of these failures was in physical education. Seventy-six students took courses to improve their grades to a point which would allow them to move on to the next level. Other school districts do not offer summer school programs; consequently, it cannot be argued that they are necessary to provide a thorough and efficient education since summer school is not a mandatory requirement.

The Commissioner has carefully considered this disputed item. Direction for this determination is found in Bd. of Ed. of East Brunswick Township v. Township Council, East Brunswick, 48 N.J. 94 (1966) which is quoted in Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989). That decision holds:

> ***the commissioner has the power to review the municipality's proposed reductions guided by three concerns: (1) fulfillment of minimum educational standards under the "thorough and efficient" constitutional mandate; (2) negating procedural or substantive arbitrariness; and (3) fulfillment of mandatory legislative and administrative educational standards. [East Brunswick] at 107. (at 313)

As Council has argued, thorough and efficient educational standards do not require operation of a summer school program. However, the absence of a specific mandate in law for a particular type of program does not in and of itself foreclose a determination that a given program is necessary for the delivery of a thorough and efficient education in a given school district. In the instant matter the Board utilizes summer school as a vehicle to provide remedial education to students failing to meet course requirements and to provide additional educational opportunities to students who wish to improve their educational performance. Given that the reduction effected by Council entirely eliminates the funding appropriated by the Board for summer schooling and the fact that the Board maintains a surplus of approximately only 2%, the Commissioner determines to restore the $105,390 reduced by Council.

A tabulation follows:

Description	Council's Reduction	Amount Restored	Amount Not Restored
Admin. Salaries Expense	$ 851,359	$851,359	$ -0-
Add'l Surplus to Appropr.	242,000	-0-	242,000
Lease/Purchase Interest	417,885	-0-	417,885
Summer School	105,390	105,390	-0-
TOTALS	$1,616,634	$956,749	$659,885

In accordance with the foregoing exposition, the Commissioner restores $956,749 to the budget and a reduction of $659,885 is sustained.

Therefore, the Mercer County Board of Taxation is directed to add to the amount already certified an additional $956,749 for current expense tax levy for the Township of Hamilton. The increase shall raise the 1991-92 tax levy for current expenses as set forth below:

Tax Levy Certified By Council	Amount Restored	Tax Levy After Restoration
$50,694,345	$956,749	$51,651,094

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 9, 1991

DATE OF MAILING - DECEMBER 9, 1991

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EWING, MERCER COUNTY, RESPONDENT.	:	DECISION

For Petitioner, David W. Carroll, Esq.
(Carroll & Weiss)

For Respondent, Charles P. Allen, Jr., Esq.

The Board of Education of the Township of Ewing (Board) appeals to the Commissioner of Education from an action taken by the Ewing Township Committee (Committee) pursuant to N.J.S.A. 18A:22-37 certifying to the Mercer County Board of Taxation a lesser amount for current expense costs for the 1991-92 school year than the amount proposed by the Board in its budget which was rejected by the voters.

At the annual school election held on April 30, 1991, the Board submitted to the electorate a proposal to raise $23,642,261 by local taxation for current expense costs of the school district. After the voters' rejection of the proposal, the Board submitted its budget to the Committee for its determination of the amount necessary for the operation of a thorough and efficient school system in Ewing Township for the 1991-92 school year pursuant to the mandatory obligation imposed on the Committee by N.J.S.A. 18A:22-37.

After consultation with the Board, the Committee made its determination and certified to the Mercer County Board of Taxation an amount of $23,028,733 for current expense costs.

CURRENT EXPENSE

Board's Proposal	$23,642,261
Committee's Proposal	23,028,733
Amount Reduced	$ 613,528

Although the Committee's reduction is $613,528, the Board seeks restoration of only $495,178, thus conceding a reduction of $118,350.

The Board asserts that the Committee's reduction in the school budget was arbitrary, capricious and unreasonable and will impair the Board's ability to provide and maintain a thorough and efficient system of schools for the 1991-92 school year.

The Committee asserts that after consultation with the Board, and after extensive review and investigation, the budget it adopted is a reasonable one, which is neither arbitrary nor capricious, and is one which will provide for thorough and efficient educational facilities and programs for the 1991-92 school year.

By letter dated November 2, 1991, the Commissioner denied the Committee's Motion to Strike the Final Summation of the Board in the instant matter and the Committee's Motion for Hearing the appeal and the Board's responsive papers regarding these two motions. The Commissioner stated that an evidentiary hearing is not necessary under the provisions of N.J.A.C. 6:24-7.8(a)7 as there was no demonstration by the Committee that material facts in the matter needed to be determined. He further ruled that all papers submitted by the litigants would be reviewed to determine whether or not the Board has demonstrated its need for a given expenditure for the

provision of a thorough and efficient system of schools in the Township.

In consideration of the dispute now before the Commissioner, a tabulation follows of the contested budget items and those items which the Board did not appeal:

Account	Item	Council's Reduction	Requested Restoration	Uncontested Reductions
110F	Salaries Supt's. Office	$ 6,000	$ -0-	$ 6,000
120D	Contracted Servs. Admin.	10,000	-0-	10,000
130A	Board Members Expenses	2,000	-0-	2,000
130B	Bd. Secy. Off. Exps.	3,000	-0-	3,000
130F	Supt's. Office Expenses	1,750	-0-	1,750
130M	Print./Publish. Exps.	6,700	6,700	-0-
213A	Salaries Teachers	215,000	152,000	63,000
215A	Salaries Sec./Clerical	5,000	-0-	5,000
215C	Salaries Sec./Clerical	2,000	-0-	2,000
230C	A.V. Materials	3,198	3,198	-0-
250A	Misc. Supplies Instruct.	5,880	5,880	-0-
250C	Misc. Expenses Instruct.	4,000	4,000	-0-
250D.1	In-Service Training	5,000	5,000	-0-
430	Professional/Tech. Services	5,000	5,000	-0-
510A	Salaries Pupil Trans.	5,000	5,000	-0
530	Replace. of Vehicles	88,000	88,000	-0
540	Pupil Trans. Insurance	2,400	2,400	-0-
610A	Salaries Cust. Services	20,000	20,000	-0-
630	Heat	10,000	10,000	-0-
650A	Custodial Supplies	2,000	-0-	2,000
650B	Supplies Vehicles	1,000	1,000	-0-
710A	Salaries - Grounds	6,000	-0-	6,000
710B	Salaries - Buildings	4,000	4,000	-0-
720A	Contracted Servs. Grounds	55,000	55,000	-0-
720B	Contracted Servs. Buildings	10,000	10,000	-0-
730B	Replace Non-Instr. Equip.	7,000	-0-	7,000
730C	New Instr. Equipment	10,000	10,000	-0-
730D	New Non-Instr. Equipment	12,000	12,000	-0-
740B	Repair Build., Other Exps.	5,000	5,000	-0-
740C	Repair Equip., Other Exps.	4,000	-0-	4,000
	SUBTOTALS	$515,928	$404,178	$111,750
	SURPLUS	100,000	100,000	-0-
		$615,928	$504,178	$111,750
550C	Tire and Tube Replacement	+ 2,400	-0-	
	TOTALS	$613,528*	$504,178	

* The Committee's reductions total $615,928; however, it added $2,400 to the budget making its final reduction $613,528 as set forth in its Resolution. (Petition of Appeal, Exhibit A)

REVIEW OF CONTESTED ITEMS AND COMMISSIONER'S DETERMINATION

Account 130M Printing and Publishing

The Committee's reduction does not prevent the Board from providing this service. The record shows that the Board will have the same proposed expenditure for this item after the Committee's reduction as it had last year. Therefore, the reduction will not affect the Board's ability to provide quality educational services in the district without its proposed increased for this item.

Based on the above, the $6,700 reduction is sustained.

Account 213A Salaries-Teachers

This account was reduced by $215,000. In the area of Attrition/Retirements, the Committee reduced $125,000 based on its assertion that a pending legislative bill will allow for substantial retirements by experienced higher salaried teachers who will be replaced by younger, less experienced teachers. This attrition will result in substantial savings for the Board.

The Board appeals this reduction asserting that the Committee's reduction is based on an assumed retirement incentive bill which has not been signed into law.* And if it does become law, it has not been determined whether or not the bill would save the district money, or whether or not the district would choose to participate. At the present time the district does not have sufficient retirements to allow for a $125,000 reduction; therefore a reduction of the teaching staff would have to be made and this reduction would impair the Board's ability to provide a thorough and

* The bill was later signed into law. At the time of this appeal it was still pending.

efficient education for its students. The Board seeks restoration of $62,000 of the $125,000 reduction based on the passage of the bill; therefore, it has accepted a $63,000 reduction based on the retirements at hand.

The Committee's reduction in Attrition/Retirements is well-reasoned but speculative. There are too many unknowns to allow for the full reduction of $125,000. The Board's reasoned reduction, based on the facts at hand relative to teacher retirements, is readily acceptable as presented. Therefore, this item will be reduced by $63,000 and $62,000 is restored to the budget.

Alternative Program - High School

Since the filing of this appeal, the Board withdrew its request for its Alternative Program funding in the amount of $50,000 having received funding in like amount from the State. Accordingly, this $50,000 reduction is sustained.

Alternative Program - Junior High School

The Committee asserts that it is not necessary to expand the Alternative Program at Fisher Junior High School and that it may be maintained in its present status with expansion deferred. Accordingly, the Committee reduced this item by $20,000.

The Superintendent's Affidavit states that it is his opinion that any reduction in this program would jeopardize the provision of a thorough and efficient education to the district's secondary student population. Therefore, the Board seeks restoration of $20,000 for the Alternative Program at the Fisher Junior High School.

Notwithstanding the Board's position, its argument is not persuasive and there is no evidence that this reduction will prevent

it from providing a thorough and efficient system of schools. Accordingly, the $20,000 reduction is sustained.

Summer In-Service Program

The Committee reduced the summer in-service programs for teachers by $20,000 because the item was increased above last year's proposal. The Committee believes that the program may be reduced by retirements and that any expansion of the program should be deferred. Further, alternate programs are available to be utilized.

The Superintendent's Affidavit asserts that this is an in-depth program for teachers in staff development in accordance with N.J.A.C. 6:8-4.3(a)(6)(vi), and attendance is voluntary.

Based on the above, the Commissioner finds that the Board has not established a need for this program. Neither has it been able to establish that it would be unable to provide a thorough and efficient system of schools if the reduction is made. Accordingly, the $20,000 reduction is sustained.

A summary of the reductions in Account 213A follows:

Description	Reduction	Restoration	Not Restored
Attrition/Retirement	$125,000	$62,000	$ 63,000
H.S. Alternative Program	50,000	-0-	50,000
Jr. H.S. Alternative Program	20,000	-0-	20,000
Summer In-service	20,000	-0-	20,000
TOTALS	$215,000	$62,000	$153,000

The Committee reduced $215,000 in Account 213A Salaries-Teachers. Of this amount $62,000 is restored to the budget and a reduction of $153,000 is sustained.

Account 230C Audio Visual Materials

The Committee avers that its reduction of $3,198 is for many small items spread throughout this account which will not affect the Board's ability to provide a quality education.

The Board contends that the funding is earmarked for materials for computer instruction, new technology and computer software programs districtwide. The district's ability to keep abreast of modern technology is inhibited by these reductions.

The record shows that the Board will be able to support this program with the same amount of funding provided last year. Although an additional amount would be desirable, there is no showing that the amount remaining in this account will prevent the provision of a quality program. Accordingly, the $3,198 reduction is sustained.

Account 250A Miscellaneous Supplies

The Committee's reduction in this account will leave the Board's expenditures at, or near, last year's levels. The Committee asserts that several sub-accounts might be reduced to absorb this reduction without adverse impact on a thorough and efficient education.

The amounts reduced from this account will not directly affect classroom instruction; however, the Board asserts that they will impede support services.

The record shows that the $5,880 proposed reduction, if effected, will leave slightly more in this account than was provided last year. Further, the Board has not shown that it will not be able to provide a thorough and efficient education for its students if the reduction is made; therefore, the reduction is sustained.

Account 250C Miscellaneous Expenses-Instruction

The Committee asserts that its reduction of $4,000 is minimal in consideration of the large increases in the account for the past two years.

The Board complains that no specific items were identified for discussion or elimination. On the other hand it has signed contracts for rentals of equipment which must be honored.

The Commissioner finds that this argument is persuasive and the $4,000 is restored to the budget.

Account 250D In-Service Training

The Committee argues that this in-service training account was reduced elsewhere in another line item and, therefore, a concurrent reduction is warranted here.

Signed contracts with nationally known consultants have been issued for in-service training for the coming school year. The Board asserts that the $5,000 reduction must be restored so that it may honor its legal contracts.

Based on the Board's reasoning, the $5,000 is restored to the budget.

Account 430 Purchased Professional/Technical Services for Health

The Board asserts that it is required by state law to have a certified company dispose of medical waste from the school nurses' office. However, no further supportive documentation or statutory citation is provided. Accordingly, the $5,000 reduction is sustained.

Account 530 Replacement of Vehicles

The evidence shows a growing need to replace vehicles; however, in consideration of the Committee's addition of $2,400 for

tires which shall be discussed later, a restoration of $58,667 is made for the purchase of two vehicles. A reduction of $29,333 will be sustained.

Account 540 Pupil Transportation Insurance

The Committee asserts that this account may be reduced if the three requested new vehicles are eliminated. However, the Board seeks additional insurance for the added new vehicles.

The Board's rationale is not persuasive. No specific reason is suggested for an increase in insurance premiums. In fact an inference may be drawn that a decrease in insurance should be effected with new vehicles. Accordingly, the $2,400 reduction is sustained.

Account 610A Salaries - Custodial Services

The Committee avers that this account includes all custodial services districtwide including overtime and extra summer help. It contends that a $20,000 reduction will have no impact on a thorough and efficient education.

The Board demands restoration stating that no directions were given for reductions in this account. The proper maintenance of school buildings is a requirement for a thorough and efficient education. This reduction would cause the elimination of one full-time person and the Board asserts that it is already at minimum staffing.

Based on the Board's rationale, the $20,000 reduction is restored to the budget.

Account 630 Heat for Buildings

The Committee asks the Board to consider economy measures and to reduce temperatures minimally, and further on weekends and vacation periods.

The Board states that it utilizes all conservation strategies and that recent increases in heating oil and gas make a $10,000 reduction unrealistic.

A review of the record shows that the $10,000 reduction is minimal in view of the total allocation for this account and that the reduction will still allow a substantial increase over the amount budgeted last year. Therefore, the $10,000 reduction is sustained.

Account 650B Supplies - Operation of Vehicles

The Committee suggests that this account be maintained at the present level with no increase. The Board avers that its present inventory was nearly depleted in 1990-91. Nevertheless, the reduction will allow a nominal increase over last year's budget; therefore, the $1,000 reduction in supplies is sustained.

Account 710B Salaries - Repair of Buildings

The Committee asserts that this account contemplates an increase of 8% while a 5% increase is more reasonable. Accordingly, a reduction of $4,000 will not adversely impact on a quality educational system.

Two of its schools are very old and in need of extensive repairs. Renovations and upgrading are an ongoing necessity. Therefore, the Board claims that a reduction is unwarranted and that it is understaffed and underfunded in this area.

A review of the budget discloses that $4,000 is less than half the increase over the amount budgeted last year. The proposed

reduction will still allow substantial funds for repairs and renovations; consequently, the reduction is sustained.

Account 720A Contracted Services for the Upkeep of Grounds

According to the Committee, items in this account needing repair or maintenance are of varying urgency and necessity and may be deferred. Therefore, a $55,000 reduction will have no impact on a thorough and efficient school system.

The Board cites heavy use of its fields by the Township Parks and Recreation Department and the general public. The continual deterioration of the fields presents a liability problem.

Upon review, the Commissioner determines that proper and safe maintenance of all Ewing Board of Education play and recreational areas is deemed essential for the provision of a thorough and efficient educational opportunity for the pupils in the district. The Board's small increase over the amount budgeted last year is reasonable. Consequently, the $55,000 reduction is restored.

Account 720B Contracted Services for Repair of Buildings

The Committee's reason for this reduction is that the services are not urgent and can be deferred. The Board asserts that the repair services are not only necessary, they also must be done for continued compliance with State Monitoring.

Based on the above, the Commissioner finds that the $10,000 is necessary and it is restored to the budget.

Account 730C Purchase New Instructional Equipment

The Committee states that this item is for movable furniture and equipment which may be deferred without affecting the Board's ability to provide a thorough and efficient education.

The Board argues that no specific items or directions were given for reducing this account. Such a reduction will cut student desks, balances for science programs, film strip projectors and physical educational equipment.

The documentation shows that this account is nearly twice the amount budgeted last year. The Commissioner is not persuaded that the Board will not be able to carry out its constitutional mandate without the $10,000 reduction proposed by the Committee. Accordingly, the reduction is sustained.

Account 730D Purchase of New Non-Instructional Equipment

This account includes a utility vehicle, picnic tables, and a refrigerator. The Committee argues that they may be deferred. The Board asserts that it needs the vehicle for clearing parking lots and driveways in inclement weather.

Upon review of the account, the Commissioner finds that these acquisitions may be deferred without affecting the Board's ability to provide a thorough and efficient education for its students. Consequently, the $12,000 reduction is sustained.

Account 740B Other Expenses - Repair of Buildings

The Committee reduced $5,000 for this item stating that materials, parts, rentals and other incidentals may be deferred. The Board referred to its reasoning set forth in Accounts 710B and 720B to justify this need.

The elimination of this $5,000 expenditure will leave as much in this account as was budgeted last year without affecting the Board's ability to provide a thorough and efficient education. Therefore, this reduction is sustained.

Account 550C - Tire and Tube Replacement

The Committee increased this account in the amount of $2,400 given the reduction it effected in Account 530 - Replacement of Vehicles. The Commissioner notes for the record that there is no provision in law for a governing body to increase a line item or account of a school district's budget. To do so would allow the governing body to substitute its judgment for that of the Board. See Board of Education of the Township of Belleville v. Mayor and Council of the Township of Belleville, Essex County, decided by the Commissioner December 9, 1991.

Given that the Board has not contested the action of the Committee herein as occurred in Belleville, supra, the Commissioner shall not disturb the increase in this account.

SURPLUS

The Board asserts that the Committee's reduction of $100,000 of its surplus was arbitrary, capricious, unreasonable and not based on any consideration of the age of its educational facilities. Additionally, it is faced with the removal of underground tanks, several law suits, and the replacement of boilers. It seeks restoration of this reduction for any unforeseen emergencies.

The Committee denies that its reduction of surplus was arbitrary, capricious, or unreasonable. Rather, it made its determination after discussion and review of the entire budget with the Board. It considered the history of preceding budgets, with emphasis on reasonable future projections, and it applied fundamental budgetary consideration.

The Commissioner has reviewed the documents in evidence and has considered the arguments of the parties. As the Commissioner has stated on many occasions, a reasonable surplus is a necessary item in the budget.

In Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison, 1968 S.L.D. 139, the board of education faced substantial reductions by its governing body. The Commissioner determined that the Madison Board's "***problem is one of total revenues available to meet the demands of a school system***." (at 142) Although this conclusion is probably applicable to many budget disputes, it is particularly applicable in the present matter, where the district has to contend with aging facilities and other special problems, as set forth in detail, ante.

In Board of Education of Fair Lawn v. Mayor and Council of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976), aff'd 153 N.J. Super. 480 (App. Div. 1977), the court held that "***the board has the right, subject to ultimate review by the Commissioner of Education, to maintain a reasonable surplus in order to meet unforeseen contingencies.***" (at 275) See also, Board of Education of the Town of Dover v. Mayor and Board of Aldermen of the Town of Dover, Morris County, decided by the Commissioner August 26, 1991, wherein the Commissioner concluded that a surplus of 1.9% of the current expense budget was "insufficient to sustain the Board against unforeseen contingencies." (Slip Opinion, at p. 14)

Both in prior case law and in regulation, the Commissioner has held 3% as the amount of surplus to be generally regarded as reasonable and necessary. (N.J.A.C. 6:20-2.13)

In Board of Education of Delaware Valley Regional High School District v. Township of Alexandria et. al., decided by the Commissioner, February 6, 1989, aff'd in part/rev'd in part by the State Board August 2, 1989, the State Board of Education determined a free balance of approximately 4% of the current expense budget to be a slender reserve. See also, Board of Education of the Township of West Orange v. Township Council of West Orange, Essex County, decided by the Commissioner on January 28, 1991.

In the instant matter the Board has a free appropriations balance in its current expense account of a little more than 1%. This surplus is insufficient. Accordingly, the $100,000 reduction will be restored to the budget.

A recapitulation of the amounts restored, modified, and sustained is set forth below:

Account	Item	Council's Reduction	Amount Restored	Amount Not Restored
110F	Salaries Supt's. Office	$ 6,000	$ -0-	$ 6,000
120D	Contracted Services Admin.	10,000	-0-	10,000
130A	Board Members Expenses	2,000	-0-	2,000
130B	Bd. Sec. Off. Exps.	3,000	-0-	3,000
130F	Supt's. Office Expenses	1,750	-0-	1,750
130M	Print./Publish. Exps.	6,700	-0-	6,700
213A	Salaries Teachers	215,000	62,000	153,000
215A	Salaries Sec./Clerical	5,000	-0-	5,000
215C	Salaries Sec./Clerical	2,000	-0-	2,000
230C	A.V. Materials	3,198	-0-	3,198
250A	Misc. Supplies Instruct.	5,880	-0-	5,880
250C	Misc. Expenses Instruct.	4,000	4,000	-0-
250D.1	In-Service Training	5,000	5,000	-0-
430	Professional/Tech. Services	5,000	-0-	5,000
510A	Salaries Pupil Trans.	5,000	-0-	5,000
530	Replace. of Vehicles	88,000	58,667	29,333
540	Pupil Trans. Insurance	2,400	-0-	2,400
610A	Salaries Cust. Services	20,000	20,000	-0-
630	Heat	10,000	-0-	10,000
650A	Custodian Supplies	2,000	-0-	2,000
650B	Supplies Vehicles	1,000	-0-	1,000
710A	Salaries - Grounds	6,000	-0-	6,000
710B	Salaries - Buildings	4,000	-0-	4,00
720A	Contracted Servs. Grounds	55,000	55,000	-0-

Account	Item	Council's Reduction	Amount Restored	Amount Not Restored
720B	Contracted Servs. Buildings	10,000	10,000	-0-
730B	Replace Non-Instr. Equip.	7,000	-0-	7,000
730C	New Instr. Equipment	10,000	-0-	10,000
730D	New Non-Instr. Equipment	12,000	-0-	12,000
740B	Repair Build., Other Exps.	5,000	-0-	5,000
740C	Repair Equip., Other Exps.	4,000	-0-	4,000
	SUBTOTALS	$515,928	$214,667	$301,261
	SURPLUS	100,000	100,000	-0-
	TOTALS	$615,928	$314,667	$301,261
550C	Tire and Tube Replacement	+ 2,400		
		$613,528*		

This tabulation shows that $314,667 must be restored to the budget; accordingly, the Mercer County Board of Taxation is directed to add to the local tax levy for the Township of Ewing School District $314,667 for current expense purposes for the 1991-92 school year which when added to the amount of $23,028,733 previously certified by the governing body will result in a total current expense tax levy of $23,343,400.

Amount of Tax Levy Certified by the Governing Body	$23,028,733
Amount Restored by the Commissioner	314,667
Total Tax Levy After Restoration	$23,343,400

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 9, 1991

DATE OF MAILING - DECEMBER 10, 1991

* The Committee's reductions total $615,928; however, it added $2,400 to the budget making its final reduction $613,528 as set forth in its Resolution. (Petition of Appeal, Exhibit A)

BOARD OF EDUCATION OF THE BOROUGH OF FIELDSBORO, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MAYOR AND COUNCIL OF THE BOROUGH OF FIELDSBORO, BURLINGTON COUNTY, RESPONDENT.	:	

Destribats, Campbell, DeSantis & Magee, for Petitioner
(Dennis M. DeSantis, Esq., of Counsel)

Guest, Domzalski, Kurts, Landgraf & McNeill, for Respondent
(Brian M. Guest, Esq., of Counsel)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Borough of Fieldsboro (Board) on July 30, 1991 appealing a $240,300 reduction in the local tax levy for current expense for the 1991-92 school year, restoration of which it contends is necessary for the district to provide a thorough and efficient system of education for its students.

The aforesaid reductions were imposed by respondent Mayor and Council (Council) after consultation with the Board pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following the voters' rejection of the Board's proposed current expense budget of $708,420 on April 30, 1991, which amount represents the maximum permissible budget under the Quality Education Act (QEA). At the same election,

the voters also defeated a cap waiver request in the amount of $250,648. The proposed tax levy for the 1991-92 school year and reductions thereto are set forth below:

Proposed Tax Levy Adopted by the Board		Amount of Tax Levy Certified by Council	
Current Expense	$337,296	Current Expense	$96,996
Amount of Reduction by Council		**Amount in Dispute Before the Commissioner**	
Current Expense	$240,300*	Current Expense	$240,300

Council filed an Answer to the petition with the Commissioner on August 15, 1991 and, thus, the pleadings were joined. Said Answer admitted the amounts as stated above but denied the Board's allegation that the $240,300 reduction in the current expense budget would prevent the Board from providing a thorough and efficient education to its students. Council's Answer also raises an affirmative defense that the petition was not filed within the time permitted under N.J.A.C. 6:24-7.4.

Council is correct in its assertion that the instant matter was untimely filed under the aforesaid regulation. However, given the gravity of the circumstances facing the Board relative to its financial obligations necessary to provide a thorough and efficient education to its students, the Commissioner finds and determines that relaxation of the filing timelines is warranted, N.J.A.C. 6:24-1.15. The gravamen issue of this appeal goes to the Board's

*The reductions made by Council were to two line items, one being line item 114 in the amount of $240,000. There appears to be a discrepancy as to whether the line item receiving a $300 reduction was line 110 or 49. See Board's Position Statement at page 2, Affidavit of Board Secretary at page 2 and Council's Resolution of May 21, 1991.

ability to meet its tuition obligations to the Bordentown Regional School District. The Fieldsboro School District operates no schools of its own, thus, all students are educated on a tuition basis outside the school district.

In May 1991 the Board submitted an application to the Commissioner of Education for $250,648 (18A:7D-28) in supplementary funds under the provisions of L. 1991, c. 62, sec. 39 to enable it to meet its tuition obligations for the education of its students for the 1991-92 school year. In July 1991 the Board received $75,000 as a result of that application. See Amended Petition, at p. 2 and Exhibit C.

On September 11, 1991 the Board amended its Petition of Appeal to include the restoration of $175,648 in remaining cap waiver monies rejected by the electorate which monies it avers are necessary to meet its tuition obligations for the 1991-92 school year. The amended petition was filed on that date as a result of the district becoming apprised of an opinion rendered by the State of New Jersey Attorney General on July 8, 1991 which concluded that notwithstanding the provisions of the amendments to the QEA (L. 1991, c. 62, sec. 19; N.J.S.A. 18A:7D-28(f)), indicating that disapprovals of cap waivers by the voters are final and not subject to further review and appeal, the Commissioner of Education has the authority and duty to entertain appeals relative to defeated cap waivers when in his judgment the local school district's budget, at the cap level, is not sufficient to provide the fiscal resources necessary for a thorough and efficient education. See Exhibit C-1. On September 11, 1991 the Board also submitted its position statement relative to the appeal pursuant to the provisions of N.J.A.C. 6:24-7.8.

On September 23, 1991 Council submitted its Answer to the amended petition and its position statement. The Board's reply to Council's position statement was submitted on September 30, 1991.

The record of the matter closed on October 31, 1991 after receipt of supplemental position statements of the parties addressing the cap waiver appeal and supportive documentation relative to the Board's tuition obligations.

I. POSITION OF THE PARTIES

COUNCIL

Council's statement of reasons for the reductions it made to the maximum permissible budget under the provisions of QEA rejected by the voters on April 30, 1991 is set forth below:

> 1. The Current Expense portion of the 1991-92 school budget amounts to $708,420. Mayor and Council finds it is necessary to appropriate the amount of $468,120, with reduction, to provide a thorough and efficient education.
>
> 2. The basis for the reduction is that the tuition charges by the Regional School District are excessive in light of those charges made by districts similarly situated and the Board of Education should explore reduction or education of its students in another District.
>
> 3. This action anticipates restoration of the funds defeated by the voters with respect to the cap waiver following adoption of appropriate enabling legislation.
>
> (Council's Resolution, May 21, 1991)

The aforesaid reduction in the current expense portion of the budget resulted in a certified tax levy of $96,996 for the district's 1991-92 school year current expenses as set forth, ante.

Council's position statement provides an elaboration of its basis for effectuating reductions to the budget. It states, inter alia, that:

1. The Borough of Fieldsboro sends all its pupils to the Bordentown Regional School District for education under a sending/receiving relationship.

2. Regular tuition to Bordentown Regional under the actual 1989-90 expenditures was $411,163.50. (See budget line 114)

3. Regular tuition for 1991-92 is budgeted at $505,700.00 (see budget line 114), a difference of $94,536.50 representing an increase of nearly 30%.

4. There is absolutely no basis for the contention that the cost of providing a thorough and efficient education to the students of the Borough of Fieldsboro has increased to such a degree in such a short space of time.

5. Investigation by the Mayor and Council of tuition costs in similarly situated districts revealed the following tuition charges:

District	Tuition Primary	Tuition High School
Chesterfield	$6,000.00	N/A
Florence	$4,363.00	$6,807.00
Northern Burlington	N/A	$7,200.00
Pemberton Township	$4,423.00	$7,000.00

6. These charges set forth in paragraph five compare with tuition charges at Bordentown Regional of $8,063.00 and $8,491.00 respectively.

***

8. The fact that neighboring districts assess tuition charges that, in some cases, are less than 60% of the charges at Bordentown Regional clearly demonstrates that the actions of the Mayor and Council were not arbitrary, capricious, or unreasonable, but were designed to provide a thorough and efficient education at a reasonable and appropriate cost. The statement regarding the cap waiver which lay beneath the decision underscores this reasoned approach.

***

12. The Borough of Fieldsboro, according to 1990 figures, has total population of just under 600 persons. The number of taxpayers is considerably less, many have fixed incomes. It is not a wealthy community.

13. It is with this background, that the Petitioner's position must be reviewed. Petitioner sought a cap waiver of $250,648.99. This represents over $400.00 for every man, woman, and child residing in the Borough.

14. Put another way, a family of four would be subjected to a tax increase, solely on the basis of the cap monies, in excess of $1,200.00.

15. A different view is to look at total tuition cost. Using Petitioner's figures, the 1990-91 tuition above is $650,820.00 (Petitioner's position statement at paragraph 12). But see budget line 117.

16. Using this figure the tax for tuition is over $1,000.00 for every man, woman, and child in the Borough and over $4,000.00 for a family of four.

17. These figures, of course, can be lessened by State aid as contemplated by both the QEA and the Respondent. It is inconceivable that the legislature intended to impose such a confiscatory increase on school districts such as Fieldsboro.

18. Imposition of the amounts sought on the Borough's taxpayers will be extremely burdensome and will likely result in widespread inability to pay on the part of the Borough's residents.

19. It is submitted that this situation was created by the State in permitting an unconscionable increase in tuition by Bordentown Regional and by the State's failure to recognize its duty to the citizens and students of the Borough as instructed by the Supreme Court in Abbott v. Burke, 119 N.J. 287 (1990). (emphasis in text)(Council's Position Statement, at pp. 1-4)

As to the appeal of the cap waiver, Council submits that the Commissioner has no authority to either entertain the appeal or to restore the rejected funds through local taxation as set forth below:

1. The question of the appeal on Cap waiver is controlled by N.J.S.A. 18A:7D-28(f) as amended by L. 1991, chap. 62, sec. 19(f). This says in pertinent part that the rejection of the waiver request by the voters "...shall be deemed final and shall not be subject to further review or appeal."

2. Nothing can be plainer than this statement that disapproval of the Cap waiver by the voters is final. There is no ambiguity or basis for "interpretation" and accepting such an argument would be tantamount to legislating by fiat of the Commissioner's office.

3. Likewise, there is no constitutional deficiency here. If the Commissioner were to determine that a "thorough and efficient" education required an increase in expenditures there are additional avenues to provide it, not the least of which is the $25 million on supplemental funds contained in the amendments to the Quality Education Act.

4. Furthermore, it is ludicrous to suggest that, in this time of recession, the cost of providing a thorough and efficient education for Fieldsboro increased at the rate suggested in the Petitioner's budget and that of the Bordentown Regional District. The reality is that the rules for calculating tuition payments were changed which has had an unintended effect on a poor district such as Fieldsboro. As Petitioner acknowledges, elementary education tuition has gone from $5,726.00 in 1990/91 to $8,063.00 in 1991/92 an increase of 29% per cent in a single year.

5. It is submitted that the Commissioner is without authority to restore the rejected monies through local taxation. (emphasis in text) (Council's Supplement to Position Statement, at pp. 1-2)

BOARD

The Board urges that its total projected budget for the 1991-92 school year is $959,068. See Board's Position Statement, at pp. 1-2. Since the maximum permissible budget under QEA is $708,420, it must receive a waiver to expend $250,648 above the cap if it is to provide a thorough and efficient education to its

pupils. (Id.) It therefore is seeking a total of $415,948 to be raised by local tax levy which includes the $240,300 reduced by Council and $175,648 in additional funds. (Amended Petition, Exhibit B)

It is the Board's contention that the statement of reasons submitted by Council is arbitrary, capricious and unreasonable and insufficient as required by N.J.S.A. 18A:22-37. It acknowledges that under the standard of review for budget appeals set forth by the New Jersey Supreme Court in Bd. of Ed. of East Brunswick Twp. v. The Township Council of East Brunswick, 48 N.J. 94 (1966), the governing body may seek to effectuate savings which will not impair the educational process. However, it points out further that, under that standard, (1) the governing body's determination must be an independent one properly related to educational considerations rather than voter reaction and (2) the governing body must act conscientiously and with full regard for the state's educational standards and the obligation to fix a sum sufficient to provide a thorough and efficient education. As to this, the Board argues, inter alia, that:

> ***11. The respondent did not make an independent determination as to the need for a reduction in the budget of the petitioner. Rather, the respondent reacted solely to the defeat of the budget by the voters and in paragraph two of its Resolution indicated its reason for reducing the budget was because the cost of education at Bordentown Regional was too high. The Board did not act conscientiously or reasonably with regard to the need to provide a sum sufficient to insure that the children of Fieldsboro were educated for the 1991/92 school year. By reducing the budget in the amount of $240,300.00 the respondent made it impossible for petitioner to pay its tuition bills due to Bordentown Regional, especially in view of the fact that the request for cap waiver was also defeated by the voters, which defeat appeared to have no appeal.

