State of New Jersey
Department of Education
Trenton

NEW JERSEY
SCHOOL LAW DECISIONS

January 1, 1966, to December 31, 1966

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DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION, SUPERIOR COURT (APPELLATE DIVISION), AND SUPREME COURT ON CASES PREVIOUSLY REPORTED

I

TEACHER GROUP REPRESENTATIVE MAY SPEAK AT BUDGET HEARING

JANICE BELLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HALEDON, PASSAIC COUNTY,

Respondent.

For the Petitioner, Cassel R. Ruhlman, Jr., Esq.

For the Respondent, Dominic Cavalieri, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, a teacher in respondent's schools and president of the Haledon Education Association, seeks an order directing respondent to permit her and the representatives of the teachers to present objections to and to be heard with respect to the budget of respondent at its budget hearing. She seeks further an order directing respondent to permit the representatives of the Haledon Education Association and of the teachers employed by respondent to present grievances and proposals of the teachers to respondent at its meetings. Respondent denies violation of any of petitioner's rights, and asserts that only a member of the New Jersey bar may properly represent the teachers at its meetings.

This case is presented to the Commissioner in a Stipulation of Facts and in briefs of counsel.

The facts are stipulated as follows:

"1. On January 20, 1965, petitioner was employed by respondent as a teacher and was President of the Haledon Education Association, an organization of a majority of the teachers employed by respondent.

"2. On that date respondent held a budget hearing pursuant to N. J. S. A. 18:7–77.1 and 18:7–77.2.

"3. At said budget hearing, Russell Stanley, a representative of the Haledon Education Association and the teachers employed by respondent, attempted to present grievances and proposals and to present objections to and to be heard in respect to said budget on behalf of petitioner and the teachers employed by respondent.

"4. Respondent refused to permit said Russell Stanley to speak at said hearing.

"5. Said Russell Stanley is employed by the New Jersey Education Association, a professional organization of teachers employed in the public schools of this state.

"6. Said Russell Stanley is not and on the date of said hearing was not a resident or taxpayer of the Borough of Haledon, nor a member of the bar of the State of New Jersey.

"7. After Russell Stanley was refused permission to speak, certain individual teachers of respondent were permitted to speak, some of whom

were not residents or taxpayers of the Borough of Haledon, one of whom was petitioner, Janice Bello."

The central issue is whether teachers and their representatives have a right to be heard at a budget hearing held by the board of education which employs the teachers.

Petitioner rests her argument on Article I, Paragraph 19 of the Constitution of New Jersey, which reads in part as follows:

"* * * Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

and on *R. S.* 18:7–77.2, which reads as follows:

"On the date and at the time and place so fixed for such public hearing the board of education shall at a public hearing grant the taxpayers and other interested persons an opportunity to present objections and to be heard with respect to said budget and the amount necessary to be appropriated for the use of the public schools in the district for the ensuing school year and with respect to the various items and purposes for which the same is to be appropriated and at or after said public hearing but not later than on February first said board of education shall fix and determine the amount of money to be voted upon by the legal voters of the district at the annual meeting, which sum or sums shall be designated in the notice calling such meeting as required by law."

It is petitioner's contention that teachers, whether resident or nonresident in the school district, are "interested persons" within the meaning and intent of the statute, *supra.* Pointing to the definition of "interested" given in Webster's New International Dictionary:

"have a share or concern in some project; liable to be affected or prejudiced."

petitioner asserts that personally and professionally teachers have an obvious share and concern in the school budget and will be directly affected by it.

Respondent, on the other hand, argues that "other interested persons" must necessarily be construed to be persons other than taxpayers who will be affected by the tax levy. Such necessity, respondent urges, is directed by the legislative scheme which provides that a budget for the current and capital expenses of the school district must be prepared by the board of education (*R. S.* 18:7–77.1), and presented to the public for review, question, explanation and objection at a hearing before final adoption by the board (*R. S.* 18:7–77.2), before being submitted to the voters for acceptance or rejection (*R. S.* 18:7–78). Such a legislative scheme, says respondent, clearly relates the budget process to the tax levy, and the expression "taxpayers and other interested persons" must therefore be restricted to taxpayers or those who contribute indirectly to the tax levy.

The Commissioner does not accept the restricted interpretation of "interested persons" advanced by respondent. It is well established that "in the absence of an explicit indication of a special meaning, the words of a statute are to be given their ordinary and well understood meaning." *Safeway Trails, Inc.* v. *Furman,* 41 *N. J.* 467, 478 (1964) See also *Abbotts Dairies* v. *Armstrong,* 14 *N. J.* 319, 325 (1954); *State* v. *Sperry & Hutchinson Co.,* 23 *N. J.* 38, 46 (1956). In *Lloyd* v. *Vermuelen,* 40 *N. J. Super.* 151 (*Law Div.* 1956),

affirmed 40 *N. J. Super.* 301 (*App. Div.* 1956), 22 *N. J.* 200 (1956), the Law Division said, at page 165:

> "The court will presume that words, save terms of art, have been employed in their natural and ordinary meaning. *In re Act Concerning Alcoholic Beverages*, 130 *N. J. L.* 123, at page 128 (*Sup. Ct.* 1943)."

"Interested persons," by the application of this principle of statutory construction, must then be regarded in the instant matter as those persons having a share or concern in the budget and the school system which the budget is designed to sustain. Such persons as teachers are indeed "liable to be affected or prejudiced" in both their personal lives and the execution of their professional duties by the budget which is presented to the voters for adoption or rejection. It becomes therefore immaterial whether such teachers are resident or non-resident of the school district.

In the Commissioner's opinion the principle of construction thus applied prevails over the rule of *ejusdem generis* urged by respondent. In the application of this rule, the general term "other interested persons" following the more specific term "taxpayers" must be construed in some "taxpayer" sense —in this case, according to respondent, persons paying taxes indirectly, such as tenants. The clear sense of the statute is to expose the budget to question, explanation, and objection by those having an interest in it, whether by taxpayers or others. Only after such exposure may the board of education finally adopt the budget. If it were not implicit that the proceedings of the budget hearing may influence the board in its final determination, then the Legislature might well have permitted the board to conduct its hearing after the final adoption, but before the annual school district election. In such a case, obviously, the only persons interested in being heard would be the voters, taxpayers or otherwise. The application of the rule of *ejusdem generis* would destroy the clear intent of the statute. When the invocation of *ejusdem generis* clouds the internal sense of the statute then this interpretive rule need not be applied. *State, by Parsons* v. *United States Steel Corp.*, 22 *N. J.* 341, 352 (1956)

The Commissioner finds that the sense and interpretation of the expression "other interested persons" as used in *R. S.* 18:7–77.2, which best comports with the legislative intent is that which would include teachers employed in the district whether resident or non-resident therein. Such teachers are therefore entitled to present objections and to be heard with respect to the budget presented at the hearing required by the statute.

Since the teachers may be heard, it follows from the provision of the New Jersey Constitution, *supra,* that they may be heard through the meduim of their chosen representatives. Respondent's brief recites the history of the development of Paragraph 19 of Article I at the Constitutional Convention of 1947, pointing out that the provision therein for persons in public employment granted them the same right to organize and present their proposals and grievances that is available to persons in private employment. Inherent in this right, as explicitly set forth in the Constitution, is the right to be heard "through representatives of their own choosing." The Commissioner can find no basis for any limitation on the nature of such representation as respondent argues. The term "representatives of their own choosing" allows great latitude of choice. For instance, the Commissioner observes that in *Title 34—Labor and Workmen's Compensation* of the Revised Statutes, the Legislature defined "representative" for the purpose of the Labor Mediation Act (*R. S.* 34:13A–1

et seq.). While recognizing that this act has no bearing upon the rights of persons in public employment (see *Perth Amboy Teachers Association, et al.* v. *Board of Education of Perth Amboy,* decided by the Commissioner December 4, 1965), the Commissioner finds in this definition an indication of legislative intent applicable to the instant case:

> "The term 'representative' is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organization serving as a representative need not be limited in membership to the employees of, the employer whose employees are represented." *R. S.* 34:13A-3(d)

It is stipulated that Russell Stanley, who was prohibited from speaking at the 1965 budget hearing, is the representative of the Haledon Teachers Association, of which petitioner is president, and is employed by the New Jersey Education Association. The Commissioner finds nothing in the Constitution of New Jersey or in any statute to preclude such a representational relationship.

Nor does the Commissioner find any validity in respondent's contention that since the said Russell Stanley is not an attorney-at-law of New Jersey, he is not entitled to act as a representative. The Commissioner does not presume to define the rights of attorneys to practice law in New Jersey. He does, however, look to the language of the statutes and the courts. In the statutes governing labor disputes in public utilities, *Chapter* 38 of the *Laws* of 1946, as amended, section 2 of the act (*R. S.* 34:13B–2) states in part:

> "Employees shall have the right to organize and bargain collectively *through representatives of their own choosing.* * * *" (Emphasis added.)

and in the section on definitions of the same act (*R. S.* 34:13B–16 (c)):

> "The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a utility or group of utilities or by its or their employees to act or do for them."

Such a definition does not, even by the remotest implication, require that a representative must be an attorney. While again recognizing that these statutes have no application to persons in public employment, the Commissioner is of the opinion that the similarity of the language of *R. S.* 34:13B–2, quoted *supra,* to the language of the New Jersey Constitution sustains the analogy to the instant situation.

Moreover, in *Auerbacher* v. *Wood,* 139 *N. J. Eq.* 599 (*Chan.* 1947), affirmed 142 *N. J. Eq.* 484 (*E. & A.* 1947), complainants sought to enjoin Wood, an industrial relations consultant and not an attorney in New Jersey, from what they contended was the unlawful practice of law, in that, *inter alia,* he represented employers in the adjustment of grievances and in collective bargaining. The Court said, in this regard:

> "* * * This is not *per se* the practice of law. Anyone may use an agent for negotiations and may select an agent particularly skilled in the subject under discussion, and the person appointed is free to accept the employment whether or not he is a member of the bar." 139 *N. J. Eq.* at page 603

In affirming the decision below, the Court of Errors and Appeals said, at page 485:

> "* * * The field of industrial relations, while it overlaps the law in some areas, like other professions and businesses, is yet in its major aspects and

objectives separate and distinct from the practice of law and is not in essence of the domain for reasons of policy assigned to the practitioner of the law. The contentions and problems growing out of the industrial relation and personnel administration involve in the main sociological, economic and public relation factors and administrative policies, procedures and practices wholly unrelated to the practice of law."

In holding that teachers or their representatives have a right to present objections and to be heard at budget hearings of the Board of Education and that teachers or their representatives have a right to present grievances and proposals to the Board of Education, the Commissioner of Education is not determining that representatives of teachers have a right to represent them at quasi-judicial hearings involving tenure and other issues. The Courts of this State have held that the presentation of a case before a quasi-judicial tribunal constitutes engagement in the practice of law under *R. S.* 2A:170–78. The presentation of a case to a quasi-judicial tribunal requires legal knowledge, skill and training in examining and cross-examining witnesses; in presenting competent, admissible evidence; in arguing the construction of statutes and the application of other decisions; as well as occasionally furnishing briefs as to the law and facts. *Tumulty* v. *Rosenblum,* 134 *N. J. L.* 514, 517-518 (*Sup. Ct.* 1946); *Stack* v. *P. G. Garage, Inc.,* 7 *N. J.* 118, 120, 121 (1951) When the Commissioner or a board of education sits in a quasi-judicial capacity to hear matters other than the presentation of grievances, representatives of teachers do not have a right to present the case. This case must be presented by the teacher *pro se* or by an attorney-at-law.

Thus, the Commissioner concludes and so finds, that even as petitioner, a non-resident, is entitled to be heard at her employing board's budget hearing, so also is the chosen representative of the Association over which she presides, even though the employee of another organization, entitled to be heard in behalf of the Association.

In finding that either teachers or their chosen representatives are entitled to be heard at such budget hearings, the Commissioner does not find that such persons, or any others, have such license to be heard as to subvert the purposes of the hearing. "Taxpayers and other interested persons" may "present objections and be heard with respect to said budget and the amount necessary to be appropriated * * * and with respect to the various items and purposes for which the same is to be appropriated" (*R. S.* 18:7–77.2, *supra*). It is well within the authority of the board of education to make reasonable rules for the transaction of business (*R. S.* 18:7–56), or in the absence of such rules, for the presiding officer at the budget hearing to see to it that the hearing is confined to its statutory purposes.

The Commissioner finds and determines that petitioner, or her chosen representative, or the chosen representative of the Haledon Education Association, of which petitioner is president, is entitled to be heard at respondent's budget hearing within the limits established by *R. S.* 18:7–77.2. He directs respondent to take such steps as may be necessary to comply with this determination in its budget hearings.

COMMISSIONER OF EDUCATION.

January 3, 1966.

Affirmed by State Board of Education without written opinion, April 5, 1967.

II AND III

BOARD MAY REDUCE EARNINGS OF TENURE EMPLOYEES WHEN CHARGES ARE SUSTAINED

IN THE MATTER OF THE TENURE HEARING OF CHARLES CARRINGTON, CITY OF CAMDEN, CAMDEN COUNTY

IN THE MATTER OF THE TENURE HEARING OF FERDINAND VESPER, CITY OF CAMDEN, CAMDEN COUNTY

For the Board of Education, Leonard A. Spector, Esq.

For the Respondents, Joseph T. Sherman, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Respondents in these cases are tenure employees of the Board of Education of the City of Camden. Until March 4, 1964, they were employed in the Supply and Distribution Department of the school system. On that date they were suspended. On July 20, 1964, written charges against them were certified by the Board of Education to the Commisioner of Education pursuant to the provisions of the Tenure Employees Hearing Act (*R. S.* 18:3–23 *et seq.*). On the same date they were transferred to janitorial positions at reduced salaries, effective July 23, 1964. The two cases have been consolidated for the purposes of hearing.

A hearing was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Camden County Superintendent of Schools in Pennsauken on September 14, 1965.

The charges certified to the Commissioner alleged that on several occasions respondents had received items of foodstuffs, "knowing same to have been pilferaged from the Board of Education of the City of Camden, said goods being the property of the Board of Education of the City of Camden, given title to same by the United States Government under the school lunch program."

At the hearing it was testified that respondents were suspended on March 4, 1964, and criminal charges were placed against them. Those charges were subsequently dismissed on motion and thereupon the Board, on July 6, 1964, directed its Business Manager to file written charges against respondents under the Tenure Employees Hearing Act. The certification of the charges and the transfer of respondents to other positions followed on July 20.

In the course of the hearing, respondents through their counsel entered a statement admitting possession of some of the items mentioned in the charges against them, but asserting that they had no knowledge that these items had been stolen from the Board of Education and that they had no intent to do any wrong. In the light of this statement, it was agreed that the sole issue for the Commissioner to decide is the severity of the disciplinary action imposed upon respondents by the Board of Education.

Respondent Vesper was employed as Supervising Clerk—Foreman of Supply and Distribution at the rate of $5,050 per year. He was suspended without pay for somewhat over four months. The July 20, 1964, resolution of the Board transferred him to the position of Janitor—Class B, at a salary of $4,450, or a reduction in salary of $600. The maximum salary for the Janitor—Class B position is $4,450 on the Board's salary guide for janitors.

Respondent Carrington was employed as Assistant Clerk—Foreman of Supply and Distribution at an annual salary of $4,150 when he was suspended. After a like period of suspension he was transferred to the position of Janitor —Class C, at a salary rate of $3,550, also a reduction of $600. The Commissioner notes that on July 1, 1965, he was advanced to a salary of $3,800 per year. The Board's salary guide for Janitor—Class C provides for a maximum of $4,200.

It was testified that both respondents had many years of service in the district, that both are rendering efficient work in their present positions, and, in the judgment of the secretary of the Board, both will be considered for and entitled to any promotions or openings for which they may be eligible. The secretary expressed the opinion that the punishment already meted out for the past offense closes this episode. (Tr. 68)

The statutes (*R. S.* 18:7–56) provide that no person holding tenure in a clerical position

> "shall be dismissed or subjected to reduction in salary except for inefficiency, incapacity, unbecoming conduct or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her * * * and after the charge shall have been examined into and found to be true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act. * * *"

The Commissioner finds that the charges, to the degree admitted at the hearing by respondents, constitute cause sufficient to warrant the loss of earnings resulting from suspension without pay from their clerical positions pending the filing of charges, and from the reduction in salary occasioned by their subsequent transfer to janitorial positions. Public employees at all levels must be held rigorously accountable for their stewardship of the public's money and property. The Commissioner determines that the penalties imposed upon respondents were reasonable in the light of this offense and finds no reason to disturb the action of the Camden City Board of Education with respect to these employees.

COMMISSIONER OF EDUCATION.

January 4, 1966.

IV

BOARD SECRETARY MUST MAKE SUITABLE ARRANGEMENTS TO RECEIVE NOMINATING PETITIONS

RICHARD P. CONSTANTINOS,

Petitioner,

v.

SAMUEL MEYERSON, SECRETARY, BOARD OF EDUCATION OF THE BOROUGH OF STANHOPE, SUSSEX COUNTY,

Respondent.

For the Petitioner, *Pro Se*

For the Respondent, *Pro Se*

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this matter, a resident of the Borough of Stanhope, complains that respondent has improperly refused to receive his nominating petition as a candidate for election to the Stanhope Board of Education, and to include his name in the drawing for a position on the ballot to be used at the annual school election to be held on February 8, 1966. Respondent asserts that petitioner's nominating petition was not filed with him within the time provided by law for such filing.

The facts in this matter are presented to the Commissioner in the verified petition of appeal and in the affidavits of respondent and the principal of the Stanhope School.

There being no dispute as to the facts set forth under oath by the parties hereto, the Commissioner will decide this matter on the factual situation as presented to him in order that his decision may not impede or delay the procedure leading to the election to be held on February 8.

In his verified petition of appeal, petitioner makes the following statements:

"1. That on Tuesday, December 28th, 1965, at approximately 12:30 P.M. he did attempt to submit his petition as a candidate for the Board of Education of Stanhope to Mr. Samuel Meyerson, Secretary of the Board, at the respondent's office in the Public School building, but the respondent was not available.

"2. That on Wednesday, December 29th, 1965, at approximately 11:30 A. M. he did attempt to submit his petition at the office of the respondent, but the respondent was not about the premises or available.

"3. That on Wednesday, December 29th, 1965, at approximately 11:45 A. M. he did attempt to submit his petition at the home of the respondent, but the respondent was not available.

"4. That on Wednesday, December 29th, 1965, at approximately 1:00 P. M. he did attempt to submit his petition at the home of the respondent, but the respondent was not available.

"5. That on Wednesday, December 29th, 1965, at approximately 8:00 P. M. he did attempt to submit his petition at the home of the respondent, but the respondent was not available.

"6. That on Thursday, December 30th, 1965, at approximately 10:30 A. M. he did attempt to submit his petition at the office of the respondent, but the respondent was not available.

"7. That on Thursday, December 30th, 1965, at approximately 10:45 A. M. he did submit the petition to the Principal of the Public School in a final attempt to have the petition officially received.

"8. That the respondent at no time indicated where or when he would be available to receive petitions of candidates, either to the general public or to the petitioner, nor did he leave such information with other responsible persons to be communicated to prospective candidates who might be seeking for him.

"9. That on Friday, December 31st, 1965, at approximately 7:00 P. M. the respondent informed the petitioner by telephone that his petition was received from the Principal, Mr. Stephens, at 11:00 A. M. that morning and therefore the petitioner's name could not be placed on the official ballot of candidates seeking election to the Board of Education."

Respondent was requested to answer petitioner's allegations by affidavit which reads as follows:

"I, Samuel Meyerson, being of lawful age and sound mind, do hereby state the following facts:

"Concerning the petition of Richard P. Constantinos to have his name put upon the ballot, as I am a part-time secretary of the Board I am not available at all times at the office of the school. If I am not at the office of the school I am available at my home.

"On Tuesday, December 28, 1965, I was at school until noon. The petitioner made no attempt to contact me at my home to make application. On December 29 I was not at home from 10:30 A. M. on. On Thursday, December 30, I was at home the entire day to receive petitions of candidates. Mr. Constantinos went to the office and I was not there. He immediately went to the home of the principal and left his petition, which was entirely unnecessary as I live on the same street as the principal less than a block away and it would be just a matter of a minute that he could file his application. On December 31, at approximately 11:00 A. M. the principal called me and told me that he had Mr. Constantino's petition at his home. I called Mr. Constantinos but was not able to reach him until about 6:30, at which time I informed him that I had not received his petition and his name would not appear on the printed ballot. I had refused one candidate at approximately 7:45, December 30, to have his name on the ballot because he had filed it too late. Incidentally, Mr. Constantino's petition was sworn to on December 21, giving him ample time to file.

"I feel that if Mr. Constantino's name is order to be put on the official ballot that the name of the candidate refused by me on December 30 should receive consideration.

"Drawing for the position on the ballot was held on December 31, 1965 at the schoolhouse at 8:00 P. M. Below are listed the positions on the ballot:

1. Charles J. Leavy, Main Street, Stanhope
2. Prescott W. Stearns, Jr., Musconetcong Avenue, Stanhope
3. Jacques C. Edwards, Reeve Ave., Stanhope
4. Marion T. Fine, Young Drive, Stanhope"

Because the principal of Stanhope School was named by both petitioner and respondent, he too was asked to submit his affidavit setting forth his participation, as follows:

"I Theodore M. Stephens, being of lawful age and sound mind, do hereby state the following facts:

"That on Tuesday, December 28, 1965 Mr. Richard P. Constantinos appeared at the office of the Stanhope Public School, Valley Road, Stanhope, New Jersey, to present his petition to Mr. Samuel Meyerson, Secretary, Stanhope Board of Education. In the absence of Mr. Meyerson, Mr. Constantinos asked me to examine the petition to determine if it were properly completed. Mr. Constantinos left the office a few minutes later saying that he would stop at Mr. Meyerson's home. On Wednesday, December 29, 1965, at approximately 9:00 P. M. Mr. Constantinos called me at my home and said that he had attempted to reach Mr. Meyerson at his home but could not locate him either by person or phone. Thursday, December 30, 1965, Mr. Constantinos appeared at my home at approximately 10:45 A. M. and said that he had appeared at the school and had been told by the custodian present that no one was present in the office. Following that, he came to my home and asked me to receive the petition and forward it to Mr. Meyerson. I accepted the petition and then left home for the day, returning home late in the evening. I did not call Mr. Meyerson to inform him of receipt of the petition until the following morning on Friday, December 31 at approximately 11:00 A. M. Mr. Meyerson informed me that in compliance with the State Laws it was too late to receive the petition."

It thus appears, on the unchallenged statements of petitioner, that from December 28 to December 30, he made six unsuccessful attempts to file his nominating petition with the secretary of the Board, during morning, afternoon, and evening hours, both at respondent's home and at his office in Stanhope School. Finally, he submitted the petition to the principal of the School, who states that he accepted the petition at his home, thereafter left for the rest of the day, and notified respondent on the following morning, December 31, that he had the petition.

Respondent's answer shows that, except for December 29, when he was neither at home nor at his office after 10:30 A. M., he was at his office when petitioner tried to reach him at home, and at home when petitioner went to his office. Respondent makes no answer to petitioner's complaint that at no time did respondent indicate "where or when he would be available to receive petitions of candidates, either to the general public or to the petitioner, nor did he leave such information with other responsible persons to be communicated to prospective candidates who might be seeking for him."

Absent any indication that the principal was authorized to represent respondent either to inform candidates of respondent's whereabouts or to accept nominating petitions on respondent's behalf, petitioner erred in his final decision to leave his nominating petition with the principal. In turn, the principal erred in accepting a responsibility for which he had neither authorzation nor the information essential to performance.

The relevant statute is *R. S.* 18:7–25, which reads in part as follows:

"Nominating petitions shall be filed with the secretary of the board of education on or before 4 o'clock P. M. on the fortieth day before the date of the election * * *."

Under the conditions made known to respondent by the principal on December 31, the day after the deadline for filing nominating petitions, the decision of respondent not to accept the nominating petition of petitioner herein is understandable. However, in the light of the full statement of the circumstances now made known to the Commissioner by all the parties involved, it is clear that petitioner made reasonable effort to file his nominating petition with the Secretary of the Board, and was frustrated in his efforts by lack of proper information as to the times and place or places at which his petition could be properly filed. The availability or unavailability of the secretary of the board of education at reasonable hours and places cannot be allowed to determine who may or may not become a candidate for election to board membership. It is the Commissioner's opinion that in order for the intent of the statute, *supra*, to be fully effectuated, a board secretary has an affirmative duty to make known to the public the times and places at which nominating petitions can be filed in accordance with law.

The Commissioner finds and determines that Richard P. Constantinos has been improperly denied a position on the ballot for election of Board of Education members at the annual school district election in the Borough of Stanhope on February 8, 1966. He directs that the nominating petition of said Richard P. Constantinos, if otherwise in proper form, be received as if it had been filed with the Secretary of the Board of Education on or before 4 P. M. on December 30, 1965. He further directs that the name of Richard P. Constantinos be added to the names of those whose petitions were received, and that a new drawing for the position of names on the ballot be conducted immediately following the public hearing on the Stanhope School District budget on January 21, 1966, in the manner prescribed by law, as if the drawing previously held on December 31, 1965, had never occurred. He further directs the Secretary of the Stanhope Board of Education to notify all candidates of such drawing, in order that they may be present if they so desire.

COMMISSIONER OF EDUCATION.

January 18, 1966.

V

In the Matter of the Termination of the Sending-Receiving Relationship Between the Boards of Education of the Township of Lakewood and the Township of Manchester, Ocean County

For the Petitioner, Mark Addison, Esq.

For the Respondent, Steinberg & Steele (Morton C. Steinberg, Esq., of Counsel)

Decision of the Commissioner of Education

For many years the Lakewood Board of Education, petitioner, has received the pupils of the Board of Education of Manchester Township, respondent, as tuition pupils in its high school. Now, because of the growth of the resident pupil population of Lakewood, petitioner seeks to terminate the sending-receiving relationship with respondent, in order to avoid overcrowding of its facilities and allegedly possible harmful effects on its educational program. Respondent answers that its own high school population is not large enough to warrant operation of its own high school facility and denies that it has made no effort to provide other facilities for its high school pupils.

A hearing in this matter was conducted by the Assistant Commissioner in charge of Controversies and Disputes on June 30, 1965, at the office of the Ocean County Superintendent of Schools in Toms River.

Petitioner operates a four-year high school which was constructed in 1957 and has a current functional capacity of 1,047 pupils and a maximum capacity of 1,327 pupils. The high school enrollment as of the end of the 1964-65 school year was 1,331. However, because the sending-receiving relationship with the Jackson Township Board of Education terminated with the graduating class of 1965, the projected high school enrollment for the 1965-66 school year was 1,232 pupils, including 167 from Manchester Township. Enrollment figures in the Commissioner's office show the actual enrollment as of September 30, 1965, to be 1,165. Further high school enrollment projections made by petitioner's superintendent (Tr. 36-41, 50-51) through the 1969-70 school year are as follows:

	Lakewood Resident Enrollment	*Manchester Township Tuition Pupils*	*Total*
1966-67	1137	210	1347
1967-68	1185	218	1403
1968-69	1178	214	1392
1969-70	1174	246	1420

These figures, according to the superintendent, are straight-line projections and make no allowance for pupils moving into or out of either Lakewood or Manchester Township. A comparison of projected and actual enrollments for the years 1959-60 through 1964-65 shows the projections to be from 6 per cent to nearly 12 per cent lower than actual enrollments. The projected figures for high school enrollments from Manchester Township made by the administra-

tive principal of that district are slightly higher than those shown in the above table. (Tr. 67)

Since 1946, petitioner has built a new elementary school and its present high school. In addition, it has added 11 classrooms to the elementary school, 11 classrooms to another elementary school, 12 classrooms and enlargements of the library and science areas in the high school, and is currently contemplating the erection of an intermediate school for grades 7 and 8.

Evidence was introduced to show that since August 1957, petitioner has sought to terminate its sending-receiving relationships. On August 14, 1957, petitioner addressed a letter to respondent stating that it would be unable to accept ninth grade pupils beginning with the school year 1960-61, and urging respondent and other sending districts to proceed immediately to develop their own high school programs. Meetings and correspondence between petitioner and respondent have occurred periodically since then, to discuss the problem of continuation of the sending-receiving relationship.

The nub of petitioner's testimony and argument is that the Township of Lakewood has provided facilities necessary to provide a suitable school program for the children of its own district, that enrollment of respondent's high school pupils will seriously overburden its high school to the detriment of the educational program, and that the taxpayers of Lakewood should not be required to obligate the Township to additional bonded intebtedness to provide the additional facilities for respondent's pupils needed to sustain the quality of the program. They therefore ask that the Commissioner direct the termination of the sending-receiving relationship with respondent beginning with the school year 1966-67.

Respondent, on the other hand, points out that even though Manchester Township is experiencing growth, its projected high school enrollment through 1970-71 will be 275, far short of the minimum of 600 which it feels would be required to sustain a high school. It points out, further, that despite the construction of 26 elementary school classrooms between 1954 and 1964, all rooms will be needed for the 1965-66 school year, and unless there is further building, "split" sessions are foreseen by 1967-68. (Tr. 68-71) Documentary evidence (R-11) and testimony were presented to show that respondent has made efforts to have its pupils accepted at Jackson Township High School, Dover Township High School and Central Ocean County Regional High School, without success since none of these high schools has sufficient facilities to accommodate tuition pupils. Overtures to Lakehurst School District to explore possible regionalization were not accepted by Lakehurst.

The statute relevant to the termination of sending-receiving relationships is *R. S.* 18:14–7, which reads in part as follows:

> "* * * No designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior 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 unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner."

While the law thus clearly provides for the stability of a sending-receiving relationship, it also establishes that when good and sufficient reason exists

therefor, such a relationship may be terminated by the Commissioner. The facts in the instant matter demonstrate that while Lakewood has provided facilities for Manchester Township pupils in the past, its own population growth will soon utilize all existing high school facilities. A continuation of the present relationship will confront Lakewood with the alternatives of either building additional facilities or adopting some emergency arrangement, such as double sessions, which will operate to the detriment of the educational program. *Cf. Board of Education of Bradley Beach* v. *Board of Education of Asbury Park,* 1959-60 *S. L. D.* 159, 162. The Commissioner can find no reason to conclude that a receiving district must necessarily be forced to either of these alternatives. *In the Matter of the Termination of the Sending-Receiving Relationship Between the Boards of Education of Middletown Township and the Borough of Keansburg,* decided by the Commissioner April 14, 1964

On the other hand, respondent has made *bona fide* efforts to find another high school which would accept its pupils, without avail. It validly argues that its high school enrollment as projected to 1969-70, will not be sufficient to sustain an effective high school program of its own. In the light of the rapid growth of population in Ocean County generally, however, and in consideration of Manchester Township's own growth in high school population—in 1964-65 nearly three times that in 1960-61—the Commissioner believes the method of straight-line projection used to predict enrollment in 1969-70 to be conservative. Indefinite continuation of the present sending-receiving relationship can be expected to impose such serious demands upon the high school facilities in Lakewood that the Lakewood Board of Education will be unable to provide suitable school facilities for its pupils and to maintain a thorough and efficient system of secondary education. *In the Matter of the Termination of the Sending-Receiving Relationship Between the Board of Education of the Borough of Pitman and the Board of Education of the Township of Mantua,* 1958-59 *S. L. D.* 101

The Commissioner finds and determines that the high school facilities now available in the school district of Lakewood are inadequate to enable the Board of Education of the district to continue indefinitely to provide a suitable program of education for its own pupils and those of Manchester Township. In order to afford the Board of Education of Manchester Township a reasonable period of time to make other arrangements for its high school pupils, he directs that the sending-receiving relationship be terminated as of September 1, 1970; provided, however, that pupils of the eleventh and twelfth grades residing in Manchester Township, if it is so requested by the Board of Education of Manchester Township or other board of education then having jurisdiction over such pupils, shall continue to be received by the Lakewood Board of Education until their classes graduate from high school. He further directs the Board of Education of Manchester Township to consult with the Ocean County Superintendent of Schools and members of the State Department of Education for the purpose of arranging an educational program for its high school pupils beginning in September 1970.

COMMISSIONER OF EDUCATION.

January 20, 1966.

VI

WHERE EDUCATIONAL OPPORTUNITY IS UNEQUAL, BOARD IS LEGALLY OBLIGATED TO SEEK PROPER SOLUTION

JOAN BYERS, MARTENIA BYERS AND THERESA M. BYERS, MINORS, BY MRS. EDITH J. BYERS, THEIR PARENT AND NEXT FRIEND; PERCY HALL, A MINOR, BY MRS. DOROTHY HALL, HIS PARENT AND NEXT FRIEND; GILBERT JAMES, JR., A MINOR, BY GILBERT JAMES, SR., HIS PARENT AND NEXT FRIEND; ALVIN LASTER AND GLORIA LASTER, MINORS, BY MOZELL LASTER, THEIR PARENT AND NEXT FRIEND; LYSHRON LINCOLN, A MINOR, BY ROOSEVELT LINCOLN, HIS PARENT AND NEXT FRIEND; ANTHONY D. LINGO AND PRITICIA L. LINGO, MINORS, BY MR. AND MRS. DENSON LINGO, THEIR PARENTS AND NEXT FRIEND; GAIL A. MILLER, A MINOR, BY FREEMAN E. MILLER, HER PARENT AND NEXT FRIEND; ROBERT E. RIDGEWAY, STACY RIDGEWAY AND STANLEY RIDGEWAY, MINORS, BY MRS. DORIS RIDGEWAY, THEIR PARENT AND NEXT FRIEND; JAMES H. RILEY AND NORMAN A. RILEY, JR., MINORS, BY NORMAN A. RILEY, SR., THEIR PARENT AND NEXT FRIEND; DON EVERETT TAYLOR, LINDA J. TAYLOR, TYRONE G. TAYLOR AND WANDA L. TAYLOR, MINORS, BY REV. JAMES TAYLOR, THEIR PARENT AND NEXT FRIEND; RONNIE D. WATFORD AND THEODORE R. WATFORD, JR., MINORS, by MRS. BETTY J. WATFORD, THEIR PARENT AND NEXT FRIEND; ALBERT C. WILLIAMS AND DORA JANE SCOTT, MINORS, BY MRS. NAOMI B. WILLIAMS, THEIR MOTHER AND GUARDIAN AND NEXT FRIEND; JOAN WILLIS, JOSEPH WILLIS AND LARRY E. WILLIS, MINORS, BY DAVID U. WILLIS, JR., THEIR PARENT AND NEXT FRIEND; JAMES ZIGLER, JR., AND JOANNE ZIGLER, MINORS, BY JAMES ZIGLER, THEIR PARENT AND NEXT FRIEND,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,

Respondent.

For the Petitioners, Robert Johnson, Esq., Robert L. Carter, Esq., Barbara A. Morris, Esq.

For the Respondent, David L. Horuvitz, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal alleges the maintenance of a racially segregated public school system in the City of Bridgeton and failure of respondent Board of Education to take action to eliminate all aspects of such segregation and its consequent denial of equal educational opportunity. Petitioners allege further that this condition will be extended and entrenched by respondent's plan to construct a new elementary school and an addition to an existing school in a section of the city in which the population is predominantly Negro. Respondent avers that the allegations relating to racial segregation and unequal educational opportunities of Negroes are fictitious and without basis.

This appeal was initiated before the Commissioner of Education on August 16, 1962. At that time respondent's plans to construct two new elementary schools and additions to several existing buildings had progressed to the point where construction had been under way for two months and bonds of the school district had been sold and were about to be delivered. The institution of these proceedings acted to bar delivery of the bonds under the terms of the contract of sale for reason that the required certification of absence of litigation affecting validity of the bonds could not be executed. Respondent therefore moved to dismiss that part of the petition addressed to school building construction or, in the alternative, to sever that part from the issue of alleged racial segregation. Testimony and argument on the Motion were heard and exhibits and memorandums of counsel were received by the Assistant Commissioner in charge of Controversies and Disputes in Trenton on August 28, 1962. The Motion was denied by the Commissioner of Education on October 16, 1962. There followed a lengthy interval of time during which discovery proceedings, including an exchange of interrogatories, were accomplished. The matter was concluded with the taking of testimony and documentary evidence before the Assistant Commissioner in charge of Controversies and Disputes at the Cumberland County Court House in Bridgeton on September 23, 1965.

The Bridgeton School District is organized under the provisions of Chapter 7 of Title 18. It maintains 11 elementary schools, a junior high school, and a senior high school. The issue of racial segregation herein is directed solely to the elementary school enrollments which in the 1964-65 school year were as follows:

School	*White*	*Negro*	*Other*	*Total*	*% Negro*
Buckshutem Road	7	319	----	326	97.9**
South Avenue	29	245	----	274	90.0**
Cherry Street	25	322	1	348*	94.8**
Bank Street	199	200	1	400	50.0
Monroe Street	108	37	4	149	24.8
Vine Street	221*	59	2	282	20.9
Indian Avenue	188	41	2*	231	17.7
Irving Avenue	161	30	----	191	15.7
Quarter Mile Lane	187	14	3	204	6.8
Pearl Street	243	15	----	258	5.8
West Avenue	170	6	2	178	3.3
	1538	1288	15*	2841	45.3

* Corrected from Exhibit P-1 to agree with data supplied by respondent's answer to interrogatory dated June 15, 1965.

** Corrected errors in calculation found on Exhibit P-1.

It is to be noted that the Cherry Street School and an addition to the Buckshutem School are now completed and in use. Petitioner's protest of these facilities came too late to prevent their erection. The record shows that since 1960 the Board of Education had undertaken studies and had worked with a Citizens Advisory Committee, the Mayor and City Council, and the City Planning Board on school building plans to meet projected enrollment needs. Publicity was given to the studies and proposals as they developed.

The question was eventually submitted to the voters at a referendum on December 12, 1961, at which authorization was obtained to acquire the Cherry Street site and build a school thereon, to add to the Buckshutem School, to erect a second new school on West Avenue, and to make additions to several other buildings. Although protests against the continuance of double sessions at the Buckshutem School had been lodged with the Board prior to the referendum, there is no record that any clear protest was directed against the choice of the Cherry Street site for erection of a school to eliminate this condition until May 1962. Under its mandate from the voters, the Board proceeded to develop final plans and to take bids. It awarded construction contracts on June 5, 1962, and sold bonds to finance the projects on August 6, 1962. The apppeal herein, taken on August 16, 1962, as recited above, resulted in blocking delivery of the bonds and receipt of funds for the payment of construction already under way. Although the record does not reveal how this impasse was eliminated, it obviously was resolved and construction proceeded to completion. No substantial evidence was produced to support the charge that the Cherry Street school site was "physically undesirable and unsafe." The Commissioner finds therefore that the contentions with respect to the erection of the Cherry Street School are now moot, except as they pertain to the main issue of alleged improper racial segregation in the school district generally.

Since the inception of this appeal, certain principles pertinent to the issues herein have been established by decisions of the Commissioner and of the State Board of Education, and by pronouncements of the New Jersey Supreme Court in similar cases. *Fisher* v. *Orange Board of Education,* 1963 *S. L. D.* 123; *Spruill* v. *Englewood Board of Education,* 1963 *S. L. D.* 141, affirmed State Board of Education 147; *Booker* v. *Plainfield Board of Education,* 1963 *S. L. D.* 136, affirmed State Board of Education February 5, 1964, remanded 45 *N. J.* 161 (1965); *Fuller* v. *Volk,* 230 *F. Supp.* 25 (1964); *Alston* v. *Union Board of Education,* decided by the Commissioner April 6, 1964, affirmed State Board of Education July 8, 1964; *Schults* v. *Teaneck Board of Education,* 86 *N. J. Super.* 29 (1964) It is now clear that maintenance of a school populated predominantly by pupils of the Negro race constitutes under New Jersey law a denial of educational opportunity to the pupils assigned to attend it:

> "* * * [E]xtreme racial imbalance * * * at least where means exist to prevent it, constitutes under New Jersey law a deprivation of educational opportunity for the pupils compelled to attend the school * * *." *Fisher* v. *Orange Board of Education,* 1963 *S. L. D.* 123, 128
>
> "When * * * the Supreme Court struck down segregated schools, it recognized that they generate a feeling of racial inferiority and result in a denial of equal educational opportunities to the Negro children who must attend them. Although such feeling and denial may appear in intensified form when segregation represents official policy, they also appear when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting." *Booker* v. *Plainfield Board of Education,* 45 *N. J.* 161, 168 (1965)

It is also clear that the local district board of education has an affirmative duty to seek ways to eliminate or alleviate such a condition:

> "* * * [T]he Commissioner is of the opinion that in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils." *Fisher* v. *Orange Board of Education*, 1963 *S. L. D.* 123, 127

In this connection, the Supreme Court in *Booker, supra,* cites with approval the finding of the California Supreme Court in *Jackson* v. *Pasadena City School District*, 59 *Cal.* 2*d* 876, 31 *Cal. Rptr.* 606, 382 *P.* 2*d* 878, stating:

> "While its actual holding was narrower, the court's opinion clearly recognized that, under state law and policy, the school authorities have an affirmative duty to take steps towards alleviation of racial imbalance in the school system without regard to its origin." 45 *N. J.* at page 171

In an affidavit filed in the case of *Fuller et al.* v. *Volk et al.*, 230 *F. Supp.* 25, the Commissioner said:

> "A board of education is charged by State law to provide equalized educational opportunities for its pupils. The mere fact that the board did not initiate the conditions causing such educational deprivation does not relieve it from the legal obligation of seeking proper solutions * * *. A board's lack of fault does not absolve it from the responsibility of mitigating or eliminating the harm."

The issues in this appeal may be framed as follows:

1. Does racial segregation of pupils exist in fact in the Bridgeton Public Schools, regardless of underlying cause?

2. If so, has the Board of Education taken whatever practical, reasonable, and educationally sound means there may be to eliminate or reduce this condition?

The answer to the first question is obviously in the affirmative. More than 90% of the pupils in three of the schools are Negro children. In another building the enrollment is equally divided. In the remaining seven schools the ratio of Negro pupils ranges from 25% to less than 4%. That there is a disproportionate number of Negro and white children in most of the schools in Bridgeton in terms of the racial composition of the community, for whatever reason, is an obvious fact based on the statistics alone.

The question which follows is what has the Board of Education done to eliminate or mitigate this condition? A search of the record reveals the following actions pertinent to this problem.

In June 1963 the superintendent recommended a policy of "open enrollment" under which a parent could request transfer of his child to another school provided that there was room there in the appropriate class. Under such a voluntary transfer the parent assumed responsibility for transportation

and for providing lunch for his child. Such a program became operative at the commencement of the 1963-64 school year, but apparently it has had little if any effect on the racial composition of the schools.

The superintendent testified that he also recommended that the Board urge the Mayor to appoint a "multi-racial committee" presumably to make studies and recommendations. The Board acted on this suggestion and such a committee was formed comprised of members from various racial, social, and political groups in the community. According to the superintendent the committee met from time to time but "fell apart because of lack of interest." He also recommended that the Board of Education request the Commissioner of Education to appoint a "fact-finding committee" to survey the situation in Bridgeton but the Board failed to act on this suggestion.

The actions recited above appear to have been the extent of the measures taken with respect to the subject problem. There is no evidence of any recent surveys, studies, or plans having been undertaken by the Board or the administration, concerned with pupil attendance areas. The President of the Board in his testimony admitted that the Board has done nothing and has no plans to alleviate the present condition. (Tr. 57) The testimony further reveals that except for necessary alterations made at the time new schools were built, school attendance areas have remained substantially the same for decades. It appears that the Board has relied on this tradition and its concept of the "neighborhood school" as sufficient to meet present conditions and has assumed that nothing more can or need be done.

Such an assumption cannot be supported. Faced with conditions which have been clearly held to constitute a denial of educational opportunity, a board of education cannot take refuge in tradition and status quo or resort to vague references to an ill-defined "neighborhood school policy" as an excuse for avoiding the necessity of grappling with the problem and attempting to eliminate or, at least, mitigate it. As the N. J. Supreme Court has said:

> "* * * the goal here is a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures. This brings into play numerous factors to be conscientiously weighed by the school authorities." *Booker* v. *Plainfield, supra*, at page 180

The salient fact in this case is that no attempt has been made to develop "a reasonable plan" to improve the present undesirable enrollment conditions in this school district. Until adequate studies are made and proper consideration given to various plans, any conclusions can be more than unsupported assumptions. By diligent and conscientious study, an apparently insoluble problem can be effectively remedied in many cases by theretofore unrealized means. From the evidence in this case the Commissioner concludes that the respondent Board of Education has neglected to undertake the kind of planning needed to determine this issue and that it has an affirmative duty to make a proper finding based on thorough and adequate studies. The Bridgeton Board of Education is directed, therefore, to proceed with all possible speed to develop surveys, studies and plans in order to determine how best it can accomplish the goal enunciated by the Supreme Court of "a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures."

The Commissioner notes that there appears to have been a further assumption in this school district that the end sought by petitioners can be achieved only by large outlays of tax moneys for transportation of pupils and construction of cafeterias. Some testimony was even introduced on such costs. Following the hearing, articles appeared in the local press citing the effect of such costs on tax rates, and numerous letters expressing concern in this respect were received from residents. This kind of leaping to conclusions points up the hazard of making assumptions based on no evidence. It cannot be assumed at this juncture that the Bridgeton Board of Education is faced with a choice of only two extreme alternatives: (1) to do nothing or (2) to raise and expend huge sums of money for pupil transportation and school lunchrooms. The problem herein has been met successfully in other districts by a variety of solutions depending upon the particular circumstances and factors to be considered. The means employed have included redrawing of attendance zones either on a district-wide or partial basis; the pairing of two or more schools in what has become known as the "Princeton Plan;" locating new schools or adding to existing schools so as to reduce racial concentrations of enrollments; reorganization of schools as to function, *i.e.* the establishment of central schools housing pupils from wider areas for specialized functions; realignment of "feeder" patterns where several smaller schools send pupils to one larger unit; as well as other methods and combinations of methods. Valid conclusions can be reached only after all possibilities have been considered and applied.

For the reasons stated this matter is remanded to the Bridgeton Board of Education for action in accordance with the principles enunciated herein. The Commissioner suggests that the advice and counsel of the Cumberland County Superintendent of Schools and other members of the staff of the State Department of Education are available to respondent in the development of its studies and plans if desired and requested. Respondent may also wish to involve representatives of petitioners and other interested community groups in appropriate ways. The Commissioner will require that the matter move forward with all possible speed and he will retain jurisdiction pending receipt and approval of respondent's final report.

COMMISSIONER OF EDUCATION.

January 24, 1966.

JOAN BYERS, et al.,
Petitioners-Respondents,

v.

THE BOARD OF EDUCATION OF THE CITY OF BRIDGETON,
Respondent-Appellant,

AND

HELEN BURGER, et al.,
Intervenors-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF BRIDGETON,
Respondent-Respondent.

DECISION OF THE STATE BOARD OF EDUCATION

APPEARANCES:

Barbara A. Morris, Esq. for Joan Byers, et al.

David L. Horuvitz, Esq. for The Board of Education of The City of Bridgeton.

Philip L. Lipman, Esq. & C. Zachary Seltzer, Esq. for Helen Surger, et al.

Miss Morris was unable to appear and relied upon her Notice of Motion To Dismiss and accompanying Memorandum.

This is an appeal from an order of the Commissioner of Education (hereafter Commissioner) dated December 5, 1966, in the first of these two matters, namely *Joan Byers, et al.* (hereafter Petitioners) v. *The Board of Education of the City of Bridgeton* (hereafter Respondent) which was consolidated with a petition seeking to intervene by Helen Burger, et al. (hereafter Intervenors), pursuant to an order of the Law Committee of the State Board of Education dated January 18, 1967 and ratified by the State Board on February 1, 1967.

The order from which Respondent appealed was embodied in a letter from the Commissioner addressed to Respondent through its President. We reproduce it here, first because we affirm it for the reasons expressed therein, and secondly because we shall have reason to comment upon it later. The text of the letter is as follows:

> On October 8 you sent us a "Report to the Commissioner of Education" in the above-entitled matter. This report followed upon your request of June 27, 1966, for an extension of time to file a plan in this matter, in which you asked:
>
> > "(1) *Deadline* on submitting plans and supporting data to the Commissioner to be Monday, October 19, 1966.
> >
> > "(2) *Deadline* on effecting such a plan as may be designated by the Commissioner to be September 1, 1967."
>
> And on July 19, you wrote in part as follows:
>
> > "The Board of Education of the City of Bridgeton affirms that it will meet these deadlines and will not request further extensions."
>
> By letter of July 28, the Commissioner granted the extension, saying even further:
>
> > "If additional time is required beyond that date *in order to perfect details,* consideration will be given to such a request, but a report of progress will be expected on or before that date." (Emphasis supplied)

> The good faith and determination expressed by the Board of Education on June 27 and July 19, and acknowledged by the Commissioner in granting the extension, clearly contemplated that the report to be submitted on October 10 would present a plan to be effected on September 1, 1967, with the possibility that only the final details of its administration would be lacking and would require additional time for perfection.
>
> This latest "Report to the Commissioner" does not comport with prior agreements and is unacceptable. It contains no plan to become effective in 1967. There are no data supporting a contemplated proposal to be effective in 1967 or at any other time in the future. Instead, the report is essentially a repetition of the testimony already presented at two hearings in this matter, and reiterated in the already rejected interim report submitted by the Superintendent on May 20.
>
> The findings of the Commissioner in this matter have been fully set forth in his decision of January 24, 1966. The law and the Commissioner's responsibility in the light of these findings were clearly established by the New Jersey Supreme Court in *Booker* v. *Board of Education of Plainfield*. There is therefore no purpose to be served in arguing for the continuance of the *status quo*. The request for a further extension, and continuation of the present interim plan until June 1968, makes no offer of an acceptable plan; it seeks only the assent of the Commissioner to an indefinite extension of conditions which have been determined to be legally and educationally unacceptable.
>
> Under the circumstances of the already unduly prolonged delay in correcting this situation no further extension of time can be granted. The Board of Education is directed, therefore, to submit, not later than January 15, 1967, a plan consistent with the principles enunciated in the decision of the Commissioner in this matter dated January 24, 1966, such plan to become effective for the 1967-68 school year.

As is evident from the Commissioner's order, Respondent's "Report to the Commissioner of Education" dated October 8, 1966, manifested an element of contumacy which was not previously apparent in its conduct. This impression is reinforced by an examination of the Report which enumerated a variety of reasons why Respondent should not be forced to act under the time schedule to which it had agreed and from which it had sought and been granted several extensions based upon promises and assurances of performance.

On January 3, 1967, Respondent served Notice of Appeal from the Commissioner's order of December 5, 1966. There was, of course, no compliance with the deadline set therein at January 15, 1967, neither was there an application to the Commissioner or to us for a stay therefrom. Respondent failed to file Points of Appeal as required by our rules for the purpose of giving us and adversaries notice of the legal basis for the appeal. The Byers case was initiated by petition to the Commissioner on August 16, 1962. After complex and protracted proceedings, the Commissioner rendered a decision on January 24, 1966, which was not appealed. Against this background, the insistence of counsel for Respondent on February 1, 1967, that he should be permitted to present testimony as to the problems Respondent had encountered seemed to us inappropriate and we rejected it. We note here that we also rejected a similar proposal on behalf of the Intervenors. As we understood

counsel for Respondent when we pressed him to state the legal basis of his appeal, his reply was to the effect that it was unlawful for the Commissioner to compel Respondent to present a final plan for correcting racial imbalance in its schools at this time, and by implication, unlawful for us to review the matter without our hearing testimony as to the reasons for the necessity of further and open-ended delays. We do not agree that this was required of us in the circumstances, and we note merely in passing that such a proceeding would have been fundamentally unfair to Petitioners because counsel's failure to file Points of Appeal and a memorandum of law, or indeed any indication of what he proposed to do, gave Petitioners no opportunity to be prepared with cross-examination, or rebuttal witnesses, or any other rejoinder they might have deemed suitable if they had reasonable notice. Respondent's sole basis for appeal can be summarized: the action of the Commissioner was arbitrary and capricious. We concluded, from the Order itself, Respondent's progress report and indeed the whole record that the Commissioner has been completely fair. We are remanding this matter to the Commissioner and we recommend that he withhold state aid from this school district until in his judgment there has recommenced an effort in good faith upon the part of Respondent to deal with the problem of racial imbalance in its schools.

The status of the Intervenors in these proceedings is a bit of a puzzle from a procedural standpoint. In September 1966, they applied to the Chancery Division of Superior Court for an injunction against Respondent and the Commissioner, and on December 2, 1966, their action was dismissed without prejudice on the grounds that they had not exhausted their administrative remedies before the Commissioner and State Board of Education. We note here, once again, that the Commissioner's decision of January 24, 1966 was not appealed within the statutory time limit, and nevertheless appeared to be the target, at least in part, of the attack of the Intervenors. Intervenors sought leave from the Commissioner and from the Law Committee of this board to intervene, and it is not entirely clear which came first. Such efforts were at first rebuffed, but thereafter Respondent appealed the Commissioner's order of December 5, 1966, to us and we learned that meanwhile Intervenors had filed a Notice of Motion seeking leave to intervene which was then scheduled for hearing before the Commissioner on February 7, 1967. With a view to the anomaly of the pendency of an appeal before us and the pendency simultaneously of the motion to intervene before the Commissioner, and moreover in the apprehension that any rebuff on procedural grounds of the efforts of Intervenors to intervene might result in subjecting Petitioners to additional delays, we concluded it was best to grasp the nettle. On our own motion, and without holding a hearing, we ordered that the Intervenors were admitted and the matters consolidated for hearing February 1, 1967, at which time no party took exception to this procedure.

The position taken by the Intervenors as to substance is also perplexing. The four points of appeal are essentially four objections to "The plan of the respondent and of the Commissioner of Education . . ." Insofar as these arguments may purport to be directed at the January 24, 1966 decision, they are out of time and we have no jurisdiction to hear them, much less act upon them. If the objections are somehow separable from the decision and are to be considered only as directed at the consequences of the final plan which Respondent has been ordered to produce we have difficulty reconciling the

argument to the fact that Respondent is before us appealing from an order of the Commissioner directing Respondent ". . . to submit . . . a plan consistent with etc. . . ." Respondent this day tells us it cannot comply and requires an extension until June 30, 1968 in order to be able to comply. Further, Intervenors repeatedly refer to "the plan" as "the plan of the Respondent *and the Commissioner of Education*" (italics added). Thus far the Commissioner has confined his efforts to attempts to have the Respondent fulfill its obligation in this regard, failing in which he would then be impelled by law to prepare and institute a plan of his own. At this juncture we find the position of the Intervenors to be composed of elements in which they are too late and elements in which they are premature; the sum total is fallacious if not frivolous.

The appeals are hereby dismissed and the matters remanded to the Commissioner for further actions in accordance with his decision and order, this opinion, and his continuing discretion.

February 1, 1967.

VII

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

Decision of the Commissioner of Education

The announced results of the balloting at the annual school election held February 8, 1966, in the School District of Florence Township for three seats on the Board of Education for a full term of three years each were as follows:

Samuel Cesaretti	254
Robert T. Coates, Jr.	194
Nils Johnson	173
Donald Lambert	172
John D. Halverson	142
Mrs. Paul Sullivan	114
Mary Quig	2

Pursuant to a request made by the highest of the defeated candidates, the Commissioner of Education ordered a recount of the votes cast for candidates Lambert and Johnson. The recount was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes, at the office of the Burlington County Superintendent of Schools in Mount Holly on February 16, 1966. At the conclusion of the recount the tally as announced was confirmed.

The Commissioner finds and determines that Samuel Cesaretti, Robert T. Coates, Jr., and Nils Johnson were elected at the annual school election on February 8, 1966, to the Florence Township Board of Education for full terms of three years each.

Commissioner of Education.

February 24, 1966.

VIII

In the Matter of the Annual School Election Held in the Town of Belleville, Essex County

Decision of the Commissioner of Education

The announced results of the balloting at the annual school election held February 8, 1966, for two members of the Town of Belleville Board of Education for full terms of three years each were as follows:

	At Polls	*Absentee*	*Total*
Nicholas S. Juliano	2296	5	2301
Ernest S. Arvidson	2152	5	2157
David E. Haight	2148	1	2149
Dominic A. Lally	2086	2	2088

Pursuant to a request dated February 15, 1966, from candidate Haight, the Commissioner of Education ordered a recount of the ballots cast for Ernest S. Arvidson and David E. Haight. The recount was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the warehouse of the Essex County Board of Elections, 133 Bruce Street, Newark, on February 17, 1966. The recount confirmed the announced tally of the votes at the polls, *supra,* in all respects.

The Commissioner finds and determines that Nicholas S. Juliano and Ernest S. Arvidson were elected on February 8, 1966, to seats on the Board of Education of the Town of Belleville for full terms of three years each.

Commissioner of Education.

March 3, 1966.

IX

In the Matter of the Annual School Election Held in the Borough of Butler, Morris County

Decision of the Commissioner of Education

At the annual school election held in the School District of the Borough of Butler, Morris County, on February 8, 1966, three members were to be elected to the Board of Education for full terms of three years each. Only two candidates filed nominating petitions. The announced results of the tally of the votes for them were as follows:

George M. Langbein	318
Orion E. Horwath	311

The names of nineteen other citizens were written in as personal choice votes for the third vacant seat. The announced tally of the personal choice votes for the two highest candidates was as follows:

Ellsworth Rogers	62
James Osar	51

Seventy-three ballots were voided by the election officials.

Pursuant to a request dated February 11, 1966, the Commissioner of Education ordered a recount of the personal choice ballots. The Assistant Commissioner in charge of the Division of Controversies and Disputes conducted the recount on February 17, 1966, at the office of the Morris County Superintendent of Schools, Morris Plains.

The recount disclosed a number of variations in the spelling of the names written in. Votes for candidate Rogers were recorded in ten different ways. For candidate Osar there were four acceptable variations plus 3 votes for "Osar" and 1 vote for "Jim Oscar." Variations such as mispellings, failure to use the full name or initials, etc., do not invalidate the ballot. Title 19, Elections, to which the Commissioner looks for guidance in deciding election problems provides:

> "No ballot cast for any candidate shall be invalid * * * because the voter in writing the name of such candidate may misspell the same or omit part of his Christian name or surname or initials." *R. S.* 19:16–4

It is questionable, however, whether the three votes cast for "Osar" or the one for "Jim Oscar" can be counted for candidate Osar. *Cf. Weeks* v. *Kip*, 64 *N. J. L.* 61 (*Sup. Ct.* 1899). It is not necessary, however, to determine the validity of these last four votes because even if they are counted for Mr. Osar he cannot prevail. Candidate Rogers received 66 personal choice votes. Even if the four questionable votes above are added to the tally of candidate Osar, his total is only 61.

The Commissioner finds and determines that George M. Langbein, Orion E. Horwath and Ellsworth Rogers were elected at the annual school election on February 8, 1966, to seats on the Butler Borough Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION.

March 3, 1966.

X

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the voting for three members of the Board of Education of the Township of Delaware, Hunterdon County, for the full term of three years each at the annual school election on February 8, 1966, were as follows:

Harold C. Pyatt	159
Ralph Motz	156
H. M. Royal III	125
William E. Bodine	125

Pursuant to a letter request dated February 10, 1966, from candidate Bodine, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to conduct a recount of the ballots cast for the tied candidates on February 21 at the office of the Hunterdon County Superintendent of Schools in Flemington. The result of the recount confirmed the tally of the election board as previously announced.

The Commissioner finds and determines that Harold C. Pyatt and Ralph Motz were elected to seats on the Delaware Township Board of Education for full terms of three years each. He finds further that there was a failure to elect a member to one vacant seat on the Board. The Hunterdon County Superintendent of Schools is therefore authorized under the provisions of *R. S.* 18:4–7d and is hereby directed to appoint from among the residents of the Township of Delaware a citizen who holds the qualifications for membership to a seat on the Delaware Township Board of Education, who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION.

March 3, 1966.

XI

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF SOUTH BELMAR, MONMOUTH COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for three seats on the Board of Education for full terms of three years each at the annual school election held February 8, 1966, in the school district of the Borough of South Belmar, Monmouth County, were as follows:

	At Polls	*Absentee*	*Total*
Margaret Walling	203	8	211
William R. Lord	178	10	188
Donald P. Baer	169	7	176
William T. Addison	174	0	174
John J. Fitzgibbons	160	0	160
Rae Stone	142	0	142

Pursuant to a letter request dated February 17, 1966, from Candidate Addison, the Commissioner directed the Assistant Commissioner in charge of Controversies and Disputes to conduct a recount of the votes cast. The recount was held March 14, 1966, at the office of the Monmouth County Superintendent of Schools. At the conclusion of the recount with one ballot referred, the tally of the uncontested ballots stood:

	At Polls	*Absentee*	*Total*
Walling	202	8	210
Lord	178	10	188
Baer	168	7	175
Addison	174	0	174
Fitzgibbons	159	0	159
Stone	142	0	142

The single ballot in question (Exhibit A) has a proper cross mark in the square before Stone and before Fitzgibbons. The squares before Baer and before Addison are almost completely filled with heavy random pencil markings. It appears as though the voter had marked a cross in each of these squares and then obliterated it by scribbling. There is also a cross to the left and outside of the square before the name of candidate Addison.

The Commissioner determines that this ballot is to be counted for Stone and for Fitzgibbons. It cannot be counted for Addison because the statutory requirement of a proper mark in the square to the left and in front of the candidate's name has not been met. The Election Law, Title 19, to which the Commissioner looks for guidance at *R. S.* 19:16–3 provides:

> "No vote shall be counted for any candidate * * * unless the mark made is substantially a cross ×, plus + or check √ and is substantially within the square."

See also *In the Matter of the Annual School Election in the Township of Union, Union County*, 1939-49 *S. L. D.* 92; *In the Matter of the Annual School Election in the Township of Monroe, Gloucester County*, 1957-58 *S. L. D.* 79.

Adding this ballot to the tally gives one more vote each for Fitzgibbons and Stone. The final result then is:

	At Polls	*Absentee*	*Total*
Walling	202	8	210
Lord	178	10	188
Baer	168	7	175
Addison	174	0	174
Fitzgibbons	160	0	160
Stone	143	0	143

The Commissioner finds and determines that Margaret Walling, William R. Lord and Donald P. Baer were elected on February 8, 1966, to seats on the Board of Education of the Borough of South Belmar for full terms of three years each.

COMMISSIONER OF EDUCATION.

March 23, 1966.

XII

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the voting for three members of the Board of Education for full terms of three years each at the annual school election on February 8, 1966, in the school district of the Township of Monroe, Gloucester County, were as follows:

George W. Ormsby	468
O. Philip Zaccagni	401
Peter A. Lanzalotti	373
Robert M. Stott	372

and others in lesser amounts.

Pursuant to a petition for recount dated February 14, 1966, signed by Candidate Stott, the Assistant Commissioner in charge of Controversies and Disputes on March 15, 1966, conducted a recount of the ballots cast for candidates Lanzalotti and Stott.

At the conclusion of the recount, with two ballots undetermined the tally stood:

Lanzalotti	374
Stott	369

There being no necessity to determine the two remaining ballots for the reason that in any case they could not affect the result, the recount was concluded without further determination.

The Commissioner finds and determines that George W. Ormsby, O. Philip Zaccagni, and Peter A. Lanzalotti were elected on February 8, 1966, to seats on the Monroe Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION.

March 23, 1966.

XIII

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the voting for three members of the Board of Education for full terms of three years each at the annual school election on February 8, 1966, held in the school district of the Township of Middletown, Monmouth County, were as follows:

	At Polls	*Absentee*	*Total*
Warren C. De Brown	2310	5	2315
Frank A. Braun	2175	7	2182
Brinton M. Miller	1681	5	1686
Frank Defino	1677	2	1679
Mac Dara F. Lyden	1346	2	1348
Herbert C. Fitzgerald	1344	2	1346

Candidate Defino, by letter dated February 15, 1966, requested a recount of the votes cast. A re-check of the voting machines used in this election was made by the Assistant Commissioner in charge of Controversies and Disputes on March 14, 1966, at the storage depot of the Monmouth County Board of Elections, Freehold. The recount confirmed the previously announced results above.

The Commissioner finds and determines that Warren C. De Brown, Frank A. Braun, and Brinton M. Miller were elected on February 8, 1966, to seats on the Middletown Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION.

March 23, 1966.

XIV

In the Matter of the Annual School Election Held in the Township of Montgomery, Somerset County

Decision of the Commissioner of Education

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held in the school district of the Township of Montgomery on February 8, 1966, were as follows:

	At Polls	*Absentee*	*Total*
Paul J. Messineo	410	4	414
Albert W. Lutz	366	3	369
Francis E. Lawrence	299	0	299
Earlene S. Baumunk	293	3	296

Pursuant to a letter request dated February 11, 1966, from candidate Baumunk, the Assistant Commissioner in charge of Controversies and Disputes conducted a recount of the ballots at the office of the Somerset County Superintendent of Schools on March 17. The check was confined to the votes for candidates Lawrence and Baumunk. At its conclusion, with one ballot undetermined, the tally stood:

	At Polls	*Absentee*	*Total*
Francis E. Lawrence	298	0	298
Earlene S. Baumunk	292	3	295

There was no necessity to determine the single referred ballot because in any case it could not affect the result.

Testimony was also heard from candidate Baumunk, a voter of the district, and the secretary of the Board of Education with respect to civilian absentee ballots. It appears that the voter asked for and received from the Board secretary on January 28, two applications for civilian absentee ballots. She and her husband completed them and placed them in their rural delivery post box for pick-up on January 29. Unfortunately a large and crippling snow storm began that day and prevented normal mail pick-up and delivery for several days. The applications were finally given to the postman on January 31 but they were not delivered to the office of the secretary until late February 2. The secretary testified that there was no mail delivery at her office from January 29 until the afternoon of February 2. Because the statute (*R. S.* 19:57–4) requires that applications for civilian absentee ballots be filed 8 days prior to the date of the election, the secretary rejected the applications as not being within time. Petitioner raises a question whether such denial was proper under the circumstances of non-delivery of mail and whether such denial is sufficient to affect the outcome of the election.

The action of the secretary in rejecting the applications was correct. The deadline established by the Legislature of 8 days before the election is to insure sufficient time for the mailing of ballots to absentees and for their return to

the election board. In the Commissioner's judgment the filing of an application within the appointed time is a mandatory requirement which the secretary is without authority to waive. The occurrence of a natural phenomenon which prevented the accomplishment of normal routine mail collections and deliveries was unfortunate in this case, but such a circumstance cannot be used to alter the results of this election.

The Commissioner finds and determines that Paul J. Messineo, Albert W. Lutz, and Francis E. Lawrence were elected on February 8, 1966, to seats on the Montgomery Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION.

March 23, 1966.

XV

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF BRICK, OCEAN COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for two members of the Board of Education for full terms of three years each at the annual school election in the Township of Brick, Ocean County, held February 8, 1966, were as follows:

Howard A. Fellner	925
Michael A. Milano	780
John P. Zirwes, Jr.	780

Pursuant to a request dated February 18, 1966, made by counsel in behalf of Candidate Milano, a recount of the votes cast for the two tied candidates was ordered by the Commissioner of Education. The Assistant Commissioner in charge of Controversies and Disputes examined the voting machines used in this election and the tallies of the votes thereon on March 4 at the storage depot of the Ocean County Board of Elections in Toms River. The result of the recount confirmed the tally of the votes previously announced.

Petitioner states that at least one voter complained to him that the voting machine on which he cast his ballot at the Drum Point School was not in proper working order. The voter alleges and is prepared to file an affidavit that he could move the levers for all three candidates when it should have been possible to depress only two. Petitioner asserts that the voter made no complaint at the time to the election officials because it was then 8:45 p.m. and too near the close of the polls to call a repairman. This alleged circumstance and the fact of the tie vote led petitioner to request the Commissioner to order a run-off election to determine which of the two tied candidates should be seated.

Determination of malfunction of the machine in question was not possible as the compensators in all ten machines had been reset at the time of the recount. It is well established, however, that attention should be called to malfunctioning or irregularities at the time they occur. In this case no such

complaint was made until after the vote was determined and found to be inconclusive. Such a protest is out of time. In any event, no evidence was adduced to show that the alleged malfunction of the voting machine affected the outcome of the election, nor did any other voter come forward to complain about or to report any malfunction. The determination that the tally of the votes for the second seat on the Board of Education was in equal number for candidates Milano and Zirwes remains unchanged.

Petitioner's request for a run-off election must be denied. There is no provision in the school law for such an election and absent such authority a Board of Education is without power to spend public funds for such purposes. Furthermore, the Legislature has anticipated the circumstance of a tie vote and consequent failure to elect by its specific provision in *R. S.* 18:4–7d that in such case the county superintendent of schools shall make the appointment. The Commissioner finds no reason to depart from the statutory procedure in this case nor does he know of any authority for so doing.

The Commissioner finds and determines that Howard A. Fellner was elected at the annual school election held February 8, 1966, to a seat on the Brick Township Board of Education for a full term of three years. He finds further that no other candidate received a plurality of votes necessary to election (*R. S.* 18:7–41) and finds therefore that there was a failure to elect a member to the remaining seat on the Board for a full term of three years. Pursuant to *R. S.* 18:4–7d, the Ocean County Superintendent of Schools is authorized and directed to appoint a properly qualified resident of the district to the Brick Township Board of Education who shall serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION.

March 25, 1966.

XVI

NON-TENURE EMPLOYEE NOT ENTITLED TO REASONS OR HEARING WHEN CONTRACT IS NOT RENEWED

FRANK S. TAYLOR,

Petitioner,

v.

PATERSON STATE COLLEGE AND MARION E. SHEA, PRESIDENT,

Respondents.

HOWARD A. OZMON, JR.,

Petitioner,

v.

PATERSON STATE COLLEGE AND MARION E. SHEA, PRESIDENT,

Respondents.

FRANK S. TAYLOR,

Petitioner,

v.

PATERSON STATE COLLEGE AND MARION E. SHEA, PRESIDENT,

Respondents.

DECISION OF THE COMMISSIONER OF EDUCATION

For the Petitioners, Okin & Pressler (David A. Pressler, Esq., of Counsel, Sylvia B. Pressler, Esq., of Counsel and on the Brief)

For the Respondents, Marilyn Loftus Schauer, Esq., Deputy Attorney General

Petitioners are former members of the faculty of Paterson State College who allege that their employment was improperly terminated. They seek reinstatement in the positions they held and compensation for salary lost for the period of their alleged illegal dismissal. Respondents admit that petitioners' employment was terminated but deny any improper action with respect thereto.

This matter comprises three separate petitions of appeal which were consolidated and heard as one. Petitioners Taylor and Ozmon each filed individual appeals contesting the cessation of their employment at Paterson State College. Mr. Taylor also filed a separate petition protesting cancelation of his assignment to teach two courses during the 1964 summer session. The Commissioner of Education initially dismissed the first two petitions on the grounds that he found no reason to undertake to review judicially the exercise of his own legislatively delegated discretion with respect to the appointment of faculty members at the State Colleges. Petitioners thereupon appealed to the State Board of Education. Prior to consideration by that body, counsel for both parties entered into a stipulation that the two cases be remanded to the Commissioner of Education for hearing. Accordingly, all three matters were set down and heard as one before the Assistant Commissioner in charge of Controversies and Disputes on July 14, 1965, at the office of the Passaic County

Superintendent of Schools in Paterson. Witnesses were examined and exhibits received and subsequently briefs of counsel were submitted. On September 24, 1965, on request of counsel for petitioners, oral argument was heard by the Assistant Commissioner at the State Department of Education, Trenton.

There is no significant dispute with respect to the facts in this matter. Paterson State College is a state-supported college (*R. S.* 18:16–19) under the control and management of the Commissioner of Education subject to the approval of the State Board of Education. (*R. S.* 18:16–20) Petitioners were nominated and appointed to faculty positions at the beginning of the 1961-62 school year and were reappointed for 1962-63 and 1963-64. Petitioner Taylor also taught during the summer session of 1963. Sometime during December 1963 both petitioners were informed by the chairman of the department that he was recommending to the President of the College that they be reappointed for the 1964-65 school year.

Such re-employment for the fourth consecutive academic year would have accorded them tenure of position. (*R. S.* 18:16–37) The chairman did so recommend to the President by letter dated December 13, 1963, the pertinent excerpts of which read:

> "I have carefully considered all of the contributions made to the life of the college by the following individuals: * * * Dr. Howard Ozmon * * * and Mr. Frank Taylor. On the basis of my observations and evaluations it is my privilege to recommend each of them to you for reappointment. In each instance the individual named will acquire tenure with this appointment. I know of no reason why this status should not be given to these individuals." (Ex. P-8)

The department chairman testified that he subsequently changed his mind and sometime during March 1964, he informed the President of the College orally that "when the time comes for this recommendation to be made I'm not going to recommend the reappointment of these people." (Tr. 77)

Introduced in evidence as Exhibit P-R-1 is a pamphlet entitled "A Guide in Personnel Policies for the Faculties of the New Jersey State Colleges." The procedure for reappointment set forth therein provides that the college president, on or before April 1, shall notify each faculty member not on tenure what recommendation will be made to the Commissioner of Education with respect to his employment for the next year. In accordance with this procedure, the President of the College sent the following letter, (Ex. P-9) dated March 26, 1964, to each of petitioners:

> "The State Board of Education requires that each faculty member who is not on tenure be notified by April 1 whether or not he is to be recommended for reappointment for the following academic year.
>
> "On the basis of a recommendation from the chairman of the Education Department, to which the Dean of the College and I subscribe, I have decided not to recommend you for reappointment for the 1964-65 academic year."

After receipt of this communication on April 1, both petitioners requested a conference. The President, dean, and department chairman met with Petitioner Taylor on April 2, and with Petitioner Ozmon on April 3. Both petitioners expressed surprise that their employment was not to be continued.

They said that they had relied on the department chairman's statement in December that he was recommending them for reappointment and, in the absence of any further conference or communication from him on the subject, had assumed that it was a *fait accompli* and that any further action such as approval of the President and the Commissioner would be of "the rubber stamp variety." (Tr. 190) No reasons were given for the decision not to recommend re-employment and tenure status because the President recognized no legal necessity to do so and "preferred to leave it that way." (Tr. 140)

At the April 2 meeting some reference was made also to Mr. Taylor's employment to teach in the summer school. It apparently occurred at the conclusion of the conference when the department chairman said that the termination also applied to the summer school. (Tr. 141, 183) Because of the informal nature of this statement, petitioner Taylor later took steps to verify his status with respect to the summer school employment for which he had been scheduled. (Exhibit A) He testified that although he made specific inquiries to the director of the summer school, to the dean, and to the President he was not given a definite answer by anyone and that he did not know for certain that he would not have summer employment until the day of registration in late June when he discovered that the courses for which he had been scheduled had been canceled. Petitioner Taylor did not teach at Paterson State College during the summer of 1964. The services of both petitioners ended at the end of May 1964, the conclusion of that school term.

Petitioners, either singly or jointly, make the following claims:

1. that petitioner Taylor, by reason of his service during the 1963 summer session in addition to his three academic years of employment, had fulfilled the requirements of the statute (*R. S.* 18:16–37) for the acquisition of tenure and therefore his services could not be terminated absent dismissal charges and the right to a hearing; and

2. that a binding employment contract for the ensuing 1964-65 year did arise as a result of the acts of the College administration during the 1963-64 year in accordance with custom and usage; and

3. that, in any event, petitioners are entitled to reasons for the termination of their employment and a hearing thereon; and

4. that petitioner Taylor was effectively employed for the summer session of 1964-65 and is entitled to the pay which he was denied the right to earn thereby.

These claims are dealt with as follows:

1. Petitioner Taylor was employed for three consecutive academic years: 1961-62, 1962-63, and 1963-64. He also taught for one summer session, a period of approximately 6 weeks, between his second and third years, in July and August 1963. As a result, he claims, he has met the statutory conditions for the accrual of tenure under requirement (c) of *R. S.* 18:16–37, which reads in part as follows:

> "The services of all professors, associate professors, assistant professors, instructors, supervisors, registrars, teachers, and other persons employed in a teaching capacity, who are or shall hereafter be employed by the State Board of Education or the Commissioner of Education in any New Jersey State Teachers College * * * shall be during good behavior and efficiency * * * (c) after employment in any such institution or institu-

tions, within a period of any four consecutive academic years, for the equivalent of more than three academic years * * *."

Petitioner cites the fact that he was employed for three consecutive academic years and contends that his summer school employment between the second and third years accomplishes the "equivalent of more than three academic years" required by the statute.

R. S. 18:16–37, enacted as Chapter 124 of the Laws of 1946, is modeled after the Teachers' Tenure Act (*R. S.* 18:13–16) and employs identical language to define the required probationary period. Determinations which have been made with respect to the application of the Teachers' Tenure Act would also hold true therefore for *R. S.* 18:16–37. In seeking the meaning of a statute resort may also be had to its legislative history, the evil to be corrected and the remedy sought, its context, and statutes *in pari materia*. *Lloyd* v. *Vermuelen*, 22 *N. J.* 200 (1956); *State* v. *Sperry & Hutchinson Co.*, 23 *N. J.* 38 (1956); *Westinghouse Elect. Corp.* v. *Board of Review*, 25 *N. J.* 221 (1957); *Trugman* v. *Reichenstein*, 27 *N. J.* 280 (1958); *San-Lan Builders, Inc.* v. *Baxendale*, 28 *N. J.* 148 (1958); *Key Agency* v. *Continental Cas. Co.*, 31 *N. J.* 98 (1959); *State* v. *Congdon*, 76 *N. J. Super.* 493 (*App. Div.* 1962); *Edgewater* v. *Corn Products Refining Co.*, 136 *N. J. L.* 664 (*E. & A.* 1947); *Loboda* v. *Clark Township*, 40 *N. J.* 424 (1963)

The probationary period set forth as (c) in *R. S.* 18:16–37, under which petitioner Taylor claims tenure, first appeared in Chapter 43 of the Laws of 1940 amending *R. S.* 18:13–16. Prior to its enunciation some boards of education successfully avoided giving tenure to their employees by interrupting their continuity of employment. This was accomplished either by dismissal or resignation for a period of one day, usually in the spring of the third year of service, and re-employment the next day. Such a one day's hiatus prevented the accomplishment of three consecutive years needed for tenure and in such districts few, if any, teachers achieved permanent status. It was to eliminate this practice, which negated the public policy enunciated by the Legislature that all professional employees of boards of education should be protected in their positions after a trial period of service, that led to this amendment clarifying the legislative intent. Thereafter absence for a full year was necessary in order to effect a sufficient break in the continuity of employment to avoid tenure status.

Administrative interpretation since the original tenure law in 1909 was held that tenure does not accure until after a trial period of at least three years. Thus persons employed on a calendar year obtain tenure once three such years have been completed. (*R. S.* 18:16–37 (a)); *Mullen* v. *Board of Education of Jefferson Township*, 1960-61 *S. L. D.* 194, affirmed State Board, 1963 *S. L. D.* 267, affirmed 81 *N. J. Super.* 151 (*App. Div.* 1963) Others who serve on the basis of an academic year must be employed for a fourth year before tenure becomes effective. (*R. S.* 18:16–37 (b)) An academic year is defined in the statute as "the period between the time school opens in the institution after the general summer vacation until the next succeeding summer vacation." Summer sessions are not part of the academic year. They differ in many respects from the regular school term. The courses may enroll others than full-time students, may be taught by other than regular faculty members, and may be administered and supervised by persons other than those assigned to such duties during the academic year. Under petitioner's argument,

teachers who are employed in an evening session or any other special or extra session could count that service toward the probationary employment requirement and acquire tenure before three years had elapsed. The Commissioner finds no such intention in the statute and holds that the legislative purpose was to require persons employed on an academic year basis to be employed for a fourth such year or its equivalent before tenure accrues.

Reliance on petitioner's argument would create an anomaly in that persons employed for an academic year could gain tenure in less time than those hired by the calendar year. Thus a superintendent employed on a 12 months basis would need to serve three full calendar years or 36 months before tenure became effective. But if petitioner's contention prevails a teacher could acquire the equivalent of more than three academic years some months before the end of the third year of employment by teaching two summer sessions. A statute will not be construed to reach an absurd or anomalous result. *Robson* v. *Rodriquez*, 26 *N. J.* 517, 528 (1958); *Gannon* v. *Saddle Brook Twp.*, 56 *N. J. Super.* 76, 80 (*App. Div.* 1959) See also *Schumacher* v. *Mansfield Twp. Board of Education*, 1961-62 *S. L. D.* 175, affirmed as *Board of Education of Manchester Twp.* v. *Raubinger*, 78 *N. J. Super.* 90 (*App. Div.* 1963).

The Commissioner holds that teaching during summer sessions cannot be "tacked" to regular academic year employment in order to accomplish the equivalent of more than three years required for tenure. It is well established that tenure cannot accrue until the precise conditions laid down by the statute are met. *Ahrensfield* v. *State Board of Education*, 126 *N. J. L.* 543, 544 (*E. & A.* 1941) Those conditions have not been met in this case. The Commissioner finds, therefore, that petitioner Taylor did not acquire tenure by reason of his three academic years of employment plus one summer session.

2. Petitioners claim that a binding contract of employment to teach for the 1964-65 school year came into effect as a result of the exchange of promises and commitments in December 1963. They say that it is long established practice to notify faculty members, early in the academic year, of their employment status for the ensuing year for reasons of practical necessity and in the mutual interest of both administration and faculty. They contend that the department head's notification that he was recommending their continued employment was tantamount to and in fact actually constituted an employment contract, subsequent steps in the nature of confirmation being merely ministerial.

The procedure for nomination, employment, and reappointment of State College faculty members is set forth in the "Guide in Personnel Policies" (Exhibit P-R-1) referred to *ante*, the pertinent excerpts of which are as follows:

> "2. Appointments
>
> Appointments and reappointments are made by the Commissioner of Education subject to approval by the State Board of Education. Such appointments and reappointments are not effective until recorded by the Department of Civil Service and until funds are made available by the Division of Budget and Accounting.

"3. Period of Appointment
Appointments and reappointments are limited to a maximum of one year until the faculty member attains tenure in accordance with law.

* * * * * *

"6. Notification of Reappointment
On or before April 1 of each year, the President of each college, after consultation with the Dean of the College and the Chairman or Directors of the Departments concerned, shall notify in writing each faculty member not on tenure concerning the anticipated recommendation to be made to the Commissioner. Each notice should indicate clearly what the President's recommendation will be. In cases of recommendations for reappointments, faculty shall within a two-week period indicate in writing their acceptance or rejection of this recommendation for reappointment.

"7. Nominations for Reappointment
On or before May 1 of each year, nominations for reappointment to the faculty of a New Jersey State College shall be made by the President of the College and nominations on approved forms will be forwarded to the Assistant Commissioner for Higher Education. If funds are available for the reappointment concerned, the nomination with recommendations will be forwarded to the Commissioner of Education. If funds are not available, the President will be notified. Reappointments are made by the Commissioner of Education subject to approval by the State Board of Education. Reappointments are not effective until recorded by the Department of Civil Service and funds are made available by the Division of Budget and Accounting."

The Commissioner agrees with petitioners that it is customary for the department chairman to confer and counsel with the teachers he supervises and to advise the President of their progress. It is also usual practice for the chairman to advise a teacher of his employment status and what recommendation he intends to make to the President with respect to reappointment. Indeed, this is common practice not only in the State Colleges but in public schools generally. It is the responsibility of a supervisor to evaluate the performance of the teachers assigned to him and to make recommendations to his superior with respect to continued employment. The recommendation may have to receive the endorsement of several administrative officials in the process of reaching the employing authority whose affirmative action is essential to any conclusive effect. Thus in schools generally, a supervisor recommends to a principal, who recommends to a superintendent, who recommends to a board of education, which body takes the action necessary to continue the employment and which it alone has the power to do. While the titles may be different in the State Colleges, the functions are analogous and the same chain of events and responsibilities occurs.

In this case the department chairman recommended to the President in December that petitioners be reappointed and communicated to this decision to petitioners. Before the President acted, the department chairman changed his mind and reversed his recommendation. The President concurred and notified petitioners in accordance with the personnel practices set forth in the "Guide" (P-R-1) *supra*. Petitioners were not recommended for reappoint-

ment and no action to renew their employment was taken by the Commissioner of Education or the State Board of Education. The authority to appoint teachers at the State Colleges rests solely with the Commissioner of Education subject to the approval of the State Board (*R. S.* 18:16–20) and without affirmative action on his part the reappointment of a non-tenured teacher cannot occur.

However unfortunate the sequence of events herein may have been—the department chairman's first favorable recommendation, petitioners' reliance on it, the chairman's subsequent change of mind, and notification to petitioners at the latest possible date—and regardless of the fact that ordinarily the chairman's first recommendation would have proceeded through regular channels to final approval—the facts are that the chairman, when required to do so, did not recommend and that the President concurred and also did not recommend. Petitioners argue that they had reason to rely on the chairman's first recommendation which he communicated to them, but this is not so. Even had the chairman not changed his recommendation, the President would not have been bound by it. It was her responsibility to consider the chairman's evaluation and to make her own independent recommendation to the Commissioner. While petitioners may have had reason to expect that their reappointment would proceed to a finality without interruption, they had no right to do so. To hold otherwise would be to place the appointive power in the hands of the department chairman and to make unnecessary any further consideration by others higher in authority. Petitioners' conclusion that because most reappointments proceed without hitch through the various levels of administrative authority, the responsibility of the several officials is ministerial or in the nature of "rubber stamp" is not valid. It is within the exercise of each officer's discretionary authority to accept or reject the recommendation made to him from below. The Commisioner rejects petitioners' contention that the chain of events herein gave rise to a contract on which petitioners could rely.

3. Petitioners' third contention is that they are entitled to reasons for the non-renewal of their employment and the opportunity to challenge them at a hearing. They say that such non-renewal is humiliating and damaging to their reputation, career, and earning ability and they are, therefore, entitled to know why such action is taken and to defend themselves against it.

The Commissioner finds no such stigma attached to non-renewal of a teacher's contract as petitioners assert. The requirement of three years of probationary employment before the acquisition of tenure provides a trial period for both employer and employee. During this time the employer has an opportunity to assess not only the employee's performance in the classroom but also the many other factors involved in a decision to make a particular teacher a permanent member of the staff. A teacher with excellent classroom skills may exhibit other characteristics or behavior which may lead the employer to question whether he will fit the particular group or situation. Many factors contribute to such a decision and most of the judgments are necessarily subjective. The conclusion often rests on professional judgment of many intangibles which do not lend themselves to a statement of "reasons" or a hearing such as petitioners seek. The New Jersey Supreme Court recognized this in *Cammarata* v. *Essex County Park Commission*, 26 *N. J.* 404, 412 (1958) when it said:

> "It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge and intelligence do not alone [suffice] * * *. The crucial test of his fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the [employer] * * * is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may make pragmatically informed and unrestricted decisions as to an applicant's suitability."

Petitioners entered into an agreement with respondents to teach at the Paterson State College for the year 1963-64. The terms of that agreement were fulfilled. Petitioners did not acquire tenure. No rights extended to either party beyond the conclusion of that contract. Neither party was under any legal obligation to continue the relationship. Respondents could not compel petitioners to continue to teach at Paterson if they did not choose to return, and neither could petitioners require respondents to renew their employment there. Petitioners were not dismissed. Their agreement with respondents was concluded and neither party had an obligation to enter into a renewal. Under such circumstances there appears no basis on which a demand for "reasons" can rest. Were the circumstances reversed, with respondents ready but petitioners unwilling to enter into a new contract, respondents could hardy enforce a demand on petitioners for "reasons" why they would not return. The decision to renew or to terminate the relationship is a matter of the discretionary judgment of either party for reasons which appear sufficient to it and which it can divulge or not as it sees fit.

This principle has been enunciated by the Courts in several cases. In *Zimmerman* v. *Newark Board of Education*, 38 *N. J.* 65, 70 (1962) the Supreme Court quoted from *People* v. *Chicago*, 278 *Ill.* 318, 116 *N. E.* 158, 160 (1917) to illustrate the "historically prevalent view" as follows:

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

The Court went on to observe that certain statutory limitations, such as illegal discrimination and tenure, have been placed upon the employment powers of boards of education, but

> "Except as provided by the above limitations or by contract the Board has the right to employ and discharge its employees as it sees fit." *Ibid.* at page 71

The right to reasons and a hearing thereon was considered by the United States District Court in the case of *Parker* v. *Board of Education of Prince George's Co.*, 237 *F. Supp.* 222 (*Md.* 1965), which bears many similarities to the one herein. In that case plaintiff's contract was not renewed at the end of his second year of employment. His suit alleged "dismissal" and "termination" of his contract, sought "reinstatement" in his position and asked for

reasons and a hearing thereon. In dismissing the complaint the Court made the following statements:

> "In fact, plaintiff was not dismissed from his position; his contract was not renewed at the end of the school year * * *." (at page 224)
>
> "The first two years of their employment, however, are probationary only. Their [teachers'] contracts may be terminated at the end of either one of the probationary years with or without cause, and without a hearing." (at page 226)
>
> "* * * unless there is a statute to the contrary, probationary teachers' contracts may be terminated by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without a hearing." (at page 227)
>
> "It is true, of course, that any dismissal or termination of employment by an employer for personal reasons limits to some extent the opportunity of the employee to obtain other employment, because some prospective employers may prefer employees whose services have never been terminated by their previous employers. But that does not give a probationary teacher the constitutional right to a hearing * * * on termination of his contract * * *. Any other rule would impose unreasonable burdens upon the members of the School Boards and would weaken the whole concept of tenure * * *. *It is not disputed that plaintiff in this case was given an opportunity to present his side to his educational superiors. No more should be required.*" (at page 228) (Emphasis supplied.)

A similar conclusion has also been reached in the neighboring State of New York by its Supreme Court in the case of *Pinto* v. *Wynstra*, 225 *N. Y. S. 2d* 536 (*N. Y. Supreme Court, App. Div.* 1964). See also decision of the New Jersey State Board of Education in the case of *Eastburn* v. *Newark State College, et al.*, dated March 2, 1966.

The Commissioner notes that each of petitioners was given an opportunity to present his side to the department chairman, the dean, and the President of the College. He determines that any right to an explanation that petitioners may have had was satisfied thereby and there is no further entitlement to a hearing.

4. The final question concerns the cancelation of petitioner Taylor's assignment to teach in the 1964 summer session.

In November 1963, petitioner's department chairman circulated a memorandum asking those interested in summer teaching to so indicate. Petitioner complied and his interest was transmitted to the Director of the Summer Session. In January petitioner received notice that he was scheduled to teach two courses. Nothing occurred further until the meeting of April 2, *supra*, at the conclusion of which a statement was made by a member of the administration that the termination of petitioner's services at the end of the current term applied also to the summer session. It appears that petitioner did not receive any subsequent notice that his assignment was withdrawn, but the courses he was scheduled to teach were canceled on June 15. There is no evidence that the courses originally assigned to petitioner were, in fact, offered during the 1964 summer session or were taught by anyone else.

Petitioner contends that the notification of assignment he received in January was a commitment upon which he relied, that it constituted an effective hiring which was breached without cause, and that he is therefore

entitled to compensation for the courses which he was willing but not permitted to teach. He cites the fact that his name appeared on a schedule of summer school courses which was posted in March as evidence that the arrangements were complete at that time as far as the College was concerned. While admittedly the list had not yet been approved by the Commissioner, petitioner contends that such approval is purely technical, of a fiscal and ministerial nature only. He finds support in the testimony of the President that her recommendation is tantamount to hiring (Tr. 170), that the Commissioner has never failed to approve those employed for summer sessions (Tr. 149), and that the Commissioner's approval often comes after the summer session has begun and is under way (Tr. 146).

The Commissioner agrees that in order to fit the various summer sessions into the summer period it is necessary to start classes at or near the beginning of the fiscal year and that this sometimes prevents his approval prior to the actual commencement of summer classes. He does not agree, however, that this removes or destroys his authority to give or withhold approval of any part of the program. Employment under such conditions is tentative and not final until his approval is given. Nor can his confidence in the competence of the administration of the various colleges as demonstrated by his customary approval of their recommendations, be used to support an argument that such approval is ministerial. The Commissioner holds that his approval of employment of faculty at the State Colleges for whatever kind of session, is a necessary and essential element without which no contract or hiring can occur.

Unlike the regular college year, enrollments for summer sessions cannot be predicted with certainty, with the result that pre-registration schedules must be tentative. It is not unusual to substitute or cancel courses just prior to or even after the start of such a session. For that reason it is generally understood that any invitation to teach in a college summer session is not a binding commitment upon which absolute reliance can be placed. Knowing this and having been told, albeit informally, at the April 2 conference that his services would terminate at the end of the current term, petitioner had little reason to rely on the summer employment. In this case the courses were canceled and petitioner's services were not needed. For this reason and because the essential requisites of employment for the summer session, *i. e.* recommendation by the President and approval by the Commissioner, were not met, the Commissioner concludes that petitioner had no rights which were violated.

The Commissioner finds and determines (1) that petitioner Taylor did not fulfill the requirements for the acquisition of tenure as a teacher in the Paterson State College by reason of his employment for the summer session of 1963; (2) that no contracts of employment of petitioners for the 1964-65 school year occurred by reason of the events of the 1963-64 term; (3) that petitioners cannot demand, as a lawful right, a statement of reasons for non-renewal of their employment and a hearing thereon; and (4) that petitioner Taylor is not entitled to salary compensation because of the withdrawal of an offer of employment for the summer session of 1964 and subsequent cancelation of the courses to be taught by him.

The petitions are dismissed.

COMMISSIONER OF EDUCATION.

March 29, 1966.

XVII

BOARD MAY ASSIGN TENURED PART-TIME TEACHER TO FULL-TIME POSITION

JOSEPHINE DE SIMONE,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

For the Petitioner, Joseph V. Cullum, Esq.

For the Respondent, Anthony J. Monforte, Esq.

Petitioner is a teacher claiming tenure of employment in respondent's schools and contesting the termination of her services at the beginning of the current school year. She seeks reinstatement in her position and payment of salary from the time of her dismissal. Respondent denies that petitioner has acquired any tenure rights and says that her failure to sign a contract of employment left no alternative but to engage the services of another teacher.

Testimony was taken and exhibits received at a hearing before the Assistant Commissioner in charge of Controversies and Disputes at the Bergen County Court House on January 25, 1966. Counsel also filed briefs.

There is little disagreement as to the facts. Petitioner was first employed by respondent for the 1961-62 school year at a salary of $2,610 and was assigned to the English Neighborhood School where she taught a one-session kindergarten class. She was re-employed for the 1962-63 school year at $2,940; for 1963-64 at $3,390; and for 1964-65 at $3,840. In each of these four years her employment was formalized by a standard form of teacher's contract setting forth the terms and signed by petitioner and respondent's authorized representatives. (Ex. P-1, 2, 3, and 4)

In the spring of 1965, instead of the regular teacher's contract petitioner received a document entitled "Annual Notice to Teachers and Other School Employees Under Tenure." (Ex. P-11) Its purpose was to give notice that her salary for the ensuing year would be $4,080 and to obtain her agreement to these terms. Petitioner indicated her acceptance by signing and returning the agreement. At that time the form lacked the signature of the President of the Board and it was withdrawn by respondent before it was completed. Instead, a second agreement was offered petitioner (Ex. P-12) calling for a salary of $6,800 for which she would be required to teach two kindergarten classes, one in the morning at the English Neighborhood School and the other in the afternoon at the Lincoln School. She protested the full-time assignment and asserted her right to continue to teach one session only. (Ex. P-7) In her letter to the Superintendent (Ex. P-7) petitioner made these statements:

"As I am informed and believe that I have tenure, I do not intend to sign a contract.

> "I also feel that I am entitled to teach one-session kindergarten in the school system. If the Board of Education insists that I undertake the responsibility for two kindergarten sessions I will only do so under protest pending a decision from the Commissioner of Education as to my obligation in this regard."

By letter dated September 1, petitioner was notified by the Superintendent that he had been instructed to tell her that unless she signed and returned her contract on or before Thursday, September 2, a replacement would be sought. Petitioner did not execute the document referred to but she did report to both the English Neighborhood School and to the Lincoln School on September 7, the day before school opened. She testified that she prepared the kindergarten room in each building to receive pupils the next day. On the opening day of school, September 8, she reported for duty at the English Neighborhood School and was engaged in teaching her class when the following notice was handed to her:

> "By order of the Board of Education, as voted last night, you have been relieved of your duties as teacher in the Fairview School System." (Ex. P-9)

The appeal herein was signed on September 9, and mailed to respondent the same day.

Petitioner claims tenure in her position by reason of her employment with respondent for four consecutive years. She admits that she protested the change in her assignment from one session to a full day but contends that she agreed to comply pending a determination of her rights to the part-time position. She admits refusing to sign a "contract" for the full-time position because of her protest and asserts that as a teacher under tenure no contract is necessary nor can she be required to sign one. She says that she reported for duty as assigned and that her summary dismissal without notification of charges and right to a hearing thereon is illegal.

Respondent takes the position that petitioner had not acquired tenure for the reason that she was never employed in other than a part-time position. It says that during the 1964-65 school year it operated the following kindergarten classes:

> English Neighborhood School—one-half-day kindergarten—taught by petitioner
>
> School #3—one-half-day kindergarten—taught by teacher B
>
> Lincoln School—two-half-day kindergartens—taught by teacher C

At the end of the 1964-65 school year teachers B and C resigned. The Board then decided to eliminate one of the kindergarten sessions at Lincoln School because of reduced enrollment. The President testified that they preferred to have petitioner take on the remaining class there because she was the only kindergarten teacher with experience in the local system and because of their high regard for her competency. He said further that when she refused to sign the "contract" offered her, it was decided to replace her to insure that there would be a teacher present when school opened.

The first question to be answered is, Has petitioner acquired tenure as a teacher in respondent's employ? Respondent argues that as a part-time teacher petitioner was not eligible for and could not acquire tenure.

The relevant statute is *R. S.* 18:13–16, the pertinent excerpts of which read:

> "The services of all teachers * * * and such other employees of the public schools as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners, excepting those who are not the holders of proper certificates in full force and effect, shall be during good behavior and efficiency, * * * (b) after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year * * *."

There is no dispute that petitioner was employed by respondent in a teaching position which required her to hold an appropriate certificate issued by the Board of Examiners, that her certificate was a proper one in full force and effect, and that she had been employed for more than the probationary period required by the statute. It follows then that she has tenure in her employment.

The evidence indicates that respondent had also reached this conclusion. It executed with her four successive documents entitled "Teacher's Contract." (Exhibit P-1, 2, 3, and 4) Parenthically it should be noted that at the bottom of each of these forms there appears "Note—A written contract is not required in the case of a teacher whose tenure is fixed by the Tenure of Service Act." At the end of petitioner's fourth year respondent offered her a different kind of employment document (Ex. P-11 and 12) which was headed "Annual Notice to Teachers and Other School Employees Under Tenure." It seems obvious that in offering petitioner this document (P-11) instead of the usual Teacher's Contract form, respondent recognized her tenure status.

The Commissioner has already determined that part-time teachers enjoy the protection of tenure in the case of *Fox* v. *New Providence Board of Education*, 1939-49 *S. L. D.* 134. The teacher in that case taught home economics at first one day and later two days each week for the full school year and had done so for eleven consecutive years. In reaching his counclusion that petitioner Fox had acquired protection in a part-time job, the Commissioner pointed out that the provisions of *R. S.* 18:13–16, *supra*, apply to "all teachers," without regard to their employment on either a full-time or part-time basis.

It is clear that "all teachers" does not include substitute teachers, student teachers, or others who are not regularly employed by a board of education. *Schulz* v. *Newark Board of Eduaction*, 132 *N. J. L.* 345 (*E. & A.* 1944) It is also clear that teachers who are regularly and steadily employed are entitled to tenure protection. *Wall* v. *Jersey City Board of Education*, 1938 *S. L. D.* 614, 119 *N. J. L.* 308 Petitioner herein was regularly and steadily employed for more than four years in a teaching position which required her services every school day for the full school year. The fact that her teaching day was shorter than that of teachers of other grades has no bearing on the matter of tenure of employment in the district.

It is valid, in the Commissioner's judgment, to make a distinction between those employed on a regular part-time basis and those whose services are intermittent, temporary or unscheduled. He notes that the Teachers' Pension and Annuity Fund makes such a distinction. On January 24, 1955, the Board of Trustees of the Fund adopted a resolution which decreed in part as follows:

> "Whereas we have received an opinion of the Attorney General indicating the fact that employment, *if regular part-time*, does not alter the eligibility

of a teacher or janitor to membership in the Teachers' Pension and Annuity Fund, and *that membership shall be a condition of employment* * * *." (*Emphasis supplied.*)

Substitute teachers and others employed irregularly part-time are not eligible for membership in this Fund.

The Courts in other jurisdictions also recognize the distinction between a regularly employed part-time teacher and one employed occasionally:

"It is contended * * * that the appellant is not a tenure teacher and that her employment and her salary are not protected by the Teachers' Tenure Law, for the reason that she was what is termed a 'part-time teacher,' that is, that she did not teach classes every school day, but only twelve days in each month. There can be no merit in this contention. She was not an occasional teacher, who taught intermittently as a substitute or otherwise. She was a regular teacher. The law does not require that teachers shall teach every day, or every hour of every day. Such subjects as art or music may require fewer hours of teaching. This is in the discretion of the school authorities. But appellant was undoubtedly regularly employed, teaching the same subject a given number of days per month, over a period of years, and must be considered a regular teacher." *Sherrod* v. *Lawrenceburg,* 213 *Ind.* 392, 12 *N. E. 2d* 944 (*Supreme Court of Indiana* 1938)

"Relator was a 'teacher' * * * and her contract was no different from that given a full-time teacher, even though according to the record, by virtue of oral agreement with the school board, she only taught in the morning * * *.

* * * * * *

"* * * the number of hours a teacher may teach in a day is not a factor in determining her right to tenure." *State ex rel. Saxtorph* v. *District Court of Fergus Co., et al.,* 275 *P. 2d* 209 (*Supreme Court of Montana* 1954)

It should be noted further that by rule of the State Board of Education, a 2½ hour session in a kindergarten class is considered a full school day for purposes of State Aid.

The Commissioner finds that petitioner, as a regularly employed teacher under yearly contract of employment, acquired tenure at the beginning of her fourth year of employment in respondent's school district.

Respondent bases its dismissal of petitioner on her failure to sign the contract offered her for the 1965-66 school year. The Commissioner finds this position defective for two reasons. First, there is no requirement in the law that a teacher who has acquired tenure must sign a contract each year. To hold that she must do so is to impose an additional condition on the enjoyment of tenure protection not contemplated in the statute. It is well established that a board of education cannot impose additional conditions upon the intent of the Legislature. *Downs* v. *Hoboken Board of Education,* 12 *Misc.* 345 (*Sup. Ct.* 1954); *Craster* v. *Board of Commissioners,* 9 *N. J.* 226 (1952); *Angel & Ackerman* v. *Newark Board of Education,* 1959-60 *S. L. D.* 141 Nor can a board of education adopt rules and regulations which are inconsistent with the school laws. *R. S.* 18:7–56 The enactment of a rule which requires tenure employees to sign a written agreement as a condition of continued employment is clearly inconsistent with the requirements of *R. S.* 18:13–16 and cannot be enforced. *Matecki* v. *Board of Education of East Brunswick,* decided by the Commissioner February 4, 1965 Further,

respondent's expressed fear that there might be no teacher to cover the kindergarten classes unless petitioner committed herself by signing its "contract" was groundless. Petitioner had already indicated in writing that she would "undertake the responsibility for two kindergarten sessions" pending a decision from the Commissioner of Education on her obligations to do so. (Ex. P-7) As a teacher under tenure (which status petitioner recognized even if respondent did not) petitioner was bound to give at least 60 days' notice of intention to resign. *R. S.* 18:13–20; *Mateer* v. *Fairlawn Board of Education*, 1950-51 *S. L. D.* 63, 67 Failure to give such notice would have subjected her to possible loss of her license to teach. Absent such notice respondent could rely, therefore, any time after July 1, that petitioner would report for duty at the opening of school and would continue to teach until 60 days after such notice, if any, was given.

The second defect in respondent's procedure is its summary dismissal of petitioner. As a teacher under tenure, petitioner's dismissal could occur only in conformance with the Tenure Employees Hearing Act, *R. S.* 18:3–23 *et seq.* That Act entitles petitioner to a written statement of charges and a hearing thereon before the Commissioner of Education. No such charges have been made. The various items of correspondence between respondent and petitioner (Ex. P-5, 6, 8, and 9) cannot by any stretching be considered to fulfill this requirement. The Commissioner concludes, therefore, that respondent has imposed improper conditions upon petitioner's continuation of her tenure status and has dismissed her illegally.

There remains the question of respondent's right to assign petitioner to teach both a morning and an afternoon kindergarten class. Petitioner takes the position that she was protected in her position as a half-day teacher and as long as such a position continues to exist in the district, she had a claim to it.

The Commissioner does not agree. The protection afforded petitioner by the tenure laws is in her position as teacher. As a teacher she has no claim to a particular class or grade or school but may be assigned by her employer to teach within the scope of her certificate. *Greenway* v. *Camden Board of Education*, 1939-49 *S. L. D.* 151, affirmed State Board of Education 155, affirmed New Jersey Supreme Court 129 *N. J. L.* 46 (1942) As a teacher under tenure she could not be dismissed or suffer a reduction in salary without cause, but she could be transferred to other teaching positions for which she was qualified. A transfer is not a demotion or a dismissal. *Cheesman* v. *Gloucester City Board of Education*, 1 *N. J. Misc.* 318 (*Sup. Ct.* 1923); *Downs* v. *Hoboken Board of Education*, 12 *N. J. Misc.* 345 (*Sup. Ct.* 1934), affirmed 113 *N. J. L.* 401 (*E. & A.* 1934) The Commissioner finds, therefore, that respondent Board could, by a majority vote of the whole number of its members pursuant to *R. S.* 18:7–58, exercise its discretionary authority to assign petitioner to teach two kindergarten sessions.

The Commissioner finds and determines that petitioner is under tenure as a teacher in respondent's school system and that she was illegally dismissed from her position on September 8, 1965. Respondent Board of Education is directed to reinstate her in the position from which she was removed. Petitioner is entitled to recover compensation under the provisions of *R. S.* 18:5–49.1 for the period from September 8, 1965, until the date of her reinstatement.

April 11, 1966. COMMISSIONER OF EDUCATION.

XVIII

PETITION FOR SPECIAL EDUCATION FOR HANDICAPPED CHILD RENDERED MOOT WHEN SERVICES ARE PROVIDED

EDWARD A. APPLEGATE AND CHARLOTTE APPLEGATE,

Petitioners,

v.

BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,

Respondent.

For the Petitioner, *Pro Se*

For the Respondent, Schiff, Cummis and Kent (Clive S. Cummis, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION ON MOTION TO DISMISS

In a petition of appeal received by the Commissioner of Education on January 25, 1965, petitioners complained that respondent had deprived their son Steven of learning and his right to be educated. Petitioners sought an order from the Commissioner (1) requiring respondent to provide immediately a full-day educational program for their son; (2) requiring respondent to readmit their son to any special class provided for other children within the district or to provide home instruction on a full-day basis; (3) requiring respondent to comply fully with the laws and statutes in this matter.

Respondent's Answer admitted that Steven was not then admitted to any school or special class in the school district, but set forth that following the lifting of the suspension imposed upon Steven, he had been enrolled in a special class from September 9, 1964, through October 2, 1964. At that time his parents withdrew him from school and placed him for diagnostic studies at the Menlo Park Diagnostic Center, where he remained until December 19, 1964. After receipt of the Center's report in January 1965, Steven was not readmitted to the special class, but was provided home instruction for one hour daily by a teacher employed by respondent Board.

In a motion received by the Commissioner on March 15, 1965, petitioners moved for summary judgment on the pleadings. After hearing arguments on the motion, the Commissioner on April 22, 1965, denied the motion. Petitioners appealed to the State Board of Education from the Commissioner's determination, and on September 8, 1965, the State Board denied the appeal and remanded the matter to the Commissioner for hearing.

A hearing in this matter was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Essex County Superintendent of Schools in East Orange on October 11, 1965.

The following facts are established:

1. In September 1965, petitioners enrolled Steven in The Midland School, a private institution.

2. On September 30, 1965, respondent applied to the State Department of Education for approval of the placement of Steven Applegate in The Midland School with payment of tuition by the Board of Education pursuant to the terms of *R. S.* 18:14–71.36 *et seq.*

3. On October 4, such approval was granted, effective as of September 30, 1965.

4. Respondent accepts responsibility for the payment of Steven's tuition at The Midland School and for transportation in accordance with law.

Respondent has moved to dismiss the petition herein on the grounds that Steven's placement in The Midland School and the payment for his education in that school having been assured by the Board, the relief sought by the petitioners renders the petition moot.

The Commissioner rejects petitioners' demand made in argument at the hearing on October 11 for punitive and compensatory damages for the alleged "willful withholding of educational facilities by the Board of Education of South Orange and Maplewood from the time petition has been filed to the date of September 30th." (Tr. 32) While the Commissioner believes that reasonable procedural latitude should be granted where such latitude does not prejudice the rights of an adversary, he finds no justification for permitting the amendment of petitioners' prayer for relief after hearing has begun and without prior notice to respondent. In any event, the Commissioner has no authority to award either compensatory or punitive damages. His quasi-judicial authority is defined in *R. S.* 18:3–14, as follows:

> "The commissioner shall decide without cost to the parties all controversies and disputes arising under the school laws, or under the rules and regulations of the state board or of the commissioner. * * *"

The placement of Steven in The Midland School was accomplished pursuant to *R. S.* 18:14–71.39, which reads in part as follows:

> "Local boards of education may provide instructional and related special services for emotionally disturbed or socially maladjusted pupils by:
>
> * * * * * * *
>
> "f. sending children to privately operated, non-profit, day classes in schools whose services are nonsectarian providing services for emotionally disturbed or socially maladjusted children if no suitable public school placement is available. * * *"

The Commissioner takes notice of the approval given by the Department of Education on October 4, 1965, for the placement of Steven in The Midland School, and finds such placement to fulfill the responsibility of respondent Board to provide instructional and related special services as set forth in *R. S.* 18:14–71.39, *supra.* Petitioners' first prayer for relief is thereby satisfied and the second prayer is rendered of no effect. As to petitioners' third prayer that the Commissioner "set forth an Order requiring the Board of Education, Respondents herein, to fully comply with the laws and statutes of the State of New Jersey in this matter," the Commissioner, having found that respondent is in compliance with law in this matter, regards such an order as an act of supererogation. It is expected and assumed that a board of education will comply with the law, and the remedy supplied by the Legislature in *R. S.* 18:3–14, *supra,* is available if it does not.

The issues in this matter having become moot, respondent's motion is granted and the petition of appeal is dismissed.

COMMISSIONER OF EDUCATION.

April 20, 1966.

Dismissed by State Board of Education, February 1, 1967.

XIX

RENTAL CHARGE FOR USE OF SCHOOL FACILITIES DISCRETIONARY WITH BOARD

ROCCO RANNO,

Petitioner,

v.

NEW JERSEY EDUCATIONAL TELEVISION CORPORATION, INC., AND BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,

Respondents.

For the Petitioner, William V. Breslin, Esq. (Antranig Aslanian, Esq., of Counsel)

For the Respondent New Jersey Educational Television Corporation, Inc., Smith, Kramer, and Morrison (Charles C. Collins, Jr., Esq., of Counsel)

For the Respondent Board of Education, Harold D. Green, Esq. (Irving C. Evers, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, a citizen and taxpayer of the Township of Teaneck, complains in this action that respondent Board of Education has continually, illegally, and unlawfully permitted the New Jersey Educational Television Corporation to store goods and equipment in a part of the Jefferson Junior High School without charging reasonable rent for the use of such storage space. Petitioner seeks an order compelling the Board to institute an action to recover the reasonable rental value of the space used and to require the Board to remove or cause to be removed the Television Corporation's equipment and property from the public school buildings. Respondents deny any illegal or unlawful action.

A conference attended by counsel for petitioner and counsel for respondent Board was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the Department of Education Building, Trenton, on September 3, 1965. It was agreed, *inter alia,* (1) that the removal of the Television Corporation's equipment from the Teaneck Schools renders moot petitioner's prayer for an order that such equipment be removed; and (2) that within 30 days after the answering of petitioner's interrogatories, counsel for petitioner would notify the Commissioner of the need for further hearing on any factual questions. Should no such need appear, counsel for petitioner would file and serve his brief within 30 days after the filing of answers to the interrogatories.

Respondent Television Corporation was not represented at the conference held by the Assistant Commissioner. It was stipulated that the agreements reached at the conference would be subject to the confirmation and acceptance of counsel for the Corporation. Subsequently, on September 27, 1965, counsel

for the Corporation addressed a letter to the Assistant Commissioner, from which the following paragraphs are excerpted:

> "New Jersey Educational Television Corporation has for some time been without assets of any kind. It has advised us that because of its financial condition it would prefer not to continue actively participating in this matter regardless of its outcome.
>
> "Any ultimate judgment against the Corporation could not be satisfied if such were obtained.
>
> "This being the case we would prefer not to proceed any further herein and have so advised counsel for the Board of Education. However, counsel for the petitioner has served us with interrogatories pursuant to the agreements of September 7, 1965, despite our lack of consent thereto."

More than 60 days having elapsed since notice was received from counsel for respondent Board of Education that he had served the answers to petitioner's interrogatories, and neither a request for further hearing nor brief having been filed by counsel for petitioner, the Commissioner is warranted to dismiss this matter for want of prosecution. However, he elects to dispose of it on other grounds.

At the request of the Commissioner, the President of the New Jersey Educational Television Corporation filed an affidavit setting forth the nature of and present status of the Corporation with respect to the petition herein. Deponent described the Corporation as having been established to provide educational television services. It was incorporated as an association not for pecuniary profit, and was granted tax-exempt status under the Internal Revenue Code. It received, by donation from the National Broadcasting Company and Columbia Broadcasting System, television and electronic equipment which was stored in the Thomas Jefferson Junior High School in Teaneck, by permission granted by the Teaneck Board of Education. After a fund raising drive proved disappointing, the Trustees of the Corporation decided to suspend activity and dispose of the equipment to satisfy liabilities.

There is no allegation in petitioner's complaint that the Television Corporation's equipment was stored in any area of the school building in use for school purposes (see *R. S.* 18:5–22), or that the storage was in any way detrimental to the safety of pupils or in any manner interfered with the operation of the school. The Board of Education has authority in its corporate powers to institute suit to collect rent if it determines such action appropriate. *R. S.* 18:7–59 That it has not charged rent or instituted suit to collect rent is entirely within the discretion of the respondent Board. The Commissioner hereby determines that respondent Board did not abuse its discretion in failing to charge rent for the storage of equipment by the New Jersey Educational Television Corporation in the Jefferson Junior High School.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

April 20, 1966.

XX

WHERE REASONABLE MEANS EXIST, BOARD MUST SUBMIT PLAN TO CORRECT OR ALLEVIATE DE FACTO SEGREGATION

BARRY ELLIOT, A MINOR, BY THERESSA ELLIOT, HIS MOTHER AND NEXT FRIEND; BEN DILL AND JOHN DILL, JR., MINORS, BY JOHN DILL, THEIR FATHER AND NEXT FRIEND; CHERYL ANN FORTSON, A MINOR, BY DOLORES FORTSON, HER MOTHER AND NEXT FRIEND; MICHELE LONG, CHARLES LONG AND MICHAEL LONG, MINORS, BY MRS. JAMES LONG, THEIR MOTHER AND NEXT FRIEND; SHARI ANN MILLER AND DURRICK MILLER, MINORS, BY CORNELIA MILLER, THEIR MOTHER AND NEXT FRIEND; ANDREA AUSTIN AND JOSEPH TYRONE AUSTIN, MINORS, BY MRS. SYLVIA AUSTIN, THEIR MOTHER AND NEXT FRIEND; ALFRED D. OVERBEY, A MINOR, BY MRS. ALFRED H. OVERBEY, HIS MOTHER AND NEXT FRIEND; MICHAEL STAFFORD, A MINOR, BY MRS. PALMER B. STAFFORD, HIS MOTHER AND NEXT FRIEND; ALSTON ANDERSON AND ALEXIS ANDERSON, MINORS, BY MRS. ANNIE ANDERSON, THEIR MOTHER AND NEXT FRIEND,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Respondent.

For the Petitioners, Joseph N. Dempsey, Esq.

For the Respondent, Stout and O'Hagen (William J. O'Hagen, Jr., Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION
ON MOTION FOR SUMMARY JUDGMENT

This appeal was filed by a number of parents in behalf of their minor children who are pupils in the public schools of the Township of Neptune, Monmouth County. They alleged that respondent Board of Education is maintaining a racially segregated school system and that it has failed to put into operation plans and procedures which would eliminate this condition. They maintain that there is a consequent denial of equal educational opportunity to themselves and other pupils similarly situated and a violation of rights guaranteed to them by law. Respondent, in its Answer, denies any racial imbalance and/or segregation in its school system.

In order to expedite this matter and as a result of experience in previous appeals in which racial segregation was the issue, the Commissioner directed respondent to furnish, as part of its Answer, certain data germane to the problem. That information included estimates of the racial composition of the enrollment in each school building. While the figures are admittedly not precise and represent gross estimates only, they approximate the conditions sufficiently to show the general distribution of pupils by race in the schools of the district to be as follows:

	Grade Organization	*Oct. 1965 Enrollment*	*% Non-White Pupils*
Bradley Park School	K-6	577	20%
Green Grove School	K-6	916	10%
Ocean Grove School	K-6	193	1%
Ridge Avenue School	K-6	560	99%
Shark River Hills School	K-6	803	2%
Summerfield School	K-5	680	1%
Whitesville School	K-6	427	98%
Intermediate School	7-8	980	30%
High School	9-12	1770	21%

Petitioners seek summary judgment in this matter, asking the Commissioner to take cognizance of the fact of racial segregation as shown by respondent's data. They argue that there is no need for a hearing to establish that segregation exists in fact because such a condition is indisputably present on the basis of the figures supplied by respondent. They request that the Board of Education be directed to formulate and submit a plan to eliminate racial imbalance in its schools. It is apparent from respondent's data, *supra,* that there is a concentration of white pupils in at least three of the elementary schools and of Negro children in two others. While there is no reason to believe that such a distribution has occurred as a result of purpose or intent on the part of respondent, it cannot be denied that racial segregation exists in fact in its schools.

Decisions of the New Jersey Courts, the State Board of Education, and the Commissioner have clearly established the principle that existence of a school populated predominantly by pupils of the Negro race, at least where means exist to prevent it, constitutes under New Jersey law a deprivation of educational opportunity for the pupils compelled to attend it. *Fisher* v. *Orange Board of Education,* 1963 *S. L. D.* 123, 128; *Booker* v. *Plainfield Board of Education,* 45 *N. J.* 161, 168 (1965) It is also clear that even though such so-called "de facto segregation" results from causes not within the ambit of the local board of education, such board nevertheless has an affirmative duty to seek ways to correct, or at least alleviate, the condition. *Fisher* v. *Orange, supra,* 127; *Booker* v. *Plainfield, supra,* 171; *Byers* v. *Bridgeton Board of Education,* decided by the Commissioner of Education January 24, 1966 See also *Spruill* v. *Englewood Board of Education,* 1963 *S. L. D.* 141, affirmed State Board of Education 147; *Fuller* v. *Volk,* 230 *F. Supp.* 25 (*U. S. Dist. Ct. New Jersey* 1964).

The Commissioner agrees with petitioners that there appears to be no need for hearing at this point. Respondent should proceed without delay to make whatever studies and surveys may be necessary in order to achieve a sound and reasonable plan to correct the existing undesirable situation. In developing its plan respondent should have in mind the objective enunciated by the New Jersey Supreme Court:

> "* * * the goal here is a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures. This brings into play numerous factors to be conscientiously weighed by the school authorities." *Booker* v. *Plainfield, supra,* at page 180

The Commissioner finds, on the basis of data submitted by respondent, that a condition of racial segregation exists in fact in the Neptune Township

Public Schools. Respondent Board of Education is directed, therefore, to proceed with all possible speed to develop and submit a plan to correct or alleviate such condition in accordance with the principles enunciated herein and in *Booker* v. *Plainfield, supra.* The Commissioner suggests that the advice and counsel of the Monmouth County Superintendent of Schools and other members of the staff of the State Department of Education are available to respondent if desired and requested. Respondent may also wish to involve representatives of petitioners and other interested community groups in appropriate ways as it seeks a resolution of the problem. The Commissioner will require respondent to move forward with whatever celerity is needed to insure that an approved plan will be implemented at the beginning of the 1966-67 school year, and he will retain jurisdiction pending receipt and approval of such a plan.

COMMISSIONER OF EDUCATION.

May 2, 1966.

DECISION OF THE STATE BOARD OF EDUCATION

For the Appellant: Stout and O'Hagan, Esqs. (William J. O'Hagan, Jr., of Counsel)

For the Respondents: Joseph N. Dempsey, Esq. and Lewis M. Steel, Esq., of the New York Bar

This is an appeal from a decision of the Commissioner of Education granting summary judgment to the petitioners in this matter.

The appeal was heard before the State Board of Education in Trenton on November 2, 1966. Arguments of counsel were heard and the briefs, record below and pleadings were considered. The State Board of Education affirms the decision of the Commissioner of Education on the motion for summary judgment, which decision was dated May 2, 1966. The matter is remanded to the Commissioner for action.

We hold that the Commissioner was justified in proceeding by way of summary judgment because there was no material dispute as to the existence of racial imbalance in the schools. The Appellant Board contended that the figures submitted to the Commissioner by the Board itself were not nor could be 100% accurate. The petitioners contended that there was racial imbalance in certain schools and the information submitted by the appellant confirmed this fact. Under these circumstances the Commissioner ordered the Neptune Township Board to submit a plan to correct the racial imbalance in its schools. This was necessary and proper as we read the opinions in *Booker* v. *Plainfield Board of Education* 45 *N. J.* 161 (1965).

It is noted that the decision of the Commissioner intended to insure an approved plan be implemented at the beginning of the 1966-67 school year. This date has passed and no plan has been submitted. The appellant did not move for a stay of the Commissioner's decision pending the appeal to the State Board of Education. At the oral argument before the Board, it was contended by the appellant that its appeal automatically constituted a stay.

Respondents contend that the appeal did not constitute a stay. It appears that the respondents did not take action to enforce the decision of the Commissioner during the pendency of the appeal.

In any event, the State Board of Education directs the Commissioner to proceed expeditiously with the matter in accordance with the tenor of his decision of May 2, 1966, and to enter such orders as would be appropriate under the circumstances.

Dated: November 15, 1966 (As voted by the State Board of Education November 2, 1966.)

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued April 10, 1967—Decided April 10, 1967.

Before Judges Goldmann, Kilkenny and Collester.

On appeal from the Commissioner of Education and State Board of Education of New Jersey.

Mr. William J. O'Hagan, Jr. argued the cause for appellant.

Mr. Joseph N. Dempsey argued the cause for respondents. (*Messrs. Robert L. Carter* and *Lewis M. Steel,* of the New York Bar, of counsel).

Mr. Stephen G. Weiss, Deputy Attorney General, argued the cause for the Commissioner of Education and the State Board of Education (*Mr. Arthur J. Sills,* Attorney General, attorney).

PER CURIAM

The Board of Education of Neptune Township has appealed from a decision of the State Board of Education affirming the decision of the State Commissioner of Education in which he found, on the facts presented, that a *de facto* racial imbalance clearly existed in the township's elementary school system and therefore directed the local board "to move forward with whatever celerity is needed to insure that an approved plan [to alleviate the imbalance] will be implemented at the beginning of the 1966-67 school year." The State Board concurred in the Commissioner's conclusion that there was no material dispute as to the existence of such a racial imbalance. Accordingly, it directed him to proceed expeditiously with the matter "in accordance with the tenor of his decision" and to enter such orders as would be appropriate in the circumstances. The Commissioner thereupon ordered the Neptune board to submit a plan to him not later than December 15, 1966. No such plan was submitted, then or since.

That a *de facto* racial imbalance exists in the Neptune elementary school system cannot be denied. The local board's own figures indelibly show this to be so. The non-white pupil population in two of the schools is 98% and 99%, the percentage in three others being 1%, 1% and 2%, respectively. Although the board claims that these figures cannot be taken as precisely correct, it has never presented any other figures although it has had more than adequate time to do so.

Racial imbalance indisputably being present in the elementary school system, the Commissioner summarily, and correctly, ordered the Neptune board to present a plan. *Cf. Booker* v. *Board of Education, Plainfield,* 45 *N. J.* 161 (1965). The State Board affirmance was entirely proper in the factual setting of the case.

The school board contends that before reaching a decision the Commissioner should have conducted a full hearing to explore the factors mentioned

in *Booker:* safety, convenience, time economy, values inhering in a neighborhood policy, costs, and "other practicalities." The answer to this is that petitioners' motion was directed simply to determining whether *de facto* segregation existed. On the other hand, the factors relied upon by the board as posing questions of fact relate to an entirely different matter, namely, whether a given integration plan is acceptable. Since the board submitted no plan, that issue was not involved in the proceedings before the Commissioner or the State Board. The Commissioner decided only that when the relevant decisional law is lined up against the mentioned percentages of pupil concentration, it is clear that *de facto* segregation exists in Neptune's elementary schools. The factors referred to in *Booker* were irrelevant to such a determination.

We have not overlooked the fact that this appeal is actually one from an interlocutory order and that no leave to appeal was sought. We pass over this procedural deficiency, grant leave to appeal *nunc pro tunc,* and herewith decide the appeal on the merits in the interest of an expeditious determination.

The local board has too long delayed in presenting a plan for correcting the *de facto* segregation pattern present in the Neptune elementary schools. It should do so now, in order that it may be reviewed and become operative before the opening of the next school term.

Affirmed.

XXI

In the Matter of the Annual School Election Held in the Township of Vernon, Sussex County

For Petitioners, John J. Greco, Esq.

For Respondent, Robert Lee, Esq.

Decision of the Commissioner of Education

Petitioners challenge the validity of the annual school election held February 8, 1966, in the school district of Vernon Township. They say that the officials appointed to conduct the election failed to ascertain that those who voted were properly registered and qualified to vote as required by law. They pray that the results be set aside and a new election ordered.

Testimony and argument were heard by the Assistant Commissioner in charge of Controversies and Disputes on March 22, 1966, at the office of the Sussex County Superintendent of Schools in Newton. Briefs of counsel were also submitted.

One polling place was set up for this election, at which 344 voters indicated their choice of six candidates for three seats on the board of education. The announced results were as follows:

	At Polls	*Absentee*	*Total*
Edward Snook	246	2	248
Amisa Gilpatrick	236	2	238
Amos Phillips	232	2	234
Francis Hickey	107	0	107
Joyce Riggs	96	0	96
Edward Kelley	82	0	82

There were no challengers appointed by any of the candidates.

The testimony reveals that instead of having each voter write his name and address on the poll list and having his signature verified by comparison with the signature copy register, one of the election officials kept the poll list by writing the name of each voter and the area of the district in which he lived in a standard copy book. (Exhibit P-1) Thus all the names appear in the handwriting of the election official and not as the personal signatures of the voters.

Petitioners contend that the defective procedure which was followed in this election is not of the nature of a slight irregularity which can be overlooked when the will of the people has been fairly expressed, but that it constitutes such a gross disregard of the school election laws as to be fatal to the results. They argue that they are deprived of the right to determine whether those who voted were qualified because there are no signatures which can be checked to learn if the person who voted was in fact the one whose name appears on the poll list. Petitioners admit they make no claim of fraud for the reason that they have been deprived of any chance to determine illegal voting when the only record is one not made by the voters but by an election official. Because of what they consider to be total disregard of the statutes they ask that the election be set aside and a new one ordered.

The pertinent portions of the statutes relevant to this matter are as follows:

R. S. 18:7–35.5 "Every voter at any school election shall, previous to receipt of an official ballot, sign his name without assistance and state his address, in an appropriate column of the poll list and the election officer in charge of the poll list shall record therein opposite the voter's name, the number of the official ballot furnished to the voter for voting."

R. S. 18:7–35.6 "After the voter shall have so signed and before an official ballot shall be given to him, 1 of the election officers shall compare the signature made in the poll list with the signature theretofore made by the voter in the signature copy register, and if the signature thus written in the poll list is the same or sufficiently similar to the signature in the signature copy register, the voter shall be eligible to receive a ballot."

R. S. 18:7–36 "In all school districts after the election officers shall have ascertained that a voter is properly registered and qualified to vote, the election officers shall furnish to the voter one official ballot * * *.

"No ballot shall be handed to a voter until there is a booth ready for occupancy and until the voter shall have signed the poll list. * * *"

It is obvious that the election officials failed to comply with the provisions of these statutes. An election official recorded a name and location in the poll book for each voter who appeared instead of having the voter sign and write his address. According to the testimony, reference was not made to the registration sheets in the signature copy registers in each instance but only when there was some doubt whether the voter was registered, how his name was spelled, or similar question.

That the election officials knew most of the voters by sight, knew that they had voted in prior elections and consequently must have been registered, or that there was an unexpected number of voters, or other explanation, does not excuse ignoring the law. The Commissioner has said many times that the school election is an important exercise of the democratic privilege and as such it is essential that it be conducted with exact regard to every requirement

of law. The slipshod procedures brought to light in this case cannot be condoned.

There being no question that the election officials failed to perform their duties properly, the issue then is whether their neglect was so fatal to a proper election that it should be set aside.

Even though the election officials were derelict in their duty, the Commissioner finds insufficient grounds herein for voiding the results. The officials examined stated that they had served at prior elections and that they know those who voted and were generally sure that they were properly qualified. They did deny ballots to two persons who appeared whose lack of qualification they checked and verified. (Tr. 14) To the best of their knowledge, they testified, no one was permitted to vote who was not registered, even though they admit not having verified each voter. The Commissioner is satisfied from the testimony of the witnesses that their failure to perform the registration verification procedure called for in the statute, resulted from ignorance, misunderstanding, or a desire to speed up the election process, and that there was no fraudulent intent or other improper motive.

The New Jersey courts give effect to contested elections whenever possible. "Elections should never be held void unless they are clearly illegal." *In re Wene*, 26 *N. J. Super.* 363, 376 (*Law Div.* 1953) See also *In re Stoebling*, 16 *N. J. Misc.* 34 (*Cir. Ct.* 1930); *Sharrock* v. *Keansburg*, 15 *N. J. Super.* 11 (*App. Div.* 1951). The will of the people, plainly expressed, cannot be vitiated by acts of those assigned to conduct the election for which voters were not responsible.

> "Can it be said that a voter could be held either directly or indirectly responsible for the failure of the district or county board to present to him or her for signature what the statute may require to be signed by the said voter in a primary election? Certainly it was not the intent of the Legislature, nor is it proper, to defeat the vote of a fully qualified and registered citizen by an act for which he was neither directly nor indirectly responsible, nor for a negligent default, act or misconception of duty in respect to a form required under a statute to be supplied by the election officials and not required to be furnished by the voter himself." *In re Wene, supra*, at 377

> "Certainly irregularities on the part of the election officers or others which do not appear to affect, alter or void the voting, the counting, or the returns, will not form a ground of contest." *In re Wene, supra*, at 377

Petitioners argue that the occurence herein goes beyond a mere irregularity or non-compliance with a directory statute which can be overlooked. The Commissioner sees no need, however, to determine whether the relevant statutes in their application to this case are directory or mandatory or to ascribe a particular grade or degree of irregularity to the officials' omission. He is satisfied that in any case, the will of the people was fairly expressed and determined by this election despite its procedural defects. The testimony of the witnesses supports such a conclusion. The wide margin of votes by which the successful candidates more than doubled the tally for the unsuccessful candidates must also be given weight. And finally, no person has come forward or has been produced to say that any voter cast a ballot in this election who should not have been permitted to do so. Even if it is assumed that illegal votes were cast because of the failure to check each registration,

it strains credulity to speculate that there were enough such ballots to alter these results. For all of these reasons the Commissioner, while deploring the inattention to statutory procedure evident herein, declines to set the election aside and will give it effect as announced.

The Commissioner finds and determines that the officials in charge of the annual school election on February 8, 1966, in the school district of Vernon Township failed to require voters to sign the poll list and to compare their signatures and verify their registration in the signature copy registers as required by law. He finds further that this omission did not suppress or thwart a fair expression of the will of the people, and the results of the election will therefore stand as announced. The election of Edward Snook, Amisa Gilpatrick, and Amos Phillips to seats on the Vernon Township Board of Education for full terms of three years each is hereby confirmed.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

May 2, 1966.

Pending before State Board of Education.

XXII

BOARD MAY ADOPT REASONABLE PLAN TO REDUCE RACIAL IMBALANCE

CHARLES B. BOOKER, *et al.*,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,

Respondent.

For the Petitioners, Herbert H. Tate, Esq., William Wright, Jr., Esq., Robert L. Carter, Esq., Barbara A. Morris, Esq., and Joan Franklin, Esq.

For the Respondent, Victor R. King, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION ON REMAND

In a petition of appeal filed before the Commissioner of Education on September 5, 1962, petitioners, who are or were at that time pupils in the elementary schools of the City of Plainfield, alleged that respondent maintained racially segregated schools, thus denying equal educational opportunity to pupils of the Negro race. They appealed to the Commissioner to order respondent to take immediate steps to eliminate all aspects of segregation in the Plainfield public school system. The parties submitted by stipulation three plans, each purportedly designed to reduce racial imbalance in the Plainfield elementary schools. The Commissioner found that each of the plans was educationally sound, reasonable, and practical and that each would eliminate schools in which the enrollment was all or nearly all Negro. In a decision on June 26, 1963, the Commissioner found that the Washington School was segregated and directed the Plainfield Board of Education to adopt and implement for the 1963-64 school year the plan which it deemed best suited to the needs of the Plainfield school system. *Booker* v. *Plainfield Board of Education*, 1963 *S. L. D.* 136

Pursuant to this directive respondent Board of Education adopted a plan which made the Washington School, whose enrollment was 96.2 per cent Negro, a sixth grade school for all pupils of that grade in the district. The pupils of grades Kindergarten to 5 who had been assigned previously to the Washington School were dispersed to other elementary schools, but no such pupil was assigned to a school where the enrollment was already over 50 per cent Negro. Petitioners appealed to the State Board of Education from the Commissioner's decision, complaining that the resulting percentages after the adoption of the "Sixth Grade Plan" did not eliminate what is variously called "racial imbalance" and "segregation," and that the Commissioner failed to order the reduction of "racially imbalanced schools other than the Washington Street School." On February 5, 1964, the State Board affirmed the Commissioner's decision and also the adoption of the Sixth Grade Plan by the Plainfield Board of Education.

Petitioners thereupon appealed from the State Board's decision, and the New Jersey Supreme Court certified on motion before the matter was argued in the Appellate Division. 45 *N. J.* 161 (1965) The Court found that population shifts had occurred subsequent to the adoption of the Sixth Grade Plan which made further review of its efficacy desirable. Also, in limiting relief to schools in which the enrollment was all or nearly all Negro, the Court deemed that:

> "* * * the Commissioner, along with the State Board in sustaining his pertinent determinations, has taken a position which we deem too restrictive." 45 *N. J.* at page 178

It defined the Commissioner's duty by saying:

> "* * * [W]hen the sufficiency of the local choice is brought before him he must affirmatively determine whether the reasonably feasible steps towards desegregation are being taken in proper fulfillment of State policy; if not, he may remand the matter to the local board for further action or may prescribe a plan of his own * * *." *Id.* at page 178

The objective sought was enunciated as follows:

> "* * * the goal here is a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures. This brings into play numerous factors to be conscientiously weighed by the school authorities. Considerations of safety, convenience, time economy and other acknowledged virtues of the neighborhood policy must be borne in mind. Costs and other practicalities must be considered and satisfied. And trends towards withdrawal from the school community by members of the majority must be viewed and combatted, for if they are not, the results may be as frustrating as the inaction complained about by the minority. * * *" *Id.* at page 180

The case was therefore remanded to the Commissioner:

> "* * * for further consideration and action on his part pursuant to the judicial views expressed in this Court. * * * The Commissioner will, of course, be at liberty to have the record supplemented by such further evidence and plans as he may call for or as the parties may choose to present. Thereafter he will make whatever determination and take whatever action appears appropriate under the circumstances and the governing principles set forth earlier in this opinion." *Id.* at page 181

Pursuant to the Court's order, the Commissioner convened a conference of the parties herein on July 22, 1965, at the State Department of Education in Trenton. The following agreements were reached:

"1. The Plainfield Board of Education will prepare and submit to the Commissioner of Education on or before August 20, 1965, its school attendance plan to carry out the principles laid down by the Supreme Court.

"2. The Commissioner of Education will consider the plan, the schedule for its implementation and will direct the Plainfield Board of Education with respect to it.

"3. The Commissioner of Education will hold a hearing with respect to the plan on Monday, September 27, 1965 * * *."

As agreed, respondent submitted to the Commissioner on August 20 a proposal to be implemented upon the opening of schools for the 1965-66 school year. The plan proposed to provide the following steps (R-9):

1. Establish in the Washington and Emerson Schools two Fifth and Sixth grade schools for the community.
2. Reassign pupils of grades 1 to 4 in Emerson, Washington and Bryant Schools attendance zones to make the best use of available classroom space and to maintain an acceptable degree of racial balance.
3. Establish kindergarten classes in each of the eleven elementary school buildings (including Emerson, Washington and Bryant Schools).
4. Designate Lincoln and Bryant Schools to house special education classes only, with the exception of the kindergarten class in Bryant School.

A further step, anticipated for September 1968, when it is hoped a new high school will be available, provided for the conversion of the present high school building to elementary use, in order to

1. Relieve anticipated overcrowding in K-4 elementary schools by establishing another K-4 center.
2. Relieve crowding of Washington and Emerson Schools by establishing a third Fifth and Sixth grade center.
3. Improve racial balance in the Stillman School attendance zone.
4. House special education classes from Bryant School.
5. Abandon the Bryant School Building.

Respondent's proposal was accompanied by enrollment projections which demonstrated the changes in the racial composition of the anticipated pupil enrollment, which will be set forth more fully hereafter.

In accordance with item 2 of the conference agreements, *supra*, on August 24, 1965, the Commissioner sent a letter to the Plainfield Board of Education with respect to its proposal, stating in part:

> "With regard to the standards set down by the Supreme Court in *Booker* v. *Board of Education of Plainfield*, the proposal is superior to the attendance plan in effect in 1964-65. I therefore approve the inauguration of the Board's proposal effective with the opening of school in September. In so doing, I make no final judgment as to the adequacy of the proposal, withholding such judgment until after the hearing on September 27."

Accordingly, by later agreement of counsel, hearings were conducted on September 30 and October 5, 1965, by the Assistant Commissioner in charge of Controversies and Disputes at the Court House in Elizabeth, at which witnesses were examined and exhibits were received. On November 3, 1965, the Assistant Commissioner heard presentations made by counsel for two groups of citizens of Plainfield whose application to intervene in the hearings had been denied.