12. In the matter of Branchburg Board of Education vs. Branchburg, 187 NJS 540 (AD 1983), the respondent municipality was found to have acted improperly in reducing the petitioner's budget where ample evidence demonstrated that the reduction would seriously affect the library program well into its third year of development. The court found that reductions were arbitrary and were properly restored by the Commissioner and the State Board. Branchburg, at 544. In the within matter the [respondent's] action is no less arbitrary in that it effectively prohibits the ability of the Petitioner to complete the education of its students at the Bordentown Regional School District. The cost of tuition alone was $650,820.00. The reduction by the respondent resulted in a 37% decrease in the funds needed to pay the cost of tuition, which included a need for a cap waiver of $250,648.00.

13. The amount of tax levy certified by the respondent together with the denial of the request of cap waiver have resulted in the Petitioner being unable to provide a thorough and efficient education to its students. As a sending district the Petitioner has no authority to set the amount of tuition which it must pay for each of its pupils which are educated by the Bordentown Regional School District. The action of the Respondent reducing line item 114 which is regular tuition by the amount of $240,000.00, together with the denial of the cap waiver, results in a short fall of $490,648.00. The total cost of tuition is $650,820.00. Clearly the action of the Respondent and the voters has resulted in the Petitioner being unable to provide a thorough and efficient education to its pupils since it will not be able to meet tuition bills when due and therefore will be unable to send its students to the Bordentown Regional High School. (Board's Position Statement, at p. 3)

In reply to Council's position statement summarized above, the Board argues, inter alia, that:

1. The Respondent observes that the cost of tuition for Petitioner's pupils to attend the Bordentown Regional School District has increased 30% from the 1989/90 school year to the 1991/92 school year. The 1990/91 tuition contract between Petitioner and Bordentown Regional was $508,982.00. The Petitioner however was due a credit for the 1987/88 school year based on an adjusted tuition billing for that year. The adjusted tuition billings are not resolved until

two years after the school year and represent the difference between what the Petitioner paid Bordentown Regional and what the State of New Jersey certifies as the actual cost based on the number of pupils. Bordentown Regional owed the Petitioner the sum of $30,367.00 for the 1987/88 school year representing over payment. Therefore the true tuition for 1990/91 is $478,614.50. This represents a difference of $67,451.00 or an increase of approximately 16% over a two year period. Therefore, the Respondent is incorrect in stating that the increase over the two year period was nearly 30%.

2. Additionally, the Respondent fails to take into account the fact that the number of students has increased since the 1989/90 school year. In 1989/90 Petitioner sent 75 regular pupils to Bordentown Regional; in 1990/91, 79 pupils; and in 1991/92, 92 pupils.

3. The high school tuition for Bordentown Regional has not drastically increased between 1989/90 ($7,408.00) and 1991/92 ($8,491.00). However, the cost of elementary education increased from 1990/91 ($5,726.00) to 1991/92 ($8,063.00). This increase was generated by the new Quality Education Act.

4. In paragraph five the Respondent makes much of the cost of other tuition at other schools. It should be noted that the Petitioner held a public hearing regarding the current school budget at which no member of the public other than Respondent Tyler attended. Neither the Council Members nor any other member of the public appeared to express any dissatisfaction whatsoever with the continuance of sending the children to the Bordentown Regional School. It was only after the budget was defeated by the voters and presented to the Respondent, that the Respondent indicated that it had information concerning cheaper tuition costs for other districts. Needless to say the information presented to the Petitioner at that point in time was too little, too late. Any such request by the public or the Respondent should have been presented prior to the commencement of the budget process in order to afford the Respondent ample time to explore the actual costs of other districts and whether in fact a sending/receiving relationship was possible. This of course requires not only the consent of the receiving district but also the approval of the Department of Education. The Respondent takes the position that simply because tuitions in other schools are

> cheaper that this constitutes action by the Petitioner which is arbitrary, capricious and unreasonable. In fact, the Petitioner acted prudently and responsibly in continuing to provide an education for its students in the school district which they have been attending for years without having received any indication of dissatisfaction from the public as to the quality of the education being received or its costs.
>
> ***
>
> 6. As to the total tuition cost alleged in paragraph 15 of the Respondent's Position, line item 117 reflects the sub-total of lines 103 - 116. The actual costs of tuition for Bordentown Regional are $505,700.00 as contained on line item 114. Special education costs alone which are for County Special Services, Regional Day School, and other total $145,120.00.
>
> 7. It is therefore submitted that the Commissioner should grant the relief requested from Petitioner. (Board's Reply, at pp. 1-3)

The Board further contends that while N.J.S.A. 18A:7D-28(f) provides that the rejection of a cap waiver request is deemed to be final and not subject to further review or appeal, the Commissioner has the inherent authority and obligation to order an increase in its budget to the extent necessary to satisfy the constitutional mandate that a thorough and efficient education be provided to its students. More specifically, it argues:

> ***
>
> 3. In interpreting the finality provision of sec. 19 (f), the Commissioner must be guided by the well established principle, which presumes "that the legislature acted with existing constitutional law in mind and intended the act to function in a constitutional manner." State v. Profaci, 56 N.J. 346, 349 (1970). Moreover, "if it is reasonably susceptible to such an interpretation," a statute should be construed consistent with the Constitution. Profaci at 350. Thus, statutory language should be narrowly interpreted if that interpretation would free it from constitutional defect. See Right to Choose v. Byrne, 91 N.J. 287, 311 (1982).

> 4. It is submitted that the constitutional mandate for a thorough and efficient school system of education which incorporates an obligation that adequate fiscal resources, would empower the Commissioner to order a budget increase where necessary to meet the constitutional mandate. In the within matter the Petitioner had no ability to set the tuition costs to be charged by the Bordentown Regional School District for the students of Fieldsboro. In view of the fact that the Petitioner had no options in terms of where to send its students nor as to the actual tuition costs per pupil, it is clear that a thorough and efficient education can only be obtained for the children of Fieldsboro by obtaining the additional sums of money needed to meet its tuition obligation, which is in the sum of $250,648.00.
>
> (Board's Supplement to Position, at p. 2)

The Board also stresses that (1) the budget is the only means by which it can pay the cost of tuition to Bordentown Regional so that a thorough and efficient education may be provided to its pupils and (2) the County Superintendent disapproved its budget unless a cap waiver was approved by the voters to pay the cost of the tuition. More specifically, the Board argues that:

> 5. In the within matter the County Superintendent disapproved the Petitioner's budget unless a cap waiver was approved by the voters to pay the cost of tuition. The legislature intended the Commissioner to exhaust all available administrative solutions to meet the constitutional mandate of a thorough and efficient education, such as directing re-allocation before exercising his constitutional authority to set a budget above cap. This administrative discretion would include the authority to allocate monies from the discretionary fund provided by L. 1991, C. 62, Section 39. In the within matter the sum of $75,000.00 was provided by the Commissioner from this fund thereby reducing the need of a cap waiver to the sum of $175,648.00 to pay tuition costs.
>
> 6. Since the Petitioner's budget was "conditionally approved", the Petitioner has an affirmative obligation to petition the Commissioner for additional funds so that fiscal resources to meet the constitutional mandate are available. See Board of Ed. of the Township of

Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305, 315 (1989). It is clear in the within matter that re-allocation within the permissible budget amount cannot be accomplished, since the Petitioner as the sending district has no authority to re-allocate funds, and has no authority to determine the per pupil tuition costs, which were determined by the Bordentown Regional School District in accordance with State guidelines.

7. It is therefore submitted that L. 1991, C. 62 Section 19 (f) does not preclude the Commissioner from reviewing budgets that are inadequate at cap and from ordering an increase in those budgets. In the within matter the Petitioner requests that the budget be increased in the amount of $175,648.00 despite voter disapproval. (Id., at pp. 2-3)

II. COMMISSIONER'S DETERMINATION

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the authority for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to N.J.S.A. 18A:6-9, 22-14; 22-17 and 22-37 has authorized the Commissioner to review and decide appeals brought by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. (See also Board of Education of the Township of East Brunswick v. Mayor and Council of the Township of East Brunswick, 48 N.J. 94 (1966) and Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305 (1989)

In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line item reduction imposed by the

governing body is necessary for the provision of a thorough and efficient system of education.

Upon a thorough examination of the record in this matter, it is clear that the Fieldsboro School District must have restored the $240,300 in funds reduced by Council from the current expense budget for the 1991-92 school year. The tuition alone for 1991-92 to Bordentown Regional is estimated to be $756,348 while tuition for special education is $145,120. (Exhibits B and C, Board's Letter of October 29, 1991)

Notwithstanding Council's frustration at the rate of tuition for the attendance of Fieldsboro's students at Bordentown Regional School District, Council's action to cut $240,000 in tuition monies from the current expense budget in this matter was arbitrary, capricious, unreasonable and contrary to the provisions of N.J.S.A. 18A:22-37. By law the Board in this matter had no choice whatsoever but to send its students to Bordentown Regional for the 1991-92 school year. Under the provisions of N.J.S.A. 18A:38-13, a sending-receiving relationship may not be severed until approval of the Commissioner is sought and granted as set forth below:

> 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 upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil

> population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.

The process to secure withdrawal from a sending-receiving relationship is both lengthy and complex. See Board of Education of the Township of Washington, Mercer County v. Board of Education of the Upper Freehold Regional School District, Monmouth County, Township of Plumsted, Ocean County and Township of Millstone, Monmouth County, decided by the Commissioner June 27, 1989 and Board of Education of the Township of Cranbury, Middlesex County v. Board of Education of the Township of Lawrence, Mercer County, 1985 S.L.D. 1478, reversed State Board April 1, 1987, dismissed New Jersey Superior Court April 22, 1988.

Moreover, the tuition rate set in a sending-receiving relationship such as herein is determined based upon actual per pupil cost of education as audited by the State Department of Education; thus, the Board is not in a position to negotiate or bargain with Bordentown Regional School District for lower tuition.

Additionally, the Board in this matter had no flexibility whatsoever to look to other areas of its budget so as to reallocate monies to meet its tuition obligations. There are no teaching staff. There are no administrative staff. There are no schools. Every single one of Fieldsboro's students is educated out of district, which the Board correctly points out is due to the order of the Commissioner of Education in 1982 to discontinue the

operation of the Fieldsboro School. Thus, the tuition owing for the education of the students is unequivocally a necessity for meeting the constitutional mandate for the provision of a thorough and efficient education. A review of the remainder of the budget reveals no ability to reallocate funds for the purpose of meeting its tuition obligation of $901,468, a fact recognized by the County Superintendent and by Council itself apparently since it found all other monies in the budget necessary for a thorough and efficient education, except $300.

As to the cap waiver appeal, it is determined that the Commissioner, as opined by the Attorney General of New Jersey, has the authority and the obligation to order an increase in a district's budget if, when at cap, the funds available to a school district are insufficient to provide the fiscal resources necessary for the provision of a thorough and efficient education. Exhibit C-1 reads in pertinent part:

> ***Although L. 1991, c. 62 may appear to have limited the Commissioner's ability to grant cap waivers, it is clear that despite the absence of explicit statutory authority, he still possesses the breadth of implied powers needed to fulfill the constitutional mandate for a thorough and efficient system of public education and to override local fiscal decisions where required to meet that mandate. Robinson (V), supra. See Freehold, supra (despite voter rejection, Commissioner could authorize issuance of bonds if necessary for a thorough and efficient education); Elizabeth, supra (in light of educational mandate in Constitution, Commissioner had inherent authority to hear appeals from budget reductions in Type I districts); East Brunswick, supra (Commissioner had inherent authority to hear appeals from budget reductions by the City Council in Type II districts).
>
> In interpreting the finality provision of section 19(f), we are guided by well-established principles which presume "that the legislature acted with existing constitutional law in mind

and intended the act to function in a constitutional manner." State v. Profaci, 56 N.J. 346, 349 (1970). Moreover, "if it is reasonably susceptible to such an interpretation", a statute should be construed consistent with the Constitution. Profaci, 56 N.J. at 350. Thus, statutory language should be narrowly interpreted if that interpretation would free it from constitutional defect. See Right to Choose v. Byrne, 91 N.J. 287, 311 (1982); New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 75 (1980).

It is our opinion that the constitutional mandate for a thorough and efficient school system of education, which incorporates an obligation that districts have adequate fiscal resources, would empower the Commissioner to order a budget increase where necessary to meet the constitutional mandate. This interpretation is consistent with the longstanding and continuing legislative delegation of this constitutional responsibility to the Commissioner and the State Board. Robinson (V), id. at 461, which has been recognized by the courts. As the Supreme Court stated in Upper Freehold,

> The delegation of that duty carries with it the necessary power to meet the mandate of the constitution. For this purpose, the Commissioner and State Board have been constituted "legislative agents. They have received a vast grant of power and upon them has been placed a great and ongoing responsibility." (quoting Robinson (V) at 461) [Id., 86 N.J. at 265.]

The QEA and subsequent amendments have not relieved the Commissioner of this constitutional responsibility. Thus, based on this delegation and the court's expansive interpretation of the Commissioner's authority and obligation to meet the constitutional mandate, it is reasonable to conclude that the Legislature did not intend to restrict the Commissioner's ability to fulfill his constitutional responsibilities. The recently enacted provision, therefore, does not preclude the Commissioner from entertaining a petition from a local school district whose budget -- without the cap waiver -- is determined to be inadequate to provide a thorough and efficient education to the children in that district. Those districts should be readily identifiable since the county superintendent

should approve their budgets conditioned on the district receiving approval of a cap waiver.

In enacting L. 1991, c. 62, sec. 19(f), the Legislature did intend to broaden the availability of cap waivers and also to limit the review and appeal of cap waiver disapprovals where the constitutional mandate was not at issue. Thus, where the board of school estimate or city council certifies an amount for the budget that is consistent with the amount that the county superintendent approved as sufficient, no further review or appeal is available. Cf. N.J.S.A. 18A:22-14 (board of education can appeal board of school estimate's budget determination); N.J.S.A. 18A:22-17 (board of education can appeal governing body's certification for school budget); N.J.S.A. 18A:22-37 (if voters reject budget, governing body to determine amount of budget; board of education can appeal that determination). See also Deptford, supra. Moreover, the Legislature intended the Commissioner to exhaust all available administrative solutions to meet the constitutional mandate such as directing reallocation before exercising his constitutional authority to set a budget above cap. This administrative discretion would include the authority to allocate monies from a $25 million discretionary fund in the FY 92 State Budget designed to "ensure the continuation of educational quality," L. 1991, c. 62, sec. 39, and thereby diminish the number of instances where resort to the cap waiver remedy is needed to meet the constitutional standard.

A district whose budget was "conditionally approved" has an affirmative obligation to petition the Commissioner for additional funds so that the fiscal resources to meet the constitutional mandate are available. See Deptford, 116 N.J. at 315 ("local boards have not only the power but the duty to appeal actions that threaten to deprive the local school system of necessary teaching staffs and physical facilities"). In considering the petition, the Commissioner should exercise restraint in overriding the expressed desires of the voters or board of school estimates. See Deptford, 116 N.J. at 314; Upper Freehold, 86 N.J. at 280. The district should be required to demonstrate not only that a particular amount of funds above the cap is necessary to provide a thorough and efficient education to children in the district but also that reallocation within the permissible budget amount cannot be accomplished.

> Furthermore, if the cap waiver was disapproved by the board of school estimate, it should be made a party to the action; if the voters rejected the cap waiver, the public should be given the opportunity to participate in the hearing. See Upper Freehold, 86 N.J. at 280 (where voters rejected bond referendum, Commissioner should give the public the right to participate in any hearing before the Commissioner as to whether he should order the issuance of bonds). Finally, any hearing must be conducted on an expedited basis so that funds can be made available to the district at a meaningful time. See Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. at 321.
>
> In summary, it is our opinion that L. 1991, c. 62, sec. 19(f) does not preclude the Commissioner from reviewing budgets that are inadequate at cap and from ordering an increase in those budgets if the increase is limited to that amount necessary to provide for a thorough and efficient education in that district. The Commissioner, therefore, can entertain petitions from those districts whose budgets are "conditionally approved" subject to a cap waiver approval and order inclusion of those funds beyond the permissible budget limit to the extent those funds are constitutionally required.
>
> (C-1, at pp. 4-6)

As set forth above, the Board in this matter has unequivocally demonstrated that the funds able to be expended under its maximum permissible budget, even with restoration of the reductions effectuated by Council to the maximum permissible budget, are insufficient to meet its financial obligation to provide a thorough and efficient education to its students for the 1991-92 school year. Consequently, the Commissioner finds and determines that $250,648 in additional funds are needed to meet that purpose, $75,000 of which have already been provided under the provisions of L. 1991, c. 62, sec. 39.

Accordingly, the $240,300 reduction to the current expense local tax levy effectuated by Council is ordered restored, together

with $175,648 in cap waiver funds. Therefore, the Burlington County Board of Taxation is directed to make the necessary adjustments to the Borough of Fieldsboro's tax levy to raise an additional $415,948 for current expense purposes for the 1991-92 school year which, when added to the $96,996 already certified by Council, results in a total current expense tax levy of $512,944 for that school year as set forth below:

RECAPITULATION

Amount of Local Tax Levy Reduced by Council	Local Tax Levy Amount Restored
$240,300	$240,300
Amount of Cap Waiver Rejected by Voters	
$250,648	$175,648
Total Restoration to Local Tax Levy	$415,948
Amount Previously Certified by Council	$ 96,996
Total Local Tax Levy for 1991-92	$512,944

In ordering such adjustment to the tax levy, the Commissioner is acutely mindful of the impact this will have on the taxpayers of Fieldsboro and he is most empathic with the Mayor and Council's justifiable concerns about, and desire to protect the taxpayers from, a burdensome tax levy, particularly in this time of recession. However, given the facts presented in this matter, there is simply no choice but to restore the monies necessary to meet the tuition obligations of the district.

In closing, the Commissioner would point out that if the citizens of Fieldsboro are dissatisfied with its sending-receiving relationship with Bordentown, there is nothing to prevent the Board, if it concurs, from seeking a withdrawal under the provisions of N.J.S.A. 18A:38-13.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 12, 1991

DATE OF MAILING - DECEMBER 12, 1991

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 5576-90
AGENCY DKT. NO. 207-6/90

DELPHINE LAUFENBERG,

Petitioner,

v.

RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

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

Alan Dzwilewski, Esq., for respondent
(Green & Dzwilewski, P.A.)

Record Closed: October 18, 1991 Decided: October 28, 1991

This is a transcript of the Administrative Law Judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

BEFORE **ELINOR R. REINER**, ALJ:

On June 26, 1990, petitioner, Delphine B. Laufenberg, filed a petition of appeal with the Commissioner of Education alleging that her tenure and seniority rights had been violated by respondent. More particularly, petitioner alleged that respondent's reduction of her salary rate and benefits for the 1990-91 school year was an illegal reduction in compensation, in violation of *N.J.S.A.* 18A:28-5.

Petitioner further alleged that respondent employed less senior and/or nontenured individuals for the 1990-91 school year in positions within the scope of petitioner's tenure and/or seniority protection. Respondent filed its answer on July 13, 1990, and an amended answer on August 9, 1990, requesting that the Commissioner dismiss the petition with prejudice. Respondent pointed out that petitioner, subsequent to a reduction in force, was not reemployed as a full-time English teacher for 1990-91. Petitioner was subsequently offered and accepted an appointment as a supplemental teacher for 1990-91 at a salary of $16,438 as provided by the appropriate collectively negotiated salary guide. Respondent alleged that the position of supplemental teacher is part-time and, accordingly, petitioner worked fewer hours per week than a full-time teacher.

On July 17, 1990, this matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.* A telephone prehearing conference was held on September 24, 1990, at which time the issues were isolated and the hearing was scheduled for December 10, 1990, at the OAL. The hearing was adjourned in an effort to reach an amicable resolution and, when it was determined that a settlement could not be reached, the parties agreed to stipulate as to the essential facts of this matter and file cross-motions for summary decision. Subsequent to the filing of the stipulations of facts and briefs in this matter, it became apparent that additional facts were necessary. The record closed on October 18, 1991, when it was determined that all facts necessary for determination here had been placed in the record.

ISSUES

At issue in the instant case is whether respondent violated petitioner's tenure and seniority rights. More particularly at issue is whether petitioner is entitled to pro-rata salary compensation for the 1990-91 school year as a part-time supplemental teacher under the salary guide in force for regular full-time teaching staff members as required by *N.J.S.A.* 18A:28-5. Further at issue is whether petitioner's tenure and seniority rights were violated by respondent's employing less-senior and/or nontenured staff in positions for which petitioner is qualified to teach.

UNDISPUTED FACTS

The relevant facts in this matter are undisputed and are set forth in the joint stipulation of facts, with attached exhibits JJ-1, filed May 13, 1991, and supplemental stipulation of facts JJ-2, dated August 20, 1991, submitted by the parties. Respondent also submitted a certification of David L. Rinderknect, dated May 31, 1991, which is undisputed. The stipulations of fact and attached exhibits are incorporated by reference herein and constitute this tribunal's findings of fact.

The relevant facts may be summarized as follows. Petitioner, Delphine B. Laufenberg, was employed by the Ramapo Indian Hills Regional High School District Board of Education (Board). Her employment history with the Board is as follows: October 7, 1985 to June 30, 1986 -- part-time English teacher; September 1, 1986 to June 30, 1987 -- full-time English teacher; September 1, 1987 to June 30, 1988 -- full-time English teacher; September 1, 1988 to June 30, 1989 -- full-time English teacher; September 1, 1989 to January 19, 1990 -- supplemental teacher; January 22, 1990 to June 30, 1990 -- full-time English teacher; September 1, 1990 to November 25, 1990 -- supplemental teacher; November 26, 1990 to present -- full-time English teacher.

On April 10, 1989, respondent eliminated petitioner's position by reason of a reduction in force (RIF). Commencing September 1, 1989 through January 19, 1990, petitioner was employed by respondent as a supplemental teacher. During petitioner's September 1989 to January 22, 1990 employment as a supplemental teacher, she earned $15,150 annually. After being reappointed to a full-time English teacher position as of January 22, 1990, petitioner's salary increased to $36,103 per year. Subsequently, when petitioner was not offered a contract as a full-time English teacher for the 1990-91 school year, and was reappointed as a supplemental teacher in September 1990, her annual salary decreased to $16,438.

Generally, supplemental teachers implement the individualized education program for assigned students in consultation with the learning consultant and upon conferring with classroom teachers. They are generally employed 19 1/2 hours per week. The 19 1/2 hour per week limitation is specified in Article VII, Paragraph J of the negotiated collective bargaining agreement.

While employed as a supplemental teacher during the 1989-90 school year, petitioner worked from 8:15 a.m. until 12:15 p.m. Mondays through Thursdays, and until 11:45 a.m. on Fridays. She taught four periods daily; the rest of the time was used for conferences and preparation. Periods are 42 minutes in length. During the 1990-91 school year, petitioner worked from 9 a.m. until 1 p.m. (except for Fridays, when she left early), or four periods daily.

As a full-time teacher, petitioner was required to work 7 3/4 hours per day or five teaching periods, two preparation periods, and one lunch period. During the 1990-91 school year, the following teachers were not tenured at the start of the year:

NAME	DATE EMPLOYED	CERTIFICATIONS HELD
Madeline Lakritz	9/1/87	English/Elementary
Linda Kates	2/1/89	Social Studies -5/70
Clair Cullen	9/1/81 (Sub) 3/17/88 (supplemental)	Social Studies - 8/70

In addition, the record reflects that the following teachers (who appear to have tenure) had been employed as follows:

NAME	DATE EMPLOYED	CERTIFICATIONS HELD
Kathleen Rosenberg	1/27/86	English 10/73
Gail Tancredi	5/18/87 (sub) 6/5/87 (supplemental)	Sub Cert - 5/87; English 2/88
Ann Gannaio	9/1/85	Social Studies/ English - 8/13/62
Janet Cornewal	10/7/85	Limited Math - 6/63; Teacher of Handicap - 11/85; Math - 5/86

Employment as a supplemental instructor in the respondent's school district requires the employee to possess an instructional certificate with an endorsement in the subject area in which instruction is given. Petitioner was assigned as a supplemental instructor in English. Throughout her employment, she held a valid endorsement as a teacher of English. Petitioner makes no claim to assignments as a supplemental instructor in any area for which she is not properly certified. Other

supplemental instructors were assigned to teach during those periods of time before 9 a.m. and after 1 p.m. as contained in the schedule for supplemental instructors. It appears that of those supplemental instructors employed, the only teaching periods that could be assigned to petitioner were certain periods of teaching assigned to Kathy Rosenberg, Ann Gannaio (but it could be that Ann Gannaio was only teaching social studies, I am unclear about that; she could have been teaching English), Mattie Lakritz, and Gail Tancredi.

In the event that a determination is made that petitioner is entitled to a salary based upon placement on the negotiated salary guide for teachers, prorated as to her employment, each party makes the following claim as to the manner in which her salary is to be prorated.

(a) Petitioner -- 4/5 salary based upon her 20 teaching periods per week. If her claim to an extended day based on tenure and seniority rights is granted, then she claims that she would be as much as a full-time employee and entitled to a salary based upon that employment status.

(b) Respondent -- 50.3 percent of full salary based upon a comparison of petitioner's actual work week of 19 1/2 hours compared to the maximum work week of 38 3/4 hours for full-time teachers.

DISCUSSION

As stated above, petitioner challenges both her reduction in salary for the 1990-91 year and her reduction to a part-time capacity while respondent was employing nontenured teachers or teachers with less seniority and assigning them to classes that could have been scheduled with petitioner. Under the applicable statutes, *N.J.S.A.* 18A:28-5 and 18A:28-6, petitioner has acquired tenure in respondent's school district. Pursuant to *N.J.S.A.* 18A:6-10, a tenured employee shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause."

As a tenured employee, petitioner has certain statutorily conferred protections including protection from the unilateral reduction in her salary without just cause. In the instant case, petitioner argues that her salary was unlawfully reduced when she went from a full-time employee to a supplemental employee. Petitioner concedes that in certain reassignment circumstances, a reduction in salary is warranted.

For instance, in *Vexler v. Bd. of Ed. Borough of Red Bank*, 1980 *S.L.D.* 272, 277, the ALJ stated:

> The Commissioner has held that a reduction in salary where a position is abolished and the person holding such position is lawfully transferred to a lower paying position is not a reduction in salary under the tenure laws.

Similarly, in *Metzger v. Bd. of Ed. of Tp. of Willingboro*, 1979 *S.L.D.* 598, the Commissioner of Education upheld the reduction of a tenured teaching staff's salary after he was transferred from coordinator of health and physical education to that of classroom teacher.

However, unlike the situation in *Metzger*, petitioner in the instant case is being transferred to a teaching position within her instructional certificate (and the endorsement issued thereon). Stated another way, the positions of English teacher and supplemental instructor are not different "positions" under the Tenure Act. The types of "positions" are listed in *N.J.S.A.* 18A:28-5 and include "all teachers, principles, assistant principles, vice-principles, superintendents . . . and such other employees as are in positions which require them to hold appropriate certificates. . . ." *See, generally, Howley v. Ewing Bd. of Ed.*, 6 *N.J.A.R.* 509, 526 (1983); *Childs v. Union Twp. Bd. of Ed.*, 3 *N.J.A.R.* 163 (1980).

Bassett v. Bd. of Ed., 223 *N.J. Super.* 136 (App. Div. 1988) clearly illustrates the point. In *Bassett*, the court upheld the State Board decision that a reduction of the petitioner's salary after reassignment to a supplemental teaching position from a full-time reading position was improper. The State Board reasoned as follows:

> It is not disputed that petitioner achieved tenure prior to commencing her leave of absence in 1980. We emphasize that upon her return to active employment, she was not "transferred"

> within the meaning of *N.J.S.A.* 18A:28-6 from one tenurable position to another. Rather, she was reassigned within the same tenurable position. Prior to commencing her leave, she was employed under her instructional certificate, achieved tenure as a teacher and, upon her return was reassigned within the same position. Therefore, by virtue of her status as a tenured teaching staff member, she had statutory protection against reduction in her compensation. Since *N.J.S.A.* 18A:28-5 specifically mandates that the petitioner's salary level be maintained, the Board was required to conform to the statutory requirement even if it was contractually bound by the provision in the collective negotiations agreement establishing a lesser rate of compensation for "hourly rate" teachers which was applicable to petitioner's assignment for that year. *Bassett*, 223 *N.J. Super.* at 142.

Utilizing this approach, the court specifically held that the teacher's part-time rate of compensation of $10.80 per hour, pursuant to the collective bargaining agreement, was in violation of *N.J.S.A.* 18A:28-5, prohibiting reduction in compensation of any tenured teaching staff member except as specifically provided. The court reasoned that although the petitioner was being compensated pursuant to a collective bargaining agreement and the parties were free to negotiate separate salary schedules for supplemental teachers, the rate at which the teacher was compensated constituted a reduction in salary. That is, the teacher was entitled to be paid as an hourly rate teacher but at a full-time teacher's rate. This was accomplished by dividing the full-time teacher's annual salary by the required number of annual teaching hours to reach an hourly rate of $20.22, which was then multiplied by the actual number of hours petitioner taught.

It is to be noted that the Board argues that petitioner is not entitled to a pro rata share of her full-time salary, pursuant to *Odenwald et al v. Oakland Bd. of Ed. of the Borough of Oakland*, OAL DKT. EDU 7385-83 (June 19, 1984), aff'd Comm'r of Ed. (Aug. 7, 1984), rev'd State Board (Feb. 6, 1987). The facts of *Odenwald* make it inapposite to the instant case. In *Odenwald,* petitioners were part-time teachers compensated on an hourly basis pursuant to their contracts. They alleged they had acquired tenure in their positions and were therefore entitled to pro rata compensation based on the salary schedule applicable to full-time teachers. The State Board rejected the petitioner's claim because, unlike in *Bassett,* their compensation had not been reduced since they had been continuously employed on a part-time basis.

In sum, since petitioner's position of full-time English teacher was abolished and she was reassigned to a teaching position within the endorsement issued on her certificate, her compensation may not be reduced. The Appellate Court has addressed this issue in *Bassett* and held that once an employee has acquired tenure, his or her compensation may only be reduced proportionately with the reduction in hours employed.

Petitioner further argues that her tenure and seniority rights were violated when she was reduced to part-time status while nontenured teachers or teachers with less seniority were hired for positions for which she was qualified.

It is established that a reduction in an employee's hours of employment constitutes a RIF. *Klinger v. Cranbury Twp. Bd. of Ed.*, 190 *N.J. Super.* 354, 357 (App. Div. 1982). The board has discretion to reduce its work force pursuant to *N.J.S.A.* 18A:28-9, which provides

> [n]othing 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.

However, a board's authority to reduce its personnel must be balanced against the rights of tenured employees. This tension was explained in *Lingelback v. Bd. of Ed. of Hopatcong*, decided by the State Board (May 14, 1984), aff'd (N.J. App. Div., May 17, 1985, A-4738-83T7) (unreported) at 4:

> In the final analysis, there is a conflict between the legislative policies implicit in *N.J.S.A.* 28A:28-5 [*i.e.*, tenure statute] and *N.J.S.A.* 18A:28-9 [*i.e.*, RIF statute]. . . . The tenure statute seeks to give some measure of security after years of service, while the RIF statute has a goal of governmental economy. *Viemeister v. Prospect Park Bd. of Ed.*, 5 *N.J. Super.* 214, 218 (App. Div. 1949).

In an attempt to resolve this conflict, the State Board has chosen to place the burden on the board to establish that it has made a good faith attempt to acknowledge the tenure rights of the affected employee. *Valenski v. Bd. of Ed. of*

Borough of Garwood, OAL DKT. EDU 5930-84, aff'd Comm'r of Ed. (March 11, 1985), rev'd State Bd. (November 13, 1985), illustrates the point.

In *Valenski*, the petitioner, a tenured full-time health/physical education teacher, challenged the board's decision to reduce the district's two physical education positions from full-time to 4/5 time. Ms. Valenski held one of these positions and the other was held by a nontenured teacher. Similarly, the petitioner in *Valenski* argued that the reduction of her employment from full-time to part-time and the assignment of a nontenured teacher to teach within the scope of her certification was in violation of her tenure and seniority rights. The State Board agreed with Ms. Valenski that while a local board has the authority to reduce its work force due to declining enrollment and budgetary constraints, pursuant to *N.J.S.A.* 18A:28-9, its authority "is not sacrosanct and will be disturbed if it is found that the board acted in bad faith." *Valenski, supra*, at 4 (citing *Viemeister, supra; Vogel v. Bd. of Ed. of the Borough of Ridgefield*, OAL DKT. EDU 8503-82, aff'd Comm'r of Ed. (August 15, 1983), rev'd State Bd. of Ed. (June 7, 1985).

The State Board cited a previous decision, *Miller v. Bd. of Ed. of Twp. of Mendham*, OAL DKT. EDU 5029-81 (April 2, 1982), rev'd Comm'r of Ed. (May 17, 1982), rev'd State Bd. of Ed. (Feb. 3, 1983), in which it held:

> a board has an obligation to attempt to acknowledge an affected teacher's tenure rights by eliminating or reducing the positions of nontenured teachers before eliminating or reducing the positions held by tenured teaching staff members when it exercises its discretionary authority pursuant to *N.J.S.A.* 18A:28-9. This obligation encompasses the duty to attempt to assign the affected teacher to teach courses assigned to a nontenured teacher before reducing the tenured teacher's position from full time. [*Valenski*, supra, at 5.]

Further, the State Board reasoned that if the board does not have a sound educational policy, such as one favoring dual instruction for retaining the tenured and nontenured teacher, and full-time assignment of the tenured teacher does not affect pupil schedules (*see Klinger, supra*, at 358), retaining the full-time teacher and reducing or eliminating the positions of nontenured teachers allows the board to achieve its goals without impairing the purposes underlying the tenure provisions of the school laws. *Id.* at 5 (citing *Veimeister, supra*, at 219).

Therefore, if the respondent board cannot establish it had educationally based reasons for not retaining petitioner, and thereby acknowledging her tenure rights, it has acted arbitrarily. *Id.* at 6. The State Board in *Valenski* found that the board could not meet its burden. Both the nontenured and tenured teachers taught all grades and sections in both district elementary schools. Moreover, assigning Ms. Valenski to full-time and the nontenured to 3/5 instead of 4/5 would not require any adjustment to pupil schedules.

Additionally, this standard has been upheld by the Appellate Division in *Capodilupo v. West Orange Tp. Ed. Bd.*, 218 *N.J. Super.* 510 (App. Div. 1987), in which the court affirmed the State Board decision, which provided in part:

> [w]here a board validly determines that a reduction in force is necessary, it has an obligation to attempt to recognize the tenure rights of a teacher affected by the reduction. This obligation does include consideration of the reassignment of the affected teacher to assignments filled by nontenured teachers for which he is qualified. . . .

See also, Bednar v. Westwood Bd. of Education, 221 *N.J. Super.* 231 (App. Div. 1987).