In his letter to respondent Board on August 24, 1965, *supra*, the Commissioner directed respondent to show at the hearing that its proposal "best comports with the goal set forth by the Supreme Court in *Booker*," *supra*, at page 180. Through the testimony of the assistant superintendent of schools and exhibits received in evidence, it was established that:

1. The percentage of Negro pupils enrolled in the Plainfield elementary schools has increased from 37 per cent in April 1962 to 50.8 per cent in September 1965. (R-2)
2. This increase is reflected with general consistency in all elementary grades. (R-3)
3. The enrollment of Negro pupils in the elementary school has increased between April 1962 and September 1965 from 1905 to 2787, a 46.3 per cent increase. During the same period the enrollment of "other" elementary pupils has declined from 3236 to 2696, a 16.6 per cent decrease. (R-4, 5, 6)
4. The comparative racial distribution of pupils in public elementary schools from April 1, 1963, to the 1965-66 school year is as follows (R-7, 8, 12, and 1963 *S. L. D.* at page 137):

	April 1, 1963		*6th Grade Plan 1964-65*		*5th & 6th Grade Plan 1965-66*		
School	*Org.*	*% Negro*	*Org.*	*% Negro*	*Org.*	*% Negro*	*% Negro***
Emerson	K-6	72	K-1-5	77.0*	K-5-6	48.1	44.4
Washington	K-6	96	6	44.1	K-5-6	57.5	48.8
Barlow	K-6	31	K-1-5	44.4	K-1-4	49.9	51.5
Cedarbrook	K-6	4	K-1-5	17.3	K-1-4	33.8	37.9
Clinton	K-6	59	K-1-5	68.8	K-1-4	70.5	70.5
Cook	K-6	1	K-1-5	23.5	K-1-4	36.8	41.6
Evergreen	K-6	8	K-1-5	30.9	K-1-4	43.7	48.8
Jefferson	K-6	45	K-1-5	56.2	K-1-4	62.8	64.1
Stillman	K-6	68	K-1-5	68.5	K-1-4	63.7	66.8
Woodland	K-6	19	K-1-5	51.9	K-1-4	50.5	52.4
Bryant	K-6	66	K-1-5	80.0	K*	70.0	

* does not include pupils in special education classes
** exclusive of kindergarten classes

5. To effectuate the Fifth and Sixth Grade Plan for 1965-66, pupils in grades 1 to 4 in the Washington School attendance area were assigned to Cedarbrook and Evergreen Schools, and like pupils in the Emerson School attendance area were assigned to Barlow and Cook Schools. Pupils in grades 5 and 6 were assigned from Cedarbrook, Clinton, and Jefferson Schools to Washington School, and similar pupils were assigned from Evergreen, Stillman, Bryant, Cook, Woodland and Barlow Schools to Emerson School. (R-10, 11)

6. While 52 per cent of the elementary school population resides in the westerly part of Plainfield, only 45 per cent of the available elementary school classrooms are located in schools west of Park Avenue. Thus, in order to utilize available classroom space, respondent found that the movement of pupils would be from west to east. The greatest density of Negro pupil population is in the westerly portion of the city. (Tr. 63, 65, 67, 68) The movement of pupils therefore affects Negro pupils more extensively than other pupils. (Tr. 125) Although it was shown that the functional capacities of Washington School (in an area having a large Negro population) and Evergreen School (having a larger white than Negro population) were alike (R-16), utilization of Evergreen School instead of Washington School as a fifth and sixth grade school would be impractical because it is located so far toward the easterly section of the city that it would increase the west to east movement of pupils. (Tr. 123, 156, 157)

7. The subject pupil assignment plan provides full utilization of available classroom facilities, with the exception of one room vacant in the easterly portion of the city (Woodland School) and three rooms vacant in the westerly portion (Jefferson School). No pupils were reassigned from the Washington School area to the Jefferson School because of the proportion of Negro pupils already in Jefferson School. (Tr. 72)

8. Despite two changes in the attendance area served by Clinton School during the past three years (April 1962 to April 1965), and despite the transfer of all sixth grade pupils from Clinton School to Washington School in September 1963, the enrollment in that school has increased from 355 to 422, and the percentage of Negro enrollment has grown from 45.9 per cent to 68.8 per cent. (R-18)

9. Under respondent's present policy to provide transportation to pupils in grades K to 4 who live .9 miles from school, and to pupils in grades 5 and 6 who live 1.3 miles from school, the transportation cost for 1965-66 has risen from $42,000 to between $47,000 and $48,000. (Tr. 99, 100) An assignment policy which would place all K-6 pupils in schools nearest their homes, thereby reducing transportation costs, would not be educationally or administratively feasible because of the insufficiency of classroom space in the western portion of the city. (Tr. 100)

10. Consideration was given to pupil safety in establishing the pupil assignment plan for 1965-66. Respondent determined what in its opinion was the safest organization in the light of all the criteria established for an assignment plan, then considered with the city police the number and location of crossing guards needed to provide protection of pupils. Six guards were added for the 1965-66 school year. (Tr. 102)

11. Lunchroom facilities with catered cold lunches for sale to pupils who wish to purchase them have been made available in all schools for pupils who are transported to school. (Tr. 102, 155) Where lunchroom facilities are taxed to provide for transported pupils, other pupils are not encouraged to stay for lunch. (Tr. 103)

12. The retention of Kindergarten in all schools to which pupils are assigned on a "neighborhood" basis is grounded upon respondent's determination that the educational, safety, and administrative values of housing pupils of kindergarten age in schools near their homes are greater than any values that would accrue from reassignment on the basis used to assign pupils of grades 1 through 4. (Tr. 85, 86, 162, 165) Retention of neighborhood kindergartens results in kindergarten classes having the following racial distribution as of September 22, 1965:

	*Kindergarten Enrollment**			*Per Cent*
School	*Negro*	*Other*	*Total*	*Negro*
Barlow	18	28	46	39.1
Bryant	28	12	40	70.0
Cedarbrook	2	69	71	2.8
Clinton	71	30	101	70.3
Cook	0	63	63	0.0
Emerson	74	19	93	79.6
Evergreen	20	90	110	18.2
Jefferson	61	44	105	58.1
Stillman	50	41	91	54.9
Washington	134	11	145	92.4
Woodland	27	38	65	41.5

* This table is developed by subtraction of enrollment figures given in R-8 from those in R-7.

13. Other organizational plans considered included a K-6 organization, grades 4, 5, and 6 in either three or four schools, and a system of so-called "paired schools." Each of these patterns was discarded because the distribution of available classrooms *vis a' vis* population concentrations made it impossible to house pupils properly. (Tr. 124, R-9 page 13) Creation of attendance zones on a north-south basis, rather than east-west, as had been previously proposed, has been effectively accomplished in the present areas assigned to Cook, Cedarbrook, and Evergreen Schools. (Tr. 124, 125)

14. A "maximum dispersal" plan having as its goal the achieving of a maximum degree of racial balance but without regard to the other "considerations" enunciated by the Supreme Court (45 *N. J.* at page 180), was submitted to the Commissioner, not as a proposal of respondent, but for purpose of comparison with the subject plan. (R-9 pages 9, 10, 11) Essential differences involved the realignment of the boundaries of the Clinton, Cedarbrook, and Evergreen zones, resulting in the increase in the percentage of Negro enrollment in Cedarbrook School from 37.9 per cent to 49.7 per cent, and in Evergreen School from 48.8 per cent to 50.3 per cent, and a decrease in Negro enrollment in Clinton School from 70.5 per cent to 43.5 per cent. It was testified that to effectuate this plan under respondent's present transportation policy, the number of pupils in the affected attendance zones who would require transportation would increase from 30 to 150. (Tr. 95) Stability of this plan would be dependent upon the further growth of the population concentration in the Clinton

School area, which has undergone two attendance area changes in the past three years. (Tr. 97)

15. Step 5 of respondent's plan contemplates the refurbishing and remodeling by 1968 of the present high school building for elementary school use. As heretofore stated this step is designed to relieve anticipated overcrowding of present K-4 schools, provide a third, fifth and sixth grade school, improve racial balance in the Stillman area, and effectuate the complete abandonment of Bryant School for classroom uses. The Commissioner takes official notice of a letter dated March 1, 1966, copies of which were sent to counsel for petitioners, enclosing copies of ordinances appropriating funds for the purchase of land for the erection of a new high school and for the proposed modifications of the existing high school building, all in implementation of the proposals of Step 5.

The thrust of petitioners' objection to the subject plan, as expressed in counsel's closing argument, is twofold:

1. That the burden of movement, especially as to travel and the necessity to have lunch away from home, rests more heavily upon Negro children than upon others.

2. That maintaining kindergartens on a "neighborhood" basis deprives many Negro children of an opportunity to experience a racially intregated environment at the very beginning of their schooling.

As set forth in item 6, *supra,* the concentration of pupil population in the westerly part of the city and the availability of classrooms in the easterly portion explains and validates the necessity to move the children to the schools. The Commissioner holds that this necessity, while it affects Negro children more than other children, has been suitably met by respondent's plan. The Commissioner further holds that respondent's decision to operate kindergartens on a "neighborhood" basis is grounded upon accepted educational principles set forth in *Fisher et al.* v. *Orange Board of Education,* 1963 *S. L. D.* 123, 127, and, in the context of the entire plan, is consistent with the considerations of safety, time economy and convenience enunciated by the Supreme Court.

The Commissioner finds and determines that the organizational plan developed by respondent Board of Education and described herein is consonant with the goal and requirements established by the Supreme Court in *Booker* v. *Board of Education of Plainfield, supra,* and approves the operation of said plan by respondent.

COMMISSIONER OF EDUCATION.

May 2, 1966.

XXIII

BOARD MAY WITHHOLD SALARY INCREMENT WHEN GOOD CAUSE EXISTS

WILLIAM MYERS,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,

Respondent.

For the Petitioner, Gant & Miller (Edward S. Miller, Esq., of Counsel)

For the Respondent, Walter L. Marshall, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is a teacher under tenure in respondent's schools. He complains that respondent withheld his 1964-65 salary increment in an unlawful, arbitrary and incompetent manner. Respondent answers that petitioner's salary increment was withheld in the manner required by law, and denies that its action was either arbitrary or incompetent.

Hearings in this matter were held by the Assistant Commissioner in charge of Controversies and Disputes at the office of the County Superintendent of Schools in Clayton on June 10 and September 13, 1965, and at the Department of Education Building, Trenton, on November 29, 1965.

Petitioner was first employed by respondent in September 1956. During the school year 1963-64 his annual salary was $6,300. (Ex. P-R-2) Pursuant to *R. S.* 18:13–13.2, a teacher with petitioner's educational background and years of employment as a teacher would be eligible for the salary fixed at Step 9—$6,700, for the school year 1964-65. At a special meeting of the Board of Education held on June 24, 1964, the following motion was adopted by a unanimous vote of the 5 members of the 9-member board in attendance:

> "Mr. Walker made a motion, seconded by Mr. Prince, that the salary of Mr. William Myers be set at $6,300 for the 1964-65 school year and that his salary increment be withheld for the following reasons:
>
> a. refusal to comply by announced and established rules of the school
>
> b. inefficiency in planning and conducting class." (Ex. P-7)

Petitioner was notified of the Board's action, and its reasons therefore, by letter dated June 26, 1964 (P-R-1), as required by *R. S.* 18:13-13.7.

Petitioner's first attack is upon the legality of the special meeting of June 24. It is petitioner's contention that since only 5 of the 9 members of the Board were present, and no waivers from those absent appear in the minutes, the entire action is unlawful. The Commissioner knows of no decisions of the courts to support petitioner's position. It was testified by the President of the Board that he instructed the Secretary to issue notices of the special meeting and that such notices were issued. (Tr. 99, 100) A board member who had been hospitalized at the time of the meeting testified that the notice had been relayed to her from her home. (Tr. 153) Neither she nor any other absent member is on record as having protested the meeting, or having raised any objection as to adequacy of notice. In fact, the minutes of the special meeting of June 24 were approved at the next regular meeting on July 15, 1964. (Tr. 48) The essential facts here are that all members received notice,

and that those who were absent raised no protest about either the meeting or the actions taken, either on June 24 or subsequently. The Commissioner holds that the special meeting of June 24 was a lawful meeting.

Petitioner further contends that the reasons given by respondent for withholding his increment are not supported by the evidence. He denies that he was guilty of any inefficiency in planning or conducting a class or that he ever refused to comply with announced and established rules of the school.

The guidelines for the Commissioner's determination in a matter of this sort were laid down by the court in *Kopera* v. *Board of Education of West Orange*, 60 *N. J. Super.* 288, 296 (*App. Div.* 1960), as follows:

> "However, since the proceeding before the Commissioner was the first 'hearing' afforded appellant of the type specified in *Masiello, supra,* we think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the *mise en scene;* and that the burden of proving unreasonableness is upon the appellant."

During the school year 1963-64 the principal of the high school where petitioner was employed did not participate actively in the supervision and evaluation of teachers, in anticipation of his retirement at the end of the school year. These duties, as well as other administrative duties, were the responsibility of the assistant principal, who testified however that he kept the high school principal fully informed of his activities and reports to the Superintendent of Schools. (Tr. 49-51, 53, 76, 96, 124-128, 174) He testified that he had personally observed petitioner's classroom teaching in 6 formal visits of not less than 35 minutes each, and had made approximately 4 briefer observations. He found that petitioner did not make efficient use of class time, did not adequately motivate his pupils, did not sufficiently involve pupils in the learning process, and did not plan his lessons in sufficient detail. (Tr. 56-61) The assistant principal testified further, that petitioner's attitude toward suggestions and criticism of his work was "most belligerent" (Tr. 59, 62), and that on subsequent visits he found no significant change or improvement. (Tr. 62)

The assistant principal also testified that on three occasions he found petitioner either in the faculty room or preparing to leave the school building while his class was still in session and unattended in the classroom (Tr. 65, 66); that he did not follow announced requirements that proper notification be given when a pupil was sent from class to the administrative office for disciplinary reasons (Tr. 67); that he did not pursue required procedures for reporting class absences (Tr. 68); and that during the closing week of school, he dismissed classes contrary to specific instructions. (Tr. 69)

Testimony shows further that the principal, the Superintendent, and the Board of Education were aware of the assistant principal's dissatisfaction with petitioner's performance of his duties. At the meeting in the Spring of 1964 when the Board voted salaries for the next school year, action on petitioner's salary was delayed for further consideration, and a letter was sent to him on April 14 to that effect. (R-5) On June 15 the assistant principal filed a report (P-10) with the Superintendent in which he described petitioner's teaching as "sterile and illprepared," and in which he enumerated specific instances of petitioner's failure to abide by the rules of the school.

At the special meeting of June 24, the Superintendent recommended that petitioner's salary for 1964-65 be continued at the same rate as for 1963-64, for the reasons stated in the Board's motion. (P-7, *supra*)

Petitioner's defense to the criticisms of his teaching procedures is that they are unjust, that the assistant principal's comments were based on inadequate or untimely observation, and that the assistant principal's presence in the classroom created an unnatural atmosphere because of the pupils' fear of him as the school's disciplinarian. His response to charges of failure to abide by the established procedures and rules of the school is either that he had done what had long been the custom at the school and was not aware of any announced rule to the contrary, or that other teachers had committed the same offenses charged against him. He offered no clear defense to the charges of absenting himself from the classroom, leaving his class unattended, even after this infraction had been called to his attention.

The evaluation of a teacher's performance is often a matter of total impression, based upon both objective evidence and subjective judgment. No generalization concerning the amount and type of classroom observation required for a valid evaluation is possible; frequently, as in the present case, the responsiveness of the teacher to suggestions for improvement of his teaching becomes more significant than the number of classroom visits made by the evaluator. See *Haspel* v. *Board of Education of Metuchen*, 1963 *S. L. D.* 78, affirmed State Board of Education, October 9, 1964, affirmed Superior Court, Appellate Division, June 10, 1965; *Charen* v. *Board of Education of Elizabeth*, decided by the Commissioner October 27, 1965. Similarly, justification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school, or in many incidents. In the context of dismissal, but with equal force here, it was said in *Redcay* v. *State Board of Education*, 130 *N. J. L.* 369, 371 (*Sup. Ct.* 1943), affirmed 131 *N. J. L.* 326 (*E. & A.* 1944):

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

The quantum of proof required to sustain a decision to withhold a salary increment is less than that required to establish cause for dismissal of a teacher under tenure.

> "To withhold an increment on such a salary schedule, it is not necessary to show shortcomings on the part of a teacher sufficient to justify dismissal under the Teacher's Tenure Act." *Kopera* v. *Board of Education of West Orange*, 1960-61 *S. L. D.* 57, 62, affirmed Superior Court, Appellate Division, January 10, 1963

The Commissioner finds and determines that the evidence presented herein establishes that petitioner was inefficient in planning and conducting his classes and failed to conform to the established rules and regulations of the school to such a degree as to warrant the withholding of a salary increase for the school year 1964-65.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

May 9, 1966.

XXIV

In the Matter of the School Election Held in the Penns Grove-Upper Penns Neck Regional School District, Salem County

Decision of the Commissioner of Education

The announced results of a referendum held in the Penns Grove-Upper Penns Neck Regional School District on April 26, 1966, to authorize the purchase of a site for a new schoolhouse were as follows:

	At Polls	*Absentee*	*Total*
Yes	798	8	806
No	808	1	809

Pursuant to a letter request dated April 27, 1966, signed by the President of the Board of Education, a recount of the ballots was authorized by the Commissioner of Education and was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Salem County Superintendent of Schools on May 3.

The recount disclosed 24 ballots which could not be counted for one or more of the following reasons:

1. ballots which were wholly bank
2. ballots marked for both "yes" and "no"
3. ballots on which the word "yes" or "no" was written or other markings appeared but on which no cross, plus, or check mark had been made. *R. S.* 19:16–4, 19:16–3e, 19: 16–3g

The remaining ballots were determined to be properly marked and were counted, resulting in the following complete tally:

	At Polls	*Absentee*	*Total*
Yes	795	8	803
No	801	1	802

The Commissioner finds and determines that the proposal submitted to the voters of the Penns Grove-Upper Penns Neck Regional School District at a referendum on April 26, 1966, was approved.

Commissioner of Education.

May 9, 1966.

Decision of the State Board of Education

For Petitioners: William R. Smith, Esq.

For Respondent: Gerald J. DeNicola, Esq.

This is an appeal from a recount in a referendum held on April 26, 1966, to authorize the purchase of land for a new schoolhouse. The Commissioner's recount was requested by the President of the Board of Education because the proposition was defeated by a margin of 3 votes and the President said:

> "It is our view that because of the closeness of the vote a recount is necessary and vital to verify this tally since mechanical errors and disputed ballots may have an effect in the final decision."

It should be noted that 13 ballots were voided in the original count. The Commissioner found and determined that the proposal had been approved by a margin of one vote. When the Commissioner recounted, he rejected 24 ballots for various reasons stated in his opinion.

Appellants raised three points in this appeal, the third of which we shall dispose of first. The contention is that a properly registered voter was denied the right to vote and there was a proffer of her testimony as to how she would have voted. This question must be decided against the appellants. We question the propriety of our hearing such testimony. In any event, in the absence of proof by the proper election officers, we would not be able to decide whether the voter was indeed qualified to vote.

Another point raised by appellants is that certain ballots which were rejected should have been counted. These ballots bear the marking over the word YES or over the word NO instead of in the square to the left of the word YES or NO. We had no difficulty in concluding that these were properly rejected by the Commissioner in accordance with the language of the statute, and moreover, because the intent of the voter in each of these cases is ambiguous. By placing an X over YES a voter may be intending to vote YES or, on the other hand, he may be intending to vote NO by striking out the word YES.

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

For the foregoing reasons, we affirm the Commissioner's determination on the recount and his conclusion that the proposition was approved by the voters.

December 7, 1966.

XXV

IN THE MATTER OF THE SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE TOWNSHIP OF MEDFORD, BURLINGTON COUNTY

For Petitioner, Antonio R. Cioffi, Esq.

For Respondent, Robert E. Dietz, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of a referendum held April 26, 1966, in the school district of the Township of Medford, Burlington County, seeking authorization of the voters to issue bonds of the district in the amount of $897,000 for purchase of a site and construction of a new schoolhouse thereon, were as follows:

	At Polls	*Absentee*	*Total*
Yes	456	----	456
No	452	3	455

Pursuant to a letter request dated April 28, 1966, from William Bisignano, the Commissioner of Education directed that a recount of the ballots be made. The recount was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes at the office of the Burlington County Superintendent of Schools on May 9, 1966.

At the conclusion of the recount, with 11 ballots referred and undetermined, the count of the uncontested votes stood:

	At Polls	*Absentee*	*Total*
Yes	452	----	452
No	452	3	455
Referred	11	----	11

Consideration of the 11 referred ballots resulted in agreement that 8 were clearly void and could not be counted because the voter either had marked both "Yes" and "No," or had failed to mark a cross, plus, or check mark in the appropriate square. *R. S.* 18:7–32, 19:16–1, 19:16–2 The remaining three ballots, marked exhibits A, B, and C were referred to the Commissioner for determination.

The Commissioner finds no need to determine the three contested ballots because even if they should be counted they cannot alter the result. The final tally stands:

	At Polls	*Absentee*	*Total*
Yes	452	----	452
No	452	3	455
Void	8	----	8
Referred	3	----	3

The Commissioner finds and determines that the proposal submitted at the referendum in the school district of Medford Township on April 26, 1966, failed to win the approval of the voters.

COMMISSIONER OF EDUCATION.

May 16, 1966.

XXVI

In the Matter of the Evaluation of Rodger-Spencer Business Colleges, Essex County and Hudson County

For the Respondent, Fahy and Walsh (Francis X. Fahy, Esq., of Counsel)

Order of the Commissioner of Education

Notice having been given by the Division of Vocational Education of the New Jersey Department of Education that Rodger-Spencer Business College, 45 Clinton Place, Newark, and Rodger-Spencer Business College, 1 Foye Place, Jersey City, have failed to comply with certain standards for the approval of such schools established by the State Board of Education; and the Commissioner of Education having directed T. Austin Smith, owner and director of said Rodger-Spencer Business Colleges to show cause on May 27, 1966, why approval of said Colleges should not be denied; and said T. Austin Smith having failed to appear at such hearing; and counsel for said T. Austin Smith having notified the Commissioner on May 31, 1966, that said Rodger-Spencer Business Colleges are not operating, will not operate in the future, and withdraw from any consideration for approval by the State Board of Education; and the Commissioner determining that this matter has been rendered moot; now therefore, for good cause appearing,

It is Ordered, on this 10th day of June 1966, that the matter of the approval of Rodger-Spencer Business College in Newark, and of Rodger-Spencer Business College in Jersey City be dismissed with prejudice.

Commissioner of Education.

XXVII

BOARD MAY ESTABLISH PLAN TO ASSIGN PUPILS TO SCHOOLS OF THE DISTRICT

DAVID K. STRATTON, *et al.*,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,

Respondent.

For Petitioners, John A. Lombardi, Esq.

For Respondent, McCarter and English (Eugene M. Haring, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal from an action of the Board of Education of Berkeley Heights altering school attendance areas. Residents of a section of the municipality known as the "Blue Mountain" area, petitioners herein, contend that the plan adopted by the Board arbitrarily discriminates against them, causes them undue hardship, and is unsupported by facts, necessity or educational need. They allege further that the plan was adopted by an illegal procedure and that it was entered into for reasons of political expediency.

Testimony of witnesses was heard and exhibits received by the Assistant Commissioner of Education in charge of Controversies and Disputes at a hearing at the Union County Court House, Elizabeth, on November 23, 1965. At the conclusion of petitioners' presentation, counsel for respondent moved to dismiss on the grounds that petitioners had produced no cause for action.

The challenged action of respondent occurred at a public meeting of the Board of Education on May 10, 1965. Those in attendance were furnished upon arrival with a multigraphed one-page document (Exhibit P-1) which defined new school attendance areas for the Berkeley, Hamilton, Mountain Park, and Woodruff Schools. At the bottom of this document the following appeared: "Adopted 5-10-65." After some discussion of this redistricting proposal, known as plan 711, by citizens in attendance and by members of the Board, the plan was adopted. Under this policy children from the Blue Mountain area who were attending the Berkeley School are now assigned to the Woodruff School, approximately one-half mile farther. Bus transportation is continued for all children affected.

Petitioners object to the change in school assignment on the grounds that (1) it discriminates with respect to them by making their children go to a school other than the one nearest their homes; (2) it necessitates traversing a dangerous railroad crossing; (3) respondent's action was based on erroneous information and insufficient consideration; (4) respondent's action was in bad faith because it had prejudged the matter as evidenced by its bulletin already prepared and marked "Adopted 5-10-65;" (5) pupils are adversely

affected by the change of school and differences in curriculum; (6) plan 711 creates a split district in violation of the neighborhood school policy; and (7) respondent's stated purpose to reduce class size has not and will not be achieved by implementation of this plan for redistricting.

Respondent moves for dismissal, contending that petitioners have not established any of their allegations even if the inferences from the testimony most favorable to petitioners' cause are accepted.

The Commissioner finds that petitioners' contentions are not supported by the evidence. The testimony reveals that respondent had been dissatisfied for some time with its pupil assignment policies and that its administrative staff had been collecting data and making studies as early as the fall of 1964. Its reasons for seeking a new assignment policy were that pupils had to be transferred too frequently in order to balance class sizes and that pupils in the same family in many cases went to different schools. It sought a new attendance area policy that would be flexible enough to maintain class size at desirable levels without the need for frequent transfer, that would eliminate hazardous walking areas, that would take into account future growth so that district lines would be permanent as nearly as possible, and that would avoid sending pupils from the same family to different elementary schools.

The testimony reveals further that a committee of the Board and the assistant superintendent both made studies during the 1964-65 school year. Reports were made to the Board as early as February 1965. It is also clear that a number of possible plans and alternatives were suggested and considered by respondents and discussed at public meetings before it fixed on the one challenged herein. It also appears that the assistant superintendent met with interested parents at each of the four schools on successive days in March 1965 to present and discuss the proposals being considered by the Board. Reactions of the parents were reported to the Board on March 29. A meeting was held also with representatives of each of the Parent-Teacher Associations on the subject of redistricting plans. There were further communications with parents in the Blue Mountain area with respect to the accuracy of some of the data, with the result that corrections were made up to May 3, 1965. Suggested plans were also received from the "Blue Mountain group" and the "Forrest Avenue group" (Tr. 69), which, after consideration, were rejected in favor of plan 711.

The assistant superintendent testified that he was directed to prepare Exhibit P-1 by the President of the Board at a meeting on May 3. He estimated that he duplicated 15 copies which were distributed to Board members at a caucus meeting on May 6 when the plan was discussed but no action taken. Subsequently he prepared approximately 80 copies for distribution to the public at the regular meeting on May 10. He stated further that he caused the statement "Adopted 5-10-65" to be placed at the bottom of P-1 although no vote had yet been taken, in anticipation of affirmative Board action in order to avoid the need to reduplicate the statement. It appears that this was a customary practice, and examples were given of other instances in at least two of which the Board had failed to act as was expected and the dates of adoption required correction. Although petitioners may have had some basis for concluding that the matter had already been determined because of the date of adoption statement, the Commissioner is satisfied with

respondent's explanation and is convinced that there was no private final action that would support a charge of bad faith. The Commissioner finds that the evidence presented by petitioners fails to support the charge that respondent acted on inadequate or erroneous information, with insufficient consideration, arbitrarily or in bad faith. The Commissioner determines that respondent's action to adopt a redistricting plan at its meeting on May 10 was properly performed.

Nor does the Commissioner find evidence of any improper discrimination with respect to petitioners' children. The fact that children in some parts of the district walk to schools near their homes while pupils in the Blue Mountain area are transported, is not evidence of wrongful discrimination. There is no school within walking distance of these pupils and they have to be transported in any case. All of the Blue Mountain area children are treated alike. The Commissioner has held that a board of education may evaluate conditions in various areas of the school district and may make appropriate arrangements which may differ for certain groups of pupils whose circumstances are different. *Schrenk* v. *Ridgewood Board of Education*, 1960-61 *S. L. D.* 185; *Livingston* v. *Bernards Township Board of Education*, decided February 19, 1965

The matter of traversing the railroad grade crossing is one which lies wholly within the discretionary judgment of the Board of Education. It appears that some children will have to cross the railroad either on foot or by bus. The testimony is clear that the Board of Education has considered this question and has determined that it is preferable to have the pupils transported in an approved school bus operated by a properly licensed driver. The Commissioner finds no basis for interfering with respondent's decision.

Petitioners produced no evidence that would support a charge of adverse effect on pupils caused by school reassignment or of significant curriculum differences between schools. No two schools in a district are exactly alike, nor should they be. It appears from the testimony that the educational standards of all of the elementary schools are identical and whatever variations exist between the Berkeley and the Woodruff Schools are normal and insignificant with respect to their effect on a pupil's progress. The Commissioner finds no evidence of any harmful effect on the opportunity of pupils to learn by reason of respondent's reassignment policy.

Petitioners point out that plan 711 creates a "split district" and contend that such a district violates the "neighborhood school policy." It is true that the Blue Mountain area is not contiguous to the balance of the Woodruff School district, but this fact in itself offends no statute or State Board of Education regulation. While it is generally accepted practice to have children attend the school nearest their homes for a number of logical reasons, there are circumstances in which other considerations outweigh or override this so-called neighborhood school policy. *Spruill* v. *Englewood Board of Education*, 1963 *S. L. D.* 141; *Morean* v. *Montclair Board of Education*, 42 *N. J.* 237 (1964); *Schults* v. *Teaneck Board of Education*, 86 *N. J. Super.* 29 (*App. Div.* 1964) Such is the case herein. There is no school in the Blue Mountain area and hence no "neighborhood" school to which the pupils may easily walk. While the Berkeley School is closer than the Woodruff School, the pupils are transported in any case. The Commissioner finds no significant

advantage to attendance at the Berkeley School which would outweigh the values sought by respondent through its reassignment policy which requires petitioners' children to attend the Woodruff School.

Finally, petitioners argue that respondent's plan does not and will not accomplish its expected reduction of class size. It appears from the testimony that the implementation of plan 711 has accomplished respondent's objective in this respect. According to the assistant superintendent a comparison of class sizes showed that in September 1964 there were 20 classes with 29 or more pupils and in September 1965 there were only 4 such groups. His testimony also revealed that 43 pupils were shifted from one school to another in 1964 to adjust class size and in 1965, after the institution of respondent's plan, no such transfers needed to be made. (Tr. 79) The Commissioner finds that petitioners' claim is not supported by the evidence.

It has long been recognized that boards of education have the authority to determine the assignment of pupils to the schools of the district. *Pierce* v. *Union District School Trustees*, 46 *N. J. L.* 76 (*Sup. Ct.* 1884); *Edwards* v. *Atlantic City Board of Education*, 1938 *S. L. D.* 683, affirmed State Board of Education 685; *Clausner* v. *Millburn Board of Education*, 1938 *S. L. D.* 645; *Gunsberg* v. *Teaneck Board of Education*, 1961-62 *S. L. D.* 163; *Rutherford* v. *Maywood Board of Education*, 1963 *S. L. D.* 129 It is equally clear that

> "The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal." *Kenney* v. *Montclair Board of Education*, 1938 *S. L. D.* 647, affirmed State Board of Education 649, at page 653

The Commissioner finds that petitioners have presented no evidence which would support a charge of illegality or bad faith. The adoption of the subject pupil assignment plan is therefore a matter which lies within the exercise of respondent's discretionary authority. The issue herein falls within the third class of cases analyzed by the Court in *Fanwood* v. *Rocco*, 59 *N. J. Super.* 306, 317 (*App. Div.* 1960). The preclusion of the Commissioner from substituting his judgment in such cases was reiterated recently by Judge Conford in *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, decided April 11, 1966 (*App. Div.*). See also *Kopera* v. *West Orange Board of Education*, 60 *N. J. Super.* 288, 295 (*App. Div.* 1960); *Boult and Harris* v. *Passaic Board of Education*, 136 *N. J. L.* 521 (*E. & A.* 1947).

The Commissioner finds and determines that the evidence offered by petitioners fails to support the charges of discrimination, improper procedure, bad faith, or adverse effects on pupils in the adoption of a pupil assignment policy by the Berkeley Heights Board of Education. The Commissioner finds further that absent such evidence of illegal conduct or abuse of authority the Board of Education acted within the scope of its statutory discretion in adopting plan 711 and there is no ground for further review. The petition is therefore dismissed.

COMMISSIONER OF EDUCATION.

June 13, 1966.

XXVIII

WHERE CHARGES OF ACTIONS ADVERSE TO SCHOOL DISTRICT ARE PROVED, DISMISSAL OF SUPERINTENDENT IS WARRANTED

IN THE MATTER OF THE TENURE HEARING OF JOSEPH A. MARATEA, TOWNSHIP OF RIVERSIDE, BURLINGTON COUNTY

For the Board, Thomas P. Cook, Esq.

For the Respondent, Francis J. Hartman, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Charges of unbecoming conduct and other just causes for dismissal have been made by two members of the Board of Education against the Superintendent of Schools, Joseph A. Maratea, of the School District of Riverside Township, Burlington County. Twenty-four charges were certified to the Commissioner of Education by action of the Riverside Board of Education, hereinafter referred to as petitioner, at a special meeting on September 2, 1965. Three additional charges were submitted and were certified by the Board at a subsequent meeting on October 20, 1965.

Hearings on the charges were initiated on November 15, 1965, before the Assistant Commissioner in charge of Controversies and Disputes. At that time counsel for the Superintendent, hereinafter referred to as respondent, argued a Motion to dismiss certain charges because of laches, insufficiency, waiver and ratification, or other reasons. Decision was reserved until counsel for the Board of Education had offered his proofs. Hearings continued on November 17, December 16 and 29, 1965, January 5 and 7, February 3, 15, 22 and 23, concluding March 4, 1966. The hearings were held at the Burlington County Court House, Mount Holly, except for those on November 15, February 15 and 22, which took place at the New Jersey State Department of Education, Trenton. At the conclusion of petitioner's presentation of testimony, Charges 20, 21 and 27 were withdrawn and Charge 14 was dismissed by the Commissioner for lack of sufficient proof.

The remaining charges are to be dealt with individually and seriatim, after which they will also be considered as a whole.

CHARGE 1

"During the school years 1961-62 and 1962-63, the Respondent misappropriated approximately $1,000.00 from the 'Cafeteria-Miscellaneous Receipts' Fund and kept this money under his personal control. From these funds he made personal loans between December 1961 and September 1963 to six different individuals in a total amount of $1,235.00 of which $510.00 were still outstanding as of March 10, 1964. The Respondent failed to inform the Board of Education concerning the handling of these funds until after his secretary, Mrs. Alice Taylor, brought these facts to the board's attention and a subsequent audit by Independent Public Accountants revealed the foregoing situation."

During respondent's employment, which began in the summer of 1961, it was his practice to keep certain sums of money in a vault on the school

premises. These funds came from several sources and were kept in separate envelopes, presumably according to their derivation. It appears that there was (1) an "Office Fund" which originally consisted of $828.00 received in commissions collected on the sale of pupil photographs; (2) a "Scrap Iron" envelope which contained $72.40 of receipts from the sale of old iron; (3) a "Library Fines" envelope holding $49.28 in cash; (4) a "Miscellaneous Fines" envelope in which there was $50.00; (5) an envelope holding $31.62 of "Teachers' Subscriptions" money; and (6) a "Cafeteria-Miscellaneous Receipts Fund." According to the auditor's report (Exhibit P-7) the source of this last fund was as follows:

> "During parts of the school years 1961-62 and 1962-63, the Superintendent had the Cafeteria transfer to him in cash $5.00 per day. There were occasional exceptions where more or less was transferred. The purpose given for making the transfers was to pay the student help used in the Cafeteria, the Cafeteria obtaining this money from its miscellaneous sales by understating the recording by the amount withheld. Students were paid in lump sums periodically. However, these payments were less than the amounts taken from the Cafeteria thus permitting a build-up in the balance which was then used for personal loans."

In 1961-62 $385.00 was withheld for this account and in 1962-63 $615.00 for a total of $1,000.00 in the two years. From this $534.50 was paid to students who helped in the cafeteria.

These monies were placed in envelopes in the vault and the records of the various accounts were kept by respondent's secretary. She testified that this practice was instituted by respondent and that prior to his coming all such monies were turned over to the Board of Education as they were received. Respondent's testimony that these funds were turned in at the end of each school year (Tr. 1410) is contradicted by his secretary, who states that only the library fines were so transmitted. (Tr. 113) The evidence indicates that at least some of the funds were retained over a period of more than one year.

During the 1961, 1962 and 1963 school years, loans were made from these funds to several teachers by respondent varying in amount from $10 to $225. The recipients testified that they needed money to pay for extension course tuition fees, for obligations entered into in anticipation of pay for extra duties which was not promptly forthcoming, etc. The loans were made at the direction of the Superintendent to his secretary, who handed over the required sum from the funds in the vault and kept a record of each loan and its repayment.

Prior to going on a vacation in February 1964, respondent's secretary informed the Secretary of the Board of Education of the existence of these funds and where her records of them might be found. She denied any intent to embarrass respondent but expressed her growing uneasiness over this practice and her wish not to be held responsible if anything happened to her while she was away. The Board Secretary gave this information to the Board President, who ordered an audit of the funds in question. The audit report listed the various accounts and monies cited above and revealed that loans had been made to six persons by the Superintendent totaling $1,235, of which $725 had been repaid and $510 was outstanding. Between March 10, 1964, when the audit was made, and March 19 all loans receivable were

repaid. The report of the auditor (Exhibit P-7) contains the following observations:

> "During the course of our work, we learned that the Superintendent has been handling certain other cash balances from envelopes held in his office for the dual purpose of paying certain expenses and for making loans. We were unable to properly audit these balances since no formal records were available and we had to rely on pencilled notations on envelopes, etc.
>
> * * * * * * *
>
> "While these receipts were handled in an irregular manner, we found no indication that any shortage of funds is involved. It is probable that the school district did ultimately collect all of the revenues, but because of the incompleteness of the records necessary to our examination, we do not express an opinion that all funds, commented on, were received that should have been."

Respondent admits that he did not inform the Board prior to the disclosure of February 1964 of his practice of withholding $5.00 a day of cafeteria funds, of the existence of the other funds, or, of the use he made of them. He neither saw then nor sees now any impropriety in his conduct with respect to this charge. (Tr. 1399) According to his testimony the sale of ice cream in the school cafeteria was in the nature of a "concession" which he could assign in his discretion to provide financial support to any school group or activity. Instead, he stated, he chose to use the profits from ice cream sales to reduce deficits in the operation of the cafeteria. He also ordered the withholding of $5.00 per day from lunchroom receipts for the special cafeteria fund. Respondent appears to have considered the sale of ice cream as a separate part of the school cafeteria operation within his sole discretion and control, the profits from which he could direct to any appropriate school purpose. He argues that the Board had set no policy with respect to what should be done with money realized from sale of pupil photographs or of ice cream in the cafeteria and that in the absence of Board policy the Superintendent properly determined the uses to which the funds should be put: (1) to reduce cost of cafeteria operations and (2) to provide a revolving loan fund for the benefit of members of the staff.

With respect to the use made of the monies respondent says there was no "misappropriation" of funds. He points out that the loans were made for salutary purposes, that they aided faculty members at times of financial distress, that he never used any of the monies for himself, and that all loans were repaid and all funds accounted for.

The Commissioner finds that the evidence amply supports Charge 1. While there may have been no "misappropriation" of funds in a technical sense, it is clear that respondent manipulated and used school monies for purposes of his own choosing without the knowledge of and without informing his employer in whose control the funds belonged. No matter how nonselfish the motivation, how salutary the purposes, it is clear that respondent had an affirmative duty to report the existence of these funds to the Board of Education and to receive direction from it for their use. Respondent's argument that the Board had no policy with respect to such funds is specious. It appears that even if there were no written policy, under practice and usage prior to respondent's incumbency such monies had been turned over to the

Board of Education whenever received. But such argument beggars the point, which is that all such school funds whether they be from picture sales, library fines, ice cream profits or other revenue are part of the internal funds of the school district and as such are under the control of the Board of Education. Respondent had no need of a written policy to spell out such a fundamental fact of school administration.

The school cafeteria is an integral part of the total school program specifically authorized by law. *R. S.* 18:11–14 That law makes the operation of the cafeteria a function of the board of education. Sale of food of any kind—Type A lunches, ice cream, or whatever—is a part of that operation. To hold that a part of the cafeteria operation, such as the sale of ice cream, is considered to be a "concession" under the control of the Superintendent for whatever purposes he deems worthy is untenable.

The Commissioner finds that Charge 1 is supported by the evidence.

CHARGE 2

"After Mrs. Alice Taylor, the Respondent's secretary, had in the performance of her duties brought to the attention of the Board of Education the facts concerning the Respondent's misuse of cafeteria funds, the Respondent improperly and unjustly penalized her by moving her desk a considerable distance from his office, relieving her of most of her duties, and otherwise mistreating her."

A special meeting of the Board of Education was held on April 7, 1964, to receive the report of the special audit ordered by the President following the revelation of the circumstances covered by Charge 1. The question of continuing respondent's employment was discussed and by a vote of 6-2 it was decided not to renew his contract and he was so advised. The next morning he ordered his secretary's desk and files moved out of the anteroom of his office on the second floor of the building to a location on the first floor. According to her testimony, when she questioned the reason for the move, respondent replied that "since he no longer had a job he no longer needed a secretary." She complained that she had no telephone, the area was drafty, poorly lighted and ventilated, and that lack of communication prevented efficient work production. Work was sent to her by messenger. On June 9, following a meeting the previous evening of the Board of Education, the Superintendent, and the secretarial staff, respondent's secretary was moved back to her former location and continued there. Although she was restored to her position in a physical sense, the duties she was accustomed to perform as secretary to the Superintendent, which she testified had been taken from her, were still being performed by others. Continued disharmony resulted in a directive from the Board that its President and its Personnel Committee chairman meet with the Superintendent and his secretary to work out a proper working relationship. Such a meeting was held March 19, 1965, with the result that "both knew what the Board expected," according to the President.

In his direct testimony on this charge respondent said that he moved his secretary away from his office because she did not keep information confidential. He stated further that he discontinued dictating to her because he preferred to write most of the material in longhand in the evenings so that he could be free to visit classes during the day. On cross-examination he denied any intent to humiliate or embarrass her at the time but admitted that "maybe" such may have been the result.

The issue here is not whether respondent's secretary was indiscreet, incompetent or inefficient, or whether respondent had a right to assign her to a new location and a change of duties. Different administrators have their own ways of working and will use the services of a secretary in ways suited to their own habits, methods, preferences, etc. Certainly a superintendent has a right to assign particular responsibilities to the various members of his secretarial staff and to decide where those duties can be performed best. It is the task of the secretary to adapt and harmonize her work to the ways and wishes of her employer and to be loyal to his interests. It is also true that the secretary to a superintendent of schools is in a peculiarly sensitive position with access to information which requires her to be unusually discreet. Lack of these qualities or failure to perform acceptably would call for open and frank evaluation and discussion of deficiencies with the employee at fault and ultimate removal if not corrected.

Other than respondent's bare assertion, no evidence was offered to show that his secretary did not respect the confidentiality of her position. Nor is there any indication that prior to the events detailed in Charge 1 he had found fault with her performance or had confronted her with failings he wished corrected.

The issue raised by this charge then is not the competency of the secretary or the extent of the Superintendent's authority with respect to her but how he conducted himself in this aspect of his administration.

Respondent's responses to questions on cross-examination on this charge were evasive, quibbling and unconvincing. Such drastic action as moving the secretary to a remote and improvised location, removing some of her responsibilities, and sending her work by messenger without prior notice or explanation, for the reasons given by respondent is not credible. The coincidence of this action with the previous night's Board meeting at which the auditor's report was reviewed and a vote taken not to renew respondent's contract is too pat to believe that it was taken for other reasons than in spite and with intent to punish, demean and humiliate the secretary. Continuing to operate in this fashion accomplished nothing to resolve the difficulty, but created increasing tension, discord, and inefficient communication and work performance which finally required intervention of the Board of Education. Under these circumstances the Commissioner is forced to conclude that respondent stooped to retaliatory actions ill-befitting a superintendent of schools and in which he persisted until it became necessary for the Board of Education to intervene in the interests of the good order of the school system.

The Commissioner finds and determines that Charge 2 is supported by the evidence.

CHARGE 3

"On or about September 1, 1964, without approval of the Board of Education and while the board was studying the budget problem involved, the Respondent purported to hire a clerk Virginia Barta for employment in the Riverside School system, even though as superintendent he had no authority to do so."

In response to a request for additional clerical help, the Board of Education, at a meeting on August 4, 1964, authorized the employment of an additional clerk for the elementary school provided that funds were available.

(Exhibit P-18A) The Chairman of the Finance Committee subsequently made a report (Exhibit P-35) dated August 8, 1964, that he had met with the Board Secretary who stated that there were not sufficient funds in the budget to warrant an additional secretary. At its next meeting on September 8, the Board learned that a clerk had been employed and had started work on September 1. The employment was then ratified by appropriate motion. (Exhibit P-18B) Thereafter, the Board Secretary reported in a letter dated October 19 to the chairman of the Personnel Committee (Exhibit P-18C) that the employment of the clerk would leave an estimated uncontracted balance of $216.

Respondent testified that after the Board tentatively approved the hiring of another clerk at the August meeting, he determined by means of the records in his office that there was sufficient uncommitted money to make this possible. He so informed the chairman of the Personnel Committee. When, at the September meeting the Finance Committee chairman's report of insufficient funds was given, respondent says the Board Secretary was directed to prepare a report to settle the question and this resulted in Exhibit P-18C, *supra*.

The Board contends that respondent hired a clerk without authority. Action of the Board of Education is an essential element in any such employment. In this case the Board had given approval contingent on adequate funds. The Superintendent used his own methods to make that determination and went ahead without checking with the Board Secretary or the finance chairman or waiting for appropriate action of the Board. In doing so he exceeded his authority.

The Commissioner finds Charge 3 to be supported by the evidence.

CHARGE 4

> "On or about January 2, 1965, the Respondent purported to hire a secretary, Rose Kirchner, again without prior approval of the Board of Education. This action was not only in excess of the superintendent's powers, but in direct violation of a policy on emergency hiring, which had been adopted by the Board of Education on September 8, 1964." [See Tr. 1413]

After the events recited in the previous charge and at the same meeting of September 8, 1964, the Board adopted a policy (Exhibit P-17) to govern "emergency hiring" as follows:

> "Motion by Mr. Orfe, seconded by Mr. Marshall and carried, that the following procedure be declared board policy for hiring personnel in cases of emergency between board meetings:
>
> 'Chairman of any Committee or Superintendent may employ a person during an emergency, by first polling his committee for approval, then calling the President of the Board of Education and with his approval notifying the Chairman of Personnel, advising of the emergency and person(s) to be employed.
>
> 'The period of employment shall be until the next regularly called meeting of the Board of Education, at which time the action of the Committee or Superintendent will be considered for ratification.' "

The secretary about whom this charge centers was interviewed for the position by the principal of the elementary school during the Christmas recess and began her work in the school just prior to January 1. At the next regular Board meeting on January 9, 1965, following approval of a motion to employ her, it was called to the Superintendent's attention that the Board had adopted a specific policy to govern hirings between meetings such as this which had not been followed in this case. (Exhibit P-19)

In his defense, respondent says he did not know the secretary had been employed until after the fact, on or about January 4. It was also testified that he spoke to the chairman of the Personnel Committee about the matter but apparently he did not confer with the Board President.

This charge and number 3 are similar. The evidence indicates no deliberate wrong-doing or misconduct by respondent but rather a careless and slipshod administrative procedure which placed the Board in the position of either ratifying his too hasty acts or refusing to do so and thereby embarrassing not only the Superintendent but the unknowing employee. The Commissioner finds that the Superintendent failed to conform to the policy of the Board. The charge is supported by the evidence.

CHARGE 5

"On or about January 5, 1965, the Respondent purported to hire a substitute teacher Richard Stockton, without board approval, thus again exceeding his powers and violating the aforesaid policy of the Board of Education with respect to emergency hiring."

The matter of this charge is similar to the two which precede it. In this instance, the Superintendent testified that during the 1964 Christmas vacation he was informed in a casual conversation with the person named in the charge of his availability for substitute teaching. Respondent subsequently employed him for that purpose and admittedly neglected to put his name on the list of teachers for approval of the Board. In consequence, when the name of this teacher appeared on the payroll, the President of the Board refused to endorse payment of salary. His refusal was based not on any question of qualification or competence but solely, according to the President, on his belief that the "emergency hiring procedure," recited *supra*, should be complied with. At a subsequent meeting the teacher was approved and his salary paid.

Respondent admits that he neglected to submit the subject teacher's name for approval but says that it was merely an oversight occasioned, at least in part, by the circumstances surrounding his chance meeting with the teacher and its occurrence during the vacation period.

The Commissioner finds that Charge 5 is supported by the evidence.

CHARGE 6

"In January 1965, the Respondent purported to dismiss a teacher, Merton Howe, and in June 1965, he purported to dismiss another teacher, Virginia Hartle, all without notifying the President of the Board of Education, thus acting in excess of his powers and arrogating to himself the powers of the board."

On February 23, 1965, respondent sent each member of the Board a letter (Exhibit P-20A) which informed them, among other things, that the high school principal had recommended the release of an art teacher, said release to be effective March 18. The principal's recommendation was contained in a letter to the Superintendent dated February 18, 1965. (Exhibit R-12) At the next Board meeting on March 9, the Superintendent was criticized for giving notice of termination of employment to a teacher without first obtaining Board approval or, at least, consulting the President before acting. (Exhibit P-20B) The Board then acted to dismiss as recommended but made the effective date thirty days from March 9 in accordance with the terms of the contract with the teacher. Subsequently, the teacher in question submitted his resignation effective March 11. (Exhibit P-38)

Respondent takes the position that he did no more than transmit and endorse the principal's recommendation of dismissal to the Board and that he did not dismiss the teacher. There is evidence, however, of a telephone conversation shortly after February 23 when the Board President told respondent he had not acted properly in giving the teacher notice of dismissal. In any case, respondent says the dismissal and notice were not required because the teacher resigned voluntarily.

Between March and the end of the school year another art teacher was employed on a per diem basis. She testified that respondent indicated that her employment would be for the remainder of the year. However, on the Wednesday prior to Memorial Day the high school principal told her that they had decided to terminate the art classes early and that Friday would be the last day that they would require her services. She completed her work and left at the conclusion of Friday's session. The testimony of the supervisors discloses that such a course was deemed advisable because of increasing disorder and other problems in the classes.

The evidence supports this charge. Whatever problems either or both teachers may have presented to the administration, the proper course of action was to report the fact and recommendations to the Board for appropriate action or, in an emergency, to poll the Board or at least to inform the President and obtain his concurrence. This is another instance in which respondent ignored or failed to consider the function of the Board, and assumed to himself the responsibilities belonging to that body. The evidence is clear that the first teacher was given some kind of notice from the Superintendent that his employment would not continue past March 18, and after that action was taken the Board was so notified. Similarly, the services of the second teacher were terminated and the art classes discontinued at the end of May with apparently no notice of any kind to the Board of Education. The fact that the first teacher acted to sever the employment relationship on his own initiative and that the second teacher made no protest does not erase the defect in respondent's procedure.

The Commissioner finds that the allegations of Charge 6 are supported by the evidence.

CHARGE 7

"On or about May 1, 1965, without the knowledge of the Board of Education, but while the Personnel Committee was reserving judgment pending the receipt of more information, the Respondent purported to dismiss a

teacher Mr. John Wnuk, thus again acting in excess of his powers and assuming for himself the prerogatives of the board. The Respondent withheld from the board the action he had taken with respect to Mr. Wnuk until confronted with information on the subject which had been obtained elsewhere by the board."

In April 1965, at a meeting of the Personnel Committee called to discuss re-employment of teachers for the ensuing year, the Superintendent presented a list with pertinent data of all employees. (Exhibit P-41) The names of those who were not returning or who were not recommended for re-employment were crossed off. The teacher involved in this charge was one of those so eliminated. The Superintendent gave several reasons for recommending that the teacher be dropped, and it was decided that the Personnel Committee chairman would make further inquiry of the teacher. In his subsequent conversation with the teacher the chairman learned that the Superintendent had already written him a letter saying that his contract would not be renewed. The Board contends that the Superintendent abused his authority by so notifying the teacher without the knowledge of the Board and before any final action had been taken by it with respect to this teacher.

The Commissioner does not agree. There is nothing improper in the action which respondent took in this matter. His recommendation to the Personnel Committee was that there be no renewal of this teacher's contract. He then wrote the teacher on April 12, 1965, the following letter: (Exhibit R-10)

"After giving much consideration to the overall problem that we had discussed earlier and having conferences with Mr. Dixey, I feel it regretable to inform you that a recommendation will be made not to renew your contract. Should you have any further question I will be available to meet with you at your convenience."

The Commissioner cannot agree that by this letter respondent assumed the prerogatives of the Board. The letter merely informs the teacher what the Superintendent's recommendation to the Board is going to be. As such it is entirely proper. The Superintendent owed a duty to the teacher to so inform him as early as possible if his recommendation was to be adverse. Whether the Board was misinformed with respect to the contents of this letter or whether it leaped to a conclusion that the Superintendent had acted precipitously and usurped its authority is not clear. In any case, the Superintendent had every reason to communicate his intent to the teacher and no reason to notify the Board that he had so informed the teacher.

The Commissioner finds that the evidence does not support the allegations of Charge 7 and it is dismissed.

CHARGE 8

"As superintendent of schools, the Respondent failed on numerous occasions to co-operate with either of the former principals of the elementary school in such matters as meeting with them to evaluate the needs of the school and to review reports thereon which had been prepared by aforesaid principals."

Extensive testimony was taken on this charge from one of the principals. His successor did not appear as a witness.

It appears that the principal became increasingly concerned about problems in the elementary school such as class size, available classrooms, playground space, program enrichment, etc. and came to a conclusion that the Superintendent was favoring the high school at the expense of the elementary grades. He also felt that he was afforded inadequate opportunities to confer with the Superintendent and that his reports and recommendations were not given proper consideration or communicated to the Board. As a result he presented several reports directly to the Board of Education beginning in November 29, 1963. (Exhibits P-30, 32)

It is clear from the testimony that the principal felt blocked in his efforts to improve the elementary school program and that he believed the Superintendent did not share his concerns or give them the attention they deserved. His frustrations over their lack of communication is obvious, and this situation led the principal finally to resign in January 1965 in favor of a position elsewhere.

After a careful study of the lengthy testimony given by a number of witnesses on this charge, the Commissioner is forced to conclude that it is supported by the evidence. He is reluctant to so find because he does not wish to appear to condone the action of the principal in bypassing the Superintendent and going over his head to the Board of Education with the problems he saw in the elementary school. There is no doubt that there were differences of opinion between the principal and the Superintendent and a lack of the close and constant communication so necessary and desirable for effective school administration. Whether under the circumstances that prevailed the principal had no other recourse than to approach the Board directly it is not necessary to decide. The fact which emerges is that the Board had not been kept informed by the Superintendent and was disturbed by the matters presented to it by the principal. Its concern led the Board to direct the Superintendent to hold regular staff meetings and render reports, which is the subject of the next charge. The Commissioner finds that the preponderance of the evidence is in support of Charge 8.

CHARGE 9

> "Although directed by the Board of Education on May 19, 1964, to meet frequently with the staff to review school needs and prepare reports, the Respondent held only three meetings on this subject with the staff during the whole school year, 1964-65. Again in February 1965 the Board directed the Respondent to meet monthly with the staff, but the Respondent failed to do so. He also failed to submit monthly staff meeting reports as requested."

This charge is an outgrowth and continuation of the matter of the preceding Charge 8. At a special meeting on May 19, 1964, the Board of Education heard a report on needs of the elementary school from the principal. Discussion followed in which teachers and citizens present participated and during which the dimensions of the problems became more apparent. It concluded with a directive from the Board (Exhibit P-32) that

> "* * * the High School and Elementary principals meet with the Superintendent to evaluate and prepare necessary factors and reports for the Board of Education in order to properly establish cost factors on the immediate needs and the projected plan of a split session for a recommended immediate needs solution should one be necessary."

To implement this directive, the elementary principal, the high school principal and the Superintendent met four times between May 19 and July 17. Although the tone of the elementary principal's memo to the Superintendent on the last date is sharply critical (Exhibit P-39), its postcript, written after the fourth session, is hopeful.

There is conflicting testimony with regard to the occurrence of regular staff meetings from July 17 on. The elementary principal told of a meeting in August 1964 to plan for the opening of school, an informal conversation in his office in September concerning secretarial help, and a meeting on various problems on November 10, 1964. Other than brief conversations as a result of chance meetings, the elementary principal stated there were no further discussions with the Superintendent. (Tr. 451-453) The high school principal states, however, that it was regular practice to hold weekly staff meetings on Monday afternoons at which various problems were discussed. (Tr. 1162) Evidently it was assumed that the Board's directive was satisfied by the meetings held during June and July 1964, culminating in the Superintendent's report dated July 30, 1964. (Exhibit P-33)

The action of the Board cited in the second part of this charge did not occur in February 1965 but at a meeting on November 10, 1964, when the following action took place:
(Exhibit P-46)

> "Motion * * * carried, that: Staff meetings be held at least once a month and *a* written report on the meeting be forward [sic] to each member of the board."

One Board member testified that he offered this motion to try to resolve the continuing difficulty between the elementary principal and the Superintendent and in order that the Board might be kept informed of what progress was being made. Later at the April 1965 meeting, when asked whether staff meetings had been held, the Superintendent replied that there had been two such meetings but that he had not yet prepared the reports.

The testimony on this charge indicates that the Board of Education, for one reason or another, became concerned about administrative staff relationships, particularly with respect to the elementary school, to the degree that it felt the need to intervene. In an attempt to insure that channels of communication were kept open and that appropriate information was brought to the Board, it directed the Superintendent to hold monthly staff meetings and submit reports. It appears that even the maker of the motion was reluctant to take such action and thought it should have been unnecessary. Whether this was a good way to deal with whatever problem existed is not the issue for the Commissioner to decide. Certainly the Board had the power to make this requirement of the Superintendent and having done so, he had no option except to comply. The evidence shows that he did not carry out the order of the Board to hold regular monthly staff meetings and to report thereon.

The Commissioner finds that Charge 9 is supported by the evidence.

CHARGE 10

> "In September 1964, the Respondent purported to enter into a contract for bus transportation of the pupils without the knowledge and approval

of the Board of Education, thus acting in excess of his powers; and he failed to inform the board that such action had been taken."

Prior to the 1964-65 school year, pupil transportation to athletic contests, school trips, and for other purposes not including transportation to and from school, was arranged on a per trip basis by calling a bus company and ordering the appropriate service. In September 1964 the Superintendent obtained quotations from several transportation companies of charges for trips to more than 25 destinations. After compiling the quotations he presented them to the chairman of the Athletic Committee and attached them to the agenda prepared for the September meeting of the Board. The Superintendent testified (Tr. 1273) that the chairman of the Athletic Committee failed to include this matter in his report and no action was taken by the Board.

On November 24, 1964, a special meeting of the Board was called for the purpose of "discussing or acting upon transportation bids." The Superintendent was criticized for having awarded the contract to one of the companies without Board approval and action. The Board then took formal action to award the transportation contract to the company already engaged by the Superintendent whose price had been the lowest of those received.

Whether the Superintendent purported to contract with the particular company for the year's transportation needs after the Board neglected to act on the matter in September, or whether he engaged buses needed in accordance with previous practice, is not clear. No written material was offered to show the existence of any agreement prior to the Board's action in November. Buses were used to transport pupils to various events in the fall of 1964, and all of them were provided by the same company. While petitioner infers that a contractual agreement was entered into on his own initiative by the Superintendent, the proofs fall short of such a showing. Absent such proofs the Superintendent's statement that he continued the accustomed practice of engaging transportation services as needed must be accepted.

The fault here lies, of course, in the fact that this matter was allowed to drift along until the Board became aware of it and took action. There was certainly time to rectify the oversight of the September meeting long before the end of November. It would appear to the Commissioner that the Superintendent had a duty to bring this matter to the attention of the Board as soon as he became aware of it, and this awareness must have been present every time a bus was ordered. The evidence on this charge, while falling short of proof of award of a contract, does indicate a careless disregard of sound school business practice and an assumption of authority without Board sanction.

The Commissioner finds that the charge of entering into a contract is not supported by the proofs and to that extent the charge is dismissed. He finds, however, that the Superintendent did engage transportation services in the fall of 1964 on his own authority and that he failed to notify the Board of his action.

CHARGE 11

"On or about April 1, 1965, the Respondent authorized the holding of an additional student dance in the gymnasium, contrary to board policy and after the board had specifically denied the request for such an additional dance to be held."

On March 11, 1962, after completion of a new gymnasium, the Board adopted a policy which limited its use for school dances to two formal dances per year plus "sock hops" on special occasions. It appears that the cafeteria was available for dances without limit.

One Board member testified that in the spring of 1965 the Superintendent requested permission to hold a dance which was in addition to the two permitted by policy and which were regularly scheduled each year. The Superintendent was referred to the policy, the dance was held on April 1, 1965, and this became the subject of this charge. The minutes of the Board are silent with respect to a request for or a denial of permission to hold this dance.

According to the Superintendent, the dance in question was an annual affair approved by the Board and first held in 1963. It was his belief that the approval of this program constituted a modification of the Board's policy to include this dance in addition to the two regularly sanctioned. He testified further that only one of the two regularly scheduled dances was held in the 1964-65 school year and therefore, he argues, no matter how the policy is interpreted, it was not violated.

No conclusive evidence was offered by either party to show how many dances were held in the 1964-65 school year. Nor is there substantial proof that the Superintendent asked and was denied permission to hold the subject dance.

The Commissioner finds that Charge 11 is not supported by a preponderance of the evidence and it is therefore dismissed.

CHARGE 12

> "At a meeting held on August 4, 1964 the Board of Education considered the employment of a teacher to do maintenance work, but decision on the matter was reserved pending further study of a policy on hiring. At a meeting held, however, on August 11, 1964 the Board was informed that the teacher in question had already been put to work by the Respondent, in deliberate violation of the specific determination reached by the Board at its previous meeting."

At a Board meeting on August 4, 1964, the chairman of the Maintenance Committee recommended employment of one of the teachers to help paint the cafeteria. The Board decided to delay action "pending an interpretation of the board policy on hiring." (Exhibit P-15) At the next meeting on August 11, it was revealed that the teacher had in fact been hired and started work on August 3 (Exhibit P-4) and some angry words were exchanged. (Exhibit P-16) After this discussion the following motion was adopted:

> "the action taken by the Chairman of Maintenance Committee in the employment of Bernard Smith be and hereby is ratified and confirmed."

Subsequently on September 8, 1964, and presumably as a result of this and similar incidents, the "emergency hiring procedure" referred to *supra* was adopted.

The Commissioner finds nothing in the evidence which connects this charge to the Superintendent. Petitioners infer that the teacher was put on the payroll a week prior to Board approval by some action of the Superintendent, but the evidence indicates that the Superintendent was away on

vacation at the time and the chairman of the Maintenance Committee admits that he gave the order to put the man to work.

The Commissioner finds that the Superintendent was not involved in the matters set forth in Charge 12 and it is therefore dismissed.

CHARGE 13

"At the opening of school in September 1964, the Respondent recommended the hiring of a teacher, Jane Spencer, on a one-year regular contract, although the Respondent had been informed that said teacher would leave the school system in October on the occasion of her adopting a baby. Failure to disclose the teacher's intentions to the Board lead [sic] the Board to hiring said teacher on a regular one-year contract instead of as a substitute teacher with a lower salary."

It appears that the teacher involved in this charge was employed on the day preceding the opening of school in September 1964, that she proved to be an able teacher, and that she found it necessary to withdraw from her employment in October 1964. It also appears that the first action of the Board with respect to her employment occurred at its meeting on October 13, 1964, when the following motion was adopted: (Exhibit P-42)

"* * * Mrs. Jane Spencer be contracted to teach first grade and be it further moved to release her from contract as of October 31, 1964."

Petitioner's complaint on this charge is that respondent knew when he hired this teacher that she would not be able to continue and that he misled the Board into employing her on a more costly contractual basis instead of as a substitute.

Respondent admits to knowledge when he interviewed this teacher that she was attempting to adopt a child, but stated that she told him she expected to continue teaching even so because there were adults with whom she lived who were qualified to care for the child. Subsequently, according to the Superintendent, after a child was placed with the teacher, she informed him that since the adoption agency frowned upon her continuing to work and leaving the care of the child to others, she would, therefore, have to leave. This knowledge, he says, first came to him in early October.

This charge appears to be a part of the general problem that existed with respect to the employment and dismissal of personnel and reflects the widening breach between the Board and its Superintendent. It is evident in the testimony in general that the Board entertained a growing mistrust of the Superintendent and an increasing irritation at having to ratify actions already consummated to avoid embarrassment. But granting this to be true, the Commissioner finds no evidence of improper conduct by the Superintendent in this charge. There is no proof that he knew that the teacher would need to be released or that he misled the Board. There is evidence that everyone was misled including the teacher herself.

The Commissioner fails to find in the testimony supporting this charge evidence that the Superintendent deliberately misinformed the Board or withheld information from it with respect to this matter. Charge 13 is dismissed.

CHARGE 15

"In December of 1964 the Respondent gave notice to a teacher, Barbara Beck, that her contract was being terminated immediately. In so doing, Respondent failed to comply with Board policy that employees should be given 30 days notice of termination; he acted without authority from the Board, which had not determined to dismiss the teacher; and he later misrepresented to the Board that the teacher had resigned, when in fact she had not. When the Board received a protest from the teacher regarding the Respondent's action, the Board was obliged to countermand same."

The teacher involved in this charge was employed by action of the Board at its meeting on November 10, 1964, (Exhibit P-21A) to take the position vacated by the teacher who is the subject of Charge 13, *supra.* She submitted a written resignation adressed to the Superintendent and dated December 1, 1964, which stated her wish to terminate her services on December 31, 1964 (Exhibit R-14) Notice of the resignation was included on the agenda prepared by the Superintendent for the December 8 Board meeting (Exhibit P-21B) and a motion to accept it effective December 31 was adopted. (Exhibit P-21C)

From the testimony it appears that the Superintendent had a conversation with this teacher either just before or after Thanksgiving in which he told her that a fully certificated teacher was interested in her job. According to the Superintendent they agreed that the following day would be her last. The President of the Board, however, received a telephone call from the teacher's mother objecting to the summary dismissal and pressing the 30-day notice of termination called for in the employment contract. The President then telephoned the Superintendent, informed him of the conversation, and told him that if the teacher had been improperly released the obligation required by contract should be fulfilled. As a result of this discussion with the President, the Superintendent asked for and received the teacher's written resignation effective 30 days later. (Exhibit R-14, *supra*)

This incident is one more in the series of personnel problems which troubled this school district. It is a fair assumption from the testimony that the Superintendent intended to replace the teacher on almost immediate notice and that he abandoned this idea after learning of the objection lodged with the President of the Board by the teacher's mother. Thereafter the termination and replacement of this teacher followed accepted procedure.

The Commissioner finds that the allegations of Charge 15 are expressed in stronger terms than the facts indicate. It is not clear whether the summary notice was unilateral or mutual. Further, the charge that the Superintendent misrepresented to the Board that the teacher had resigned, when in fact she had not, is not supported by the evidence. The only representation of resignation made to the Board was at the December 8 meeting, when the December 1 resignation had already been received. Nor did the Board receive a protest from the teacher although it may be inferred that the mother's protest was made in her behalf. Neither the teacher nor her mother was called as a witness.

The Commissioner finds sufficient evidence to support this charge to the extent that it alleges inept handling of a personnel matter unnecessarily requiring intervention by the President of the Board. In all other respects it is unsupported and dismissed.

CHARGE 16

"On or about April 15, 1965, after a Personnel Committee meeting but before the Board of Education had made a decision, the Respondent wrote letters to four teachers: Arnold Kahn, Alice Rittinger, Patricia Jones and Edwin Gernant, saying that their respective contracts would not be renewed. These acts of the Respondent were not only unauthorized but caused considerable embarrassment to the Board."

In the first part of April 1965, a meeting of the Personnel Committee was held to consider re-employment of teachers for the ensuing school year. The Superintendent and the elementary principal attended this meeting and presented recommendations. A document (Exhibit P-41) submitted to the Committee by the Superintendent indicated by a line through the name those teachers who were not being recommended for re-employment or those who would not be returning for other reasons. Each of the four teachers named in this charge, one of whom taught in the high school and the other three in the elementary school, was not recommended for renewal of employment by the appropriate principal. The Superintendent was asked in each case if he concurred and his reply was affirmative. The Committee accepted the recommendations of the administration for appropriate action at the next meeting of the Board.

Before the Board acted on this matter the Superintendent wrote letters dated April 12, 1965, to each of the four teachers. The one to the high school teacher (Exhibit R-3) was as follows:

"After a discussion with the High School Principal and Department Head, it was decided to recommend to the Board of Education not to renew your contract for the next school year. It is regretable that this action be taken. Should you have any question kindly see your Principal and/or Department Head."

The letters sent to the elementary teachers (Exhibits R-4, 5 and 6) were identical but varied in language from the one addressed to the high school teacher:

"Upon the recommendation of the Elementary Principal to the Personnel Committee of the Board of Education, it was decided not to offer you a contract for the next school year. Should you have any question please feel free to discuss this with the Elementary Principal."

The Board met on May 3 and adopted the recommendation made by the respondent to the Personnel Committee. Growing dissension and controversy over this matter led the Board to agree to a meeting with the teachers' association in an attempt to harmonize the situation. That meeting is the focus of Charge 19 and is discussed below in that connection.

The Commissioner finds nothing to criticize in the Superintendent's notification to the high school teacher (Exhibit R-3) that he and the high school principal did not intend to recommend to the Board that the teacher be re-employed.

It is not clear why the Superintendent was less direct with the three elementary teachers, seeming to place the onus for their termination upon the elementary school principal alone rather than jointly with himself as he did with the high school principal. Nor does any reason appear why he told these teachers what the contemplated action of the Personnel Committee was to be before it had been communicated to the Board, rather than merely

notifying them that he was not going to recommend them as in the case of the high school teacher. Whether the change in language was deliberate or unintentional can only be speculated upon, but in either case, it lends that much more color to the various charges of the Superintendent's ineptitude in personnel procedures.

The Commissioner finds that the charge that the Superintendent's letters to the four teachers named caused considerable embarrassment to the Board is not supported by the evidence. He finds further that one of the letters (R-3) required no prior authorization. There remains then only the question of authorization of the three other letters. The Commissioner will dismiss this entire charge believing that the real problem, if any, is the subject of Charge 19, to which the incidents of this charge were only preliminary. Charge 16 is dismissed.

CHARGE 17

"During the year 1965 the Respondent undertook to pay a teacher, Elizabeth Horbach, sick leave in excess of the ten days allowed by Board policy, claiming that he would have work for the teacher to do during the summer after the close of school year. Such action of the Respondent was without authority in the law or from the Board."

The teacher named in this charge was employed for the 1964-65 school year as a reading supervisor. The ten days' sick leave to which she was entitled by law and for which she received full pay, was exhausted on November 9, 1964. (Exhibit P-6B) She was absent because of illness thereafter on November 10, 11, 18, 19, 20, December 8, 9, 10, 11 and January 14, an additional 10 days for which she also received full pay. For subsequent absences the appropriate deduction from salary was made.

The Secretary of the Board testified that he discovered the overpayment sometime between January 15 and 20, 1965, when a member of the Board of Education made inquiry whether this teacher was being paid for sick leave in excess of ten days. His question to the financial secretary elicited the information that the Superintendent had authorized it. He spoke then to the Superintendent who said that he had authorized the overpayment to compensate for work in the ensuing summer which he planned for the teacher and for which there were no funds budgeted. At the request of the Secretary, the Superintendent put his statement in writing dated January 22, 1965. (Exhibit P-6C) On March 23 the Secretary wrote a note (Exhibit R-8) to the Superintendent referring to this matter and asking how the teacher preferred to have the financial adjustment made. No definitive action was taken thereafter until the June 1965 meeting when the Board directed that the overpayment be deducted from the teacher's salary.

The Superintendent concedes that he authorized the payment of an additional ten days' leave but says that he communicated his intention and his purpose to the Board Secretary at the time. The Board Secretary had no such recollection. The Superintendent justifies his action on the grounds that the teacher had worked diligently the previous summer without pay and that there would be extra work for her during the forthcoming summer for which she would not be compensated.

It is obvious that the Superintendent had no authority to grant this teacher compensation for sick leave in excess of that permitted by Board policy. His

defense is to say that the end justified the means. The only proper course would have been to make the request of the Board and to carry out its decision. In this instance the Superintendent took it upon himself to make the authorization and in so doing he exceeded the scope of his powers.

The Commissioner finds that Charge 17 is substantiated by the evidence.

CHARGE 18

"During the year 1964, the Respondent deliberately violated Board policy and instructions that secretaries should take their vacations at the same time as the persons they serve."

A memorandum with reference to "Vacation Time" dated September 18, 1963, over the name of the Superintendent was circulated to all year-round employees, the pertinent excerpts of which read: (Exhibit P-43)

"To provide sufficient time to make plans for vacation next year, the following change in policy is being made.

"All persons, with the exception of the Director of the High School Summer School, will plan to be off during the last two weeks of July."

At the January 14, 1964, meeting of the Board the following motion was adopted: (Exhibit P-44)

"* * * that: school operations close down for a unified vacation period of two weeks, with exception of a skeleton complement, at a time designated by the Superintendent."

The testimony indicates that the high school principal and the Superintendent did not take their vacations the last two weeks in July 1964. It is clear, however, that the vacations of the elementary principal and the rest of the staff did conform to the policy recited above. Both the high school principal and the Superintendent said that the scheduling and other necessary summer work were not in a state of readiness which would permit their absence at that time and for that reason their vacations did not occur at the same time as their secretaries.

The Commissioner finds the matter of this charge to be insubstantial. Evidently there was some complaint during the spring from the clerical staff over the rigid vacation schedule which did not permit adjustments in terms of husbands' time off, etc. But the policy of the Superintendent, affirmed by the Board was implemented except as to the two administrators. It could even be argued that these two made up the "skeleton complement." There is no showing that the work of the school system was disadvantaged by the failure of these two officials to take vacation at a time other than their staff did. It is a fair assumption rather that the work was enhanced. The Commissioner concludes that the policy itself left much of the decision to the discretion of the Superintendent and there is no evidence of any abuse of that authority.

The Commissioner finds that there is insufficient proof to support Charge 18 and it is therefore dismissed.

CHARGE 19

"At a public meeting of the Board in May of 1965, which was attended by a large group of teachers in the system, the Respondent told the meeting that the then elementary school principal, Mr. James Montgomery,

was not the Respondent's choice for that position. He also stated that it was Mr. Montgomery and not the Respondent who had recommended that the contracts of certain teachers not be renewed. However, in a previous meeting with the Personnel Committee of the Board of Education, the Respondent had voiced his agreement with the principal's recommendations. His conduct at the aforesaid public meeting caused great embarrassment to the Board, and also evinced a failure on the part of the Respondent to take responsibility for recommendations in regard to the teaching staff."

After the Superintendent notified the four teachers named in Charge 16 that their employment would not be renewed, the Board held a special meeting on May 3, 1965, at which it received and confirmed the recommendations of the Personnel Committee. The Riverside Education Association (REA), comprised of teachers in the system, then requested a meeting with the Board to discuss personnel matters. This was arranged for the regular meeting of May 11 at which time a number of questions were put to the Board.

One of the queries had to do with the basis on which the decision not to re-employ certain teachers had been reached. This became diverted to expressions of dissatisfaction with the elementary principal, who was not present, and how he had been selected. In explaining the procedure, the Superintendent let it be known that the incumbent elementary principal had not been his choice of the candidates. This statement was disputed by the Board and some acrimonious discussion followed.

It appears that the REA was in some doubt as to who had recommended the non-renewal of the four teachers' contracts and whether the Board had acted upon or by-passed the suggestions of the administration. The Board attempted to explain how the evaluations were made and that it had acted only on the recommendations made to it. At no time does it appear that the Superintendent spoke up to explain his role and that of the principals in this matter.

It is apparent that this was an unhappy and an unfortunate meeting in which questions were raised about particular staff members which should not have been the subject of public debate. It is clear, too, that the Superintendent shirked his responsibilities by not coming forward to admit that the Board's action denying new contracts to the four teachers was based on his recommendations or of those of his subordinates in which he concurred. To remain silent in the face of strong inference that the elementary principal was responsible and that the Board had acted in concert with him while by-passing the Superintendent was unprofessional and irresponsible. The Superintendent's defense that it was the Board's meeting and that he was only a spectator is unacceptable. As the chief executive officer of the school system he had a duty to set the matter straight, as long as the questions had been raised, and not to permit false inferences to attach to the actions of the Board on the one hand, or of his associates on the other. It is apparent that the Superintendent in this instance wanted to be on both sides of the fence at once.

Nor can the Commissioner condone the Superintendent's volunteering information that the elementary principal had not been his choice of the candidates. Even were the statement true (and the record indicates it is not unqualifiedly so) its only effect was to create discord and mistrust. It is the

Superintendent's job to work with those subordinates assigned him by the Board, to get the best performance possible from them, and if they prove wanting to report and recommend appropriate action to the Board. The lack of leadership shown by the Superintendent at this meeting could only serve to embarrass the Board, to humiliate the subordinate publicly, and to promote confusion and mistrust within the staff.

The Commissioner finds that Charge 19 is amply supported by the proofs.

CHARGE 22

"During the winter of 1965, without the knowledge of the Board of Education, the Respondent changed the school calender regarding Easter vacation and notified the sending districts accordingly. He then misrepresented to the Board of Education that the sending district of Delran had approved the change, when in fact it had not."

The testimony on this charge reveals the following facts and series of events. Prior to the 1965 Easter recess, the Superintendent had a conversation with the principal of the Delran school district whose pupils attend Riverside High School, about a possible change in the school calendar. Apparently it was a practice for Riverside, as a receiving district, to work out a mutually agreeable calendar with its sending districts to avoid the problems that may occur in such a relationship when some schools are closed and others are not. At the March 9, 1965, meeting of the Board the Superintendent made known his recommendation that the vacation period be extended. The suggestion was approved with the proviso that it be agreed upon by the sending district.

Thereafter the president of the Riverside Board received a letter dated March 20 (Exhibit P-25A) expressing the extreme displeasure of the Delran Board over the change in the school calendar made without consultation with or approval of that body. After receipt of this letter the President of the Riverside Board conferred by telephone with the Delran Board's President. He then sent a letter (Exhibit P-25B) to the Superintendent with a copy to each Board member, from which the following excerpts are pertinent:

"I talked with Mr. Don Anderson, President Delran Twp. Board of Education today, relative to the change in our common school calendar over the Easter holidays. This was done as a result of their letter of March 25, 1965, to our board, protesting our action.

"Mr. Anderson was emphatic that while you talked to Mr. Morris Schmoll prior to presenting this to our board for approval at our March 9, 1965 meeting, that Mr. Schmoll advised you in your discussion with him, that he was sure that the Delran Board of Education would not look favorably upon this change. If this is the case, then this information should have been given to the Riverside Board of Education by you when your proposal was presented to us for our appraisal and consideration in making a decision.

"If we are to maintain a harmonious relationship with our sending districts we must seriously consider their feelings in such matters."

It appears to be another instance of the Superintendent's eagerness to accomplish his purposes without complying with the proper procedures warranted by the circumstances. Any school administrator who has functioned in a sending-receiving school organization knows how sensitive the

relationships are and the care and consideration necessary to preserve harmony and to avoid misunderstandings. No matter how desirable to all parties the change may have been, its accomplishment should not have rested on an informal discussion followed by the report to the Board by the Superintendent that it was acceptable to the neighboring district. The Commissioner does not believe that the Superintendent deliberately misrepresented the situation to his Board, but he does conclude that the Superintendent exhibited inept administration in his handling of the matter.

The Commissioner finds that the first part of Charge 22 is contrary to the evidence which shows that the Board did have knowledge of and approved the change. This part of the charge is dismissed. The Commissioner further finds that the Superintendent did misrepresent the situation to the Board and by his actions created tension and discord between petitioner and its sending district.

CHARGE 23

> "For the school years, 1963-64 and 1964-65, the Respondent allowed two children of non-resident teachers to attend schools in Riverside without paying the required tuition, contrary to law and Board policy. The Respondent also withheld this information from the Board, so that it did not come to light until a representative of the Riverside Education Association requested the Board to send a tuition bill to one of the teachers in question."

At the November 1964 meeting of the Board, a representative of the Riverside Education Association appeared and informed the Board that there were two teachers in the system, both of whom were non-residents, each of whom had a child attending the Riverside schools without payment of tuition. One of the children had attended the entire 1963-64 school year and the second child was enrolled in September 1964. Although there is testimony that the Superintendent presented this matter as part of his agenda for the October 1964 meeting (from which he was absent) the first time the Board had knowledge of the tuition-free attendance of these two pupils appears to have been at its November meeting. From the testimony of the Superintendent it appears that the question of tuition was discussed with both teachers at the time they were employed and both expressed a willingness to pay the required amount. However, nothing was done about the matter until the meeting of November 14, 1964, when it was brought to the Board's attention by a representative of the REA. At that meeting the Board voted to charge tuition for each child based on actual cost.

The Superintendent's defense to this charge is that there was no Board policy with respect to this question and in that vacuum no action was called for. He notes that once the policy was set by the Board, the teacher still in the employ of the Board made payment. Apparently no effort was made to collect from the other teacher, who had already left the school system.

It seems clear that this incident represents another example of oversight on the part of the Superintendent. The establishment of the terms upon which non-resident pupils may be received is a responsibility of the board of education, not of the superintendent. *R. S.* 18:14–1 Judging from the testimony he just never got around to bringing this question to the Board, and the unresolved state of affairs continued until it was called to the Board's attention. In the Commissioner's judgment the financial loss to the district was in-

significant. The real issue here is respondent's neglect to inform the Board in order to receive and carry out its instructions.

The Commissioner finds that the weight of the evidence supports Charge 23.

CHARGE 24

"Respondent's long and consistent history of acting in excess of his authority as superintendent, of violating Board policy, of ignoring Board directives and determinations, of withholding relevant information from the Board, and otherwise engaging in conduct unbecoming a superintendent of schools, has caused detriment to the morale of the Riverside School staff and has shown the Respondent to be unfit to administer the Riverside School system."

This statement is in the nature of a summation of all the charges. Very little testimony was directed specifically to this charge. It could well be said that the total of all the testimony sought to establish these allegations. The Commissioner can see no reason to deal with this charge separately. He will consider it to be a summary of all the charges and it will, therefore, be dealt with as a part of his consideration of the charges as a whole.

CHARGE 25

"The Respondent neglected to perform many of his duties as Superintendent of Schools. Specific instances of his neglect of duty include the following:

"(a) The Respondent failed to provide adequate lists of substitute teachers for the elementary school for the year 1964-65. He also failed on at least two occasions to provide substitute teachers when requested. These failures required the Principal himself to cover classes on numerous occasions, and thereby impeded the performance of his duties as Principal.

"(b) The Respondent failed to fill all required teaching positions in time for the opening of the school year 1964-65.

"(c) During the same year the Respondent failed frequently to keep the Elementary Principals informed of situations affecting the elementary school which were of concern to the Principal, thereby impeding the performance of the Principal's duties.

"(d) During his entire term as Superintendent the Respondent failed to write up or issue any Manual of Instructions for teachers and principals in the elementary school.

"(e) During the summers of 1963 and 1964, the Respondent failed to set up and announce a schedule for teachers who were to work in both the elementary and the high school during the ensuing year."

The testimony on this charge was given by the former elementary school principal already referred to in Charge 8 and is essentially an elaboration of that more general accusation.

(a) The principal testified that during the summer of 1964 the Superintendent failed to have his secretary contact the persons on the substitute list to determine whether they would continue to be available in the ensuing year. The result, according to him, was that the list was not current or adequate at the beginning of the fall term. An inference is also made that had proper efforts been made to compile an adequate list, substitute teachers

would have been available on two occasions when none were obtained and emergency coverage of classes had to be resorted to.

The Superintendent countered by saying that finding and listing teachers available as substitutes is not solely his responsibility but calls for the cooperative efforts of all employees. He pointed out that the adequacy of a list of substitutes varies with the need and said that the only reason no temporary teacher was provided on the two occasions charged was that everyone on the list had been called but none could come.

The Commissioner fails to find in this testimony substantial evidence to support this as a charge against the Superintendent. Few schools are blessed with an unlimited number of persons available to take over a classroom in the absence of regular teachers, and few administrators would admit that their substitute list was ever adequate. Neither is it uncommon for an administrator to have to step into the breach himself on occasions, although admittedly it should not be necessary frequently. There is absent clear proof of a dereliction of duty on the part of the Superintendent necessary to establish this charge, and section (a) is therefore dismissed.

(b) Apparently the elementary school still lacked one teacher to fill its complement just prior to the opening of the 1964-65 year. A teacher was found, however, on the day before school opened and reported for duty on the first day of classes. This was the same teacher who is the subject of Charge 13.

The Commissioner does not find that this charge imputes a dereliction of duty to the Superintendent. Lack of success in filling vacancies is not necessarily related to lack of effort. There is no showing whatever that the Superintendent did not try or neglected known resources to fill this vacancy. In any event, the charge is admittedly erroneous as all vacancies were filled by the time school began. Charge 25(b) is dismissed.

(c) The testimony on this sub-charge is generally a repetition of that offered in support of Charge 8. The elementary principal cited several instances of arrangements about which he had not been consulted such as the location of band practice in an area that disturbed elementary school classes; lack of information about the progress made in the replacement of teachers; changes in the scheduling of assemblies and of teachers and facilities shared with the high school; and an alteration of the high school lunch program which affected the elementary grades. Such incidents as these cause irritation and annoyance and call for the best efforts of a school staff to eliminate them. But the Commissioner does not recognize in the principal's complaints such a unique situation and one so clearly the fault of the Superintendent as to warrant a charge of dereliction of duty. There was an obvious clash of opinion between this witness and the Superintendent, and the substance of this testimony reflects the principal's unhappiness with the situation rather than a charge clearly established by evidence that the Superintendent failed in the performance of his duty. The Commissioner finds that sub-charge 25(c) is not supported by sufficient evidence and it is dismissed.

(d) The Commissioner knows of no law or rule other than one enacted by a local board of education which requires a superintendent to prepare and issue a manual of instructions for teachers and principals. While it may be desirable to have such a manual, there is no evidence that the Board ever directed or required one. Evidently the principal believed that such a publica-

tion would be helpful and thought the Superintendent deficient in leadership in not providing one. But this again is only a matter of opinion which apparently the Superintendent did not share. There is no showing that the staff was not informed with respect to regulations and policies, and absent such a showing it is reasonable to infer that they were informed by other means than a manual. The Commissioner does not find fault with the Superintendent because he chose a different method than the manual favored by the principal. The Commissioner finds no merit in sub-charge (d) and it is dismissed.

(e) The principal's complaint on this sub-charge is based not on the fact that the schedules of teachers who worked in both the high school and the elementary school were not setup but rather that they were not completed as early in the summer as he thought they should be. Apparently the preparation of these schedules was a matter of collaboration between the two principals, with the Superintendent giving ultimate approval. The testimony indicates that it was the high school principal who was responsible for whatever delay occurred and not the Superintendent. Asked what was his complaint in regard to the Superintendent on this sub-charge the principal replied: "Well, that somehow the Superintendent appeared to assume that matters were progressing when actually they weren't." The Commissioner finds that the evidence fails to support sub-charge (e) and it is dismissed.

Charge 25 accuses the Superintendent of general neglect of duty. The direct evidence in support of the charge was given almost entirely by a former elementary principal and is uncorroborated by any other witness. From his study of the testimony the Commissioner concludes that the evidence offered does not support a charge of this magnitude. Charge 25 is dismissed.

CHARGE 26

"The Respondent frequently undermined the authority of the Principals of the elementary school, in such ways as the following:

"(a) Two special teachers, Mrs. Dodge and Miss Barbara Steck, who were hired by the Board of Education in the summer of 1964 for elementary school arithmetic and science, were told by the Respondent to report to him rather than to the Elementary School Principal.

"(b) On at least three occasions during the school year 1964-65, the Respondent took into his own hands the discipline of pupils including C. B., S. J. and P. H., although discipline of pupils is primarily the function of the Principal. In the case of C. B., he countermanded a five-day suspension imposed by the Principal for persistent bad conduct. [Pupils' names omitted.]

"(c) After the Elementary School Principal in the summer of 1964 had prepared reading class groupings the Respondent made many changes therein during the opening weeks of school without consulting the Principal."

The testimony supporting this charge was offered by one of the former elementary school principals. His successor did not testify.

(a) According to the principal the Superintendent told these two teachers that they would be responsible directly to him, through the reading supervisor, and this made it difficult for the principal to coordinate their work with the rest of the elementary school. The Superintendent admits that he told these

teachers to report to him because through them a new program was being instituted which he wanted to follow closely. He denies that this direction excluded the elementary principal. Neither of the teachers was called to testify on this charge.

Despite the Superintendent's denial of any intent to exclude the principal, his direction to two new teachers that they report directly to him could not avoid undermining the authority of the principal. If proper and adequate communication were in effect, the Superintendent would normally receive full reports on any new program from the principal in charge. Certainly there was no basis for assigning this responsibility to the reading teacher, who was not qualified to supervise, which, according to the principal, was done. There is in fact evidence that the Superintendent assigned duties to the reading teacher, such as evaluating other teachers, which were beyond the scope of her certification and which invaded the principal's responsibilities. The conclusion is inescapable that the Superintendent failed to recognize the accepted chain of command in this instance and thereby acted to undermine the authority of the principal, and the Commissioner so finds.

(b) Although three pupils are referred to in this subcharge, detailed testimony was offered about only one.

The subject pupil was rude and disrespectful to the principal while waiting to be readmitted following her second five-day suspension on October 14, 1964. Before taking further action the principal conferred with the Superintendent, went over the pupil's record with him, and announced his intention to continue her suspension for an additional five days. The Superintendent suggested that the principal visit the pupil's home and attempt to see her parents. The principal then suspended the pupil for a further five days. That afternoon he telephoned the parents to try to arrange for a conference and learned that the mother had already telephoned the Superintendent who, according to her, told her to send the pupil to his office the next morning and he would return her to classes pending the working out of the problem. The principal protested vigorously to the Superintendent and asked why he had not been consulted or notified, to which the Superintendent replied, the principal said, that it had slipped his mind. The pupil returned to school the next day and was reinstated by the Superintendent.

The Superintendent admits that he took over responsibility for the discipline of the other two students mentioned in this charge but says that he did so with no intention of undermining the authority of the principal but only to help him and the pupils.

It is difficult to evaluate this charge on the minimum facts of the testimony. Certainly the Superintendent owed a duty to the principal to maintain his authority. He also had a responsibility to the pupil to accomplish her rehabilitation. Apparently he believed that the principal's action was not well conceived toward that objective. The Superintendent's error was in failing to consult the principal before taking any action. The end sought could have been accomplished and the principal's authority maintained had the Superintendent consulted the principal and persuaded or directed him to take action which he deemed more appropriate. The Commissioner concludes that the Superintendent's purposes with respect to these pupils may have been valid but the way he went about achieving them is subject to criticism. The Commissioner finds that Charge 26(b) is supported by the evidence.

(c) The elementary principal says that he had little success in conferring with the Superintendent with respect to the grouping of pupils for reading. Lacking the Superintendent's clear direction he went ahead with his own groupings, only to find that during the summer the reading supervisor, with the approval of the Superintendent, altered the arrangements which he had prepared. The reading supervisor testified that she was directed by the Superintendent to make the changes, that the principal was so informed, that she consulted about changes with various teachers, and that when the job was completed she handed a book with the new lists to the principal. The Superintendent's defense to this charge is that he made no changes but they were done by the reading supervisor.

The testimony indicates that there was a lack of clear definition of responsibility and a failure of communication at the administrative level. In this matter the Superintendent cannot disclaim responsibility even though he did not himself arrange for any child's assignment. The testimony on this question indicates that the reading supervisor was permitted to act independently of the principal rather than in consultation with him. Although the principal was informed of what was to be done, and even though it affected the classes under his supervision, he was not involved in it. The Commissioner concludes that this is a clear instance of undermining of authority and that the Superintendent must assume the responsibility for it. Charge 26(c) is found to be supported by the weight of evidence.

The evidence offered on the three sub-sections of this charge demonstrates that in these instances at least the Superintendent's actions resulted in depreciating the position of the principal in the elementary school. The Commissioner concludes that this charge is established by a preponderance of the evidence.

* * * * * * *

Having found that the weight of the evidence supports all or part of Charges 1, 2, 3, 4, 5, 6, 8, 9, 10, 15, 17, 19, 22, 23, and 26, the question remains whether these actions, either singly or considered as a whole, demonstrate incapacity, conduct unbecoming a superintendent, or other good cause warranting dismissal or reduction in salary. Such a determination of fitness is in accord with the principles enunciated by the New Jersey Supreme Court in *Redcay* v. *State Board of Education,* 130 *N. J. L.* 369, 371 (1943), affirmed 131 *N. J. L.* 326 (*E. & A.* 1944):

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

The proven charges in this case vary from extremely serious derelictions such as the use of school funds without the Board's knowledge (Charge 1) to an excusable oversight as in the matter of the unapproved substitute (Charge 5). With a few exceptions, any one of these incidents considered alone and unrelated to the others, could be ascribed to misunderstanding, unintentional oversight, or an error of judgment. Unfortunately, however, they are not unrelated and taken as a whole they add up to a pattern of behavior that conclusively demonstrates unfitness for the position of superintendent in this school system.

The facts which emerge from all of the testimony in this case reveal a Superintendent who failed to understand or appreciate the function of the Board of Education and his relationship to it. He was impatient with the restrictions imposed upon actions he considered desirable, by the necessity to obtain Board approval, either because he feared he would not get it and thus be thwarted or because he was unwilling to wait. This led to his assumption of the prerogatives of the Board as illustrated in a number of instances. Such over-eager behavior is excusable if acknowledged or curbed after having been pointed out, but in this case there apparently was and is no acceptance of error by respondent in matters of this sort. Even after his attention was called repeatedly to his failings in this respect, the Superintendent persisted in such conduct until the patience of the Board was exhaused. Of much significance, in the Commissioner's opinion, is the fact that in his testimony the Superintendent found no fault in his performance nor gave any indication that he might have erred.

The unwillingness or inability to accept criticism, to acknowledge error, and to learn from past mistakes exhibited by the Superintendent looms large as an element of his unfitness. The record is replete with instances in which the Board found it necessary to point out his error before it ratified his action. These warnings and criticism seem to have had little effect. In his testimony, the Superintendent categorically denied that he had ever consciously ignored a directive of the Board or violated a policy, that he had ever acted in excess of his authority or acted in a manner unbecoming a Superintendent. He denied that anyone had ever criticized the manner in which he conducted himself. Even with respect to the unauthorized withholding of cafeteria funds and their use for loans, the Superintendent replied to a direct question that he considered such conduct to be fitting and proper. Such an attitude of either unwillingness or incapacity to admit error and to seek it correct it, is in itself a measure of unfitness.

It is the Superintendent's contention that the charges herein represent the culmination of a deliberate plan by a majority of the members of the Board to oust him. He implies that some of the members who testified against him sought membership on the Board in order to get rid of him. He places the blame for all of his troubles on these Board members and a few of his subordinates. Most of the problems and difficulties recited in these charges were caused, in his opinion, by the Board's failure to make policies or to act on his recommendations. He admits that his relationship with all but one member of the Board deteriorated after July 1964 and says that as a result every statement or action of his, susceptible of various inferences, was interpreted unfavorably by the Board.

From his study of the evidence the Commissioner agrees that the relationship of the Superintendent and all but one member of the Board became increasingly strained in the year before these charges were instituted, but not for the reasons put forth by respondent. The testimony is to the contrary that witnesses were motivated to become members of the Board in order to get rid of the Superintendent. One of those toward whom this inference was directed testified that he became a candidate at the express invitation of the Superintendent who, in fact, brought him a nominating petition. All others denied any preconception with respect to the Superintendent's competency. The fact that a number of those so accused at one time or another voted for

salary increases and the renewal of the Superintendent's contract negates any inference of preconceived intent or design to effect his ouster.

Respondent was first employed as Superintendent in this district in August 1961. He was re-employed in 1962 and 1963. In the spring of 1964 following the disclosure of the facts of Charge 1, the Board at first decided not to renew his contract. After some reconsideration this action was reversed and in June 1964 the Superintendent was employed for a fourth year, which effectively gave him tenure, with $1,000 increase in salary. As respondent himself says in his brief, the relationship began to deteriorate shortly thereafter and worsened steadily until the certification of the charges herein in September 1965 by a vote of 7 to 1. Most of the incidents which form the basis of the charges occurred in this period after the accrual of tenure.

The Commissioner cannot escape the conclusion that rather than seeking to oust the Superintendent, the Board of Education gave him more than a fair opportunity to perform acceptably. Had the Board wanted to thwart or embarrass the Superintendent it could have done so many times by refusing to ratify actions he took without first obtaining Board approval. On the contrary, time after time the Board ratified those actions in the interests of a harmonious working relationship and in order to avoid the deleterious effect of conflict and disharmony in the operation of the schools. After the Superintendent acquired tenure his performance of his office deteriorated to the point where those who had staunchly supported his being placed under tenure became alienated, and within a year sought his dismissal. The Commissioner finds no element of design, scheme, malice, or improper intent on the part of petitioner. The Board of Education was, if anything, permissive and patient in its concern to avoid controversy and to allow respondent a fair opportunity to perform acceptably.

The testimony indicates that the Board was willing to and did give the Superintendent a free hand in the administration of the schools and the educational program. It is true that there are instances in which the Board or a committee of its members intervened or became involved in problems which were within the scope of the Superintendent's duties. It is equally apparent that when the Board intervened in such matters it did so reluctantly and only because the Superintendent's ineptitude forced the Board to take over. The Commissioner finds no improper interference or meddling in administrative matters on the part of members of the Board in this case.

Respondent argues that the Board is estopped in bringing many of these charges under the principles of laches, estoppel, waiver, and ratification. He points to the fact that the Board acted to approve some actions he took which it complains of now, and says that such ratification constituted acceptance and a waiver of any finding of fault. Even in the case of the school monies, respondent says, the Board of Education had full knowledge before it acted to re-employ him and place him under tenure, and in such circumstance it cannot now resurrect such a stale matter and use it, having already condoned it, toward his dismissal.

The defense of laches is not applicable here. Laches is a matter of unreasonable delay in enforcing a known right. *Flammia* v. *Maller*, 66 *N. J. Super.* 440, 453 (*App. Div.* 1961) See also *Redcay* v. *State Board of Educa-*

tion, 130 *N. J. L.* 369, at 371. In this case, petitioners could have dismissed respondent at the time that the facts of Charge 1 became known. They decided not to do so and to continue his employment with the hope, it must be assumed, that such a mistake would not be repeated and that he would measure up to his responsibilities. Obviously the Board did not approve or accept or ratify respondent's actions with respect to the school funds. However, it did not at that point determine to release him but, in effect, gave him another chance. When, after being cloaked with tenure, the Superintendent did not take advantage of that opportunity and, through a series of incidents over a period of time, his unfitness became apparent, the Board should not be estopped by its earlier forbearance from citing the gamut of his failings. If respondent's argument were to prevail, a board of education would be foreclosed from showing a series of incidents as per *Redcay, supra*, because it would be prevented from citing past errors which it had overlooked or accepted at the time. Confronted with a dereliction by an employee, a board would have to press charges immediately, condemn, fail to ratify, or take some such drastic action to preserve its right, should such failings continue, to cite this instance of unfitness. In the instant case it is abundantly clear that the Board had no wish to condemn the Superintendent, that it wanted to afford him further and complete opportunity to administer its schools successfully, and that it ratified actions which it did not approve rather than provoke controversy which would adversely affect the school system. Ratification under such circumstances is not condonation, approval, or waiver which destroys the right to press charges at a later date. The Commissioner finds no matter herein which is so stale and so unrelated to the issues that respondent is prejudiced by its resurrection and inclusion. *Taylor* v. *Bayonne*, 57 *N. J. L.* 376, 378 (*Sup. Ct.* 1894)

The final question before the Commissioner is whether the unfitness found herein warrants dismissal or, if not, what lesser penalty, if any, should be imposed.

Tenure of office of professional staff employees of boards of education is a legislative status provided as a public policy for the good order of the public school system and the welfare of its pupils. *Wall* v. *Jersey City Board of Education*, 1938 *S. L. D.* 614, 617, affirmed State Board of Education 618, 622, affirmed 119 *N. J. L.* 308 (*Sup. Ct.* 1938); *Viemeister* v. *Prospect Park Board of Education*, 5 *N. J. Super.* 215, 218 (*App. Div.* 1949); *Redcay* v. *State Board of Education*, *supra* Its objectives are to protect competent and qualified professional staff members in the security of their positions during good behavior, and to protect them against removal for "unfounded, flimsy, or political reasons." *Zimmerman* v. *Newark Board of Education*, 30 *N. J.* 65, 71 (1962) Its protection is not a personal privilege which is subject to waiver, *Lange* v. *Audubon Park Board of Education*, 26 *N. J. Super.* 83, 88 (*App. Div.* 1953), or abuse, *Cook* v. *Plainfield Board of Education*, 1939-49 *S. L. D.* 177, affirmed State Board of Education 180; *In the Matter of the Tenure Hearing of Leo S. Haspel, Metuchen Board of Education*, decided by the Commissioner January 20, 1964, affirmed State Board of Education October 7, 1964, affirmed *App. Div.* June 10, 1965, cert. denied *N. J. Sup. Ct.* May 12, 1965, cert, denied *U. S. Sup. Ct.* May 16, 1966, rehearing denied June 20, 1966

The reasons advanced for the Superintendent's removal in this case are neither flimsy, unfounded, nor based on political or other improper considerations. This is not a case of attempting to oust an employee on the basis of maliciously construed charges, picayune peccadillos, or exaggerated minor mistakes as was true in an earlier tenure case in this same school district. *Rein* v. *Riverside Board of Education*, 1938 *S. L. D.* 302, affirmed State Board of Education 306 The reverse is true here. In the instant matter, the Superintendent by his lack of leadership and his disregard for sound business and administrative practice created a climate of disharmony, loss of confidence and mistrust in which the school system could not operate effectively. These conditions did not arise from acts or failures to act by the Board of Education but are directly attributable to the Superintendent and the manner in which he functioned as chief administrator. The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit.

The Commissioner finds that such is the case here. He is forced to the conclusion that the School District of Riverside has been so adversely affected by the instant controversy that it cannot operate effectively under the conditions which presently exist and that the primary responsibility for this controversy and these unfortunate conditions lies with the Superintendent. The imposition of a penalty other than dismissal would not cure these conditions and would serve only to maintain the unhappy state in which this school district now exists. But even were it possible to rectify the situation by some other means, the Commissioner determines that the proven charges are of sufficiently grave import to warrant dismissal. The Commissioner finds, therefore, that the Superintendent, by his own acts and failures to act, has forfeited his right to the protection of tenure in the office of Superintendent of Schools. The Board of Education of the Township of Riverside is authorized to adopt a resolution to dismiss Joseph A. Maratea.

COMMISSIONER OF EDUCATION.

July 5, 1966.

Affirmed by State Board of Education without written opinion, December 7, 1966.

Pending before Superior Court, Appellate Division.

XXIX

BOARD MAY NOT UNREASONABLY DELAY ACTION ON TEACHER SUSPENDED BY SUPERINTENDENT

IRENE W. SMITH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

For the Petitioner, Cahill, Wilinski and Mohrfield (John H. Mohrfield, III, Esq., of Counsel)

For the Respondent, Leonard A. Spector, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is a teacher under tenure in respondent's schools. She complains that she was improperly kept from the performance of her duties and was unlawfully deprived of her salary during her suspension and of her salary increment for the ensuing school year. Respondent enters a general denial of any improper or unlawful action.

A hearing in this matter was held by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Camden County Superintendent of Schools in Pennsauken on December 1, 1964, and November 24, 1965.

Petitioner's position in the 1963-64 school year was that of teacher. As a part of her duties she managed the school cafeteria in Camden Junior School. Her duties included ordering and preparing or directing the preparation of foodstuffs for the school lunchroom and for special occasions where meals or refreshments were served in the school. On or about March 3, 1964, the business manager of the Board of Education made a criminal complaint against petitioner, charging in effect that

(1) On both November 12, 1963, and December 11, 1963, she received "two frozen turkeys, weight, 18 pounds each, valued at $16.00, knowing same to have been pilferaged from the Board of Education of the City of Camden, said goods being the property of the Board of Education of the City of Camden, given title to same by the United States Government under the school lunch program."

(2) On January 14, 1964, she received a case of corn valued at $3.15 and a case of peaches valued at $6.00, under like circumstances.

(3) On February 14, 1964, she unlawfully took a case of butter valued at $21.12, belonging to the Board of Education, which had received it under the Federal school lunch program. (P-R-1)

The Board of Education was notified of these charges, and on March 4, 1964, petitioner was suspended from her duties by the Superintendent of Schools, with the permission of the Board President. *Cf. R. S.* 18:6–42, 18:7–70.2. On April 27 the Superintendent formally notified the Board of the suspension, which the Board ratified at its meeting on that date. (Tr. 44, 45) On July 2 the criminal charges against petitioner were dismissed. On

July 6 the Business Manager filed the same charges before the Board of Education (P-R-1), and the Board at that time heard the testimony of witnesses with respect to the charges. (Tr. 35, 36) Petitioner was not notified of and was not present at the July 6 meeting.

On July 20 the Board of Education adopted a resolution reciting the charges and concluding as follows:

> "Be it resolved that it is the determination of the Board of Education of the City of Camden that the charges against Irene M. [sic] Smith, and the evidence in support of such charges are sufficient to warrant that the suspension without pay from the period March 4th until June 30, 1964 be and is hereby ratified.
>
> "Be it further resolved that under provision of R. S. 18:13–13.7 that both the employment increment of $250 and the adjustment increment of $200 be withheld for the school year 1964-65." (P-R-1)

On July 22, 1964, the Commissioner received a verified copy of the aforesaid charges and resolution. On August 17 the petition herein was filed before the Commissioner.

It is petitioner's contention that the suspension without pay from March 4 to June 30, 1964, and the withholding of her salary increment and adjustment for 1964-65 constitute an unlawful reduction in salary under the terms of *R. S.* 18:13–17 and the Tenure Employees Hearing Act (*R. S.* 18:3–23 *et seq.*). She argues that following her suspension on March 4—the legality of which she does not challenge—she could not be continued under suspension without pay unless charges against her were filed with the Board and certified by the Board to the Commissioner, and that only the Commissioner could determine, after hearing, whether the charges and the evidence in support thereof were sufficient to warrant reduction in salary. She argues further that the denial of her employment increment and salary adjustment constitute a further reduction in salary on charges against which she was given no opportunity to defend.

Respondent, on the other hand, contends that the suspension of petitioner was within the statutory authority of the Camden Board of Education, that petitioner was not entitled to a hearing before the Board of Education, and that denial of her increment and adjustment do not constitute a reduction in salary.

The Commissioner agrees with each of respondent's arguments as statements of law but finds each argument inappropriate to the present case.

There is no debate as to the validity of the suspension of petitioner by the Superintendent on March 4. However, the statute (*R. S.* 18:6–42) which authorizes such a suspension requires that the superintendent

> "* * * shall report such suspension to the board forthwith. The Board, by a majority vote of all of its members, shall take such action for the restoration or removal of such * * * teacher as it shall deem proper, subject to the provisions of sections 18:13–16 to 18:13–18 of this Title."

In this case there was an interval of nearly two months between the suspension of petitioner on March 4 and formal notification thereof to the Board on April 27, and the action of the Board when so notified was only to ratify the suspension, but not to take action for "restoration or removal" subject to the provisions of the Teachers Tenure Law. While the Commissioner found no

reason to hold that the term "forthwith," as used in the statute, *supra*, was violated when there was a 10-day interval between the suspension and report to the Board of Education (*Marmo* v. *Board of Education of Newark*, 1963 *S. L. D.* 211), no reasonable explanation appears for the long delay here.

The failure of the Board to take any affirmative action to dispose of petitioner's case between March 4 and July 6 is explained but not justified by the decision to withhold any Board action until the disposition of the criminal charges in Municipal Court. (Tr. 34) Respondent argues from *Schwarzrock* v. *Board of Education of Bayonne*, 90 *N. J. L.* 370 (*Sup. Ct.* 1917), wherein the Court said:

> "* * * That controversy was whether the local board had rightfully removed Schwarzrock from a position existing under the School law. The proceeding could only result in either affirming or reversing the removal. It could not result in any binding judgment as to his guilt or innocence of the charge of attempting bribery; the finding that he was guilty or innocent could only be a finding for the purpose of action by the board, not for the purposes of the criminal law. Whether in such a case the board should act before action is taken by the criminal courts is a matter resting in the discretion of the board. * * *"

It is respondent's position that the Board in its discretion could postpone any administrative determination in petitioner's case until it had been disposed of in the court. The Commissioner agrees that the Board's determination can be made independently of any finding by the courts with respect to the criminal charges. *Borough of Park Ridge* v. *Salimone*, 36 *N. J. Super.* 485, 498 (*App. Div.* 1955), affirmed 21 *N. J.* 28 (1956); *Schwarzrock* v. *Board of Education of Bayonne, supra; De Bellis* v. *Board of Education of Orange*, 1960-61 *S. L. D.* 148, 150; *Mignone* v. *Board of Education of West Orange*, decided by the Commissioner August 10, 1965 The Commissioner does not agree, however, that this discretion extends to a board of education the right to keep a tenure employee on suspension for an indefinite period without taking affirmative action with respect to her status. In the case of *Durkee* v. *Board of Education of Belleville*, which has not yet come to final hearing and determination, the Commissioner has held, in a series of interlocutory decisions and orders, that a board of education may suspend its superintendent on a temporary basis pending investigation of his office, but that when such investigation is unjustifiably protracted, the rights of the superintendent to a speedy determination of the issues are invaded. In an interlocutory decision on September 24, 1965, the Commissioner annulled the suspension of the Superintendent and ordered him reinstated to his duties. It is the clear intent of the Tenure Employees Hearing Act that an employee be accorded the right of an early hearing and determination of charges. *R. S.* 18:3–29 requires the Commissioner to conduct the hearing upon the charges within 60 days after receipt of the certified charges, and to render his decision within 60 days after the close of the hearing.

In the instant case the criminal complaint became the basis of the suspension. No need for further investigation was shown. That respondent was not responsible for several delays in bringing the matter on for hearing in the municipal court cannot operate to excuse the Board from its obligation to give petitioner the protection intended by the tenure laws.

Even after the dismissal of charges in municipal court on July 2, petitioner was denied procedural rights. The criminal charges became, in effect, the written charges filed against petitioner before the Board. On July 6 the Board heard testimony in support of the charges. If the Board had treated the charges as the first procedural step provided under the Tenure Employees Hearing Act, as set forth in *R. S.* 18:3–25, such action as occurred at this point would have been completely in order. A hearing at which the accused must be present and be permitted to enter a defense is clearly precluded by the terms of the Act. *Sheffmaker* v. *Board of Education of Runnemede*, 1963 *S. L. D.* 116, 118; *Marmo* v. *Board of Education of Newark, supra*, 213 But in the instant matter respondent proceeded as if the charges were departmental in nature, on which it had authority to make a final determination. If such authority did indeed exist, then petitioner was entitled to procedural due process. But since the statutes make no provision for an administrative hearing before a local board in such a case as this, the whole of the action on July 6 and the subsequent resolution of July 20 must be regarded as without authority in law, and therefore a nullity.

Respondent argues that the action against petitioner is not an action subject to the procedures of the Tenure Employees Hearing Act, since it did not seek her dismissal or a reduction in her salary. Therefore, respondent contends, petitioner has no statutory right to a hearing before the Board of Education or to appeal from the Board's action to the Commissioner. The Commissioner is in full agreement with the former contention and in like disagreement with the latter. As he has already stated, the Tenure Employees Hearing Act makes no provision for a hearing at the local level. Moreover, the statute authorizing suspension of a teacher, *R. S.* 18:6–42, *supra*, offers the board of education but two courses of action when such a suspension is reported to it; namely, "restoration or removal." Respondent in the instant case took neither course, but pursued a course of its own, for which no authority can be found in Title 18. As to petitioner's right of appeal to the Commissioner, the New Jersey Supreme Court clearly established *In re Masiello*, 25 *N. J.* 590, 602 (1958), that

> "* * * the demands of due process necessitate a fair hearing * * * by administrative or judicial action."

Then, having considered several possible ways by which due process could be secured, the Court said, at page 604:

> "* * * The statute does not in express terms direct that appeal * * * be taken to the Commissioner. However, *N. J. S. A.* 18:3–14 says that he
>
> > 'shall decide without cost to the parties all controversies and disputes arising under the school laws, or under the rules and regulations of the state board or of the Commissioner.'
>
> "This enactment provides the basis for his review of the action of local boards of education. [Cases cited]"

Moreover, in addition to sustaining the four months' suspension without pay, respondent withheld petitioner's employment increment of $250 and adjustment increment of $200 for the school year 1964-65. It is unnecessary to determine whether the statutory procedures to be followed when an increment or adjustment is withheld pursuant to the Minimum Salary Law, *R. S.* 18:13–13.7, are applicable here. Since the hearing before the Commissioner is the first one afforded to petitioner both as to her suspension and as to the

withholding of her salary increases, he must make an independent decision on the facts. *In re Masiello, supra,* at 606 See also *Kopera* v. *Board of Education of West Orange,* 60 *N. J. Super.* 288, 296 (*App. Div.* 1960).

Respondent's case in support of the charges that petitioner received or unlawfully took foodstuffs belonging to the Camden Board of Education under the Federal School Lunch Program was based almost wholly upon the testimony of a supply clerk. He testified that in February 1964 petitioner authorized him to keep a case of butter consigned to her school and take it back to the warehouse to be shared by him and "the boys." He further testified that on that occasion and "a few other times" she had given him her house key so that he could leave a case of butter on the stairway of her apartment. (Tr. 63, 64, 65) He "believed" that he had once left a case of turkeys at her home, but he was "not sure" about this. (Tr. 64, 65) He had no recollection concerning the corn and peaches which petitioner was charged with receiving. (Tr. 66) In a statement made to the police in petitioner's presence on March 3, 1964, the witness made similar statements about the butter, but said that he had taken no other commodities to petitioner's home besides the butter. (Tr. 82) There was no testimony in any way corroborating that of the supply clerk.

Petitioner not only denied having either received or taken any foodstuffs as charged, but also denied either authorizing the supply clerk to take for himself any commodities delivered to her school (Tr. 110, 117), or furnishing him with her house key so that he could deliver commodities to her apartment. (Tr. 99) On several occasions she took foodstuffs and supplies to her home to prepare food and refreshments for school affairs, because lack of time or inadequate facilities prevented her from completing these tasks at the school. When such action was required, she had the approval or express consent of her principal. (Tr. 96-104, 143-145, 148) In November 1963, petitioner testified, 20 cases of turkeys had been delivered to the school from the warehouse; on the same day four turkeys had been delivered to the school from a butcher shop on a personal order in anticipation of a church dinner. Lacking freezer storage space, the 20 cases were taken by private automobile to a cold storage warehouse, and the four turkeys were taken to her home. (Tr. 105) These incidents were corroborated by the testimony of a fellow teacher whose automobile had been used, and by petitioner's husband. Contradictory testimony was offered by the receiving clerk at the cold storage warehouse, who said that 11, not 20 cases were delivered for storage. (Tr. 162)

In an administrative hearing it is necessary that charges of conduct unbecoming a public employee be sustained by a preponderance of the believable evidence. *Park Ridge* v. *Salimone, supra,* at 498; *Kravis* v. *Hock,* 137 *N. J. L.* 252, 254 (*Sup. Ct.* 1948); *De Bellis* v. *Board of Education of Orange, supra,* at 151 In the instant matter, the Commissioner finds and determines that respondent Board has not sustained the burden of proving its charges with such a preponderance of believable evidence.

Having so determined, the Commissioner finds that it is unnecessary to decide petitioner's claim that the withholding of her salary increment and adjustment constitutes a reduction in salary. Respondent rested its determination to ratify the suspension of petitioner without pay and to withhold her salary increase for 1964-65 solely on the charges against her. Since these charges have not been proved, petitioner is entitled to be paid for the period

of her suspension, and is entitled to the employment increment and the adjustment increment to which she would otherwise have been eligible for the school year 1964-65.

The Commissioner finds and determines that petitioner was improperly and unlawfully suspended without compensation from March 4, 1964, to the end of the 1963-64 school year. He directs that she be compensated for such period at the rate of salary at which she was employed during that school year. He further finds and determines that petitioner was improperly denied an employment increment of $250 and an adjustment increment of $200 for the school year 1964-65. He directs that such increment and adjustment be paid to petitioner for the school years 1964-65 and 1965-66.

COMMISSIONER OF EDUCATION.

July 6, 1966.

XXX

WHEN CHARGES OF UNFITNESS AND UNBECOMING CONDUCT ARE PROVED, PROTECTION OF TENURE IS FORFEITED

IN THE MATTER OF THE TENURE HEARING OF FRANK C. MARMO, SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY

For the Board, Jacob Fox, Esq.

For the Respondent, *Pro Se*

DECISION OF THE COMMISSIONER OF EDUCATION

In this case respondent is a teacher who has acquired tenure in the Newark public schools under the provisions of *R. S.* 18:13–16. He is charged by the Superintendent of Schools with conduct unbecoming a teacher and other good cause warranting forfeiture of his tenure status and dismissal. The charges, detailed in thirty-five separate counts, were considered by the Newark Board of Education, hereinafter referred to as petitioner, and certified to the Commissioner of Education pursuant to the provisions of *R. S.* 18:3–25 on April 25, 1963. Hearing of the charges was begun on June 12, 1963, before the Assistant Commissioner in charge of Controversies and Disputes, and continued on twenty-five succeeding days, concluding May 19, 1966. All of the sessions were held at the office of the Essex County Superintendent of Schools, first in Newark and later in East Orange, with the exception of three which took place at the State Department of Education in Trenton.

Petitioner presented 21 witnesses and 87 exhibits and respondent called 32 witnesses and submitted 91 exhibits, producing a record of almost 4,000 pages. During the course of the hearing petitioner became involved in several other matters of an emergency nature which required temporary abandonment of these proceedings. On the other side respondent, who appeared *pro se*, expressed a wish that hearings be held not more than once a month because of his need to prepare his case and to provide a livelihood for his family. As a result of these factors the adjudication of this case was unusually protracted.

Respondent was first employed by petitioner in September 1952, and assigned to the Robert Treat School. He was transferred to the Abington

Avenue School on February 1, 1956, to the Hawthorne Avenue School in September 1957, and finally to South 17th Street School in September 1959. He was suspended by the Superintendent from June 5 to 17, 1959, and from October 19 to November 15, 1962. The matter came to a crux when he was again suspended on March 15, 1963. Tentative charges were served on him and his suspension continued on March 25, 1963. Petitioner adopted, certified, and served the final charges on April 25, 1963. The matter of respondent's suspension was the subject of an appeal already adjudicated by the Commissioner. *Cf. Marmo* v. *Newark Board of Education*, 1963 *S. L. D.* 211.

The charges will be considered first separately and then as a whole. References to "vice-principal," "principal," etc., indicate the person incumbent in the position at that particular time and place.

CHARGE 1

"Mr. Marmo is incapacitated by reasons of ill health from the proper performance of his duties and obligations as a public school teacher. In support of this I charge that he has over a period beginning with the latter part of the 1956-57 school year to the present time, and embracing periods while he was a teacher at Abington Avenue School, Hawthorne Avenue School, and South 17th Street School: repeatedly made false, irresponsible and irrational accusations against his superiors; publicly denounced alleged conditions at the said schools, and in the Newark school system generally, in such manner as to engender unwarranted fears and dismay on the part of parents of children in the city's schools; made and encouraged others to make public statements tending to foment needlessly unrest and agitation among the students, the parents of students, and teachers at Hawthorne Avenue School and South 17th Street School; and has engaged in a course of erratic conduct disruptive to good order and discipline in the Newark Schools and calculated to bring his fellow teachers, his superiors, and the Newark school system into open disrepute and to portray and promote himself as a fearless champion of the city's public school children and their parents in the exposure of a pretended broad-scale reprehensible state of affairs in the city's schools.

"The facts set forth in paragraphs 2 through 35 below are repeated and incorporated here as part of the within charge. I charge that the course of conduct consisting of the behavior specified in the said paragraphs, considered with comparable conduct preceding Mr. Marmo's transfers from Abington Avenue School and Hawthorne Avenue School, establishes the incapacity charged above,—or, in the alternative, I charge that the behavior in each of the said paragraphs set forth, constitutes conduct unbecoming a teacher or other just cause for Mr. Marmo's dismissal as a teacher in the Newark schools."

Although this charge does not refer to the period prior to the latter part of the 1956-57 school year, when respondent was still at the Robert Treat School, some testimony was introduced with respect to it. Respondent at first entered an objection but subsequently insisted that the record stand and this testimony be included. The evidence discloses that respondent was reported to have physically assaulted a boy in the school. No complaint was filed and no formal action taken, but the incident, which respondent denies,

became a matter of community discussion and affected respondent's position there. Because of this and other indications of incompatibility in this school the Superintendent decided that respondent might make a better adjustment in a new situation and transferred him to Abington Avenue School on February 1, 1956.

On March 26, 1956, respondent appeared and spoke at a meeting of the Board of Education as a representative of a "citizen's council." (Exhibit P-3) He read an article from a local newspaper on violence in schools and charged certain schools as being "problem schools" in "horror areas." He called for more vigilance on the part of the school officials to prevent the invasion of school grounds by groups of out-of-school youth and the assignment of police to particular schools. On April 19 and 24 the faculty of two of the schools cited by respondent wrote letters to the Superintendent vigorously protesting the allegations made by respondent and denying their accuracy. (Exhibits P-4 and 5) When respondent again appeared at the next Board meeting in April 1956, he was handed a note from the Superintendent (Exhibit R-19) which suggested that he refrain from further speaking and that a conference be arranged. The Superintendent testified that he recognized respondent's right to speak but questioned the advisability of his doing so both for his own sake and the best interests of the school system because of the reactions to his earlier statements. (Tr. 300) Respondent accepted the Superintendent's suggestion, conferred with the Superintendent and was advised by him.

Beginning in October 1956, and off and on for the rest of that school year, respondent had a series of conflicts with the vice-principal of the Abington Avenue School. In her testimony the vice-principal related details of five occasions on which respondent challenged her authority, was disrespectful and rude, or was openly defiant and insubordinate. After the last instance in March 1957, she reported his conduct to the Superintendent. She testified further that although she had been vice-principal at Abington Avenue School for 19 years, she asked to be transferred at the end of that year rather than continue to be humiliated before pupils by respondent. (Tr. 244)

On April 16, 1957, the Superintendent summoned respondent to a conference at which the assistant superintendent was also present. The purpose and substance of this discussion was confirmed in a letter to respondent dated April 18, 1957, (Exhibit P-1) pertinent excerpts of which were:

> "In the incident, or series of incidents which were discussed, it is my considered opinion that your admitted conduct was most unprofessional if not unethical entirely aside and apart from the issue involved.
>
> "I believe I made it quite clear to you that my chief concern is how you acted rather than why. Your admission to me that, if you had to do it again, you would have acted differently appears to justify my decision not to suspend you.
>
> "As you know, this is the second time you have given me reason to call you to my office regarding your professional conduct and behavior as a member of the Newark public school system. I hope sincerely that you have learned once and for all from these two unfortunate experiences. I wish to repeat for the record what I said to you yesterday, namely, that as far as I am concerned, there will be no third time. Any repetition of your recent behavior will result in my requesting your resignation

immediately. Should you decline to submit your resignation voluntarily, I shall have no alternative except to place you under suspension and file charges with the Board of Education recommending the termination of your employment on the basis of conduct unbecoming a teacher under the appropriate New Jersey Statute."

At the end of the 1956-57 school year, the Superintendent again deemed it advisable to transfer respondent to a different school and assigned him to Hawthorne Avenue School.

The record is barren of any reference to controversy connected with respondent during the 1957-58 school year, but in February 1959 he became involved in a series of incidents which ultimately led to his suspension by the Superintendent on June 5, 1959. A new teacher, who was in charge of the class which respondent had taught during the first term, testified that respondent came to his classroom one day in February and demeaned him before his pupils by questioning the adequacy of his teaching and his competency. He said that respondent humiliated him further on another occasion by telling the class that certain facts he had taught them were inaccurate. On another occasion, the witness said, respondent vilified him before pupils by epithets reflecting on his courage and challenged him to a fight.

Another teacher testified that toward the end of the school year while he was using a pole to open the auditorium windows, respondent dared him to hit respondent with the pole and then informed him that he was going to be taken to court. The teacher denies striking or even menacing respondent with the window pole. He reported the incident to the vice-principal. Subsequently he was served with a complaint made by respondent in Magistrate's Court. The Court held an informal hearing, declined jurisdiction and remanded the matter to the school authorities.

Late in May 1959 respondent was involved in an incident over a fifth grade boy, a former pupil of his, whom he accused of terrorizing other children. On this occasion, respondent summoned a policeman, took him to the boy's classroom, and attempted to have him arrested. The boy's teacher, who was the subject of the February episode recited above, refused to surrender the boy unless directed to do so by the school administrators. The principal, who was at a nearby school to which he was also assigned, was called, no arrest was made, and a conference was held by him with respondent and the boy's teacher. At this meeting respondent claimed he had written complaints from pupils who had been terrorized by the boy. The principal asked for the notes in order to make a thorough investigation of the boy's conduct. Respondent refused then and also the next day when again asked to produce the complaints, on the grounds that he needed them to protect himself and in order to prevent the matter being glossed over and hushed up. Thereafter the school officials conducted a complete investigation which established the fact that the boy, who was somewhat retarded academically, and who needed to be disciplined from time to time, had annoyed some children but not to the extent or degree asserted by respondent or beyond the ability of the school authorities to deal with properly. The investigation failed to disclose any intimidation or unusual unrest among the pupils or teachers because of the presence or activities of this boy. Respondent, however, took the position that the authorities were covering up and "whitewash-

ing" the whole matter. He wrote letters to this effect to the Commissioner of Education and the New Jersey Attorney General asking that the schools be independently investigated, and he incited unrest among parents with regard to the school. Independent investigations by the police authorities failed to result in any further action. The incident, however, became so exaggerated, received such undue attention, and involved respondent to such a degree that on June 5 the Superintendent directed him to remain at home. He was permitted to resume his duties on June 17. Unfortunately some misunderstanding about the nature of the absence occurred between the Superintendent's office and that of the Board Secretary and respondent's salary for that period was held up. The matter was resolved eventually and respondent was paid for the period during which he absented himself by administrative directive.

This episode was the subject of a four-hour conference with the Superintendent in June, after which respondent wrote the Superintendent a letter thanking him "for the manner in which you handled the recent unpleasant incident at Hawthorne. I wish to convey my most sincere thanks for your fairness and open-mindedness at all times." (Exhibit P-11) He took sharp issue in August, however, with the Superintendent's decision to remove him from Hawthorne Avenue and to assign him to South 17th Street School for the 1959-60 school year. (Exhibit P-9)

Pursuant to a request from respondent, the Superintendent conferred with him on September 10, 1959. Also present were two assistant superintendents. On September 11, respondent wrote the Superintendent condemning the report the Superintendent had made to the Board of Education on the Hawthorne Avenue School matter as being full of distortions and half-truths. (Exhibit P-7) A letter from the Superintendent dated September 14 confirming the conference (Exhibit P-6) informed respondent as follows:

> "This letter also serves to confirm my official reprimand in the light of your professionally inappropriate behavior in connection with some aspects of the recent Hawthorne Avenue School situation. On at least two other occasions, in my office and conference room, I found your attitude and manner correspondingly inappropriate for a professional person.
>
> "This letter also serves to confirm the fact that I directed you to report to South 17th Street School on Thursday, September 10, with the distinct understanding that any repetition of behavior on your part which I deem to be professionally inappropriate shall make it necessary for me, as Superintendent, to request your resignation forthwith. Should such an eventuality occur and you decline upon request to submit your resignation, I shall have no alternative other than to suspend you and recommend to the Board of Education that your separation from the Newark school system be effected in the manner prescribed by law.
>
> "This letter also serves to confirm my request for copies of all communications written, signed and sent by you to anyone in connection with the Hawthorne Avenue School situation on or after May 11, 1959. I trust for your sake, and that of your family, that your complete adjustment to your teaching responsibilities at South 17th Street School in a thoroughly professional manner will make it unnecessary to implement the admin-

istrative details and procedures specified and understood during our conference and confirmed for the record in this communication."

Matters appear to have gone well with respondent in his new assignment for the next two years. There is evidence that he and his new principal enjoyed a mutual esteem during this period. (Exhibits P-40, 86 A, B, and C) Trouble developed, however, in the 1961-62 year and thereafter, culminating in respondent's ultimate suspension in March 1963 and the filing of the charges herein. Incidents which occurred while respondent was at South 17th Street School are detailed in charges 2 to 35 and will be considered individually hereafter. For the purpose of this charge it will suffice to say that those which the Commissioner finds to be true, serve to add to the weight of the evidence in support of Charge 1.

This charge asserts that respondent is "incapacitated by reasons of ill health" from properly performing his duties as a teacher. The Commissioner is not competent, of course, to determine the state of respondent's health. He notes that respondent was asked to submit to examination by qualified medical personnel but that he refused to follow through. Respondent offered no competent evidence in support of its generalized statement as to petitioner's health. Therefore, the Commissioner cannot find that the facts alleged in this charge constitute incapacitation by reason of ill health.

Respondent generally denies blame for the incidents recited heretofore. He asserts that he was a good teacher, that he received satisfactory ratings from his supervisors, and that this matter is a conspiracy to get rid of him on the part of the school authorities for political and other reasons.

Respondent's claim to competent classroom performance and to generally satisfactory ratings appears valid. He was evidently a competent teacher in the classroom and the record is devoid of any failings in this respect. The charges herein stem primarily from his relations and his conduct with respect to his colleagues, his superiors, and the community.

The evidence presented substantiates the factual allegations of Charge 1. Both the number and kind of persons who gave testimony with respect to the occurrences were impressive. They displayed a sympathetic attitude toward respondent and his problems in which personal animus was generally absent even under the extreme provocation of respondent's unbridled vilifications. There is abundant evidence that the school authorities displayed unusual patience and made many attempts to help respondent make a proper adjustment. The Superintendent testified that respondent came to his office informally on many occasions and was advised and counselled by him repeatedly. There is also ample evidence that the school staffs were aware of the problems that respondent saw fit to denounce publicly and that his charges of unfit conditions were investigated thoroughly and dealt with adequately. The Commissioner therefore finds that the factual allegations stated in Charge 1 are established by the evidence and constitute conduct unbecoming a teacher.

CHARGE 2

"On a date shortly prior to May 3, 1962 Mr. Marmo permitted a picture to be taken in his classroom at South 17th Street School portraying him supposedly instructing a group of his students. The picture, accompanied by a political write-up, was published in a Newark neighborhood news-

paper. Mr. Marmo was at the time a candidate for the office of councilman in the oncoming municipal elections in May, 1962. Four of the pupils in the picture were Mr. Marmo's pupils.

"On May 3, 1962 Mr. Marmo, on questioning by Mr. Jerome B. King, his Principal, told Mr. King that the picture was taken when Mr. King was out of the school, with the consent of Miss Llewella Cain, a retired Newark Vice-Principal, who at various times was assistant in the school office and who had been doing some voluntary work in the school. On May 4, 1962, Mr. Marmo, during a conference with Miss Cain held at Mr. King's request, reported to Miss Cain that his brother had taken the picture, and that Mr. Marmo had permission slips, signed by the parents of the pupils in the picture, for the taking of the picture. Neither Miss Cain nor Mr. King authorized the taking of the picture; and inquiry from pupils in the photographed group has disclosed that the picture had not been taken by Mr. Marmo's brother, and that permission slips had not been obtained from the parents. In a later discussion regarding the incident Mr. Marmo, in justification of his conduct, in the presence of other members of the school staff, said to Mr. King: 'You don't own these children and it wasn't my class either.' "

In the May 1962 issue of a local newspaper there appeared a picture of respondent in a classroom with 11 children with a globe on a table before him and captioned "Mr. Frank Marmo discusses World Affairs with his students at South 17th Street School." The news article accompanying the picture concerned respondent's candidacy for a municipal political office. No permission had been sought or obtained for the taking of such a picture. The testimony of the principal and the retired vice-principal named confirmed the facts as stated in the charge.

Respondent admits that he is the adult in the photograph but denies that the picture was taken in his class or that it was taken by his brother. He denies specific knowledge of where the picture was taken but conjectures that it was on a class field trip to Trenton. He further denies any statement to the retired vice-principal that his brother had taken the photograph or that he had obtained permission slips from parents for the pupils' participation.

The Commissioner agrees with respondent that he cannot be held responsible for material published in the local press and that respondent may not have himself arranged for its publication. In the light of respondent's asserted vivid recollection of almost every detail of the many events which are the subject of these charges, the Commissioner finds it difficult to accept respondent's loss of memory with respect to the facts of this picture. The testimony of the principal and the vice-principal on this charge, on the other hand, is credible.

After a careful study of the testimony and exhibits educed on Charge 2, the Commissioner concludes that the weight of the evidence supports the allegations as stated.

CHARGE 3

"At a conference on June 7, 1962, in the office of the South 17th Street School staff, Mr. Marmo launched into a ranting tirade against Mr. King

during which he made numerous false statements and charges and veiled threats including the following:

"(a) That Mr. King was a 'phony.'

"(b) That Mr. King had transferred a teacher (Mrs. Cartledge) last year, and that Mr. King 'better not try' to transfer Mr. Marmo; challenged Mr. King to transfer him, emphasizing that he (Marmo) was a 'fighter.'

"(c) That the last principal that 'made trouble' for him died.

"(d) That Mr. King had interfered in politics by permitting a candidate for the city council to make a campaign speech and to circulate election petitions at his school.

"(e) That Mr. King was annoying Mr. Marmo's wife with telephone calls."

One afternoon early in June 1962 the principal decided to attempt to clear up several misunderstandings with respondent before they became major problems. He summoned respondent from his classroom and, in the presence of the vice-principal and a teacher who was given occasional administrative responsibilities, invited him to air any problems. Respondent became excited and launched into a tirade in the course of which he made the statements recited in the charge. The witnesses' estimates of the length of the conference varied from over an hour to two hours but all agreed that it was heated. Both of the observers stated that they were shocked at respondent's attitude, threats, and accusations and confirmed the statements attributed to him in this charge.

Respondent admits that such a conference was held and that he became excited. He denies making the statements contained in the charge and says that he did not accuse the principal of being a "phony" but of raising "phony issues." He claims that the principal also became excited and unjustly accused respondent of causing trouble.

The Commissioner finds that the evidence on this charge supports the allegations as stated.

CHARGE 4

"On May 8, 1962, the day of the Newark municipal election, Mr. Marmo permitted and arranged for several children in his class to be absent and to perform campaign chores at various polling places."

Respondent was a candidate for municipal office in the election on May 8, 1962. The principal testified that he made no objection to respondent's political activities as long as they did not interfere with his service as a teacher. This assertion is supported by part of a letter from the principal to respondent dated May 7, 1962, in which he said in part: (Exhibit P-40)

"* * * You will recall that when you asked if I had any objections to your running for office, I Replied [sic] that I had none whatsoever as long as it didn't interfer [sic] with your work."

Respondent requested and was granted permission to be absent from his school duties on the day of the election and a substitute was employed in his place. The substitute teacher did not record the attendance of the pupils in the classroom register but sent to the office a list showing ten pupils absent. Later on, an examination of the register revealed that five of those listed as absentees by the substitute had been recorded as present in the register.

Respondent called seven witnesses to refute this charge. All of them testified that they were at a number of polling places, that they observed workers for respondent at the polls, but that none of them were school-age children. They asserted that children are not permitted at polling places and had any appeared the policeman on duty would have banished them. Respondent denies that he arranged to have his pupils absent to perform campaign chores for him.

There is insufficient evidence to support this charge. Although there may have been ten pupils absent from respondent's class and the discrepancy in the attendance reports was not explained, there is no conclusive showing that the absences were related to respondent or his political campaign.

The Commissioner finds that the proofs are insufficient to support Charge 4 and it is dismissed.

CHARGES 5 and 6

"In May, 1962, Mr. Marmo included in a list of students to be graduated to the 9th grade the name of a 7th grade pupil, contrary to Mr. King's instruction to Mr. Marmo in February, 1962, that this pupil was not to be permitted to 'skip' the 8th grade."

"In May and June 1962, Mr. Marmo listed, without prior approval of the Principal, four 7th grade students, including the one mentioned in '5' above, for graduation to the 9th grade. He then indicated to their parents that he had recommended this, despite the fact that he had previously been advised by Mr. King that the 'skipping' of these children had been disapproved and that they were not to be moved from the 7th to the 9th grade. This conduct by Mr. Marmo stirred up protests and agitation by parents of the students in question that these students should be permitted to graduate from the 7th to the 9th grade, notwithstanding Mr. King's determination, based on their record of achievement and performance, that they should not be permitted to 'skip' the full and customary program of instruction for the 8th grade."

These two charges are so closely related and overlap to such an extent that they will be considered together.

Until the beginning of the 1962-63 school year, the Newark elementary schools were organized on a half-grade, two semester basis with promotions at the end of January and June. In anticipation of the abandonment of this organization, special arrangements were made during the 1961-62 year to adjust the grade placement of those pupils who would normally have been in mid-grade status in June. This was done by permitting those pupils who were so recommended to accomplish three semesters in two, thus having the effect of a half year acceleration.

Respondent's assignment for the term beginning February 1962 was a mixed class, one third of whom were beginning the 7th grade. The other two thirds were known as 8T, one of the transition groups permitted to "skip" a half grade.

Sometime in February 1962 respondent listed a pupil, hereinafter referred to as C. B., for graduation from 8th grade in June. When this was called to the principal's attention he conferred with respondent and told him that

C. B. was not eligible for graduation as she was properly placed in the 7th grade and not in a transition status. Later on the principal discovered that not only had respondent continued to include C. B. in those recommended for graduation but had also added three boys who were similarly situated in the 7th grade. Respondent was notified that their names were removed from the graduation list and the four pupils were not graduated. Despite the earlier directions from the principal, respondent permitted these children and their parents to believe that they would be graduated. Respondent took the position that he would have graduated the children and placed on the principal the responsibility for their failure to be accelerated. As a result the parents were irate and directed their displeasure toward the administration.

Respondent defends his action by contending that at least two of these pupils came to him in September 1961 as 7A pupils, which entitled them to be grouped with the 8T pupils and accelerated to graduation. This contention is refuted by the principal and the school records. Respondent asserts that in his judgment these pupils were ready for 9th grade and should have been placed there.

Respondent's conduct in this matter was improper and unprofessional. Unquestionably he had a right to an opinion with respect to the proper grade placement of these children, but the way in which he tried to enforce that judgment was clearly wrong. In misleading the children and their parents and then placing the blame on the principal he abused his position as a teacher and performed a disservice to everyone concerned.

The Commissioner finds that the proofs amply support Charges 5 and 6.

CHARGE 7

"On September 5, 1962, Mr. Marmo protested to Mr. King the assignment of Mr. Marmo to the 5-6 grade for the oncoming school year, and stated to Mr. King: 'I will give you until tomorrow to change your mind.' "

The principal testified that he had no difficulty with respondent until February 1962 when he disapproved respondent's placement of C. B. on the graduation list referred to in Charge 5, *supra*. From that time on, he says, respondent's attitude toward administrative direction deteriorated and became increasingly hostile and resistant. As a result he sent a request to the Superintendent that respondent be transferred to another school but the request was not acted upon. The events of the previous term then led the principal to decide to transfer respondent to a middle rather than an upper grade for the ensuing school year, and in September 1962 he was assigned to a class of 5th and 6th grade pupils. Respondent protested vehemently but does not admit to any threat to the principal.