In contrast, *Klinger, supra,* illustrates when a reduction of a tenured teacher's employment from full-time to part-time should be upheld. In *Klinger*, the board reduced the petitioner's hours from full-time to 7/10 time and hired a nontenured teacher to also teach on a 7/10 basis. As in prior years, both teachers taught the same classes at the same time. The petitioner challenged the board's decision, arguing that the board was required to retain him on a full-time basis rather than employing two teachers on a part-time basis or be in violation of his tenure and seniority rights.

The Appellate Division upheld the State Board and rejected petitioner's claim. The court cited the board's longstanding policy of dual instruction in its physical education program and existing pupil schedules. In the instant case, the Board has not asserted any educationally based reason or scheduling conflict for its decision to have part-time teachers.

CONCLUSION

Petitioner is a tenured teacher within the Ramapo Indian Hills District and, as such, may not be dismissed or reduced in compensation without just cause, pursuant to *N.J.S.A.* 18A:28-5. Thus, when petitioner's full-time position was abolished following a RIF and she was assigned a new position with less hours, her salary should have only been reduced proportionately to the reduction in the hours of her new position.

In addition, it appears that the Board violated petitioner's tenure rights when it hired nontenured part-time teachers or part-time teachers with less seniority to instruct classes for which petitioner was qualified. The Board has not argued that it had educationally based reasons for hiring these part-time teachers nor does it argue that assigning petitioner to full-time hours would upset existing student schedules.

ORDER

It is hereby **ORDERED** that petitioner's appeal is **GRANTED**. Petitioner's salary should only have been reduced on a pro rata basis relative to the hours employed. Since the Board could have reduced the hours of other less-senior teachers before reducing petitioner's full-time schedule, petitioner is entitled to be paid at the full-time teacher's rate of pay.

Dzwilewski:	Judge, are you dealing with that mitigation issue?
Judge:	Am I dealing with the mitigation issue?
Dzwilewski:	Um hmm
Judge:	As the fact that she should have mitigated?
Dzwilewski:	Um hmm
Judge:	I think in finding this way, I don't think that she had an obligation to mitigate. So, I've considered that but I don't think that the cases suggest that she has any obligation to do that.
Dzwilewski:	Okay.

Judge: Okay. Thank you very much.

Dzwilewski: Thank you.

END OF TRANSCRIPT

I, Jane R. Pearson, hereby certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision rendered in the above matter.

Oct. 28, 1991
Date

Jane R. Pearson

This oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Receipt Acknowledged:

11/1/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 6 1991
Date

OFFICE OF ADMINISTRATIVE LAW

jrp/e

DELPHINE LAUFENBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions, and petitioner's reply thereto, were timely filed pursuant to N.J.A.C. 1:1-18.4.

In its exceptions, respondent (hereinafter "the Board") first argues that the ALJ made a fundamental error in concluding that petitioner was "transferred" or reassigned" from a full-time position as English teacher to a lesser position as a supplemental instructor; rather, she was riffed from her English position and offered a supplemental position, which she freely accepted. This distinction, the Board argues, is not merely one of semantics; to the contrary, it has specific legal implications which establish the entire framework for consideration of the matter herein. (Exception No. 1)

The Board next contends that the ALJ erred in concluding that petitioner's salary was to be pro-rated based on the regular teachers' salary guide rather than that of the supplemental teachers. This is so, the Board avers, because the district's negotiated agreement for its various classes of teachers (full-time, part-time and supplemental) provides for annualized salaries based on distinctly different workloads and schedules, all of which were agreed to by the teachers' exclusive collective bargaining representatives and are outside the jurisdiction of the Commissioner. According to the Board, Bassett, supra, on which the ALJ relies, is distinguishable from the matter herein in that the petitioner in Bassett was simply "assigned" supplemental classes as opposed to being riffed and then reemployed in a significantly different (and lesser) type of position. To apply Bassett herein, the Board contends, would result in petitioner being paid the same amount as other teachers with heavier workloads and more than other tenured supplemental teachers having duties similar to her own, simply because she was riffed and notwithstanding that the same pay scale for full- and part-time employees is not an emolument of tenure generally. If Bassett is construed to have this effect, the Board argues, then that decision should be re-thought and reversed herein. The Board also argues that the ALJ erred in determining that petitioner was entitled to full salary, as no matter whom she bumped she could still not meet the contractual requirements for a full-time teacher; moreover, the ALJ never details precisely how this was to have been done. (Exception No. 2)

The Board further contends that the ALJ erred in concluding that petitioner's tenure rights were violated, inasmuch as she failed to properly balance petitioner's employment rights with the district's negotiated obligations and its right not to be required to restructure existing programs or fragment existing positions. Neither can petitioner's tenure rights implicate the full panoply of negotiated benefits, the Board avers, as these are outside the Commissioner's jurisdiction to award. (Exception No. 3)

Finally, the Board argues that the ALJ committed reversible error in concluding that petitioner had no duty to mitigate notwithstanding that additional and alternative employment was available outside the district and that petitioner undisputedly did not seek same, as well as in failing to address the Board's claim of estoppel, which is based on petitioner's not having made any claim against supplemental work assigned to other teachers until personnel commitments and student schedules were already set. (Exceptions Nos. 4 and 5)

In reply, petitioner characterizes the Board's exception to the ALJ's use of "transfer" and "reassignment" as an atttempt to use a hypertechnical reading of general language to overturn completely sound analyses and conclusions of law. She further endorses Bassett, supra, as the controlling law in this case and argues that the Board's attempts to factually distinguish it from the matter herein are both inaccurate and legally erroneous. Petitioner then repeats her demonstration that nontenured and less senior teachers were assigned supplemental classes for which she was available both in terms of scheduling and location and for which no educational

reason was proffered for her nonassignment, thus violating her tenure right to a full-time position as determined by the ALJ. Finally, petitioner deems meritless the Board's arguments on estoppel and mitigation, the first because she was not at fault in her employer's noncompliance with the law, and the second because she did accept significant, responsible employment as offered to her by the Board and should not have been expected to forfeit her tenure and seniority status by seeking full-time employment in another district or by looking for "filler" work before 9:00 a.m. and after 1:00 p.m.

Upon careful review, the Commissioner finds no merit in the Board's exceptions and affirms the initial decision of the ALJ for the reasons expressed therein.

Initially, the Commissioner concurs with petitioner that the ALJ's use of the words "transfer" and "reassign" in their ordinary rather than legal sense in no way reflects an erroneous framing of issues, nor would the outcome of this matter be altered by adopting the Board's contention that petitioner's situation is to be distinguished from a transfer or a reassignment. Simply stated, petitioner was riffed and offered reemployment within the scope of her certificate as required by law. The ALJ's analyses and conclusions clearly flow from this proposition and not from any conceptual overlay of transfer or reassignment issues.

The Commissioner likewise concurs that Bassett, supra, controls on the question of any conflict between statutory tenure rights and the salary and benefits that would otherwise have accrued to petitioner under negotiated agreements and that nothing in the

circumstances under consideration herein would so distinguish Bassett (which the Board does, as petitioner claims, erroneously characterize as to fact pattern) that the Commissioner could deem it inapposite. To the contrary, it is clearly dispositive of the claims to which it is applied in this matter and the Commissioner has no authority to reverse it herein.

Nor is the Commissioner persuaded by the Board's contention that petitioner was not entitled to more classes than she was actually assigned and hence must be compensated by full-time salary for the period of her wrongful deprivation. The Board did not evince, either in exceptions or in its filings before the ALJ, any cogent reason as to why petitioner could not have been assigned one or more of the classes given to nontenured or less senior supplemental teachers, as there was no demonstration that the results of so doing would be educationally unsound or lead to fragmenting of cohesively designed programs or positions. Under these circumstances, the ALJ need not have specified precisely how such assignment should have been made in order to find that it could have occurred.

Finally, the Commissioner concurs that estoppel cannot be invoked against petitioner herein merely because it inconveniences the Board or exposes it to financial liability, as petitioner was under no obligation to remind the Board of its responsibility to remploy her in full accord with the extent of her statutory tenure right. Nor can she have reasonably been expected to mitigate beyond the substantial degree that she did, and her situation is in no way comparable to that of most petitioners in West Orange Supplemental

Instructors Association et al. v. Board of Education of the City of West Orange, Essex County, decided January 9, 1991, on which the Board relies for its contention that petitioner was obliged to further mitigate. To the contrary, petitioner's situation is actually more analogous to that of Rita Zimring, who was found to have sufficiently mitigated by remaining in the Board's employ as a part-time teacher following her RIF from a full-time position, and distinguishable from that of Florence Berk whose substantial substitute teaching employment was rejected as an effort to obtain work as a teaching staff member because it was undertaken on a per diem basis. (West Orange, supra, at p. 44 and p. 46)

Accordingly, the decision of the ALJ is affirmed for the reasons stated therein and the Board is directed to pay petitioner the difference between the salary she actually received and that of a full-time teacher, as well as all other benefits and emoluments withheld, for the period between September 1, 1990 and November 25, 1990 when she served and was compensated as a part-time supplemental teacher in violation of her tenure and seniority rights.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 12, 1991

DATE OF MAILING - DECEMBER 12, 1991

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1048-91
AGENCY DKT. NO. 409-12/90

PAUL E. PHILLIPS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY,
Respondent,
and
HELEN STAYBACK,
Intervenor.

Charles F. Sheeler, Esq., for petitioner
(Hogger and Sheeler, attorneys)

Richard H. Bauch, Esq., for respondent
(DeMaria, Ellis, Hunt & Salsberg, attorneys)

Arthur E. Balsamo, Esq., for intervenor

Record Closed: November 1, 1991 Decided: November 7, 1991

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

After request by Paul E. Phillips, natural father and non-custodial parent of Paul Michael Phillips a/k/a Stayback, a 13-year-old student in the River Vale, Bergen County, school district, the Board of Education determined on November 5, 1990 that school records should recognize the student's legally corrected name to be Paul

Michael Phillips but that the student's name on such records could also denote him as a/k/a Paul Michael Stayback, a surname under which the student had been known from time of first registration in the district. The marriage of Paul E. Phillips and Helen E. Phillips was dissolved by divorce on January 6, 1981; their son, Paul Michael Phillips, was born of the marriage on November 18, 1977. Sole custody was awarded to the mother, who since has remarried and is known as Helen Stayback. She registered the student for kindergarten in the district under the name Paul Michael Stayback (Phillips) in 1983. Family Court actions by and between the parents of the student involving, inter alia, visitation and use of name are pending in Superior Court, Bergen County.

In a petition of appeal filed by the non-custodial parent before the Commissioner of the Department of Education on December 31, 1990, it was alleged that Board action in permitting the a/k/a Stayback designation after the student's legal name on all school records was violative of parental rights and district obligations under N.J.A.C. 6:3-2.7. Judgment was demanded reversing the determination of the Board of November 5, 1990, and directing removal of the designation a/k/a Stayback presently and in future from all mandated and permitted school records of the student. The Board filed its answer before the Commissioner on January 24, 1991, admitting background facts generally but denying it had violated any duty owed to petitioner, asserting it had complied both strictly and in spirit of regulations concerning school records and seeking judgment dismissing the petition. The Commissioner transmitted the matter to the Office of Administrative Law on January 30, 1991 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. A demand for interim relief in the petition was withdrawn by petitioner at prehearing conference.

As directed by the administrative law judge, notice was given by petitioner to Helen Stayback, custodial parent, of her right to move to intervene or participate in the proceeding. Her motion to that effect was filed in the Office of Administrative Law on May 13, 1991. There having been no objection, the administrative law judge allowed such intervention on May 21, 1991, at time of prehearing conference. Intervenor Stayback's additional motion for remand of the proceedings to the Superior Court or to the Board of Education for reconsideration was denied by the administrative law judge. Intervenor Stayback's contentions in the matter at issue, generally, mirror those of the Board of Education in opposition to the petition.

The prehearing conference order required the parties to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact in chronological and sequential order, together with documentation as necessary, indexed and premarked, which thereafter were to be filed in the case no later than ten days before hearing. Thereafter, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision based on pleadings, admissions, stipulations, documentation and memoranda of law, in accordance with N.J.A.C. 1:1-12.5. Hearing date was established for September 20, 1991. Thereafter, stipulations and memoranda of law having been filed, the record closed on November 1, 1991.

The prehearing conference order provided that at issue in the matter were (1) whether petitioner Paul E. Phillips has standing as a "parent" in the proceedings under definition in N.J.A.C. 6:3-2.1; and (2) if so, whether petitioner shall have proven by a preponderance of the credible evidence that Board action in its November 5, 1990 determination was arbitrary, capricious, unreasonable or contrary to law and violative of petitioner's rights and/or Board obligations under N.J.A.C. 6:3-2.7.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having admitted and/or stipulated, I make the following findings of fact:

1. Helen Connors was married to Paul E. Phillips on November 23, 1974.
2. They were divorced on January 6, 1981.
3. On November 18, 1977, a son, Paul Michael Phillips, was born of this marriage.
4. Under the terms of their separation agreement, dated January 6, 1981, and entered into prior to their divorce, Helen Phillips was given custody and Paul E. Phillips retained unlimited visitation, which petitioner did not exercise except as set forth in paragraph 8 of Exhibit B.
5. After Helen Phillips' divorce she married Gary Stayback.

6. Helen Stayback and Gary Stayback did not legally adopt Paul Michael Phillips, nor did they institute any name change proceedings.

7. On May 23, 1983, Helen Stayback registered Paul Michael for kindergarten in the district under the name Paul Michael Stayback, as set forth in Exhibit (D), which is herewith marked into evidence by consent of all parties.

8. Paul E. Phillips visited his son for a short period after the divorce but voluntarily made no contact to see his son for a period of approximately nine (9) years.

9. Paul E. Phillips lived in Harrington Park, New Jersey, and Paul Michael Phillips lived with his mother and step-father in River Vale, New Jersey. The distance separating these two communities is approximately five (5) miles.

10. Paul E. Phillips and Helen Stayback agree that Paul E. Phillips be listed in the records as Paul Michael's father.

11. All parties consent to the admissibility and receipt into evidence of the documents specified as follows:

Exhibit (A) Opinion of the Board of Education of River Vale, Bergen County, dated November 5, 1990.

Exhibit (B) Final judgment of divorce of Helen Phillips and Paul E. Phillips, dated January 6, 1981, incorporating property settlement agreement.

Exhibit (C) Birth certificate, Paul Michael Phillips, born November 18, 1977.

Exhibit (D) Kindergarten registration blank for Paul Michael Phillips, dated May 23, 1983.

Exhibit (E) Revised registration blank, November 1990.

Exhibit (F) Memo from Jack Dennis to Miss Fabricatore, dated November 13, 1990.

Exhibit (G) Report card of Paul Michael Phillips, Grade 7.

Exhibit (H) Cumulative record folder.

Exhibit (I) Board written policy concerning pupil records.

DISCUSSION

I

Petitioner's appeal to the Commissioner has invoked rights under N.J.A.C. 6:3-2.7(a), which permits challenge to pupil records by parents and adult pupils on grounds of inaccuracy, irrelevancy, impermissive disclosure, inclusion of improper information and which permits expungement of inaccurate, irrelevant or otherwise improper information from the pupil record. It permits insertion of additional data as well as reasonable comment as to the meaning or accuracy of the records. But the first question isolated in this matter is whether a non-custodial parent like Paul E. Phillips has standing to invoke the Commissioner's dispute resolution jurisdiction. That petitioner was divested of custody is clear from the final judgment of divorce. Exhibit B. But a property settlement incorporated in the judgment gave him unlimited visitation rights and rights to free access and unhampered contact between the child and himself. The divorcing parties were enjoined not to do anything to foster estrangement between child and either parent, or to injure the opinion of the child as to either or to hamper the free and mutual devotion of the child's love and respect for the other party. Petitioner was required to pay weekly support for the support of the child to the wife until emancipation. N.J.A.C. 6:3-2.2 provides as follows:

> "Parent" means the natural parent(s) or legal guardian(s), foster parent(s) or parent surrogate(s) of a pupil. Where parents are separated or divorced, "parent" means the person or agency who has legal custody of the pupil, as well as the natural or adoptive parents of the pupil, provided such parental rights have not been terminated by a court of appropriate jurisdiction. [Emphasis added.]

Written Board policy in Exhibit I, which in general mirror regulations in N.J.A.C. 6:3-2.1 et seq., would appear to have a narrower definitional scope. R. 4-7.2(c) defines "parent" with appeal rights to the Board for expungement or insertion of data thus:

> The natural parent or legal guardian of a pupil. Where parents are separated or divorced, "parent" shall mean the person or agency who has legal custody of the child.

While it could fairly be argued, therefore, that Paul E. Phillips as non-custodial natural parent had no standing to object under Board policy and mere questionable standing to object under regulation, since his "parental rights" to custody have been terminated by a court of appropriate jurisdiction, it is apparent from the record the Board elected not to view his objection restrictively but to entertain it and decide the matter accordingly. I think it proper to do the same and thus hold petitioner does have standing to challenge Board action under N.J.A.C. 6:3-2.7(a). I sense no potential prejudice to either private or public rights in so doing since petitioner is at least an "interested person who will be substantially, specifically and directly affected by the outcome of [this] controversy before the Commissioner," within the meaning of N.J.A.C. 6:24-1.

II

By action on November 5, 1990, the Board in its confidential written opinion recited material facts and competing arguments of the warring spouses. The Board noted there was no dispute over the pupil's correct legal surname, Phillips, nor that his pupil records should be changed to reflect it. The Board felt itself limited to rendering its decision as to placement of additional information on the pupil records. It noted regulation permitted a dissenting parent to include a statement in pupil records concerning additional information or reasons for disagreement with the Board or Commissioner under N.J.A.C. 6:3-2.7(d). The Board thought it clear that petitioner should be carefully denominated as the pupil's legal paternal parent and that his name should appear to that effect wherever appropriate. Thus, the Board specifically determined the pupil's name as Paul Michael Phillips should be listed on all mandated and permitted pupil records, as defined, where placement of the name is appropriate. It determined, however, the pupil may rightfully refer to himself as Paul Michael Stayback on records generated by the Board or its staff. Any document generated by the pupil would be accepted if it set forth his surname as either Phillips or Stayback. The Board noted, importantly in my view, that the pupil has been known as Paul Michael Stayback in the district for more than eight years. The least disruptive method to implement the Board's ruling was to insert the designation "a/k/a Paul Michael Stayback" as requested by the maternal parent, after the name Paul Michael Phillips. Thus, said the Board, all mandated and permitted pupil records as defined, generated by the Board or its staff, should set forth the pupil's legal name and the explanatory alternative "Paul Michael Phillips a/k/a Paul Michael Stayback." Exhibit A.

Legal arguments of the spouses appear to focus on whether an unemancipated minor can lawfully change his name at common law without resorting to statutory procedures; the arguments appear to presuppose the proceeding here before the Commissioner involves those rights. But the proper focus of the proceeding, in my view, has less to do with who or under what circumstances one has the right to change one's name than whether action of the Board was arbitrary, unreasonable or violative of obligations to maintain mandated and permissive pupil records in the district. The Board's November 5, 1990 decision allowing and requiring denomination of the pupil in the alternative as Phillips a/k/a Stayback enjoys a presumption of reasonableness and validity, the obligation thus falling to petitioner to establish the contrary. It seems reasonable to remember the pupil's original registration in the district ten years ago was under an inaccurate designation of surname. But time has passed and waters have flowed beneath the bridge. For the Board to be required now to expunge all inaccurate nominal reference and suddenly, for the first time, require an accurate designation of name, would be, in my opinion, to require a revision of history. The plain fact is that the Stayback surname is but a sobriquet, if an inaccurate one, but if only for the purpose of avoidance of transcript confusion now and in future, the double name designation should not be disturbed. It does not constitute a name change. It recognizes reality and actuality and visits upon no one any deception, stigma or confusion. It is a measure tending to promote accuracy and completeness and does not threaten access, security or confidentiality. It is a measure that is a reasoned and reasonable recognition of practicality and necessity. It is a measure that properly leaves ultimate solution of private and more personal considerations to the parties themselves in judicial setting.

CONCLUSION

Based on the foregoing, I **CONCLUDE** that while petitioner Paul E. Phillips should be accorded standing as a natural parent to challenge action of the Board as evidenced in its determination of November 5, 1990, he has nevertheless failed to establish Board action in that determination was arbitrary, capricious, unreasonable, contrary to law or violative of his rights and/or Board policy under N.J.A.C. 6:3-2.7. Board action is **AFFIRMED**. The petition of appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 7, 1991
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

November 12, 1991
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 18 1991
Date

OFFICE OF ADMINISTRATIVE LAW

amr

EXHIBIT LIST

A	Opinion of Board of Education of Township of River Vale, Bergen County, dated November 5, 1990
B	Final judgment of divorce of Helen Phillips and Paul E. Phillips, dated January 6, 1981, incorporating property settlement agreement
C	Birth certificate of Paul Michael Phillips, born November 18, 1977
D	Kindergarten registration blank for Paul Michael Phillips, dated May 23, 1983
E	Revised registration blank, November 1990
F	Memo from Jack Dennis to Ms. Fabricatore, dated November 13, 1990
G	Report card of Paul Michael Phillips, grade seven
H	Cumulative record folder
I	Board written policy concerning pupil records

PAUL E. PHILLIPS,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND,	:	
HELEN STAYBACK,	:	
INTERVENOR.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply were filed in accordance with N.J.A.C. 1:1-18.4.

In his exceptions, petitioner essentially reiterates his argument that the Board's action in this matter effectively constitutes a change of his son's name without benefit of court proceedings, thereby violating statutory and decisional law, denying petitioner his due process rights and expanding the scope and intent of pupil record regulations beyond all acceptable bounds. In reply, the Board argues that no name change occurred, merely a notation to clarify a child's records and avoid potential confusion. Further, the Board avers, such action is well within the scope of its

discretionary powers and is to be judged by the traditional standard of review associated with such powers, that is, whether the action was arbitrary, capricious or unreasonable.

Upon review, the Commissioner fully concurs with the carefully delineated and well-reasoned decision of the ALJ.

The disputed "a/k/a" designation in this matter is clearly no change of Paul Michael Phillip's legal name, about which there is no dispute and under which he is now properly enrolled. Rather, it is a ministerial acknowledgement of his having been enrolled for ten years under a different name, undertaken so as to avoid confusion now and in the future as to the continuity and identification of his pupil records. Under these circumstances, the Board's actions were fully in accord with applicable law and in no way arbitrary or unreasonable.

Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons well expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 16, 1991

DATE OF MAILING - DECEMBER 16, 1991

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8344-90
AGENCY DKT. NO. 278-8/90

DONALD RALPH,
Petitioner,
v.
HIGHLAND PARK BOROUGH BOARD OF EDUCATION,
Respondent

Stephen E. Klausner, Esq., for petitioners (Klausner & Hunter, attorneys)
James L. Plosia, Jr., Esq., for respondent (Sills Cummis Zuckerman Radin Tichman Epstein & Gross, attorneys)

Record Closed: October 19, 1991 Decided: November 7, 1991

BEFORE **DANIEL B. McKEOWN**, ALJ:

Donald Ralph (petitioner) has been employed as a supervisor by the Highland Park Board of Education (Board) for a sufficient period of time to have acquired a tenure status. As the result of a reorganization of supervisors positions by the Board, petitioner's position as supervisor was abolished effective for 1989-90 year. Pursuant to law, petitioner was placed on a preferred eligibility list. He claims the Board violated his tenure rights by employing nontenured supervisors for 1990-91. He prays for relief from the form of reinstatement to a "tenured supervisory position in accordance with his tenure and seniority." The Board denies it acted improperly regarding any rights petitioner has as a supervisor and because petitioner already litigated and lost a similar claim before the Commissioner for 1989-90,[1] he is foreclosed from complaining anew for 1990-1991.

[1] See companion initial decision issued November 7, 1991, Paszamant, et al. v. Highland Park Board of Ed., OAL DKT. EDU 1805-91, on remand.

After the matter was transferred October 24, 1990 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., the parties failed to agree that the matter should be consolidated with the then pending matter referenced in footnote 1. Therefore, this case has been treated separately for purposes of adjudication.

The Board has since moved to dismiss this petition of appeal on two bases. First, the Board contends petitioner Ralph has no tenure or seniority rights to any supervisory positions held by any nontenured supervisor during the 1990-91 year and, two, even if he had such an enforceable claim, his entitlement ceased during February 1991 when he refused a supervisory position offered to him. Petitioner's sole response to the Board's motion was simply to file an affidavit on or about October 18, 1991.

FACTS

For purposes of this case, the facts are undisputed and they are clear. It is undisputed that the petitioner was a tenured supervisor at the time his position was abolished effective for 1989-90. It is also undisputed that the Board employed nontenured supervisors during 1990-91. It is agreed petitioner possesses certification as a supervisor/principal, director of student personnel services, teacher of the handicap, and student personnel services. The Board itself acknowledges that during 1990-91 it employed nontenured supervisors for mathematics and industrial arts, lab and life science and humanties. The job descriptions for the positions of supervisor as adopted by the Board required possession of an instructional certificate in at least one of the areas under supervision. Petitioner Ralph possesses none of the instructional certificates in the areas of supervision at issue for these three supervisory positions.

According to the affidavit filed by petitioner Ralph, he was offered on behalf of the Board, on or about March 30, 1990 the position of supervisor of athletics, cocurricular activities, and plant. The letter from the Board containing the offer, attached to the Board's memorandum, is dated February 28, 1991. The proffered

assignment was to begin March 15, 1991. According to petitioner's affidavit, the responsibilities of that offered position represented an increase in hours on the job from his former position of supervisor. In the former position of supervisor petitioner attests he began the work day at 8:00 a.m. and was finished by 3:00 p.m. He further attests that as supervisor of athletics, cocurricular activities in plant, he would be expected to be at work no later than 7:45 a.m. "usually until 8:00 p.m. at night" because he would have to supervise all extracurricular activities late into the evening and on weekends.

Even though the Board objects to a consideration of petitioner's affidavit on the asserted basis it was filed late, the contents of the affidavit shall be considered here. The foregoing constitutes the essential facts of the matter.

ARGUMENT OF THE BOARD

The Board claims petitioner has no tenure or seniority rights to any supervisory job held by nontenure supervisors during 1990-91 because under its own adopted job descriptions supervisors are required to possess appropriate subject matter certificates in order for the supervisor to carry out its locally created job description duty of teaching two classes a day in one of the subject areas under supervision. The Board maintains that all three of its nontenured supervisors for 1990-91 taught two classes a day in one of the subject areas under supervision and because petitioner was not so certified, he could not teach, and therefore he was not properly certificated for the supervisor position in 1990-91.

But even if petitioner was entitled to appointment as a supervisor for 1990-91, the Board contends that because he refused a supervisory position when it was offered him he waived whatever right he otherwise may have had. Therefore, the Board reasons petitioner is precluded from making any claims for a supervisory position because he no longer remains on a preferred eligibility list. In this regard, the Board cites three administrative decision and one judicial opinion in support of its argument. It is noted that the Board cites O'Toole v. Milburne School for the Hearing Handicapped, 221 N.J. Super. 394 (App. Div. 1986). No such case is reported at that citation. In fact, the case name cannot be located as being reported in West's New Jersey Digest, 2d, 1991. Next, the Board cites Hagens v. Princeton Reg. Board of Ed, 1982 S.L.D. - (1/26/82). This case

is also not reported in the 1982 School Law Decisions pubished by the Department of Education. The Board finally cites Old Bridge Education Association v. Old Bridge Board of Ed, 1985 S.L.D. - (8/8/85), aff'd. State Board of Ed (1/7/87) and Collins v. New Milford Board of Ed, 1985 S.L.D. - (9/2/86). The Board claims that the only reason petitioner was offered the supervisor of athletics position was because that supervisor does not teach classes. Consequently, the Board reasons petitioner could have properly been that supervisor under its locally created job description.

ANALYSIS AND CONCLUSION

The Board's argument regarding petitioner's lack of qualification to be a supervisor in light of its requirement that a supervisor must possess an instructional certificate in the area to be supervised is a defense predicated upon a belief that if the Board had a sound educational basis for retaining a non-tenure individual in a supervisory position over a tenure supervisor it may do so. Such reasoning has been soundly rejected in a number of cases decided by the New Jersey Superior Court, Appellate Division. Recently, In Herbert v. Board of Ed of Middletown, N.J. Super. (App. Div), unpub. (May 22, 1991), the following was said:

> On this appeal the Middletown Board argues that there is a "sound educational basis" for appointing Cohen to the position based on the distinctions between the two candidates and the uniqueness of the duties required by the position. Hence, the Middletown Board asks us to declare that the tenure rights protected by Legislative wisdom are subject to an exception where there is a "sound educational basis" fairly exercised.
>
> We cannot agree and we affirm for the reasons expressed by the State Board in its decision dated August 3, 1990. As we pointed out in a recent unreported case cited by the parties involving certified principalships, Schienholz v. Bd. of Ed. of Twp. of Ewing, Docket No. A-2905-89T3 (App. Div. November 19, 1990), certif. denied _____ N.J. _____ (March 5, 1991),
>
> > ...we are mindful of the dilemma that is presented to local boards of education by the interpretation of tenure preference which we announced in Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den. 109 N.J. 514 (1987) and Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den. 110 N.J. 512 (1988). We can only remind one,

> however, that the Legislature, in this wisdom, has chosen to protect such a right in omnibus fashion with the passage of N.J.S.A. 18A:28-12 and we are not privileged to change that decision, even if we were inclined to do so.
>
> Furthermore, the arguments presented on this appeal suggest that the problem is created, not by the tenure statute, but with the implementing regulations concerning the certification of principals. Compare N.J.S.A. 18A:26-2 with N.J.A.C. 6:11-3.3(a) and 6:11-3.4. Before 1969 separate certifications had been issued for elementary and secondary principalships. The State Board decided to eliminate that distinction and chose to issue a single principal's certificate, contrary to beliefs held in educational circles regarding the differences between such principalships. Apparently the State Board feared dealing with a "multiplicity of certificates." Consistent therewith, a transfer from one level to another within the "position" of principal has consistently been held to be a change of assignment rather than a change of position. See DiNunzio v. Bd. of Twp. of Pemberton, 1977 S.L.D. 24 aff'd 1978 S.L.D. 843; Flanagan v. Camden Bd. of Ed., 1980 S.L.D. 1283 (Holding a certificate as a principal entitles Petitioner to supervise any grade or subject matter area established in Respondent's school district.)
>
> As a consequence, qualification certifications are issued to persons who may then act as principals without any regard for the differences in the supervisory duties of elementary, junior high or high school positions, which all parties seem to agree do exists. We can only observe that such regulations therefore seem to ignore the realities of the different duties performed by such principals. Thus, it is this situation which appears to lie at the heart of the problems raised here.

Likewise, in this case, the problem lies with the fact that supervisor certificates are issued without regard to the differences which may exist in the requirement to perform the various jobs and duties of such personnel. Any remedy therefore must rest with the Legislature in the first instance and the State Board's implementing regulations in the second. The fact that Herbert is "less qualified" than Cohen to perform the job is irrelevant, as the law now stands.

(Slip Opinion, at pp. 3-5)

More recently in Dennery v. Passaic Valley Regional High School Board of Ed, District No. 1, N.J. Super (App. Div.), approved for publication, Nov. 9, 1991, Dennery, had tenure at the time her position as guidance counsellor was eliminated and the position of class supervisor was established in its place. Dennery had obtained a supervisor's certificate for the new position. The Court held that Dennery's tenure rights were violated by the Board when an nontenured applicant who never held such a position was appointed as class supervisor. The Dennery court, relying upon Capodilupo v. W. Orange Twp. Ed. Bd., 218 N.J. Super 510 (App. Div. 1987), certif. denied, 109 N.J. 514 (1987) noted that a tenured teacher is entitled to retention as against a nontenured teacher under the tenure law. To hold otherwise would be to defeat the purpose of tenure.

There can be no clearer or expression as to the state of the law then what has been said above. Petitioner has tenure as a supervisor in the Board's employ. He holds the appropriate certificate to be supervisor. Petitioner is qualified under law to be a supervisor. The Board is without authority to expand upon legal requirements for one to be a supervisor in these circumstances. The Board has no choice when it comes to selecting a tenured supervisor over a nontenured supervisor for one position. The law says the tenure supervisor is the one to be appointed. Consequently, I **CONCLUDE** that petitioner Ralph had a legitimate claim by way of tenure to any one of the supervisor positions held by nontenure supervisors during 1990-91.

However, the Board's argument has merit that petitioner abandoned whatever rights he may have had to a supervisor position when he refused the proffered position of supervisor of athletics, or, as the Board says, of physical education. The protection afforded petitioner by the tenure law is in his position as supervisor. In these circumstances petitioner has no claim to a particular supervisor position but may be assigned by the Board to be a supervisor within the scope of his supervisory certificate. In Clark v. Margate City Board of Ed, 1974 S.L.D. 678 Clark was a teacher with a tenure status assigned to an eligible class. Her position of employment was abolished by the Board in July 1971. The Board reassigned Clark to another position which she was qualified to fill. Clark refused the newly assigned position. The Commissioner held that by her refusal to accept assignment she abandoned her tenure status and her employment.

The same principle applies here. Whatever claim petitioner had to a supervisor position for 1990-91 was abandoned by him as of March 15, 1991, the date he would have otherwise assumed his duties as supervisor of physical education. Nevertheless, petitioner was entitled by virtue of his tenure status to be supervisor from September 1, 1990 through March 15, 1991. Therefore, petitioner is entitled to the difference in pay he would have received as supervisor from September through March 15, 1991 had his tenure not been violated by the Board.

In sum, I **CONCLUDE** that petitioner Ralph had a legitimate claim to a position of supervisor for 1990-91. I further **CONCLUDE** that petitioner Ralph abandoned that claim as of March 15, 1991 in his refusal to accept assignment as supervisor of physical education for which he was otherwise qualified. I **CONCLUDE** that petitioner Ralph is entitled to the difference in pay he would have received as supervisor from September 1, 1990 through March 15, 1991. Therefore, the Board is directed to pay petitioner Ralph the difference in salary.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 7, 1991
DATE

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

Nov. 12, 1991
DATE

Maureen Keller
DEPARTMENT OF EDUCATION

NOV 15 1991
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

tmp

DONALD RALPH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent's exceptions were filed within the timelines set forth in N.J.A.C. 1:1-18.4.

Upon review of the record, including respondent's exceptions, the Commissioner is in full agreement with the findings and conclusion of the administrative law judge. Respondent's attempt to distinguish the instant matter from Herbert, supra, is clearly without merit.

Accordingly, the initial decision is adopted as the final decision in this matter for the reasons stated therein.

DECEMBER 23, 1991

DATE OF MAILING - DECEMBER 23, 1991

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8029-90
AGENCY REF. NO. 232-7/90

FORT LEE BOARD OF EDUCATION,
Petitioner,
v.
PANAGIOTIS KINTOS AND KYRIANOS KINTOS,
Respondents.