Respondent, in his defense, says that on the first day that teachers reported to school in September 1962, he waited two hours before being given his assignment and then found that he was taken out of the grades he had expected to continue teaching and assigned to a lower grade in a former sewing room which was not properly equipped until mid-October. He asserts that the class he expected to have was assigned to a substitute teacher who had influential political connections.

The assignment of respondent to a particular class of pupils was within the scope of the principal's administrative discretion. There is no proof

that he abused that authority or that his action to reassign respondent was unreasonable or improperly motivated. The principal's action could be justified solely on the basis of respondent's behavior with respect to upper grade pupils as set forth in the two previous charges.

The Commissioner finds that the evidence supports Charge 7.

CHARGE 8

"On or about September 10, 1962, a letter was sent over the signature of Mrs. Florence Tremmel, mother of Frederick Jones, one of the four children mentioned in '6' above, to the State Board of Education and the Commissioner of Education of New Jersey, complaining of alleged misconduct and discrimination by Mr. King as to her two children, students at South 17th Street School. A copy of the letter was sent to the Governor of New Jersey, to the Mayor of the City of Newark, to Congressman Rodino, to the Civil Rights Division and to the Essex County Board of Education. These letters had particular reference to Mr. King's disapproval of Mr. Marmo's plan to graduate the said Frederick Jones from the 7th to the 9th grade. Mr. Marmo sponsored the sending of these letters. They were written on a typewriter in his possession and control, and owed by a corporation with which he is affiliated."

On September 12, 1962, the Commissioner of Education received a letter dated September 10 over the signature of a Mrs. Florence Tremmel protesting the principal's actions with respect to her son and particularly his rejection of respondent's recommendation that the boy graduate. The letter (Exhibit P-13) accused the principal of discrimination and of physical violence toward her. A copy of this letter was sent to the Mayor of Newark and was turned over by him to the school authorities. (Exhibits P-14 and 14A)

A short time thereafter as will be recited more fully in connection with Charge 9, the principal took a portable typewriter which was in respondent's possession and gave it into the custody of the Superintendent. The Superintendent caused three specimen copies of the Tremmel letter to be typed by three clerks in his office on the impounded typewriter (Exhibits P-15, 16, 16A and 17) and submitted them with the original letters to an examiner of questioned documents who was called as a witness. According to this expert, the "Tremmel letters" and the three specimen copies were all typed on the same machine. He testified further that additional documents were also written on this same typewriter. *Cf.* Charge 20.

Respondent denies that the letters were typed on a typewriter of his or that he sponsored their production. He contends that this matter, like others, is a trumped-up part of a plot to discredit him and oust him from his job.

The proofs in support of this charge are conclusive. The "handwriting expert," one of the most eminent men in this field, identified all of the five documents as the product of the same typewriter without reservation. The typewriter on which the specimen copies was made was known to have been in respondent's possession. The Commissioner can reach no other conclusion than that Charge 8 is established by the evidence.

CHARGE 9

"Beginning with the latter part of September 1962, or the early part of October 1962, Mr. Marmo has on several occasions charged in the presence of others that he had been accused by Mr. King of stealing a typewriter belonging to the Newark Board of Education. No such accusations were in fact made. The charge that they were made was falsely constructed by Mr. Marmo when it became apparent that Mr. King suspected that the Tremmel letters mentioned in '8' above had been produced on a typewriter in the possession and control of Mr. Marmo."

There is no question that respondent charged on a number of occasions that the principal had accused respondent of stealing a typewriter belonging to the school system. Respondent makes that charge in complaints made to the Division on Civil Rights (Exhibits P-38 and 39) and in a letter to the Mayor of Newark. (Exhibit P-50) The principal denies making any such accusation saying that he knew the school system did not own portable typewriters and he at all times believed that the machine in question belonged to respondent.

The Commissioner finds that Charge 9 is established by the evidence.

CHARGE 10

"On or about September 28, 1962, Mrs. Florence Tremmel, the parent of Frederick Jones, a student at South 17th Street School, filed with the New Jersey Division on Civil Rights a complaint in behalf of her son, Frederick, and against Mr. King and the Newark Board of Education charging discrimination against Frederick because of his color, national origin and ancestry. The complaint related particularly to Mr. King's disapproval of Mr. Marmo's plan to 'skip' Frederick from the 7th to the 9th grade; but also charged misconduct by Mr. King in alleged references by him to both Mrs. Tremmel's sons, Frederick and Francis. The said complaint was instigated by Mr. Marmo, was false and known by him to be false. It has been dismissed by the Division on Civil Rights."

The boy named in this charge was one of the four pupils whom respondent recommended for accelerated graduation which was disapproved by the principal. There was some confusion with respect to the graduation lists, and as a result the boy was actually enrolled at the beginning of the 1962-63 year in vocational high school. When the error was discovered he was returned to the 8th grade in South 17th Street School. Thereafter, on September 28, 1962, his mother signed a complaint before the Division on Civil Rights charging the Board of Education and the principal with unlawful discrimination. (Exhibit P-30)

This charge is a part of the problem involving the grade placement of pupils in respondent's class and whether they were eligible to be accelerated and graduated in June 1962. The evidence is clear that the boy completed 6th grade in June 1961. Respondent contends he attended summer school and as a result was entitled to be placed in the last half of the seventh grade in September 1961. There is no evidence, however, that he was given credit for a half year of seventh grade by his attendance at summer school. There was also testimony that summer sessions are designed primarily for remedial and not for acceleration purposes.

It is clear that respondent proposed to accelerate this pupil and graduate him and that the principal disapproved and overruled him. It is also clear that the principal signed a list of graduates and failed to notice that the boy's name was included. This inadvertence led to the boy's enrollment in vocational school and the subsequent cancellation and return to South 17th Street School. The mother's claim that she had spoken to the Superintendent and gotten his approval as set forth in her complaint was denied by the Superintendent.

It is not disputed that the parent filed a complaint as set forth in this charge or that it was subsequently dismissed by the Division on Civil Rights. Respondent denies, however, that he instigated the making of the complaint.

While the making of the complaint was an outgrowth of the controversy over the pupil's graduation, no specific evidence was produced to show that respondent encouraged or persuaded the mother to take this action. The Commissioner finds that there is a lack of conclusive proof of actual collaboration with the mother on the part of respondent.

The Commissioner finds that to the extent that Charge 10 alleges improper conduct by respondent it is not supported by sufficient proof and it is therefore dismissed.

CHARGE 11

"At about 10:55 on October 19, 1962, Mr. Marmo approached Mr. King on the second floor of the South 17th Street building and asked if he could see Mr. King then about a matter. Mr. King replied: 'Not now, —later.' A few minutes later Mr. King was confronted by Mr. Marmo in the school office which leads to the Principal's office. Mr. Marmo repeated the request to see Mr. King, who then told him that it could not be that day (Friday), but sometime in the coming week. Mr. King thereupon entered his office, closing the door behind him, and went to his desk. Mr. Marmo stalked into the Principal's office through another door, sat down in a chair, and then, bending over the Principal's desk toward Mr. King, pointed his finger close to Mr. King's face and said: 'You're not Jesus Christ and I'm staying here till you talk with me.' Mr. King ordered him from the office, and when Mr. Marmo failed to leave, Mr. King approached the door through which Mr. Marmo entered. Mr. Marmo blocked Mr. King from reaching the door. Mr. King turned away and entered the outer office through another door. Mr. Marmo left the Principal's room, but refused to comply with Mr. King's orders to leave the outer office. Mr. King called the Superintendent of Schools on the telephone, and Mr. Marmo did not leave until he was directed, over the telephone by the Superintendent, to leave and go to his classroom."

Extensive testimony was heard on this charge and Charges 12, 13 and 14, which are sequential. It is clear that respondent met the principal at about 11 o'clock on this morning in a corridor of the school, that he asked to see him and was refused; that respondent went to the school office and when the principal returned, renewed his request and was put off until the following week; that the principal entered his private office and respondent followed by another door and insisted on seeing him. Respondent denies couching

his demand in profane language. The principal says he directed respondent to leave but he did not do so and continued his angry expostulations. The principal testified he then attempted to leave because of his alarm at respondent's threats and menacing attitude, that respondent deliberately blocked his egress, but that he managed to evade and exited through the second door to the outer offices, directing his secretary to call the police. Respondent in turn entered the outer office, was ordered by the principal to leave the building and refused to do so unless told by the Superintendent. The Superintendent was then called, spoke to respondent on the telephone, and directed him to return to his classroom.

The testimony clearly establishes that respondent invaded the principal's private office, forced himself upon the principal, and provoked a dispute in which he made angry and threatening remarks. Respondent's uncontrolled outbursts during the course of these proceedings makes the principal's assertion of alarm entirely credible. Whether respondent used the profane language alleged in the charge is not material.

The Commissioner finds that the evidence substantiates Charge 11.

CHARGE 12

"On October 19, 1962, following the incident mentioned in '11' above, Mr. Marmo asserted that Mr. King had struck and pushed him that morning in the Principal's office. The school physician assigned to South 17th Street School was called to the building to examine Mr. Marmo. The school's Vice Principal relieved Mr. Marmo from his class. He met with Mr. King and the school physician in the adjoining corridor, and was directed by Mr. King to permit the physician to examine him, but he refused to comply with that request."

The Commissioner finds no dispute with respect to the facts of this charge. In the early afternoon, following the incidents related in the previous charge, the principal received a message from respondent which said that he needed to see a doctor because of the injury to his head and back which he had sustained when the principal had struck him in the office that morning. The principal informed the Superintendent of this message and asked that a school doctor be directed to examine respondent. One of the school physicians testified that at the direction of the chief medical inspector he went to the South 17th Street School early that afternoon and, accompanied by the principal, went to the corridor outside respondent's classroom. Respondent was relieved of his teaching duties by the vice-principal but refused to be examined by the school physician saying he preferred the services of his own doctor. Although directed by the principal to permit the doctor to inspect the injuries he alleged he had sustained, respondent refused to do so.

Respondent testified that while he was in the principal's office that morning the principal hit him on the chest with both fists and kicked him, that as a result he slipped on the waxed floor and struck his head and injured his back. The principal denies striking respondent or making physical contact of any kind.

The Commissioner finds that the facts of Charge 12 are as stated.

CHARGE 13

"On October 19, 1962, directly following the corridor conference, Mr. King ordered Mr. Marmo to return to his classroom. He refused to do so and started to leave the building with some children from his classroom who were carrying various items for Mr. Marmo. Mr. King instructed the children to go to the office, but this instruction was countermanded by Mr. Marmo, who told them to go on to the street and to Mr. Marmo's car with the articles they were carrying. The children proceeded to do as directed by Mr. Marmo and left the building with him."

Testimony on this charge was given by the school physician and the principal. When respondent was relieved of his duties by the vice-principal in order that he might be examined, he emerged from his classroom accompanied by a number of pupils who were carrying miscellaneous materials. After his refusal of an examination the principal directed respondent to return to his classroom and the pupils to go to the office. Respondent did not return to the classroom, told the pupils to come with him, and went to his car which was parked at the rear entrance of the school. The doctor and the principal followed and watched while respondent loaded the objects carried by the pupils in his car. The pupils returned to the school building and respondent left.

One of the objects was the portable typewriter which the principal suspected had been used to write the "Tremmel letters," and the anonymous notes which are the subject of Charge 20. The principal had asked to see the typewriter. Respondent claims the principal "seized" the typewriter at this time; the principal and the physician say that respondent offered it for their inspection. In any case it was at this point that the typewriter passed from the control of respondent to the principal who delivered it into the custody of the Superintendent. The typewriter remained in the Superintendent's custody while the specimen letters were being made for comparison purposes and was later returned to respondent.

Respondent testified that he left school early because he was in pain and needed to see his doctor and that he had been relieved by the vice-principal for that purpose.

The Commissioner finds that Charge 13 is supported by the evidence.

CHARGE 14

"Mr. Marmo has since the October 19, 1962 occurrence in the school offices mentioned above falsely accused Mr. King with having struck and pushed Mr. Marmo during the episode in the office, knowing that at no time during that episode was he even touched by Mr. King."

The record establishes the fact that respondent accused the principal of physical assault in this incident of October 19, 1962, on a number of occasions. Such an accusation was made by him in a complaint filed in the Division on Civil Rights (Exhibits P-38 and 39), and in a claim in the Division of Workmen's Compensation (Exhibit P-60) and in charges filed with the Secretary of the Board of Education. (Exhibit P-61) The accusation is categorically denied by the principal.

The incidents of October 19, 1962, recited in Charges 11 to 14 were testified to minutely and exhaustively by several witnesses. Granting that there were opposite points of view expressed as to why these events occurred, there is little material difference with respect to what happened, except for the principal's alleged assault on respondent. To this there were no witnesses other than the two participants, and the determination of this charge, as was noted by Judge Skeffington in Workmen's Compensation Court (Exhibit P-82), is a question of credibility.

It should be noted that respondent called a parent as a witness to another charge who testified that he was in the corridor outside the principal's office at the time that the subject altercation came to a head. According to him he observed not only the principal striking respondent but also respondent striking the principal. The Commissioner discredits the testimony of this witness, however, because he refused to submit to cross-examination.

Although the Commissioner reached his judgment independently, he finds himself in complete accord with the opinion expressed by Judge Skeffington referred to above, in which he dismissed the claim, finding there had been no assault. During the course of these proceedings respondent displayed an hysterical personality that was triggered by very slight provocation. Many times his face was contorted, his body tense, his voice loud and harsh, and his whole demeanor unbelievably bellicose. His tirades were shocking and his seeming incapacity to control himself was distressing. It is easily believable that respondent could provoke the kind of unpleasantness that occurred in the principal's office, but it is not credible that he would submit to physical indignities from the principal.

The principal, in many ways the antithesis of respondent, is a quiet, deliberate, and self-possessed man. For him to evade and avoid physical combat with respondent is entirely in character. It is not believable that he would initiate such an assault.

The Commissioner finds that the preponderance of the evidence supports the principal's denial that he struck respondent and that the weight of the testimony substantiates this charge of false accusations by respondent.

CHARGE 15

"On October 29, 1962, Mr. Marmo sent a letter to the 'Grievance Committee' of the New Jersey Education Association, in which he asserted that as a result of his 'testimony' before a representative of the Division on Civil Rights he was being 'persecuted' by Newark school officials. The allegation was false."

The letter referred to in this charge, admitted in evidence as Exhibit P-63, which respondent admits sending, contains the complaint cited in the charge. It asks further for an opportunity to discuss the matter with a field representative of the Association.

Respondent contends that he was persecuted by the principal, the vice-principal, and by other members of the administration and because of this he sought the help of the NJEA. Petitioner denies any persecution of respondent.

The Commissioner finds no evidence of persecution in this case. A sifting of all the evidence shows that the school authorities were extremely patient with respondent's shortcomings, gave him more opportunities to straighten

out his relationships and to measure up to his professional responsibilities than he had a right to expect, and moved to dismiss him only after there appeared to be no other course. Any transfers, suspensions, assignments, and supervision that he received and which he considered to be persecution, were the result of some unacceptable behavior on his own part and must be considered to have been appropriate.

The Commissioner finds that Charge 15 is supported by the evidence.

CHARGES 16 and 17

"On November 1, 1962, Mr. Marmo filed a complaint with the Division on Civil Rights against the Newark Board of Education, Mr. King, Dr. Paul Van Ness, Assistant Superintendent of Schools in Charge of Elementary Education, and Dr. Edward F. Kennelly, Superintendent of Schools for the Newark school district. In this complaint he charged that he was intimidated and threatened by Mr. King and Dr. Van Ness because of assistance he rendered as a result of and in the investigation of Mrs. Tremmel's complaint to the Division; that he had been warned he would be dismissed if he did not keep his 'mouth closed'; that he had been belittled in front of his pupils by Mr. King, and physically pushed and struck by Mr. King; and that he had been accused by Mr. King of having stolen a typewriter. The charges of misconduct made by Mr. Marmo in this complaint were false and were known to him to be false.

"This complaint has been dismissed by the Division on Civil Rights."

"On December 4, 1962 Mr. Marmo filed with the Division on Civil Rights an amended complaint against the same parties mentioned in '16' above and, in addition, against Franklyn Titus, Deputy Superintendent of Schools for the Newark school district, Clair Burns, vice-principal of South 17th Street School, and Jacob Fox, counsel for the Newark Board of Education. The charges of misconduct made by Mr. Marmo in this complaint were false and were known to him to be false.

"The complaint has been dismissed by the Division on Civil Rights."

Respondent was told to stay home from school following the altercation of October 19, 1962, and he did not return until November 15. During this period he made the complaint to the NJEA which is the subject of Charge 15 and he also initiated the complaints recited in Charges 16, 17 and 18.

The testimony discloses that respondent visited the office of the Division on Civil Rights; that he was interviewed by one or more of its field representatives both there and at his home; that he was assisted in preparing a complaint, the substance of which is set forth in this charge; and that he signed the complaint at the Civil Rights office on November 1, 1962. (Exhibit P-39)

After further conferences with representatives of the Civil Rights Division, respondent decided to file an amended complaint and did so, adding the other persons named in Charge 17 and statements of their alleged misconduct. (Exhibit P-38) This information was conveyed in a letter from respondent to the field representative dated November 23, 1962 (Exhibit P-47) and a second letter dated December 1, 1962. (Exhibit P-48) The amended complaint was signed by respondent at the Civil Rights Division office on December 4, 1962.

These complaints are another aspect of respondent's general allegations of persecution referred to in Charge 15. Petitioner's witnesses deny that there is any truth to any of the charges made by respondent and the Commissioner finds their testimony credible.

Testimony was also received from the Supervisor of Compliance of the Division on Civil Rights that after investigation the complaints were dismissed. On March 8 he sent a letter (Exhibit P-41) to the President of the Board of Education with respect to both the complaint made by respondent (Exhibit P-38) and also the one filed by Mrs. Tremmel (Exhibit P-30), which was the subject of Charge 10, the pertinent excerpts of which are as follows:

"The Division on Civil Rights is dismissing the above-captioned complaints. Our investigation did not support the allegations made in either one of the complaints.

"During our investigation additional allegations were made about certain practices occurring within the school system. Upon further investigation, we also discovered that there was no basis for these charges."

The Commissioner finds that the evidence establishes the truth of Charges 16 and 17.

CHARGE 18

"On October 22, 1962, Mr. Marmo made an informal complaint in the Municipal Court of Newark against Mr. King regarding the 'return' of a typewriter which had come into Mr. King's possession on October 19, 1962, and which Mr. King had brought to the office of the Superintendent of Schools. On November 7, 1962 Mr. Marmo made an informal complaint in the same court against Dr. Edward F. Kennelly, Superintendent of Schools, regarding the alleged unlawful possession of the typewriter. At the hearing on these complaints Mr. Marmo dropped Dr. Kennelly but added Jacob Fox, counsel for the Newark Board of Education, as a party, on the allegations relating to the typewriter; and added a further charge of assault and battery against Mr. King. The case was heard on December 28, 1962, by a judge brought in from another municipality, at the direction of the Chief Magistrate of the City of Newark,—and after a full scale hearing the Judge ruled that Mr. Marmo's charges had not been established."

There is in evidence as Exhibit P-62 a Municipal Court summons dated October 22, 1962, addressed to the principal. Exhibit R-65 is a copy of a similar document dated November 7, 1962, addressed to the Superintendent.

The testimony discloses that the hearing on this complaint of unlawful possession of respondent's typewriter was opened on November 21 before Judge Malanga who then disqualified himself. The hearing was subsequently convened on December 28, 1962, before Judge Abramson. By that date the typewriter had been returned to respondent and the matter was moot. Respondent attempted to add to the complaint the alleged assault of October 19 by the principal, but after various conferences with the judge and the clerk the matter was dropped. The records of the Municipal Court show that the complaint was dismissed by the Court on December 28, 1962. (Exhibit P-85)

The evidence establishes the facts as stated in Charge 18 and the Commissioner so finds.

CHARGE 19

"On November 21, 1962 Mr. Marmo brought to the Newark Municipal Court, as witnesses for him on the complaints mentioned in paragraph '18' above, four students who were members of his class at South 17th Street School. At least two of these students had not been given permission by their parents to leave the school premises during school hours on that day. The case was adjourned early in the day. Mr. Marmo did not return the children directly to school but took them first to the Pennsylvania Railroad Station for 'soda, hot dogs and candy,' then to 'a big stone place' where a 'man' asked them 'about the typewriter,'—and then 'to Mr. Marmo's engineering place.'

"Notwithstanding their absence except perhaps for a few minutes just before the end of the school day, none of the students was marked absent in Marmo's attendance register for that day."

The testimony reveals that four boys from respondent's class accompanied respondent to Municipal Court on November 21, 1962, for the purpose of the complaint which is the subject of the previous charge. The hearing was dismissed before the close of the school day and the children did not return to school. The attendance register for respondent's class later showed each of these pupils marked as present that day.

Respondent says that he needed the pupils to confirm his complaint that the principal had stolen his typewriter, that he obtained permission from their parents, that the hearing was adjourned at about 1:30 p.m., that he took the boys to a luncheonette and bought them lunch, that he then dropped them off in front of the school at approximately 2:30 o'clock. He admits not knowing whether they reported to class.

The vice-principal testified that the mother of one of the boys verified the fact that her son had permission to go to court with respondent. The vice-principal was unable to reach the parents of two of the other boys but did interview the fourth boy's aunt who acted as his guardian. The aunt denied giving permission.

The principal testified that he learned from the father of the fourth boy that no permission had been given in his case. The principal stated that the boys did not return to school at all but he discovered some time later that all were marked present that day in the attendance register.

Respondent claimed to possess signed permission slips which he attempted to introduce, but the validity of the signatures was challenged and the parents were not called to establish their authenticity. In the instance in which the father denied giving permission, respondent claimed he had obtained approval from the mother. Respondent failed to call these persons although the opportunity was open to him.

The preponderance of evidence supports the conclusion that respondent did not have proper permission for two of the boys to be absent from school for his own purposes. Whether he returned them to school promptly the Commissioner deems of little material significance. With respect to the marking of attendance, however, the Commissioner finds respondent at fault. No matter how the substitute teacher had recorded the boys' attendance for that

day, respondent knew they were absent and knew the register was marked otherwise. As a teacher he had a duty to see that the register was as accurate a record as within his knowledge it could be. He attested to its accuracy over his signature knowing these four entries were incorrect. Respondent's attempts to evade this responsibility and place the onus on the substitute lends credence to the allegations of this charge.

The Commissioner finds that the preponderance of the evidence is in support of Charge 19.

CHARGE 20

"On January 3, 1963 there appeared in the mail boxes of some of the teachers at South 17th Street School the following unsigned written statement which, on information and belief, emanated from Mr. Marmo:

" 'Miss Burns:

Mrs. Quinn:

Be advised that a complaint has been filed against you with the Division on Civil Rights, New Jersey State Board of Education, under New Jersey law 18:25.12 section 'e' for your FALSE TESTIMONY in the MUNICIPAL COURT on Friday, December 28. Will you commit perjury?

"Your false TESTIMONY will be exposed at the FORMAL HEARING.'

"Mrs. Quinn is the school nurse and Miss Burns is the vice-principal at South 17th Street School. Both were witnesses at the Magistrate's Court hearing mentioned in '18' above."

Four identical typewritten notes, whose message is reproduced in the charge, *supra*, were submitted in evidence as Exhibits 21 A, B, C, and D. Attached to three of them were statements relative to their reception marked Exhibits 21 AA, BB, and DD. In two instances the teachers stated they found sealed envelopes holding the notes in their school mail box and turned them over to the school office. In the third, the teacher said the envelope containing the typed note was delivered to him by a pupil. The fourth envelope with the note was extracted from an absent teacher's mail box by the principal, who so testified.

Petitioner ties the notes to respondent on the assertion that they were written on the typewriter which was impounded and subsequently returned to him. Respondent denies any knowledge of the production or delivery of the notes. For his determination of this charge the Commissioner must rely on the findings of the handwriting expert who also testified on Charge 8. That witness, whose qualifications and integrity are unassailable, was positive in his identification of these documents as having been produced on the same typewriter as the one impounded from respondent and returned to him prior to the appearance of these notes.

While the Commissioner accepts the testimony of the examiner of questioned documents as establishing that the letters were produced on respondent's typewriter, he finds that such evidence, circumstantial as it is, is not sufficient to substantiate the charge that the notes "emanated from Mr. Marmo." Charge 20 is therefore dismissed.

CHARGE 21

"On January 7, 1963 there appeared in the mail boxes of some of the teachers at South 17th Street School the following unsigned written statement which, on information and belief, emanated from Mr. Marmo:

'Mr. King

Mrs. Devonald

Mrs. Quinn

'What is fair punishment for those who persist in lying?'

"Mrs. Devonald is the school clerk at South 17th Street School and was a witness at the court hearing mentioned in '18' above."

The documents alluded to in this charge were not introduced into evidence. References in the testimony to them indicate that they were not inscribed on the same typewriter referred to in the previous charge. Although there was some reference to this matter in the testimony, no significant evidence was educed on it and the charge is therefore dismissed.

CHARGE 22

"Mr. Marmo has on numerous occasions discussed with, or within hearing of students in his class, and in his classroom, various matters pertaining to his difficulties with Mr. King and other school officials. These discussions included references to the court hearing mentioned in '18' above, and Mr. Marmo encouraged some of the students who were witnesses at the hearing to make it the subject of their class compositions. These practices continued notwithstanding Mr. King's directions to Mr. Marmo that they were to be discontinued."

One parent called as a witness said that respondent told her and another mother of his difficulties with the principal in the presence of his class and in a voice audible to all the children. She also testified of conversations in which her daughter told her that the principal had stolen respondent's typewriter and which indicated that the pupils had been induced to take sides either for or against the respondent and the principal. The mother objected orally and in writing to the unnecessary and undesirable inclusion of pupils in the problem and requested a transfer of her child to another class.

The principal testified that after respondent's return to school after his suspension from October 19 to November 15, he received so many complaints from parents that respondent was using his classroom as a forum to discuss his problems, that he assigned the vice-principal to monitor respondent's teaching constantly beginning November 16. The vice-principal's testimony confirmed the fact that she was directed to observe in respondent's classroom to make sure that his instruction was confined to the curriculum. This observation was continued until the Christmas recess and then abandoned.

One of the most deplorable aspects of the kind of rancor and controversy which continued to mount during the 1962-63 school year between respondent and the school administration is the involvement of children and its effect on them. It is unlikely that such a dispute as that herein could have been hidden completely from the pupils, but no matter how difficult the circumstances it should not have become a matter openly discussed with or before pupils.

The preponderance of the evidence is against respondent. His own excitable nature, the extent to which he was involved in his battle with his superiors and the extremes he went to in carrying it on, and his evident strong rapport with children lends credence to the belief that he would seek the support of pupils and involve them in his problems. His use of four boys from his class in his complaint in Municipal Court and the facts of Charge 34 are instances in point. It is clear to the Commissioner that respondent did not employ the circumspection expected of a teacher with respect to pupils in the controversy herein and did unnecessarily involve them in ways which were prejudicial to the best interests of the children and the good order of the school.

The Commissioner finds that Charge 22 is sustained by the evidence.

CHARGES 23, 24 and 25

"Mr. Marmo has repeatedly ignored and violated directives from Mr. King not to let certain children leave the classroom during class hours except for toileting and medical attention. The directives were given because of the bad behavior of the designated children on their way to the library and to remedial reading classes."

"Mr. Marmo has repeatedly refused to comply with requests by Mr. King to investigate and report on any incident involving students of his class who are implicated in difficulties in school, on school playground, or on any occasion calling for the attention of the school authorities. When specific incidents have been called to his notice his usual reply has been: 'You saw it, you handle it,' or 'if you want to detain them you do it,' or 'this didn't happen in my class.' "

"Mr. Marmo has repeatedly, and in violation of instructions from the school principal, permitted students from his class,—particularly students who were brought by him, as witnesses, to the court hearing mentioned in '18' above,—to wander unattended, during class hours, in various parts of the school building."

These three charges overlap and were heard more or less as one, and will be considered as a unit.

According to the principal, because certain boys in respondent's class created disturbances while they were going to other assignments in the building such as to the library or reading class, he directed respondent not to permit them to leave the room except for necessary medical or lavatory purposes. Despite this directive, the principal asserts that he frequently found these boys in parts of the building where they did not belong and with no valid reason for being there. In addition to his own personal observation, this situation, he says, was reported to him also by teachers.

Respondent's defense to this charge attempted to show that had he obeyed the principal's directive he would have been insubordinate. His position is that he was "caught in the middle" and could not prevail no matter what he did. He reasoned that if one of the boys was summoned from the office and was permitted to go respondent would be accused of violating the principal's directive and if he refused to let the boy go in compliance with the order, he would be accused of insubordination. This is, of course, a distortion and an evasion. The charge is plainly not directed at the release of pupils for regularly scheduled purposes and times but for other and

irregular reasons. Beyond this attempt to obscure the matter, respondent had no defense other than a categorical denial of all three charges.

The Commissioner finds that the weight of the evidence supports Charges 23, 24 and 25, and they are sustained.

CHARGE 26

"Mr. Marmo has repeatedly failed to produce, in compliance with requests from the school principal, scholarship record books and report cards for his class."

The vice-principal testified that she made requests on specific dates, which she enumerated, for the submission of respondent's pupil records and was always put off with an excuse. She was positive that she never received these records from respondent after January 1, 1963, although she asked for them on at least three occasions.

The principal confirms this testimony despite the fact that respondent produced a typewritten note which indicates the transmittal of five different sets of records to the principal and on which "Thank you, J. B. King" is hand inscribed. (Exhibit R-46) The principal admits the signature but denies placing it on this note and contends that it is a fraud. He was positive that other than the class register, respondent submitted no pupil records to the office in 1963 prior to his suspension.

Respondent called a former clerk in the office who testified that his reports were submitted regularly and in excellent order. This witness left South 17th Street School in June 1962, however, before the time covered by the testimony in support of this charge.

The Commissioner finds it unnecessary to decide whether respondent submitted his records on February 19, 1963, as R-46 purports to show. This one instance of compliance does not offset the testimony establishing the fact that respondent failed to produce the pupil records on other occasions when required to do so. The Commissioner finds that Charge 26 is substantiated by the evidence.

CHARGE 27

"On December 4, 1962 Mr. Marmo left word at the office of the South 17th Street School that he was ill. A substitute was called to take his class. At 10:30 A. M. on that day he kept an appointment in the office of the Mayor of the City of Newark. Shortly before noon on that day he had a conference with Mr. Hess in the latter's office. He was in the office of the Division on Civil Rights in the afternoon of the same day. He reported his absence on that day, on the school absence forms, as 'due to personal illness.' "

Respondent admits being absent from school and reporting ill. (Exhibit P-49) He denies being in any of the three offices named in the charge on that day.

The evidence with respect to respondent's going to the office of the Mayor on December 4, 1962, is not conclusive. The Secretary of the Board of Education was certain that respondent had called on him about that time but could not be positive that the visit was on December 4. The principal, however,

testified to a telephone call made to the Secretary on that day which confirmed respondent's appearance at the Board's office. Finally, it is clear, although respondent denies it, that he appeared at the Division on Civil Rights and signed his amended complaint on December 4, 1962. This is confirmed by the document itself (Exhibit P-38) and by the testimony of the notary who witnessed his signature.

The Commissioner finds that a preponderance of the evidence is in support of Charge 27.

CHARGE 28

"On December 10, 1962 Mr. Marmo sent a letter to the Mayor of the City of Newark in which he stated 'I was warned by my superiors that I would be fired unless I kept my mouth closed.' The same statement was made in a letter sent by him on the same date, to the New Jersey State Board of Education and to the New Jersey Commissioner of Education. The statement is false."

The letter to the Mayor referred to in this charge and which respondent admits sending, was received as Exhibit P-50. Respondent claims that both the principal and an assistant superintendent warned him that he would be dismissed if he didn't remain quiet. Both administrators deny such a statement. No evidence was educed with respect to letters to the State Board of Education and the Commissioner of Education.

In the climate of this controversy it is a reasonable inference that a number of respondent's superiors advised him that he would run the risk of dismissal unless he were more temperate in his utterances. There are many instances herein which show that respondent was prone to take well-meaning statements of this sort and distort and exaggerate them into threats, accusations, and meanings never intended. This exhibit well illustrates the kind of reckless accusations and irresponsible distortions which respondent was capable of uttering and which he demonstrated during the course of these proceedings.

The Commissioner concludes that the statements ascribed by respondent to his superiors were not made in the context represented in his letter to the Mayor. Charge 28 is sustained.

CHARGE 29

"Since the latter part of February, 1963 Mr. Marmo has directed a public campaign against the administration of the Newark public school system, charging and instigating others to charge that there was a general state of danger,—due to alleged undisciplined conduct on the part of some students or on the part of strangers entering the school premises without authority,—to the physical safety of the children at South 17th Street School and at schools throughout the Newark school system, and that specific incidents were being either ignored or treated with indifference on the part of the school authorities, and in particular by Mr. King at South 17th Street School. Mr. Marmo's course of conduct in this direction has been calculated to inflame some of the parents of students at the school, and to bring the Newark public school system into disrepute. He has seized upon isolated and exceptional incidents at South 17th Street School to create an image of widespread disorder at the school, and of irresponsibility on the part of the school officials."

Lengthy testimony was heard on this charge from the principal, several teachers, respondent and as incidental testimony from many other witnesses.

Beginning in late February 1963 and continuing into the spring, the schools of Newark were subject to some unfortunate publicity, which made it appear that there was a "reign of terror" not only in the South 17th Street School but prevailing generally. Inherent in this publicity was the inference that the school administration was lax and inept in dealing with the problem and that children who attended the public schools were in imminent danger of physical harm.

The testimony discloses that these charges of general laxity and indiscipline were grounded in a few relatively isolated incidents which occurred at South 17th Street School. One such instance was a report from a girl in respondent's class that two boys had invaded a girls' lavatory. Another girl reported that she had been accosted by two boys unknown to her in a stair tower. In a third instance a girl reported having a snowball and stick thrown at her while she was on her safety patrol post. Each of these episodes was thoroughly investigated and proper measures taken against continuance. Despite what appear to have been entirely proper and adequate procedures by the school authorities, the adverse publicity continued, parents became excited and alarmed, and the schools were brought into undeserved disrepute. Respondent was quoted in the newspaper accounts as charging that a "reign of terror" was permitted to exist in the schools by the administrators. After his suspension respondent also appeared on local radio and television programs in which he was interviewed with respect to alleged undesirable conditions in the schools.

Respondent admits appearing on the television and radio interviews but denies responsibility for the quotations ascribed to him in the newspaper articles. He insists that such conditions did exist in the schools and placed the blame on the administration, but he denied that he instigated or fomented such a charge.

Respondent's activities during this period of time as shown in succeeding charges indicate that he was at the center of this storm. There is every reason to believe that had he not been at odds with the school administration, this unfortunate shadow which was cast temporarily on the Newark schools, and which the light of truth dissipated, would never have developed.

The Commissioner concludes that the weight of the evidence establishes the facts of Charge 29 and it is sustained.

CHARGE 30

"On March 7, 1963 Mr. Marmo organized a group of parents of students at South 17th Street School to attend a weekly 'Open House' meeting conducted by Newark Police Director Dominick A. Spina, at which citizens are invited to present grievances requiring the attention of the police authorities. At this meeting Mr. Marmo made the following statements:

'Director Spina * * * I want you to know that I am not afraid of the Board of Education.

Only the people directly involved are here, Director, and I represent them. I have plenty to tell you about conditions at South 17th Street School.'

"After referring to some alleged recent occurrences at the school he said 'I was told that the Vice-Principal's exams were coming up next fall and words to that effect. They tried to intimidate me.' These statements were false.

"As to the 'conditions' he claimed existed at South 17th Street School he stated at the meeting that 'These conditions do exist throughout the city in the various schools,'—a statement designed to paint a false generalized picture of neglected violence, degeneracy, and danger to pupil safety in all parts of the Newark School System.

"At the end of the meeting he claimed that this alleged state of affairs existed because there was fear by all employed in the school system. He charged that the teachers were afraid of the vice-principal; the vice-principal was afraid of the principal; the principal was afraid of his superior,—and he carried the accusation of fear of reprisals from above all the way through all levels of school authority including the Board of Education.

"He pointed at Mr. William O'Toole, Director of Attendance, who was sitting in the room, and accused him of being the 'Cover-up man for the Board of Education.' He complained that too many teachers did not live in Newark, and falsely represented that the School Board's counsel lived 'out of Newark,'—in Short Hills. He twice called upon and induced those present to give a round of applause for Director Spina, who was listening but taking no sides during the course of the presentation. Mr. Marmo did not, prior to his appearance at the 'Open House' meeting with Police Director Spina, present any of the complaints made there regarding general conditions in the Newark schools, to any of his superiors, including his principal, the Superintendent of Schools, or the Board of Education."

Respondent admits that he attended the subject meeting but denies that he organized the attendance of a group of parents there. He avers that he took no active part although he admits that he made some comments but not all of those ascribed to him in this charge. He contends that the written digest of the meeting, which was admitted in evidence as Exhibit P-78, is inaccurate because it was not a stenographic transcript but was prepared by a sergeant of police and it imputes statements to him which were made by others.

Even conceding, *arguendo,* respondent's contentions about the report of this meeting, it remains clear that respondent did take an active role in this public meeting, that he did make inaccurate representations which placed the schools in a false light, that he acted in an unprofessional manner and did not measure up to his responsibilities as a member of petitioner's professional staff.

The Commissioner finds that the burden of Charge 30 is sustained by the weight of the evidence.

CHARGE 31

"On March 20, 1963 Mr. Marmo so conducted himself during the course of a hearing in the Magistrate's Court in Newark, where he was a witness in a case in which Mr. King was charged with assaulting a student, that the presiding judge directed a court officer to escort Mr. Marmo from the courtroom."

Parents of a child in respondent's class filed a complaint against the principal in the Municipal Court claiming that the principal struck their daughter on the right arm in a corridor of the South 17th Street School on the morning of March 7, 1963. At the hearing held on March 20 respondent testified as a witness for the pupil.

A certified transcript of the opinion of the Court which was rendered March 28, 1963, was received in evidence as Exhibit P-77. The following excerpts are pertinent in this charge:

> "Mr. Marmo's testimony on the witness stand in this court was disgraceful, impertinent and abusive. He repeatedly refused to adhere to the admonitions of this court as to restricting his testimony to the relevant issues after repeated directions and instructions from this court. Mr. Marmo's conduct was the very antithesis of a normal behavior that would be expected of a teacher who has the responsibility for the education of children who are in our public school system. Even after Mr. Marmo concluded his testimony and took his place in the courtroom he repeatedly shouted, made inflammatory statements and attempted to interfere with the orderly process of this hearing. As a result of Mr. Marmo's lack of respect and dignity for this court, and because of his repeated interference and conduct after he left the witness stand, and in the presence of the court, I was compelled to have him ejected from this courtroom."

The complaint against the principal was dismissed.

Respondent's defense to this charge rests on two contentions: (1) that this hearing occurred after he was suspended and while charges against him were being prepared, and that he was, therefore, not a teacher subject to the Newark Board of Education but merely a citizen, and for that reason he should not be subjected to this charge and it should be dismissed; and (2) that the magistrate who presided at this hearing was not a magistrate but was a biased political appointee who was acting in place of the regular magistrate who was ill.

The Commissioner rejects both of these defenses. Whether respondent was an active or a suspended teacher, he was in an employment status with the Board of Education. Any other view would render these lengthy proceedings unnecessary. Under such a status he was required to conduct himself in a manner becoming such a professional employee and any failure to do so could be the subject of a charge against him even during the pendency of this litigation. It is obvious that a suspended status does not open the door to unrestrained and uninhibited conduct upon which the employer is barred from proceeding.

The Commissioner will accord no weight to respondent's unsubstantiated attack upon the integrity of the court. Respondent's behavior in the instant proceedings was from time to time similar to that described by the magistrate including several occasions when he referred to this tribunal as a "kangaroo court" whose bias precluded any chance he might have of a fair and impartial hearing.

The Commissioner finds more than sufficient evidence for the establishment of Charge 31.

CHARGE 32

"On the evening of March 20, 1963 Mr. Marmo led a group of persons, in a presentation of grievances against the Newark school administration, before the Municipal Council of the City of Newark. None of the complaints regarding general conditions in the Newark schools, aired by Mr. Marmo there, were previously made by him to any of his superiors, including his principal, the Superintendent of Schools, or the Board of Education."

Respondent moved to dismiss this charge on the ground that it occurred after his suspension as he also did in Charge 31. The motion was denied for the reasons set forth in the consideration of the previous charge.

Respondent admits being present at the subject meeting of the Municipal Council but denies leading the group. The Commissioner finds that whether respondent led the group or not is a question of semantics. It is obvious from an inspection of Exhibit P-66, which is a 10-page excerpt of the record of the meeting, that respondent was the first of the group to speak and assumed a leadership role. The record shows that he continued his harangue against the administration of the schools and the alleged undesirable conditions which were permitted to exist. His discourse was larded with innuendoes, sweeping generalizations, broadside accusations, and inflammatory statements based on part-truths.

Whether or not respondent had communicated any of the complaints made by him at this meeting to his superiors, it is clear that he did not pursue a remedy for his allegations through established administrative channels. Instead, in this matter of alleged neglect of discipline, respondent by-passed the school authorities who were in a position to investigate and remedy any faults that may have existed, and sought to create for himself the image of a champion of threatened children, where no such threat existed, at the expense of his colleagues and superiors. It is well known that in any school district there may be found parents whose relationship to the school or certain members of its staff, through lack of communication or other reason, is not co-operative and who are over-ready to find fault. Respondent had an affirmative duty to press any charges he considered he had through proper channels, which he failed to do. His attempts to undermine the confidence of the public in its schools and those who worked in them by false accusations made directly to the public constitute an irresponsible abuse of his position as a teacher.

The Commissioner finds that Charge 32 is supported by a preponderance of the evidence.

CHARGE 33

"On March 21, 1963, at a hearing before the Newark Board of Education, at which Mr. Marmo was a witness, he accused, without any justification, the Board of Education, and in particular the President of the Board (who was presiding) of bias and prejudice as to the testimony he was giving, and generally conducted himself throughout the session in an arbitrary and abusive manner, and in open defiance of and with a show of contempt for his superiors in the Newark school system."

Respondent moved to dismiss this charge for the same reasons set forth in Charge 31 and was similarly denied.

Petitioners offered no direct testimony on this charge. Counsel for petitioner, however, elicited some admissions from respondent on cross-examination in which portions of the record of the hearing before the Board of Education were read. Respondent admitted he accused the President and the Vice-President of the Board of nepotism. He also admits accusing the President of being biased toward him and saying other things he would not say today.

Respondent's admissions tend to show that his demeanor at this meeting left much to be desired, but there is not enough evidence, in the Commissioner's judgment, to support the allegations of this charge to the degree called for by the language in which it is stated. There is, for instance, insufficient evidence to prove that respondent accused the entire Board of bias, or that he conducted himself improperly throughout the session, or that he was openly defiant or contemptuous of his superiors at this hearing.

The Commissioner finds the evidence insufficient with respect to Charge 33 and it is dismissed.

CHARGE 34

"On March 11, 1963, Mr. Marmo brought three students in his class to the school office at South 17th Street School and in a loud voice and in the presence of others, repeatedly accused Mr. King of stealing Mr. Marmo's typewriter, and said he had a number of witnesses to prove it. Mr. King ordered Mr. Marmo to return to the Art Room, where Mr. Marmo had left his class with the art teacher. Mr. Marmo refused, went behind the office counter and said he was to call Mr. Arnold Hess, the Secretary of the Board of Education, and proceeded to do so. Mr. King again ordered him to return to his class, but he did not do so until after he failed to reach Mr. Hess on the telephone."

Conclusive and convincing testimony on this charge was given by the senior field representative of the New Jersey Education Association who happened to be present and witnessed the events recited in this and the next charge. He testified that on Friday, March 9, 1963, as a result of requests from teachers who were disturbed over the publicity being accorded a so-called "reign of terror" in the schools, he was directed by his superior to investigate the matter as soon as possible. He arrived at South 17th Street School on the morning of March 11, and at about 11 o'clock while he was with the principal in his office respondent rapped loudly on the door. His testimony confirms in every detail the recitation of this charge, *supra.*

Respondent's direct testimony on this charge is evasive. He points to the fact that the typewriter had been returned long before this date and was no longer a problem. He protests that his only purpose in coming to the office was to telephone the Board Secretary who had requested that he do so.

The Commissioner finds the account of petitioner's witness completely credible and convincing. The preponderance of evidence supports Charge 34 and it is sustained.

CHARGE 35

"On March 11, 1963, after the occurrence mentioned in '34' above, Mr. Marmo engaged another teacher in an altercation in the corridor a short distance from the school office at South 17th Street School. Mr. Marmo challenged the teacher to a fight, claiming that the teacher stuck his finger down Mr. Marmo's throat and pushed Mr. Marmo against the wall, although in fact Mr. Marmo had pushed the teacher several times. The incident took place in the presence of other members of the school faculty."

Following the incident related in Charge 34 one of the teachers met respondent in the corridor near the office and said he believed that respondent was all wrong in carrying on his "reign of terror" charges. Respondent became enraged, used abusive language, shoved the teacher several times, took off his own glasses and invited the teacher to fight. This incident was witnessed by three other teachers and by children who were passing in the hall. The noise of the altercation reached the New Jersey Education Association representative and the principal in the office and caused them to witness the end of the dispute. The details of the occurrence were reduced to writing by the teacher and signed by him and four others present. (Exhibit P-67)

Respondent presented two witnesses who stated that they saw respondent that same day at approximately noon at an address in Bloomfield. Although respondent elicited this testimoney he made no claim that he was at another place than the school when the events of this charge occurred. In his own testimony he characterized the whole thing as a "frame-up" and denied that it ever took place.

There can be little doubt with respect to this charge in the face of the corroborating testimony given by five witnesses. The Commissioner finds that the evidence substantiates the facts of Charge 35 and it is sustained.

The Commissioner has considered each of the charges separately and has determined that the evidence educed fails to support Charges 4, 10, 20, 21 and 33 and they are dismissed. Having found that the weight of the evidence substantiates all or part of the other thirty charges, it remains to be decided whether these actions, either singly or considered as a whole, constitute incapacity, conduct unbecoming a teacher, unfitness, or other just cause warranting dismissal or reduction in salary. *R. S.* 18:13–17 Such a determination accords with the principles enunciated by the New Jersey Supreme Court in *Redcay* v. *State Board of Education,* 130 *N. J. L.* 369, 371 (1943), affirmed 131 *N. J. L.* 326 (*E. & A.* 1944):

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

Several of the individual charges herein constitute sufficient cause for forfeiture of this teacher's right to be continued in his employment. Taken all together, they demonstrate unfitness to an incontrovertible degree.

Respondent maintains that he was a good teacher and petitioner admits that his instructional duties were performed competently. This being so it is all the more to be deplored that he could not maintain appropriate relation-

ships with his colleagues, his supervisors, and employers, or conduct himself in a manner befitting a member of the professional staff of a public school.

The history of respondent's service in petitioner's schools extends over a period of more than ten years in four different schools and shows a consistent pattern of behavior. Each new assignment began promisingly. In the beginning in each new school his competency was recognized, his services, including extra duties he performed, were esteemed, and he appears to have been well liked by his colleagues. Sooner or later, however, in each instance he deviated from his expected standard of behavior and conducted himself in such an erratic and irresponsible manner as to make it impossible for him to be continued in that situation. This happened not once or twice but four times and each occurrence produced more serious consequences. The climax was reached when he recklessly created a distorted image of conditions in the schools without regard to consequences, including the needless and wasteful harassment of those in charge and the unfortunate and undeserved discrediting of the schools and those who taught therein. It is no cause for wonder that these charges followed.

In the hearing of these charges, respondent contended at great length and with equal vehemence that he was not at fault in these occurrences; that he was the almost defenseless victim of a politically controlled and motivated administrative system that harassed and persecuted him, violated his rights, drove him to whatever retaliatory measures he employed and finally "framed" him. On some occasions he conceded that certain officials had treated him fairly and considerately while at other sessions he turned on them and scathingly denounced their machinations to bring him into disrepute. If one were to accept respondent's point of view, they were all out of step but him.

It is difficult to understand how respondent could take this position with sincerity in the face of the evidence to the contrary. Rather than "ganging-up" on respondent to get rid of him, the testimony supports the opposite point of view. Certainly the Superintendent afforded him more opportunities to correct his mistakes and start anew than he had any right to expect. The record shows also that the Superintendent's door was open to respondent, that he visited the Superintendent several times a year, and that the Superintendent gave him constructive help and counsel continually. Other members of the central administrative staff and in the individual schools acted similarly. Despite their efforts, respondent seemed unable to conform consistently and ended up behaving so badly that he alienated those who wanted to help him. Even though the patience of his superiors was exhausted, the charges herein were not made until it became obvious that respondent could not be salvaged as a responsible member of the teaching staff and the welfare of the school system demanded his permanent disassociation.

Certain principles enunciated by the Commissioner in previous tenure cases are relevant here:

> "Tenure of office of professional staff employees of boards of education is a legislative status provided as a public policy for the good order of the public school system and the welfare of its pupils. *Wall* v. *Jersey City Board of Education*, 1938 *S. L. D.* 614, 617, affirmed State Board of Education 618, 622, affirmed 119 *N. J. L.* 308 (*Sup. Ct.* 1938); *Viemeister* v. *Prospect Park Board of Education*, 5 *N. J. Super.* 215, 218 (*App. Div.* 1949); *Redcay* v. *State Board of Education, supra.* Its objectives are to

protect competent and qualified professional staff members in the security of their positions during good behavior, and to protect them against removal for 'unfounded, flimsy, or political reasons.' *Zimmerman* v. *Newark Board of Education,* 30 *N. J.* 65, 71 (1962). Its protection is not a personal privilege which is subject to waiver, *Lange* v. *Audubon Board of Education,* 26 *N. J. Super.* 83, 88 (*App. Div.* 1953), or abuse, *Cook* v. *Plainfield Board of Education,* 1939-49 *S. L. D.* 177, affirmed State Board of Education 180; *In the Matter of the Tenure Hearing of Leo S. Haspel, Metuchen Board of Education,* decided by the Commissioner January 20, 1964, affirmed State Board of Education October 7, 1964, affirmed *App. Div.* June 10, 1965, cert. denied *N. J. Sup. Ct.* May 12, 1965, cert. denied *U. S. Sup. Ct.* May 16, 1966, rehearing denied June 20, 1966." *In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside,* decided by the Commissioner July 5, 1966

"Public schools exist not to provide jobs for adults but to educate children." *In the Matter of the Tenure Hearing of Leo S. Haspel, Metuchen Board of Education, supra*

In this case the reasons established by the charges for respondent's removal are neither flimsy, unfounded, nor based on political or other improper considerations. The evidence in support of the charges more than adequately demonstrates that respondent conducted himself with such a disregard for his professional responsibilities and by his own actions created such tensions, disharmony, and mistrust that his continued presence as a member of the professional staff became prejudicial to the good order of the schools and adversely affected their purpose to serve the children of the community.

The Commissioner repeats here his position with respect to the protection of tenure recently articulated in the *Maratea* matter, *supra.*

"* * * The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit."

Such is the case here. The evidence in this matter leads the Commissioner to a firm conviction that respondent, through his own actions, has created a situation in which he can no longer render effective service in the Newark Public Schools and his right to continue in that service is therefore forfeit. The Commissioner finds and determines that the aforesaid findings and conclusions constitute a pattern of conduct unbecoming a teacher, and demonstrate such unfitness for continued employment that just cause exists for the dismissal of respondent. The Commissioner sustains the suspension of respondent beginning March 15, 1963, and authorizes the Board of Education of the City of Newark to adopt a resolution of dismissal of Frank C. Marmo.

COMMISSIONER OF EDUCATION.

July 25, 1966.

XXXI

REGIONAL BOARD OF EDUCATION MAY WITHDRAW PUPILS FROM RECEIVING HIGH SCHOOL WHEN IT PROVIDES ITS OWN FACILITIES

BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,

Petitioner,

v.

BOARDS OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, THE BOROUGH OF BRANCHVILLE, THE TOWNSHIP OF FRANKFORD, AND THE TOWNSHIP OF LAFAYETTE, SUSSEX COUNTY,

Respondents.

For the Petitioner, Honig & Kovach (Donald L. Kovach, Esq., of Counsel)

For the Respondents, Gardner & Williams (David J. Caliri, Esq., of Counsel; Victor C. Otley, Jr., Esq., on the Brief)

DECISION OF THE COMMISSIONER OF EDUCATION
ON MOTION FOR SUMMARY JUDGMENT

Petitioner has been for many years the high school receiving district for pupils from the school districts of Branchville, Frankford Township and Lafayette Township. In 1963 these districts united with two others, Sussex Borough and Wantage Township, to form the High Point Regional High School District, which has constructed a high school building to be occupied at the beginning of the 1966-67 school year. Petitioner seeks an order requiring the three sending districts to continue to send their sophomore, junior and senior pupils to Newton High School until all have graduated by June of 1969. Respondents in answer assert their right by law to enroll all high school pupils in the High Point Regional High School, except such as may be engaged in the vocational agriculture program, and by way of counterpetition ask the Commissioner to order the Newton Board of Education and its administration to cease and desist from all activities which tend to hamper the smooth transition of pupils from the one high school to the other.

At a conference of counsel held by the Assistant Commissioner in charge of Controversies and Disputes on March 1, 1966, it was agreed that by way of a motion for summary judgment filed by respondents, the Commissioner would decide the legal questions raised by the petition and counterpetition.

Respondents base their motion for summary judgment upon the statutes providing for the creation of regional high school districts, *R. S.* 18:8–1 *et seq.*, and in particular upon *R. S.* 18:8–14.1, which reads as follows:

> "In the absence of an agreement to the contrary between the regional board of education and the respective local constituent boards of education when two or more school districts have voted to establish a regional board of education as provided in sections 18:8–1 to 18:8–3 of this Title, the board of education created under chapter eight of Title 18 of the Revised Statutes and chargeable with the education of high school pupils therein

shall not take charge and control of the high school pupils of such regional district until, in the judgment of such board, suitable facilities and accommodations are available for the instruction of such pupils. In the absence of an agreement, the instruction of such pupils shall continue under the respective local boards of education now chargeable with their instruction, until suitable facilities and accommodations are provided by such regional board of education, at which time the board of education of the regional high school district shall assume the responsibilities of their instruction."

Respondents assert that the High Point Regional Board of Education, having arranged for the erection of a high school, now has exercised its judgment that it will have available in September 1966 suitable facilities and accommodations for the pupils of its constituent districts. The boards of education of the constituent districts having been so notified, respondents contend that as a matter of law the Regional Board of Education preempts the power of the constituent boards so that they no longer have the power to send their high school pupils elsewhere than to the High Point Regional High School.

Petitioner, on the other hand, contends that a valid sending-receiving relationship exists pursuant to *R. S.* 18:14–7, and that such a relationship cannot be terminated except for good cause, upon the determination of the Commissioner. The relevant portions of *R. S.* 18:14–7 read as follows:

"Any school district heretofore or hereafter created, which has not heretofore designated a high school or schools outside such district for the children thereof to attend, and which district lacks or shall lack high school facilities within the district for the children thereof to attend, may designate any high school or schools of this State as the school or schools which the children of such district are to attend. * * *

* * * * * * *

"No designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior 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 unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner. * * *"

Without full hearing of the facts, petitioner contends, the Commissioner cannot determine whether "good and sufficient reason exists" for the termination of the sending-receiving relationship, and for this reason summary judgment should be denied.

Moreover, petitioner urges, *R. S.* 18:8–14.1, *supra*, requires that suitable facilities and accommodations *be*, in fact, in existence before the Regional Board of Education can take charge and control of the education of the pupils of the constituent districts. The anticipation of the Regional Board that the facilities being erected will be available for occupancy in September 1966 does not meet the precise requirements of the statute, petitioner argues. Hence any "agreement" between the Regional Board and the constituent members of the Regional District cannot be sustained without granting petitioner an opportunity through hearing to examine such an agreement. There-

fore, petitioner concludes, it should not be barred by operation of law from making application pursuant to *R. S.* 18:14–7 for "a review by the Commissioner concerning the withdrawal of the respective pupils and the resulting equities involved."

With respect to the contention that cause must be shown for terminating a sending-receiving relationship pursuant to *R. S.* 18:14–7, the Commissioner holds that such a procedure was, in effect, accomplished by his endorsement of the referendum to create the High Point Regional High School District on November 26, 1963. Such endorsement was grounded upon study and review by the Commissioner and the constituent school districts as required by *R. S.* 18:8–1, which not only demonstrated the advisability of such a regionalization, but also clearly contemplated the erection of a high school facility available for use by the school year 1966-67.

However, even if it be argued that petitioner had no opportunity to be heard in such a determination, the fact remains that a valid sending-receiving relationship can exist only where a district "lacks or shall lack high school facilities within the district for the children thereof to attend."

> "* * * Once a district provides its own high school facilities, the statute cited is inapplicable as to it. * * * Absent such an agreement [as provided by *R. S.* 18:14–7.3], the sending district could withdraw once its facilities are ready, without any necessity for an application and approval by the Commissioner. * * *" *In the Matter of the Termination or Modification of the Sending-Receiving Relationship between the Boards of Education of Chatham Township and Chatham Borough,* 1961-62 *S. L. D.* 144, 146

See also *In the Matter of the Withdrawal of Students of the Borough of Hawthorne from Central High School, Paterson,* 1938 *S. L. D.* 665.

While the above-mentioned decisions deal with Chapter 7 school districts, the Commissioner holds that *R. S.* 18:14–7 must be read *in pari materia* with the statutes applicable to regional school districts (Chapter 8), since regional districts can function as either sending or receiving districts. Regional boards of education are by statute specifically endowed with the powers of Chapter 7 boards of education. *R. S.* 18:8–14 In the instant case, the High Point Regional High School will be a sending district to Newton High School for pupils enrolled in the vocational agriculture program, since it will not offer such a program of its own.

Petitioner's argument that respondent Regional Board of Education cannot assume responsibility for the high school education of the pupils of the Regional District until facilities are actually *in being* ignores the realities of school construction. Boards of education must have the right to place reasonable reliance on the architect's projection of the completion date of a building in order to prepare budgets, to make contracts for transportation and supplies, to employ teachers and custodians, and to do the other acts and things incident to occupying and using a new school facility. To wait until the last screw is in place before taking specific action to utilize the building would in many cases result in wasted facilities or buildings standing idle and unused through much of a school year. The Commissioner holds that no need for hearing exists to establish the right of the Regional Board of Education to exercise its judgment that suitable facilities will be available for the instruction of the pupils of the Regional High School District in September 1966.

The Commissioner finds and determines that no material question of fact exists in this matter, and that the sole questions are those of law. He determines that the High Point Regional High School District Board of Education, having in the proper exercise of its judgment found that in September 1966 it will have facilities available for the instruction of high school pupils in the district, may take charge and control of such pupils, and withdraw them from Newton High School. Respondents' Motion for Summary Judgment is granted, and the petition of appeal is accordingly dismissed.

COMMISSIONER OF EDUCATION.

July 28, 1966.

XXXII

BOARD MAY REQUIRE COMPLIANCE WITH TERMS OF MILK CONTRACT

ROBERT S. ANDREWS AND SHEARER'S DAIRIES, INC.,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Respondent.

For the Petitioners, Kirchner & Strassner (M. J. S. Stoney, Esq., of Counsel)

For the Respondent, Leonard A. Spector, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners were awarded a contract to supply milk to respondent's schools during the 1964-65 school year. They protest an order from respondent demanding that half-pints of milk be delivered in gable top cartons as set forth in respondent's specifications on which petitioner had bid and upon which it had been awarded the contract. Respondent asserts that its specifications were in accordance with law, that petitioners were aware of the specifications when they submitted their bid, and that petitioners must comply with the specifications.

This matter is submitted to the Commissioner for his determination on briefs and memoranda of counsel.

There is no dispute as to the essential facts in this matter. Shearer's Dairies, Inc. was the low bidder on invitations to bid for a contract to supply milk for the school year 1964-65. Included in respondent's specifications was the following requirement:

> "All milk shall be packaged and delivered in Pure-Pak (gable top) plastic coated paper cartons, in order that no part of opening or pouring surface shall be exposed to handling or subject to casual contamination. * * *"

The specifications also required that bids be accompanied by the following signed statement:

> "The undersigned certifies that he is authorized to submit the enclosed bid on behalf of the bidder herein and further that the bidder herein will

comply fully with all specifications as filed in the office of the Board of Education of the City of Camden."

The specifications as supplied to bidders were accompanied by a "Notice to Bidders," which reads as follows:

"*NOTICE TO BIDDERS*

"Attached to the Specifications is a certification required to be signed by the bidder as an additional specification.

"The bidder, once he has signed this certification, waives any right he may have or claim to have to deviate in any respect from the specifications herein.

"Any changes, additions, or deletions of any portion of the specifications will be deemed and construed as a failure of the bidder to comply with specifications and will constitute grounds for rejection of the bid.

"The Board of Education requests any bidder knowing that specifications as prepared are not open and competitive to advise the Board of Education of any such condition.

"Bidders are advised that submissions may be made on any item as an equal to the item specified for consideration by the Board of Education.

"A bidder intending to furnish an 'or equal' in place of the item specified, must submit the name of the item, description of the item and the name of the manufacturer on the proposal sheet of the 'or equal' that he intends to furnish under the bid."

Petitioners performed their contract in compliance with all of respondent's specifications except that part which designates a Pure-Pak (gable top) carton. In lieu thereof petitioners packaged and delivered milk in Sealking flat top, plastic coated cartons. Following a protest to respondent by another dairy company, respondent ordered petitioners to commence delivering milk in the gable top cartons. Petitioners complied with this order, but protest it to the Commissioner and pray for an order declaring the directive null and void and ordering respondent in the future to delete reference to specific brand names and shapes from its milk specifications and instead to make its specifications "sufficiently broad and descriptive so as to permit on an equal basis participation by users of all shapes, sizes and name brand plastic coated cartons."

Petitioners contend that the flat top carton they use is superior to the gable top carton for sanitary reasons. They further argue that respondent's specification of the brand name Pure-Pak (gable top) fails to set forth specific qualities designed to meet the stated purpose of preventing handling and contamination of the pouring spout, and therefore the brand name is but a preface to the specification. Finally, petitioners contend, to bind petitioners to this preface unduly prejudices competitive bidding and precludes successful bidding of an equal. They urge that their disregard of a manufacturer's exclusive brand name under these conditions is not a material departure from the specification.

Boards of education are required by statute to advertise for bids to supply milk. *R. S.* 18:7–64 The advertisements are made under such regulations as the board may prescribe. Petitioners make no assertion that they offered any

kind of protest or objection to the specifications as established by respondent. Nor did they submit the flat top carton as an "equal" to the specified item for consideration by the Board of Education. See "Notice to Bidders," *supra.* In the absence of any protest or a submission of an "or equal," respondent was entitled to rely upon the validity of its specifications and petitioner's good faith performance of the contract. In *Consumers Ice Cream Co.* v. *Board of Education of Camden,* 1960-61 *S. L. D.* 212, the Commissioner said:

> "* * * whenever there is any question of the validity of specifications or the manner in which competitive bids are sought the complainant should make timely protest and not wait until bids are awarded. Such objections should be made before the bid is submitted."

By their own inaction, petitioners may not now complain that the specifications were improper and that the contract awarded them is not binding upon them, or that they should not be held in precise performance of the contract to which they agreed.

The Commissioner finds no basis in law to order respondent to develop different specifications for future use. It has not been shown that the specifications herein protested have thwarted the legislative purpose in the bidding statutes.

Having so decided, it is unnecessary for the Commissioner to consider other matters raised by petitioners.

The Commissioner finds and determines that respondent Board of Education properly advertised for bids for milk for the school year 1964-65, that petitioners were awarded the contract to supply such milk as the lowest responsible bidder in accordance with respondent's specifications, that petitioners made no timely protest against such specifications and offered no "or equal" bid as provided in the instructions to bidders. Petitioners are therefore without standing to protest an order from respondent for compliance with the terms of the contract.

The petition is accordingly dismissed.

ACTING COMMISSIONER OF EDUCATION.

August 19, 1966.

XXXIII

BOARD NOT REQUIRED TO REIMBURSE PARENT FOR UNAUTHORIZED TUTORING

ETHEL M. MASSEY,

Appellant,

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE SILVER, MONMOUTH COUNTY,

Respondent.

For Appellant: David A. Biederman, Esq.

For Respondent: Edward C. Stokes, Esq.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from an order of the Commissioner entered on April 6, 1965, to the effect that this matter be reopened and a rehearing be scheduled.

The respondent Board of Education appeals on the grounds that the Commissioner had no jurisdiction to grant a rehearing, that a rehearing is not justified on the basis of newly discovered evidence or excusable neglect and that to permit a rehearing would invade the rights of the respondent Board of Education.

It is the opinion of the State Board of Education that the within appeal is in the nature of an interlocutory appeal and should therefore be dismissed. We recognized that this has been a most protracted and difficult litigation. However, we are not inclined, at this time, to disturb the decision of the Commissioner. In general, only final decisions of the Commissioner are subject to review by the State Board of Education, as provided in R. S. 18:3–15. Although we sympathize with the respondent's desire that this matter be brought to an end at the present time, we feel that the best interests of all the parties require that petitioner have the relief granted by the Commissioner.

We note that in the course of the argument for the rehearing held before the Commissioner on March 11, 1965, counsel for the petitioner stated: "On our application, the rehearing would be limited to the medical testimony * * *." Counsel continued: "* * * it would be, therefore, very brief and very short * * *." In his brief order of April 6, 1965, the Commissioner did not state the nature of the rehearing. We suggest to the Commissioner that it be limited in accordance with the statements of counsel.

The appeal is dismissed.

March 2, 1966.

DECISION OF THE COMMISSIONER OF EDUCATION

For the Petitioner, Christian Jorgensen, Esq. (David A. Biederman, Esq., and Henry J. Brock, Esq., of Counsel)

For the Respondent, Edward C. Stokes, Esq.

Following the promulgation of the decision of the Commissioner in this case on December 18, 1963, petitioner submitted a written application dated December 1, 1964, for a rehearing of her appeal. The application was grounded on the assertion that petitioner's case had not been adequately presented because she had not been represented by counsel and that new and more detailed relevant medical evidence was available which had not been elicited at the first hearing. After respondent made known its opposition to reopening the matter, oral argument on the application was presented by counsel for both parties before the Assistant Commissioner in charge of Controversies and Disputes on March 11, 1965, at the State Department of Education, Trenton. The Commissioner granted the application and issued an Order on April 6, 1965, that the matter "be reopened and a rehearing thereof be scheduled as soon as may be for the purpose of receiving such additional testimony, argument and evidence as may be appropriate." Respondent took an appeal from that Order to the State Board of Education which was denied on March 2, 1966. Thereafter, the matter was reopened and further testimony was heard by the Assistant Commissioner at the office of the Monmouth County Superintendent of Schools on May 6, 1966.

Testimony was again heard from the physician who attended petitioner's son during the period pertinent to this complaint. This witness reiterated his earlier testimony but added no significant facts to those already in the record. The only other witness called was petitioner, who testified to the amounts paid by her to tutors for various periods of home instruction.

Petitioner testified that in the 1960-61 school year when her son was enrolled in the eighth grade in the Little Silver School, she employed and paid a tutor $25.00 per week for the period from October 15, 1960 to the end of June 1961. In the next school year, during part of which he was enrolled in the ninth grade at Red Bank High School, petitioner testified she paid $5.00 an hour for 23 hours of tutoring between February 6, and April 15, 1962. The previous record shows that the pupil returned to Red Bank High School thereafter and finished the school year there. During the 1962-63 school year the boy was out of New Jersey and received further schooling in Florida and Virginia. Testimony was also received with respect to the 1963-64 school year, despite the objection of respondent's counsel that this period was beyond the scope of the original petition and occurred after its filing. For the period from September 1963, to June 1964, petitioner testified she employed an algebra tutor one hour per week at $7.00 per hour and a Spanish tutor one hour per week at $5.00 per hour. There is no evidence that petitioner's son was enrolled in any New Jersey school subsequent to June 1962, when he completed the ninth grade at Red Bank.

The Commissioner finds that the rehearing produced no additional material which would change or modify his original decision. His belief that both sides must share some measure of fault for the failure of communication which fostered this controversy and thwarted its resolution does not provide a basis on which petitioner can be afforded relief for tutoring expenses contracted without the school's knowledge or approval. The further evidence educed does not alter the basic fact that petitioner did not furnish the necessary supporting data to complete a proper application for home instruction to the school authorities and that lacking such information the Little Silver School medical inspector was within the scope of his discretionary authority in refusing to make his certification. There exists no basis therefore on which respondent can be ordered to pay for tutoring expenses which it had not approved and which were performed without its knowledge or control.

The record is bare of any evidence of any further application after the 1960-61 school year for home instruction either to the Little Silver School district or to Red Bank High School. Petitioner's son completed the 1961-62 school year at Red Bank and received full credit for his ninth-grade courses of study. Thereafter he attended schools in other states. From petitioner's testimony it appears that her son returned to New Jersey during the 1963-64 school year, but there is no evidence that he applied for admission or transfer or was enrolled in a New Jersey school. Nor is there any evidence that petitioner made application to any school district in New Jersey for home instruction during that year. Absent such an application, approval, and supervision by a school district, petitioner's employment of tutors was on her own initiative and at her own expense. Under the circumstances herein, the Commissioner can find no basis on which respondent can be required to reimburse petitioner.

The Commissioner reaffirms the observations, findings and conclusions contained in his earlier decision dated December 18, 1963.

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

August 19, 1966.

Pending before State Board of Education.

XXXIV

EMPLOYMENT CONTRACT MUST BE TERMINATED IN ACCORDANCE WITH ITS TERMS

GLADYS M. CANFIELD,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,

Respondent.

For the Petitioner, Cassel R. Ruhlman, Jr., Esq.

For the Respondent, Piarulli & Vittori (Frank E. Vittori, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case was employed as a teacher by respondent under a contract during whose term she would acquire tenure in the Pine Hill School District. She contends that she was dismissed by respondent in violation of the terms of her contract and of her tenure rights. Respondent asserts that petitioner's contract was properly terminated and that no effective tenure rights ever accrued to her.

This case is submitted to the Commissioner in a Stipulation of Facts and briefs of counsel.

Petitioner was originally employed by respondent under a contract running from November 19, 1962, to June 30, 1963. Her succeeding contracts were for the following terms:

September 1, 1963 to June 30, 1964
September 1, 1964 to June 30, 1965
September 1, 1965 to June 30, 1966

The 1965-66 contract contains the following clause:

"It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 60 days' notice in writing of intention to terminate the same * * *."

On November 15, 1965, the Secretary of respondent Board addressed the following letter to petitioner: (Schedule E)

"The Board of Education of the Borough of Pine Hill, herein notifies you that as of November 15th, 1965 they are terminating your teaching contract, to take effect immediately, with this District, giving you two months' pay."

On November 20, 1965, petitioner by letter returned to the Board a check dated November 15, 1965, in the amount of $1,083.96, stating that she expected to receive her regular pay checks under normal procedure as she had in the past. (Schedule F) It is stipulated that petitioner has continued to tender her services as a teacher to respondent, but has been prevented by respondent from rendering such services. It is also stipulated that petitioner holds a permanent New Jersey Teacher's Certificate in full force and effect.

Petitioner argues that respondent could terminate the employment contract only by giving 60 days' notice of intention to terminate it, and that the

termination cannot be accelerated by the paying of 60 days' salary. It follows, petitioner contends, that since petitioner would have acquired tenure during the 60-day period following November 15, 1965, her tenure rights have been violated.

Respondent, on the other hand, contends that by paying petitioner her salary for 60 days it effected complete termination of the contract as of the day notice was given. Respondent further argues that to hold that petitioner had *effectively* acquired tenure on the date when an insufficient time remained to give the contractual notice of intention to terminate is to shorten the statutory period for acquiring tenure, contrary to public policy.

Thus the following issues are posed for the Commissioner's determination:

1. Does the payment of salary for the contractual period of notice of intention to terminate constitute actual termination as of the date of notice?

2. Have petitioner's tenure rights been violated by the termination of her services within the time that her contract of employment would give her statutory tenure?

The Commissioner holds that the language of the employment contract herein is clear and unambiguous. The contract calls for "notice in writing of intention to terminate the same." "Intention" clearly indicates an act to be completed at some point in the future—in this case 60 days in the future. This position is supported by *R. S.* 18:13–11.1, which is apposite to termination of teachers' employment under contract:

> "If the employment of any teacher is *terminated on notice pursuant to a contract* entered into between the teacher and the board of education, it shall be optional with the board of education whether or not the teacher shall teach during the period between the time of the giving of the notice and the date of *termination of employment* fixed therein." (Emphasis added.)

Thus, a board of education may terminate the *services* of a teacher when it gives notice, but it may not terminate the *employment* until the expiration of the period of notice provided in the employment contract. The legal significance of the difference between service and employment was set forth in *Mateer* v. *Board of Education of Fair Lawn,* 1950-51 *S. L. D.* 63, 66, affirmed State Board of Education 1951-52 *S. L. D.* 62, where the Commissioner held that for the purpose of the Tenure Law, employment continued during leaves of absence when no services were being rendered. The distinction is apparent in the Commissioner's decision in *Barratt* v. *Board of Education of Harrison Township,* 1961-62 *S. L. D.* 185, which respondent says is dispositive of the instant matter, and from which respondent quotes this paragraph:

> "Does the letter written by the principal on November 7, combined with subsequent unanimous adoption by the Board of the recommendations of its president and administration committee later that day, constitute termination on notice pursuant to the contract of employment? To answer this question the Commissioner must look to the intent of the Board. Granting *arguendo* that the letter does not in terms give 30 days' notice of termination and that even if it had, only the Board of Education had authority to issue such notice, the subsequent ratification of the terms of the letter made amply clear the intent of the Board to terminate the petitioner's services as of the close of school on November 7, and to pay her for a 30-day period thereafter. Further, the ratification of an act of its

> agent which it had power to authorize in advance gives the principal's letter the full legal effect of notice."

This paragraph, when read in the context of the entire decision, emphasizes that the intent of the Board, however imperfectly it was exercised, was to terminate Mrs. Barratt's *employment* on 30 days' notice from November 7, 1961, as provided in the employment contract, but to terminate her *services* immediately as provided in *R. S.* 18:13–11.1, *supra.* The Commissioner does not find in *Barratt* the justification which respondent urges to make intent override the specific terms of the employment contract. The only "intent" possible under the terms of the contract herein is the intention to terminate employment after the expiration of a period of 60 days' notice. Any other interpretation would render termination meaningless as to either employer or employee.

The Commissioner finds and determines that in purporting to terminate petitioner's employment on November 15, 1965, by giving her 60 days' salary in lieu of notice, respondent acted in violation of the terms of its contract with her, and the action must therefore be set aside.

In light of this determination, what rights remain to petitioner? Her employment with respondent began on November 19, 1962. The Teachers' Tenure Law, *R. S.* 18:13–16, provides:

> "The services of all teachers * * * as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners, excepting those who are not the holders of proper certificates in full force and effect, shall be during good behavior and efficiency, * * * (c) after employment, within a period of any 4 consecutive academic years, for the equivalent of more than 3 academic years * * *."

Thus, in petitioner's case, employment on November 20, 1965, would provide for her the equivalent of more than 3 academic years within the period of 4 consecutive academic years beginning with the 1962-63 academic year as defined in *R. S.* 18:13–16.

It has been found that petitioner's employment did not terminate on November 15, 1965, as respondent purported to accomplish, but barring any intervening rights, would have terminated 60 days thereafter. Thus, petitioner was in fact employed on November 20 and thereafter, and thereby acquired tenure of employment in respondent's schools. Having become so protected by tenure, she cannot be dismissed except for cause (*R. S.* 18:13–17) and after a hearing as provided in the Tenure Employees Hearing Act (*R. S.* 18:3–23 *et seq.*). The Commissioner finds and determines that petitioner has been unlawfully dismissed from her employment.

Having so found, the Commissioner directs that petitioner be reinstated immediately as a tenure employee, and that she be compensated from November 15, 1965, in accordance with the terms of her contract, as provided in *R. S.* 18:5–49.1, with all such rights as she would have enjoyed had she not been deprived of her employment.

ACTING COMMISSIONER OF EDUCATION.

August 22, 1966.

Affirmed by State Board of Education without written opinion, April 5, 1967.

XXXV

BOARD MAY NOT FILL VACANCY NOT OCCURRING DURING ITS OFFICIAL LIFE

HENRY S. CUMMINGS,

Petitioner,

v.

BOARD OF EDUCATION OF POMPTON LAKES, PASSAIC COUNTY, AND WILLIAM F. BROWN,

Respondents.

For the Petitioner, William DeLorenzo, Jr., Esq.

For the Respondents, Slingland, Bernstein & van Hartogh (George W. Slingland, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner moves for summary judgment on the single issue of respondent Board's legal authority to enter into a contract with its Superintendent of Schools under the circumstances prevailing herein. By agreement of the parties the question is submitted to the Commissioner on the pleadings and briefs of counsel.

The Pompton Lakes School District is organized under Chapter 7 of Title 18 of the Revised Statutes with a board of education of nine members elected by public referendum. The incumbent Superintendent of Schools was appointed originally under a contract providing for employment beginning July 1, 1963, and expiring June 29, 1966. The effect of such a period, one day short of three years, was to avoid the accrual of tenure, failing as it did to fulfill the statutory requirement of three consecutive calendar years of employment. *R. S.* 18:13–16. This original contract was not terminated at any time. However, on June 29, 1965, when the Superintendent had been employed for two years less one day and the contract still had one full year to run, the Education Committee, at a special meeting of the Board, recommended that:

> "* * * the present contract of Mr. William F. Brown to serve as Superintendent of Schools be renewed from June 29, 1966 to June 30, 1969, at an annual salary increase of 5%, thereby granting a salary of $18,900.00 for the first year of said term, and $19,845.00 for the second year of said term, and $20,837.00 for the third year of said term."

The Board accepted the recommendation of its Education Committee and voted on a resolution giving the Superintendent a new contract to run from the expiration one year thereafter of the existing agreement, June 29, 1966, to June 30, 1969, at the salaries recommended by its committee. The vote, according to the petition, was four in favor, two against, and one not voting.

Questions with respect to the validity of this action were raised subsequently on the grounds that such a purpose had not been included in the call of the meeting and that the resolution had failed to be approved by a majority of the whole number of members of the Board. On advice of counsel the Board reconsidered its action at its next meeting on July 13, 1965. The minutes of the meeting state:

"*Appointment of Superintendent of Schools:* In view of the nature of the publicity concerning the action taken at the Special Board of Education Meeting, held June 29, 1965, it is the desire of the Board to clarify the appointment of the Superintendent of Schools, and to ratify the action taken at the Special Meeting.

"THEREFORE:

"It is recommended that the present contract of Mr. William F. Brown to serve as Superintendent of Schools be renewed from June 29, 1966 to June 30, 1969, at an annual salary increase of 5%, thereby granting a salary of $18,900.00 for the first year of said term, and $19,845.00 for the second year of said term, and $20,837.00 for the third year of said term."

After discussion by members of the Board and of the public the resolution was approved by a vote of 6 to 1. Petitioner seeks to have this action declared invalid and set aside.

Petitioner argues that a board of education is a noncontinuous body and as such has no authority to award a contract which will begin after its own official life is ended and in the term of its successor board. He contends that a board cannot bind its successors except in ways expressly granted by statute, and that the power to appoint belongs to the board in office at the time the position becomes vacant. For these reasons, he says, the board of education which took office in February 1965 could not bind or usurp the authority of the board elected in February 1966 with respect to the future employment of the Superintendent, whose contract did not conclude until June 1966.

Respondent Board defends its action on the grounds that it was well satisfied with the work of the Superintendent and that it wanted to assure him that his employment would continue in order that he might not look elsewhere because of uncertainty with respect to his present position. Respondents rely on the statute, *R. S.* 18:7–70, which permits the employment of a superintendent of schools for a term of five years, for the authority to extend the contract with the Superintendent for an additional three years. Respondents argue that they could have avoided the existing contract by mutual consent and entered into a new one and the failure to do so was merely an irregular exercise of the basic power authorized by statute and not a fatal defect. Finally, respondents contend that petitioner is estopped by reason of his failure to contest the action before the filing of his amended appeal on January 2, 1966, six months after the event.

It is well established that a board of education is a noncontinuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute. *Skladzien* v. *Bayonne Board of Education*, 12 *N. J. Misc.* 603 (*Sup. Ct.* 1934), affirmed 115 *N. J. L.* 203 (*E. & A.* 1935); *Evans* v. *Gloucester City Board of Education*, 13 *N. J. Misc.* 506 (*Sup. Ct.* 1935), *affirmed* 116 *N. J. L.* 448 (*E. & A.* 1936) Such express authority is given to a board of education by *R. S.* 18:13–6 to employ personnel beyond its official life for the balance of the current school year in order that there may be no interruption of the school program in February when a new board comes into being, as follows:

"* * * any board of education may enter into contracts for the services of teachers and other employees and fix and determine their salaries for

the period from July first of any year for which such board shall have been organized, to June thirtieth of the succeeding year."

Thus it is clear that the employing authority of a board of education extends to but not beyond the end of the school year in which its term concludes.

A further specific exception is made with respect to the employment of a superintendent of schools. The pertinent excerpt of *R. S.* 18:7–70 provides:

"A board may * * * appoint a superintendent of schools by a majority vote of all of the members of the board, for a term not to exceed five years, and define his duties and fix his salary, whenever the necessity for such appointment shall have been agreed to in writing by the county superintendent of schools and approved by the commissioner and the State Board. No superintendent of schools shall be appointed except in the manner provided in this section."

The legislative history of this statute and others *in pari materia* illumine the questions herein. Prior to 1952 a differentiation was made between the chief administrative officer of Chapter 6 and Chapter 7 school districts. In setting up the public school system in 1903 the Legislature authorized Chapter 6 boards of education to appoint a superintendent (*Chap.* 1, *Laws* of 1903 (2*d Sp. Sess.*) § 50) and provided further that (1) such appointment must be by a majority vote of the whole number of members, (2) at such salary as the board might determine which could not be reduced thereafter, and (3) that the superintendent could be removed by a majority vote. *Chap.* 1, *Laws* of 1903 (2*d Sp. Sess.*) § 64. Chapter 7 districts, on the other hand, were authorized to appoint a suitable person as supervising principal of schools, to define his duties and fix his salary. *Chap.* 1, *Laws* of 1903 (2*d Sp. Sess.*) § 87

In 1909 the Legislature enacted the Teachers' Tenure Act (*R. S.* 18:13–16), and included in its protection all supervising principals. Thus the chief administrative officer in a Chapter 7 district acquired tenure but his counterpart in a Chapter 6 school system had no such protection. This situation led to the amendment of *R. S.* 18:6–37 by *Chapter* 272, *Laws* of 1931, which provided that the appointment of a superintendent could be for a term not to exceed five years and further, that any reappointment could be "for a term not to exceed five years, or without term to continue at the pleasure of the board." Under this amendment a superintendent could be insured of a five-year term but not the kind of permanent protection afforded a supervising principal by the Teachers' Tenure Act.

This situation continued until the enactment of *Chapter* 236, *Laws* of 1952. By that legislation amendments were made to *R. S.* 18:6–37, 18:7–70, and 18:13–16, which in effect (1) made all supervising principals superintendents of schools with the same powers and duties as those in Chapter 6 districts, and (2) included superintendents of schools in the positions protected by the Teachers' Tenure Act. By the enactment of this legislation the title of supervising principal was abolished and the distinctions between the chief school officer in a Chapter 6 and a Chapter 7 district disappeared.

The obvious intent of the Legislature in providing for the appointment of a superintendent for a five-year term was to make it possible for a board of education to attract a competent administrator by insuring that he would have adequate opportunity to demonstrate his capacity to lead the school

system. Although prior to 1952 he could not acquire permanent tenure, he could be guaranteed a term long enough to study the school system, to develop a program, and to demonstrate the competency of his leadership. In the period from 1931 to 1952 a superintendent might also be reappointed for successive five-year terms at the direction of the board.

Such a provision for extended reappointments became unnecessary with the enactment of the 1952 legislation. The authority to appoint a superintendent for a period not to exceed five years in order to attract suitable candidates was retained. But once the probationary period of employment required for the accrual of tenure is accomplished, no further reappointment is necessary or appropriate. The superintendent is then under a legislative status which needs no further action by the board for continuance and which, indeed, cannot be disturbed except for cause.

Applying the law to the facts in this case, the Commissioner finds no fault with the action of the 1963 Board which entered into an agreement with the Superintendent for initial employment for a period of three years less one day. Such an agreement was within the scope of the Board's authority under *R. S.* 18:7–70 even though its terms extended beyond the life of the initially employing Board and became binding on its successors. With the normal passage of time the contract would expire in June 1966 and the Board in office at that time, which had come into being in February 1966, would be empowered to decide whether to continue the Superintendent's employment. Any renewal of the employment by the Board would have accorded the Superintendent tenure and would have made further agreements unncessary. In this case, however, the 1965 Board intervened in June 1965 to "extend" the agreement which would not expire until another year had elapsed, for an additional three-year period. This action, petitioner contends, was invalid and the Commissioner agrees.

There was no necessity for the 1965 Board to act on this matter, and to do so usurped the prerogative of the 1966 Board. There was no vacancy to be filled in June 1965, and the Board then in power had no authority to reach forward beyond its own official life and into the term of its successor to make a decision not due until then. *Brown* v. *Meehan*, 45 *N. J. L.* 189 (*Sup. Ct.* 1883); *Fitch* v. *Smith*, 57 *N. J. L.* 526 (*Sup. Ct.* 1895); *Dickinson* v. *Jersey City*, 68 *N. J. L.* 99 (*Sup. Ct.* 1902)

The Commissioner agrees with respondents that the elements of bad faith present in *Cullum* v. *North Bergen Board of Education*, 15 *N. J.* 285 (1954), and in *Thomas* v. *Morris Township Board of Education*, 89 *N. J. Super.* 327 (*App. Div.* 1965), affirmed 46 *N. J.* 581 (1966), are not present here. He does not question the motivation of the Board of Education to quiet any uncertainty and retain the services of a Superintendent who had been carefully selected, had demonstrated his competence, and had inspired confidence in his leadership. But however meritorious its objectives may have been, respondent Board did not have the authority to perform the action herein contested, and it must therefore be set aside.

The Commissioner finds no merit in respondents' defense of estoppel which is based on the date of filing of petitioner's amended appeal. Petitioner's original appeal, which also contested the appointment of the Superintendent, was dated July 6, 1965, approximately one week after the original

action of respondents. The Commissioner finds no unreasonable delay which would act to bar this action.

The Commissioner finds and determines that the action of the Pompton Lakes Board of Education on July 13, 1965, extending the contract of employment of its Superintendent from June 29, 1966, to June 30, 1969, was beyond the scope of its authority and it is therefore a nullity and is set aside. The Commissioner notes that the original contract with the Superintendent expired on June 29, 1966, and that the Superintendent's status has been in suspension pending the outcome of this litigation. With the determination now made voiding the action of July 13, 1965, the present Board of Education is authorized to take whatever action it deems appropriate with respect to reappointment of the Superintendent.

ACTING COMMISSIONER OF EDUCATION.

August 29, 1966.

XXXVI

BOARD MEMBER ENTITLED TO PERSONNEL DATA NEEDED TO PERFORM OFFICIAL DUTIES

BARBARA WITCHEL,

Petitioner,

v.

PETER CANNICI, SUPERINTENDENT, AND THE BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,

Respondents.

For the Petitioner, H. Ronald Levine, Esq.

For the Respondents, Louis Marton, Jr., Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case is a member of the Board of Education of the City of Passaic. She complains that she has been improperly denied access to personnel records in the possession of the Superintendent of Schools, and seeks an order directing the Superintendent and the Board of Education to make such records available to her when requested.

The facts in this matter are submitted in a Stipulation of Facts. Oral argument on the question was heard on July 7, 1966, at the State Department of Education Building, Trenton, by the Assistant Director of the Division of Controversies and Disputes, who was directed by the Commissioner to hear this matter. The following report has been submitted by the hearing examiner:

The facts in this matter are stipulated by counsel to be as follows:

"1. On February 8, 1966, the petitioner was duly elected and qualified as a member of the Board of Education of the City of Passaic, a Chapter VII School District, and has continued her status as such to the present time.

"2. That Peter Cannici, a respondent, is presently serving as Superintendent of Schools of the respondent Board of Education.

"3. A written agenda is prepared by the staff prior to each regular meeting containing various items and matters for disposition. The February 14, 1966 agenda contained a recommendation by the Superintendent of Schools for the appointment of a named employee (Boverini) to the vacant position of Director-Principal of the Adult Evening School. The Board did not interview any candidates and this name was the only name proposed. The 1960 edition of the By-Laws of the Board contains the following provision:

'Whenever a permanent vacancy occurs in an administrative position, the Superintendent shall present for interview to the entire Board candidates properly certified and acceptable to him. It is desirable that the Superintendent should present three or more candidates for any administrative position.'

"4. A motion was made and carried to table said resolution for further study.

"5. On March 1, 1966, petitioner visited the Superintendent's office and requested Mr. Ginexi (executive Secretary to the Superintendent) for an opportunity to review the personnel files. In the absence of the Superintendent, Mr. Ginexi voluntarily opened the cabinet containing all the personnel records and prepared a work space in the office for petitioner.

"6. At the March 10th, 1966 meeting, petitioner made a request of the Board to review the Boverini file, upon which the Superintendent advised the Board that petitioner had already seen the file without his prior knowledge and permission. The Superintendent further stated that he would refuse to make the file available except at the direction of a majority of the Board, and that he considered the request a reflection on his integrity. Following this, the President of the Board directed its counsel to prepare a written legal opinion on the duties and privileges of board members and when they can be exercised, which supplemented her previous written request of March 2nd, 1966.

"7. The legal opinion was furnished to the members of the Board under date of March 14, 1966, a copy of which is attached to the Answer filed by Respondents. An executive committee meeting was called for during the course of the regular meeting on March 14, 1966, at which time petitioner again formally requested an opportunity to see the personnel file of the named employee. On this occasion, petitioner was permitted to see the cumulative record card of subject employee, but not the personnel file.

"8. At a committee of the whole meeting on April 6, 1966, petitioner asked the Superintendent if he would produce the file in question, and petitioner further alleges that he replied 'unless you are directed by the entire Board to look into the files, I will not let you into the files.' Respondent Cannici claims his response was 'unless I am directed by the entire Board to look into the files, I will not let you into the files.'

"9. On April 11, 1966, at an executive session prior to the regular meeting, petitioner requested the Board to vote to direct the Superintendent to produce the personnel records of Boverini. The Superintendent protested the motion, and stated his reasons for opposing the request of petitioner, but said he was willing to produce any information requested by petitioner. The Board voted 6 to 2 denying petitioner's request.

"10. On a number of occasions prior to April 11, 1966, the Superintendent represented to the Board that he was at all times ready, willing and prepared to produce any personnel file before an executive session of the Board, providing he was directed to do so by a majority of the said Board."

At the argument of the matter before the hearing examiner, counsel for petitioner originally took the position that a member of a board of education has a right of unlimited access to school records. It is petitioner's contention that since a board member has statutory responsibility with respect to the employment, transfer, promotion, and dismissal of school personnel, she must have access to any and all records which she needs to enable her properly to discharge her responsibility. Petitioner further argues that the determination of what information shall be made available to board members, and when, cannot be delegated to the Superintendent. As to respondent Board's denial of permission to petitioner to examine personnel records in possession of the Superintendent, petitioner contends that such action unlawfully puts a minority member of the Board at the mercy of the majority and prevents such a minority member from properly performing her duty.

Respondents deny any unlawful act, stating that their action was on advice of counsel to the effect that except when a board member is in a regularly convened meeting of the board, he has no authority to act as a board member, and that between meetings his status is no different from any other citizen of the community. Counsel also advised the Board that it has rule-making authority to direct the Superintendent to produce whatever information is desired by a member and disclose it in the presence of the entire Board.

The hearing examiner knows of no previous decision of the Commissioner or of the courts of this State which precisely reaches the question here. In two cases, both decided in 1912, and both brought by Wilson Taylor to set aside certain resolutions of the Board of Education of Hoboken, 1938 *S. L. D.* 54, 55, the Commissioner held that a board of education cannot confer upon a committee of the board its power to act, and that "all business must be transacted in open meetings of the Board, regularly called." (Page 55) Official action can be taken only at meetings open to the public. "An official action is a determination made by vote." *Wolf* v. *Zoning Board of Adjustment of Park Ridge*, 79 *N. J. Super.* 546, 552 (*App. Div.* 1963) See also *Shults* v. *Board of Education of Teaneck*, 86 *N. J. Super.* 29, 46 (*App. Div.* 1964). In *Nixon* v. *Board of Education of Pleasantville*, 1938, *S. L. D.* 56, the Commissioner held that a board of education cannot confer upon its superintendent a power imposed by statute upon the board. Thus, while board members cannot perform official acts except in a public board meeting, nor can the board delegate its discretionary powers, no suitable argument was advanced by respondents to show that board members may not perform functions appropriate to their office between meetings of the board. Attention was called to the accepted practices of conducting personnel interviews, meeting in committees and executive sessions and carrying out other responsibilities between meetings which most boards find necessary to the efficient discharge of their duties. In other words, while a board member has no authority to act as an individual, he has prerogatives and responsibilities which give him a status different from that of other citizens of the community. The hearing examiner finds no essential dispute over such a conclusion in the instant matter. (Tr. 22, 23)

There remains, then, the question of what limits if any exist upon the exercise of such responsibilities and prerogatives. It is conceded by petitioner's counsel that a board member's access to board records under the superintendent's control should be subject to reasonable limitation as to time, but not as to purpose. (Tr. 26-27) It is the conclusion of the hearing examiner that access between meetings to personnel records of the Board of Education in the custody and control of the Superintendent when such records relate to the Superintendent's recommendation or proposal of a candidate for employment, promotion, transfer, or dismissal, is essential to the exercise of petitioner's responsibilities and duties. Such access should be available during regular office hours, and not subject to the judgment of either the Superintendent or the majority of the Board as to the validity of the purpose thereof, and the hearing examiner so recommends.

* * * * * * *

The Commissioner has reviewed and considered the report of the hearing examiner in this matter and accepts the finding and conclusions expressed therein.

The Commissioner observes in this case an unfortunate breakdown in relationships among Board members and between a part of the Board and the Superintendent. The Commissioner here reaffirms his belief that the superintendent's participation in the screening and recommendation of professional personnel for appointment and promotion is indispensable for the proper and effective administration of a New Jersey school system. *Valente* v. *Board of Education of Bayonne*, 1950-51 *S. L. D.* 57, 60; see also *Carr* v. *Board of Education of Bayonne*, 1938 *S. L. D.* 276, reversed State Board of Education 279, 281. However, such participation cannot be proper and effective when some members of the board of education, whether by action of the superintendent or by the vote of the majority of the board, cannot have such full and complete access to personnel records as will enable them to make independent decisions.

The Commissioner finds and determines that, notwithstanding that such action was upon opinion of counsel, respondents herein improperly denied petitioner access to personnel records of the Board to which, as a member of the Board of Education, she is entitled. He directs that petitioner be given the right to examine any and all personnel records prepared or maintained for the Board of Education by its officers or employees, during regular business hours, when such records relate to an applicant or employee recommended or proposed for employment, promotion, transfer, or dismissal, as the case may be.

ACTING COMMISSIONER OF EDUCATION.

August 29, 1966.

XXXVII

PARENT NOT ENTITLED TO REIMBURSEMENT FOR TUITION WHEN CHANGE OF DESIGNATION HAS BEEN AUTHORIZED

MAGDALENE LICHTENBERGER,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,

Respondent.

For the Petitioner, Francis J. Feeley, Esq.

For the Respondent, G. Tapley Taylor, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is a parent who appeals from an action of respondent denying her request that a change of designation of high school be approved for her daughter. She contends that her request is grounded on good and sufficient reasons and prays that the Commissioner set aside respondent's refusal to apply for such a change. Respondent replies that it is under contract to send its high school pupils to Bogota High School, that it finds insufficient basis for the change, and that its refusal was a proper exercise of its discretionary authority.

Testimony was heard and exhibits received by the Assistant Commissioner in charge of the Division of Controversies and Disputes, at a hearing at the Bergen County Court House, Hackensack, on April 12, 1966.

Children in the Maywood school district attend local schools through the ninth grade, after which they are sent and tuition is paid for them to a senior high school in a nearby district. In June 1955, respondent entered into an agreement (Exhibit R-2) with the Bogota Board of Education, pursuant to *R. S.* 18:14–7.3, to send its pupils to Bogota High School for the next ten years. That contract terminates at the completion of the 1965-66 school year. Beginning September 1966, pupils completing the ninth grade in Maywood will attend Hackensack High School under a new agreement entered into with with the approval of the Commissioner of Education.

Petitioner's daughter finished the ninth grade in Maywood in June 1965. Instead of enrolling in Bogota High School she applied for admission to Hackensack High School and began attendance there in September 1965. On October 11, petitioner addressed a letter to respondent (Exhibit R-1) asking that a change of designation from Bogota High School to Hackensack High School be made for her daughter. The reason given for the request was that her daughter wished to pursue a course in German which was not offered in the Bogota High School curriculum. At its meeting on November 8, 1965, respondent acted to deny petitioner's request and so informed her. From this action petitioner appeals.

Petitioner says that her daughter's reason for wanting to study German is that she plans to go on "in medicine or in engineering or something of that

sort." (Tr. 3) The German language is spoken also to some extent in her home. Petitioner admitted that she was motivated also by her belief that the "standing" of Bogota "is not up to the quality that Hackensack has." (Tr. 7) It appears also from the testimony that petitioner's financial position changed adversely soon after she placed the girl in Hackensack. Her appeal rests, however, on her daughter's lack of opportunity to study German in Bogota High School and she asserts her right under such circumstances to go to a school which offers the desired course of study.

In reply, respondent says that desire for a course in German is not sufficient reason to seek a change of designation. A proper request should rest on the need for a broad course of study such as for college preparation, for vocational training, etc., and not upon a single subject offering, in its opinion. Respondent says further that it is bound by its contract with Bogota to send all of its secondary pupils there and the concession which petitioner seeks would not constitute a proper modification of that agreement.

Several statutes bear upon this question. The relevant portions, which must be read *in pari materia*, are as follows:

> *R. S.* 18:14–6: "Any child who shall be a resident of a district which does not furnish a full high school course of study or course including the subjects such child may desire to pursue and who shall have completed the elementary course of study provided therein may be admitted to a school in another district."
>
> *R. S.* 18: 14–7: "* * * No designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior 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 unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner * * *."
>
> *R. S.* 18:14–7.3: "Whenever a board of education, now or hereafter furnishing high school education for the pupils of another school district pursuant to section 18:14–7 of the Revised Statutes, finds it necessary to provide additional facilities for the furnishing of education to high school pupils, it may, as a condition precedent to the provision of such additional facilities, enter into an agreement with the board of education of such other district for a term not exceeding ten years whereby it agrees to provide such education to the pupils of such other district during the term of such agreement, in consideration of the agreement by the board of education of such other district that it will not withdraw its pupils and provide high school facilities for them in its own district during the term of said agreement, except as provided in this act."

Respondent's contention that its contract with Bogota precludes an application for a change of designation cannot be supported. Such a contract does not act as an irremovable bar to a valid request based on sound educational considerations. The instant matter is significantly distinguishable from the case of *In The Matter of the Termination or Modification of the Sending-Receiving Relationship Between the Boards of Education of Chatham Township and Chatham Borough*, 1961-62 *S. L. D.* 144, cited by respondent. In

that case the Commissioner found no authority for major modification of a contract entered into pursuant to *R. S.* 18:14–7.3, *supra*. An exception with respect to one pupil based on sound reasons is not a major alteration of the contract such as that asked for in the *Chatham* matter. An agreement which would automatically inhibit a proper adjustment of individual pupil needs would be inconsistent with the purpose of *R. S.* 18:14–6, *supra*.

Having found that respondent could have applied for the change of designation sought by petitioner, the issue is whether respondent acted properly in refusing petitioner's request.

The Commissioner finds no fault with respondent's action. He concurs in respondent's judgment that there was insufficient justification for a change of high schools. Bogota High School is fully accredited and its curriculum provides entirely adequate preparation for college entrance. Despite the absence of classes in German in the Bogota High School curriculum, petitioner's daughter could have received adequate preparation there for higher education leading to scientific vocations. Some knowledge of two foreign languages is considered desirable in such pursuits and it is not uncommon for pupils to study one language in high school and a second in college. Petitioner's study of German could have waited on her college years with no loss or hazard to the achievement of her goals. It is manifestly impossible for each secondary school to include in its curriculum every subject of instruction which some parent might wish his child to pursue. In any case the Commissioner finds no compelling necessity for petitioner's daughter to have opportunity for the study of German in her high school curriculum and finds nothing arbitrary in respondent's refusal of her request.

Petitioner contends that *R. S.* 18:14–6, *supra*, establishes her daughter's right to go to another high school at public expense when the one to which she is assigned does not offer studies which she desires to pursue. The Commissioner does not construe this statute so broadly. He notes that it was enacted in 1903 as part of the whole body of school law which established the existing public school system. At that time most school systems did not maintain secondary schools and this statute authorized such districts to continue the education of pupils who had finished the elementary grades in a high school outside the district. Furthermore, even districts which operated high schools did not always maintain a comprehensive curriculum. Preparation for college was common but pre-vocational curriculums were often lacking. In order that pupils might not be restricted to a narrow choice of curriculum unsuited to their educational objectives, the Legislature authorized boards of education, even those operating high schools, to send individual pupils outside of the district to schools where their broad educational interests would be better served. Such interests have been construed to be furthered by full curriculums or broad courses of study. The presence or absence of a single subject matter area has never been considered to be of sufficient importance to a pupil's educational welfare to require a change of school, and in the judgment of the Commissioner the statute cannot be construed to so hold.

The issue herein is in all significant respects analogous to the case of *Boorstein* v. *Fort Lee Board of Education*, 1957-58 *S. L. D.* 50, in which the parent wanted a change of designation in order that his daughter might pur-

sue a course in French. The Commissioner reiterates herein his statement in that case at page 52 as follows:

> "* * * The local Board of Education, in refusing to grant the request of petitioner, did not abuse its discretionary powers under the statute or act with bias or prejudice, and, in the absence of bias, prejudice or the abuse of discretionary powers, the Commissioner will not interfere with the decisions of local boards of education. *Christopher C. Fiell et al* v. *Union Township Board of Education,* 1938 *S. L. D.* 751"

Petitioner's prayer for reimbursement of costs of tuition and transportation to Hackensack High School for the year 1965-66 is therefore denied.

The Commissioner notes that because of overcrowding, Bogota has not wished to continue receiving pupils from Maywood, that a change of designation has been approved, and that beginning in September 1966 all ninth grade pupils from Maywood will attend Hackensack High School. Petitioner's daughter is not affected by this change, however, because she will be in the tenth grade which is still assigned to Bogota. However that may be, the Commissioner will grant approval of a change of designation beginning September 1966, for the assignment by respondent of petitioner's daughter to the Hackensack High School. This decision is governed by the doctrine of equitable principles enunciated by the Court in *Evaul* v. *Camden City Board of Education,* 35 *N. J.* 244 (1961). While not an insuperable obstacle to a pupil's educational progress, any transfer to a new school is unsettling, and unnecessary reassignments should be avoided. In this case, petitioner's daughter has attended Hackensack High School for a year and has made an excellent record there. Because of overcrowded conditions, Bogota High School is unable to continue receiving Maywood pupils and has voluntarily released all of respondent's new high school students to Hackensack. Under these circumstances, the Commissioner finds that no valid purpose would be served, and the pupil herein would suffer an unnecessary transfer if she were forced to change schools. He concludes, therefore, that the best interests of all parties will be served and justice best accomplished by the application of equitable principles to this specific case by permitting petitioner's daughter to continue her education in Hackensack High School at public expense.

The Commissioner finds and determines (1) that respondent's action denying petitioner's request for the assignment of her daughter to Hackensack High School at public expense was a proper exercise of its discretionary authority, (2) that the costs of tuition and transportation for the 1965-66 school year were incurred by petitioner at her own peril and she is not entitled to reimbursement therefor by respondent, and (3) that under the doctrine of equitable principles applied and restricted to the peculiar circumstances of this case, the attendance of petitioner's daughter at Hackensack High School at the expense of respondent beginning with the 1966-67 school year is authorized and approved.

ACTING COMMISSIONER OF EDUCATION.

September 26, 1966.

Pending before State Board of Education.

XXXVIII

SECRETARY MAY BE TRANSFERRED TO ANOTHER POSITION WITHOUT VIOLATION OF TENURE RIGHTS

MARY A. FEGEN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN AND RALPH W. OSBORNE, SUPERINTENDENT, BERGEN COUNTY,

Respondents.

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Maurice D. Emont, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is a secretary under tenure of employment in the Fair Lawn school system who appeals from an action transferring her from the office of the Superintendent to a position in the junior high school. The essential facts are stipulated and the matter is submitted for the Commissioner's adjudication on the pleadings and briefs of counsel.

Petitioner began her employment in respondent Board's school system on May 15, 1955, as a secretary in the Superintendent's office. There was no interruption in her employment and in due course of time she acquired tenure. After several intervening promotions, she was made secretary to the Superintendent of Schools at a salary of $4,275 beginning November 1, 1959, and she continued in that position until July 9, 1964. On that date the Board of Education held a special meeting at which it received a report from the Superintendent (Exhibit R-1) which states in part:

"Report of the Superintendent of Schools for Special Meeting of July 9, 1964

"Ladies and Gentlemen:

"A. The following items are brought to the attention of the Board of Education for action:

* * * * *

"6. *Transfer of Secretarial Personnel*

That Mrs. Mary Ann Fegen, Executive Secretary (Grade A-6) Administrative Offices, be transferred to assume the duties of the Head Secretary—Thomas Jefferson Junior High School, with no change in her present classification or salary, effective July 13, 1964."

The Board approved and adopted the Superintendent's recommendation by resolution. Some eight months later, on March 15, 1965, the Board approved the appointment of another person to the position formerly held by petitioner in the Superintendent's office retroactive to January 1, 1965. Thereafter, on March 30, 1965, petitioner filed this appeal.

On February 17, 1964, prior to its action transferring petitioner, the Board adopted a resolution approving a salary schedule for "Administrative Office and School Secretarial and Clerical Personnel" for the 1964-65 school year. (Petitioner's Exhibit A) The salary range for the position of Executive Secretary A-6 on this schedule was $4,400 to $6,120 with increments of $215. Head Secretary-Junior High School, S-5, was listed at $3,800 to $5,360, with increments of $195.

Petitioner's appeal is grounded on two contentions. The first is that her transfer was invalid because the procedure to accomplish it was illegal. She says that the Board of Education lacks the authority to transfer clerical personnel in the Superintendent's office and that such power resides exclusively in the Superintendent. The fact that the Board's action was taken on the recommendation and at the request of the Superintendent does not cure the defect, in her opinion.

Petitioner's second contention is that regardless of the mechanics employed, the transfer was a demotion which is violative of her tenure rights. In its adopted salary schedule (Petitioner's Exhibit A) respondent Board established different gradations of clerical personnel, she argues, and the position to which she was transferred is in a lower classification, with less important duties, and at a lower salary range and increments. Even though the transfer was without change of classification or salary, petitioner contends that she has suffered injury which amounts to a demotion. She points out that her potential maximum salary is now less as are also her annual increments, that she has less important and responsible duties to perform, that such downgrading is humiliating to her, and amounts in fact to a change of classification and demotion which violates not only the spirit and intent of the tenure law but also the Board's own salary schedule. If such a transfer can be sustained, what is to prevent subsequent actions which could reduce her, or other secretarial employees, to the lowest classification of clerk-stenographer, she asks, and thereby nullify their tenure protection.

Respondent Board denies any infirmity in its procedure to transfer petitioner or the violation of any of her tenure rights. It says that all school employees, including clerical personnel, are under the general jurisdiction and control of the Board of Education. It admits the special power accorded to the superintendent by statute to appoint and remove clerks in his office but recognizes no invasion of that authority by reason of its action to effect a transfer recommended by the Superintendent. It maintains that petitioner's assignment was to a secretarial position performing the same or equivalent duties to those required in her former post, that her classification and salary were protected, and that her tenure as a secretary was recognized and respected.

Respondents argue further that petitioner is barred by laches from bringing this appeal. They assert that petitioner took no action to assert her alleged rights from July 13, 1964, until a third party was appointed to her former position in March 1965. Respondents claim that the Superintendent relied upon this eight months' inaction of petitioner in filling her former position and she is, therefore, now barred from bringing this action.

The tenure statute relevant to this appeal is *R. S.* 18:7–56, the pertinent portion of which reads:

> "All persons holding any secretarial or clerical position under any board of education, or under any officer thereof, in the school system in this State, shall enjoy tenure of office or position during good behavior and efficiency, after the expiration of a period of employment of 3 consecutive calendar years in that district * * *. No such employee shall be dismissed or subjected to reduction in salary except for inefficiency, incapacity, unbecoming conduct or other just cause * * *."

Express authority is given to the superintendent of schools with respect to employees in his office by *R. S.* 18:6–38, the pertinent excerpt of which is as follows:

> "* * * He [the Superintendent] may appoint and, subject to the provisions of section 18:6–27 of this Title, may remove clerks in his office, but the number and salaries of such clerks shall be determined by the board."

The Commissioner finds no merit in petitioner's first contention that the Board of Education invaded the authority of the Superintendent when it acted to transfer her. While the superintendent has certain statutory powers with respect to clerical personnel in his office, such persons are employees of the board of education, paid by the board of education, maintained on its records and subject to its rules and regulations. The board decides how many such employees the superintendent's office may have and what they are to be paid. It is then the exclusive prerogative of the superintendent to appoint the individual to fill those positions. This privilege cannot be usurped. In the normal operation of business, however, it would follow that once the superintendent had appointed or made known his choice of candidates, the board would take appropriate action to put in motion the details necessary to employment. The procedure would operate similarly in reverse. In this case the Superintendent, for reasons not disclosed, wanted petitioner removed from his office and placed in another position and he so recommended to the employer. The Board acted to carry out the request of the Superintendent and executed the transfer he recommended.

The Commissioner finds no invasion of the Superintendent's authority herein. Certainly the Board could not and did not reach into the Superintendent's office to remove or transfer one of its employees assigned there. In this case the Superintendent acted as he had the discretionary power to do—to remove a secretary in his office by requesting her employer to put in motion the machinery necessary to transfer her to another position in the school system. The Board's resolution did nothing more than implement the Superintendent's purpose and can in no wise be construed as an assumption of his prerogatives.

The second question is whether the transfer violated petitioner's tenure rights. Petitioner does not question the Board's right to assign and transfer teachers and other employees nor does she argue with the firmly established principle that "a transfer is not a demotion." *Lascari* v. *Lodi*, 36 *N. J. Super.* 426 (*App. Div.* 1955) Her contention is that her reassignment was not a transfer in the proper sense of that term but a demotion in that she was placed in a classification of less importance, lower salary increment, and lower maximum salary. She cites the decision of the State Board of Education in

Davis v. *Overpeck Township Board of Education,* 1938 *S. L. D.* 464, affirmed State Board of Education 466, and of the Commissioner of Education in *Williams* v. *Madison Board of Education,* 1938 *S. L. D.* 552, in support of her argument.

In the Commissioner's judgment, these two precedents are distinguishable from the subject case. In *Davis,* the principal of a high school was transferred to an eighth grade teaching position at the same salary. The record reveals that the Board's intention had been to dispense with his services entirely until it discovered that he was protected by tenure, whereupon it transferred him to a teaching position. The State Board found that the Board's purpose was to dismiss the principal without preferring charges and that the transfer was an attempt to evade the statutes. In such case the transfer was in effect a dismissal and it was set aside. Similarly in *Williams, supra,* the Board of Education asked the music supervisor to resign and when she refused, transferred her to a teaching position. Here again the State Board refused to uphold a transfer which was tantamount to a dismissal, obviously intended to degrade and to force a resignation.

The Commissioner finds no such element of evasion, attempted dismissal, or demotion herein. There is no indication that petitioner's work was unsatisfactory, that the transfer was intended to encourage her resignation, or that her dismissal was sought. The record is devoid of any inference that the transfer was motivated by any improper purpose.

Nor does the Commissioner regard the transfer herein as a demotion. Petitioner occupied the second highest secretarial position in the Superintendent's office and was moved to the top position in the junior high school. There would be, of course, some difference in duties and tasks performed, but the competencies demanded and responsibilities carried are similar. The transfer of a teacher from an upper to a lower grade, from junior high school to elementary school, or from senior high school to junior high school has been held valid. *Cheesman* v. *Gloucester City Board of Education,* 1 *N. J. Misc.* 318 (*Sup. Ct.,* 1923) ; *Tinsley* v. *Lodi Board of Education,* 1938 *S. L. D.* 505, affirmed State Board of Education 508; *Greenway* v. *Camden City Board of Education,* 1939-49 *S. L. D.* 151, affirmed State Board of Education 155, 129 *N. J. L.* 46 (*Sup. Ct.* 1942), 129 *N. J. L.* 461 (*E. & A.* 1943) In the same way as teachers are moved within the general category of teacher from one grade to another, petitioner was transferred within the general classification of secretary from one assignment to another without loss of salary. Such a reassignment is not a demotion.

The superintendent of schools occupies a peculiarly sensitive position in the school system and in the community. To discharge his weighty responsibilities most effectively he must be able to have closest to him, persons in whom he has confidence. It was for this purpose that the Legislature enacted laws authorizing the superintendent to appoint and remove clerks in his office (*R. S.* 18:6–38) and to nominate assistant superintendents. *R. S.* 18:6–40 The superintendent must be in a position to transfer secretarial and clerical employees in and out of his office as the needs and best interests of the schools demand. In making such assignments and reassignments, the rights of the individual must be considered, but if those rights are maintained and the action rests in an exercise of sound discretion, it is not subject to challenge.

Petitioner says also that her potential salary maximum and annual increments are lower in the new assignment and that this constitutes a demotion and reduction in salary. It is not clear whether this assertion is factually correct or is an assumption indulged in by petitioner. Respondent Board's resolution (Exhibit R-1) calls for petitioner's transfer "with no change in her *present classification* or salary." (Emphasis added.) However that may be, there is no merit to this contention. Boards of education are not required to adopt salary schedules for clerical employees, and each new board may repeal or modify such a schedule enacted by its predecessor. Nor does a failure to receive an increase in salary constitute a reduction. *Greenway* v. *Camden City Board of Education, supra* The attainment of tenure is not a contractual status incapable of modification. *Phelps* v. *Board of Education of West New York,* 115 *N. J. L.* 310 (*Sup. Ct.* 1935), affirmed 116 *N. J. L.* 412 (*E. & A.* 1936), 300 *U. S.* 319 (*Sup. Ct.* 1936) It cannot be successfully argued that respondent is limited in the exercise of its discretion by its salary schedule and that therefore, petitioner could only be transferred to a new position at the lower classification and rate for that assignment. Respondent can amend its own rules in favor of petitioner as was done in this case.

Respondent altered its salary policy to insure that petitioner would suffer no injury as a result of the transfer. It is specious to argue that the transfer was invalid because to accomplish it respondent had to alter its policy in petitioner's favor.

Having reached a conclusion on other grounds, the Commissioner finds no need to deal with the defense of laches asserted by respondents.

The Commissioner finds and determines that respondents' action to transfer petitioner from an assignment as secretary in the office of the Superintendent of Schools to one as secretary in the junior high school upon the recommendation of the Superintendent was a proper and valid exercise of its discretionary authority. The Commissioner finds further that petitioner suffered no demotion, reduction of salary, or loss of tenure or other rights by reason of her reassignment.

The petition is therefore dismissed.

ACTING COMMISSIONER OF EDUCATION.

September 26, 1966.

XXXIX

RESIGNATION MAY BE WITHDRAWN IF CONDITION OF ACCEPTANCE IS NOT FULFILLED

CHARLES R. THOMPSON,

Petitioner,

v.

BOARD OF EDUCATION OF MADISON TOWNSHIP, MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Charles R. Thompson, *Pro Se*

For the Respondent, Wilentz, Goldman & Spitzer (Alfred J. Hill, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner appeals to the Commissioner to restore him to a seat on the Madison Township Board of Education from which office he alleges he was unlawfully ousted and replaced by means of an appointment which respondent lacked the power to make. Respondent denies that its action to replace petitioner was in any way improper. A hearing of the matter by the Assistant Commissioner in charge of Controversies and Disputes, at the Middlesex County Court House, New Brunswick, on May 10, 1966, discolsed little dispute with respect to the facts.

At a regular meeting of respondent Board of Education on December 9, 1965, the following communication was received from petitioner:

> "Dear Members: Due to matters beyond my control, it will be necessary for me to relinquish my position on the Board of Education immediately prior to the seating of the new Board of Education at the re-organization meeting in February 1966.
>
> "I am notifying the Board at this time so that the electorate may fill the vacancy for the remaining one year term at the February 1966 election.
>
> Your fellow member, Charles R. Thompson."

Before the letter was acted upon, the Secretary to the Board and its counsel telephoned petitioner, informed him of the Board's discussion and questions and asked if he would consider changing the effective time of his resignation from just prior to the organization meeting of the next Board to a date before December 30, the last day to file nominating petitions for election to seats on the Board. Petitioner declined to make any change. After receiving this report, the Board acted to accept petitioner's communication as a letter of resignation. It also directed its attorney to inquire into the procedure to be followed to fill the vacancy.

Counsel for respondent subsequently made inquiry to the State Department of Education as directed and to others, and submitted his opinion in writing (Exhibit R-1) at respondent's next regular meeting on January 13, 1966, advising as follows:

"It is my opinion * * * that a vacancy does not exist until the Board member actually steps down. In this case, that point in time must be immediately prior to the reorganization meeting.

"* * * Since there is now existing no vacancy, it is my opinion that the seat of Mr. Thompson cannot be filled until such time as the actual vacancy occurs."

Respondent accepted the opinion of its counsel and made no arrangements to have the prospective vacancy filled at the forthcoming annual school election.

As a result of respondent's failure to announce a vacancy to be filled by a vote of the electorate, petitioner sent the following letter (Exhibit R-2) dated January 27, 1966, to respondent:

"Reference is made to a letter I directed to the Board of Education on 9 December 1965 stating my intention to resign immediately prior to the seating of the new Board of Education at the Reorganization Meeting and further stating that I was informing the Board of my intention to resign so that the electorate would have the opportunity to fill the one-year term at the coming election.

"The attorney for the Board, Mr. Albert Hill, and the Board Secretary, Mr. William Collinson contacted me on behalf of the Board the same evening. They asked for a clarification of my position and also requested that I might prepare a resignation which would call for the vacating of the position prior to the filing date for petitions. I told them that I had no intention of filing a resignation that would allow either the present Board or a subsequent Board to fill the seat by appointment. I further assured Mr. Hill that the resignation was presented in good faith and that I would vacate the seat as stated 'immediately prior to the reorganization meeting'. All of this contingent upon the filling of the seat by the electorate.

"As you are well aware, the board has not advertised the position and has not received petitions whereby the one year term may be filled by the electorate. Therefore, the undersigned, in accordance with his statements to Mr. Hill and Mr. Collinson, has no intention of relinquishing his post and thereby make it available to any appointee that the remainder of the Board might see fit to designate.

"In view of the foregoing, I feel that it is incumbent upon me to make my position crystal clear to both the present members of the Board and to members who will assume office in February, as follows:

"1. I concur in the Attorney's opinion both with respect to his designation of my communication as a letter of intent and to his opinion that no vacancy exists.

"2. I have no intention of filing a letter of resignation which will permit the appointment of an individual to fill a resulting vacancy.

"3. I will resist the effort or attempt by any Board member or group of Board members to deprive me of my elected position. Any such action will be followed by appropriate legal action and claims for redress that I consider appropriate and necessary."

This letter was referred to counsel who advised the Board at a meeting on February 10, 1966, (1) that petitioner's letter of December 9, 1965, was "an absolute resignation to be effective in the future and that it was not a con-

ditional resignation," (2) that the resignation having been accepted, the Board could not now be compelled to withdraw it, and (3) that the Board could expect and compel petitioner to surrender his seat immediately prior to the reorganization meeting. Respondent accepted counsel's opinion and acted to reject petitioner's rescission of resignation. Petitioner then filed this appeal to the Commissioner.

When petitioner appeared and took his seat at the organization meeting of the new Board of Education on February 14, 1966, a motion was adopted asking him to leave because his resignation had been accepted and was now effective. Petitioner acceded. Subsequently, on April 14, 1966, respondent appointed William Staples to fill the seat formerly occupied by petitioner.

Petitioner says that he submitted a letter of resignation on December 9, 1965, setting a specific time, just prior to the organization of the next Board, when it would become effective. Respondent accepted it as a *bona fide* resignation and therefore, petitioner contends, it should have declared and advertised a vacancy and provided for the election of a citizen at the forthcoming annual school election to serve the balance of petitioner's term. Having failed to submit petitioner's vacant seat to the electorate, petitioner contends respondent was compelled to accept petitioner's withdrawal of resignation on January 27, 1966, and he is, therefore, entitled to continue in his elected office. It is petitioner's position that respondent "cannot have it both ways," *i.e.*, it could not accept his letter of December 9 as an effective resignation and at the same time take the position that no vacancy existed which the electorate could fill.

Respondent says that petitioner submitted a resignation on December 9 and when respondent accepted it as such it became a finality which could not be withdrawn. It maintains that the vacancy did not exist until the effective date of the resignation and it could not, therefore, provide for an election of a member to a seat which was not yet vacant. When the effective date of the resignation arrived, it declared the seat vacant and filled it by appointment pursuant to *R. S.* 18:7–55.

Vacancies which occur on boards of education organized under Chapter 7 of Title 18 by reason of a resignation may be filled by appointment of a qualified person. Such an appointee serves only until the electorate can act with respect to that seat at the next annual school election. *R. S.* 18:7–55 The statutes provide for the election not only of persons to the full term of three years but also for balloting for members to complete unexpired terms. *R. S.* 18:7–29.3, 18:7–30, 18:7–31

In this case, petitioner submitted a letter of resignation on December 9 to become effective on February 14. The annual school election was held on February 8. Respondent accepted the resignation but reserved action to fill the vacancy until after its actual occurrence on February 14. In this the Commissioner believes respondent erred.

The Commissioner finds no infirmity in respondent's assertion that a vacancy does not exist until the time arrives when the incumbent member steps down. He sees no difference, however, between the vacancy created by petitioner's resignation and the three others occurring at the same time by reason of expiring terms. The fact of these three vacancies was made known to the electorate by the notices required by statute, nominating petitions were filed by candidates for the three seats and their names appeared on the ballot. The incumbent three members, however, retained their seats pursuant

to statute (*R. S.* 18:7–53) until the organization meeting of the new Board. At that point they began a new term if re-elected or were replaced by their successors. The fact that their seats were not vacant at the time of the school election and did not become vacant until they actually stepped down upon the organization of the new Board had no effect upon the duty of the Board of Education to provide for the election of persons to the three seats which were to become vacant.

Respondent could have and should have acted similarly with respect to petitioner's seat. Knowledge of his resignation was received in ample time to make the fact known to the voters and to any candidate who aspired to submit a nominating petition and seek election for the unexpired term. Petitioner's seat would inevitably have become vacant at the same time as the other members whose terms were completed. Respondent had accepted petitioner's communication of December 9, not as a letter of intent to resign but as a definite resignation and petitioner concurred. Once accepted as such by respondent it became final and complete and beyond petitioner's power to rescind. There could be no doubt that a vacancy for an unexpired term occurred by reason of petitioner's resignation at the same time as the three other vacancies which only the electorate had the power to fill. In the Commissoiner's judgment respondent erred in failing to submit the choice of petitioner's successor to the electorate. The Commissioner holds that the voters should be afforded the opportunity to fill vacant seats on boards of education whenever possible.

The Commissioner concludes that petitioner is entitled to be reinstated in the seat to which he was elected. There was here no failure to elect which would empower the county superintendent to fill the vacancy. There was a failure of opportunity to elect. Respondent purported to accept petitioner's letter as a resignation but its subsequent actions were not consistent with that determination. Respondent had two alternatives: (1) to accept the resignation and provide for the election of a person to fill the vacancy, or (2) to consider the letter as a notice of intent to resign requiring a subsequent definitive action by petitioner in order to establish the certainty of a vacancy. In this case its actions were consistent with the second alternative. A notice of intent, however, may be withdrawn before made final. *Belles* v. *Wayne Twp. Board of Education*, 1938 *S. L. D.* 556; *Austin* v. *Mahwah Board of Education*, 1954-55 *S. L. D.* 98 Petitioner attempted to rescind his letter but was not permitted to do so. Under the circumstances the Commissioner holds that petitioner's letter of January 27 effectively withdrew his former notice and there was then no resignation and no vacancy.

The Commissioner finds and determines for the reasons expressed herein, (1) that Charles R. Thompson is a duly elected member of the Board of Education of the Township of Madison, (2) that he was entitled to withdraw his letter of resignation as a consequence of respondent's failure to submit the vacancy thus created to the electorate, and (3) that petitioner is entitled to continue in his seat on the Board of Education of Madison Township until the expiration of the term for which he was last elected.

ACTING COMMISSIONER OF EDUCATION.

September 28, 1966.

Dismissed by State Board of Education without written opinion, April 5, 1967.

XL

BOARD MEMBER MAY NOT BE REMOVED FOR ABSENCE FROM MEETINGS WITHOUT FAIR HEARING

CHARLES H. VAN NUTT,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROCHELLE PARK AND HENRY J. ROES, SECRETARY, BERGEN COUNTY,

Respondents.

For the Petitioner, Wittman, Anzalone & Bernstein (Walter T. Wittman, Esq., of Counsel)

For the Respondents, *Pro Se*

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case contends that he has been illegally deprived of his seat on the Rochelle Park Board of Education and he prays that he be reinstated. Respondent says that its action to remove petitioner from membership on the Board was in accordance with law and was in all ways proper.

The issues in this matter were framed at a conference of both parties on May 12 at which it was agreed that either litigant could move for judgment on the pleadings. Petitioner so moved on June 6, 1966, and both sides filed briefs. The Commissioner's decision herein is based on the uncontested facts set forth in the pleadings.

Petitioner was first elected to a seat in the Board of Education at the annual school election in February 1961 and was re-elected to a second full three-year term in February 1964. He failed to attend the regular meetings of the Board on October 25, November 22, and December 27, 1965.

The following excerpt from the minutes of the December meeting is relevant:

"RESOLVED: #190

that the Rochelle Park Board of Education accept the resignation of Charles Van Nutt for his failure to adhere to the oath taken by him upon accepting his duties as a member of the Rochelle Park Board of Education. He has failed to attend the last three public Board meetings held on October 25, 1965, November 22, 1965 and December 27, 1965. As per New Jersey Statutes 18:7–13 and 18:6–11, he has consistently failed to attend Caucus Meetings and has not interested himself in any manner with the budget preparations for the school year 1966-67.

"Mr. Burgos asked if Mr. Van Nutt should not be notified and given an opportunity to explain his reasons for his absences before the Board took formal action on this proposed resolution. Mr. Anderer would not withdraw his resolution and the Secretary was instructed to poll the Board on the resolution as presented.

"On Roll Call:

Yes: President Winkler, Mr. Anderer, Mr. Kraski, Mr. Leech

No: Mr. Burgos and Mr. Scheiner

"The Board Secretary stated that because a majority of the whole Board had not supported the resolution, in his opinion the motion was defeated.
"Moved by Mr. Burgos, seconded by Mr. Scheiner:

"RESOLVED: #191

that the Board Secretary be directed to write to Mr. Van Nutt explaining the actions taken by the Board and asking him to explain his absence and what his intentions are in regards to the Board of Education in the future and also to suggest to him that if he does not intend to attend the Board meetings in the future that he may resign his position on the Board of Education.

"Unanimously adopted on roll call."

On December 28, 1965, the Secretary of the Board sent the following letter to the petitioner:

"Please be advised that at a public meeting of the Rochelle Park Board of Education on Monday, December 27, 1965 a motion was presented by Mr. James Anderer and seconded by Mr. Jerome Leech to accept your resignation from the Rochelle Park Board of Education under N. J. Statutes 18:7–13 and 18:6–11.

"Statute 8:6–11 [sic] does not apply to our type of school district. However, Statute 18:7–13 does apply to our school district and gives the Board of Education the right to remove from the Board a member who has failed to attend three (3) consecutive regular meetings of the Board without good cause. The motion so made and so seconded was declared defeated by the Board Secretary as a result of the roll call. However, a motion was moved by Mr. Burgos and seconded by Mr. Scheiner that the Board Secretary be directed to write to you to ascertain your position in regards to attendance at further meetings and to advise you to present good cause in the event you are unable to attend meetings in the future.

"I have also been directed by the Board of Education to inquire if, because of personal problems and your inability to attend meetings regularly, you plan to resign from the Rochelle Park Board of Education.
"It is advisable that this communication be answered by you before the next regular Board meeting which is scheduled for January 24, 1966. However, if you plan to appear personally at that meeting, no written reply will be necessary."

At almost the same time the Secretary sent to all members, including petitioner, a notice of five meetings to be held during January 1966. No mention of petitioner appeared in connection with any of these meetings.

(Respondents' Answer—Exhibit B)

In its Answer respondents say that the Board held a "work meeting" on January 3 at which seven members, including petitioner, were present, and at which petitioner's absenteeism was discussed. According to respondents, petitioner was informed that they had subsequently learned that a simple majority of a quorum present was sufficient to approve a motion for removal, that the Secretary had erred in declaring resolution #190 at the December

27 meeting lost, that the Board now considered the action to remove petitioner valid and that he was no longer a member of the Board. Respondents admit taking a vote at this meeting which resulted in a 5 to 1 stand against rescinding the action.

A notice from the Secretary dated January 4 stated three purposes for the call of a special meeting on January 7, the last of which was:

> "3. Re-statement of removal of Mr. Charles Van Nutt from the Rochelle Park Board of Education." (Respondents' Answer—Exhibit D)

Although petitioner denies receiving this notice, he attended the meeting, was refused a seat with the Board, and voiced his objections. When asked for a statement in explanation of his absences petitioner said that he had come to participate in the announced purpose of the meeting, the preparation of the budget; that the letter he had received (Petitioner's Exhibit B) had said he would have an opportunity to explain his absences at the next regular meeting on January 24; and that he was not prepared to defend himself that evening. The following resolution recorded in the minutes of January 7 as #211 was moved and approved by a vote of 6 to 1 (Respondents' Answer—Exhibit E):

> "RESOLVED: that inasmuch as the original motion properly made and seconded at the regular public meeting of December 27, 1965, was inadvertently ruled as being defeated, while in effect, a majority of a quorum present is sufficient to effect the removal of Mr. Van Nutt as a Board member, I further move that it be stated in the minutes that Mr. Van Nutt has been removed from the Board and let it be spread upon the minutes that the Board has heard from Mr. Van Nutt his reasons for not attending prior Board meetings. He has not presented sufficiently valid reasons for non-attendance and the Board further finds no reason to rescind the original motion for removal."

Petitioner thereafter presented himself at the regular meeting of the Board on January 24, 1966, but was denied a seat on the grounds that he had been removed and he was no longer a member of the Board. The within proceedings were then initiated by petitioner.

Petitioner contends that he was never given written notice of charges against him nor a fair opportunity to be heard with respect to his absences. He argues that resolution #191 and the letter of December 28 affording him an opportunity to explain on January 24, superseded resolution #190 which purported to oust him. At no time has he been accorded the fundamental due process to which he is entitled before he can be removed from his elected office and therefore, he claims, respondent Board's action is fatally defective.

On its part respondents say that petitioner's attendance was irregular; that he had missed many work meetings of the Board; that he had taken no part in the preparation of the budget; that he took little or no part in meetings when he did attend; and that he made only a limited contribution to the affairs of the Board. The Board contends that petitioner's appearance at the work meeting of January 3 constituted a waiver by petitioner of the letter of December 28 affording him an opportunity to be heard on January 24. In respondents' judgment, the fact that at this meeting petitioner was apprised of respondents' intentions and opportunity was afforded both for petitioner to explain his absences and for the Board to determine the validity of petitioner's reasons fully satisfied the requirement of due process.

The statute under which respondents took the contested action is *R. S.* 18:7–13:

> "A member of a board who shall fail to attend three consecutive regular meetings of the board, without good cause, may be removed by the board. The vacancy thus created shall be filled in the same manner as other vacancies."

The Commissioner believes that citizens who are selected to serve on boards of education assume an important office requiring attendance at numerous meetings. Those who are unwilling or unable to sacrifice time ordinarily devoted to leisure or other pursuits should not seek to hold office. Without regular attendance of all members the work of the board is hampered and the full voice of the electorate is not heard with respect to decisions to be made. It was with the intent to provide for removal of inactive members in order that the board might function effectively that this statute was enacted as part of the whole body of school law in 1903.

The Commissioner further believes that this power to remove a board member under this statute should be exercised with restraint and only after good cause has been clearly established. The will of the people expressed at the polls in their choice of a member of the board should not lightly or informally be set aside. The determination of lack of good cause for repeated absences is a clear statutory precedent to removal. The procedures by which respondent Board attempted to accomplish petitioner's unseating fail to meet the standards of due process required for such an action. Respondent moved to oust petitioner at the earliest opportunity, during the third meeting from which he was absent, with no regard to whether there was or was not good cause for petitioner's non-attendance. When this appeared to have failed, respondent gave petitioner notice of opportunity to exculpate his neglect on January 24. After learning that the Secretary had erred, it attempted to declare its original motion valid and to deprive petitioner of his seat without hearing or considering his explanation. The informal discussion at the January 3 work meeting cannot be regarded as fulfilling respondent's responsibility to hear petitioner's side. Moreover, respondent admits in its Answer that petitioner indicated he would try to improve his attendance at future meetings. The record is barren of any finding by respondent with respect to the cause of petitioner's non-attendance. *Cf. Reale* v. *Manville Board of Education*, 1961-62 *S. L. D.* 182, affirmed State Board of Education 185. The conclusion is inescapable that petitioner was not given a full and fair opportunity to justify his three consecutive absences, and respondent Board did not meet the necessity to establish the fact that petitioner's failure to attend was without good cause, as required by statute.

The Commissioner finds and determines that the action of the respondent, Rochelle Park Board of Education, in purporting to deprive the petitioner, Charles H. Van Nutt, of his duly elected seat in said Board was not taken in accordance with law, and that he is therefore entitled to be immediately restored to his former position in said Board.

ACTING COMMISSIONER OF EDUCATION.

October 18, 1966.

XLI

DELAY OF NEARLY THREE YEARS IN PROTESTING TRANSFER SUFFICIENT TO SUSTAIN DEFENSE OF LACHES

E. GORDON JOHNSTON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE AND ROCCO DI PIETRO, SUPERINTENDENT, PASSAIC COUNTY,

Respondents.

For the Petitioner, Eckhaus & Guston (Herbert M. Guston, Esq., of Counsel)

For the Respondents, Salvatore J. Ruggiero, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is a teacher in the Wayne Township Schools. He complains that he was unlawfully and improperly removed from his position as elementary science coordinator and that he has been denied salary increments to which he is entitled. Respondents deny any unlawful or improper action, and assert that they have properly exercised their discretionary authority.

A hearing in this matter was held by the Assistant Commissioner in charge of Controversies and Disputes on January 18, 1966, at the office of the Passaic County Superintendent of Schools. Briefs of counsel were submitted.

Petitioner was first employed by respondent Board of Education for the 1958-59 school year, and served thereafter until April 1962, as elementary science coordinator. At a committee meeting of the Board on April 17, 1962, it was the "consensus" of the Board that petitioner be transferred to a position as classroom teacher of science in order to fill an existing vacancy. (Tr. 100, 135) The minutes of that meeting also indicate that since petitioner's salary as coordinator was higher than that of a classroom teacher, he would receive no increment. It was not until the 1964-65 school year that he received any further increment. There was no evidence that at any regularly called meeting of the Board a formal vote was taken, either with respect to the transfer of petitioner or the abolition of the position of elementary science coordinator. However, the position has never been filled, and there was testimony that since the supervisory organization of the school district has been changed, the filling of the position of coordinator would be "unique" in the school district. (Tr. 71)

Petitioner contends that his removal from the position of elementary science coordinator was arbitrary and capricious, without rational basis, and was induced by improper motives. He offered testimony to show that by reason of a report given to the Board by respondent Di Pietro, then Superintendent of Schools, the Board erroneously concluded that he might have association with Communists or persons having Communistic leanings. As a result of this conclusion, he contends, the Board arbitrarily transferred him to a classroom teaching position. The petitioner contends that he learned this

from a Board member a few weeks after his transfer took place in April 1962. However, petitioner sought no determination of his employment rights by the Commissioner until he filed the petition herein on March 29, 1965.

Respondents raise, among others, the defense of laches. The transfer of which petitioner complains occurred in April 1962; yet the petition herein was not received by the Commissioner until March 29, 1965. Respondents contend that petitioner's delay of nearly three years in asserting his alleged rights and/or claims is inexcusable, and that such delay is prejudicial to respondents, demonstrates a lack of good faith, and places an undue and unfair burden upon respondents. Petitioner, on the other hand, asserts that since laches is an equitable affirmative defense, the burden is upon respondents to prove that they have been harmed or prejudiced by petitioner's delay. He points to the necessity for such proof as expressed by the court in *Clark* v. *Judge*, 84 *N. J. Super.* 35, 53 (*Ch. Div.* 1964):

> "Generally, laches consists of an unexplained and inexcusable delay in enforcing a known right whereby prejudice has resulted to the other party because of such delay. *West Jersey Title & Guaranty Co.* v. *Industrial Trust Co.*, 27 *N. J.* 144 (1958)"

And in *Heagen* v. *Borough of Allendale*, 42 *N. J. Super.* 472, 484 (*App. Div.* 1956), it was stated that:

> "Defendants have the burden of proving the defense of laches. *Cf. R. R.* 4:8–3. To make out the defense, they must establish a delay which has worked a prejudice on themselves and which, unless explained and excused, is altogether unreasonable under the circumstances. *Hinners* v. *Banville*, 114 *N. J. Eq.* 348, 357 (*E. & A.* 1933); *Massie* v. *Asbestos Brake Co.*, 95 *N. J. Eq.* 298, 311 (*E. & A.* 1923)."

The opinions of the courts in these cases have been carefully examined. Consideration has likewise been given to several other opinions concerning the defense of laches, particularly *Taylor* v. *Bayonne*, 57 *N. J. L.* 376 (*Sup. Ct.* 1894); *Glori* v. *Board of Police Commissioners*, 72 *N. J. L.* 131 (*Sup. Ct.* 1905); *McMichael* v. *South Amboy*, 14 *N. J. Misc.* 183 (*Sup. Ct.* 1936); *Marjon* v. *Altman*, 120 *N. J. L.* 16 (*Sup. Ct.* 1938); and *De Stefano* v. *Civil Service Commission*, 126 *N. J. L.* 121 (*Sup. Ct.* 1941). Each of these latter cases shares a common factor with the instant matter, to wit: the right of the plaintiff to *public* employment and the *public* interest involved therein. The position of the courts in such a case is clearly stated in *De Stefano* v. *Civil Service Commission*, *supra*, at page 124:

> "Thus it is that the Civil Service Commission, in the conduct of this examination, did not observe the limitations of the statute. Yet its action constituted a merely irregular exercise of its statutory function, and not an excess of power that is to be denominated a nullity. In such circumstances, inexcusable delay operates as an estoppel against the assertion of the right to vacate the action; and this is the situation here. While laches, in its legal sense, ordinarily connotes delay injurious to another, the public interest demands that a challenge directed to the Civil Service Commission's exercise of this authority be interposed with reasonable promptitute. Sound economy dictates that questions relating to the exercise of such power be determined with reasonable expedition. The proper administration of the affairs of the commission and of the local

government forbid undue delay in such matters. Compare *Glori* v. *Board of Police Commissioners of Newark*, 72 *N. J. L.* 131; *Marjon* v. *Altman*, 120 *Id.* 16."