Robert Zeller, Esq., for petitioner
(Monaghan, Rem & Zeller, attorneys)

Samuel R. De Luca, Esq., for respondents
(De Luca & Taite, attorneys)

Record Closed: October 1, 1991 Decided: November 13, 1991

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter concerns a petition filed by the Fort Lee Board of Education with the Commissioner of Education seeking reimbursement for educational costs and expenses for the children of respondents. This request was based upon an allegation by the petitioner that the respondents were not domiciled in the Borough of Fort Lee during a period of time from approximately September 1984 on. This petition was dated June 29, 1990 and was filed with the Department of Education.

The matter was then transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.* on October 2, 1990 The matter was set down originally for hearings on March 11 and 13, 1991 however, those dates were adjourned due to discovery

problems. The matter was then rescheduled for April 5, 1991 and May 21, 1991 at the Bergen County Courthouse, Hackensack, New Jersey. Hearings were held on those dates however the matter was not concluded and further dates were scheduled. Those added dates included May 23, 1991 as well as June 18, 1991. At the conclusion of the final date the record remained opened for posthearing submissions by both parties. The record was to remain open until September 30, 1991 however at that time at the request of both counsel the record was held open for a month until October 1, 1991. Posthearing submissions were received by that time and the record closed.

ISSUE

Both sides agree that students living in a municipality are entitled to a free and appropriate education. That free and appropriate education is to be afforded within a municipality in which the child or children live. The only question presented by this case is whether or not the Kintos family legitimately resides as its principal place of residence in the Borough of Fort Lee.

TESTIMONY

At the time of the hearing the Fort Lee Board of Education presented the testimony of Constance Dellas. She is an employee of the Fort Lee Board of Education and has been so for approximately four years prior to the hearing. She functions as an attendance officer and is acquainted with both Anthony and Nicholas Kintos, the children who attended the Fort Lee school system. She stated that she first became involved with them in 1987. As a result of her involvement a report was sent to Robert Tessaro, who was then the board of education attorney.

Her involvement came about as a result of the principal requesting that she investigate where the Kintos family was residing. She visited 1633 Palisades Avenue in Fort Lee. This address consisted of a dry cleaning establishment belonging to the Kintos which was attached to a larger structure. She found that the dry cleaning establishment was open between 7:00 a.m. and approximately 7:00 p.m., six days a week. The establishment was run by the father. It was not however open on Sundays. On March 14, 1987 she paid her first visit on a Saturday. On Sunday May 3, 1987 at 6:30 p.m. she also visited the house. No one was in the dry cleaning

establishment nor at the home which was attached. The setup is that the dry cleaning is in the front of the house and the actual house portion is located in the back. She stated that she found one window boarded up and a door had a sheet over it. She was unable to find a doorbell and there were no cars in the driveway. She did state that sometimes she did find cars in the driveway when the business was open. She indicated that she gave this report to Mr. Tessaro and nothing was done until sometime approximately a year prior to this matter.

In May 1990 the younger child, Nicholas, was absent. The emergency number which the school had for the family was used however no one could be reached. Subsequent to this a new investigation was begun.

On March 25, 1990 Ms. Dellas indicated that she went to the residence at three separate times. She went at approximately 12:00 p.m., 3:00 p.m. and 7:00 p.m. At no time was anyone home when she visited. She subsequently went to the residence on April 1, 1990 and again found no one home. She described that upon her visits she would walk down the driveway to the rear of the dry cleaning establishment to the back where there was a door. Due to the fact that there was no doorbell she knocked. She described the structure as three stories. The windows all had shades which was always all the way down or all the way up.

She further stated that on April 2, 1990 she went to the house at approximately 7:30 p.m. and found no one at home and no cars in the driveway. She then went on April 4, 1990 at approximately 7:15 p.m., and found no one body and no cars in the driveway. She stated that the dry cleaning establishment closes at 7:00 p.m. She then went on April 8, 1990 at 3:00 p.m. which was a Sunday. At that time nobody was home and no cars were located in the driveway.

Ms. Dellas further outlined her visits to the house. On April 10, 1990 she stated that she went at approximately 8:30 p.m. which was a Tuesday. At that time once again nobody was home and no cars were in the driveway. She found exactly the same results on the following dates:

Date	Day of week	Time of day
April 12, 1990	Thursday	8:00 p.m.

April 22, 1990	Sunday	8:00 p.m.
April 25, 1990	Wednesday	9:00 p.m.
April 29, 1990	Sunday	9:00 p.m.
May 13, 1990	Sunday	7:30 p.m.
April 19, 1990	Saturday	9:00 p.m.
May 27, 1990	Sunday	4:00 p.m.

She stated that she went on approximately 13 occasions and each time banged on the door and on the window. At no time did she see any cars nor did she see any lights inside the house.

Ms. Dellas stated that she lives less than one-half mile away from this particular house which made it easier for her to visit periodically. She also stated that she called by telephone on several occasions. Upon calling she indicated that she had received a wrong number after getting an answer and drove over to the house in less than five minutes. Upon doing so the house was dark and nobody was there. She stated that she did this several times during the month of May 1990.

Ms. Dellas determined that the family owned property on Karens Lane in Englewood Cliffs. On July 16, 1990 she visited that property and found Mrs. Kintos there with a contractor. At that time she was invited into the house but she declined the invitation. She spoke to several neighbors and asked if they knew where the Kintos lived. Those individuals pointed across the street to the Karens Lane address. She stated that she spoke to the residents of number 10 Karens Lane and number 7 Karens Lane. She related that a conversation with a woman across the street took place and that the woman said that the family had been there at the Karens Lane address for several years. The same result took place with a conversation with the next door neighbor.

Ms. Dellas stated that the Kintos children started in the Fort Lee school system in 1980 however left that school system in September 1982. It was not until September 1984 that they reentered the Fort Lee school system and had continuously attended. She stated that Nicholas began in 1984 and continued until the time of the hearing. As of that time he was in the eleventh grade. Antonius had been attending the Fort Lee school system from 1984 until the time of the hearing and was presently in the tenth grade.

Ms. Dellas also stated that she checked with the tax assessor in July 1990 in Englewood Cliffs. According to her the tax assessor stated that they knew the Kintos family and had dealings with them and knew they lived at the Karens Lane address.

Ms. Dellas also spoke with the condominium association located at 2195 and 2205 North Central Boulevard in Fort Lee. The Kinto family also owned condominiums at this location. She stated that she spoke with a board member on July 16, 1990. The board member confirmed that the family owned two apartments at these locations. That board member told her that the family lived at the Englewood Cliffs address.

In December 1990 and approximately May 1990 Ms. Dellas also consulted with the Fort Lee police department. She stated she had a discussion with detectives there although was unable to give the names of the detectives. She stated that the police had said they knew that no one was residing at the 1633 Palisades Avenue address. She also visited neighbors at that address. On May 3, 1987 she visited the next door neighbor. That woman stated that no one resided there and that they were renting out the house. In 1990 she spoke with the same neighbor who reiterated that information.

On cross-examination Ms. Dellas confirmed that in 1987 she had been employed by the board of education for five months. She had no specific training as an attendance officer. She stated that truancy is not a severe problem in the district however verification of residency is. She indicated that after the 1987 portion of the investigation she turned the report in and no action was taken either in that year or in 1988 or in 1989. It was not until May 1990 that the continuation or new investigation began. She acknowledged that she had never followed the children "home." She also confirmed that one child works as a volunteer with the fire department in Fort Lee.

When asked why Ms. Dellas did not believe that on a Sunday if no one was present the family might be on vacation she stated that those occasions were when the father was at work on a Saturday and school was to take place on Monday. As a result these were times she did not believe that a family vacation was taking place.

Ms. Dellas stated that she assumed based upon her investigation that the family had some form of call forwarding and that it would go to Englewood Cliffs however she stated that she had no personal knowledge nor had she received knowledge as to this during the course of her investigation.

When Ms. Dellas went to the condominium association she stated that not only was she told that the family lived in Englewood Cliffs but they also produced a card and that card indicated that their address was the Englewood Cliffs address. She was able to state that she spoke with a "Debbie" as well as a Mrs. Santorello. She did confirm that she never saw any condominium papers personally that reflected the address. She also confirmed that other than the two addresses which she indicated on Karens Lane she did not speak with any other neighbors. She did not check the election records in Fort Lee however confirmed that the family is registered to vote in Fort Lee. She stated that the children participate in after school activities including football and wrestling in Fort Lee.

Roberta H. Hanlon also testified during the hearing. She is the assistant to the board secretary and keeps the records of the cost of educating the students in the Fort Lee district. She had confirmed the attendance of both Nicholas and Antonius and the records which she produced had the cost during the pertinent period of time broken down by each child. The cost for Nicholas amounting to $43,512. The cost with respect to Antonius was $40,569. The total of these equalled $84,081 for the period of time pertinent to this case.

Ms. Hanlon stated that the cost with respect to a student varies from district to district and is based upon the total expense per year.

This testimony as well as certain documentary evidence that will be addressed separately concluded the petitioner's case.

Respondent's case began with the testimony of Constance Jeanetta. Ms. Jeanetta resides at 15 Karens Lane in Englewood Cliffs. She stated that she has lived there from 1970 on and is acquainted with the house at 13 Karens Lane. She stated that she never recalls speaking with Ms Dellas and did not tell her that the family lived at the Englewood Cliffs address. She stated that she was able to say that they did not live there due to the fact that she gardens often and would have seen them.

According to her the house is not habitable. She also stated that she spoke with a census taker who had rung the bell at the 13 Karens Lane address. She stated that she told them that the Kintos family was living in Fort Lee.

She acknowledged having known the Kintos family for approximately five years since they had started working on their home. She further acknowledged that she does not garden during the winter months but stated that when she is outside she did not see the family. She stated that she would have heard a car from her family room. She does know not when or if the Kintos family goes to work. She stated that she is an insomniac and goes to the couch during the middle of the night in order to rest. According to her if they went to work between 6:30 and 6:45 she would have heard them. She stated that she hears her own husband go to work and hears her children. According to her even if she is sleeping she is merely dozing. Her house is approximately 20 feet from the 13 Karens Lane house. There is a driveway between her house and the Kintos house and there is no shrubbery.

She stated that she had seen Mrs. Kintos on the Tuesday preceding the hearing and was asked if she would come and testify. She stated that she was never told what she should say. She indicated that she had been to the 13 Karens Lane home but has never been to the Kintos Fort Lee house. She stated that she saw 13 Karens Lane approximately four months prior to the hearing.

According to the witness there was construction going on in the house prior to the Kintos having purchased it. During that time, although construction was ongoing, the former owners were living in the house. She further stated that there is no usable kitchen since it has been gutted.

Stephen Lepore also testified during the hearing. He has lived at 7 Karens Lane since 1983. He stated that between his house and the Kintos house there is a driveway and then grass. According to him nobody lives in the home. He stated that he does not recall speaking to Ms. Dellas. He has however been in the house one time approximately one year before the hearing. According to him the house was not habitable and was under construction. He indicated that he has only seen Mrs. Kintos and on occasion the older son. The witness is not employed but owned a store until he retired in 1980. He has been nursing an illness and lives year round in Englewood Cliffs. He does not socialize with the Kintos family.

On the day of the hearing the witness stated that he was picked up at 8:45 a.m. for the hearing by Mrs. Kintos. She had spoken to him on the Tuesday prior to the hearing about testifying. Prior to this she had spoken to him in April. At that time she mentioned to him that he had told someone that the Kintos family lived at the 13 Karens Lane house. He responded to her that that was ridiculous.

George Kottaras also testified during the hearing. He has lived at 17 Karens Lane since 1978. He is acquainted with 13 Karens Lane. He stated that he knows Mrs. Kintos and knows of the house. According to him no one lives in the house. He stated that he has to exercise and walks up and down the street. According to him the house gets what he refers to as "throwaways," referring to certain newspapers. Those are left in front of the house and sometimes he has to wash down sewer clogs. He retrieves the newspapers.

He stated that on occasion he used to hire the children in order to mow his law when the family was working on the house. This was sporadic and occurred mainly on weekends. He stated this was generally on Sunday. According to him he was unable to get them during the week.

The witness stated that he was in the Karens Lane house four or five times since the mid-80s. Accordng to him the house is a mess. There is no kitchen since it has been ripped out. Additionally the floor had been ripped up and it is down to the sub-flooring. He stated that one room tilts to the right and is warped. He further stated that the thermostat does not work with the furnace and there is no furniture in the house.

The witness acknowledged that he has been disabled for approximately two years but prior to that worked for seven months. Before that time he had been out of work for approximately a year. During the period of time from February through November 1989 he worked. The prior 16 months he had been out of work. His training is as an electronics technician. The four or five times that he had been in the house were since 1984 or 1985. The last time he had been the house was approximately March 1991. The most recent visit before that was in 1989. The last time that he recalls having the children cut the lawn was five or six years prior to the hearing.

The witness stated that he spoke with Mrs. Kintos on the Tuesday preceding the hearing. He had spoken with her a few weeks before that but it was not until the day of the hearing that she told him that there was a claim that she lived at the 13 Karens Lane address.

During the course of the hearing there was also testimony from Polly Joyce Salomon. Ms. Salomon has lived at 10 Karens Lane in Englewood Cliffs for approximately 27 years. She knows both 13 Karens Lane address as well as the Kintos family. She recalls speaking to Ms. Dellas and acknowledged that she may have said the family lived at that address however they did not. She stated they had merely purchased.

Ms. Salomon has been in the home three or four times. According to her it is not habitable. For the preceding four years construction has been going on. She stated there is no furniture in the house and she does not believe that the home is safe. She is acquainted with other neighbors but according to her the Kintos family does not live there and never has.

She recalls speaking with Ms. Dellas about the Kintos family and also recalls speaking with another individual. She does not remember when this occurred however the gentlemen rang the doorbell. According to her she says that her response was that they did not live across the street but did own it. She further responded that the residence was not habitable.

Ms. Salomon believes that the family bought the house in 1986. According to her she volunteered to come and testify at the hearing.

The witness did not know the people who owned the house prior to the Kintos family. She also did not know how long those people owned the house prior to the sale.

According to the witness the house at 13 Karens Lane was habitable at the time that the Kintos family purchased it. She stated that the condition making it impossible to inhabit arose from the construction which was going on. She did

acknowledge never having seen the house after the purchase but before the renovations were begun.

She stated that there was no evidence of people living at the house however if they left at approximately 6:30 a.m. she would not have observed them. She would not be outside at that hour. She did not know if mail was delivered to the house and did not pick up any mail for the Kintos family. According to her the family did not live there on an overnight basis.

Kyrianos Kintos also testified. She and her family are the subject of this litigation. She stated that she resides at the 1633 Palisade Avenue, Fort Lee address. According to her she lives there with her children and her husband. Her children are Nicholas and Antonius. Nicholas is 16 years old and Antonius is 15 years old. According to her both children work with the family in the dry cleaning business and Nicholas also works at the movie theater in Fort Lee.

[At this point both sides entered into a stipulation that Nicholas is a member of the fire department on a volunteer basis.]

Mrs. Kintos stated that she has a dog and a dog license in Fort Lee. She further stated that her car is registered to the 1633 Palisade Avenue address.

Mrs. Kintos stated that most communication in English is done by her oldest son, Konstantine. He does the insurance and other paperwork as well.

Mrs. Kintos stated that she has a drivers license upon which the 1633 Palisade Avenue address appears. She stated that the family also owns a condominium in Fort Lee. She stated that they have Blue Cross/Blue Shield and the address used for that is 1633 Palisade Avenue. According to her the family also owns another condominium in Fort Lee.

She stated that there is a Midlantic bank equity checking form and the address on that is once again the 1633 Palisade Avenue address. That form was signed in August 1984. The statement from Midlantic bank which was produced (R-7, Ev.) which had the Fort Lee address was dated February 22, 1991.

Mrs. Kintos stated that her husband, Panagiotis Kintos also resides at that address. She stated that her husband had a car and she and her husband vote for which the address is once again the Fort Lee address.

Mrs. Kintos testified that she helps her husband in his work at the dry cleaners and tailoring business which is located at 1633 Palisade Avenue. She described the building as a two-family house and there is a studio apartment in it. She stated that the store is on the south side in front of the building. In addition to this property the Kintos family owns three condominiums in Fort Lee. The insurance for the apartments lists the address of the insured as the Fort Lee address.

Mrs. Kintos stated that one time they were represented by Robert Tessaro and that all written communication from their attorney came to that Fort Lee address. The witness recalls speaking with Ms. Dellas approximately one year prior to the hearing on April 13, 1990. She stated that that day was Greek Good Friday. She was in the kitchen cooking and she saw Ms. Dellas in the driveway. This occurred at the Karens Lane address. She stated that she went out and asked what it was that Ms. Dellas wanted. She confirmed that she had not sent her children to school due to the fact that it was a religious holiday. According to her Ms. Dellas stated that she was from the school and asked why the children were not present. She stated that Ms. Dellas never asked to see the inside of the house.

The witness stated that the family owns the 13 Karens Lane address in Englewood Cliffs. She believes they bought it in 1986 but had never lived there after the purchase. She explained that the reason for this was twofold. According to her the house was not livable and the children did not wish to live at this house. She acknowledges living in Bergenfield for a short period of time. When the children were older she took them back to Fort Lee where they went to school and originally lived at 1571 Palisade Avenue.

According to the witness after the purchase of the 13 Karens Lane house the family started fixing it up. The construction had begun however, it was never completed. According to her it does not have a kitchen due to the fact that it was torn out for renovation. She stated that the kitchen was taken out about three or four years ago.

Mrs. Kintos indicated that she has been going to school for the last four years in the borough of Fort Lee in order to learn English.

[It should be pointed out that due to the witness's difficulty with the English language an interpreter was secured in order to more easily facilitate her testimony and also to guard against any misunderstanding based purely upon a linguistic error.]

A number of photographs were also produced at the time of the hearing.

These photographs dealt with the 13 Karens Lane house.

The witness acknowledged that she took the photographs days prior to the hearing and not during the time that the construction was begun. After making this statement the witness indicated that she took the pictures a long time ago but does not remember when. She stated that she had taken the pictures sometime ago but had never taken them to be developed until just prior to the hearing. She was unable to state what type of camera was used as she is not a photographer. She was unable to say whether the photographs were taken before or after lawsuit had begun however she did acknowledge that the photographs did not accurately represent the condition of the home at the time that it had been purchased. She did state that at the time of the purchase there were bathrooms however "to me they were useless." She indicated that in total there were three bathrooms at the time of the purchase. However, "some worked this way others worked another way." There was a kitchen when the house was purchased however there was an old stove from approximately "40 years" ago and the water did not drain properly. There was a functional refrigerator but according to her the oven did not work properly. There was also a dishwasher but that also did not work properly. She stated that she did not like the kitchen because everything in it "was garbage."

The witness described the 1633 Palisade Avenue house as two regular apartments plus a studio apartment. She stated that she is personally living in the studio apartment and her oldest son, Konstantine also lives at that address. He has an apartment but she was unable to say where he stayed all of the time. He has had the apartment for several years. She stated that he pays rent and electricity to her but she did not know the amount although according to her, her husband would be

aware of it. During the time they have owned this house there was originally an unrelated tenant. It has however been more than a year since the last tenant left. She stated the time frame is more than a year but not more than two years. She pinned it down to possibly the beginning of 1989.

Mrs. Kintos stated that they also owned the property at 1571 Palisade Avenue in Fort Lee. This was purchased in 1984 and has a commercial portion which acts as a bakery. The house itself has several living units. It was originally a two-family home however it was divided to make a total of three apartments. She did not recall when they built the front portion as a commercial structure. Originally that location was used residentially and commercially. There were also rental units and they did have rent paying tenants.

After the commercial addition was put on the house it was never used residentially by anyone other than their son, Konstantine. It is Konstantine's bakery that it located in the commercial portion. According to the witness Konstantine pays rent for the commercial property although there is no written lease. She stated that the amount of rent depends on whether business is good. She did not know how much rent was paid.

The witness stated that there was one residential tenant located at the 1571 Palisade Avenue property. That tenant does not use the whole residential area and there was never a time when there were three residential tenants using all three units. The witness did acknowledge that there are no residential tenants at the 1633 Palisade Avenue location as of the time of the hearing. According to her she and her entire family occupy the total residential area of the 1633 Palisade Avenue residence. During the period before occupying the 1633 Palisade Avenue property the family slept at the 1571 Palisade Avenue property.

The witness described her son Konstantine as keeping all of her books for the business due to the fact that he is most fluent in English. He also reviews all bank statements. Konstantine has an apartment at the 1633 Palisade Avenue address although he goes "in and out." She stated that it is possible that sometimes he goes to 13 Karens Lane in Englewood Cliffs with his girlfriends. According to the witness in the past year and one-half the family did not spend holidays at the Englewood Cliffs property.

While the witness works at the dry cleaning establishment at 1633 Palisade Avenue she stated that she does not receive a paycheck. She and her husband make a living from the dry cleaning business as well as receiving money from rental income from the other properties.

The witness also stated that she and her husband, Peter Kintos, vote and that she is sure it is in Fort Lee. Her certainty comes from the fact that there has been a dispute about whether or not both of them can go into a voting booth together.

Konstantine Spanoudis also testified during the hearing. He is the oldest son of Panagiotis and Kyrianos Kintos. He stated that he lives at 1633 Palisade Avenue in Fort Lee with his family. He also has a bakery business. He has also worked for the fire department. His car is registered to that address as well as the address appearing on his drivers license.

The witness is involved in a bakery business which is located at 1571 Palisade Avenue in Fort Lee. This is part of a two story residential structure

He described the Englewood Cliffs house as being purchased in 1986. He stated that it was not well maintained and consisted of three bedrooms. Construction has been going on since the first month that they owned the property. According to him there is an entranceway and the foundation is not level. As a result the front step has "dropped." It was tilted and unsafe. He also stated that the back entrance is up approximately three feet and it necessary to leap up in order to gain entry or put down blocks. He also described a plumbing problem due to the fact that water pressure is extremely low and the water comes out at a mere dribble. The boiler has never been fixed so there is no heat. An electric heater has been used to heat the area.

The witness acknowledges having slept there on occasion but states that it is less than ten times in total. One functional bathroom exists and another has no running water. According to him, he lives in one-half of the house located at 1633 Palisade Avenue.

Mayor Nicholas Corbiscello also testified on behalf of respondents. In essence, the mayor testified that he knows the Kintos family due to the fact that he is a patron of the dry cleaning establishment. He has known them for approximately three or four years and visits the store three or four times a month. The full extent of his knowledge of their residence was that he patronizes the store and sees the family. As a result he stated that he would assume that they live on the premises. He has never been in the residence and has no personal knowledge as to whether or not they actually live there.

Rebuttal testimony of Robert Tessaro was also offered. He had been the attorney for the Fort Lee board of education for six or seven years but had also represented the Kintos family in unrelated matters. As a result of his prior representation he was unable to represent the Kintos family in this litigation. He stated that the 1633 Palisade Avenue address is visible from his office. It is a residential wood frame structure with a dry cleaning business in the front. He had used the dry cleaning business within the preceding year.

Mr. Tessaro stated that when he had written communication with the Kintos it was both by mail and hand delivered and those items went to the 1633 Palisade Avenue address. He stated that he used this address because each day between 11:00 and 12:00 he would walk by and get the mail from the post office. As a result it was easier for him to just drop it off at the business.

He stated that he has never made any observations of the Kintos family living at that address. He also has not delivered mail since 1986.

DOCUMENTARY EVIDENCE

Those items which are listed as evidence speak for themselves. However certain items of evidence which are documentary in nature must be discussed at this time.

The claim is that the family resides at the 1633 Palisade Avenue address. P-12 in evidence is individual tax returns for the years from 1984 to 1989. On each return there is a space that lists "present home address." On each of these returns the addresses are as follows:

Year	Present home address
1984	22 Greenwich Street, Bergenfield, NJ
1985	22 Greenwich Street, Bergenfield, NJ
1986	none listed
1987	13 Karens Lane, Englewood Cliffs, NJ
1988	13 Karens Lane, Englewood Cliffs, NJ
1989	1633 Palisade Avenue

The other portions of documentary evidence which should be discussed at this time are found in P-10 in evidence and P-11 in evidence. These are the telephone bills which were presented for both the 1633 Palisade Avenue, Fort Lee address as well as the 13 Karens Lane, Englewood Cliffs address. The 1633 Palisade Avenue telephone bills cover a span of time from October 4, 1989 through March 4, 1991. Upon review of each of these individually it becomes apparent that telephone calls are made from approximately 7:00 in the morning until no later than approximately 11:00 at night. The bills also indicate that there is an additional service for which the Kintos family pays and that is called forwarding. One thing which is not listed on these bills is where the calls are forwarded to. Those bills make up P-11 in evidence

P-10 in evidence consist of telephone bills to the Kintos family at 13 Karens Lane in Englewood Cliffs. These bills span a time from approximately October 5, 1989 to March 1991. On these bills there are calls to Greece during the early morning hours. While not inclusive it is important to look at the timing of these calls.

Date	Time	Location
Dec. 25, 1990	5:06 a.m.	Greece
Dec. 26, 1990	4:28 a.m.	Greece
Dec. 26, 1990	4:52 a.m.	Greece
Dec. 26, 1990	5:01 a.m.	Greece
Dec. 26, 1990	5:30 a.m.	Greece
Dec. 26, 1990	5:33 a.m.	Greece
Jan. 18, 1990	4:29 a.m.	Greece

Jan. 18, 1990	5:34 a.m.	Greece
Jan. 18, 1990	6:24 a.m.	Greece
Jan. 18, 1990	6:34 a.m.	Greece
Feb. 25, 1990	2:55 a.m.	Greece
Feb. 25, 1990	2:59 a.m.	Greece
Feb. 25, 1990	3:03 a.m.	Greece
Feb. 25, 1990	3:09 a.m.	Greece
Feb. 25, 1990	3:11 a.m.	Greece

While these documents have been marked into evidence it would be redundant to go through each and every day where telephone calls are made between midnight and 7:00 a.m. to Greece from the Karens Lane house. It should be noted that these calls are made on more than ten occasions.

FINDINGS OF FACT

Having reviewed the evidence in this case and having heard the testimony and assessed the credibility of the witnesses, I **FIND** the following to be fact:

1. The Kintos family owns property in Fort Lee which includes a house at 1633 Palisade Avenue as well as three other separate condominiums. The 1633 Palisade Avenue house consists of the front portion being a dry cleaning establishment as well as a back portion which is residential in nature.

2. The Kintos family has continously since 1984 sent their sons, Nicholas and Antonius to the Fort Lee school system incurring a cost which, if not borne by the board of education would total $43,512 for Nicholas and $40,569 for Antonius.

3. The Kintos family also owns a house at 13 Karens Lane, Englewood Cliffs, New Jersey.

4. During the couse of her investigation Constance Dellas made repeated visits to the rear portion of 1633 Palisade Avenue but was unable to find anyone at home.

5. Tax records for those years available list addresses other than Fort Lee for all but one year under the portion which states "present home address."

6. The Kintos oldest son stated that on less than ten occasions he has stayed at the Karens Lane, Englewood Cliffs house.

7. Telephone records whose accuracy was not challenged at the time of the hearing indicate calls to Greece between midnight and 7:00 a.m. on more than ten occasions. No calls during that time frame to Greece are reflected on the telephone bills for the 1633 Palisade Avenue, Fort Lee residence.

DISCUSSION

The only question to be addressed in this proceeding is whether or not the family resided in the Borough of Fort Lee during the time in which their children attended school there. If not, the family would be required to reimburse the borough for educational expenses which total $89,081 as of the time of the hearing. Although the testimony itself may not have been conclusive, it is the tax records and the telephone bills which are most telling. This family filed tax returns for those years listed above and on only one tax return was the Fort Lee address placed in the portion which stated, "present home address." Clearly they did not consider their home to be in Fort Lee at least until 1989 tax return.

Also most telling are the telephone records. The Kintos would have this ALJ believe that although they do not reside at the 13 Karens Lane, Englewood Cliffs address, telephone calls were continuously made to Greece between midnight and 7:00 a.m. at that location. It is absurd to think that one would either not challenge those charges if they were not incurred by the family, or would drive from Fort Lee to Englewood Cliffs in order to make those calls. The possibility did exist that those calls were made by the eldest son, Konstantine while at the house. That, however, was discounted due to the fact that he stated clearly that the total amount of time he stayed at the house was less than ten times. The calls to Greece occur on numerous days exceeding ten.

CONCLUSION

Based upon the foregoing Findings of Fact as well as having assessed the credibility of the witnesses, I **CONCLUDE** that the Kintos family did not reside in Fort Lee during the period of time when they sent their sons to the school. As a result, I **CONCLUDE** that they are obligated to pay the Fort Lee Board of Education for those amounts expended in furtherance of theis sons' education.

ORDER

It is hereby **ORDERED** that the respondents pay the following amounts to the Fort Lee Board of Education:

1. For Nicholas - $43,512;

2. For Antonius - $40,5069.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSISON OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/13/91
Date

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

11/15/91
Date

MAUREEN KEHER
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 19 1991
Date

OFFICE OF ADMINISTRATIVE LAW

am

WITNESSES

For petitioner:

Constance Dellas
Roberta Hanlon
Robert Tessaro

For respondents:

Constance Genet
Steven Lapore
George Kottaras
Polly Salomon
Kyrianos Kintos
Konstantine Spanoudis
Nicholas Corbiscello

EVIDENCE LIST

P-1	Nikos v. Kintos Dkt. #43571-89; 12/15/89
P-2	Lambrinides File Answer & Proof of Service
P-3	Englewood Cliffs Municipal Court Complaint State v. Lombardo
P-4, Id.	Memo from Dellas
P-5, Id.	Bergenfield report card
P-6	Fort Lee reg. form 9/1/87
P-7, Id.	Bergenfield reg. form
P-8, Id.	Bergenfield reg. form
P-9, Id.	Inv. report of Ms. Dellas
P-10	Phone bills, Oct. 5, 1989 - March 1991, 13 Karens Lane
P-11	Phone bills, P. Kintos, 1633 Palisade Ave., Oct. 4, 1989 - March 4, 1991
P-12	1984 - 1989 tax returns
P-13	Deed, April 4, 1986, Deed Kintos to Planmoottil & Baby 22 Greenwich St., Bergenfield
P-14	Deed, April 2, 1986, 13 Karens Lane

P-15	2 pg. insurance certificate homeowners - Centennial - Kintos, 13 Karens Lane
P-16	Mortgage statement Lomas USA, 11 Karens Lane
P-17	Letter from Roberta Hanlon
P-18a	Letters from Tessaro to Kintos
P-18b	"
P-18c	"
P-18d	"
P-18e	"
P-18f	"

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PANAGIOTIS KINTOS AND KYRIANOS KINTOS,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by respondents and replies by the Board, both of which additionally direct the Commissioner to post-hearing arguments submitted to the ALJ, were timely filed pursuant to N.J.A.C. 1:1-18.4 and are briefly set forth below.

In their exceptions, respondents contend that the ALJ completely disregarded uncontradicted testimony favoring their position and failed to even list the evidence put forth by them; that she based her entire ruling upon unsupported assumptions drawn by her from documents (telephone bills and tax returns) upon which no testimony was taken; that she made factual errors such as placing the "kitchen cooking incident" in Englewood Cliffs rather than Fort Lee, where it actually occurred; and that she failed to address certain legal issues (laches, authority of Board to assess tuition) raised in respondents' arguments and filings. The Board in turn urges the Commissioner to adopt the ALJ's correct, well-reasoned

decision and notes that the weight to be accorded testimony and evidence in a controverted matter is fully within the province of the ALJ, whose findings in this case properly reflect her discretionary judgment.

Upon review, however, the Commissioner finds that the central issue of this matter was framed in the initial decision (although not, interestingly, in the prehearing order) in terms of respondents' residency notwithstanding the clear language of the controlling statute:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> (a) Any person who is domiciled within the school district***.
> (emphasis supplied) (N.J.S.A. 18A:38-1)

As discussed by the Commissioner in a prior matter, residency and domicile are not interchangeable:

> Every person has a domicile at all times, and no person has more than one domicile at any one time. In re Gillmore's Estate, 101 N.J. Super. 77 (App. Div. 1968), cert. den., 52 N.J. 175 (1968). The person "may have several residences but can have only one permanent home to which legal incidents of domicile attach." Trustees of Princeton University v. Trust Company of New Jersey, 22 N.J. 587 (1956). In other words, the terms "residence and domicile" are not interchangeable; a person may acquire several residences but only one domicile. DiFiore v. Erie-Lackawanna R.R. Co., 67 N.J. Super 267 (Law Div. 1961).
>
> In Gillmore, the court used the following language:
>
> Domilcile may be acquired in one of three ways: (1) through birth or place of origin, (2) through choice by a person legally capable of choosing his domicile, and (3) through operation of law in the case of a person who lacks capacity to acquire a new domicile by a choice [at 87]. (Emphasis added.)

> This language seems to recognize the fact that a "person" can choose her domicile as long as she is "legally capable." *** Where a person has two homes in which he lives and between which he divides his time, it is still his intention which creates one or the other as his domicile. Collins v. Yancey, 55 N.J. Super. 514 (Law Div. 1989). *** (C.J. on behalf of her minor children, R.J. and D.J., Jr. v. Bd. of Ed. of the Borough of Palmyra, Burlington Cty., decided 5/14/86, at pp. 6-7)

In the present matter, it is clear that respondents did not have a single residence in any conventional sense, but rather appear to have lived between and among multiple dwellings, all undisputedly owned by them and all having some indicia of residency attached according to testimony and documentary evidence. Accordingly, what is necessary in this matter is to establish domicile, or more precisely, for the Board to demonstrate that respondents were not domiciled in Fort Lee and therefore not entitled to a free public education there. That they may not have actually resided at 1633 Palisade Avenue for much of the time in question may enure against a claim of domicile therein, but does not necessarily preclude one.

Therefore, because the Commissioner cannot with any degree of certainty ascertain respondents' intent with respect to domicile from the present record, particularly in view of the absence of testimony on much of the documentary indicia provided by the parties, it is necessary for this matter to be remanded for the purpose of obtaining testimony, argument and further evidence, as appropriate, specifically directed toward the question of domicile as opposed to residency.

Further, certain findings in the initial decision appear to require clarification. For example, the "kitchen cooking incident" alluded to by respondents in their exceptions (initial decision, at

p. 11) is stated as having occurred in Englewood Cliffs, yet the context (asking about the children's absence from school on a particular day), consistent references to the lack of a usable kitchen at Karens Lane, and the summary of the attendance officer's testimony at pp. 3-6 appearing to indicate that she paid only one visit to Karens Lane (the "contractor incident" at p. 4), all work to suggest that the incident actually occurred in Fort Lee. However, in the absence of pertinent portions of the hearing transcript,* the Commissioner cannot make a certain finding on the present record.

Also in need of further exploration are the telephone bills, which raise unresolved issues of call forwarding and multiple late-night calls to Greece. With regard to the latter, the Commissioner notes that although there are indeed, as the ALJ states, numerous calls to Greece, the bulk of these are clustered on single days or within two-day periods which significantly reduce the number of total "incidents."

Finally, notwithstanding that the issues were not raised as part of the prehearing agreement, given that this matter must be remanded on other grounds, the Commissioner directs the ALJ to also hear argument and render a recommendation on respondents' claims of laches and the Board's authority to assess tuition under N.J.S.A. 18A:38-1(a).

Accordingly, the present matter is remanded to the Office of Administrative Law for further testimony, argument and recommendation consistent with the parameters set forth herein.

---

* The Commissioner notes that transcripts were provided only for the latter two (May 23, 1991 and June 18, 1991) of the four hearings held in this matter.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 24, 1991

DATE OF MAILING - DECEMBER 24, 1991

GEORGE AARON AND DIANA AARON,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY AND BOARD OF EDUCATION OF THE BOROUGH OF ALPINE, BERGEN COUNTY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, January 23, 1991

For the Petitioners-Appellants, Leonard Adler, Esq.

For the Respondent-Respondent Board of Education of the Borough of Tenafly, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Frank N. D'Ambra, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of Alpine, J. Dennis Kohler, Esq.

The letter decision of the Commissioner of Education is affirmed for the reasons expressed therein. Notwithstanding our concerns regarding the Petitioners' standing to bring this action, an issue which was not raised or addressed in the proceedings below, we fully concur with the Commissioner's analysis of N.J.S.A. 18A:38-19 and N.J.A.C. 6:20-3.1, and reject Petitioners' arguments as without merit.

June 5, 1991

Pending Superior Court

BEDMINSTER TOWNSHIP COMMITTEE, APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY, RESPONDENT.	:	DECISION

Endorsement Certificate issued by the Commissioner of Education, October 15, 1990

For the Appellant, Kunzman, Coley, Yospin & Bernstein (John E. Coley, Jr., Esq., of Counsel)

For the Respondent, Broscious, Cooke & Glynn (James W. Broscious, Esq., of Counsel)

This action was initiated on November 12, 1990, when the Township Committee of the Township of Bedminster (hereinafter "Township Committee") filed a Notice of Appeal to the State Board of Education pursuant to N.J.A.C. 6:2-1.6 seeking to appeal the issuance on October 15, 1990 of an Endorsement Certificate by the Commissioner of Education to the Board of Education of Bedminster Township (hereinafter "Board"). The Endorsement Certificate approved a lease purchase agreement pursuant to N.J.S.A. 18A:20-4.2, N.J.S.A. 18A:20-8.2(b) and N.J.A.C. 6:22A-1.1 et seq. as to the school district's need for new construction of a K-8 school. The Commissioner also granted approval pursuant to N.J.S.A. 18A:18A-42 and 18A:20-2 to provide the personal property/equipment necessary for educational purposes. The Commissioner's approval was contingent on receipt of approval from the Department of Environmental Protection and, as required by N.J.S.A. 18A:20-4.2(f), favorable review by the Local Finance Board in the Department of Community Affairs.

The Township Committee was not a party to the conference with the Commissioner's designee held prior to approval of the project on October 3, 1990 pursuant to N.J.A.C. 6:22A-1.2(e). Nor did the Township Committee seek to intervene or otherwise participate in the approval process through which the educational need and justification for the project was established.

The Township Committee did participate in the approval process before the Local Finance Board which ultimately resulted in approval of the reasonableness of the cost and financial terms and conditions of the agreement as required by N.J.S.A. 18A:20-4.2(f). By appeal to the Appellate Division, the Township Committee is currently seeking to challenge that approval.

As stated, the instant appeal seeks to challenge only the approval for the project granted by the Commissioner of Education. As previously set forth, as provided for by the statutory scheme, that approval was of the educational need and justification for the project and was granted following fulfillment by the Board of the requirements, including submission of documentation, set forth in N.J.A.C. 6:22A-1.2.

On November 20, the Township Committee moved pursuant to N.J.A.C. 6:2-1.9 to supplement the record in this appeal. The Township Committee did not, however, specify the evidence with respect to which it sought supplementation. Rather, it argued in support of its motion that the "record" was incomplete in that the Township Committee "did not have the opportunity to provide any evidence whatsoever." Township Committee's Brief in Support of Motion, at 3.

On the same date that the Township Committee moved to supplement the record, the district Board moved for dismissal of the Township Committee's appeal. The Board argued both that the Commissioner's endorsement of October 15 did not constitute a decision appealable to the State Board and that the Township Committee lacked standing to appeal to the State Board.

While lease purchase projects have been the subject of challenges made before this agency, the situation here differs from those previously presented. In Citizens Advocating Referendum for Education ("CARE") v. Board of Education of the Township of Passaic, decided by the Commissioner, December 12, 1988, appeal dismissed by the State Board, July 5, 1990, a taxpayers group petitioned the Commissioner of Education pursuant to N.J.S.A. 18A:6-9, challenging thereby the determination of the district board of education to seek approval of a lease purchase agreement. In The Township Committee of the Township of Delaware, et al. v. Board of Education of the Hunterdon Central Regional High School District ("Hunterdon Central"), decided by the Commissioner, October 18, 1989, aff'd by the State Board, March 7, 1990, appeal dismissed, Docket #A-4405-89T7 (App. Div. July 27, 1990), we affirmed the Commissioner's determination to dismiss a petition to him by the governing bodies on the grounds that they had failed to state a cause of action entitling them to a plenary hearing. In that case, the decision appealed from was a Commisioner's decision made pursuant to N.J.S.A. 18A:6-9 rather than the issuance of an Endorsement Certificate, and the governing bodies in that case had been given and availed themselves of an opportunity provided them by the Division of Finance to participate in the approval process. Thus, neither the appealability of an Endorsement Certificate nor the question of whether the governing bodies had standing to challenge the Commissioner's decision from which they had appealed was at issue in that case.

In contrast to CARE, the Township Committee in this case has maintained consistently that it is not challenging the district Board's determination to seek approval for a lease purchase agreement, but rather the Commissioner's grant of approval. Therefore, the question of whether a governing body would have

standing to challenge a district board's determination to seek approval, as did the citizens' organization in CARE, is not now before us. Nor need we pass upon whether appeal to the State Board may be taken from an Endorsement Certificate issued by the Commissioner in that we find that the Township Committee does not have standing to bring such appeal.

Again, in contrast to Hunterdon Central, the Township Committee in this case did not seek to and did not participate in the approval process before the Commissioner of Education. Nor does it contend that it was entitled to do so under the terms of the applicable statutes and regulations. Rather, the Township Committee argues that its interest in the matter is such that, although neither the district Board nor the Department of Education had any legal obligation to do so, the Township Committee should have been notified of the conference held on October 3, and should have been provided the opportunity to present evidence to the Commissioner of actual need, demographics, analysis of alternatives to the option chosen by the district Board, financial impact, and regionalization. Brief on Behalf of Bedminster Township Committee in Opposition to Respondent's Motion to Dismiss, at 11. The basis of such entitlement, argues the Township Committee, lies in its "legitimate interest in seeing to the proper utilization of the Board's funds for school purposes" so that the actions of the Board are "inextricably linked" to the actions of the Township Committee, id at 18-9, thereby conferring on it the legal right to bring this action. We disagree.

As conceded by the Township Committee, the terms of the applicable statutes do not confer standing on a governing body so as to entitle such body to participate in the approval process before the Commissioner of Education. To the contrary, pursuant to N.J.S.A. 18A:20-4.2, it is the district board of education alone which is authorized to acquire a site and school building by lease purchase agreement, and the statute specifically allocates jurisdictional responsibility for approvals of agreements by a district board in excess of five years between the Commissioner of Education and the Local Finance Board.

In short, the terms of N.J.S.A. 18A:20-4.2 do not assign any role to municipal governing bodies with respect to either the decision to seek approval of a lease purchase agreement from the Commissioner or the process by which the Commissioner approves such agreements. This is consistent with the allocation of responsibility and authority under the education statutes generally. Under those statutes, aside from specific statutory provisions such as N.J.S.A. 18A:22-37, which expressly authorizes a governing body to determine for each item appearing in the budget the amount necessary to be appropriated to provide a thorough and efficient system of schools in a district where voters defeat the budget placed before them, the statutes do not confer on governing bodies any role of a general nature with respect to the education system. This reflects that, as embodied in the education statutes, responsibility for the provision of a thorough and efficient education and the authority to meet that responsibility at the local level is vested in the district board of education. E.g., N.J.S.A. 18A:7A-1 et seq.

Nor has the Township Committee pointed to any statute which confers on governing bodies the responsibility to challenge approvals granted by the Commissioner of Education under authority of N.J.S.A. 18A:20-4.2, and its resolution authorizing this action shows clearly that it brought the action in its representational capacity rather that on the basis of its own jurisdictional powers. As set forth in that resolution, the Township Committee initiated this action because of its "obligation to its residents to maintain the lowest possible tax rate while supplying reasonable services" and because, in its opinion, the district board's proposal would "unreasonably burden the Bedminster taxpayer with additional taxes that are unwarranted." Resolution #90-150, Revised: November 12, 1990. We find that such general concerns as this do not constitute an interest sufficient to confer standing on the Township Committee so as to entitle it to challenge the Commissioner's Endorsement Certificate. E.g., New Jersey State Chamber of Commerce et al. v. New Jersey Election Law Enforcement Commission, 82 N.J. 57 (1980); Crescent Park Tenants Association v. Realty Equities Corp. of New York, 58 N.J. 98 (1971).

Nor can we identify any substantial public interest sufficient to confer standing on the Township Committee. N.J. Chamb. of Commerce v. N.J. Elec. Law Enforce. Comm., supra. Rather, we find that the language of the New Jersey Supreme Court in Bergen County v. Port of New York Authority, 32 N.J. 303 (1960), is particularly applicable here. As expressed by the Court,

> [t]o permit contests among [governmental entities] solely to vindicate the right of the public with respect to jurisdictional powers of other public bodies is to invite confusion in government and a diversion of public funds from the purposes for which they were entrusted. The fear is not idle or theoretical. Practical politics being what they are, one can readily foresee lively wrangling among governmental units if each may mount against the other assaults now permissible upon the initiative of the government, the attorney general or a taxpayer or a citizen to vindicate the public right.

Id. at 314-315; Cedar Grove v. Sheridan, 209 N.J. Super. 267 (1986), certif. denied, 107 N.J. 464 (1986). See also Wash. Tp. Zon. Bd. v. Planning Bd., 217 N.J. Super. 215 (App. Div. 1987), certif. denied, 108 N.J. 218 (1987) (action of board of adjustment against planning board found to represent wrangling among governmental units and dismissed for lack of standing).

In sum, for the reasons set forth above, we conclude that the Township Committee lacks the requisite standing to bring this appeal, and we therefore dismiss the appeal.

Attorney exceptions are noted.
July 3, 1991

KAREN BENNETT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, March 18, 1991

For the Petitioner-Appellant, Wills, O'Neill & Mellk
(Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Busch & Busch
(Bertram E. Busch, Esq., of Counsel)

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

August 7, 1991

JILL BLACKMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, September 12, 1990

For the Petitioner-Appellant, Klausner & Hunter (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Frank N. D'Ambra, Esq., of Counsel)

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

Ronald K. Butcher and Bonnie Green abstained.
January 9, 1991

Pending Superior Court

THEODORE BONNER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 6, 1990

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen
(Nancy Iris Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Pachman & Glickman
(Martin R. Pachman, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein. We observe, with regard to falsification of grades, that as a result of his failure to follow the proper procedure of recording grades in his grade book, Petitioner was unable to substantiate grades given for the first marking period of the 1987-88 school year or to demonstrate any foundation therefor. While Petitioner testified that he had kept the grades on a separate sheet which was accidentally thrown out by his wife, we find that he failed in any way to substantiate such contention, and conclude that he has not met his burden of proving that it was unreasonable for the Board to conclude as it did, in the sense that the grades were unfounded, based upon the facts. See Kopera v. Board of Education of the Town of West Orange, 60 N.J. Super. 288 (App. Div. 1960).

April 3, 1991

IN THE MATTER OF THE TENURE :
HEARING OF APRIL RENEE BRADLEY, :
SCHOOL DISTRICT OF THE CITY OF :
NEWARK, ESSEX COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 29, 1990

For the Petitioner-Respondent, General Counsel, Newark Board of Education (Carolyn Ryan Reed, Esq., of Counsel)

For the Respondent-Appellant, April Renee Bradley, pro se

On July 25, 1989, the Board of Education of the City of Newark (hereinafter "Board") certified tenure charges against April Renee Bradley (hereinafter "Respondent"), a tenured teaching staff member, for unbecoming conduct and incompetency.

On January 23, 1990, an Administrative Law Judge ("ALJ") granted Respondent's motion to dismiss the incompetency charges, finding that the charges were actually inefficiencies and that the Board had failed to comply with the requirements of N.J.S.A. 18A:6-11. The ALJ reasoned that "the shortcomings incorporated therein could have been overcome by a reasonably intelligent teacher with a desire to do so," asserting that Respondent had "impressed me with her articulateness and reasonable intelligence." Initial Decision, at 26.

However, finding the truthfulness of unbecoming conduct charges alleging that Respondent had been insubordinate; lacked proper classroom management and control over her students; refused or been unable to include ideas, recommendations and strategies offered her to remedy her unsatisfactory performance; willfully disregarded requirements to conform her conduct to the level expected of teaching staff members; and that her conduct involved a breach of duty which professional ethics enjoined and which was unbecoming to a member of a profession in good standing, the ALJ recommended that Respondent be dismissed from her tenured position.

On May 29, 1990, the Commissioner adopted the ALJ's recommendation to dismiss Respondent. The Commissioner adopted the ALJ's findings and conclusions on the unbecoming conduct charges, but rejected the ALJ's determination that incompetency was not demonstrated by the Board. The Commissioner concluded that the ALJ had used an improper standard in distinguishing inefficiency from incompetency, asserting that such distinction could not be predicated upon the fact that the shortcomings exhibited by Respondent could have been overcome by a reasonably intelligent

teacher with a desire to do so. The Commissioner concluded that notwithstanding any impression of reasonable intelligence and articulateness respondent may have conveyed at hearing, it was clear from the record that Respondent had demonstrated gross ineptness in performing her responsibilities. Moreover, the Commissioner stated, her lack of discipline and class control had been demonstrated to be so gross that these deficiencies when combined with her instructional deficiencies made her overall ineptness rise above the level of inefficiency to that of incompetency. The presence of reasonable intelligence, he continued, did not prevent such ineptness and ineffectiveness as a teacher from being deemed incompetency. The Commissioner ordered Respondent's dismissal.

Respondent, acting pro se, has filed the instant appeal from the Commissioner's decision.[1]

After a thorough review of the record,[2] we affirm the ultimate determination of the Commissioner to dismiss Respondent from her tenured position. We fully concur with the findings and conclusions of the ALJ and Commissioner as to the truthfulness of the charges alleging unbecoming conduct, and agree with the ALJ that those charges alone warrant Respondent's dismissal. However, while we agree with the Commissioner that the ALJ erred in the standard he utilized in distinguishing between inefficiency and incompetency, we reject the Commissioner's conclusion that incompetency was demonstrated by the Board in this instance.

As pointed out by the Commissioner:

> The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise... Incompetence requires proof that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher.

---

[1] We note that in her exceptions to our Legal Committee's report, Respondent, without elaboration, appears to request an extension of time "to seek proper legal assistance." In response, we are compelled to point out that, in view of her pro se status, Respondent has already been granted several extensions in this matter, and she has had more than ample opportunity to obtain such assistance, if desired, since the filing of her notice of appeal to the State Board in July 1990.

[2] We note that the parties did not provide us with a copy of the transcripts in this matter.

School District of the Township of East Brunswick v. Renee Sokolow, decided by the Commissioner of Education, 1982 S.L.D. 1358, 1362, aff'd by the State Board of Education, 1983 S.L.D. 1645. Unlike the Commissioner, however, we find that the Board failed in such proof.

In support of its incompetency charges, the Board offered into evidence six performance evaluations of Respondent conducted during the period from December 1, 1987 until April 25, 1989 and related documents. Those evaluations are extremely critical of Respondent's performance during that period, rating her unsatisfactory in most observed categories and unsatisfactory in her overall performance.

However, while we cannot dispute the Commissioner's finding of Respondent's ineffectiveness as a teacher during that 17-month period of her employment, we cannot conclude on the basis of the record before us that the Board demonstrated her incompetency within the tenure statute.

As previously noted, the proofs presented by the Board, which has the burden of demonstrating Respondent's incompetency by a preponderance of the credible evidence, relate only to Respondent's unsatisfactory performance during a limited period of her service in the district, subsequent to her achievement of tenure.[3] The record before us includes no indication of any specific deficiencies in her teaching performance prior to the 1987-88 school year.[4]

In In the Matter of the Tenure Hearing of Edna Booth, decided by the Commissioner of Education, May 31, 1985, aff'd by the State Board of Education, April 1, 1987, aff'd by the Appellate Division, Docket #A-3985-86T8 (App. Div. 1987), incompetency charges were dismissed against a tenured teacher where the deficiencies relating to the charges of incompetency in respondent's job performance were restricted to the 1982-83 and 1983-84 school years. Prior thereto, the respondent had received favorable evaluations related to her job performance. It was therefore concluded that the record did not demonstrate that respondent was so lacking in competency that the 90 day improvement period would be a useless exercise. Only a charge alleging excessive absenteeism was upheld in that it was the only long-term recurring problem

---

[3] We note that while there is no indication in the record as to the exact length of Respondent's employment in the district, Respondent's appeal brief includes several performance evaluations dating back to 1980. Since these documents were not part of the record below and Respondent has not moved to supplement the record, they are not being considered for the substance thereof in our determination.

[4] We note that the only indication in the record before us of Respondent's performance prior to the 1987-88 school year is the ALJ's reference to the testimony of Respondent's principal who, according to the ALJ, testified that Respondent's performance in 1986-87 was "borderline." Initial Decision, at 3.

established by the record. See also In the Matter of the Tenure Hearing of Frank J. Napoli, decided by the Commissioner of Education, February 16, 1988, aff'd by the State Board of Education, December 1, 1988, aff'd, Docket #A-2301-88T3 (App. Div. 1990).

Although the record before us does not include a history of Respondent's teaching performance prior to the 1987-88 school year, it is undisputed that Respondent had served in the district as a teacher for a sufficient period of time to achieve tenure and evident that she had been employed since at least 1980.[5] Moreover, we stress that it is the Board's burden to establish incompetency. In support of its charge, the Board relies upon Respondent's conduct and performance only during the 17-month period between December 1987 and April 1989, subsequent to her achievement of tenure, as proof of her incompetency. The evidence does not demonstrate nor does the Board allege that Respondent's teaching performance was unsatisfactory during her service in the district prior thereto. Under the circumstances, in view of Respondent's previous years of service and achievement of tenure, which service has not been shown by the Board to have been unsatisfactory, we cannot conclude that the Board has demonstrated that Respondent lacked the ability to be an effective teacher.[6] In addition, while we are not unmindful of the serious concerns raised by the Board's evidence of Respondent's conduct and performance during the limited period in the record, there is no tangible evidence indicating the existence of some underlying condition which has undermined Respondent's abilities and rendered her incapable of effectively performing her duties.

Thus, under the circumstances, we find that the Board failed to satisfy its burden of proof in demonstrating incompetency, and we would therefore dismiss those charges. In so deciding, we do not downplay the gravity of the concerns raised by the Board's evidence of Respondent's conduct and performance during that limited portion of her employment included in the record. While the record may well support a charge of inefficiency, we agree with the ALJ that such a charge could not be sustained since Respondent was not afforded the written notice and 90-day correction period required by N.J.S.A. 18A:6-11. See, e.g., In re Booth, supra. The rationale underlying this rule is that a teacher whose teaching effectiveness is called into question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate that he or she is still capable of effective teaching. In the Matter of the Tenure Hearing of Donald Rowley, decided by the State Board of Education, 1984 S.L.D. 2006, 2007, rev'd on other grounds, Docket #A-4666-83T7 (App. Div. 1985).

---

[5] See supra. n. 2.

[6] We note that although favorable past performance does not preclude incompetency charges, it does serve to demonstrate the ability to perform satisfactorily. In re Napoli, supra.

However, as noted, we fully concur with the ALJ and Commissioner that the Board sustained its burden on five charges alleging unbecoming conduct, and agree with the ALJ that, under the circumstances, dismissal of Respondent from her tenured position is the appropriate penalty. See In the Matter of the Tenure Hearing of David Fulcomer, 93 N.J. Super. 404 (App Div. 1967). As found by the ALJ:

> Bradley's conduct demonstrated contempt, disregard, and a lack of confidence in the professional judgment of her immediate supervisor and others who attempted to assist her. The resultant effect created an intolerable working relationship which interfered with the efficient management and operation of the Clinton Avenue School. The most significant impact unfortunately falls on children.

Initial Decision, at 26.

We therefore affirm the Commissioner's ultimate determination to dismiss Respondent, but for unbecoming conduct only and not for incompetency.

Appellant's exceptions are noted.
February 6, 1991

LILLIAN CASCAMO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 5, 1990

For the Petitioner-Appellant, Richard K. Sacks, Esq.

For the Respondent-Respondent, Stein & Rogers
(Arthur G. Stein, Esq., of Counsel)

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

February 6, 1991

IN THE MATTER OF THE TENURE HEARING OF ANN CHARLTON, SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	
AND	:	
ANN CHARLTON	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 12, 1990

For the Petitioner-Appellant, Lake & Schwartz
(Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

By decision of December 12, 1990, the Commissioner sustained tenure charges of unbecoming conduct against Respondent, a tenured music supervisor, dismissed her appeal of the withholding of her increments, and found, on the basis of the tenure charges, that Respondent's dismissal from her tenured employment was warranted. The tenure charges against Respondent involved her conduct in collecting and disseminating sensitive information about the private life of an assistant superintendent.

Respondent appealed that decision to the State Board of Education. Prior to briefing, the Board of Education of the Borough of Paramus moved to supplement the record with several documents relating to actions by Respondent involving contacts by her with administrators in the district and members of the district board subsequent to the hearing on the tenure charges against her.

The Board argues that the documents are material to the issues on appeal in that they go directly to the issue of Respondent's "unfitness" to work as a teaching staff member in the district. While we do not dispute that Respondent's conduct subsequent to hearing may be relevant to her fitness to teach, our review of the record below indicates that it is sufficient to permit resolution of the issues involved in this appeal without the necessity of supplementing the record with information relating to Respondent's conduct subsequent to the hearing. Accordingly, the Board's motion is denied.

Carlos Hernandez abstained.
March 6, 1991

IN THE MATTER OF THE TENURE HEARING OF ANN CHARLTON, SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	
AND	:	
ANN CHARLTON,	:	STATE BOARD OF EDUCATION
PETITIONER-APPELLANT,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 12, 1990

For the Petitioner-Appellant, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

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

May 1, 1991
Pending Superior Court

MOSES CHEUNG AND CHRISTINE LAM,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 25, 1991

For the Petitioners-Appellants, Moses Cheung and Christine Lam, pro se

For the Respondent-Respondent, Martin J. Anton, Esq.

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

August 7, 1991

THEODORE CHOPLICK,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, October 11, 1990

For the Petitioner-Appellant, Lake & Schwartz
(Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, Rubin, Rubin, Malgran & Kuhn
(David B. Rubin, Esq., of Counsel)

For the Intervenor, Jeanne Castoral, pro se

The determination of the Administrative Law Judge, which was adopted by the Commissioner of Education by operation of law, is affirmed substantially for the reasons expressed therein. Accordingly, the petition is dismissed.

Bonnie J. Green opposed.
February 6, 1991

IN THE MATTER OF THE TENURE HEARING OF DONALD W. CHRIST, BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CHERRY HILL, CAMDEN COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, June 13, 1990

For the Petitioner-Respondent, Davis, Reberkenny & Abramowitz (William C. Davis, Esq., of Counsel)

For the Respondent-Appellant, Selikoff & Cohen (Stephen R. Cohen, Esq., of Counsel)

Tenure charges alleging unbecoming conduct were certified against Donald W. Christ (hereinafter "Respondent"), a tenured teaching staff member, by the Board of Education of the School District of Cherry Hill (hereinafter "Board"). The single incident forming the basis of the Board's allegations is not in dispute. Respondent was a party to divorce proceedings in the Superior Court of New Jersey, Chancery Division. On June 5, 1989, Respondent asked his supervisor to write a letter on his behalf requesting the court to postpone a hearing scheduled for June 12 and 13 in those proceedings. When his supervisor declined to do so, Respondent forged his supervisor's signature on the letter, which Respondent drafted on school stationery. The letter, which was submitted to the court, requested postponement on the grounds that Respondent's duties made it imperative for him to be present during the final week of school. In reliance upon that letter, the court granted a postponement.

As a result of Respondent's action, summary contempt proceedings were held in the Chancery Division and Respondent was ordered to pay a $500 fine and a $50 penalty to the Violent Crimes Compensation Bureau. The record demonstrates that Respondent sought to delay the divorce hearing in order to obtain enough money to purchase his wife's interest in their house and prevent its sale.

On September 1, 1989, following certification of the instant tenure charges, Respondent was suspended without pay from his teaching position.

On May 4, 1990, an Administrative Law Judge ("ALJ"), finding Respondent's "deceits [to be] multiple, studied, deliberate and for financial purposes," Initial Decision, at 8, recommended that he be dismissed from his tenured position. On June 13, 1990, the Commissioner adopted the penalty recommended by the ALJ, finding

that Respondent "compromised his profession, violated the public trust and obstructed the course of justice for his own ends." Commissioner's decision, at 15.

Respondent filed the instant appeal from the Commissioner's decision, alleging that dismissal was too harsh a penalty under the circumstances. Respondent contends that his action was a rash, one-time act of desperation during a traumatic period in his life, and that his record in the district prior thereto was unblemished.

Our Legal Committee initially recommended affirmance of the Commissioner's decision. However, on November 19, 1990, we referred this matter back to the Legal Committee for further consideration.

After a thorough review of the record, we reverse the Commissioner's determination that dismissal is appropriate in this case and direct instead that Respondent suffer the loss of compensation for one full academic year.

While a single incident may be sufficiently flagrant to warrant dismissal, unfitness for a position is best shown by a series of incidents, Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944), and although Respondent's conduct warrants firm disciplinary action, we conclude that the forfeiture of his teaching position after being employed in the district for 16 years[1] is an unduly harsh penalty to be imposed under the circumstances. See In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

Respondent, who was nearly 40 years of age at the time of his suspension in September 1989, had been employed as a teacher in the district since 1973.[2] There is nothing in the record to indicate that his performance during that period was less than satisfactory. Respondent testified that he had not been subject to any previous formal disciplinary action, tr. 4/2/90, at 34, which was not refuted by the Board. While there is some dispute as to Respondent's state of mind at the time of this incident, it is clear from the record that he was under some stress as a result of the divorce proceedings and the impending sale of his home. Such pressures certainly do not excuse or justify Respondent's actions, but do constitute circumstances germane to our determination of the appropriate penalty. Thus, after consideration of all the pertinent circumstances, including Respondent's length of service, previous record and the particulars leading to this incident, we find that dismissal is not warranted.

---

1 We note that during the period of his employment, Respondent was granted leaves of absence for the 1986-87 and 1987-88 school years.

2 See supra. n. 1.

In so deciding, we do not downplay the gravity of Respondent's offense. Respondent's action constituted a deceit against the court as well as against his supervisor, who refused to sign the letter. Such conduct was irresponsible and contravened the high standard of control expected of teaching professionals.

Thus, while we conclude that dismissal is unduly harsh under the circumstances, we do believe that a penalty severe enough to impress upon Respondent the seriousness of his actions is necessary. See In the Matter of the Tenure Hearing of Robert E. Doyle, decided by the State Board of Education, November 7, 1984, aff'd in part, vacated in part and remanded, 201 N.J. Super. 347 (App Div. 1985), decision on remand by the State Board, June 4, 1986, aff'd in part and remanded, Docket #A-4885-85T5 (App. Div. 1986), decision on remand by the State Board, Jan. 7, 1987, aff'd, Docket #A-4885-85T5 (App. Div. 1987), certif. den., 109 N.J. 55 (1987). We therefore reverse the Commissioner's decision to dismiss the Respondent from his tenured position, and direct instead that he suffers the loss of compensation for one full academic year, representing the full extent of the salary which would have been due him for his services during the 1989-90 academic year. In the event that the compensation previously withheld from Respondent in this matter does not amount to the prescribed penalty, we direct that he be suspended without pay for an additional period so that he suffers, in total, the loss of compensation prescribed herein. Respondent is to be credited for any portion of the penalty not yet served by allocation of his current salary on a per diem basis.

Respondent's request for oral argument is denied as not necessary for a fair determination of this case.

Ronald K. Butcher and Maud Dahme opposed.
Carlos Hernandez abstained.
Attorney exceptions are noted.
March 6, 1991

THE COUNCIL OF PRIVATE SCHOOLS FOR CHILDREN WITH SPECIAL NEEDS, INC., COASTAL LEARNING CENTER, INC., AND RONALD BOEDART,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
STATE OF NEW JERSEY, STATE BOARD OF EDUCATION, DEPARTMENT OF EDUCATION AND THE COMMISSIONER OF EDUCATION,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, September 14, 1990

For the Petitioners-Appellants, Apostolou, Middleton & Buonopane (Timothy B. Middleton, Esq., of Counsel)

For the Respondents-Respondents, Nancy Kaplen Miller, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

This matter involves a challenge to an amendment to the regulations governing the approval by the Department of Education of private schools for the placement of public school students who are handicapped. Specifically, Appellants are challenging N.J.A.C. 6:28-7.1(g), which provides that:

> When an approved private school has a change in corporate structure or changes the structure of its governing body from that which was approved in the prior year, the composition of the board shall be according to N.J.A.C. 6:28-7.2(e)6iii(1) and (2).

N.J.A.C. 6:28-7.2(e)6iii(1) and (2), in turn, provide that the names of the members of the board of directors:

> (1) shall be disinterested parties and not related to employees of the private school; (2) may include the director of the private school in a monitoring capacity but no other employee or officer of the school.

On August 11, 1989, Appellants petitioned the Commissioner of Education challenging the validity of the regulation both facially and as applied. On March 30, 1990, Appellants advised the Administrative Law Judge (ALJ) before whom the matter was pending of their determination to sever the facial challenge so as to pursue

those issues through appeal to the Appellate Division while proceeding at the Office of Administrative Law on the as-applied challenge.

On motion of State Respondents, the ALJ recommended that the Petition of Appeal be dismissed because the issue was not ripe in that the regulation had not been applied to any of the Appellants. That being the case, he further concluded that none of the named Petitioners had standing to bring the issue at that time.

On September 14, 1990, the Commissioner of Education adopted the ALJ's analysis and conclusions and dismissed the petition.

Upon review of the arguments of counsel, we affirm the decision of the Commissioner of Education. As argued by State Respondents, resolution of a challenge to the application of the regulation, which is the only question before this agency, requires an assessment of how the regulation in practice affects the Appellants. Yet, the regulation is prospective in application and is activated only when a change in the corporate structure or the approved governing body occurs. As conceded by Appellants, no such change has occurred, and, consequently, the regulation has not been applied to any of the Appellants. Thus, as found by the ALJ, a ruling on Appellants' as-applied challenge "would be purely speculative and conjectural and, at best, an inefficient use of time." Initial Decision, at 7. In this respect, we cannot ignore that the Appellate Division's decision on Appellants' facial challenge could completely moot the as-applied challenge or substantially change the nature of the proceedings. Therefore, for the reasons set forth herein, as well as those expressed by the ALJ in his Initial Decision, the State Board of Education affirms the determination of the Commissioner to dismiss the appeal in this matter.

S. David Brandt, Bonnie J. Green and John T. Klagholz opposed.
February 6, 1991

HARRY DEARDEN,	:	
PETITIONER-RESPONDENT,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	STATE BOARD OF EDUCATION
RESPONDENT-APPELLANT.	:	DECISION ON MOTION

Decided by the Commissioner of Education, October 1, 1990

Decided by the State Board of Education, March 6, 1991

For the Petitioner-Respondent, Lake & Schwartz
(Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Appellant, Thomas W. Sumners, Jr., Esq.

The Board of Education of the City of Trenton has filed the instant motion for reconsideration of our decision dated March 6, 1991 which affirmed the decision of the Commissioner of Education that the Board's action in abolishing Petitioner's employment as assistant purchasing agent, stock and inventory control was improper. The Commissioner found that although there was no evidence that the Board's action was a direct result of comments by the then-Mayor in which he referred to Petitioner as a "political hack" and his position as a "political position," the Board's action was improper in that the Superintendent's recommendation that the position be abolished, upon which the Board relied, was tainted by his belief that the Board wanted him to eliminate the position at the Mayor's behest.

The basis for the instant motion is that the State Board inadvertently failed to consider the transcripts in this matter during its initial review.[1] The Board also requests relaxation of the 10-day filing requirement of N.J.A.C. 6:2-2.7.

Under the circumstances of this case, we conclude that relaxation of the rules is appropriate in the interests of justice, and, although the State Board is not required to review transcripts, even when available, In re Morrison, 216 N.J. Super. 143 (App. Div. 1987), we grant the Board's motion for reconsideration. After a thorough review of the transcripts, however, we do not find any basis therein for setting aside or altering our earlier decision.

---

[1] We note that the State Board did consider excerpts from the transcripts which were provided by the Board in its brief in support of its appeal.

We again concur with the Administrative Law Judge's findings that the Superintendent's recommendation was based on his perceptions, whether accurate or not, of the Board's motivation and direction, and we agree with the Commissioner that, under the circumstances, this tainted not only the recommendation, but the Board's action in reliance thereon.

Accordingly, after reconsideration, we affirm the decision of the Commissioner and deny the Board's motion for a stay of that decision.

June 5, 1991

HARRY DEARDEN,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, October 1, 1990

For the Petitioner-Respondent, Lake & Schwartz
(Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Appellant, Thomas W. Sumners, Jr., Esq.

This is an appeal from a decision of the Commissioner which found that although there was no evidence that the Board of Education of the City of Trenton's action in abolishing Petitioner's employment was a direct result of comments by the then-mayor in which he referred to Petitioner as a "political hack" and his position as a "political position," the Board's action was improper in that the Superintendent's recommendation that the position be abolished, upon which the Board relied, was tainted by his belief that the Board wanted him to eliminate the position at the mayor's behest.