Respondents have established that the position of elementary science coordinator is not suited to the present supervisory organization in the Wayne Township Schools, and that to recreate the position, even assuming petitioner were entitled to be reinstated therein, would be inconsistent with the educational program of the schools. The Commissioner deems this fact to be crucial, and that it falls squarely within the meaning of "public interest" as expounded in *De Stefano*, *supra*. Accordingly, the Commissioner finds and determines that the defense of laches has, under the circumstances been affirmatively established by the respondents.

Furthermore, the Commissioner finds that petitioner's delay of nearly three years in bringing this matter before him was not reasonable under the circumstances. Petitioner testified that he was told in March of 1962 that the position of elementary science coordinator was going to be eliminated and that he would be assigned to a classroom teaching position. (Tr. 30-31) In May or June of 1962, within two months of his transfer, he discussed the matter with a member of the Board and at that time learned of the alleged improper reasons for the Board's actions. (Tr. 17-19) Also, in June 1962, he discussed his transfer and the alleged improper reasons therefor with respondent Superintendent. (Tr. 37) Whether petitioner received written notice of the Board's action or not, he most certainly knew at the beginning of the following school year that he had not received the increment to which he claims entitlement. Petitioner claims, however, that he was advised that he could not proceed successfully in reliance upon the testimony of only one Board member; but he fails to explain satisfactorily the unnecessarily long period required to secure the statements of two additional Board members. Indeed, one of them testified that he had prepared his statement approximately a year after the petitioner's transfer in April 1962. (Tr. 79-80) Thus, the testimony and exhibits are significantly silent on this vital point. The Commissioner holds, therefore, that petitioner has failed to give a reasonable explanation for his failure to make a timely challenge of respondents' action.

The Commissioner finds and determines that petitioner's unreasonable delay in presenting the charges is inexcusable and that it would be herein prejudicial to the public interest to grant him the relief sought. The respondents' defense of laches must therefore be sustained. Accordingly, as petitioner is not entitled to any of the relief sought, his petition is hereby dismissed.

ACTING COMMISSIONER OF EDUCATION.

October 20, 1966.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued April 17, 1967.

Decided May 1, 1967.

Before Judges Sullivan, Kolovsky and Carton.

On appeal from the Commissioner of Education, State of New Jersey.

Mr. Herbert M. Guston argued the cause for appellant (*Messrs. Eckhaus & Guston*, attorneys).

Mr. Salvatore J. Ruggiero argued the cause for respondents.

Mr. Stephen G. Weiss, Deputy Attorney General, argued the cause for the Commissioner of Education, State of New Jersey (*Mr. Arthur J. Sills*, Attorney General, attorney).

PER CURIAM.

On March 29, 1965, petitioner, a teacher in the Wayne Township schools, filed a petition of appeal with the State Commissioner of Education asserting that he was unlawfully removed in April 1962 from his position as elementary science coordinator. The relief asked for included reinstatement to the position of elementary science coordinator and recovery of the salary increments of which petitioner was allegedly deprived since April 1962. The petition prayed that the reinstatement be effective either immediately or when petitioner qualified for and obtained a certificate to act as elementary science coordinator.

Following a hearing, the State Commissioner filed a decision, dated October 20, 1966, in which he found and determined that:

> "Respondents have established that the position of elementary science coordinator is not suited to the present supervisory organization in the Wayne Township Schools, and that to recreate the position, even assuming petitioner were entitled to be reinstated therein, would be inconsistent with the educational program of the schools. The Commissioner deems this fact to be crucial, and that it falls squarely within the meaning of 'public interest' as expounded in *De Stefano*, [v. *Civil Service Commission*, 126 *N. J. L.* 121 (*Sup. Ct.* 1941)] *supra*. Accordingly, the Commissioner finds and determines that the defense of laches has, under the circumstances, been affirmatively established by the respondents. Furthermore, the Commissioner finds that petitioner's delay of nearly three years in bringing this matter before him was not reasonable under the circumstances. * * *
>
> The Commissioner finds and determines that petitioner's unreasonable delay in presenting the charges is inexcusable and that it would be herein prejudicial to the public interest to grant him the relief sought. The respondents' defense of laches must therefore be sustained. Accordingly, as petitioner is not entitled to any of the relief sought, his petition is hereby dismissed."

Although petitioner intended to appeal to the State Board of Education from the decision of the Commissioner, he failed to do so within 30 days after the decision was filed, the time limited for such appeal by *N. J. S. A.* 18:3–15. The explanation offered for petitioner's failure to take the administrative appeal is that while a copy of the Commissioner's decision was received by petitioner on October 21, 1966, it was not until November 23, 1966, by which time the allotted 30-day period had already expired, that he learned that the Commissioner's decision was filed on the date thereof.

On November 29, 1966, petitioner served and filed a notice of appeal from the decision of the State Commissioner to the Appellate Division.

Before petitioner's brief was filed in this court, respondents moved to dismiss the appeal, contending that petitioner's sole remedy was an appeal to the State Board of Education which could have been taken not later than

30 days after October 20, 1966 and that the appeal to this court is barred by *R. R.* 4:88–14 which provides:

> "Except where it is manifest that the interests of justice require otherwise, proceedings under Rule 4:88 shall not be maintainable, so long as there is available judicial review to a county court or inferior tribunal or administrative review to an administrative agency or tribunal, which has not been exhausted."

In response, petitioner argued that the interests of justice require that we consider the appeal, despite the failure to exhaust administrative remedies. We reserved decision on the motion until full argument of the appeal.

Justification for the direct appeal from the State Commissioner to this court is not to be found in the fact that petitioner inadvertently failed to take his appeal to the State Board within the time limited by statute. We do not agree with petitioner's contention that the action taken by the school authorities of Wayne was such as to call for direct judicial review rather than prior exhaustion of administrative remedies. *Cf. Nolan* v. *Fitzpatrick*, 9 *N. J.* 477, 486 (1952); *Laba* v. *Newark Board of Education*, 23 *N. J.* 364, 369 (1957). Further, the weight of that contention is substantially weakened by the fact that petitioner voluntarily dismissed an action in lieu of prerogative writs which he had instituted in the Law Division of the Superior Court so that, to quote from the affidavit filed on petitioner's behalf in opposition to the motion to dismiss the appeal, "the Commissioner of Education could fully determine the Johnston issues."

We find it unnecessary to decide the motion to dismiss the appeal. Our review of the record satisfies us that there is substantial evidence to support the State Commissioner's finding and determination that petitioner's *laches* constitute a bar to the relief which he seeks.

The administrative appeal taken by petitioner to the State Commissioner is provided for by *R. S.* 18:3–14. Although that section does not specify the time within which such an appeal must be taken, it is clear that "this statutory protection [should] 'be invoked with reasonable promptitude.'" *Bd. of Education of Garfield* v. *State Bd. of Education*, 130 *N. J. L.* 388, 393 (*Sup. Ct.* 1943). The delay of almost three years in the instant case is patently unreasonable.

The decision of the State Commissioner of Education is affirmed essentially for the reasons set forth therein. No costs.

XLII

TEACHER'S SALARY MAY BE REDUCED IF CHARGES OF UNBECOMING CONDUCT ARE SUSTAINED

IN THE MATTER OF THE TENURE HEARING OF FREDERICK L. OSTERGREN, SCHOOL DISTRICT OF FRANKLIN TOWNSHIP, SOMERSET COUNTY

For the Complainant, Nathan Rosenhouse, Esq.

For the Respondent, Sachar, Sachar & Bernstein (Irwin J. Silverlight, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

This matter comes before the Commissioner of Education pursuant to the provisions of *R. S.* 18:3–23, *et seq.*, known as the Tenure Employees' Hearing Act, as a result of written charges made by the father of a pupil in the Franklin Junior High School, Franklin Township, Somerset County, alleging that corporal punishment was inflicted upon his son, Cecil, Jr., on June 8, 1966, by a teacher, Frederick L. Ostergren, hereinafter referred to as "the teacher."

Pursuant to *R. S.* 18:6–42, the Superintendent of Schools, with the approval of the President of the Franklin Township Board of Education, suspended the teacher without pay on June 15, 1966, and reported said suspension to the Board of Education forthwith. The charges and the evidence in support thereof were examined into at a meeting of the Board of Education on June 22, 1966. The Board subsequently determined the charges as being sufficient, if true in fact, to warrant dismissal or reduction in salary of the teacher and so certified to the Commissioner of Education by letter dated July 8, 1966. At the same meeting, the teacher's suspension without pay was continued in effect "pending determination of these charges by the Commissioner of Education."

The charges are stated by the parent in a letter to the Board of Education dated June 8, 1966, the relevant portion of which reads:

> "During participation in a baseball game, Mr. Ostergren with great force, tagged my son out, hitting him in the mouth with the ball. My son became angry and called Mr. Ostergren an obscene name. Then Mr. Ostergren was seen punching, pushing, and slapping my son on the ground, mashing his face in the dirt, and heard making rash statements such as:
>
> 1. 'I've been fed up with you since Sept.'
> 2. 'I can hit you anythime I want to.' "

At a conference of counsel held on September 6, 1966, with the Assistant Commissioner of Education in charge of Controversies and Disputes, the teacher withdrew his Answer previously filed and admitted the occurrence of the altercation which gave rise to the charges. It was thereupon agreed that there would be no necessity for plenary hearing on the merits of the charges, that the only issue to be determined by the Commissioner would be the penalty to be imposed, and that the Commissioner would conduct a hearing

on September 14 for the limited purpose of affording the complaining parent an opportunity to express himself on the matter of punishment and for the teacher to plead in mitigation.

At the hearing on September 14, 1966, counsel for the Board of Education stated that it was the position of the Board that, since the teacher had admitted the charges, the Board of Education had performed its statutory duty and also its duty to the complaining parent and that the Board of Education was satisfied to leave the decision with respect to punishment to the discretion of the Commissioner. By agreement of counsel a photostatic copy of the teacher's entire employment record (Exhibit P-1) and the record of the Board's inquiry were submitted for the Commissioner's use in assessing the penalty. The parents of the pupil were afforded an opportunity to express themselves with respect to the matter and counsel for the teacher stated his willingness to rely on the record and the judgment of the Commissioner.

Corporal punishment of pupils has been prohibited in New Jersey public schools by statute since 1867. *R. S.* 18:19–1 provides in part as follows:

> "No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution * * *."

The Commissioner has held, *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 *S. L. D.* 160, 162, remanded State Board of Education 1963 *S. L. D.* 251, decided by the Commissioner November 13, 1964, affirmed State Board of Education March 2, 1966, that by the enactment of this statute many years ago, the New Jersey Legislature subscribed to the philosophy that

> "'* * * an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another although no actual physical harm be done.' (Teacher Liability for Pupil Injuries, National Education Association of the United States, p. 8)"

See also *In the Matter of the Tenure Hearing of Pauline Nickerson*, decided September 2, 1965.

The Commissioner further pointed out in *Fulcomer, supra*, at p. 162:

> "* * * that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that 'it was one of those things that just happen' * * *. While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control."

The Commissioner cannot condone punching, pushing, slapping or buffeting of pupils by their teachers as a means of punishment. It is the Commissioner's judgment that parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers, and teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty. *In the Matter of the Tenure Hearing of Pauline Nickerson, supra*

In the instant case, it is the Commissioner's finding that the teacher employed unnecessary and inappropriate physical force to punish the pupil. In so finding the Commissioner does not minimize the wrongful act of the pupil to direct an epithet at the teacher which provoked the corporal punishment. Such disrespect and indiscipline calls for corrective action but not the kind which the teacher employed. There is no evidence that the teacher needed to defend himslf or that physical restraint was required to control the situation. Means of punishment in keeping with approved policies, regulations, and procedures of the school system should have been used to deal with the pupil's misconduct.

As has been his practice in other cases of unbecoming conduct brought before him, the Commissioner has taken into account the nature and circumstances of the incident, the teacher's prior record and present attitude, the expressed concerns of the parents, and the likelihood of such behavior recurring in determining appropriate penalties.

With respect to the unfortunate incident itself, the Commissioner notes that it occurred during the heat of a contest, that it was preceded by physical contact between the participants occurring as a part of the game but tending to create tensions, and that it was provoked by an improper epithet directed at the teacher by the boy. The Commissioner has already said and he reiterates that despite this provocation the teacher's resort to physical force as the way to control the situation cannot be condoned. Neither can the provocation be entirely ignored in the total situation. Also to be noted is that the incident was short-lived, that all the participants resumed their places and the game continued without further difficulty until the end of the period. It is significant, too, that the pupil sought out the teacher later that same day and apologized for his behavior and presumably the teacher-pupil relationship was re-established satisfactorily.

Examination of the teacher's record shows that he has taught in the Franklin Township Schools since September 1949. With the exception of two letters of complaint from parents, one in 1959 and the other in 1962, both of which appear to have been resolved satisfactorily, there is no indication of improper conduct on the part of the teacher during his 17 years of employment. His attitude of contrition and remorse is demonstrated by his apologies to the parents and by his willingness to admit his error and to accept whatever penalties are deemed appropriate.

From the statements made by the parents, the Commissioner understands that their major interest is preventive rather than punitive. While they expressed a belief that the teacher had demonstrated unfitness to teach and should, therefore, be dismissed, they based their opinion on the fear that there might be similar and possibly more serious examples of lack of emo-

tional control. The mother's expressed feeling, not controverted by his father, is that

> "my husband and I have discussed this and we realize that Mr. Ostergren realizes that what he did wasn't correct as far as action on the part of being a teacher, and my husband is suggesting that he be examined by a psychologist if he is up to your decision kept in the school system and actually put on trial for such a long time that within that length of time he would either make a slip or something that could be diagnosed as another act of whatever is the correct word for it. But I hate to be so cruel as to say yes, dismiss him because I feel that a man that realizes that he has done something wrong, his punishment should be lightened. But with this type of punishment, with this type of crime it's not only my child that's involved, it's other children and he could very well need help and not know it himself." (Tr. 9)

The Commissioner has also kept in mind the penalties imposed in other cases brought before him in which teachers inflicted physical indignities upon pupils. In *Fulcomer, supra,* he upheld the dismissal of the teacher. In *Nickerson, supra,* there was no dismissal or loss of pay. The Commissioner finds significant differences between these two cases and the matter herein. The circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, his attitude and the prognosis for his continued effective performance and usefulness in the school system, varied materially in these cases. In the Commissioner's opinion each such matter must be judged in the light of all of the circumstances. The kind and degree of penalty will necessarily vary also according to the particular problem.

The Commissioner concludes after careful study of this matter that summary dismissal of the teacher for this single offense is an unnecessarily harsh penalty and not warranted in the light of all the circumstances herein. The teacher's regret of his actions, the mental anguish he has undergone over possible loss of his livelihood, the damage sustained in his professional reputation, and the efforts which he will have to exert to re-establish himself in his work are all significant aspects of the appropriate penalty for his error. A reduction in salary, represented by the loss of some part or all of the compensation that he would have earned since his suspension on June 15, 1966, would be the maximum additional penalty that would be warranted under all the circumstances of this case.

The Commissioner finds and determines that Frederick L. Ostergren inflicted improper corporal punishment upon a pupil in his charge, and that such action constitutes conduct unbecoming a teacher. He finds further that under the circumstances set forth herein, this action does not warrant dismissal. The Commissioner therefore remands this matter to the Board of Education for appropriate action in accordance with the principles set forth herein.

ACTING COMMISSIONER OF EDUCATION.

October 25, 1966.

XLIII

SENDING-RECEIVING RELATIONSHIP MAY BE TERMINATED WHEN GOOD AND SUFFICIENT REASON EXISTS

IN THE MATTER OF THE TERMINATION OF THE SENDING-RECEIVING RELATIONSHIP BETWEEN THE BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY, AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY

For the Petitioner, Thomas Cook, Esq.

For the Respondent Montgomery Township, A. Dix Skillman, Esq.

For the Respondent Hopewell Borough, Cassel R. Ruhlman, Jr., Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Pursuant to the provisions of *R. S.* 18:14–7, petitioner in this case has applied to the Commissioner for termination of the designation of the high school in the Princeton Regional School District, hereinafter referred to as "Princeton," as the receiving high school for pupils from the Montgomery Township School District, hereinafter referred to as "Montgomery."

The original petition in this matter was filed on December 21, 1964, by the Board of Education of Princton Borough, naming both the Board of Education of Montgomery and the Board of Education of Hopewell Borough as respondents. Subsequently, Hopewell Borough became a constituent member of the Hopewell Valley Regional School District, and a stipulation for the orderly withdrawal of Hopewell Borough pupils from Princeton High School resulted in the withdrawal of Hopewell Borough as a party-respondent.

Meanwhile, Princeton Borough undertook with Princeton Township the formation of the Princeton Regional School District, and the petition herein was not actively prosecuted until the Regional District became a reality. Thereupon the new Regional Board of Education moved the matter in its name.

A hearing of the case was conducted at the State Department of Education, Trenton, on July 19, 1966, by a hearing examiner appointed by the Commissioner of Education for that purpose. The hearing examiner's report is as follows:

The testimony and exhibits presented at the hearing in this matter establish that the sending-receiving relationship between Montgomery and Princeton is of long standing. Throughout the period from 1962 to 1965, Montgomery sought to renew a sending-receiving contract made pursuant to *R. S.* 18:14–7.3, which was due to expire in 1965. However, Princeton made it clear that not only would it not enter into a further agreement but that it desired Montgomery to begin the withdrawal of its pupils in September 1965. (P-1)

The record is clear that between 1962 and April 1966, Montgomery made extensive efforts to find other high school facilities. Seven neighboring

districts having high schools were asked, in several instances more than once, to accept Montgomery pupils, and in each case the request was refused. Additionally, four districts not having high schools but in a potentially like situation were approached concerning possible mutual solutions, including regionalization, but these efforts came to naught. (R-2)

There can be no question that the high school in Princeton is presently overcrowded, and that projected enrollments will intensify this condition. The high school building is designed to accommodate 1,500 pupils. This capacity is augmented by six "relocatable" classrooms. In 1965-66, these facilities accommodated slightly over 1,800 pupils. In the face of a policy to restrict class size to a 25-pupil maximum (Tr. 13), in 1965-66, of 359 class sections (excluding subjects normally involving large group instruction, but including typing classes) 206 had 26 or more pupils with 62 sections enrolling more than 30 pupils. (P-7) Moreover, fixed area facilities such as the cafeteria, library, laboratories, auditorium, and locker space are seriously overtaxed. (Tr. 26) In order to accommodate the 1966-67 enrollment, either an extended-day schedule or use of the activities period for several class sections is anticipated. (Tr. 11, 26) Thereafter, the scheduling alternatives are anticipated to be a further extension of a single session to a two-period "overlap" or double sessions. (Tr. 11, 27)

A table of projected high school enrollments to 1974-75 prepared by Princeton in April 1966, using data supplied by all sending districts, shows the following actual or anticipated enrollments. The Montgomery projections are shown separately from the totals for Princeton Regional and all other sending districts: (P-5)

	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71	1971-72	1972-73	1973-74	1974-75
Montgomery	275	298	359	409	468	554	639	761	853	974
All Other Districts	1,533	1,581	1,652	1,744	1,844	1,930	2,041	2,126	2,147	2,200
Total	1,808	1,879	2,011	2,153	2,312	2,484	2,680	2,887	3,000	3,174

Testimony of the President of the Montgomery Township Board of Education and its Superintendent establishes that Montgomery is at present completing a school building to house upper elementary grades. This building will have space adequate to house the Township's ninth grade pupils, with some physical alterations to meet educational program needs. (Tr. 69) These witnesses testified that in their judgment the time for suitable planning for a ninth grade program would require more than the 1966-67 school year, and that retaining ninth grade pupils in Montgomery should not begin until 1968. (Tr. 79, 85) However, the President testified that the Board would be willing "to make every effort to try to start the withdrawal of the ninth grade by the fall of 1967." (Tr. 80)

The program at Montgomery for ninth grade, in anticipation that these pupils will transfer thereafter to Princeton, would essentially duplicate the ninth grade program at Princeton. (Tr. 85)

As a further aspect of Montgomery's program to provide for its high school pupils, the Board of Education on July 5, 1966, adopted a resolution

authorizing the planning of a senior high school to house grades 9 and 10 in 1970, grades 9, 10, and 11 in 1971, and all high school grades in 1972.

Using the projected enrollments reported *supra*, and deducting projected enrollments furnished in a School Building Study for Montgomery Township (P-8, page III-4), according to Montgomery's proposal, the resulting enrollments at Princeton would be as follows:

	1968-69	1969-70	1970-71	1971-72	1972-73
Projected Enrollment	2,153	2,312	2,484	2,680	2,887
Deductions by Withdrawal	111(9)	140(9)	305(9, 10)	508(9, 10, 11)	761(9-12)
Total	2,042	2,172	2,179	2,172	2,126

If Montgomery were to withdraw 109 ninth grade pupils in 1967-68, Princeton's enrollment projection for that year would drop from 2,011 to 1,902.

Montgomery's justification for the scheduling of its high school proposal is: (1) that 1970 is the earliest date that the planning and completion of a high school building and program can reasonably be achieved (Tr. 71, 78); and (2) that the increasing needs for elementary school classrooms require that the high school be planned in relation to these needs and the ability of the district to support the total school housing program. (Tr. 74) Montgomery's plan is to make partial use of the high school facility for intermediate grades during 1970-71 and 1971-72, during the gradual withdrawal of its pupils from Princeton. (Tr. 72)

From the facts established in this case, the hearing examiner makes the following conclusions:

1. A condition of overcrowding currently exists at Princeton High School that overtaxes existing facilities. This condition will be intensified as enrollments grow, with the result that abnormal and unusual pupil scheduling will be required, to the detriment of the educational program.

2. After Montgomery was notified by Princeton, in 1962, that the existing sending-receiving contract could not be extended beyond its expiration in 1965, Montgomery made extensive, but unsuccessful efforts to find other high school accommodations.

3. Montgomery has already embarked upon a building program to provide its own high school facilities. The first phase of this will provide for the withdrawal of its ninth grade pupils, to be housed in a new intermediate school. While this step has been contemplated for September 1968, there is no insuperable obstacle to its becoming effective in September 1967. Such a withdrawal in 1967 will afford a degree of relief to Princeton at the earliest possible date.

4. The completion of a high school building in Montgomery is projected for 1970. If Montgomery withdraws its tenth, eleventh, and twelfth grade pupils successively in 1970, 1971, and 1972, Princeton will still have enrollments in excess of 2,100 pupils for each of those years. Such enrollments

cannot be housed except by extraordinary scheduling in an overlapping single session, or by double sessions. Either alternative imposes undue hardships which interfere with a full and complete program available to all pupils. Thus, an earlier completion of a high school facility in Montgomery, and an accelerated rate of withdrawal are clearly indicated.

5. If Montgomery were to have its high school facility available for the 1969-70 school year, the withdrawal of ninth grade pupils after June 1967, tenth and eleventh grade pupils after June 1969, and twelfth grade pupils after June 1970, would maintain Princeton's enrollment through 1970-71 at a manageable level. The effect of such a program is shown in the following table, in which Montgomery's projected enrollments (P-8, page III-4) are deducted from the Princeton enrollment projections (P-5):

	1967-68	1968-69	1969-70	1970-71
Projected Enrollment	2,011	2,153	2,312	2,484
Deductions by Withdrawal	109(9)	111(9)	379(9, 10, 11)	554(9-12)
Total	1,902	2,042	1,933	1,930

* * * * *

The Commissioner has carefully considered the facts established at the hearing of this matter and set forth in the foregoing report. He finds a sincere effort by all parties to reach a suitable arrangement for the withdrawal of Montgomery Township pupils in an orderly manner at the earliest feasible date. The only areas of difference between the two parties are the estimates of time required to accomplish this withdrawal.

The Commissioner finds and determines that upon the facts presented the petitioner, Princeton, has established good and sufficient reason for termination of its sending-receiving relationship with Montgomery. Accordingly, as Montgomery has not shown any reasonable obstacle to the establishment of an appropriate ninth grade facility and program by September 1967, the Commissioner directs that all ninth grade pupils from Montgomery be withdrawn from Princeton at the close of the 1966-67 school year.

The Commissioner further finds and determines that Montgomery's proposal to complete a high school facility by 1970 and begin the successive withdrawal of its tenth, eleventh, and twelfth grade pupils in that year imposes undue hardship upon Princeton for the reasons heretofore mentioned. He therefore directs the Montgomery Township Board of Education to arrange for the withdrawal of tenth and eleventh grade pupils at the close of the 1968-69 school year, and the withdrawal of twelth grade pupils at the close of the 1969-70 school year.

ACTING COMMISSIONER OF EDUCATION.

November 2, 1966.

XLIV

TENURE DOES NOT ACCRUE UNTIL PRECISE CONDITIONS THEREFOR ARE MET

ROBERT T. CURRIE,

Petitioner,

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF KEANSBURG, MONMOUTH COUNTY,

Respondent.

For the Petitioner, Benjamin Gruber, Esq.

For the Respondent, Pillsbury, Barnacle & Russell (William E. Russell, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case contends that the action of respondent purporting to rescind a contract employing him as a teacher for a fourth consecutive academic year was invalid and violates tenure rights which he claims have accrued. Respondent maintains that its action to terminate its contract with petitioner was valid and proper, that petitioner has not acquired tenure, and that he therefore has no further employment rights in its schools.

The matter is submitted on a Stipulation of Facts and briefs of counsel. Oral argument was heard by the Assistant Commissioner in charge of Controversies and Disputes on September 19, 1966, at the State Department of Education, Trenton.

Petitioner was employed as a teacher under separate annual contracts for three consecutive academic years: 1963-64, 1964-65, and 1965-66. On March 16, 1966, petitioner entered into a fourth contract with respondent for the following academic year, 1966-67. Under the terms of the contract petitioner was to begin teaching on September 1 and either party was entitled to terminate the agreement by giving the other 60 days' notice in writing of such intention. Subsequently, at a regular meeting of the Board of Education on June 23, the Superintendent of Schools recommended that the contract with petitioner be rescinded. After some discussion the Board decided to take no action on the Superintendent's recommendation that night but agreed to meet one week later on June 30 for further consideration of the question. This was, of course, the last effective date on which respondent could exercise its prerogative to give 60 days' notice of termination because petitioner would, in the normal running of time, come under the protection of tenure if he were in an employment status with the Board of Education on September 1, 1966.

On June 30, immediately prior to the meeting of the Board, its Secretary and two of the members were served with an Order to Show Cause and Restraint enjoining them and the Board from taking part in any action with respect to petitioner's contract. Respondent complied with the Court's restraining order and adjourned its meeting. Respondent thereafter timely

moved to vacate the Order, and at a hearing in Superior Court, Chancery Division, Monmouth County, on July 5, 1966, the restraint was dissolved. In anticipation of such a result, respondent had caused notices to be sent on July 1 calling a special meeting on July 7 for the purpose of acting on the Superintendent's recommendation.

After a lengthy discussion at the meeting held on July 7, the Board of Education adopted the following resolution by a 5-4 vote:

> "that the Board follow the recommendation of the superintendent and the principal and rescind the contract of Mr. Currie for the year 1966-67." (Exhibit 11, p. 2)

The minutes of this meeting reveal that petitioner was present and addressed the Board. (Exhibit 11, pp. 16, 19) The next day, petitioner was notified of the Board's action by letter from the Secretary as follows:

> "At a special meeting called for Thursday, July 7th, 1966 at 8:00 P. M., the Board of Education voted in favor of the recommendation of the superintendent and the principal to rescind your contract for the year 1966-67.
>
> "The Board also moved to empower me to give you 60 days written notice of their action in regard to this termination of your contract.
>
> "This action took place at the hour of 12:15 A. M. on Friday, July 8th, 1966.
>
> "The votes cast were five in favor of the recommendation to rescind your contract and 4 against the recommendation to rescind your contract." (Exhibit 12)

This letter was sent on July 8 by both regular and registered mail and a copy was also placed in the mail box at petitioner's home address.

The first question is whether respondent had the authority to rescind petitioner's contract. The statutes clearly empower a board of education to employ and dismiss teachers in accordance with its own rules and regulations not inconsistent with the provisions of the statutes. *R. S.* 18:7–56, 18:7–71, 18:13–5 Respondent gave clear evidence on June 23 that it intended to act on the rescission of petitioner's contract in a special meeting on June 30, 1966. Had respondent been able to act on that date, it would have had sufficient time to give petitioner 60 days' notice of its intention to terminate the contract prior to September 1, 1966. Respondent was prevented from acting, however, as a result of the Court's temporary restraining order obtained by petitioner. Further evidence of respondent's intention is shown by its prompt action in moving to vacate the restraint and by sending notification on July 1, in anticipation of the vacating of the Order, of a special meeting to be held on July 7, for the purpose of acting on the Superintendent's recommendation that petitioner's contract be rescinded. Respondent's intention was confirmed by a resolution adopted by a 5-4 vote on July 7 rescinding the contract and empowering the Secretary of the Board to give petitioner 60 days' notice of its termination.

In the face of such a clear demonstration of the Board's intention in this matter, the Commissioner holds that the restraining order issued on June 30

did not have the effect of estopping the Board from exercising a right that was otherwise available to it. While neither counsel has offered any cases precisely on this point, nor is the Commissioner aware of any, counsel for respondent offered the analogy found in *Lamb* v. *Martin*, 43 *N. J. Eq.* 34, 37 (*Ch. Div.* 1887), wherein the Court said:

> "* * * Justice will not permit a litigant first to prevent his adversary from seeking redress by suit at law for a wrong he has committed against his adversary, until his adversary's right of action is barred by lapse of time, and then when his adversary is relieved from the restraint which he has caused to be put upon him, and sues, to turn upon his adversary and say, 'You are too late—you have lost your right of action by your laches.' There is no laches in such a case."

The Commissioner regards this analogy as appropriate to his determination in the instant matter. He finds, therefore, and so holds, that respondent gave petitioner due and appropriate notice of its intention to terminate his contract before its effective date on September 1, 1966.

Petitioner contends that in any event, respondent had no authority to *rescind* the contract, which provides by its terms only for *termination*. He points to a distinction in meaning between "rescind" and "terminate." The Commissioner looks rather to the clear intention of the Board than to the technical perfection of its language. Board of education members are laymen, and where their intention is clear, they should not be limited by the legal niceties of language. In the instant matter the Commissioner finds clear intent to *terminate* the contract, and in fact, in its minutes and in the letter to petitioner, *supra*, respondent expressed its concurrence with the contractual necessity to give notice "in regard to this termination" of the contract.

Petitioner further contends that the period of notice given him was shortened by two circumstances: (1) that since the Board's resolution, *supra*, was finally voted on after midnight on July 7, the time should run from July 8; and (2) that since he did not receive and sign for the letter of notice until July 11, actual notification did not occur until that date. The Commissioner dismisses the former contention as being without merit. The vote on the resolution was taken as an action of the meeting of July 7. As to the latter contention, the Commissioner finds that service was properly accomplished by placing a copy of the letter in petitioner's mailbox. Moreover, since petitioner was present at the July 7 meeting, the delay in his actual receipt of the registered letter cannot be held to have impaired his rights. *Cf. Barratt* v. *Board of Education of Harrison Township*, 1961-62 *S. L. D.* 185.

The Commissioner also dismisses, as being without merit, petitioner's contention that respondent's failure to follow its Board-Employee Relationship Policy in this matter was a violation of petitioner's rights. He holds that the authority for the termination of petitioner's contract lies in the statutes and in the contract itself and cannot be delegated by such a policy. *Cf. Perth Amboy Teachers' Association* v. *Board of Education of the City of Perth Amboy*, decided by the Commissioner of Education December 4, 1965.

But petitioner contends that in any event, he had acquired tenure and that the whole sequence of actions beginning on June 23 is a nullity because they deprive him of employment already protected by tenure. Petitioner claims

that he acquired tenure in respondent's school district under the provisions of both (a) and (b) of that portion of *R. S.* 18:13–16 which reads:

> "The services of all teachers * * * excepting those who are not the holders of proper certificates in full force and effect, shall be during good behavior and efficiency, (a) after the expiration of a period of employment of 3 consecutive calendar years in that district * * * or (b) after employment for 3 consecutive academic years together with employment at the beginning of the next succeeding academic year * * *."

Petitioner asserts, in the first place, that he commenced teaching on September 3, 1963, and that on September 3, 1966, he completed 3 calendar years of employment with respondent. He claims, therefore, that he acquired tenure on that date under *R. S.* 18:13–16 (a), *supra,* for the reason that he was, in fact, in a state of employment with respondent for the full probationary period of 36 months or 3 full calendar years, measured from the date on which employment first began. This provision for acquiring tenure is not applicable to petitioner, however, since each of petitioner's contracts provided for employment for an *academic* year, as defined in *R. S.* 18:13–16, and not for a *calendar* year. It is clear to the Commissioner that, if it had been intended that petitioner's term of employment was to be for a calendar year, his contract would have been so dated to indicate employment for a full period of 12 calendar months or 365 days. *Cf. Schumacher* v. *Manchester Township Board of Education,* 1961-62 *S. L. D.* 175, affirmed as *Board of Education of Manchester Township* v. *Raubinger,* 78 *N. J. Super.* 90 (*App. Div.* 1963). The Commissioner finds that petitioner was not employed by respondent on a calendar-year basis and that he could not, and did not, obtain tenure under *R. S.* 18:13–16(a), *supra.*

Next, petitioner contends that he obtained tenure on June 18, 1966, under provision (b), *supra,* of *R. S.* 18:13–16 because he completed three consecutive academic years when school closed on June 17, 1966, and was in possession of a valid contract of employment for the next succeeding academic year. Petitioner asserts that it is not necessary that the teacher commence service under the fourth contract. He claims that, since he had a contract for employment "at the beginning of the next succeeding academic year," he met the requirements of the statute.

The Commissioner holds that the expression of provision (b), *supra,* speaks for itself. It is not the possession of a fourth contract that confers tenure; it is the fact of "employment at the beginning of the next succeeding academic year" that is critical. If the Legislature had intended otherwise, it would have said so.

The Commissioner notes that in *Zimmerman* v. *Board of Education of Newark,* 38 *N. J.* 65, 73 (1962) the Court held:

> "* * * In practice many, if not most, teachers are hired far in advance of the time they are to begin teaching. Contracts are frequently entered into during one academic year anticipating an employment relationship at the commencement of the following academic year. Thus, if appellant's interpretation of the word 'employment' were to be adopted, tenure would be acquired in many instances before the teacher had completed teaching for three academic years. That interpretation would also shorten the

length of the minimum probationary period specified in terms of 'academic' years as the latter is defined in the last paragraph of *N. J. S. A.* 18:13–16, quoted above. Such a reading would clearly detract from the statutory purpose."

See also *Carroll* v. *State Board of Education,* 8 *N. J. Misc.* 859 (*Sup. Ct.* 1930). In the instant matter, the Commissioner finds that since the required employment relationship between petitioner and respondent did not exist at the beginning of the 1966-67 academic year, the precise conditions laid down in the statute were not met, and that petitioner did not obtain tenure under *R. S.* 18:13–16 (b), *supra.* See *Ahrensfield* v. *State Board of Education,* 126 *N. J. L.* 543, 544 (*E. & A.* 1941).

The Commissioner is constrained to decide this controversy solely on its legal merits. His conclusions herein should not be interpreted as endorsement or condonation of respondent's eleventh-hour decision as to petitioner's re-employment. While the action at issue herein must be sustained legally, the Commissioner deplores such belated action with respect to teacher contracts, and advocates its avoidance whenever possible.

In summary, the Commissioner finds and determines:

(1) that the Court's temporary restraining order cannot now be claimed as having any significant effect upon respondent's exercise of its discretionary authority;

(2) that there was constructively a proper notice of intention to terminate employment before the beginning of the fourth year's employment;

(3) that petitioner was employed by respondent on an academic year, not a calendar year basis, and that he could not, and did not, obtain tenure under *R. S.* 18:13–16 (a), *supra;*

(4) that since the required employment relationship between petitioner and respondent did not exist at the beginning of the 1966-67 academic year, the precise conditions laid down in the statute were not met, and therefore petitioner did not obtain tenure under *R. S.* 18:13–16 (b), *supra.*

The petition is accordingly dismissed.

ACTING COMMISSIONER OF EDUCATION.

November 3, 1966.

XLV

JANITOR UNDER TENURE MAY BE DISMISSED FOR NEGLECT AND INEFFICIENCY

IN THE MATTER OF THE TENURE HEARING OF THERESA COBB, SCHOOL DISTRICT OF MAURICE RIVER TOWNSHIP, CUMBERLAND COUNTY

For the Complainant, N. Douglas Russell, Esq.

For the Respondent, Plone, Tomar, Parks and Seliger (Peter Green, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Respondent is a janitress employed in the schools of Maurice River Township. She has been so employed for more than 17 years, and it is not

questioned that she has acquired tenure in her employment. By a resolution adopted by the Board of Education on July 8, 1966, charges of neglect, failure and refusal to perform her duties, inefficiency, and disobedience of a directive of the Board were filed against her and certified to the Commissioner of Education pursuant to *R. S.* 18:3-25. The respondent was continued in her employment pending a hearing and determination of the charges by the Commissioner of Education.

A hearing in this matter was conducted by a hearing examiner designated by the Commissioner of Education at the Court House, Bridgeton, on September 9, 1966. The report of the hearing examiner is as follows:

The charges against the respondent are set forth in a resolution of the Maurice River Township Board of Education adopted on July 8, 1966. The preamble of the resolution makes the following allegations:

1. The janitress was first given written notice of her deficiencies on February 29, 1964.

2. After receipt of said notice, she failed and neglected to perform her duties, and continued to employ sub-contractors not approved by the Board of Education.

3. Under date of March 15, 1966, a written specification of charges was sent to the janitress by certified mail, return receipt requested, which charges were received on March 31.

4. Notwithstanding said notice, "she has failed, neglected and refused to perform her duties as janitress and has been inefficient in performance of same, and further has continued to hire other people to perform said duties, without express permission of the Board of Education."

The written specification of charges sent to Mrs. Cobb under date of March 15, 1966, is contained in the following letter from the Board's solicitor: (P-2)

> "Please be advised that the Board of Education has called my attention to the fact that you are failing to fulfill your contractual duties to the Board, as regards the Leesburg School.
>
> "I call your attention that you are not fulfilling your duties as set forth under Item #10 of Instructions, which states that the Kindergarten is to be cleaned, swept, and dusted at noon each day; which you have failed, neglected and refused to do.
>
> "I call your attention, further, that you have not complied with the written instructions, furnished to you, under Item #1 of general instructions; which requires you to sweep and dust each classroom daily. The teachers have complained that their rooms are not dusted.
>
> "I call further attention to Item #27, general instructions; which states that failure to perform the duties assigned to you would be sufficient grounds for dismissal of yourself under terms of the contract.
>
> "The Board of Education further advises me that you have people, other than Mr. James Lee, assisting you. No one is to assist in cleaning or janitor service at Leesburg School without express permission of the Board of Education."

The instructions for janitors are contained in two documents, one entitled "General Directives for Janitors 1965-66" (P-3), and "Specific Directives for Janitors 1965-66" (P-4), which the administrative principal testified he personally handed to the janitress. (Tr. 57) Although the respondent denies receiving these directives (Tr. 151) she admits attending a meeting at which they were read and explained. (Tr. 154) In any event, the directives were sufficiently expounded in the March 15 letter, *supra,* that the hearing examiner finds that she was sufficiently informed as to the items about which the charges are centered.

Testimony in support of the charge that the janitress had failed to clean, sweep, and dust the kindergarten at noon daily was given by the principal and the kindergarten teacher, both of whom testified that the room was cleaned "sometimes," but not regularly. (Tr. 59, 68, 77) The Board President testified that he found the kindergarten room "filthy." (Tr. 31) While both the janitress and her authorized assistant asserted that one or the other of them had cleaned the kindergarten each day as required, the hearing examiner finds that the weight of the credible evidence supports the charge.

Testimony on the charge that the janitress had not complied with the rule requiring that classrooms and hallways be swept and dusted daily was given by the Board President, its Secretary, the principal, a Board member, a teacher, and the school nurse. They testified that they had found the classroom and corridor floors dirty, that wax had been applied over dirty floors, that the lighting fixtures were dusty, and that dust had not been removed from chalk rails and moldings. Both the janitress and her assistant asserted that they had vacuumed the floors and dusted, and that the floors were cleaned before wax was applied. However, after taking into consideration the irregular times of the day when cleaning was done, and the different times at which the witnesses' observations were made, the hearing examiner finds that this charge is supported by the weight of credible evidence.

The third charge concerns the use by the respondent of unauthorized personnel to assist her in the performance of her duties. The janitress has been employed in this position for nearly 18 years. During the past 14 years she has had an authorized assistant, James Lee, whom she paid and for whose work she was responsible. In recent years, and particularly during the period from March 15, 1966, to July 8, 1966, when the charges were filed, both the janitress and her assistant were employed in a manufacturing plant in a nearby city. It is alleged that the respondent and her assistant from time to time utilized other personnel, including pupils, other employees, and members of their families to assist in performing custodial duties. In the letter of February 28, 1964 (P-1), sent by the Board to the janitress, she was specifically forbidden to continue this practice. In the letter of March 15, 1966, *supra,* she was again notified that she must not utilize such assistance without *express permission of the Board of Education.* The testimony of the witnesses that such outside assistance was utilized before March 1966 is unequivocal, and is not denied by the respondent or her assistant. With one exception, as set forth hereafter, there is insufficient clear evidence to support a finding that unauthorized help was utilized after the janitress received the March 15 notice. It is admitted, however, that during the Easter recess in April 1966, the respondent hired a "cleaning outfit" to strip and wax the floors. Respondent and her assistant claim that they sought and obtained oral per-

mission of four Board members to do this. (Tr. 109) This claim was not refuted. Thus, in a literal sense, respondent did not secure "express permission" of the Board by its official action. However, it is clear to the hearing examiner that respondent and her assistant, innocent of formal procedures, sincerely believed that they had sought and obtained the necessary permission. (Tr. 173-174) The hearing examiner therefore concludes that, under the circumstances present, there can be no finding of willful intent to disobey the Board's prohibition against utilizing unauthorized help after the March 1966 notice.

There was no conclusive showing that the directives for janitors are unreasonable. The directives contemplate that the janitor will unlock the building and check heating, electrical, and water systems each morning before school opens, do the required cleaning during the noon hour, and "after 4:30 P. M. return to the school for general cleaning and work as directed." (P-4) The respondent did not object to the directives at the janitors' meeting or otherwise. Testimony by a building maintenance contractor that to clean and maintain a seven-room school such as the one in question "would take all day every day of the week" (Tr. 194) does not establish the duties here as unreasonable. Nor can it be found that the annual salary of $2,400, even if regarded as less than a living wage (Tr. 165), is justification for doing less than the Board's rules require.

In summation, the hearing examiner finds that the respondent, Theresa Cobb, has failed to fulfill properly the duties prescribed by Item #1 of the "General Directives for Janitors 1965-66" and Item #10 of the "Specific Directives for Janitors 1965-66," as charged in the complaint certified to the Commissioner by the Board of Education of Maurice River Township. The hearing examiner further finds that the charge that she has continued to hire other people to perform said duties without express permission of the Board of Education is not supported by the evidence.

* * * *

The Commissioner has studied the findings of the hearing examiner as stated herein. He finds and determines that the charges as established are sufficient to warrant dismissal or a reduction in salary of Mrs. Theresa Cobb, and remands this matter to the Board of Education of Maurice River Township for action in accordance with the determination of the Commissioner.

ACTING COMMISSIONER OF EDUCATION.

November 7, 1966.

XLVI

TEACHER'S CERTIFICATE MAY BE SUSPENDED FOR FAILURE TO FULFILL CONTRACT

In the Matter of the Suspension of the Teacher's Certificate of Raymond F. Reehill, School District of Bernards Township, Somerset County

Decision of the Commissioner of Education

Upon notification by the Superintendent of Schools of Bernards Township that Rayomnd F. Reehill, hereinafter called "the teacher," had failed to fulfill the terms of his contract of employment, the State Board of Examiners heard Mr. Reehill's explanation of his action and thereafter recommended that his limited secondary teacher's certificate be suspended for the school year 1966-67.

At a hearing on October 28, 1966, at the State Department of Education, Trenton, Mr. Reehill was given opportunity to show cause why his certificate should not be suspended by the Commissioner pursuant to *R. S.* 18:13–12. The report of the hearing examiner appointed by the Commissioner for this hearing is as follows:

Raymond F. Reehill signed a contract of employment, dated May 16, 1966, to teach in the Bernards Township schools for the period from September 1, 1966, to June 30, 1967. Additionally, he signed two supplementary agreements to serve as assistant football coach and assistant wrestling coach, each for additional compensation.

During the month of August, he did not attend three of four football coaches' conferences at the High School, giving as his reason that he was moving to a new home. After the fourth conference he learned that he would be assigned to assist in coaching freshman football, instead of varsity football as he had expected. He states that he was disappointed and displeased by this change, and in the beginning of September solicited and obtained employment in another school district.

When he did not report for the opening faculty meeting on September 6, the High School principal attempted to communicate with the teacher, and on September 7 received the following telegram: (P-1)

"Due to financial problems and personnal [sic], I'm unable to accept job. Letter will follow.

Raymond F. Reehill"

The principal testified that the promised letter has not been received.

The teacher states that he was advised by his new employer that he need do no more than notify the Bernards Township school administration by telegram of his rejection of his employment there. He admits that he did not at any time submit 60 days' notice in writing of his intention to terminate as provided in his contract of employment.

The hearing examiner concludes that the teacher's failure to fulfill the terms of his contract of employment with the Bernards Township Board of Education is without good cause.

* * * * *

The Commissioner has reviewed the foregoing findings and conclusion of the hearing examiner in this matter. The relevant statute is *R. S.* 18:13–12, which reads as follows:

> "A teacher employed by a board of education, who shall, without the consent of the board, leave the school before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct. The commissioner may, upon receiving notice of that fact, suspend the certificate of the teacher for a period not exceeding one year."

The Commissioner finds and determines that Raymond F. Reehill has, without the consent of the Bernards Township Board of Education, left his teaching assignment before the expiration of the term of his employment, and is therefore guilty of unprofessional conduct. He therefore directs that Raymond F. Reehill's New Jersey teacher's certificate be and hereby is suspended for the period from September 1, 1966, to June 30, 1967.

ACTING COMMISSIONER OF EDUCATION.

November 15, 1966.

XLVII

BOARD MAY NOT ADOPT RULE REQUIRING PARENTS TO PAY COSTS OF FIELD TRIPS

MELVIN C. WILLETT,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF COLTS NECK, MONMOUTH COUNTY,

Respondent.

For the Petitioner, Melvin C. Willett, *Pro Se*

For the Respondent, McGowan, Saling, Boglioli & Moore (R. Raymond McGowan, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner brings this action to test the legality of a resolution adopted by respondent Board of Education, of which he is a member, establishing policy for the school district with respect to field trips. Petitioner disagrees with the policy adopted by respondent and asks that it be declared invalid and set aside. Respondent takes the position that the policy is within its rule-making power and is a proper exercise of its discretionary authority.

Both parties argued their contentions before the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education

Building, Trenton, on May 27, 1966. The facts underlying this controversy are not disputed.

At its meeting on November 11, 1965, the Board of Education was asked to approve several field trips to be taken by different grades to various places of interest including a turkey farm, a firehouse, and a food store. Discussion arose as to whether the pupils would pay the costs of the trip or whether the Board of Education would absorb whatever expense was incurred. The ultimate decision was that the Board would pay for the transportation for these three trips.

Prior to the next meeting of the Board, its members received a copy of a proposed policy governing transportation and admission fees for class trips. At the meeting on December 13, 1965, after some discussion, the following policy was adopted over petitioner's objections:

"9.10—FIELD TRIPS

The Board of Education will permit a limited number of field trips. Approval of all trips must be secured by the administration from the board of education.

Transportation costs and admission charges will be borne by the parents of the children, except in the case of the Beadleston class, where the education of the children is dependent upon outside experience to a greater degree than that of the other children.

It will be the responsibility of the teacher and the administration to make certain that no child is deprived of a trip due to financial hardship. In such cases, at the discretion of the administration, the expenses will be borne from petty cash funds.

The cost of transportation for students participating in (team) activities, such as sports events, music, and science programs, will be borne by the board of education."

Petitioner thereafter filed this appeal.

Petitioner takes the position that the cost of field trips should be borne by the Board of Educaiton and should not be determined by the ability of the parents of any pupil to pay such cost. He contends that the determination of pupils' ability to pay presents difficulties, imposes an improper burden on school personnel, and may be a source of embarrassment to pupils for whom the trip is provided free. Petitioner argues that field trips are "an important and integral part of the instruction, education and school experience." (Tr. 3) He cites the constitutional and statutory mandate that public schools shall be free. *New Jersey State Constitution, Art.* VIII, *Section* IV, *paragraph* 1 and *R. S.* 18:14–1 It follows then, he says, that respondent exceeds its authority when it requires the payment of fees by parents in order for their children to participate in part of the school's educational program.

Respondent counters by saying that petitioner's appeal does not set forth a cause of action cognizable by the Commissioner of Education and it should therefore be dismissed. But even if it errs in that respect, respondent maintains that it has the power to make reasonable rules for the operation of its schools and that the policy at issue herein is a proper exercise of that power. In fact, respondent says, it questions whether it would have the authority to spend public funds appropriated for the operation of the schools

to underwrite the cost of field trips as petitioner suggests. Such an expenditure, it believes, might be subject to challenge as an improper use of school funds. In any event, respondent says, if boards of education are to be required to pay the cost of field trips there will be a drastic curtailment of such trips because of insufficient budget appropriations and children will thus be deprived of the advantages of these educational experiences. Respondent sees no infirmity in requiring pupils to pay the cost of the trips when in no case will anyone be deprived because of inability to pay.

The Commissioner does not agree with respondent's contention that the petition herein fails to state a cause of action cognizable before the Commissioner of Education. Petitioner herein challenges the legality of an affirmative action of respondent in the exercise of its authority to adopt rules for the government and management of the schools pursuant to *R. S.* 18:7–56. Such actions are subject to review by the Commissioner of Education under *R. S.* 18:3–7 and 18:3–14. *Laba* v. *Newark Board of Education,* 23 *N. J.* 364 (*Sup. Ct.* 1957); *Masiello* v. *State Board of Examiners,* 25 *N. J.* 590 (*Sup. Ct.* 1958); *Booker* v. *Plainfield Board of Education,* 45 *N. J.* 161 (*Sup. Ct.* 1965) In such cases involving findings of facts and the application thereto of the law, he is required to weigh the evidence and to make independent findings when necessary. In a matter such as that herein, however, where all that is presented for review is the propriety of the exercise of the School Board's discretion, the Commissioner is "properly guided by the principles governing the scope of judicial review of municipal action." *Boult* v. *Board of Education of Passaic,* 136 *N. J. L.* 521, 523 (*E. & A.* 1947) The Commissioner, therefore, will not substitute his judgment for that of the Board of Education in the instant matter but will restrict his review of its action to a determination of whether in adopting the regulation challenged herein, it exceeded its discretionary authority.

Respondent says that the subject policy constitutes a proper exercise of its discretionary power to make rules under *R. S.* 18:7–56, the pertinent excerpt of which reads:

> "The board may make, amend and repeal rules, regulations and by-laws, not inconsistent with this Title or with the rules and regulations of the State Board of Education, for * * * the government and management of the public schools * * *."

While this statute grants to boards of education broad powers to make rules, it also limits the exercise of that authority to acts which are not inconsistent with other school laws comprising Title 18.

Respondent's policy fails to meet this test. *R. S.* 18:14–1 says:

> "Public schools *shall be free* to the following persons over 5 and under 20 years of age: * * *." (Emphasis supplied.)

R. S. 18:12–1 provides:

> "Textbooks and school supplies shall be *furnished free of cost* for use by all pupils in the public schools.
>
> "Every school district shall appropriate and raise annually in the same manner as other school moneys are appropriated and raised in the district an amount sufficient to pay for such textbooks and supplies." (Emphasis supplied.)

Moreover, the *New Jersey State Constitution, Article* VIII, *Section* IV, *paragraph* 1 states:

> "The Legislature shall provide for the maintenance and support of a thorough and efficient system of *free* public schools for the instruction of all the children in the State between the ages of five and eighteen years." (Emphasis supplied.)

See also *R. S.* 18:11–1 with respect to facilities and courses of study.

The Commissioner holds that these laws indicate a clear intent to provide public education at no cost to parents. Admittedly a field trip is not a textbook or a supply but it is an integral part of the program of instruction employed by teachers as a device for teaching and learning. As such it is analogous to other instructional materials, equipment, and techniques which boards of education are required to furnish without cost to pupils. Respondent's doubt of its authority to absorb the costs of such trips is groundless. Field trips, as defined *post*, are an educationally sound and important ingredient in an instructional program and the expenses of such approved expeditions are a proper charge to instructional costs.

Respondent's final defense of its policy is that no pupil will be deprived of participation in a field trip because the board will provide the funds for those unable to pay. Such a procedure is necessary in certain aspects of a school's program. For example, children who are medically indigent are furnished various health services at public expense and others in need are provided nutritious lunches at no cost. But such allowances for economically or medically indigent children do not open the door to a classification of pupils as "instructionally" indigent. Parents, unless unable, are expected and required to assume the financial obligations for the health and nutritional needs of their children, but there is no such responsibility with respect to the cost of their education. That expense is assumed by society. The costs of public education are not imposed upon parents alone; they are borne by all taxpayers without regard to their parenthood status. To single out a part of the regular program of instruction, in this case field trips, and require that its cost be paid only by parents does violence to the basic principles upon which rest the American concept of free public schools in a democratic society.

The term "field trip" as used in this case is understood and is lmited to mean a journey by a group of pupils away from the school premises under the supervision of a teacher for the purpose of affording a first-hand educational experience as an integral part of an approved course of study. For example, pupils may visit the postoffice, the firehouse, a bank, a farm, a museum, government buildings, a factory; they may take nature walks, visit a planetarium, observe examples of air and water pollution, attend a professional theatrical performance. There are many such opportunities for first-hand observation and learning and the educative value of such experiences is beyond question. Teaching is more effective and learning is enhanced when it is not confined to activities within the classroom and the school building but moves out into the child's environment and employs actual observation and experience to supplement and enrich classroom procedures. Such a field trip is a proper and desirable element of the school curriculum. It is not a holiday, a recess, a reward or a vacation from school work even though it may be a welcome change from ordinary routine, and pupils may find it

interesting, exciting, and enjoyable. Learning occurs most effectively when such conditions are present. A field trip is, or should be, a valuable learning experience, planned, carried out, and followed up as an integral part of the course of study with clearly understood objectives in terms of learning. If the trip does not meet such criteria, it is to be questioned whether it has any place in the school program. The Commissioner holds that field trips which supplement and enrich pupils' classroom learning are an important and desirable element of the school's program of instruction and as such are a proper cost of instruction which cannot be imposed by rule involuntarily on the parents of pupils.

It should be clearly understood that the Commissioner's determination herein that pupils cannot be required to bear the costs of school programs is limited to field trips and such other activities as are part of the regular classroom program of instruction or course of study. It does not extend to and is not applicable to such other school affairs as dances, concerts, dramatic productions, athletic events and the like, for which admission charges are ordinarily made. Such activities, while certainly part of the total school curriculum, are not part of the classroom teaching program. They occur after normal school hours and attendance at them is voluntary. A field trip is scheduled during normal school hours and attendance is not optional. It is the classroom made mobile. Such is not true in the case of those activities which although generally referred to as "extra-curricular" are actually curricular but are "extra-classroom." The distinction made here is between procedures which, like field trips, use of the library, assembly programs, gymnasium-playground activities, etc., are an integral part of the classroom teaching-learning process, which occur during regular school hours and in which all pupils in a class automatically participate, as contrasted with other activities which are not directly related to the classroom program, which take place outside of the normal school day, and which pupils elect to attend. The expenses of these latter elective activities are often underwritten by charging participants or spectators a fee. The Commissioner finds no infirmity in such practice although he would prefer, as would most public school educators, that all such events could be made free.

The Commissioner is aware, also, that the cost of a field trip is sometimes borne by a donation from the Parent-Teachers Association or similar group, or from use of internal funds of the school. The proscription made herein does not extend to or preclude such practices. The prohibition in this case is directed and restricted solely to the adoption of a rule by a board of education which requires parents to bear the costs of approved field trips as that term has been defined, *supra*.

The Commissioner finds and determines that the regulation adopted by the Colts Neck Board of Education on December 13, 1965, with respect to field trips is inconsistent with the school laws of New Jersey to the extent that it requires that the costs of such field trips shall be borne by parents of the participating children and, therefore, such portion of the regulation is improper and unenforceable.

ACTING COMMISSIONER OF EDUCATION.

December 2, 1966.

Pending before State Board of Education.

XLVIII

BOARD MAY WITHDRAW ELEMENTARY SCHOOL PUPILS ENROLLED IN ANOTHER DISTRICT

BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON,
CAMDEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD,
CAMDEN COUNTY,

Respondent.

For the Petitioner, Leonard H. Savadove, Esq.

For the Respondent, Curry, Purnell, & Greene (George Purnell, Esq., and Joseph F. Greene, Jr., Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case has been sending, since 1905, certain of its elementary school pupils on a tuition basis to an elementary school in respondent's district. It now seeks to terminate this arrangement and, beginning in September 1967, to educate these pupils in its own schools. Respondent opposes the withdrawal of such pupils.

The facts in this case were presented in a Stipulation of Facts and in a hearing conducted at the office of the Camden County Superintendent of Schools, Pennsauken, on November 15, 1966, by a hearing examiner appointed by the Commissioner for this purpose. The report of the hearing examiner is as follows:

This matter comes before the Commissioner following an order of the Chancery Division of Superior Court enjoining petitioner herein from taking any action to effectuate a proposed withdrawal of its pupils from respondent's schools at the beginning of the 1966-67 school year. Following the defeat of its budget and a subsequent reduction of appropriations by the Township Committee in late February and March 1966, petitioner on March 14 had notified respondent of its intention to withdraw all of those elementary pupils attending respondent's Thomas Sharp School effective in the ensuing school year. Respondent thereupon applied to the Court for a restraining order, which was granted on April 1. In granting the order, the Court said:

> "I do not feel it is proper for me to go beyond this budget year of 1966-'67, but I do believe that the problem of reasonableness, as to a time when, is something that the Commissioner of Education should decide." (Transcript, page 6, of proceedings before Hon. John B. Wick, J.S.C., April 1, 1966)

and elsewhere, at page 7:

> "MR. GREENE: * * * I seem to get the drift from the bench that Haddon Township should make an application to the Commissioner for a deter-

mination of when after the 1966-'67 year they should be permitted to terminate their contract.

"THE COURT: I think that is completely right."

On July 12, 1966, petitioner served a notice upon respondent indicating its intention to terminate the existing relationship on June 30, 1967. The petition herein was received by the Commissioner on October 17, 1966.

The pupils attending respondent's Thomas Sharp School which petitioner seeks to withdraw reside in a section of Haddon Township known as "West Collingswood Extension." While politically a part of Haddon Township, this section is physically separated from the larger portion of the Township. There are no public schools in West Collingswood Extension, and since 1905 the elementary school children residing there have attended respondent's Thomas Sharp School, which is within walking distance. The current tuition paid by petitioner to respondent for the education of these children approximates $48,000 per year.

During the 1965-66 school year, 107 of the 375 pupils enrolled in the Sharp School were Haddon Township residents. In the current year, 99 of 359 pupils are from Haddon Township. Projected enrollment figures for 1967-68 show 117 of the 388 pupils to be residents of Haddon Township.

While it is conceded that the reduction of the 1966-67 budget by $107,000 was a factor in petitioner's move to withdraw its pupils from Collingswood (Tr. 13), the Superintendent of petitioner's schools testified that the withdrawal had been considered by the Haddon Township Board long prior to the budget reduction. (Tr. 13, 16) He testified further that petitioner sought for its pupils the advantage of a continuous program from kindergarten to grade 12 in the same system. (Tr. 9) It is planned, he says, to distribute the West Collingswood Extension pupils among the Township's five elementary schools, increasing the average class size from 24 to 26 pupils. (Tr. 9) All pupils would be transported to their respective schools. (Tr. 11)

Respondent opposes the withdrawal first on the grounds that there is an effective contract between petitioner and respondent for the education of the West Collingswood Extension pupils in the Collingswood elementary schools. This contract, it contends, while not a written instrument, rests upon the acts and intentions of the parties, one aspect of which was the expenditure of $105,000 in 1956 for enlargement and improvement of the Sharp School facilities. The bonds issued for this purpose will not be fully amortized until 1975, and respondent urges that the Haddon Township pupils should not be withdrawn until that date.

Respondent's second ground for opposing the petition is that social and educational benefits now available to the subject pupils will be lost if they are dispersed and transported as petitioner plans.

As to respondent's first argument, no evidence was offered to support the contention that a "tacit contract" exists, beyond the stipulation of the sending-receiving relationship that has continued since 1905. Nor does respondent cite any cases in support of its position. The statutes are silent as to the continuance of such relationships at the elementary school level, by contrast to the provisions which the Legislature has established for such relationships

at the high school level (*R. S.* 18:14–7), a fact which Judge Wick noted in his opinion in granting the restraining order, *supra* at page 4. Nor has the Legislature made provision for a contract for furnishing elementary schooling as it has for high schools. *Cf. R. S.* 18:14–7.3 *et seq.* In this connection, it is significant that even when a receiving board of education undertakes to provide additional high school facilities, it may not enter into a contract with a sending district for more than 10 years. *R. S.* 18:14–7.3 Lacking statutory authority for a contract, neither petitioner nor respondent could have made in 1956 an agreement for 20, or even 10 years, since it is well established that absent specific statutory authority, a board of education may not bind its successors. *Cf. Skladzien* v. *Board of Education of Bayonne*, 12 *N. J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N. J. L.* 203 (*E. & A.* 1935).

The hearing examiner finds no basis in the evidence for concluding that educational or social benefits accrue to the West Collingswood Extension pupils by virtue of their attendance at the Sharp School in Collingswood that exceed the benefits claimed by petitioner in having all of its pupils educated in its own school system.

The hearing examiner concludes that no basis in law or fact has been established by respondent to deny petitioner its right to provide in its own schools for the education of the elementary grade pupils residing in West Collingswood Extension effective at the beginning of the 1967-68 school year.

* * * * * * *

The Commissioner has considered the findings and conclusions of the hearing examiner reported *supra*. He notes that by virtue of *R. S.* 18:11–1, a local school district may provide suitable school facilities for its pupils, or may arrange for their education in the schools of another district. Concurring in the hearing examiner's conclusion that there can be no binding contract between petitioner and respondent for the education of petitioner's pupils in respondent's schools, he holds that petitioner has the discretionary right to withdraw its pupils from respondent's schools. He further holds that since respondent has enjoyed the advantages of petitioner's tuition for the maximum term allowed by the Legislature in the analogous situation with respect to high school sending-receiving relationships, respondent cannot claim unreasonable financial hardship resulting from such withdrawal. Finally, the Commissioner holds that such withdrawal will not be contrary to the educational interests of the pupils involved. Therefore, for good cause shown and consonant with the opinion of the Court, *supra*, in this matter, the Commissioner authorizes the termination of the elementary school sending-receiving relationship between the Boards of Education of Haddon Township and Collingswood, in so far as pupils resident in West Collingswood Extension are concerned, effective June 30, 1967.

ACTING COMMISSIONER OF EDUCATION.

December 9, 1966.

XLIX

BOARD NOT RESPONSIBLE FOR EDUCATION OF CHILD VOLUNTARILY WITHDRAWN FROM THE PUBLIC SCHOOLS

IN THE MATTER OF "R,"

Petitioner,

v.

THE BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,

Respondent.

For the Petitioner, Jay J. Toplitt, Esq.

For the Respondent, Samuel A. Christiano, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

The issue raised in this appeal, is whether the West Orange Board of Education has failed to meet its statutory obligations with respect to the education of petitioner's daughter, a twelve-year-old girl with needs for special education which petitioner, her father, contends respondent has not provided. Respondent Board of Education maintains that it has at all times been ready and able to provide an appropriate program and facilities for petitioner's child.

The facts in this matter were elicited at a hearing before the Assistant Commissioner in charge of Controversies and Disputes on February 24, 1966, at the office of the Essex County Superintendent of Schools, East Orange. Counsel also filed briefs.

Petitioner's daughter, hereinafter referred to as "R," was born on May 30, 1953, and at the time of this petition was 12 years old. She started school in September 1958, as a pupil in the kindergarten class in the Gregory School in West Orange. Very soon she manifested difficulty in learning and in adjusting to school. In January 1959, she was referred to and examined by the school psychologist who made no definitive findings but reserved his recommendations until after more observation and study. (Exhibit R-2) At the end of the first year it was deemed advisable to retain R in the kindergarten grade because of her slow development and adjustment. After two years in kindergarten she was promoted to first grade. In March 1961, she was again examined by the school psychologist who reported that R was

> "* * * a child who will probably always find academic work quite difficult. Mental development shows a lag of at least a year * * * and the chances are that that lag will become more pronounced as she grows chronologically.
>
> * * * * *
>
> "It may possibly be that she should be considered for placement in special education at the end of the second grade year." (Exhibit P-1)

R's parents were aware of her problems and maintained a close relationship with the school, consulting her teachers frequently. They also sought the advice of a pediatrician regularly.

R was advanced to second grade in September 1961. In November 1961, following a conference with the school principal and while she was being

studied by the school psychologist (Exhibit P-2) the parents decided to transfer R to a private school. She was enrolled in the Beard School in West Orange and attended there for 2½ years, after which she was moved to the Sherwood School, another private institution. After two half-terms there R was transferred to the Midland School for Brain Damaged Children, North Branch, New Jersey, where she continues in attendance. The costs of her attendance there have been borne by her parents.

Petitioner contends that respondent has not fulfilled its obligations to R because it has evaluated and classified her special educational needs improperly and has failed to provide proper facilities for her education. He says that his daughter is an emotionally disturbed and socially maladjusted child, that respondent does not maintain an appropriate program for such a pupil, and that it is, therefore, incumbent upon respondent to pay for her tuition and transportation to a facility where her special needs can be met.

Respondent, on the other hand, maintains that R withdrew voluntarily from its schools in 1961 and has made no request of the West Orange Board of Education for education services of any kind between that time and the filing of this petition. Respondent contends that R is a mentally retarded child whose education needs can be accommodated in its special education classes. It disclaims any obligation to pay the costs of R's tuition and transportation to other schools in either the past or future for the reason of its expressed readiness at all times to provide appropriate educational services in the schools of the district for this pupil.

It is clear that respondent Board of Education has a duty to provide for the educational needs of children with special problems. *R. S.* 18:14–71.17 provides:

> "Each board of education shall identify and ascertain, according to rules and regulations prescribed by the commissioner with the approval of the State board, what children, if any, in the public schools between the ages of 5 and 20 cannot be properly accommodated through the school facilities usually provided because of the extent of their mental retardation, physical handicaps, emotional disturbance or multiple handicaps."

R. S. 18:14–71.22 further provides:

> "It shall be the duty of each board of education to provide suitable facilities and programs of education for all the children who are classified as handicapped under any section of this act. The absence or unavailability of a special class facility in any district shall not be construed as relieving a board of education of the responsibility for providing education for any child who qualifies under this act."

Petitioner's allegation that respondent has neglected its responsibilities to R is not supported by the facts. From the evidence it is clear that R manifested difficulties in school adjustment almost from the beginning; that her teachers were aware of her atypical development and progress; that the school began procedures aimed at identification of R's difficulties; and that those studies were interrupted by R's removal by her parents to a nonpublic school. Respondent's attempts to evaluate R's problems were not completed, no classification was made, and she was transferred out of the public school before a determination of her proper placement in a special program could be accomplished. There is, therefore, no proof that such placement would not have been suitable and successful.

No demands were made upon respondent by R's parents. In their natural anxiety over their daughter's progress they chose to seek special schooling elsewhere and in so doing they relieved respondent of any obligation with respect to their child's education. Parents have a right to elect to have their children educated in schools other than those provided at public expense but, in so choosing, they cannot, by unilateral action such as that herein, require the local school district to assume the costs of that choice. *Lange* v. *Hi-Nella Board of Education*, 1959-60 *S. L. D.* 65; *cf. Boorstein* v. *Fort Lee Board of Education*, 1957-58 *S. L. D.* 50. Even were there no suitable facilities for R in respondent's schools, placement in an appropriate program in a nonpublic school at public expense could be accomplished only after concurrence and approval by respondent and the Commissioner of Education. *R. S.* 18:14–71.23(g) There is no showing that any such approval was ever sought or granted. It is clear that R was removed from public school and placed in private school on her parents' volition and with no involvement on the part of respondent. Under such circumstances the financial obligations incurred by that action devolve solely upon the parents and not upon the Board of Education.

Even though respondent cannot be held liable for past costs of R's special private school placement, petitioner claims the right to payment of her tuition and transportation for her continued attendance there because of the lack of appropriate facilities which they allege in respondent's schools.

Respondent denies any lack of a suitable program in its school for R's particular needs. After the inception of this petition R was examined by the school psychologist employed in the West Orange public schools. He testified at length, and the report of his examination and recommendations was admitted in evidence as Exhibit R-3. The conclusion reached by him is that "R should be classified as an educable mentally retarded girl" whose "mental retardation is the primary cause of her learning difficulties." He recommended that R be placed in a special education program for educable mentally retarded children. Such a program is maintained in respondent's schools. A psychiatric evaluation of R made at approximately the same time by a consulting psychiatrist employed by respondent concurred with the psychologist's recommendation.