We reject the Board's argument that there is no basis for concluding that Petitioner's employment was improperly terminated because there is no conclusive evidence that the Board's decision accepting the Superintendent's recommendation was due in fact to the mayor's comments, and we affirm the decision of the Commissioner for the reasons expressed in his decision. In affirming that decision, we note that the full transcript of the hearing was not provided by either party and find that the excerpts provided by the Board in support of its appeal do not provide any basis for setting aside the Administrative Law Judge's findings with respect to the circumstances surrounding the Superintendent's recommendation. Those findings establish that the Superintendent's recommendation was based on his perceptions, whether accurate or not, of the Board's motivation and direction. We agree with the Commissioner that, under the circumstances as established in the record, this tainted not only the recommendation, but the Board's action in reliance thereon. See Ivan and Murray v. Board of Education of the Princeton Regional School District, 1984 SLD 1656, aff'd by the State Board 1985 SLD 1950, aff'd, 1985 SLD 1951 (App. Div. 1985) (prior history omitted).

We therefore affirm the decision of the Commissioner and deny the Board's motion for a stay of that decision.

Carlos Hernandez abstained.
March 6, 1991

CARMEN DI SIMONI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Remanded by the Commissioner of Education, August 17, 1990

Decision on remand by the Commissioner of Education, November 20, 1990

For the Petitioner-Appellant, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, DeMaria, Ellis & Hunt (Richard H. Bauch, Esq., of Counsel)

Petitioner in this case served in the unrecognized title of Academic Supervisor from 1985 until his position was abolished in 1989. Prior to that he had served as Curriculum Coordinator (1984-85), also an unrecognized title, and as Teacher of Social Studies (1988-89). Upon abolition of his position as Academic Supervisor, he was returned to service as a Teacher of Social Studies. However, by Petition of Appeal to the Commissioner of Education, Petitioner challenged the Board's continued employment of a non-tenured teaching staff member in the unrecognized position title of Associate Principal in Charge of Student Affairs, asserting that he was entitled to that position.

Based on stipulation of facts by the parties, the Administrative Law Judge concluded that Petitioner was not entitled to the position in that he had acquired tenure in the position of Academic Supervisor, which required only supervisor's certification. Since the County Superintendent had determined that the Associate Principal should be approved under the title "assistant/vice principal," that position was separately tenurable and Petitioner could assert no entitlement to it on the basis of his tenure.

By decision of August 17, 1990, the Commissioner remanded the matter for fact finding as to what endorsements and certificates were required for the positions of Academic Supervisor and Associate Principal of Student Activities as those positions had been approved by the County Superintendent of Schools.

The Commissioner adopted the Administrative Law Judge's determination on remand that the position of Associate Principal in Charge of Student Activities required a principal's endorsement while that of Academic Supervisor specified that endorsement as supervisor was required for qualification. The Commissioner concluded that pursuant to N.J.S.A. 18A:28-5, supervisory positions and assistant or vice principal positions are separately tenurable and, therefore, Petitioner could not lay a tenure claim to the Associate Principal's position.

For the reasons expressed by the Commissioner, we affirm his decision in this case. In so doing, we emphasize, as did the Commissioner, that the positions of assistant and vice principal are among those specifically enumerated in N.J.S.A. 18A:28-5 so that these positions are separately tenurable from supervisory positions. See Capodilupo v. Board of Education of the Town of West Orange, decided by the State Board September 3, 1986, slip op. at 8, aff'd. Docket #A-943-86-T (App. Div. 1987), certif. denied, 109 N.J. 514 (1987). We further emphasize that authority and responsibility to determine appropriate certification required for service in an unrecognized position title lies with the County Superintendent when he acts to approve such titles pursuant to N.J.A.C. 6:11-3.3. Accordingly, contrary to Petitioner's contentions, it is the County Superintendent's determination which establishes the certification required for such positions, and consequently the scope of tenure protection attaching from service therein, rather than the certification designated by the district board when it submits an unrecognized title for approval.

April 3, 1991

LEONARD MAYO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 25, 1989

For the Petitioner-Respondent, Miller & Galdieri
(Charles P. Daglian, Esq., of Counsel)

For the Respondent-Appellant, Murray, Murray & Corrigan
(Karen A. Murray, Esq., of Counsel)

Leonard Mayo (hereinafter "Petitioner"), a staff architect for the Board of Education of the City of Jersey City (hereinafter "Board"), alleged that the Board improperly refused to pay him his accrued vacation and credit days upon his retirement in 1987. The Board countered that Petitioner had waived his claim to such compensation by virtue of the settlement in Silvestri v. Board of Education of the City of Jersey City, decided by the Commissioner of Education, July 1, 1987.

In Silvestri, Petitioner herein and several other employees of the Board alleged that the Board had violated a contractual agreement with them by failing to establish salaries, salary guidelines and systematic increases since 1981. The parties agreed to a settlement of that litigation, in which the petitioners agreed to give up their pending claims therein in consideration of a lump sum payment by the Board in the amount of $150,000. On July 1, 1987, the Commissioner approved the settlement and dismissed the petition.

As a result of the settlement in Silvestri, Petitioner received $20,000 as his portion of the lump sum payment and a salary increase to $60,000 retroactive to one year and a day. He also agreed to immediately retire. In his retirement letter of July 10, 1987, Petitioner advised the Board that he would be applying for "all other fringe benefits to which I am entitled and not part of the settlement of the Administrative Law Proceedings." Thereafter, he requested payment for accumulated vacation time and credit days, which the Board, citing the settlement, refused to pay. Petitioner's retirement became effective on August 1, 1987.

On July 31, 1989, an Administrative Law Judge ("ALJ") concluded that Petitioner had not waived his rights to accumulated vacation time or credit days by virtue of the Silvestri settlement. The ALJ found that the testimony and evidence supported Petitioner's contention that the petitioners in Silvestri waived their rights only to any "compensation" due and not to accrued vacation time. Accordingly, she recommended that Petitioner be paid for 330 vacation days and 40¼ credit days at his rate of pay in effect at the time of his retirement.

On September 25, 1989, the Commissioner adopted the ALJ's recommended grant of payment to Petitioner for 330 accumulated vacation days at his final rate of pay, agreeing that Petitioner had not waived his right thereto. The Commissioner concurred with the ALJ that the petitioners in Silvestri had not intended for accumulated vacation pay to be included among the forms of compensation resolved in their settlement with the Board.

However, the Commissioner rejected the ALJ's grant of credit days payment to Petitioner, finding that, unlike the vacation days, credit time was clearly addressed in the documentation generated by the Silvestri settlement, and that Petitioner had willingly relinquished his rights thereto.

On October 4, 1989, the State Board, acting pursuant to N.J.S.A. 18A:7A-34 et seq., issued an administrative order removing the Board of Education of the City of Jersey City and creating the State-Operated School District of the City of Jersey City (hereinafter "State-Operated District").

On October 27, 1989, the State-Operated District appealed from that portion of the Commissioner's decision herein awarding Petitioner payment for 330 accumulated vacation days.[1] The State-Operated District alleges that Petitioner was barred by statute and regulation from accumulating vacation days for more than one year;[2] that vacation pay was a form of compensation that was waived by Petitioner in the Silvestri settlement; and that any payment awarded for vacation days should be at the rate of pay in effect at the time the days were accrued.

After a thorough review of the record, we affirm the Commissioner's determination that Petitioner had not waived his right to vacation pay, but we modify his award.

We agree with the Commissioner's conclusion that the petitioners in Silvestri did not waive their rights to accumulated

---

[1] We note that Petitioner has not filed a cross-appeal from the Commissioner's denial of his claim requesting payment for accumulated credit days.

[2] We note that this argument was not raised by the former Board in these proceedings but was argued for the first time in the State-Operated District's appeal brief to the State Board.

vacation pay. Under the circumstances of that action and the terms of the documentation generated by the settlement, we concur that vacation pay was not included as part of the petitioners' claim therein or intended to be part of the settlement. We also agree that any payment to Petitioner should be at the rate of pay in effect at the time of his retirement.

However, we agree with the State-Operated District that, pursuant to N.J.S.A. 11A:6-3, Petitioner is not entitled to payment for 330 accumulated vacation days. N.J.S.A. 11A:6-3, providing for vacation leave for full-time political subdivision civil service employees, declares that:

> (e) Vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only.

Petitioner does not deny his status as a civil service employee or dispute the applicability of that statute and its predecessor[3] to his service, but maintains that its employment herein would be inequitable since he was forced to forego much of his vacation time in recent years as a result of job demands and was assured that he would be allowed to fully accumulate his unused vacation time. Petitioner further argues that the statute cannot be read to limit the accumulation of vacation days, and points out that the other Silvestri petitioners who retired were paid their accumulated vacation time in full by the former Board.

We reject Petitioner's interpretation of N.J.S.A. 11A:6-3. It is clear on the face of that statute and its predecessor that vacation days accruing in one year may be accumulated in the following year only. As the State-Operated District points out, the use of the word "only" in the statute plainly indicates the legislative intent to limit the accumulation of vacation days. By way of contrast, N.J.S.A. 11A:6-5, dealing with sick leave, provides that "[u]nused sick leave shall accumulate without limit." (Emphasis added.)

N.J.A.C. 4A:6-1.2, applicable to State and local employees subject to Title 11A, provides further expression of the limitation on the accumulation of unused vacation leave:

> (e) Appointing authorities may establish procedures for the scheduling of vacation leave. Vacation leave not used in a calendar year because of business necessity shall be used

---

[3] We note that N.J.S.A. 11A:6-3, effective September 25, 1986, was formerly codified at N.J.S.A. 11:24A-1 (L.1939, c. 232, p.629, s.1, amended by L.1959, c.88, p.219, s.1, repealed by L. 1986, c.112, s.11A:12-3), which provided: "...Where in any calendar year the vacation or any part thereof is not granted by reason of pressure of such county, municipality or school district business, such vacation periods or parts thereof not granted shall accumulate and shall be granted during the next succeeding calendar year only."

during the next succeeding year only and shall be scheduled to avoid loss of leave.

Thus, we conclude that Petitioner was precluded by statute and regulation from accumulating unlimited vacation leave.

We also must reject Petitioner's argument that limiting his vacation pay would be inequitable under the circumstances. Notwithstanding the former Board's apparent practice of paying accumulated vacation time in excess of that permitted by N.J.S.A. 11A:6-3 to other employees of the district, or Petitioner's belief that such leave would accumulate in full, we have found the pertinent statute to be clear and unambigious in restricting the accumulation of vacation days, and any action by the former Board authorizing Petitioner's accumulation of unlimited vacation leave was in direct violation of that statute. Although we recognize that, due to the former Board's practices, other employees retiring prior to the creation of the State-operated school district might have received accumulated vacation pay in excess of that permitted by N.J.S.A. 11A:6-3, we cannot allow perpetuation of a practice that contravenes State law. Petitioner's entitlement is limited to that expressly authorized by the Legislature, and, notwithstanding the former Board's practices or any assurances made to Petitioner, he acted at his own peril in attempting to accumulate more days than permitted by statute.[4]

Turning to Petitioner's specific entitlement, we note that the Petitioner and the former Board stipulated that Petitioner did not use any of his vacation leave earned during the two years prior to his retirement. On those facts, we find, by virtue of N.J.S.A. 11A:6-3 and its predecessor, that Petitioner had accumulated a total of 50 vacation days by the effective date of his retirement, representing the 25 days earned in 1985-86, which could be accumulated in 1986-87, and the 25 days earned in 1986-87. Although the attendance records attached to the stipulation of facts submitted by the Petitioner and the former Board reflect an accumulation of vacation days accrued by Petitioner in previous years, any such leave which was not used was lost by operation of the statute. Accordingly, we modify the Commissioner's decision and

---

[4] We note, in response to Petitioner's exceptions, that, as found herein, the former Board's action exceeded its legal authority, and its failure to raise such defense in the proceedings below does not give legal sanction to such action or abrogate our responsibility as the ultimate administrative decision-maker in school law matters to assure that our decision is consistent with pertinent principles of law. See Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989).

direct that the Board compensate Petitioner for 50 vacation days at his rate of pay in effect at the time of his retirement.[5]

Alice A. Holzapfel and Deborah P. Wolfe opposed.
Attorney exceptions are noted.
April 3, 1991

Dismissed Superior Court 11/22/91

---

[5] We note, in response to Petitioner's exceptions requesting counsel fees and pre-judgment interest, that Petitioner did not request such fees or interest in his petition of appeal. Moreover, there is no evidence in this case that the Board's denial of Petitioner's claim was taken in bad faith or in deliberate violation of statute or regulation so as to entitle him to pre-judgment interest, see N.J.A.C. 6:24-1.18, and there is no statutory authority empowering this agency to award counsel fees in this instance.

PETER ESSER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 22, 1991

For the Petitioner-Appellant, Peter Esser, pro se

For the Respondent-Respondent, Dines & English
(Patrick C. English, Esq., of Counsel)

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

June 5, 1991

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN FARGO, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE BOROUGH OF NORTH	:	DECISION
ARLINGTON, BERGEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, January 24, 1990

Decided by the Commissioner of Education, June 21, 1991

For the Petitioner-Appellant, Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin (Stephen N. Dratch, Esq., of Council)

For the Respondent-Respondent, Carlin & D'Elia (Anthony V. D'Elia, Esq., of Council)

On August 24, 1988, the Board of Education of the Borough of North Arlington (hereinafter "Board") certified tenure charges for unbecoming conduct against John Fargo (hereinafter "Appellant"), a tenured teaching staff member, alleging that Appellant had engaged in sexually and emotionally abusive behavior with several male students on school grounds. On October 4, 1989, Administrative Law Judge Elinor R. Reiner issued an oral decision from the bench which was subsequently transcribed and rendered in the form of a written Initial Decision on November 9, 1989. In that decision, Judge Reiner determined that Appellant had engaged in a pattern of improperly touching male students and using profane language in class. She recommended that he be dismissed from his tenured employment.

Appellant filed exceptions to the Initial Decision with the Commissioner of Education and also sent a copy to the Office of Administrative Law ("OAL"), arguing, inter alia, that Judge Reiner should have recused herself from hearing this matter. He charged that Judge Reiner was biased, pointing to a sexual harassment and discrimination suit which Judge Reiner had filed in United States District Court against the New Jersey Secretary of State, Office of Administrative Law and the former Acting and Deputy Director of OAL.

The current Director of the Office of Administrative Law ("Director"), treated the copy of the exceptions sent to OAL as an application to review a question relating to disqualification of an administrative law judge. On December 21, 1989, the Director issued an Order denying Appellant's request to disqualify Judge Reiner, finding the request untimely pursuant to N.J.A.C. 1:1-14.10(m) since it was made after the Initial Decision was rendered. The Director also pointed out that Appellant did not claim that Judge Reiner had prevented development of the record, but rather had drawn the wrong

conclusions as a result of her alleged bias. The Director stressed that the Commissioner's review of the complete record and rendering of a final decision would cure any possible defects if, assuming arguendo, Judge Reiner should have recused herself.

On January 24, 1990, the Commissioner adopted with modification the Initial Decision of Judge Reiner and directed Appellant's dismissal from his tenured position. The Commissioner determined that he had no jurisdiction to rule on the recusal issue raised in Appellant's exceptions inasmuch as the authority to review disqualification of an administrative law judge rested with the Director of OAL. The Commissioner, quoting from the Director's Order, agreed that there was no reason for him not to proceed with his decision in the matter.

Appellant did not file an appeal of the Commissioner's decision to the State Board of Education. Nor did he appeal the Director's Order denying his recusal request.

On May 20, 1991, Appellant filed a petition with the Commissioner requesting relief from the Commissioner's decision of January 24, 1990. Appellant, noting that the State Board of Examiners had moved to revoke his teaching certificate as a result of the Commissioner's decision to dismiss him for unbecoming conduct, alleged in his petition that the Appellate Division's recent determination in State v. Bauman, Docket #A-2328-89T5 (App. Div. 1991) made apparent the Commissioner's mistake of law in not concluding that Judge Reiner should have recused herself from hearing the tenure charges. Appellant requested that the Commissioner's decision be vacated to the extent that it formed the basis for the action brought against him by the State Board of Examiners.

On June 21, 1991, the Commissioner, in a letter decision, denied Appellant's request and dismissed his petition. The Commissioner concluded that "the mere citation of the Bauman case is insufficient to accomplish the reopening of the Fargo matter in that there has been no showing made either at the time of the Commissioner's decision or now of actual bias on the part of ALJ Reiner."

Appellant has filed the instant appeal to the State Board from the Commissioner's decision of June 21, 1991. In support of this appeal, Appellant argues that Bauman added an important element to the analysis mandated in assessing the due process requirements of administrative disciplinary proceedings and demonstrated the constitutional importance of having a neutral finder of fact.

Despite the convoluted procedural history of this case, the only matter appealed to the State Board was Appellant's petition filed on May 20, 1991. By this appeal, Appellant seeks to vacate the Commissioner's decision of January 24, 1990 based upon the subsequent Appellate Division decision in Bauman. As noted, Appellant did not appeal the Commissioner's January 24, 1990 decision to the State Board, nor did he appeal the Director's Order denying his request to disqualify Judge Reiner. Thus, our review of

this matter is limited to consideration of whether Bauman provides a legal basis for vacating the Commissioner's decision of January 24, 1990 so as to prevent revocation of Appellant's teaching certificate by the State Board of Examiners.

After a thorough review of the record, we reject Appellant's arguments.

We note initially that we have no authority to direct vacation of an agency decision for a limited purpose, as Appellant requests. "Where a judgment is vacated or set aside...it is entirely destroyed and the rights of the parties are left as though no such judgment had been entered..." McKay v. Estate of McKay, 205 N.J. Super. 609, 614-15 (Law Div. 1984), quoting 49 C.J.S., Judgments s.306, at 557-58. Thus, if we were to reopen and vacate the Commissioner's January 24, 1990 determination, such action would set that decision aside in its entirety.

In essence, Appellant's petition raises a collateral attack on the Commissioner's decision of January 24, 1990, which was not appealed by the Appellant to the State Board. See N.J.S.A. 18A:6-27.[1] In requesting relief from that decision, Appellant renews his argument on the merits of disqualification, despite his failure to file an appeal from the Director's Order that his recusal request was untimely or from the Commissioner's determination that he lacked the jurisdiction to review such a request. Appellant's instant petition seeking to vacate the Commissioner's decision is grounded in the recent decision in Bauman, which involved substantive aspects of disqualification. Under the circumstances, we find review on the merits of Appellant's recusal request to be unwarranted.

Notwithstanding such determination, we find no merit in Appellant's contention that Bauman provides justification for vacating the Comissioner's decision. In Bauman, the Court, despite overwhelming evidence of guilt, reversed the conviction of the defendant therein on charges of arson and theft as a result of the trial judge's failure to interrogate a juror to determine whether her remarks and other conduct during the trial evidenced any prejudgment or bias.

While judgments in administrative proceedings may be reopened on equitable grounds in the interests of justice, Lee v. W.S. Steel Warehousing, 205 N.J. Super. 153 (App. Div. 1985), we reject Appellant's characterization of Bauman as a "recent development in New Jersey law which...demonstrates the plain error in letting stand the conclusions of the hearing as conducted by ALJ Reiner." Appeal brief, at 18-19. Indeed Bauman, which involved criminal rather than administrative proceedings, reiterated the Court's earlier holding in State v. Marchitto, 132 N.J. Super. 511,

---

[1] We note that an appeal to the State Board was due within 30 days after the Commissioner's decision of January 24, 1990 was filed. N.J.S.A. 18A:6-28; N.J.A.C. 6:2-1.3(a).

516 (App. Div. 1975), certif. den., 68 N.J. 163 (1975) that "where the record fails to show whether a remark or other communication [by a juror] was prejudicial, because the trial judge declines to interrogate [the] juror, it will be presumed to be prejudicial and constitutes cause for a reversal of the judgment." Bauman, supra, slip op. at 9. We stress again that we are faced not with an appeal from the Commissioner's January 24, 1990 decision, but rather with a petition to vacate that decision. The importance of the finality of judgments should not be lightly dismissed, and relief from a final judgment or order should be granted only upon a showing of exceptional and compelling circumstances. Baumann v. Marinaro, 95 N.J. 380 (1984). Even assuming arguendo the applicability of State v. Bauman to administrative proceedings, we cannot conclude that it provides authority for the extraordinary relief requested.

For the reasons stated herein, we affirm the Commissioner's determination to dismiss the instant petition. We stress in so doing that our decision in this matter is limited to the specific issue presented by Appellant's instant petition. We do not in any way pass upon the propriety of the Director's Order dated December 21, 1989 or the Commissioner's decision of January 24, 1990, neither of which is on appeal before us.

S. David Brandt, Alice Holzapfel, John T. Klagholz and Deborah P. Wolfe opposed.
November 6, 1991

FRANKLIN TOWNSHIP COMMITTEE ET AL.,	:	
APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

Decided by the Commissioner of Education, May 21, 1990

For the Appellants, Albert D. Rylak, Esq.

For the Respondent, Rand, Algeier, Tosti & Woodruff
(Russell J. Schumacher, Esq., of Counsel)

This is an appeal by nine of the twelve governing bodies of the North Hunterdon Regional High School District from a determination made by the Commissioner of Education pursuant to N.J.S.A. 18A:13-20 after the governing bodies failed to agree as to reductions in the education budget which had been proposed to and defeated by the voters.

In judging the amounts necessary to provide a thorough and efficient system of public education in the District, the Commissioner determined to reduce the current expense amount proposed to the voters by the district board of education by $100,000 based on the difference in the salaries of employees retiring in 1990 and the salaries of their replacements. The Commissioner, however, left the District's capital outlay budget intact, finding that the amount reflected the District's long range facilities plan.

The appealing governing bodies urge that the State Board independently review the budget and make further reductions so as to effectuate the will of the voters and the 12 governing bodies, who, while not agreeing on an amount, all favored reductions greater than $100,000. Appellants, however, do not propose an amount or identify what items would be affected.

We find that in exercising his judgment as to the amount necessary to provide a thorough and efficient education in this district, the Commissioner of Education was fulfilling the statutory mandate of N.J.S.A. 18A:13-20. In that Appellants have not made any showing that the Commissioner's determination was arbitrary or capricious, nor provided any other basis to justify setting aside his determination, we affirm the Commissioner's determination and dismiss this appeal.

Maud Dahme abstained.
February 6, 1991

IN THE CONSOLIDATED MATTER OF THE TENURE HEARING OF ERNEST E. GILBERT, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY AND WILLINGBORO BOARD OF EDUCATION V. ERNEST E. GILBERT.	:	STATE BOARD OF EDUCATION DECISION ON MOTION

Decided by the State Board of Education, November 3, 1982

Decision on motion by the State Board of Education, November 19, 1990

For the Appellant, Ernest E. Gilbert, pro se

For the Respondent Board of Education of the Township of Willingboro, Martinez & Jennings (Robert P. Martinez, Esq., of Counsel)

For the Respondent State of New Jersey, Robert H. Stoloff, Assistant Attorney General, David Powers, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

For the Respondent Public Employment Relations Commission, Robert Anderson, Esq.

For the Respondent New Jersey Division on Civil Rights, Patrice Connell, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

Appellant Ernest E. Gilbert has filed the instant motion for reconsideration of the State Board of Education's decision dated November 19, 1990, in which we denied Appellant's motion seeking to reopen those cases decided by the State Board in 1982 involving his dismissal from his position as a tenured teaching staff member for conduct unbecoming a teacher. Inasmuch as we find no basis for reconsideration, and for the reasons expressed in our November 19 decision, Appellant's motion is denied.

February 6, 1991

STEVEN B. HERN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, May 8, 1991

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen
(Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Patino-Treat & Rosen
(Louis C. Rosen, Esq., of Counsel)

The State Board of Education affirms the determination of the Commissioner for the reasons set forth in his letter decision of May 8, 1991. In that decision, the Commissioner found that he could not render a decision in this case without a prior determination by the Division of Workers' Compensation as to whether Petitioner's illness was work-related. The Commissioner's conclusion was not altered by the fact that Petitioner had been absent from work only five days. In reaching that conclusion, the Commissioner relied on N.J.S.A. 34:15-49, which confers upon the Division of Workers' Compensation exclusive original jurisdiction of all claims for workers' compensation benefits under Chapter 34, as well as on Forgash v. Lower Camden County Regional High School District #1, 208 N.J. Super. 461 (App. Div. 1985) and Tompkins v. Board of Education of the Township of Hamilton, decided by the State Board, December 2, 1987.

We agree with the Commissioner's determination. We add only that pursuant to the terms of N.J.S.A. 34:15-15, Petitioner in this case has a claim which is subject to the Workers' Compensation Act notwithstanding that he was absent from work only 5 days. The fact that Petitioner may not wish to assert that claim does not alter the nature of the jurisdiction conferred by statute on the Division of Workers' Compensation. Petitioner can not act to avoid that jurisdiction and invoke instead the jurisdiction of the Commissioner of Education without prior determination by the Division of Workers' Compensation as to whether his injury arose out of and in the course of his employment.

S. David Brandt, Ronald Butcher, John T. Klagholz and Nancy Schaenen opposed.

August 7, 1991
Pending Superior Court

JEAN M. HILLS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 1, 1991

For the Petitioner-Appellant, Willis, O'Neill & Mellk
(Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Busch & Busch
(Bertram E. Busch, Esq., of Counsel)

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

June 5, 1991

CITY OF JERSEY CITY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Assistant Commissioner of Education, August 30, 1990

For the Petitioner-Appellant, Corporation Counsel, Jersey City Law Department (Joseph Healy, Esq., of Counsel)

For the Respondent-Respondent, General Counsel, Jersey City Public Schools (Charlotte Kitler, Esq., of Counsel)

The decision of the Assistant Commissioner of Education is affirmed for the reasons expressed therein. Additionally, we caution the City of Jersey City against continuation of its practice of remitting local school tax revenues to the school district in an untimely manner in contravention of statute.

Ronald K. Butcher and Bonnie Green abstained.
January 9, 1991
Pending Superior Court

THELMA JONES AND JAMES WHITE,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, January 18, 1991

For the Petitioners-Appellants, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Office of the General Counsel of the Newark Board of Education (Marvin L. Comick, Esq., of Counsel)

On January 18, 1991, the Commissioner of Education dismissed the petition filed in this matter by two teaching staff members for failure to state a cause of action. Petitioners had alleged that the Board's use of oral interviews as part of its candidate selection process for principal and vice principal positions was, in itself, arbitrary and capricious. The Commissioner found such allegation to be an insufficient cause of action "inasmuch as oral interviews are a commonly accepted and widespread component of job application processes of all types and mere use of such a component does not in itself constitute arbitrary or unreasonable action on the part of the district."

On February 14, 1991, counsel for the Petitioners filed a notice of appeal to the State Board of Education. Pursuant to N.J.A.C. 6:2-1.11(a), a brief in support of appeal must be filed "within 20 days after the appeal has been filed." Thus, as computed under N.J.A.C. 6:2-1.4(b), Petitioners' counsel was required to file a brief in support of the appeal by March 6. In that no brief was filed by that date, the State Board notified him by letter dated March 8 that the matter was being referred to the Legal Committee of the State Board for consideration of his failure to perfect the appeal. N.J.A.C. 6:2-1.12.

On April 1, 1991, counsel filed an appeal brief. By letter dated April 2, the State Board advised Petitioners' counsel that he was required to submit 17 copies of the Commissioner's decision with his brief and that the matter had been referred to the Legal Committee for consideration of the effect of his late filing. N.J.A.C. 6:2-1.11; 6:2-1.12. Counsel has provided no explanation for his delay in filing an appeal brief even after the late notice

from the State Board or for his failure either to file an appeal brief by the March 6 due date or to seek an extension.

A review of Appellate Division decisions on the subject is instructive. In Abel v. Elizabeth Bd. of Works, 63 N.J. Super. 500, 509 (App. Div. 1960), the Court observed that:

> The rules relating to briefs and appendices on appeal have as their prime purpose the orderly and considered presentation of the matter on appeal so that the court may have before it such parts of the record and such legal authorities as will be of help in arriving at a proper determination.

Asserting that violation of the rules dealing with appellate briefs "cannot and will not be tolerated," Still v. Ohio Cas. Ins. Co., 189 N.J. Super. 231 , 236 (App. Div. 1983), the Court has stressed that an appeal is ordinarily subject to dismissal when an appeal brief is filed out of time, without an application having been made for an extension. Elmora Savings and Loan Association v. D'Augustino, 103 N.J. Super. 301, 304 (App. Div. 1968); Abel, supra, at 509. Accordingly, the Court has dismissed appeals for late filings and other violations of the rules regarding appeal briefs and appendices. See, e.g., Cherry Hill Dodge, Inc. v. Chrysler Credit Corp., 194 N.J. Super. 282 (App. Div. 1984) (appeal dismissed where appeal brief and appendix were "replete with procedural deficiencies"); Mestice v. Bd. of Adjustment of Neptune City, 35 N.J. Super. 313 (App. Div. 1955) (appeal dismissed where appeal brief was due, following an extension, on January 17, but was not placed on the opposing attorney's desk until 9:00 p.m. on January 18).

The Court has, however, been willing to relax its general rule when asked to decide a matter of public importance, see, e.g., Abel, supra (Court proceeded to a determination on the merits, despite service on July 20 of appeal brief due on June 25, in case involving challenge to validity of amendment to municipal zoning ordinance. The Court stressed that but for the fact that the case involved a matter of public importance to the City of Elizabeth and its residents, it would "not hesitate" to dismiss the appeal); and in cases presenting substantive issues of transcendent importance. See, e.g., In the Matter of the Tenure Hearing of M. William Cowan, 224 N.J. Super. 737 (App. Div. 1988) (Court proceeded to the merits in tenure proceeding against teacher charged with verbal and physical abuse of students, despite overlength appeal brief that "blatantly violates the Rules of Court." The Court noted that the appeal would have been dismissed "were it not for the transcendent importance of the substantive issues raised in the appeal."); Elmora Savings and Loan Association, supra (Court proceeded to the merits, despite out-of-time filing of appeal brief, "in view of the defense raised" where appellant, wife of career serviceman, claimed benefit of the Soldiers' and Sailors' Relief Act of 1940 in a mortgage foreclosure action in which her husband did not wish to oppose the action).

Although it involved a statutory rather than a regulatory time limit for filing, we note the case of Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), in which the Appellate Division affirmed the State Board's dismissal of an appeal where the notice of appeal was filed, in the Court's calculations, one day out of time. The Court found that even if N.J.S.A. 18A:6-8 could be construed to permit enlargement of the time for filing an appeal, the petitioner had failed to establish good cause.

Our regulations concerning the time for filing of appeal briefs are clear and unambiguous, and the great majority of the members of the Bar act in full compliance therewith. It is unusual for a situation to arise which we find to be sufficiently flagrant to warrant dismissal of an appeal for failure to file an appeal brief within the time limit imposed by regulation. However, our rules are not to be taken lightly, and violations cannot and will not be tolerated. It is a simple matter to request an extension of time "[b]y notice to the Legal Committee of the State Board of Education." N.J.A.C. 6:2-1.5.

This matter is distinguished from Wilson v. New Jersey State Department of Education, decided by the State Board of Education, August 2, 1989, recon. den., October 4, 1989, rev'd, Docket #A-536-89T5 (App. Div. 1990), decision on remand by the State Board, December 5, 1990, appeal pending (App. Div.), in which the Court directed that appellant's untimely appeal brief be accepted for filing by the State Board. In that case, the Court found that the brief was filed either four or twelve days late, depending on what was considered as the filing date,[1] and that appellant therein was treated differently from litigants in other cases in that he had not received written notice from the State Board that the brief had not been filed and that the appeal would be dismissed if it were not received by a specific date.

In the instant case, Petitioners' brief in support of their appeal was required to be filed by March 6, 1991. Despite notice to Petitioners' counsel on March 8 that no brief had been filed and that the matter was therefore being referred to our Legal Committee, a brief was not filed until April 1, 25 days after it was due and 23 days after late notice from the State Board. Petitioners' counsel does not challenge the March 6 due date, nor has he provided any basis for relaxation of the rules. See N.J.A.C. 6:2-1.19. At no time was a filing extension requested, and counsel has offered no explanation for the late filing.

---

[1] We note that the due date for the appeal brief was in dispute in that the appellant's notice of appeal had originally been sent by facsimile transmission, and an original signed copy of an amended notice was subsequently filed.

Nor do we find this case to present us with a matter of public or transcendent importance warranting a determination on the merits.

Therefore, under the circumstances, we dismiss the appeal in this matter for failure to perfect, pursuant to N.J.A.C. 6:2-1.12(a).

May 1, 1991

MAURICE KAPROW,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY, OCEAN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November, 29, 1989

For the Petitioner-Appellant, Lomurro, Davison, Eastman & Munoz (John J. Ross, Esq., of Counsel)

For the Respondent-Respondent, Gelzer, Kelaher, Shea, Novy & Carr (Milton H. Gelzer, Esq., of Counsel)

For the Intervenor Robert Ciliento, Thomas E. Monahan, Esq.

For the Intervenor Sheila McGuckin, Dasti & Murphy (Gregory P. McGuckin, Esq., of Counsel)

For the Intervenor Paul Polito, New Jersey Principals and Supervisors Association (Wayne J. Oppito, Esq., of Counsel)

For the Intervenors Elementary Teaching Staff Members, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

In October 1976, the Board of Education of the Township of Berkeley (hereinafter "Board") employed Maurice Kaprow (hereinafter "Petitioner") as assistant superintendent in charge of curriculum. Petitioner also served as principal of the Board's summer school from 1977 through 1980. From February 10, 1980 through September 1, 1980, he served as acting superintendent of schools. On February 5, 1980, the Board changed Petitioner's job title to assistant superintendent. His assignment was abolished as the result of a reduction in force ("RIF") effective June 30, 1981.

On September 9, 1986, the Board appointed Intervenor Robert Ciliento as assistant superintendent for administrative services. On July 1, 1987, the Board appointed Intervenor Sheila McGuckin as district supervisor of elementary education. Intervenor Ciliento remained in his assignment until July 1, 1987 when be was appointed superintendent of schools. His assistant superintendent assignment remained vacant thereafter.

On February 23, 1988, Petitioner inquired of the Board regarding positions established subsequent to his RIF. By letter dated February 23, the Board Secretary advised Petitioner of the aforementioned appointments of Intervenors Ciliento and McGuckin and the effective dates thereof.[1]

On February 28, Petitioner wrote to the Board Secretary asserting his entitlement by virtue of tenure to the assistant superintendent and district supervisor of elementary education assignments. Receiving no reply from the Board, Petitioner wrote again on April 25, reiterating his tenure rights to those assignments and requesting a response by May 16. On June 14, the Board's legal counsel wrote to Petitioner stating that there was no basis for his claim.

On August 1, 1988, Petitioner filed a petition of appeal with the Commissioner alleging that the Board violated his tenure and seniority rights by employing other individuals as district supervisor of elementary education and assistant superintendent for administrative services. Petitioner alleged that the district supervisor assignment required substantially the same duties and responsibilities as his abolished assignment. On February 9, 1989, Petitioner filed an amended petition in which he also alleged that the 1981 RIF was improper and not undertaken for the reasons articulated by the Board, and that his tenure rights were violated when the Board employed non-tenured individuals as teachers, superintendent of schools and other assignments for which he held the appropriate certification.[2]

As the result of Petitioner's claims, 31 elementary teaching staff members, an elementary principal, the District Supervisor of Elementary Education and the Superintendent of Schools were permitted to intervene in this matter.

On October 12, 1989, an Administrative Law Judge ("ALJ"), acting on cross motions for summary decision filed by Petitioner and the Board, recommended a grant of partial summary decision against Petitioner and in favor of Intervenor Ciliento; Intervenor Polito, a principal in the district; and the 31 intervening elementary teaching staff members. The ALJ concluded that Petitioner had acquired tenure status and seniority only in the "position of Assistant Superintendent in Charge of Curriculum," and thus had no tenure status, seniority or entitlement to positions as a teacher, principal or superintendent.

---

1 We note that Petitioner was not notified by the Board of the availability of these assignments or of the appointments thereto until his inquiry to the Board in February 1988.

2 We note that Petitioner did not allege to have served or achieved tenure in such positions, but, rather, maintained that he had achieved tenure as an assistant superintendent and possessed certification as an elementary school teacher, school administrator, supervisor and principal.

The ALJ also recommended dismissal of Petitioner's allegation that the Board's action to abolish his assignment in 1981 was for reasons other than economy, finding that Petitioner had failed to advance any facts or proofs in support thereof. However, the ALJ recommended proceeding to hearing on the issue of Petitioner's entitlement to the assistant superintendent for administrative services and district supervisor of elementary education assignments, concluding that there were material issues of fact regarding the similarity of those assignments to his former service as assistant superintendent.

On November 29, 1989, the Commissioner, disagreeing to a large extent with the ALJ's reasoning, modified the ALJ's grant of partial summary decision and dismissed the petition, directing only that the Board reemploy Petitioner in the first-available assistant superintendent assignment falling within the scope of his certificate. The Commissioner concurred with the ALJ's rejection of Petitioner's claims to the superintendent, principal and teaching assignments, rejecting the notion that tenure attached to every endorsement on every certificate held by a teaching staff member regardless of the position in which he or she had acquired tenure. The Commissioner directed dismissal of Petitioner's allegation regarding the abolition of his original position for failure to timely file under N.J.A.C. 6:24-1.2, and disagreed with the ALJ's conclusion that Petitioner might have entitlement to assignment as district supervisor of elementary education based on a possible identity of duties with his former assignment, stating that "supervisor" was a separately tenurable position in which Petitioner had never served.

Although the Commissioner concurred with the ALJ's summary dismissal of petitioner's claim to tenure as a principal, he added that it was unclear from the record whether the summer school principalship was merely an extension of Petitioner's duties as assistant superintendent or constituted a distinct appointment to a separately tenurable position. The Commissioner concluded that Petitioner would not have acquired separate tenure in either case, asserting that in the first event, his service would have attached to his tenure as assistant superintendent, while in the second, he would not have served sufficiently long to acquire tenure under either N.J.S.A. 18A:28-5 or 18A:28-6.

The Commissioner also concluded that the ALJ erred in specifying that Petitioner had acquired tenure only as an assistant superintendent for curriculum, pointing out that "assistant superintendent" is a separately tenurable position under N.J.S.A. 18A:28-5 and that Petitioner's tenure protection therein extended to any assistant superintendent assignment within the scope of his certificate. Thus, the Commissioner concluded, Petitioner was entitled to assignment as assistant superintendent for administrative services if that assignment, vacant since 1987, were to be filled at any later date. Since the Board was not presently utilizing any assistant superintendencies within the scope of Petitioner's certificate, the Commissioner concluded that it was not necessary to address the timeliness of Petitioner's tenure claims.

Petitioner has filed the instant appeal from the Commissioner's decision.

After a thorough review of the record, we dismiss in its entirety Petitioner's appeal of the Board's actions for failure to timely file under N.J.A.C. 6:24-1.2.

We disagree with the Commissioner that under the circumstances it was not necessary to address the timeliness of Petitioner's tenure claims. Petitioner alleges that the Board violated his tenure rights when it employed non-tenured individuals in assignments to which he claims entitlement, and he requests reinstatement and back pay as a result of such alleged violations. Since N.J.A.C. 6:24-1.2 is applicable to claims arising out of alleged violations of statutory tenure rights, Polaha v. Buena Regional School Dist., 212 N.J. Super. 628, 633 (App. Div. 1986), decided on remand by the Commissioner of Education, November 20, 1986, rev'd by the State Board of Education, March 2, 1988, aff'd, Docket #A-3799-87T8 (App. Div. 1989); Cade v. Board of Education of the Township of Ewing, decided by the State Board of Education, January 3, 1990, aff'd, Docket #A-2881-89T5 (App. Div. 1990); Chammings v. Board of Education of the Township of Rockaway, decided by the State Board of Education, January 3, 1990, and Petitioner alleges that specific action by the Board in employing non-tenured individuals violated his rights, it is necessary to address whether his claims were filed in a timely manner.

N.J.A.C. 6:24-1.2(b) provides that petitions shall be filed with the Commissioner "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing."

We reject Petitioner's attempt to characterize the June 14 letter from the Board's legal counsel as the "final action" from which the 90-day period of N.J.A.C. 6:24-1.2(b) should begin to run. The February 23 letter from the Board Secretary provided Petitioner with clear and unambiguous notice of the final action by the Board which is the subject of Petitioner's appeal -- the employment of individuals allegedly in violation of his tenure and seniority rights. Thereafter, Petitioner merely sought, without success, to have such alleged violations corrected by the Board and to be reinstated with back pay. However, where a cause of action has accrued under the education laws as the result of board action, an individual's attempt to negotiate with the board so as to alter its determination does not in itself toll the period of limitations established by N.J.A.C. 6:24-1.2. Polaha, supra.

As we explained in Polaha:

> Under the education laws, a cause of action accrues and the time period for filing commences when a petitioner has notice of a final action by a board that is the subject of a dispute. N.J.A.C. 6:24-1.2. Where a petitioner has had adequate notice, any negotiations are aimed at

> altering the final determination of the board upon which his cause of action is based. Although a petitioner may in some instances successfully negotiate so as to alter that determination, such attempts can not be viewed as compelling excusal from the procedural requirements that must be met in order to entitle him to adjudication of his legal rights. To hold otherwise would seriously undermine the purpose for which those requirements are imposed.

Id., State Board decision, at 5.

Thus, Petitioner was on notice of the Board's actions with regard to Intervenors Ciliento and McGuckin upon receipt of the February 23 letter,[3] and his claim to those assignments, filed over five months later on August 1, was time-barred under N.J.A.C. 6:24-1.2.

Nor do we find any circumstances surrounding Petitioner's claims, as were present in Polaha, to warrant relaxation of the 90-day filing requirement under N.J.A.C. 6:24-1.17. Petitioner was fully aware of his claim to the assistant superintendent and district supervisor assignments upon receipt of the February 23 letter, which was clear and unambiguous notice of final action by the Board in appointing Intervenors Ciliento and McGuckin thereto.

Moreover, in his April 25 letter to the Board following up his February 28 letter to which he received no response, Petitioner expressed interest in amicably resolving this matter, adding: "Therefore, I would appreciate hearing from the Board by May 16, 1988." Such deadline established by Petitioner was approximately one week prior to the expiration of the 90-day period running from receipt of the February 23 letter. Yet, despite the fact that he received no response until June 14, Petitioner failed to file the instant action until August 1, more than five months after receipt of the February 23 letter and 2½ months after the deadline he established for a Board response.

As to Petitioner's allegation of violation of his tenure rights in the Board's employment of a non-tenured principal, superintendent of schools and teachers since the time of his RIF, we also find those claims time-barred by N.J.A.C. 6:24-1.2, and find no circumstances warranting relaxation. Moreover, we note our agreement with the Commissioner's assessment of Petitioner's tenure rights. "Assistant superintendent" is a separately tenurable position under 18A:28-5, and subsequent to his achievement of tenure

---

[3] We note that Petitioner received notice of the appointments to the assistant superintendent for administrative services and district supervisor of elementary education assignments no later than February 28, 1988 since on that date he sent a letter to the Board Secretary acknowledging such information and claiming entitlement to those assignments.

therein, Petitioner was entitled to tenure protection following a reduction in force in any assignment within that tenurable position for which he was qualified by virtue of his certification as against individuals who were not tenured as assistant superintendents. See Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988); Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987); Herbert v. Board of Education of the Township of Middletown, decided by the State Board of Education, August 1, 1990, appeal pending (App. Div.).

As stressed by the Commissioner, such protection would not extend to assignments within the purview of other separately tenurable positions in which Petitioner had not achieved tenure pursuant to N.J.S.A. 18A:28-5 or 18A:28-6. Tenure is achieved within a "position," Howley v. Bd. of Ed. of Ewing Township, decided by the Commissioner of Education, 1982 S.L.D. 1328, aff'd by the State Board of Education, 1983 S.L.D. 1554, and tenure protection following a reduction in force extends to any assignment within that tenured position for which the individual is qualified by virtue of his or her certification as against non-tenured individuals. See Bednar, supra; Capodilupo, supra; Herbert, supra.

Furthermore, we reject Petitioner's argument that N.J.S.A. 18A:28-12 would give him entitlement to such other assignments. N.J.S.A. 18A:28-10 provides that dismissals in a RIF shall be made on the basis of seniority. N.J.S.A. 18A:28-12 further effectuates tenure and seniority rights by providing that tenured teaching staff members who are dismissed in a RIF shall be placed upon a preferred eligibility list in order of seniority for reemployment when a vacancy occurs in a position for which they are qualified. Petitioner does not claim seniority rights to such assignments, but asserts that the language of N.J.S.A. 18A:28-12 gives him entitlement by virtue of his tenure as an assistant superintendent to assignments within other tenurable positions for which he has the appropriate certification until an assignment as assistant superintendent becomes available.

However, as previously stated, tenure is achieved within a "position" and tenure protection attaches only to assignments for which the staff member holds proper certification within the scope of the position in which tenure was actually achieved. Seniority is an incident of tenure, and Chapter 28 of Title 18A, creating the concept of seniority as a means of ranking the job rights inter sese of tenured staff members affected by a reduction in force, does not purport to create employment rights for non-tenured individuals. Bednar, supra, at 242. Seniority rights vest only in regulatory categories within positions in which tenure has been achieved, and N.J.S.A. 18A:28-12 cannot be read to confer reemployment rights on staff members in assignments within positions in which they have not achieved tenure. Thus, since Petitioner has no tenure rights within the separately tenurable positions of superintendent, principal or teacher, he cannot claim entitlement to such assignments by virtue of N.J.S.A. 18A:28-12.

We also agree with the Commissioner's dismissal of Petitioner's claim regarding the abolition of his position in 1981 for failure to timely file. Petitioner has neither alleged nor demonstrated circumstances explaining the nearly eight-year delay or justifying relaxation of the 90-day rule.

We therefore affirm the Commissioner's ultimate determination to dismiss Petitioner's appeal in its entirety, but modify in part the basis for such determination. In addition, although we recognize that Petitioner might have entitlement by virtue of tenure to employment as an assistant superintendent should such a vacancy arise in the future, see Schienholz v. Board of Education of the Township of Ewing, decided by the State Board of Eduation, February 7, 1990, aff'd, Docket #A-2905-89T3 (App. Div. 1990), we decline at this point to address his possible future entitlements on the basis of the record now before us.

Attorney exceptions are noted.
Ronald K. Butcher and Bonnie Green abstained.
January 9, 1991

Pending Superior Court

ARTHUR KRUPP,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, March 25, 1991

For the Petitioner-Appellant, Dwyer & Canellis
(Paul J. Burns, Esq., of Counsel)

For the Respondent-Respondent, Weinberg & Kaplow
(Richard J. Kaplow, Esq., of Counsel)

On November 7, 1990, the Board of Education of Union County Regional High School District No. 1 voted to appoint an individual from outside the District as head Girls Basketball Coach at Johnson Regional High School. Petitioner, who is employed as a teaching staff member in the District, challenged that action by Petition of Appeal filed on his behalf by counsel on February 27, 1991, although pursuant to N.J.A.C. 6:24-1.2(b), he was required to file by February 8. By letter decision of March 25, 1991, the Commissioner, finding "no sufficient compelling reason" to relax the filing requirements as permitted by N.J.A.C. 6:24-1.15, dismissed the petition.

After carefully reviewing the circumstances surrounding this filing, we reverse that determination. Petitioner's counsel represents that Petitioner sought legal assistance shortly after the Board's action and that he agreed to the filing of a petition to the Commissioner, believing that such filing was being effectuated by the attorney responsible for the case. That attorney left the law firm in late January. In February, Petitioner contacted the firm to ascertain the status of his petition, at which point the firm discovered that the petition had not been filed. Counsel then filed the petition, along with his certification that the failure to file within the time period prescribed by N.J.A.C. 6:24-1.2(b) was "a result of an inadvertent error and oversight on the part of our law firm and ... not the result of any actions by the Petitioner...."

In view of the particular circumstances here, we relax the filing requirement and remand this matter to the Commissioner. Under the circumstances, we find that it would be contrary to the interests of justice to deprive Petitioner of the opportunity to have the merits of his case decided by this agency because the law

firm inadvertently failed to fulfill its responsibilities toward him. Nor would it serve the interests of the judicial system were our agency to refuse to remedy the situation at this point, especially given the candidness with which counsel has presented the circumstances to us.

S. David Brandt and John Klagholz opposed.

August 7, 1991

CATHERINE LAMMERS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, October 30, 1990

For the Petitioner-Respondent, Klausner & Hunter
(Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Appellant, Novins, York, DeVincens & Pentony (James P. Brady, Esq., of Counsel)

Catherine Lammers (hereinafter "Petitioner") was a tenured teaching staff member whose assignment as a teacher of English-secondary was abolished by the Board of Education of the Borough of Point Pleasant (hereinafter "Board") on June 30, 1989 as the result of a reduction in force ("RIF"). On August 10, 1989, the Board approved the employment of a non-tenured individual, Sandra Anthony ("Anthony"), as a middle school teacher of English for the 1989-90 school year. Anthony was given a standard teacher's contract and placed on the first step of the bachelor's degree column of the district's negotiated salary guide. The words "LONG TERM SUBSTITUTE" were written on the top of the document.

Petitioner subsequently alleged that the Board's employment of Anthony violated Petitioner's tenure and seniority rights. The Board countered that Petitioner's rights were not violated in that Anthony had been employed as a long-term substitute for a teacher on maternity leave and that, consequently, no position vacancy existed to which Petitioner would have entitlement. The parties agreed that the case could be decided on cross-motions for summary decision.

On September 20, 1990, an Administrative Law Judge ("ALJ") determined that the Board's action had violated Petitioner's tenure rights. Finding that the evidence established that Anthony was employed with all the emoluments and benefits afforded the Board's regular teaching staff members, the ALJ concluded that the legend "Long Term Substitute" emblazoned on her employment contract lost all legal significance for purposes of Petitioner's claim. The ALJ noted that the Board had enrolled Anthony in the Teachers' Pension and Annuity Fund ("TPAF") and engaged her for the full 1989-90 school year.

While acknowledging that Anthony's employment status as a substitute or a regularly employed teacher could not be reached on the record, the ALJ found that the record was sufficient to conclude that Anthony was employed by the Board in a manner which treated her as a regularly employed teacher. The ALJ concluded that Petitioner's tenure rights entitled her to employment with the Board for 1989-90 in the same manner and with the same benefits afforded Anthony. Accordingly, the ALJ recommended that the Board be directed to pay Petitioner that salary which she would have earned during the 1989-90 school year, along with benefits and emoluments.

On October 30, 1990, the Commissioner adopted with clarification the ALJ's decision. The Commissioner concurred with the ALJ that Petitioner was entitled by virtue of her tenure status to the assignment given to Anthony, maintaining that it was of no import that the assignment in question resulted from a leave of absence as opposed to a vacancy. The protection envisioned by the tenure laws, the Commissioner asserted, did not permit a district to ignore the presence of a properly certified teacher on its preferred eligibility list when an assignment within the scope of his or her certification became available for any reason.

The Commissioner qualified the ALJ's decision by noting that the scope of employment of persons holding county substitute certificates is strictly limited as to time, benefits and permissibility pursuant to N.J.A.C. 6:11-4.4, and that the county substitute certificate is not the generally accepted credential for substitutes employed pursuant to N.J.S.A. 18A:16-1.1. The Commissioner also stressed that regardless of how a district views its organizational arrangement, departmentalized seventh and eighth grades are specifically classified as "secondary" rather than "elementary" for employee entitlement purposes, pursuant to N.J.A.C 6:3-1.10(1)19 and 20.

After a thorough review of the record, we reverse the decision of the Commissioner and dismiss the petition.

N.J.S.A. 18A:28-12 provides that:

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

In Mirandi v. Board of Education of the Township of West Orange, decided by the State Board of Education, April 5, 1989, we recognized that that statute also controls reemployment by virtue of tenure of a teaching staff member dismissed in a RIF.

It is well established, however, that an assignment which is temporarily unoccupied by an absent teaching staff member does not constitute a "vacancy." That distinction was made clear in Sayreville Educ. Ass'n v. Board of Educ., Etc., 193 N.J. Super. 424 (App. Div. 1984), construing N.J.S.A. 18A:16-1.1, which authorizes district boards to "designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee..." The court stated:

> We construe the authorization of this provision [N.J.S.A. 18A:16-1.1] as applying when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis....If that other employee has, however, terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply....Again the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent. (Emphasis added.)

Sayreville, supra, at 428.

It is undisputed in this case that Anthony was assigned to act in place of a teacher on an approved maternity leave. Thus, the place for which Anthony was employed was not vacant but only temporarily unoccupied by its incumbent, whose return to duty was contemplated. Since N.J.S.A. 18A:28-12 expressly limits reemployment rights for teaching staff members on preferred eligibility lists to "vacancies occurring in positions for which such person is qualified" (emphasis added), Petitioner would have no entitlement under this statute to employment in an assignment in which she would be filling the place of a regular teacher who was temporarily absent, nor has she cited any other provision of the school laws that would give her such entitlement. The fact that the controverted assignment was for a full academic year is of no moment. Although Sayreville makes it clear that a vacant position cannot be filled by use of a substitute on a long-term basis, there is no such constraint on a position which is filled as the result of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated.

Petitioner argues additionally, however, that notwithstanding the "Long Term Substitute" label on the employment contract, Anthony was treated like a regular teaching staff member by the Board, and, consequently, was not employed as a substitute within the intendment of N.J.S.A. 18A:16-1.1. While not disputing the fact that Anthony was employed to act in the place of an absent teacher, Petitioner predicates her argument on the fact that Anthony

was provided with the salary and other benefits afforded regular teaching staff members, including enrollment in the Teachers' Pension and Annuity Fund, thereby belying the Board's assertion that she was a long-term substitute.

We conclude, however, that under the circumstances, such treatment did not alter the nature of Anthony's assignment or demonstrate that the Board's employment of Anthony was a pretextual device for circumventing Petitioner's tenure and seniority rights.

In support of her position, Petitioner cites, inter alia, Panettieri v. Board of Education of the County of Emerson, Docket #A-373-89T1 (App. Div. 1990), in which the court permitted a teacher's service under a regular teaching staff contract in his first year of employment to be credited towards his acquisition of tenure, notwithstanding the fact that he was employed during his first year in the district to act in place of an absent teacher.[1] However, as pointed out by the court, the petitioner therein served under three consecutive contracts which were identical in form (the last of which was expressly labeled "3rd Contract"), and there was "nothing on the face of the [first] contract itself remotely suggesting that it was anything but a regular teaching appointment for the periods it encompassed." Id., slip op. at 3. That first contract, the court stressed, was a "regular unqualified teaching contract" which "in no way memorialized any differentiation between that contract and all [of the board's] other regular contracts." Id., slip op. at 7. "[T]he tenure laws and their public purpose would not be advanced," the court concluded, "by permitting a local board of education to repudiate the facial contractual relationships between it and its teaching staff members." Id., slip op. at 6. As pointed out by the court, the district board could have employed petitioner under a "long-term substitute's contract, making clear his temporary status pursuant to N.J.S.A. 18A:16-1.1." Id., slip op. at 3.

In the instant matter, it is not Anthony claiming that her service as a long-term substitute in 1989-90 should be creditable for tenure achievement purposes, but rather Petitioner who claims that the Board's treatment of Anthony like a regular teaching staff member evidenced the pretextual nature of the Board's action in not giving her the assignment. In any event, no such contractual relationship existed in this case. As noted, it was plainly specified on the face of Anthony's 1989-90 contract that she was employed as a "Long Term Substitute." Moreover, it is clear from the record that the Board did not confer upon Anthony the benefits of tenure, and we cannot conclude on the basis of the record before us that the Board's characterization of the assignment was

---

[1] We note that N.J.S.A. 18A:16-1.1 provides that employees acting in the place of another may not acquire tenure in such employment.

inconsistent with the circumstances or that the employment of Anthony was a pretextual device for circumventing Petitioner's tenure and seniority rights.[2]

A review of the regulations governing certification indicates that a substitute teacher may serve for more than 20 consecutive days in the same position in the district only if he or she holds a standard instructional certificate and the employment is within the scope of that certificate. The holder of a county substitute certificate who does not possess a standard instructional certificate may not serve in one position for more than 20 consecutive days, N.J.A.C. 6:11-4.5(c), and even the holder of a standard instructional certificate is expressly barred from serving as a substitute in areas outside the scope of his or her certificate for more than 20 consecutive days. N.J.A.C. 6:11-4.5(f). There is no such proscription, however, on such individual's service as a substitute within the scope of his or her instructional certificate.

N.J.S.A. 18A:1-1 defines teaching staff member as:

> ...a member of the professional staff of any district or regional board of education,...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...

Inasmuch as a substitute employed in one position for more than 20 consecutive days must possess a standard certificate appropriate thereto, such employment constitutes service as a teaching staff member within the definition of N.J.S.A. 18A:1-1.[3] Consequently,

---

[2] We note, in assessing the Board's specific treatment of Anthony, that under the terms of a negotiated agreement for the 1988-89 and 1989-90 academic years between the Board and the Point Pleasant Education Association, individuals hired before January 1 to take the place of teachers granted leave during the course of a school year were to be issued a regular teacher's contract and were entitled to "all benefits thereof."

[3] We note that the employment situation herein differs from that in Rumson-Fair Haven Education Association, et al. v. Board of Education of the Rumson-Fair Haven Regional School District, decided by the State Board of Education, August 5, 1987, aff'd, Docket #A-291-89T8 (App. Div. 1988), in which "permanent substitutes" were found not to have status as teaching staff members. The "permanent substitutes" in that case were certified teachers who were employed on a contractual basis for the entire school year to substitute as assigned by the principal for various absent teaching staff members. There was no claim that the board therein had assigned any "permanent substitute" to the same position for more than 20 consecutive days. Thus, that case did not present the issue of a substitute assigned to one position for an extended period of time.

individuals serving in such capacity who possess the appropriate certification have the same statutory entitlements as regular full-time teaching staff members, except for those which are expressly exempted by statute.[4] Among those entitlements, N.J.S.A. 18A:29-5 provides for payment of a minimum annual salary of $18,500 to full-time teaching staff members except for those who are employed as substitutes on a day-to-day basis. As noted by the Appellate Division in Rumson-Fair Haven, supra, that statute was designed to attract and retain qualified permanent teachers and substitutes performing long-term teaching assignments. The school laws do not preclude a district board from contractually providing such individuals with salary amounts beyond the statutory minimum. Since Anthony was not employed as a short-term or day-to-day substitute, she was entitled to the protection of that statute, and was in no way precluded from placement on the district's salary guide or from receiving certain other benefits afforded teaching staff members.

Nor does the enrollment of Anthony in the Teachers' Pension and Annuity Fund alter our decision.[5] Such action did not vitiate the basic nature of Anthony's employment as a long-term substitute acting in the place of a temporarily absent teacher. And, as averred by the Superintendent of Schools in an affidavit whose facts were not disputed or challenged by Petitioner, the Board had routinely enrolled substitute teachers in the TPAF since at least 1982. Although, under the circumstances of this case, we do not find such action to have evidenced the Board's circumvention of Petitioner's tenure and seniority rights, in light of the Superintendent's admission, we admonish the Board against continuation of such practice.

Thus, while we do not intend to imply that the employment of an individual whom a district board characterizes as a "long-term substitute" could never be found to be, in actuality, a pretextual device for circumventing a tenured teacher's rights, we cannot

---

[4] We note, for example, that N.J.S.A. 18A:16-1.1 specifically excepts substitutes from tenure eligibility. We note further that, by virtue of N.J.S.A. 18A:29-1, a teacher holding only a substitute's certificate may not be compensated at the level of a full-time teaching staff member, even if the substitute is performing the functions of a full-time teacher. Toomey v. Board of Education of the City of Newark, Docket #A-4709-89T2 (App. Div. 1991).

[5] We note that substitute teachers are not deemed to be "teachers" eligible for membership in the Teachers' Pension and Annuity Fund. N.J.S.A. 18A:66-1 et seq..

conclude on the basis of the record before us that the Board's employment of Anthony was such a device.[6]

Accordingly, for the reasons expressed herein, we dismiss the petition.

Bonnie J. Green opposed.
Attorney exceptions are noted.
June 5, 1991
Pending Superior Court

---

[6] We note, in response to Petitioner's exceptions citing the unpublished decision in Middletown Township Education Association v. Board of Education of the Township of Middletown, decided by the Commissioner of Education, September 22, 1980, aff'd, State Board of Education, March 4, 1981, aff'd, Docket #A-3167-80T1 (App. Div. 1983) in support of her position, that Middletown followed Point Pleasant Beach Teachers' Ass'n v. Callam, 173 N.J. Super. 11, certif. den., 84 N.J. 469 (1980), which was subsequently overruled by the Supreme Court in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The court in Point Pleasant had considered, inter alia, the conduct of the parties and policy considerations in determining whether a teacher was entitled to tenure. In Spiewak, the court stressed that tenure is an express statutory right, eligibility for which is based upon specific conditions in the statute, and pointed out that the court in Point Pleasant had erroneously focused on the subjective intent of the parties rather than the objective statutory criteria.

JOSEPH MOORE,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 11, 1990

For the Petitioner-Appellant, Lake & Schwartz
(Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, Ashley & Charles
(Thomas R. Ashley, Esq., of Counsel)

For the reasons set forth in his letter decision of September 11, 1990, the State Board of Education affirms the decision of the Commissioner dismissing the Petition of Appeal in this case for failure to state a claim. In so doing, however, we reject Respondent's contention that N.J.S.A. 18A:27-3.1 affords district boards of education the latitude to evaluate non-tenured teaching staff members only once a year. Respondent's Brief, at 3. To the contrary, the terms of the statute clearly and unambiguously require that non-tenured teaching staff members must be observed and evaluated at least three times each year, with at least one of those evaluations taking place each semester.

February 6, 1991

Pending Superior Court

ELISE MORGAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 6, 1991

For the Petitioner-Appellant, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Fogarty & Hara
(Stephen R. Fogarty, Esq., of Counsel)

On February 15, 1991, Elise Morgan (hereinafter "Petitioner"), a tenured teaching staff member with instructional certification in social business studies, social studies, accounting and typewriting, filed the instant petition with the Commissioner of Education, alleging that the Board of Education of the Township of Wayne (hereinafter "Board") had improperly assigned her to teach junior high school courses in computer applications data base and spreadsheets. Petitioner maintained that her certification did not authorize her to teach such courses.

On March 6, 1991, following the Board's filing of an answer and amended answer, the Commissioner dismissed the petition pursuant to N.J.A.C. 6:24-1.9 for failure to state a cause of action. Citing South River Education Association et al. v. Board of Education of the Borough of South River, decided by the State Board of Education, November 7, 1987, aff'd, Docket #A-1695-87T8 (App. Div. 1990), the Commissioner stated in his letter decision that there was "no specific endorsement required pursuant to N.J.A.C. 6:11-6.2 to teach computer courses" and that "qualifications for such assignments, beyond basic instructional certification, are solely at the discretion of local school districts provided they are not used to defeat tenure rights during a reduction in force." Noting that the Board was apparently satisfied that Petitioner was qualified to teach the courses assigned to her, the Commissioner concluded that Petitioner had no cause of action on the grounds of improper certification.

After a review of the record before us, we reverse the Commissioner's determination and remand for further proceedings.

We find the Commissioner's reliance on South River, supra, for the broad proposition that there is "no specific endorsement required pursuant to N.J.A.C. 6:11-6.2 to teach computer courses" to be misplaced. Petitioners in South River, dismissed teachers on a

preferred eligibility list, challenged the district board's requirement that individuals teaching a K-5 computer literacy course hold an elementary certification and also possess nine academic credits in computer science. The Appellate Division affirmed the State Board's determination that the district board did not have the prerogative to impose such an additional requirement so as to preclude claims to the assignment based on seniority. In analyzing the appropriate certification for the specific assignment at issue therein, the State Board concurred with the Administrative Law Judge's finding that the certification regulations contained no endorsement specifically authorizing the teaching of computer literacy in the elementary schools.

Such determination, however, was predicated on the particular facts in that case, involving a K-5 computer literacy course, and cannot be read to represent the broad general principle that a specific endorsement will never be required in order to teach particular courses involving computers. Indeed, as pointed out by the Petitioner herein, N.J.A.C. 6:11-6.2(a)(4)(iii), a subsection under the general heading "Business education," provides for a specific endorsement authorizing the teaching of data processing, which is indicated therein to include "keypunching, unit record operation, computer operation, programming and technology."[1]

Although the limited record before us provides few details regarding the specific subject matter required to be taught in the controverted computer applications data base and spreadsheet courses assigned to Petitioner, the course title and grade levels involved differ significantly from those in South River and suggest the utilization of computers by older students in a business context. Under such circumstances, and in light of the existence of the data processing endorsement, we cannot conclude as a matter of law that Petitioner has failed to state a cause of action for which relief may be granted.

Thus, inasmuch as we find additional proceedings to be warranted, we reverse the Commissioner's dismissal of the petition and remand this matter to him for further proceedings in accordance with our determination herein. We stress in so doing that we make no findings with regard to the merits of Petitioner's claim. Nor do we preclude the entry of summary judgment against the Petitioner pursuant to the procedures outlined in N.J.A.C. 6:24-1.13 if the Board hereafter demonstrates its entitlement thereto as a matter of law.

Attorney exceptions are noted.
November 6, 1991

---

[1] We note that in a memorandum to Petitioner dated December 4, 1990 advising her that other teachers would initially assist her in developing the skills necessary to teach the classes in issue, the eighth grade computer applications course was described as "consisting of primarily data processing and spread sheets." Petition of Appeal at Exhibit B.

ARTHUR PAGE,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, AND BARBARA ANDERSON, COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, October 22, 1990

For the Petitioner-Appellant, Lake & Schwartz (Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent Trenton Board of Education, Green & Dzwilewski (Jacob Green, Esq., of Counsel)

For the Respondent-Respondent Barbara Anderson, Nancy Kaplen Miller, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

This matter arises from a petition filed by Arthur Page (hereinafter "Petitioner") challenging an investigative report issued by the Mercer County Superintendent of Schools on alleged violations of the Corrective Action Plan in place in the Trenton School District. Such report was issued pursuant to a directive of the Commissioner of Education in a decision dated January 9, 1990 involving the instant parties.

In a letter decision dated October 22, 1990, the Commissioner dismissed the instant petition, rejecting Petitioner's allegations that the report did not conform with the directives of his January 9, 1990 decision and dismissing on the basis of res judicata other allegations in the petition which were determined in his earlier decision. Petitioner filed a notice of appeal to the State Board of Education on November 16, 1990.

Pursuant to N.J.A.C. 6:2-1.11(a), Petitioner's brief in support of his appeal was due on December 6, 1990. Upon his request, Petitioner was granted an extension until December 21. On December 21, however, Petitioner requested that the briefing schedule be placed in abeyance pending settlement negotiations. Such request was granted.

On May 23, 1991, counsel for Petitioner, in response to a telephone call from the State Board Appeals Office requesting status information, indicated that he would inform the State Board of the

status of this case by June 1. No such information, however, was thereafter provided, and by letter dated July 15, Petitioner was notified to apprise the State Board of the status of this matter by July 22 or it would be referred to the Legal Committee of the State Board for consideration of the effect of his failure to perfect the appeal or to otherwise preserve his rights.

Petitioner, however, has still failed to advise us of the status of this case, which has been held in abeyance since December 1990, or to file a brief in support of his appeal. Nor has he requested any further extensions or provided any explanation for the delay.

The State Board of Education therefore dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).

September 4, 1991

Pending Superior Court

BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BUREAU OF PUPIL TRANSPORTATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION AND PASSAIC COUNTY SUPERINTENDENT OF SCHOOLS, PASSAIC COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 25, 1989

Decision on motion by the State Board of Education, March 7, 1990

For the Petitioner-Cross/Appellant, Podvey, Sachs, Meanor & Catenacci (Robert L. Podvey, Esq., of Counsel)

For the Respondent-Appellant, Arlene G. Lutz, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

This matter arose from a review of the operations of the School District of Paterson (hereinafter "Paterson" or "the District") conducted during the 1987-88 school year as part of Level III monitoring pursuant to N.J.S.A. 18A:7A-14(c). In conjunction with that review, an auditor from the Bureau of Auditing of the Department of Education's Division of Compliance reviewed the bus transportation contracts which had been entered into by the District in prior years. The audit indicated that the Board of Education of the City of Paterson (hereinafter "Board") had entered into transportation contracts for 1983-84, 1984-85 and 1985-86 that had been bid on the basis of more than one bus per route, i.e., multi-bus contracts, contrary to N.J.A.C. 6:21-13.2.

On May 19, 1988, when the Department of Education's (hereinafter "Department") auditor had completed the audit, he, with another of the Department's auditors and the Division's Chief Auditor, met with the Paterson Board's Secretary, Transportation Coordinator and the District's Internal Auditor. At that time, the auditors indicated the results of their review and advised that the Department would seek to recover those funds to which it was taking exception. The District's representatives were given the opportunity to review a draft of the audit report, but were not provided at that time with a copy of the report.

Upon completion of the audit, the Passaic County Superintendent was advised that it had revealed that the District

had entered into multi-bus contracts in prior years. At that time, the County Superintendent was reviewing Paterson's transportation contracts for 1987-88 pursuant to N.J.A.C. 6:21-16.1. As a result of that review, by letter of July 7, 1988, the County Superintendent advised the Board Secretary that some of the District's contracts for 1987-88 could not be approved because they had been bid on a vehicle basis rather than on a route basis and that others could not be approved because information requested had not been provided or because the contracts were incomplete.

Subsequent to the County Superintendent's determination not to approve certain of the District's transportation contracts for 1987-88, by letter of November 2, 1988, the Assistant Commissioner, Division of Finance, enclosing a copy of the audit report relating to the audit which had been completed in May by the Division of Compliance, advised Paterson that the Department of Education had taken an exception of $1,775,795 based on the results of the audit and that these monies would be recovered by reducing State aid in the 1989-90 school year. The Assistant Commissioner additionally advised that a potential exception of $710,955.35 was being taken based on application of the same formula used to arrive at the $1,775,795 exception.

As to the potential exception, the Assistant Commissioner advised the Paterson Board:

> This additional exception will not be assessed if proof is submitted that the balance of the contracts did not contain the same error as the contracts sampled. This proof should be submitted no later than December 1, 1988, at that time a decision will be made as to whether the additional exception will be assessed against 1989-90 State aid.

The Assistant Commissioner further recommended that the Board review the findings of the audit report at its next meeting and, within 10 days of said meeting, forward to the Chief, Bureau of Auditing, a certified copy of its minutes addressing the corrective action noted by the Board. The Assistant Commissioner then advised that:

> Within 45 days of receipt of the board corrective action, the report will be filed for final action with the Division of Finance and the County Superintendent of Schools.

On November 30, the Board Secretary responded by letter to the Assistant Commissioner, setting forth the Board's position with respect to the propriety of its method of bidding given that its contracts for prior years had been approved by the County Superintendent. The Board Secretary also forwarded the corrective action plan to be proposed to the Board at its December meeting, and stated that:

> The District is now asking your office for some consideration and leniency in the penalty imposed, since this large amount would be detrimental to the educational and transportation needs of our District.
>
> Any consideration your office may give us will be greatly appreciated. We will be most happy to hear from you in the affirmative.

Prior to November 30, the Transportation Cost Report School Year 1987-88 (WPT 34000) was transmitted by the Department to the Board Secretary. This report was the basis for 1989-90 State aid entitlement. The form reflected that although the District had expended $2,576,060.88 for pupil transportation in relation to its 1987-88 contracts, only $289,402.15 of that amount was being considered as an allowed expense. In his memorandum of November 10 accompanying this report, the Assistant Commissioner, Division of Finance, advised that:

> District personnel should immediately check the report for errors or omissions. Districts requesting a correction to this report must do so by letter to Ms. Linda Wells, manager, Bureau of Pupil Transportation with a copy to the county superintendent of schools. Adjustments will be made to your 1989-90 State aid entitlement, if approved, and the district will receive revised WPT 34,000 and WSA 89174-1 printouts if the request is received by December 1, 1988. Adjustments will be made to your 1990-1991 State aid entitlement if the request is received after December 1, 1988. All requests for corrections must be submitted by March 31, 1989.

In response to a letter of November 7 from the Board Secretary relating to the WPT 34000 Report, the County Superintendent enclosed a copy of the Assistant Commissioner's memorandum of November 10 and reiterated that the memorandum stated that corrections to the report were to be sought by letter to Linda Wells with a copy to the County Superintendent. The County Superintendent also advised that the Board Secretary's "letter of appeal" must be addressed to Linda Wells.

By letter of December 1 to Linda Wells, the District's Transportation Supervisor sought to "appeal regarding the 1987-88 34000 Cost Report" and requested an appeal "for the State Aid and an adjusted entitlement." This letter was followed on December 14 by another letter, which related specifically to 55 contracts for 1987-88 that had not been approved by the County Superintendent and which also sought adjustment of State aid entitlement.

Thereafter, the District was provided with a copy of a computer printout dated December 29, 1988, which reflected that the

$1,775,795 audit exception would be deducted from State aid in 1989-90 and that Paterson would receive State aid in the 1989-90 school year only for those contracts which the County Superintendent had advised the Board on July 7, 1988, were approved for the 1987-88 school year.

On March 22, 1989, the Paterson Board filed a petition with the Commissioner challenging the disallowances of State aid resulting both from the audit exception and the County Superintendent's determination not to approve the transportation contracts for 1987-88.

On March 30, 1989, the County Superintendent transmitted to the Board Secretary the revised 1989-90 State aid printout for the District. This printout reflected that adjustment of the District's State aid would include the $710,955.35 previously identified as the amount to which a potential exception was being taken.

In his decision of September 25, 1989, the Commissioner of Education held that the petition of the Board of Education of the City of Paterson challenging reduction of its State aid for transportation for 1989-90 was untimely with respect to claims therein relating both to the disallowances of costs for 1983-1986 that were specified in an audit report stemming from a Level III monitoring review of the District and those arising from the disapproval of transportation contracts for 1987-88 by the County Superintendent. The Commissioner, however, held that the petition was timely as to the Board's challenge to disallowances which were identified as "potential exceptions" on the basis of audit projections made as part of the Level III audit, but which, in the Commissioner's judgment, were not final until March 1989. Accordingly, the Commissioner dismissed the Board's petition with the exception of its claim relating to the potential disallowance, which he remanded to the Office of Administrative Law for a full hearing on the merits.

The State Respondents appealed to the State Board of Education from that portion of the Commissioner's decision remanding the potential disallowance for full hearing. The Board appealed the dismissal of the remainder of its petition.

By decision of March 7, 1990, we stayed further withholding from Paterson by the Division of Finance of State transportation aid based on either the disallowance of costs for 1983-86 resulting from the Level III monitoring review or the disallowance of costs associated with the contracts for 1987-88 which were not approved by the County Superintendent. We emphasized that our determination to stay further withholding did not, however, entitle Paterson to any amounts previously withheld.

Again, the merits of Paterson's claims are not before us in this appeal. Rather, the issues presented are strictly limited to those relating to whether Paterson's challenges are time-barred.

N.J.A.C. 6:24-1.2 provides that petitions to the Commissioner to determine controversies arising under the school

laws shall be filed no later than the 90th day of notice of the order or action which is the subject of the requested hearing. This time limit has been strictly construed to mean that the 90 day period runs from the time the initial cause of action accrued. See Watchung Hills Regional Education Association v. Watchung Hills Regional High School District, 1980 S.L.D. 356. Thus, even a teacher who proceeds to advisory arbitration is not relieved from compliance with the 90 day filing requirement. Bd. of Ed. of Bernards Twp. v. Bernards Twp. Ed. Ass'n., 79 N.J. 311 (1979).

However, the 90 day period begins only after receipt of notice of the action being contested. As we emphasized in Parisi v. Board of Education of the City of Asbury Park, decided by the State Board, October 24, 1984, when a district board provides such notice, it must be specific and definite so that a petitioner is informed both of the action taken by the board and the fact the he was affected by that action.

No less standard applies to actions taken by the Divisions within this agency. The Assistant Commissioner's letter of November 2 did formally advise the Board of the results of the audit report and that the funds to which the Department had taken exception in that report would be recovered from State aid in 1989-90. The Assistant Commissioner, however, then introduced ambiguity as to the finality of the action by stating that "within 45 days of receipt of the board corrective action, the report will be filed for final action within the Division of Finance and the County Superintendent of Schools."

Another board may possibly have construed the Assistant Commissioner's letter as a notice of final action and, similarly, might have known that a letter such as the Paterson Board's letter of November 30 might not be treated by Department of Education personnel as an appeal. However, in that there are no procedures set forth in the Administrative Code with respect to these kinds of Departmental actions and given the ambiguity of the Assistant Commissioner's November 2 letter, we find that it would misplace the primary responsibility for providing clear and definite notice of final Departmental actions to consider the November 2 letter as sufficient notice and, on the basis of such notice, to bar hearing of the Paterson Board's claims relating to the disallowances specified in the Level III audit report. This conclusion is reinforced by the fact that a clear and direct response by the Department to the Board's November 30 letter would have resolved the ambiguity introduced by the November 2 letter and would have provided adequate notice to the Board that the proper course for it to follow at that point would be to petition the Commissioner pursuant to N.J.A.C. 6:24-1 et seq.

Quite simply, at no point did the Division of Finance provide the Board with clear and unambiguous notice that a final determination had been made with respect to the disallowances resulting from the audit report. Nor did Department personnel either respond to the Board's letter of November 30, consider it as an attempt to appeal, or refer the Board's communication to the Bureau of Controversies and Disputes, which is responsible for

processing appeals to the Commissioner. Although the Board's communication did not conform with the requirements of N.J.A.C. 6:24-1 et seq., by such treatment the Board would have been provided the opportunity to amend by filing a petition conforming to the regulatory requirements.

That the Division of Finance may have the general authority to reduce transportation reimbursement where contracts previously approved by the County Superintendent are subsequently determined to be inconsistent with law, see Board of Education of the Borough of Fairfield v. Bureau of Pupil Transportation, decided by the State Board, December 5, 1984, is not sufficient to excuse the Department of Education from providing clear and definite notice of final actions in that respect. In this particular case, we can not ignore that this recoupment of funds was sought as a result of a Level III audit. This is the first such instance of which we are aware. Given that the purpose of the monitoring process is to insure correction of deficiencies so that a district may achieve certification rather than to provide a mechanism for the recoupment of State monies, the Department's responsibility to provide clear and unambiguous notice of final determinations which would affect State aid in subsequent years was enhanced.

We reject the Department's contention that Paterson's claims with respect to the disallowances for 1983-1986 are barred because they were based on an audit which may be challenged only in a judicial forum. Paterson is challenging not the audit, but the legality of the Department's underlying determination upon which State aid was disallowed. To the extent that these claims arise under the education laws, the Commissioner has primary jurisdiction to resolve them.

We also reject the Department's claim that the Commissioner erred in remanding for hearing the Board's challenge to the "potential" exception. Objection to the "potential" exception was made in the Board's Petition of Appeal to the Commissioner, the Department was certainly on notice throughout these proceedings that Paterson's challenge extended to the amounts subject to that exception, and, as the Commissioner found, the "potential" exception was "final" by the time the matter was before him. Given the subject matter of the litigation involved here, we would be remiss in our responsibility to the district and its students were we to bar this claim solely because the Board did not amend its petition when the "potential" exception became "final."

In its initial report, our Legal Committee also concluded that Paterson was not time barred from litigating the merits of its claims relating to the disallowances of expenditures reflected in the Transportation Cost Report (WPT 34000) which were related to its 1987-88 transportation contracts. Applying the same reasoning set forth above, the Legal Committee found that the ambiguity of the Assistant Commissioner's November 2 letter with respect to the Level III audit was compounded by his memorandum of November 10 accompanying the Transportation Cost Report wherein he advised districts requesting "correction" of that report as to how to proceed, as well as by the County Superintendent's subsequent letter to the Board advising it that its "letter of appeal" relating to the Transportation Cost Report must be addressed to Linda Wells. The

Committee concluded that, under the circumstances, it was understandable that the Board challenged the Transportation Cost Report and disallowances reflected therein by "appeal" directed to Linda Wells.

In its exceptions to the Legal Committee's report, the Department asserted that, pursuant to N.J.S.A. 18A:58-7, the county superintendent has sole authority to determine the appropriateness of transportation contracts and that his decision "in the area of approving transportation contracts" is "a final appealable decision" in that such decision is, by direction of the Legislature, not subject to further review by the Division of Finance.[1] Respondent's Exceptions Letter, at 3-4. The Department contended that, therefore, because Paterson did not challenge the County Superintendent's disapproval of the contracts for 1987-88 within 90 days of his letter of July 7, Paterson's challenge to the disallowances of expenditures related to its 1987-88 contracts which were reflected in the WPT 34000 Report should be time-barred.

While approval by the county superintendent of the necessity, cost and method of transportation is a statutory prerequisite to entitlement to payment of State aid pursuant to N.J.S.A. 18A:58-7 based on the cost of that transportation, we decline in the context of these proceedings to accept the broad proposition that, for all purposes, the "county superintendent's authority in regard to transportation contracts is final, not reviewable by the Division of Finance." Respondent's Exceptions Letter, at 6. C.f. Board of Education of the Borough of Fairfield v. Bureau of Pupil Transportation, supra. Nor have we previously held that a school district is required to challenge the disallowance of expenditures reflected in a Transportation Cost Report within 90 days of the county superintendent's disapproval of the transportation contracts associated with those expenditures, and the procedures for making such challenge are not set forth in the Administrative Code. Further, although the County Superintendent's letter of July 7 did notify Paterson that certain of the Districts' 1987-88 transportation contracts were not approved, it did not notify the District that this disapproval of the transportation contracts also represented the final decision that the costs of that transportation would be excluded from calculation of State aid by the Division of Finance. Nor did the Department otherwise provide such notice to the District. In this respect, we can not ignore that it was the errors revealed by the Level III audit which provided the impetus for the County Superintendent's substantive review resulting in this particular instance in disallowance of costs associated with the 1987-88 contracts. Moreover, the County Superintendent's subsequent instruction to the Board in this case that it should address its "letter of appeal" relating to the WPT

---

1 We note that, effective July 1, 1990, N.J.S.A. 18A:58-7 was repealed. Quality Education Act of 1990, L. 1990, c. 52, sec. 90. Resolution of this matter is not however affected by that fact.

34000 Report to Linda Wells, as well as the Department's lack of response to that letter, indicates that neither the County Superintendent nor the Department was entirely clear concerning how this kind of challenge should be made. Under these circumstances, we conclude that the interests of justice call for relaxation of the 90 day rule pursuant to N.J.A.C. 6:24-1.17 so as to permit litigation of the merits of the District's claims relating to the disallowances reflected in the Transportation Cost Report School Year 1987-88.

In sum, we find that the Department of Education has an obligation to provide technically specific and accurate notice when it seeks to take actions affecting the rights of school districts and their students. In seeking to recover those funds for 1983-1986 to which it took exception as part of the Level III audit and in disallowing transportation expenditures related to the District's transportation contracts for 1987-88, the Department here took action affecting the rights of a school district and its students. As set forth above, we conclude that neither the November 2 letter to the District with respect to the audit report nor any subsequent correspondence on behalf of the Department provided sufficient and definite notice so as to trigger the 90 day time limit for filing of a petition to the Commissioner with respect to the disallowances arising from the Level III audit. Nor are there any procedures set forth in Administrative Code which would have charged the District with knowledge of the proper course to pursue in order to preserve its right to challenge reduction of its State aid in these circumstances. We find that although the County Superintendent's letter of July 7 provided notice to the District that certain of its 1987-88 transportation contracts were not approved, the circumstances here are such as to warrant relaxation of the 90 day rule so as to permit determination of the merits of Paterson's challenge to the disallowances reflected in the Transportation Cost Report. Therefore, for the reasons stated, we affirm the Commissioner's determination that Paterson's challenge to the "potential exceptions" resulting from the Level III audit is not time-barred, but reverse his determination in all other respects and remand the matter for hearing on the merits.

Attorney exceptions are noted.
February 6, 1991

IN THE MATTER OF THE ELECTION :
INQUIRY IN THE SCHOOL DISTRICT : STATE BOARD OF EDUCATION
OF THE TOWNSHIP OF PENNSAUKEN, : DECISION
CAMDEN COUNTY. :
:

Decided by the Commissioner of Education, June 5, 1991

For the Petitioner-Appellant, Bernard Kirshtein, pro se

On May 3, 1991, Bernard Kirshtein (hereinafter "Petitioner"), a defeated candidate in the annual school election held on April 30, 1991 in the Township of Pennsauken, requested the Commissioner of Education to conduct a recount of the votes cast in that election. Based upon that recount, conducted on May 17, the Commissioner determined that the results announced at the conclusion of the election remained unaltered:

CANDIDATE	AT POLLS	ABSENTEE	TOTAL
Mark Schott	1,095	6	1,101
Margie Baxendale	1,073	10	1,083
Timothy M. Robinson	1,055	7	1,062
Bernard Kirshtein	1,049	10	1,059
Esther Bliss	928	12	940
Robert E. Terres	537	10	547

Only those three candidates receiving the greatest number of votes were elected to seats on the district board.

By letter dated May 21, 1991, Petitioner requested the Commissioner to conduct an inquiry into alleged election law violations. In a letter decision dated June 5, the Commissioner dismissed Petitioner's request for failure to file it in a timely fashion. Citing In the Matter of the Annual School Election Held in the School District of the City of Old Bridge, decided by the Commissioner of Education, April 18, 1989, remanded by the State Board of Education, July 6, 1989, decided by the Commissioner, July 28, 1989, remanded by the State Board, November 8, 1989, decided by the Commissioner, January 2, 1990, aff'd by the State Board, April 4, 1990, the Commissioner stressed that, pursuant to N.J.S.A. 18A:14-63.12, any requests for inquiries must be received within five days of the announced results of the election.

Petitioner has filed the instant appeal from the Commissioner's dismissal of his inquiry request, alleging that six individuals casting votes in the election were not registered to vote in the district and that the Commissioner should relax the filing requirement due to the significant issues raised.

After a thorough review of the record, we reverse the Commissioner's determination that he had no discretion to hear this matter, conclude that he should exercise such discretion in this instance, and remand for further proceedings in accordance with our decision herein.

As we expressly pointed out in Old Bridge, supra, although N.J.S.A. 18A:14-63.12 mandates the Commissioner to undertake an election inquiry when the request therefor is timely filed, that statute "does not preclude the Commissioner, at his discretion, from conducting an election inquiry when a request therefor is filed more than five days after announcement of the election results." Under the particular circumstances presented herein, we find exercise of the Commissioner's discretion to conduct an inquiry to be appropriate. The violations alleged by Petitioner, which include the filing of false voting affidavits, are of such character as not to have been facially apparent at the time of the election. It is significant in that respect that Petitioner acted promptly to request the inquiry within five days of the recount proceedings. Moreover, we find those allegations to be of such nature and gravity as to warrant further proceedings in the public interest. Petitioner, who lost by three votes, cites six specific instances of alleged voting fraud, which, if demonstrated, could alter the outcome of this election.

Accordingly, we remand this matter to the Commissioner for an inquiry into the election law violations alleged by Petitioner to determine if such violations occurred and, if so, whether they affected the outcome of this election, and to order appropriate relief. We also direct the Commissioner to determine whether to refer any such violations to the County Prosecutor for further action.

October 2, 1991

JOHN ROCHE,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 3, 1990

For the Petitioner-Appellant, John Roche, pro se

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

The letter decision of the Commissioner of Education is affirmed for the reasons expressed therein. Petitioner's motion to supplement the record with a number of newspaper articles, none of which we find to have any direct relevance to Petitioner's specific claims or to his standing to assert such claims, is denied.

April 3, 1991

Pending Superior Court

KATHI L. SAVARESE,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, November 15, 1990

For the Petitioner-Respondent, Klausner & Hunter
(Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Appellant, Schwartz, Pisano, Simon & Edelstein (Nathanya G. Simon, Esq., of Counsel)

Review of Appellant's notice of appeal dated December 14, 1990, shows that she is seeking to appeal at this point from that part of the Commissioner's decision of November 15 which remanded the matter to the Office of Administrative Law for the limited purpose of determining whether the district board took formal action to abolish her family living position. In that this issue has not been decided by the Commissioner, Appellant is not appealing from a separable issue upon which the Commissioner has rendered a final decision so as to permit her to appeal without leave to the State Board of Education pursuant to N.J.A.C. 6:2-2.3, as is specified by N.J.A.C. 6:2-1.1(b). Appellant has not sought such leave and, therefore, the State Board of Education dismisses this appeal.

Carlos Hernandez abstained.
March 6, 1991

IN THE MATTER OF THE TENURE	:	
HEARING OF RAYMOND L. SCHNITZER,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF SCOTCH PLAINS-	:	DECISION
FANWOOD, UNION COUNTY.	:	
	:	

Decided by the Commissioner of Education, April 27, 1990

Decision on motion by the State Board of Education, September 5, 1990

Referred to the Legal Committee by the State Board of Education, November 19, 1990

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

For the Respondent-Appellant, Zazzali, Zazzali, Fagella, & Nowak (Paul L. Kleinbaum, Esq. of Counsel)

The State Board of Education has reviewed the settlement submitted by the parties in this matter and finds it to be in accord with the principles expressed in In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn, decided by the State Board of Education, April 6, 1983. The State Board therefore approves the settlement and dismisses the appeal.

February 6, 1991

FORRESTINE SIMS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 14, 1990

For the Petitioner-Appellant, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Greenwood, Young, Tarshis, DiMiero & Sayovitz (Monica E. Olszewski, Esq., of Counsel)

Petitioner Forrestine Sims, a teacher whose salary increments for the 1989-90 school year were withheld by the Board of Education of the Township of Teaneck, has moved to consolidate her appeal with the appeal currently pending before the State Board of Education in Annie Pollard and Albert Guskind v. Board of Education of the Township of Teaneck, State Board Docket #50-90. That consolidated case, like the instant matter, involves a challenge to a written Board policy governing the withholding of increments for excessive absenteeism. Counsel for the Petitioner herein, who also represents petitioners Pollard and Guskind, certifies that counsel for the Board joins in the motion.

Inasmuch as we find consolidation to be warranted under the circumstances, we grant Petitioner's motion and direct that these matters be consolidated.

Carlos Hernandez abstained.
March 6, 1991

SPRINGFIELD TOWNSHIP, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY, ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
ARTHUR E. MERZ, BURLINGTON COUNTY SUPERINTENDENT OF SCHOOLS, ET AL.,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, April 1, 1991

For the Petitioners-Appellants, Hulse & Germano (Denis C. Germano, Esq., of Counsel)

For the Respondent-Respondent Burlington County Superintendent Merz, Robert J. Del Tufo, Attorney General (Marlene Zuberman, Deputy Attorney General)

For the Respondent-Respondent Northern Burlington County Regional High School District, Ferg, Barron and Gillespie (Steven Mushinski, Esq., of Counsel)

For the Respondent-Respondent Mansfield Township, John L. Madden, Esq.

For the Respondent-Respondent North Hanover Township, Schulze and Rupinski, (Carl P. Schulze, Esq., of Counsel)

For the Respondent-Respondent Chesterfield Township, Ferg, Barron and Gillespie (John Gillespie, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner of Education denying Petitioners' motion for interim relief and for a stay of the reapportionment of board seats for the constituent districts comprising the Northern Burlington Regional School District, and denies the additional interim relief sought by Petitioners in the instant appeal for failure to meet the standards for such relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). In addition, we affirm the decision of the Commissioner granting summary judgment to the Respondents on the merits of the underlying controversy substantially for the reasons expressed therein.

Unanimous decision to deny stay and interim relief.
Ronald K. Butcher, Maud Dahme, Nancy Schaenen and Robert A. Woodruff opposed a concurrent decision on the merits.

April 3, 1991
Pending Superior Court

IN THE MATTER OF THE TENURE HEARING OF ALAN S. TENNEY, SCHOOL DISTRICT OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY.

STATE BOARD OF EDUCATION

DECISION

Remanded by the Commissioner of Education, August 2, 1988

Decision on remand by the Commissioner of Education, July 26, 1990

For the Petitioner-Appellant, Oury, DeClemente & Mizdol (Dennis J. Oury, Esq., of Counsel)

For the Respondent-Cross/Appellant, Bucceri & Pincus (Sheldon H. Pincus, Esq., of Counsel)

The decision of the Commissioner of Education in this matter involving consolidated tenure charges is affirmed for the reasons expressed therein, except that we modify the penalty imposed by the Commissioner. Although we agree that the appropriate penalty for Respondent's unbecoming conduct is the loss of 120 days' compensation, we disagree with the Commissioner's directive that Respondent, following his reinstatement, serve for 120 days without pay, mitigated by the compensation forfeited pursuant to N.J.S.A. 18A:6-14 during his suspension without pay following the Board's certification of the tenure charges alleging inefficiency. Notwithstanding such mitigation, we find it improper to order Respondent to provide services to the district without compensation. Consequently, we direct that Respondent forfeit all compensation withheld pursuant to N.J.S.A. 18A:6-14 during his suspension in this matter, and, in the event that compensation was not withheld for 120 days during that period, we direct that Respondent be suspended without pay for an additional period of time so that he suffers, in total, the loss of 120 days' compensation.

Ronald K. Butcher and Bonnie Green abstained.
January 9, 1991

GEORGE WATSON, JR.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO ET AL., MONMOUTH COUNTY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Educaction, December 27, 1990

For the Petitioner-Appellant, George Watson, Jr., pro se

For the Respondents-Respondents, DeMaio & DeMaio
(Vincent C. DeMaio, Esq., of Counsel)

By decision of December 27, 1990, the Commissioner of Education, adopting the Administrative Law Judge's determination, dismissed the Petition of Appeal in this matter for failure to comply with the Uniform Administrative Procedure Discovery Rules and for failure to comply with an order issued by the ALJ that meaningful answers be served by Petitioner no later than September 28, 1990. Petitioner appealed to the State Board of Education, filing his notice of appeal dated January 15, 1991, by delivery in person to the State Board Appeals Office on February 14, 1991.[1]

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed" (emphasis added). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.17, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. e.g., B.W., a minor child by his parents, J.W. and B.W. v. Board of Education of the City of Bridantine and Safety Bus Service, decided by the State Board, November 4, 1987.

In this case, the Commissioner's decision was rendered on December 27, 1990, and mailed on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.2, the decision appealed from was filed on January 2, 1991. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.1; N.J.A.C. 6:2-1.2, as computed under N.J.A.C. 6:2-1.5,

---

[1] By that same notice, Petitioner sought to appeal another determination of the Commissioner dated October 18, 1990, involving another district board of education. We have today decided the issues relating to that matter by separate decision.

Petitioner was required to file his notice of appeal to the State Board by February 1, 1991. As stated, Petitioner did not file by that date. Accordingly, the matter was referred to our Legal Committee for consideration of the effect of Petitioner's failure to file timely notice.

Petitioner was notified of the referral by letter of February 21, 1991, and additionally advised that his notice was also deficient in that there was no proof of service on his adversaries and the Commissioner as required by N.J.A.C. 6:2-1.7(b). Petitioner neither corrected the deficiency in his notice as directed nor otherwise responded to notice of the referral.

Given that Petitioner did not file his appeal within the statutory time period provided by N.J.S.A. 18A:6-28, the State Board of Education dismisses the appeal. In view of our determination, we also deny Petitioner's request, which was included in his notice of appeal, that the State Board set a meeting to hear arguments... for their official action...."

April 3, 1991

GEORGE WATSON, JR.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON ET AL., MERCER COUNTY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, October 18, 1990

For the Petitioner-Appellant, George Watson, Jr., pro se

For the Respondent-Respondent Board of Education of the City of Trenton, Thomas W. Sumners, Jr., Esq.

For the Respondent-Respondent Board of Education of the City of Orange Township, Ronald Lee

By letter decision of October 18, 1990, the Commissioner of Education dismissed the Petition of Appeal in this matter for failure to file within the 90 day period as required by N.J.A.C. 6:24-1.17, for lack of jurisdication, and for failure to state a cause of action. Petitioner appealed to the State Board of Education, filing his notice of appeal dated January 15, 1991, by delivery in person to the State Board Appeals Office on February 14, 1991.[1]

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed" (emphasis added). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.17, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. e.g., B.W., a minor child by his parents, J.W. and B.W. v. Board of Education of the City of Bridantine and Safety Bus Service, decided by the State Board, November 4, 1987.

In this case, the Commissioner's letter decision was dated October 18, 1990, and presumably mailed on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.2, the decision appealed from was filed

1 By that same notice Petitioner also sought to appeal another determination of the Commissioner dated December 27, 1990, which involved Petitioner and another district board of education. We have today addressed the issues relating to that matter by separate decision.

on October 21. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.1; N.J.A.C. 6:2-1.2, as computed under N.J.A.C. 6:2-1.5, Petitioner was required to file his notice of appeal to the State Board by November 20, 1988. As stated, Petitioner did not file by that date. Accordingly, the matter was referred to our Legal Committee for consideration of the effect of Petitioner's failure to file timely notice.

Petitioner was notified of the referral by letter of February 21, 1991, and additionally advised that his notice was also deficient in that there was no proof of service on his adversaries and the Commissioner as required by N.J.A.C. 6:2-1.7(b). Petitioner neither corrected the deficiency in his notice as directed nor otherwise responded to notice of the referral.

Given that Petitioner did not file his appeal until almost three months after expiration of the statutory time period provided by N.J.S.A. 18A:6-28, the State Board of Education dismisses the appeal. In view of our determination, we also deny Petitioner's request, which was included in his notice of appeal, that the State Board set a meeting to hear arguments... for their official action...."

April 3, 1991

EDU #7093-81
7094-81
100-82

FRANK CARDONICK,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BROOKLAWN, CAMDEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT,	:	
AND	:	
IN THE MATTER OF THE TENURE HEARING OF FRANK CARDONICK, SCHOOL DISTRICT OF THE BOROUGH OF BROOKLAWN, CAMDEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, April 7, 1982

Decided by the State Board of Education, August 4, 1982

For the Petitioner-Appellant, Selikoff & Cohen
(John E. Collins, Esq., of Counsel)

For the Respondent-Respondent, William D. Dilks, Esq.

For the Amicus Curiae, New Jersey School Board
Association, David W. Carroll, Esq.

This consolidated tenure and increment withholding case was settled by the attorneys for the parties on January 4, 1982. The executed stipulation of dismissal was received by the Office of Administrative Law on January 13, 1982. On February 17, 1982, the Administrative Law Judge dismissed the matters with prejudice and presented the terms of the settlement to the Commissioner of Education. The Commissioner's decision was rendered April 7,

1982, and this joint appeal to the State Board of Education followed. The New Jersey School Boards Association was granted leave to appear as amicus curiae and has filed a brief in this matter.

On the settlement, the Commissioner has questioned the propriety and legality of the agreement executed by the attorneys for the parties. The settlement agreement is repeated below in its entirety:

> "The above matters having been amicably resolved by the parties, in that Mr. Cardonick has received $24,873.00 from the Board of Education of the Borough of Brooklawn and in consideration thereof has resigned his position as a tenured teaching staff member, it is hereby stipulated and agreed that the above matters be and the same are hereby dismissed without cost against either party with prejudice."

In setting aside the settlement agreement, the Commissioner specifically disapproved its execution without his prior approval and remanded to the Office of Administrative Law. The Commissioner's objections to the settlement are set forth in general terms. In the absence of a record, aside from the pleadings and briefs filed before the State Board, we too are precluded from specific evaluation or review. The criteria and guidelines which we consider to be of importance in evaluating and reviewing tenure settlements are addressed post.

The New Jersey courts have looked with great favor upon the voluntary resolution of litigation through settlement. Judson v. Peoples Bank & Trust Co., 25 N.J. 17 (1957); Honeywell v. Bubb, 130 N.J. Super. 130 (App. Div. 1974). As a general

principle, and without considering the toll of human resources, the settlement of lawsuits in good faith can be said to save time, money and proof problems. School boards, in their efforts to conserve public funds, no less than private parties, have been encouraged by the state and federal courts to carefully consider equitable settlement possibilities. As the court stated in Board of Education of Garfield v. State Board of Education, 130 N.J.L. 388, 392 (1943):

> "***A Board of Education of any municipality in our state may, among other things, 'sue and be sued.' N.J.S.A. 18:6-23. Thus, it may and should, if it can possibly do so, avoid the costs and expenses of useless litigation, of multiplicity of suits.***"

The school board's power to sue (N.J.S.A. 18A:11-2) necessarily implies the power to commence or prosecute, to determine the manner or strategy of proceeding, to determine how a suit may be terminated, including settlements, compromise or discontinuance of actions in which it is lawfully engaged as a party. This power is undisputed, but certainly not unlimited. School boards may not act in a manner which is contrary to public policy. School boards must act in the public interest, lawfully, constitutionally, reasonably and in accordance with duly enacted rules and regulations of the Commissioner of Education and State Board of Education. In this case, we focus on the determination of a school board to compromise and settle tenure litigation against the goals of the Tenure Employees Hearing Law.

The Tenure Employees Hearing Law (N.J.S.A. 18A:6-10 et seq.) is a comprehensive scheme of legislation designed to

improve education by affording teachers a measure of security in the ranks they hold. Viemeister v. Board of Education of Borough of Prospect Park, 5 N.J. Super. 215 (1949). The law regulates all of the various aspects of tenure hearings. Provisions relating to the jurisdiction of the Commissioner, the role of the local board of education, grounds for dismissal or reduction in salary, manner of filing charges, service of charges, suspension pending final determination, conduct of hearing, compensation during suspension, and reinstatement are set forth in the statute. What constitutes grounds for a tenure dismissal is a question of fact and within the exclusive jurisdiction of the Commissioner of Education, who has the duty to conduct the hearing and render a decision. In the Matter of the Tenure Hearing of David Fulcomer, 93 N.J. Super. 404, 412 (App. Div. 1965).

The Commissioner's exclusive authority to decide these cases necessarily entails the determination of any and all matters pertinent thereto in order to make a complete disposition of the case. It is proper, therefore, for the Commissioner to review and evaluate, and to approve and disapprove, tenure settlements. We believe that settlement agreements totally preempting the Commissioner from review and evaluation are against the public policy of this State as exemplified in the Tenure Employees Hearing Law.

The touchstone of the Tenure Employees Hearing Law is the teacher's fitness to teach. In Re Grossman, 127 N.J. Super.

13 (1974). Certification of tenure charges by a board of education is predicated on the board's belief that the charges (inefficiency, incapacity, unbecoming conduct, or other just cause) and the evidence in support of the charges would be sufficient, if true in fact, to warrant a dismissal or reduction in salary. N.J.S.A. 18A:6-11.

On the basis that the board believes the teacher is unfit, it makes the commitment to expend its monetary resources, provide board personnel, and hire legal counsel to obtain relief; i e., dismissal or reduction in salary. Where the facts of a case are clear, using the settlement process to achieve either of the statutorily prescribed results is prudent. Where the facts are not clear, or in dispute, a settlement for less than dismissal may be justified, bearing in mind that settlement may be inappropriate in certain matters. Where it is in the public interest to fully determine the issues, a plenary hearing is required.

We believe a proposed tenure settlement or a withdrawal of tenure charges with its attendent terms and conditions should be submitted to the Commissioner of Education for his prior scrutiny and approval. The proposed tenure settlement or withdrawal should be accompanied by supporting documentation as to the nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full

understanding of his rights, and that the agreement is consistent with the public interest. (See N.J.A.C. 1:1-17.1(b), (c)) In this case there is no indication that the teacher was advised of the Commissioner's duty pursuant to N.J.A.C. 6:11-3.7(b)1.i. to refer tenure determinations to the State Board of Examiners for possible revocation of certificate. We believe that disclosure should be part of any agreement which results in loss of position.

The absence of any record in this case allowed no opportunity for the Commissioner's review. No hearing was held below. Two prehearing conferences scheduled for November 30 and December 29, 1981, were adjourned. It is not disclosed whether the teacher received full salary during the suspension, beginning on the 121st day, excluding all delays granted at his request. (N.J.S.A. 18A:6-14) It is not disclosed whether the teacher had other employment during the suspension. The record shows that the Administrative Law Judge received the agreement and without further inquiry dismissed with prejudice. Under the circumstances, we believe the Administrative Law Judge should have rejected the agreement and inquired into these matters.

For the reasons stated above, and subject to the guidelines and objections we have expressed, the Commissioner's decision to remand is affirmed.

Attorney Exceptions are noted.

April 6, 1983

Date of Mailing APR 0 8 1983