Petitioner maintains that the classification of R as mentally retarded is incorrect and says that the proper classification should be emotionally disturbed and socially maladjusted. No proof of incorrect evaluation was offered other than petitioner's assertion and the testimony of a pediatrician who has treated R since infancy. While the pediatrician spoke in some detail with respect to the physiological bases of R's developmental problems, his testimony does not contradict the findings of the psychiatrist or psychologist and in many respects corroborates them. A careful study of this aspect of this matter leads the Commissioner to conclude that respondent has made a proper evaluation and classification of R and that facilities suitable to her education needs are available to her in respondent's schools.

Moreover, the Commissioner notes that respondent has indicated its willingness to provide a proper program for R whatever her needs may be. It must be assumed, therefore, should the parents choose to re-enroll R in respondent's schools, that the school authorities will undertake appropriate

studies and follow-up procedures to adapt a program aimed at her optimum development and progress as time goes on.

The Commissioner finds and determines that the West Orange Board of Education has fulfilled its statutory obligations with respect to the education of petitioner's child and that, upon the facts presented, it has no financial liability for the costs of tuition and transportation of petitioner's daughter to nonpublic school.

The petition is therefore dismissed.

ACTING COMMISSIONER OF EDUCATION.

December 15, 1966.

L

MOOT ISSUES WILL NOT BE DECIDED

ALEXANDER J. MCPHEE,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,

Respondent.

For the Petitioner, Parisi, Evers, & Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent, Markey & Witham (John P. Markey, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner seeks an order directing the admission of his daughter to respondent's schools as a transfer pupil. Respondent contends that petitioner's daughter is not entitled to admission because she does not meet the school district's age requirements and does not come as a *bona fide* transfer from either public or private school.

This matter is submitted on a stipulation of facts and briefs of counsel.

The original petition herein was filed on October 26, 1965, by petitioner acting *pro se.* Before respondent's Answer to that petition was filed, a second petition was filed, setting forth a further complaint, and repeating a request for an order from the Commissioner that petitioner's daughter be admitted to respondent's schools *pendente lite,* which order was denied. Thereafter petitioner was represented by counsel, who joined with respondent's attorney in the submission of a stipulation of the facts upon which this case rests. Final briefs were received by the Commissioner on April 22, 1966.

Since no determination could be made in this matter which would have a practical educational effect during the 1965-66 school year, the specific issues raised herein by petitioner have been rendered moot. Petitioner's daughter, by age alone, is now eligible for admission to the public schools of the district in which she resides. It is well settled that the Commissioner does not decide moot issues. *Tedesco* v. *Board of Education of Lodi,* 1955-56 *S. L. D.* 69, 70;

McAllister v. *Board of Education of Lawnside*, 1951-52 *S. L. D.* 39; *Rodgers* v. *Board of Education of Orange*, 1956-57 *S. L. D.* 50 In *Moss Estate, Inc.* v. *Metal and Thermit Corporation*, 73 *N. J. Super.* 56, 67 (*Ch. Div.* 1962), the Court said:

> "It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and 'to decide only concrete contested issues conclusively affecting adversary parties in interest.' *Borchard, Declaratory Judgments* (2*d ed.* 1941), *pp.* 34-35; *New Jersey Turnpike Authority* v. *Parsons, supra.*"

Since the issues in the instant controversy cannot be decided to affect the parties thereto, any determination would be fruitless. The petition is therefore dismissed.

ACTING COMMISSIONER OF EDUCATION.

December 22, 1966.

LI

TEACHER NOT ENTITLED TO RENEWAL OF EMPLOYMENT CONTRACT

ANTHONY AMOROSA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondent.

For the Petitioner, Emanuel Greenberg, Esq.

For the Respondent, John J. Pagano, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION
ON MOTION TO STRIKE AND FOR SUMMARY JUDGMENT

Petitioner in this case alleges that respondent Board of Education acted improperly in declining to reappoint him for a fourth consecutive academic year which would have given him tenure in the school system. He prays the Commissioner to order respondent to show cause why it should not be directed to re-employ him for the 1966-67 school year. Respondent says that its determination not to re-employ petitioner was a proper exercise of its discretionary authority and denies any improper motivation or illegal actions in connection with that decision.

After filing its Answer to petitioner's Appeal, respondent moved to strike paragraph 5 of the petition and for the entry of summary judgment. Argument on the motion was heard on September 29, 1966, at the office of the Hudson County Superintendent of Schools, before the Assistant Commissioner in charge of Controversies and Disputes.

Paragraph 5 of petitioner's Appeal states:

> "Furthermore your Petitioner alleges that he was approached by person or persons purporting to act on behalf of the Bayonne Board of Education and advising your Petitioner that in event of a payment to said person or

persons of a substantial sum of money, that he could be assured of being appointed to teach for the year 1966-67, which would be the third year of your Petitioner's employment as a teacher for the Board of Education of Bayonne and which would give your Petitioner tenure, as a teacher in the Bayonne Public School System. Your Petitioner refused and declined to make any payment of the amount aforementioned whatsoever."

It should be noted that the portion of the above statement of petitioner which asserts that the year 1966-67 "would be the third year" of his employment is in error and should have read fourth year.

Respondent moves to strike the above allegation on the grounds that it charges an indictable offense under the criminal laws of New Jersey and it is therefore not within the jurisdiction of the Commissioner of Education but is cognizable only before the Courts. Respondent avers further that it has forwarded all letters and pleadings in this matter to the Prosecutor of the Pleas for Hudson County and that any action with respect to paragraph 5 should emanate from that official and not the Commissioner of Education.

Petitioner counters by saying that while the Board has a right to decide whom it will or will not employ, that right is not so absolute and unlimited that it may engage in the commission of a crime in connection therewith. Under such circumstance, petitioner argues, his remedy should not be limited to the filing of a criminal complaint seeking a criminal conviction in the Courts. Even were there such a conviction, he fails to see how it would restore him to his position in the school system or undo the harm he claims to have suffered. For these reasons, petitioner contends, the Commissioner is not helpless to intervene in this situation.

The statute on which the Commissioner's quasi-judicial powers are based is *R. S.* 18:3–14. The portion pertinent to these contentions reads:

"The commissioner shall decide without cost to the parties all controversies and disputes arising under the school laws, or under the rules and regulations of the state board or of the commissioner. * * *"

It is clear that the Commissioner's power to hear and decide disputes is not unrestricted but is limited to matters which involve the school laws and regulations promulgated by him or the State Board of Education. In *Baratelli* v. *Jersey City Board of Education*, 1956-57 *S. L. D.* 80, petitioner, a recreation instructor employed by the board of education, appealed to the Commissioner to determine his tenure status under *R. S.* 38:16–1, the Veterans' Tenure Act. The Commissioner declined to intervene on the grounds that he lacked jurisdiction. The New Jersey Supreme Court also found the Commissioner lacking in jurisdiction to hear and decide a school janitor's claim for pension under *R. S.* 43:4–2 in *Reilly* v. *Camden City Board of Education*, 127 *N. J. L.* 490 (*Sup. Ct.* 1941). Similarly the Court in *East Brunswick Board of Education* v. *East Brunswick Township Council*, 48 *N. J.* 94 (1966), said:

"Where the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction *even though it may pertain to school personnel.*" (Emphasis added.)

See also *Board of Trustees of Teachers Pension, etc.*, v. *La Tronica*, 81 *N. J. Super.* 461 (*App. Div.* 1963). For the reasons stated, the Commissioner finds

and determines that his jurisdiction to decide school law controversies does not extend to the substance of the allegations contained in paragraph 5 of the petition herein, and he therefore determines that this paragraph shall be stricken from the petition.

Respondent further moves for summary judgment on the grounds that there is herein no genuine issue of material fact. It admits that petitioner was employed as a teacher in its schools for three consecutive academic years beginning September 1963 and ending June 1966, and that he was not re-employed for the 1966-67 school year. Since such employment did not meet the necessary requirements for the acquisition of tenure, and both parties having fulfilled their mutual obligations under the contract, respondent maintains that petitioner has no further rights which he can demand.

Petitioner admits that a board of education ordinarily has discretion to decide whom to appoint or not to appoint but contends that such discretion is not unlimited and where there are allegations of arbitrary, capricious or discriminatory acts, as in the instant matter, the board must be held to account and the teacher afforded a remedy. To hold otherwise, petitioner says, would open the door to racial, religious, or political discrimination in employment. However, other than the allegations contained in paragraph 5 which the Commissioner has stricken from the remainder of the appeal, petitioner's bare assertion of arbitrary and discriminatory action is unspecific. The pleadings cite no act of racial, religious, or political motivation in respondent's decision not to enter into a new contract with him.

The Commissioner and the Courts, both in New Jersey and in other jurisdictions, have held that there is no right to public employment, and that a school employee who has not acquired tenure, is not entitled to reasons and a hearing thereon when his contractual agreement has terminated and he is not offered re-employment. In *Taylor and Ozmon* v. *Paterson State College,* decided March 29, 1966, the Commissioner said:

> "* * * The requirement of three years of probationary employment before the acquisition of tenure provides a trial period for both employer and employee. During this time the employer has an opportunity to assess not only the employee's performance in the classroom but also the many other factors involved in a decision to make a particular teacher a permanent member of the staff. A teacher with excellent classroom skills may exhibit other characteristics or behavior which may lead the employer to question whether he will fit the particular group or situation. Many factors contribute to such a decision and most of the judgments are necessarily subjective. The conclusion often rests on professional judgment of many intangibles which do not lend themselves to a statement of 'reasons' or a hearing such as petitioners seek. The New Jersey Supreme Court recognized this in *Cammarata* v. *Essex County Park Commission,* 26 *N. J.* 404, 412 (1958) when it said:
>
> 'It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge and intelligence do not alone [suffice] * * *. The crucial test of his fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible

qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the [employer] * * * is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may make pragmatically informed and unrestricted decisions as to an applicant's suitability.' "

Petitioner's situation herein is similar in many respects to that of *Taylor, supra.* He did not acquire tenure. Neither he nor the Board was under any legal obligation to continue their relationship. The Board could not have compelled petitioner to return for a fourth year and neither could petitioner require that his employment be renewed. Petitioner was not dismissd. His agreement with respondent was concluded and no rights extended to either party thereafter. There appears no basis, therefore, for a charge of arbitrary, capricious, or discriminatory behavior because of the mere non-renewal of an employment contract. The decision to renew or not to renew is a matter of the discretionary judgment of either party for reasons which appear sufficient to it and which it can divulge or not as it sees fit.

The New Jersey Supreme Court enunciated this principle in *Zimmerman* v. *Newark Board of Education,* 38 *N. J.* 65, 70 (1962), when it quoted the "historically prevalent view" expressed in *People* v. *Chicago,* 278 *Ill.* 318, 116 *N. E.* 158, 160 (1917) as follows:

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

Support of this holding is found also in *Parker* v. *Board of Education of Prince George's Co.,* 237 *F. Supp.* 222 (*D. C. Md.* 1965):

"In fact, plaintiff was not dismissed from his position; his contract was not renewed at the end of the school year * * *." (at page 224)

"* * * unless there is a statute to the contrary, probationary teachers' contracts may be terminated by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without a hearing." (at page 227)

See also *Pinto* v. *Wynstra,* 255 *N. Y. S.* 2*d* 536 (*N. Y. Supreme Court, App. Div.* 1964) and *Eastburn* v. *Newark State College et al.,* decided by the New Jersey State Board of Education March 2, 1966.

Having stricken paragraph 5 of petitioner's appeal, the Commissioner finds no cause for action or any genuine issue of material fact in the remainder of the petition. Petitioner's bare assertion that respondent is guilty of arbitrary, capricious, and discriminatory behavior because it refused to re-employ him at the end of his probationary period is insufficient to raise a genuine issue of material fact. If it were, there would be no need of the tenure laws and the security they afford against unwarranted dismissal. Further, probationary teachers could also lay claim to the protection bestowed by tenure by merely alleging that their failure to be re-employed entitled them to a hearing on the motivations underlying the Board's exercise of its dis-

cretionary authority. The Commissioner finds no such anomalous legislative intent in the statutes. *Schierstead* v. *Brigantine*, 29 *N. J.* 220 (1959); *Harvey* v. *Essex County Freeholders*, 30 *N. J.* 381 (1959); *Robson* v. *Rodriquez*, 26 *N. J.* 517 (1958); *Manchester Township Board of Education* v. *Raubinger*, 78 *N. J. Super.* 90 (*App. Div.* 1963)

Moreover, assuming *arguendo* that the Commissioner were to grant petitioner's request for a hearing and that respondents were unable to establish any specific basis for its decision not to reappoint, what relief could the Commissioner afford to petitioner? It is clear that petitioner has not fulfilled the precise statutory conditions necessary to the acquisition of tenure and until he does he cannot claim that protection. *Moriarity* v. *Garfield Board of Education*, 133 *N. J. L.* 73 (*Sup. Ct.* 1945), affirmed 134 *N. J. L.* 356 (*E. & A.* 1946); *Ahrensfield* v. *State Board of Education*, 126 *N. J. L.* 543 (*E. & A.* 1941) The Commissioner has already made it clear that he cannot confer tenure under the general power of supervision accorded him by *R. S.* 18:3–7. *Zimmerman* v. *Newark Board of Education*, 1960-61 *S. L. D.* 128, 132 Both the Commissioner and the courts have consistently declined to review the non-reappointment of teachers not under tenure and have limited their determination to the sole question of whether or not tenure status had accrued. *Chalmers* v. *State Board of Education*, 11 *N. J. Misc.* 781 (*Sup. Ct.* 1933); *Gordon* v. *State Board of Education*, 132 *N. J. L.* 356 (*E. & A.* 1944); *Schulz* v. *State Board of Education*, 132 *N. J. L.* 345 (*E. & A* 1944); *Moresh* v. *Bayonne Board of Education*, 52 *N. J. Super.* 105 (*App. Div.* 1958) The Commissioner finds no relief which he could afford to petitioner on any grounds on which he can intervene in respondent's determination.

For the reasons stated, the Commissioner finds and determines that paragraph 5 of the petition herein does not allege a cause of action which falls within the scope of the Commissioner's jurisdiction, and respondent's motion to strike that portion of the appeal is granted. The Commissioner finds further that the remainder of the petition presents no genuine issue of material fact. That being so, respondent's motion for summary judgment on the remainder of the petition is proper and is hereby granted. See *Judson* v. *Peoples Bank*, 17 *N. J.* 67 (1954); *U. S. Pipe and Foundry Company* v. *American Arbitration Association*, 67 *N. J. Super.* 384 (*App. Div.* 1961); *Ocean Cape Hotel Corp.* v. *Masefield Corp.*, 63 *N. J. Super.* 369 (*App. Div.* 1960).

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

December 30, 1966.

LII

SALARY DURING PERIOD OF ILLEGAL DISMISSAL SUBJECT TO MITIGATION

JOHN S. ROMANOWSKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

For the Petitioner, Frederick J. Fox, Esq.

For the Respondent, William A. Massa, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This matter comes before the Commissioner on remand from the Superior Court, Appellate Division, to determine the amount of compensation to which petitioner is entitled by reason of his unlawful dismissal from his employment during the period from June 12, 1962, to June 12, 1964. Specifically, the Commissioner was directed to consider the question of mitigation of salary for the period in question by such amounts as petitioner earned or could have earned during such period. Additionally, by amendment of the pleadings herein, the Commissioner is asked to decide the question of petitioner's right to interest on the amount of compensation found to be due to him.

A hearing in this matter was held on Wednesday, July 6, 1966, at the office of the County Superintendent of Schools, Jersey City, by a hearing examiner appointed by the Commissioner of Education for this purpose. The report of the hearing examiner is as follows:

This matter comes before the Commissioner on remand from the Superior Court, Appellate Division (Appeal Docket No. A-874-64), dated February 4, 1966. It is stipulated that petitioner was appointed Business Manager by respondent Board of Education in 1958. In 1959 petitioner, along with members of the Board at that time and certain others, was indicted on five counts. He was convicted on one of the counts on June 12, 1962, and the Board of Education then declared his position forfeited pursuant to *R. S.* 2A:135–9. On June 1, 1964, the Supreme Court reversed the conviction, and petitioner returned to his duties. He was later suspended because of the four remaining counts of the indictment, which were ultimately dismissed. On June 29, 1964, he presented his demand upon respondent for compensation for the period from June 12, 1962, to June 12, 1964. Judgment in his favor and against the Board of Education was entered by Superior Court, Law Division (Docket No. L 27144-63) on June 10, 1965, in the amount of $27,058.50, together with costs in the amount of $84.00. This judgment was appealed, and on February 4, 1966, the Appellate Division reversed and remanded the matter to the Commissioner. The Court's opinion is stated here in full:

"We conclude that plaintiff John S. Romanowski is entitled to compensation for the period June 12, 1962 to June 12, 1964, he having been

dismissed without good cause within the meaning of *N. J. S. A.* 18:5–49.1. However, in fixing the amount of such compensation, the question of mitigation should be considered. *Mastrobattista* v. *Essex County Park Commission*, 46 *N. J.* 138 (1965); *Mullen* v. *Board of Education of Jefferson Tp.*, 81 *N. J. Super.* 151 (*App. Div.* 1963). The case is remanded directly to the Commissioner of Education to hear and decide the matter. Plaintiff should not be deprived of a just determination of his claim in the proper forum even though the procedure he followed in challenging defendant's refusal to pay him compensation for the period in question was improper. *Cf. Mastrobattista, supra*, at *p.* 150. "The judgment of the Law Division is reversed and the case remanded as aforesaid. Costs in favor of plaintiff on this appeal."

Petitioner testified that during the two-year period in question he made extensive efforts to secure other employment. He listed by name some 22 agencies, persons, and establishments from whom he had sought employment (Tr. 13 to 35), and from one he had enough work during 1964 to earn $119.30. (P-1) He attributed his difficulty in securing employment to the nature of the indictments pending against him, his conviction on one count, and the cardiac condition from which he suffers. Both petitioner and his wife testified that during this period she was the sole support of the family, first as operator of a financially unsuccessful refreshment stand, then in practice of her profession as a nurse.

The hearing examiner finds that petitioner's total earnings to be applied in mitigation amount to $119.30. He further finds that petitioner has made suitable but unsuccessful effort to obtain other employment.

At the hearing in this matter petitioner moved to amend his petition to seek interest on the unpaid judgment, with costs, entered by Superior Court, Law Division, on June 10, 1965. Counsel filed briefs on the motion and on the question of petitoner's right to interest. The hearing examiner recommends that the amendment be allowed and that the Commissioner decide the issue raised therein, on the well-established principle that amendments to pleadings are allowed with great liberality. *Smith* v. *Thermo-Fax Corp.*, 53 *N. J. Super.* 102, 105 (*Law. Div.* 1958)

On the question of interest, petitioner relies upon the general statement of the Supreme Court in *Mastrobattista* v. *Essex County Park Commission*, 46 *N. J.* 138, 143 (1965), as follows:

> "Current concepts of fair play in employment relationships suggest that persons in the public service who have been suspended or removed on charges later determined to be unfounded should be made whole inosfar as possible; they should be entitled not only to restoration of duties but should also suffer no loss in their earnings. * * *"

and on the general rule stated on *Agnew Co.* v. *Paterson Board of Education*, 83 *N. J. Eq.* 49, 67 (*Ch.* 1914), affirmed 83 *N. J. Eq.* 336 (*E. & A.* 1914):

> "Unless a case be found which is conclusive authority establishing a precedent, the safest way for a court of law or equity is to decide all questions pertaining to interest according to the plainest and simplest considerations of justice and fair dealing."

The hearing examiner has examined the New Jersey cases cited by petitioner in support of his request that interest be allowed; *viz. Cohrs* v. *Igoe Brothers, Inc.*, 71 *N. J. Super.* 435 (*App. Div.* 1962); *Lindsay* v. *Boles*, 61 *N. J. Super.* 516 (*Passaic Co. Ct.* 1960); and *Small* v. *Schuncke*, 42 *N. J.* 407 (1964). It is significant to the hearing examiner that in these cases, as well as others, the principle is clearly enunciated that:

> "Interest is in contemplation of law damages for illegal detention of a legitimate claim or indebtedness. *Fidelity Mut. Life Ins. Co.* v. *Wilkes-Barre, etc., Co.*, 98 *N. J. L.* 507, 510 (*E. & A.* 1923)." *Small* v. *Schuncke*, *supra*, at 415

The hearing examiner finds nothing in the instant matter to establish that the compensation to which the Court found petitioner is entitled pursuant to *R. S.* 18:5–49.1 has been illegally detained, or that payment has been withheld "by reason of negligence or other wrongful conduct" of respondent (*Cohrs* v. *Igoe Brothers, Inc.*, *supra*, at 447), or that there has been an "improper withholding of moneys" (*Lindsay* v. *Boles*, *supra*, at 523). The original judgment entered by the Law Division was reversed, and the matter remanded for the Commissioner's determination of compensation in accordance with the Court's opinion, *supra*. Until the Commissioner renders his decision, there is no "judgment" which respondent must discharge. *Cf. Asbell* v. *Campbell Morrell & Co.*, 12 *N. J. Misc.* 707 (*N. J. Dept. Labor* 1934).

Moreover, even had payment been improperly withheld, there is no statutory authority for a board of education to pay interest as damages.

> "It has been held that interest is payable as damages for the improper withholding of funds by a governmental agency only when provided for by statute. *Brophy* v. *Prudential Insurance Co. of America*, 271 *N. Y.* 644, 3 *N. E.* 2*d* 464 (*Ct. App.* 1936)." *Consolidated Police, etc., Pension Fund Comm.* v. *Passaic*, 23 *N. J.* 645, 654 (1957)

The statute under which petitioner makes his claim to the Commissioner is *R. S.* 18:5–49.1, which reads as follows:

> "Whenever any person holding office, position or employment with a local board of education or with the State Board of Education shall be illegally dismissed or suspended from his office, position or employment, and such dismissal or suspension shall upon appeal be decided to have been without good cause, the said person shall be entitled to compensation for the period covered by the illegal dismissal or suspension; *provided*, that a written application therefor shall be filed with the local board of education or with the State Board of Education, as the case may be, within thirty days after such judicial determination."

Nowhere does the statute authorize the payment of interest. Nor, in the absence of improper, negligent, or wrongful withholding or detention of moneys by respondent, can it be said that the balance of the equities is in favor of petitioner. *Cf. Small* v. *Schuncke*, *supra*, at 416; *Consolidated Police, etc., Pension Fund Comm.* v. *Passaic*, *supra*, at 654.

It is the finding of the hearing examiner that petitioner earned $119.30 to be applied in mitigation of his compensation for the period from June 12, 1962, to June 12, 1964, as determined by the Court.

It is the further recommendation of the hearing examiner that the Commissioner entertain petitioner's motion to amend his petition to seek a determination of his right to interest on the judgment entered in his favor on June 10, 1965. It is further the conclusion of the hearing examiner that petitioner has not established his right in law or equity to receive such interest.

* * * * * *

The Commissioner has carefully reviewed and considered the report of the hearing examiner set forth *supra*.

He finds and determines that petitioner is entitled to compensation for the period from June 12, 1962, to June 12, 1964, in the amount of $27,058.50, together with costs, as determined by the Court, reduced by $119.30, which is the amount petitioner earned elsewhere during this period.

The Commissioner also determines that the authorization given petitioner to amend his petition in order to raise the issue of his right to receive interest was proper. However, the Commissioner finds and determines that no such allowance should be made. Firstly, interest ordinarily runs from the time of entry of judgment. In this case, until the Commissioner reaches his decision as to the proper amount of compensation to which petitioner is entitled, there is no date of entry (even assuming that a determination of the Commissioner is the equivalent of a "judgment") from which interest can be computed. Secondly, even upon equitable principles, there has been no showing that respondent's conduct in withholding payment was "wrongful." Finally, the petitioner, by statute, is entitled to "compensation" only. *R. S.* 18:5–49.1 The use of the term "compensation," even in a broad sense, must be interpreted to mean "earnings." See *Mastrobattista* v. *Essex County Park Commission, supra*. Had the Legislature intended interest to be included, they could have easily provided therefor. Absent any such provision, the Commissioner finds no authority which would permit a board of education to award interest in the circumstances of this case in addition to compensation. Accordingly, the Commissioner determines that the petitioner's prayer for allowance of interest should be and is hereby dismissed.

ACTING COMMISSIONER OF EDUCATION.

December 30, 1966.

DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION, SUPERIOR COURT (APPELLATE DIVISION), AND SUPREME COURT ON CASES PREVIOUSLY REPORTED

CELINA G. DAVID,

Petitioner-Respondent,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, IN THE COUNTY OF BERGEN,

Respondent-Appellant.

Decided by the Commissioner of Education, April 22, 1965.

For Petitioner-Respondent: Joseph C. Woodcock, Jr., Esq.

For Respondent-Appellant: Eznick Bogosian, Esq.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Appellant from the decision of the Commissioner of Education rendered April 22, 1965.

It is the recommendation of the Legal Committee that the decision of the Commissioner of Education be affirmed for the reasons set forth in his opinion of April 22, 1965.

March 2, 1966.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued September 19, 1966—Decided September 28, 1966.

Before Judges Gaulkin, Lewis and Labrecque.

On Appeal from Decision of the State Board of Education of New Jersey.

Mr. Joseph C. Woodcock, Jr. argued the cause for the Petitioner-Respondent.

Mr. Eznick Bogosian argued the cause for the Board of Education of the Borough of Cliffside Park (*Messrs. Bauer, Bogosian & Whyte*, attorneys).

Mrs. Marilyn Loftus Schauer, Deputy Attorney General, appeared for the State Board of Education (*Mr. Arthur J. Sills*, Attorney General, attorney).

PER CURIAM.

The judgment is affirmed substantially for the reasons stated in the opinion of the Commissioner of Education.

IDA AND HARRY EASTBURN,

Petitioners,

v.

NEWARK STATE COLLEGE, EUGENE G. WILKINS, ALTON O'BRIEN, LEON CHARNEY, CLIFFORD L. BUSH, CATHERINE EISENHARDT,

Respondents.

For Petitioners: Matthew Grayson, Esq.

For Respondents: Joseph A. Hoffman, Esq., Deputy Attorney General

Decision of the State Board of Education

This is an appeal to the State Board of Education from the refusal of the Commissioner of Education to grant a hearing to petitioners. The Notice and Petition for Appeal originally filed indicated an appeal from the denial of a hearing before a Faculty Review Committee allegedly established in the faculty handbook of Newark State College.

Petitioner, Ida Eastburn, had a contract to teach at Newark State College from March 4, 1963 to June 30, 1963. She was not rehired for the school year commencing the following September. Although petitioner, Harry Eastburn, alleges that he was about to be employed by Paterson State College, he has never been employed by that institution in any capacity. Neither petitioner has ever acquired tenure.

By action of the State Board of Education, grievance procedures are set forth in a book entitled "A Guide in Personnel Policies for the Faculties of the New Jersey State Colleges."

Since petitioners never had tenure, it is clear that they had no rights to either renewed employment after the expiration of a contract year or original employment. The employing authority has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all. *See Zimmerman* v. *Board of Education of Newark*, 1960 *S. L. D.* 128.

The only question remaining is whether the petitioners had a right to hearings under any administrative regulation. Although the Notice and Petition for Appeal refers to the faculty handbook of the Newark State College, it is clear that the provisions of the handbook were not applicable. Any mention of the Faculty Review Committee was eliminated from the 1963-64 college handbook due to the adoption by the State Board of Education of the aforementioned Guide. Thus, the only question remaining is whether the petitioners, or either of them, are entitled to any rights under the provisions of the Guide.

The first sentence of the Guide provisions relating to grievances states: "When a faculty member feels that he has been treated unfairly, he has a right and a responsibility to bring his grievance to the proper authorities through channels." The evidence clearly establishes that Harry Eastburn has never been a faculty member. Therefore, it is clear that he has no rights under the provisions of the Guide. Since no demand for a hearing was made by Petitioner, Ida Eastburn, until November 4, 1963, there is grave question as to whether she was a "faculty member" as contemplated by the terms of the grievance procedures. There is also a question as to whether she should not be barred from invoking the grievance procedures by the lapse of time between the termination of her employment and her first insistence upon a hearing.

It is the opinion of the State Board of Education that the grievance procedures as outlined in the Guide should not apply to the case before us. Quite clearly, there is a need for grievance procedures as to all faculty members who are, in fact, employed. As to faculty members who have tenure, it is obvious that any grievance should be processed through the procedures set forth. Non-tenure teachers would also have occasion to use these procedures in the event that an attempt should be made to terminate or otherwise interfere with the employment prior to the end of a contract year. However, it would be

quite futile to provide that the grievance procedures should apply to cases where there has been a failure to renew the employment of a non-tenure teacher after the expiration of a contract year.

We find that there was a clear intent by the appointing authorities not to reappoint Ida Eastburn to any position at Newark State College. We also find that, under the circumstances, a resort to the grievance procedures would be futile in that Ida Eastburn has no contract or tenure rights entitled to protection.

The petition is hereby dismissed.

March 2, 1966.

IN THE MATTER OF THE TENURE HEARING OF DAVID FULCOMER, HOLLAND TOWNSHIP, HUNTERDON COUNTY

Decided by the Commissioner of Education, November 13, 1964.

For Petitioner: Joseph V. De Masi, Esq.

For Respondent: Cowles W. Herr, Esq.

Decision of the State Board of Education

This is an appeal by the Petitioner from the decision of the Commissioner of Education rendered November 13, 1964.

It is the recommendation of the Legal Committee that the decision of the Commissioner of Education be affirmed for the reasons set forth in his opinion of November 13, 1964.

March 2, 1966.

Decision of Superior Court, Appellate Division

Argued October 3, 1966, Supplemental Briefs submitted November 3, 1966—Decided January 17, 1967.

Before Judges Sullivan, Kolovsky and Carton.

On Appeal from the Decision of the State Board of Education of New Jersey.

Mr. Joseph V. DeMasi argued the cause for Teacher-Appellant, David Fulcomer (*Mr. Boyd Harbourt* on the brief).

Mr. Cowles W. Herr argued the cause for Respondent, Holland Township Board of Education (*Messrs. Herr and Fisher,* attorneys).

Statement in lieu of brief filed by *Mrs. Marilyn Loftus Schauer,* Deputy Attorney General, who appeared on behalf of State Board of Education (*Mr. Arthur J. Sills,* Attorney General of New Jersey, attorney).

The opinion of the court was delivered by CARTON, J. A. D.

The Board of Education of Holland Township dismissed David Fulcomer from his position as a tenure teacher in its school system for conduct unbecoming a teacher arising out of certain incidents which occurred on December 20, 1961. He appeals from the decision of the State Board of Education sustaining the Commissioner of Education which affirmed the dismissal.

THE PROCEEDINGS BEFORE THE SCHOOL TRIBUNALS

The parents of a pupil in the school system filed written charges against the teacher on January 29, 1961, charging acts of physical violence against their son. The alleged misconduct took place in a classroom presided over by the teacher.

In accordance with the provisions of the "Tenure Employees Hearing Act," the Township Board held a meeting at which it determined that such charges, and the evidence in support of such charges would be sufficient, if true in fact, to warrant dismissal of the teacher and then forwarded these charges to the Commissioner of Education with a certification as mandated by that act. (*N. J. S. A.* 18:3–25)

After a hearing on the charges, the Commissioner filed an opinion in which, after reviewing the evidence, he found that the teacher "improperly and unnecessarily did physical violence" to the person of the pupil in the classroom on the day in question. His opinion concluded that these acts constituted conduct unbecoming a teacher sufficient to warrant dismissal by the Township Board. The Commissioner made no finding or decision as to whether the penalty to be imposed should be dismissal of the teacher or a reduction in his salary, but referred the matter back to the Township Board for that determination.

When the Township Board regained the case, it held a meeting at which it adopted a resolution by a 6-2 vote to discharge the teacher. It does not appear that the members of the Board reviewed, or even had available, a transcript of the hearing before the Commissioner. During the course of the extended meeting, there was an acrimonious exchange of remarks between members of the Board and the teacher, in which members of the audience, including another teacher, participated.

The teacher appealed the Commissioner's determination to the State Board of Education. The State Board affirmed the finding of the Commissioner that the conduct of the teacher constituted conduct "unbecoming a teacher." However, it concluded that there was not sufficient evidence in the record to determine whether outright dismissal from the system was warranted, or whether a lesser penalty would have sufficed. Consequently, the State Board remanded the matter to the Commissioner for a further hearing. The State Board said:

> "* * * At said hearing evidence shall be produced by all parties concerned showing David Fulcomer's record as a teacher prior to the incidents of December 21, 1961 [sic], evidence bearing upon the question as to whether Mr. Fulcomer's conduct amounted to deliberate premeditated action, motivation or provocation for such acts, and any other evidence which the Commissioner may deem relevant to the question of the penalty to be imposed. Evidence shall likewise be introduced at said hearing bearing upon the employment of Mr. Fulcomer subsequent to the above incidents and down to the present date. It is further recommended that upon completion of said hearing the Commissioner shall report to this Board his findings and decision as to the proper penalty. * * *"

The Commissioner did conduct a further hearing. He found that the testimony failed to disclose any significant basis of provocation as to the

incidents upon which his first determination was reached. However, he did not make a specific report to the State Board of his findings and decision as to the proper penalty, nor did he make an independent finding or decision as to the proper penalty. Instead he merely concluded that the local Board had made a full and fair determination of the penalty and that its judgment that the teacher should be dismissed from his tenure position was not unreasonable, arbitrary or capricious.

The Commissioner did not refer the matter a second time to the local Board for reconsideration of the penalty to be imposed in the light of the additional evidence on the second hearing. He expressed the thesis that the proper exercise of his function restricted him "from substituting his judgment for that of the members of the local Board" in matters which are within the exercise of their discretionary authority unless their determination is clearly unreasonable, arbitrary or otherwise unlawful.

The State Board of Education affirmed this decision of the Commissioner for the reasons set forth in his opinion. Hence this appeal.

We have reviewed the voluminous records of the various proceedings before the local Board of Education, the Commissioner and the State Board and we are satisfied that the evidence fully supports the findings that the teacher was guilty of conduct unbecoming a teacher, warranting disciplinary action.

However, in our opinion, the Commissioner erred in failing to render an independent decision as to the penalty to be imposed based on the evidence before him and in permitting the local Board to exercise this function. The Commissioner also erred in restricting his function to an appellate review as to whether the local Board's determination was clearly unreasonable, arbitrary or unlawful. This restricted interpretation of the duties imposed upon him by the Tenure Employees Hearing Act, we believe, resulted in prejudice to the rights of the appellant and requires that the matter be remanded to the Commissioner for decision as provided herein.

THE COMMISSIONER'S FUNCTION UNDER THE TENURE EMPLOYEES HEARING ACT

The Commissioner's referral of the matter back to the local Board to decide whether the teacher should be dismissed or his salary reduced was based upon the view of the Department of Education that the Tenure Employees Hearing Act neither directed nor authorized him to decide this issue. The Department's contention is that *N. J. S. A.* 18:3–29 and *R. S.* 18:6–20 contain provisions that no teacher shall be appointed, transferred, or dismissed except by a majority vote of the Board, and that *N. J. S. A.* 18:3–29 confers no specific authorization on the Commissioner to impose a penalty.

The Tenure Employees Hearing Act, viewed as a whole, does not bear this narrow interpretation of his function. The Legislative intent that the Commissioner shall hear and decide the entire controversy clearly appears from a brief review of its provisions and an examination of its historical background.

At the outset, the statute broadly ordains that all hearings on charges preferred against any employee of the Board of Education holding tenure of office, position or employment covered by Title 18, Education, of the Revised

Statutes shall be conducted in accordance with this act. (*N. J. S. A.* 18:3–24) The Board of Education is authorized to make a preliminary determination that a written charge made in accordance with any provisions of Title 18 and the evidence in support of it would be sufficient in fact to warrant dismissal or a reduction in salary. (*N. J. S. A.* 18:3–25) In such event, the Board is directed to forward the charge to the Commissioner of Education, together with its certificate of such determination, and to serve a copy upon the employee. (*N. J. S. A.* 18:3–25) The Board may suspend the employee so charged, with or without pay, pending a determination. (*N. J. S. A.* 18:3–28)

Upon receipt of the charge and the Board's certification, the statute directs that the Commissioner, or a person appointed to act in his behalf, "shall conduct a hearing thereon within a 60 day period." Such hearing is required to be conducted in accordance with rules and regulations promulgated by him and approved by the State Board of Education. Authority is conferred upon him to dismiss the charges before such hearing "on the grounds that they are not sufficient to warrant dismissal or reduction in salary." (*N. J. S. A.* 18:3–29) Upon conducting such hearing, the Legislature directs that:

> "The Commissioner shall render a decision within 60 days after the close of the hearing on the charge against the employee." (*N. J. S. A.* 18:3–29)

The Tenure Employees Hearing Act thus establishes an entirely new and comprehensive procedure for the resolution of all controversies involving charges against *all* tenure employees not subject to Civil Service under Title 18. It is designed to replace the removal and disciplinary procedure relating to various classes of employees long in force under a variety of provisions of the New Jersey School Laws: *R. S.* 18:13–17 (teachers); *R. S.* 18:5–51 (secretary, district clerk, secretarial personnel); *R. S.* 18:5–67 (janitors); *R. S.* 18:6–27 (secretary, superintendent of schools, business manager, other officers, agents and employees); *R. S.* 18:7–58 (principals and teachers); *R. S.* 18:14–64.1 (nurses).

Formerly all phases of the hearing and decision making function were performed by the local Boards. The Commissioner reviewed such determinations on appeal pursuant to the general power conferred upon him to "decide * * * all controversies and disputes arising under the school laws." (*R. S.* 18:3–14)

Now the Commissioner conducts the initial hearing and makes the decision. Indicative of the intention to vest finality of decision on all aspects of the charges is the power given him to dismiss the charges before such hearing if he determines them to be insufficient in law. He is directed to render a decision on the charge within 60 days after the close of the hearing. A strict and precise timetable for the disposition of each stage of the proceeding represents Legislative recognition of the importance of a prompt resolution of such disputes.

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

The pivotal words of the statute are that the Commissioner shall "conduct a hearing" on the charge and "render a decision." The requirement of a hearing has been held to mean the hearing of evidence and argument and judgment thereon. See *In re Masiello,* 25 *N. J.* 590, 600 (1958).

The Legislative mandate to "render a decision * * * on the charge" implies a duty on his part to review the evidence and to resolve all issues necessary to a final determination. It means that the Commissioner must settle or determine the controversy by giving judgment. The imperative of "render[ing] a decision * * * on the charge" is not satisfied by a simple finding whether the charge is true in fact coupled with a statement of the maximum penalty such misconduct may warrant. To confine the Commissioner's function to this limited sphere would not only deprive him of a part of the decision-making function, it would also make his role a sterile one. The power to impose the penalty is necessary to make his hearing and decision meaningful. Common sense dictates that he must have and exercise the power to impose the penalty gauged by the evidence before him at the hearing.

On the other hand, nothing in the statute suggests that the local boards were intended to retain that power. It contains no express language to that effect, or language from which any such intention can fairly be implied. Indeed, the fact that the Legislature saw fit to confer upon the local boards the power to make a preliminary review of the sufficiency of the charge and to spell out the scope of that review negates any intention of conferring any additional power upon them in the process.

The following comment of Mr. Justice Francis in *In re Masiello, supra* at 605 concerning the authority conferred by *R. S.* 18:3–14 upon the Commissioner to decide controversies and disputes arising under the general school law is apposite:

> "The mandate of the Legislature is that the Commissioner 'shall decide * * * all controversies and disputes.' 'Decide' in such context means decision after hearing on the facts presented to him * * *."
>
> * * *
>
> "* * * On the other hand, if, as in this case, the hearing demanded by principles of fair play is had before him for the first time, then the obligation to 'decide' signifies a completely *de novo* and independent decision of the facts." (*Id.* at 606)

The Legislative history of the Tenure Employees Hearing Act confirms the Legislative intent that the Commissioner shall decide the entire controversy, including the extent of the penalty. See *Hoek* v. *Board of Educ. of Asbury Park,* 75 *N. J. Super.* 182, 190 (*App. Div.* 1962); *Statement attached to Senate Bill No.* 54 and *Assembly Bill* No. 104, which became *L.* 1960, *c.* 136; 32 *New Jersey Education Ass'n. Review, p.* 220 (1958-1959).

The main purposes of that law were two-fold. The first was to eliminate the vice which inhered in the former practice of the board's being at one and the same time investigator, prosecutor and judge. Under these conditions it was pointed out most decisions were eventually appealed to the Commissioner in any case.

Referral of the case to the local board to impose the penalty when that board has already certified it to the Commissioner represents a reversion to

the vice which the Legislature sought to eliminate from the former practice. Particularly is this true where the board itself prefers the charges or becomes an adversary on an appeal from the Commissioner's decision. The present case illustrates this problem. The Board here has been actively defending on appeal the appropriateness of a penalty which it found at the outset was warranted if the charges were true in fact, and later determined was justified on the basis of the Commissioner's findings. The appearance of some of the members of the Board as witnesses on the second hearing before the Commissioner further compounded this violation of the spirit of the law. See *Hoek* v. *Board of Educ. of Asbury Park, supra.* See also *Statements, supra,* attached to the Legislative Bills, which refer to the Board as deciding "to press the charges."

The second and no less important purpose was to remove the trial of such cases from the publicity attendant on the local hearing which "tears the community apart" and "disrupts the orderly conduct of local school affairs." See *Statements, supra.*

The piecemeal and convoluted procedure of having the local Board decide the penalty long after it has made the preliminary determination required by the statute causes an inevitable revival of the strife in the community where the teacher is employed. This is vividly illustrated in the present case. The local Board duly held a meeting on the charges and made the requisite certification to the Commissioner. The teacher was then suspended and the controversy removed to the calmer atmosphere of the Commissioner's hearing.

However, the referral of the matter back to the Township Board rekindled the smouldering fire of dissension among the members of the Board, the teaching staff, and the public. The record clearly shows that a meeting supposedly convened solely to determine the extent of the penalty to be imposed for the teacher's departure from decorum in a particular episode became the occasion for a heated debate as to the merits of his philosophy of education and school discipline and his general attitude toward the Board.

It can hardly be expected that a determination under such circumstances would be confined to the facts and findings of the Commissioner on the particular charges or that the penalty imposed would be reasonably commensurate with the offense found to have been committed.

Fulfillment of these statutory objectives can thus only be accomplished through a complete decision by the Commissioner of all issues involved in the dispute. The mere finding of guilt or innocence of the charge of unbecoming conduct, leaving to the local Board the important decision as to the penalty to be imposed, frustrates both objectives. Moreover, since the local Board did not see the witnesses or hear their testimony, their ability to fix a just penalty was seriously impaired. Indeed, as heretofore noted, it does not appear that the local board reviewed, or even had available, the transcript of the hearing before the Commissioner.

We cannot assume an intention by implication on the part of the Legislature to fragmentize the machinery in the unorthodox fashion suggested by the Department of Education. So to subdivide the decision-making power would make meaningless the provisions in the statute for the prompt disposition of the various phases of the proceeding. Moreover, it is incongruous for the local board to pass on one phase of the proceeding, and then at a later

stage, to decide another phase of the same case based on yet another determination of another agency. Particularly is this true, where as here, the intermediate determination would be made by an administrative agency at a higher level. Similarly incongruous, is the exercise of one part of the decision-making power by the Commissioner and his retention of an appellate review of a coordinate phase of the same proceeding. We discern nothing in the statute which suggests that the Legislature intended to beget so exotic an administrative hybrid. *Harrison* v. *State Bd. of Education,* 134 *N. J. L.* 502 (*Sup. Ct.* 1946) is relied upon as approving the procedure adopted by the Department of Education in this case. That case, neither expressly nor inferentially, sanctions the propriety or regularity of splintering the administrative or judicial process in this fashion. See also, 2 *Davis Administrative Law Treatise, Ch.* 11 (1958).

The Commissioner's conclusion that the local boards retain the power to determine the penalty rests primarily upon his interpretation of *R. S.* 18:6–20 and *R. S.* 18:7–58. These companion sections of Chapter 6 and Chapter 7 of the School Law provide that no principal or teacher shall be appointed, transferred or dismissed, no policy fixed, and no course of study shall be adopted or altered, nor textbook selected except by a majority vote of the whole board.

The theory is that since the Legislature has not expressly repealed the portion of these provisions relating to the dismissal of teachers, their continued existence is incompatible with a Legislative intent under the newly adopted Tenure Employees Hearing Act that the Commissioner shall exercise this power. Not so. These provisions still have efficacy insofar as teachers under contract or non-tenure are concerned. Authority for the dismissal of these teachers, as well as for the performance of the other acts listed therein, must still be sought under these general provisions of the School Law.

It must also be remembered that the new legislation is much broader in its scope than the tenure provision formerly applicable to teachers. Dismissal of these additional categories of school employees given tenure protection under the various provisions referred to above was not authorized or affected by the provisions of *R. S.* 18:6–20 and *R. S.* 18:7–58 relating to teachers.

Mere failure of the Legislature to modify the particular statutory provisions requiring majority approval of certain actions (including employment, transfer and dismissal of a single category of employees) cannot justify the conclusion that the Legislature thereby intended to deny to the Commissioner the necessary power under another statute of broader scope applicable to all categories of employees.

Likewise, no special significance can be attached to the circumstance that the amendatory provisions of Chapter 137 (*L.* 1960) contain language parallel to that of the Teachers Tenure Act (*N. J. S. A.* 18:13–17 (1952)) to the effect that removal or reduction in salary may not be effected until after the charge has been examined into and found true in fact. The suggestion is that the Legislature has thereby indicated an intent to substitute the Commissioner for the local Board as the agency designated to perform the fact-finding function, confining the Commissioner's function to this aspect of the proceeding and leaving to the local boards the penalty fixing function.

The argument thus advanced ignores the overriding language of the Tenure Employees Hearing Act (*L.* 1960, *c.* 137), directing the Commissoner

to "conduct a hearing" and "to render a decision * * * on the charge." The duty cast upon the Commissioner is not limited to an examination into the charge and a determination whether it is true in fact.

This argument is likewise flawed by the unwarranted assumption that the Tenure Employees Hearing Act must be interpreted solely in the light of the removal procedure previously applicable to teachers. Similar phraseology occurs in the amendatory provision relating to janitors; yet the earlier provision relating to this class of employees (*R. S.* 18:5–67), unlike *N. J. S. A.* 18:13–17, contains a specific grant of power of dismissal to the local boards. Such similarities and dissimilarities of language in the amendatory legislation (*L.* 1960, *c.* 137) and their amended counterparts in the School Law are merely incidental to the comprehensive treatment accorded by the Tenure Employees Hearing Act.

Nor can the administrative interpretation adopted by the Department of Education and acquiesced in by the parties give it added vitality or validity in determining the meaning of the statute. The Commissioner has concededly not promulgated rules and regulations as required by the statute for the conduct of the hearings. His determination was therefore not made pursuant to any formally established procedure. It represents no long-standing practical construction having wide public reliance. See 1 Davis Administrative Law Treatise, *Sec.* 5.06 (1958); 2 *Sutherland, Statutory Construction, 3d ed.* (1943).

THE TEACHER'S RIGHT TO AN INDEPENDENT DETERMINATION BASED ON ALL THE EVIDENCE

The Commissioner's restriction of his role to an appellate review as to whether the Board's decision after the earlier hearing was clearly unreasonable, arbitrary or unlawful further erodes the teacher's rights in such cases. The teacher is entitled to an independent determination as to the scope of the penalty based on all the evidence presented against him. What was said in *In re Masiello, supra* at 605, although used in a different context, applies with equal force to the Commissioner's function in this case:

> "When the Commissioner regained the record after all of the evidence of the parties had been compiled, what was his function? He took the view that it was to study the proof in order to decide whether the action of the Board of Examiners was arbitrary or capricious or whether it was the result of bias or prejudice. We cannot agree."

Cf. Board of Educ. of the Township of East Brunswick v. *The Town Council of the Township of East Brunswick*, 48 *N. J.* 94, 106 (1966).

The Commissioner conducted the second hearing of the evidence at the direction of the State Board for the purpose of determining the appropriate penalty to be imposed under the circumstances. Neither he nor the local Board made any independent decision on all the evidence as to what that penalty should be. The local Board had before it the Commissioner's findings on the evidence in the first hearing. Neither then, nor ever, did it have the benefit of the evidence or the Commissioner's findings at the second hearing. On the other hand, the Commissioner rendered no affirmative decision of his own as to the penalty, but confined his review to a determination whether the Board's earlier decision was arbitrary or unlawful.

The teacher was thus denied an independent determination by either agency based on all the evidence as to what penalty should justifiably be imposed. Parenthetically, we note that a logical application of the Department's view that the local Board had power to fix the penalty would have compelled the Commissioner to refer the matter once again to the local Board to reconsider the nature of the penalty in the light of all the evidence at both hearings.

As the Commissioner's review of the record of what transpired at the meeting of the local Board demonstrates, the Board's determination that the teacher should be discharged was influenced considerably by its view of the teacher's general attitude and was not confined to a decision of the proper punishment for his conduct on the day in question.

The Commissioner's conclusion that the Board's action in dismissing the teacher was not unreasonable or arbitrary reflects an acceptance in some degree of the factors deemed relevant by the local Board in fixing the punishment. In his opinion after the second hearing the Commissioner stated that he accorded much weight to the meeting of the local Board following the earlier decision; that he was convinced from his study of that meeting that the Board gave "full consideration to all aspects of this matter and reached its determination to dismiss the teacher fairly and properly; that the Board was aware that the dismissal in this case might be unduly harsh or unwarranted." He said further:

> "* * * He is convinced that its members approached the matter with an open mind and finds reason to believe that a lesser penalty might have resulted had the teacher shown any disposition to cooperate. Faced with what was characterized as a 'belligerent' and 'defiant' attitude, the majority of the members decided that the teacher's usefulness to this school system was ended and that he could not be reinstated without harm to the school."

Earlier in his opinion the Commissioner commented extensively as to what the transcript of the meeting before the Township Board had disclosed concerning "the situation which existed with respect to this teacher in this school."

The teacher was entitled to an affirmative determination by the Commissioner on all the evidence relating to the extent of the penalty for his conduct. In our view, his rights were seriously prejudiced by the intrusion of such extraneous considerations into the determination of this issue.

THE PENALTY WARRANTED BY THE TEACHER'S ACTIONS

The Commissioner's opinion on the first hearing summarizes the evidence as to the incidents which gave rise to the charges:

> "The testimony discloses that on the morning of December 20, 1961, while respondent was teaching an eighth grade arithmetic class, a girl's pocketbook was passed among several pupils until it came to rest beside the desk of Donald Yowell. The teacher, becoming aware of inattention and discovering its source, dropped his textbook on the first pupil's desk, went to Donald and laid hands upon him. When released, the boy went to the front of the room, was directed to resume his seat by the teacher, made as though to do so, but instead ran toward the door in the rear to leave the classroom. The teacher pursued the boy, again laid hands upon him, and both of them fell to the floor. The pupil escaped the teacher's hold, left

the classroom, and reported to the principal, requesting permission to telephone his parents and go home. From the beginning of the incident until the pupil left the room, the teacher gave no commands to the pupil other than to resume his seat."

The Commissioner pointed out that there was a conflict in the testimony as to whether the teacher actually struck the pupil with his fist or hand, the exact hold which he had on the boy and and whether he "tackled" the pupil in the rear of the classroom as charged by the pupil, or grabbed the pupil as they caromed off the furniture as contended by the teacher. The Commissioner found these differences immaterial for purposes of determining whether Fulcomer's acts constituted conduct unbecoming a teacher.

We agree with the view expressed by the Commissioner that:

"The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions."

We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See *Redcay* v. *State Bd. of Educ.*, 130 *N. J. L.* 369 (*Sup. Ct.* 1943); *aff'd o.b.*, 131 *N. J. L.* 326 (*E. & A.* 1944).

Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.

Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. The Commissioner noted that the teacher received his full salary during his suspension by the Township Board. However, consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State, with the resultant jeopardy to his equity rights in the teacher's pension fund accruing from his 19 years credit.

At the time appellant was suspended he had 23 years teaching experience and held a Master's Degree. He had been employed since 1954 by the Holland Board. It appears that if this teacher, who is aged 56, is reemployed in New Jersey, he will be eligible for retirement in approximately four years with a pension for life of one-half of his last year's salary—in this case an annual pension of at least $3,500. We observe that the local Board recognized that Fulcomer's teaching record was good and his teaching ability unquestioned. He had not been disciplined in any manner by the Board prior to the date of the incidents involved in these charges and he had consistently received pay raises each year.

The matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved,

any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system.

We retain jurisdiction

SULLIVAN, S. J. A. D. concurring.

I am in full agreement with the majority opinion and I concur in the remand to the Commissioner to fix a proper penalty. However, I would also hold that, under the facts and circumstances here shown, dismissal is not warranted and some lesser penalty should be imposed.

KOLOVSKY, J. A. D. (dissenting)

I do not agree that the Tenure Employees Hearing Act, *L.* 1960, *c.* 136, now *N. J. S. A.* 18:3–23, *et seq.*, (Hearing Act) terminated the authority of local boards of education (local board) to determine the penalty to be imposed on a teacher having tenure who is found guilty of charges of inefficiency, incapacity, conduct unbecoming a teacher or other just cause for disciplinary action.

I concur with the views expressed by all parties to this litigation and the administrative interpretation adopted and applied by the State Department of Education since 1960 that the 1960 legislation—which includes not only *L.* 1960, *c.* 136 (Chapter 136) but also *L.* 1960, *c.* 137 (Chapter 137)—transferred from the local board to the State Commissioner of Education (Commissioner) only the function of examining into the charges and determining whether they are true in fact. Neither expressly nor by implication did the legislation transfer from the local board to the Commissioner the power to determine the penalty, whether it be dismissal or some less drastic disciplinary action. That power remains as before in the local board.

The Legislature has vested the power to appoint, transfer or dismiss teachers in the local board, directing that any such action must result from a majority vote of the whole number of members of the board. *R. S.* 18:6–20; *R. S.* 18:7–58.

Further, it is settled law that except as limited by a contract of employment, by the Federal and State Constitutions, by the Teacher's Tenure Act and by other legislation such as the Law Against Discrimination, the local board "has the right to employ and discharge its employees as it sees fit." *Zimmerman* v. *Board of Education of Newark*, 38 *N. J.* 65, 71 (1962).

Chapter 136, the Hearing Act, must be read in conjunction with Chapter 137, which was enacted at the same time. *Key Agency* v. *Continental Gas Co.*, 31 *N. J.* 98, 103 (1959). Chapter 137 amended sections of the various tenure acts applicable to employees of local boards, *viz.*, *N. J. S. A.* 18:5–51, 18:5–67, 18:6–27, 18:7–56, 18:13–17, 18:14–44 and section 2 of *L.* 1957, *c.* 181. By its terms, Chapter 137 was to be inoperative unless and until the Hearing Act was enacted.

N. J. S. A. 18:13–17, a section of the Teacher's Tenure Act, reads as follows prior to its amendment by *L.* 1960, *c.* 137:

> "No teacher, principal, superintendent or assistant superintendent under the tenure referred to in section 18:13–16 of this Title shall be dismissed or subjected to a reduction of salary in the school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having control of the school in which the service is being rendered, *and after the charge has been examined into and found true in fact by the board of education upon reasonable notice to the person charged who may be represented by counsel at the hearing.* Charges may be filed by any person, whether a member of the school board or not." (emphasis added)

Chapter 137 amended *N. J. S. A.* 18:13–17 by substituting for the underscored language the following:

> "and after the charge has been examined into and found true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act."

Identical substitutions were made by Chapter 137 in the statutory provisions dealing with the tenure rights of other employees of local boards, *viz.*: persons holding a secretarial or clerical position, *N. J. S. A.* 18:6–27 and *N. J. S. A.* 18:7–56; attendance officers, *R. S.* 18:14–44; and school nurses, *L.* 1957, *c.* 181, *sec.* 2, *N. J. S. A.* 18:14–64.1b. The same change was made by Chapter 137 in the sections dealing with other tenure employees, secretaries, assistant secretaries and business managers, *N. J. S. A.* 18:5–51 and public school janitors, *R. S.* 18:5–67, which, while not using the language underscored above, similarly provided for a hearing before the local board and a determination by it that the offense charged had been proven.

By the adoption of Chapters 136 and 137, the function of examining into a charge against an employee having tenure and determining whether it is true in fact is taken from the local board and vested in the Commissioner or a person appointed to act in his behalf. *N. J. S. A.* 18:3–29.

Nothing in Chapter 137 manifests a legislative intent to modify or eliminate the authority of the local board under *N. J. S. A.* 18:13–17 and the other cited tenure sections to dismiss or impose some other penalty upon a teacher or other employee, despite his tenure rights, once an appropriate charge against him has been found to be true in fact.

Nor is such legislative purpose to be found in Chapter 136. The Hearing Act prescribes the procedures to be followed in the presentation of and hearings on charges preferred against an employee of a local board who is under tenure of office. Those procedures culminate in a hearing before the Commissioner or someone appointed to act for him and factual findings by the hearing official. If his finding is that the charge is "true in fact," then it is for the local board to impose the penalty pursuant to the provisions of the tenure sections exemplified by *N. J. S. A.* 18:13–17.

The basic motivation for the enactment of Chapters 136 and 137 was the desire to eliminate the prejudice inherent in a situation where the local board

"often appears as both prosecutor and judge, *i.e.*, it makes the charges and then must judge of their truth." (Statement attached to the bill which became Chapter 136). That purpose was accomplished by the designation of the Commissioner in place of the local board as the one who is to find whether the charge is "true in fact." Effectuation of that purpose does not require that the power to fix the penalty be vested in the State Commissioner rather than the local board.

Fact finding is a judicial function. There is nothing improper or unusual in placing that function in one body, here the Commissioner, while leaving the determination of whether the employee is to be dismissed or penalized in some other way in the hands of the local board whose function it is to employ and discharge employees. *Cf. Harrison* v. *State Board of Education*, 134 *N. J. L.* 502 (*Sup. Ct.* 1946).

In *Harrison* v. *State Board of Education, supra*, prosecutrix had tenure of office as principal of the Girls Vocational School at Woodbridge, a county institution. After a hearing, the county board of education found her guilty of misconduct and ordered her dismissal. The State Commissioner reversed. The State Board of Education reversed the Commissioner and affirmed the local board. In affirming the State Board, the court noted that under the *certiorari* act, *R. S.* 2:81–8, it was under a duty to weigh the evidence, and make its own independent determination of the facts. It then proceeded to review the evidence and found that the proofs established the truth of the charges, concluding at page 505:

> "We are only concerned with the truth of the charges; once guilt of misduct has been established, the disciplinary action is exclusively within the domain of the local board."

In my opinion, the Commissioner followed the statutory mandate when on June 11, 1962, after determining that the charges against appellant were true in fact and were "sufficient to warrant his dismissal by the Board of Education of Holland Township under the provisions of *R. S.* 18:13–17," he remanded the matter to the local board for the determination of the penalty to be imposed.

Following his dismissal by the local board on June 25, 1962, appellant appealed to the State Board of Education. In its decision of December 4, 1963, the State Board affirmed the Commissioner's findings as to the truth of the charges. However, it ruled that "there is not sufficient evidence in the record before this board in order to reach a determination as to whether outright dismissal from the system was warranted or whether a lesser penalty would have sufficed." It remanded the matter to the Commissioner "to the end that he shall forthwith conduct a hearing at which there shall be developed all evidence relevant to the question of the propriety of the penalty to be imposed upon David Fulcomer for his conduct as above set forth" and then "report to this board his findings and decision as to the proper penalty." The State Board retained jurisdiction of the appeal.

Following a hearing pursuant to the remand, the Commissioner filed an opinion dated November 13, 1964, in which he found:

"(1) that the Holland Township Board of Education gave full and fair consideration to a determination of the penalty to be imposed upon David Fulcomer as a result of conduct unbecoming a teacher; (2) that its judgment that his tenure of position was forfeit and he be dismissel from its employ was not unreasonable, arbitrary, or capricious in the circumstances of this case. The Commissioner finds no reason to reverse the decision of the Holland Township Board of Education."

By a decision dated March 2, 1966, the State Board affirmed the Commissioner for the reasons set forth in his opinion of November 13, 1964. Appellant appealed to this court under *R. R.* 4:88–8.

The majority and I agree that there is substantial evidence in the record to support the findings by the administrative bodies that the charges are true in fact and that, therefore, this court should not disturb those findings. *Close* v. *Kordulak Bros.*, 44 *N. J.* 589, 599 (1965).

Our basic disagreement concerns who is to fix the penalty: the Commissioner as the majority has ruled, or the local board as I believe.

Further, in my opinion, the local board's determination as to the penalty to be imposed is not to be disturbed, absent an abuse of discretion. Unless such abuse of discretion is shown, neither the Commissioner, the State Board nor we may modify the penalty fixed by the local board. *Harrison* v. *State Board of Education, supra*, 134 *N. J. L.* at *p.* 505; *Russo* v. *The Governor of State of New Jersey*, 22 *N. J.* 156, 175 (1956); see also *Boult* v. *Board of Education of Passaic*, 136 *N. J. L.* 521, 523 (*E. & A.* 1948); *Kopera* v. *West Orange Bd. of Education*, 60 *N. J. Super.* 288, 295 (*App. Div.* 1960). To be distinguished are cases arising under the Civil Service Act, for that act grants power to the Civil Service Commission to modify a penalty imposed by the municipality on one of its employees. On judicial review of the determination of the Civil Service Commission, the court may revise the decision made by the Civil Service Commission with respect to the penalty. *West New York* v. *Bock*, 38 *N. J.* 500, 514, 520 (1962); see also same case below, 71 *N. J. Super.* 143, 148 (*App. Div.* 1961). Unlike the Civil Service Act, nothing in the Education law authorizes the Commissioner or the State Board to modify the penalty imposed by the local board.

Both the Commissioner and the State Board ruled that the action of the local board in fixing the penalty at dismissal in the circumstances of this case was neither unreasonable, arbitrary or capricious. I find no justification for reversing those determinations, particularly in view of the expertise of the Commissioner and the State Board in the area here involved. *Freud* v. *Davis*, 64 *N. J. Super.* 242, 246 (*App. Div.* 1960).

I would affirm.

93 *N. J. Super.* 404.

LEO S. HASPEL,

Petitioner-Appellant,

v.

STATE BOARD OF EDUCATION,

Defendent-Respondent.

Decided by the Commissioner of Education, February 20, 1963, and January 20, 1964.

Affirmed by the State Board of Education, October 7, 1964.

Affirmed by Superior Court, Appellate Division, June 10, 1965.

Motion for certification denied, New Jersey Supreme Court, May 12, 1965.

Certiorari denied, United States Supreme Court, May 16, 1966.

JAMES HOLDEN, et al.,

Petitioners-Respondents,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Defendant-Appellant.

Decided by the Commissioner of Education, December 17, 1963.

Affirmed by the State Board of Education, November 4, 1964.

DECISION OF SUPREME COURT

Argued December 20, 1965. Decided January 14, 1966.

Mr. Joseph G. Barbieri argued the cause for the appellant.

Mr. Joseph A. Hoffman, Deputy Attorney General, argued the cause for the respondent (*Mr. Arthur J. Sills*, Attorney General, attorney.)

PER CURIAM.

The Board of Education of the City of Elizabeth appealed to the Appellate Division from the determination of the State Board of Education which upheld the action of the Commissioner of Education for reasons given by him. We certified the appeal before argument in the Appellate Division. We affirm the judgment under review upon the same basis. The opinion of the Commissioner of Education reads as follows:

"Petitioners in this case seek the reinstatement in the Elizabeth public schools of their children, who were excluded because they refused to pledge allegiance to the flag of the United States.

A hearing in this matter was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the office of the County Superintendent of Schools in Elizabeth on June 11, 1963.

Petitioner Holden's son, James Gregory Holden, was a pupil in the fourth grade at John Marshall School in Elizabeth during the 1962-63 school year. On February 14 he was suspended from school by the principal for refusing to pledge allegiance to the flag. On March 7 the Board of Education reviewed

the suspension and continued it. Petitioner Shumate's son, Harold Shumate, and daughter, Deborah Shumate, were pupils in grades 6 and 4, respectively, of the same school. Harold was suspended on February 18 and Deborah on March 12, for the same reason. Petitioner McClain's son, Jerome, and daughter, Karen, were pupils in grades 6 and 3, respectively, of the same school. Jerome was suspended from school on March 12, and Karen in the month of February, for the same reason. On March 14 a petition seeking reinstatement of his son was filed by petitioner Holden; subsequently, on April 29, an amended petition was filed to include petitioners Shumate and McClain, and requesting the Commissioner to order their children reinstated *pendente lite*. Such an order was issued by the Commissioner on May 10, 1963.

The New Jersey statute relative to the pledge of allegiance by pupils in the public schools is *R. S.* 18:14–80, as amended by Chapter 212, Laws of 1944, and Chapter 83, Laws of 1954, the pertinent parts of which read as follows:

"Every board of education shall:

"(c) Require the pupils in each school in the district to salute the flag of the United States and repeat on every school day the pledge of allegiance to the flag which shall be as follows: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all." The salute and pledge of allegiance shall be rendered with the right hand over the heart; but children who have conscientious scruples against such pledge or salute, or the children of accredited representatives of foreign governments to whom the United States extends diplomatic immunity, will always show full respect to the flag while the pledge is given by merely standing at attention: the boys removing the headdress."

Petitoners do not deny that their children refused to pledge allegiance to the flag; in fact, they freely state that they instructed their children to refuse to do so. They do assert, and it was not denied by the teachers who observed the children, that these pupils did stand at attention. Petitioners testified that they believe in a religion known as Islam, and that followers of this religion, called "Muslims," or sometimes "Black Muslims," are taught that their sole allegiance is to Almighty God Allah. They are further taught, they testify, that the flag is but a symbol and that it would be contrary to their teachings to pledge allegiance to any flag, including the flag of Islam. Their religious teachings are based on the Quran, as interpreted to them by one Elijah Muhammad, whom they regarded as their leader and spiritual prophet. They therefore contend that their refusal to permit their children to pledge allegiance to the flag falls within the exemptions provided in *R. S.* 18:14–80, *supra*, for 'children who have conscientious scruples against such pledge or salute.'

Respondent argues that the exemption for conscientious scruples was never intended to be so broadly construed as to include petitioners' beliefs. Respondent sought to establish through cross-examination of petitioners that their beliefs were as much politically as religiously motivated, and were closely intertwined with their racial aspirations. In effect, respondent challenges petitioners' accuracy in labeling their objections to participation in the pledge of allegiance as "conscientious scruples."

The Commissioner does not find it necessary to determine whether the "teachings of Islam" are religious or political, or both. One need not go outside the history of western civilization to find striking examples of the inextricable fusing of political and religious ideologies. The basic question is whether petitioners in this case can rightly invoke "conscientious scruples" as their reason for claiming exemption from the pledge of allegiance.

Freedom of religion is a guarantee of the First Amendment of the Constitution of the United States; it is the law of the land, and has frequently been the subject of Supreme Court study and interpretation. With respect to its application to a required flag salute in the public schools, the Supreme Court established the interpretation in its decision in *West Virginia State Board of Education* v. *Barnette, et al.*, 319 *U. S.* 624 (1943). This decision followed upon a series of decisions in state courts which the Supreme Court refused to review (*Leoles* v. *Landers, et al.*, 302 *U. S.* 656 (1937); *Hering, et al.* v. *State Board of Education*, 303 *U. S.* 624 (1938); *Gabrielli* v. *Knickerbocker, et al.*, 306 *U. S.* 621 (1939), a summary decision in *Johnson, et al.* v. *Deerfield, et al.*, 306 *U. S.* 621 (1939), and was an outright reversal of its own decision in *Minersville School District, et al.* v. *Gobitis, et al.*, 310 *U. S.* 586 (1940). In *Barnette* the Court ruled that a requirement by a State Board of Education or a local school board that all pupils salute the flag is unconstitutional since it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." (p. 642) In a concurring opinion, Justices Black and Douglas wrote, at page 644:

> "Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremony, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose."

This point of view was, in a sense, anticipated by our own New Jersey Supreme Court in 1942, when the Court refused to sustain the conviction of parents charged with violation of the compulsary school attendance laws when their children had been excluded from school for refusing to salute the flag for religious reasons. *In re Lattrechia*, 128 *N. J. L.* 472. In that decision, the Court quoted from *People* v. *Sandstrom*, 278 *N. Y.* 523; 18 *N. E. Rep. 2d* 840, 847 (Ct. of Appeals of N. Y. 1939), as follows:

> "The salute of the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience. The flag 'cherished by all our hearts' should not be soiled by the tears of a little child. The Constitution does not permit, and the Legislature never intended, that the flag should be so soiled and dishonored."

In the amendment to *R. S.* 18:40–80 which was enacted in 1944 (Chapter 212, Laws of 1944), exemption from the required salute and pledge of allegiance was extended to include "children who have conscientious scruples

against such pledge or salute." It is significant to the Commissioner that the Legislature employed the word "conscientious" rather than "religious." The Supreme Court in *West Virginia Board of Education* v. *Barnette, supra,* decided only a year previously, indicates its feeling that the freedom guaranteed by the First Amendment extends beyond a particular set of religious beliefs to the much broader sphere of intellect and spirit. At page 634, the Court said in its majority opinion:

> "Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty."

and at page 642 the Court said:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

The use of the term "conscientious scruples" brings New Jersey's statute within this broader range.

The dictates of conscience are personal and intimate, and often unfathomable. While often they are guided by public morality or the doctrines of religion, they vary in personal interpretation and application as human beings themselves differ one from the other. Unless the dictates of conscience operate so as to present a clear and present danger to the peace, welfare, and security of the people, they suffer no testing against human dicta, no matter how unreasonable they may seem. The Commissioner notes a recent decision of the U. S. District Court, District of Arizona, Prescott Division, in the case of *Sheldon, et al.* v. *Fallin, et al.,* Civil No. 749, August 29, 1963. In restraining a board of education from excluding plaintiffs from school because they refused to stand during the singing of the national anthem, the Court said in part:

> "But all who live under the protection of our Flag are free to believe whatever they may choose to believe and to express that belief, within the limits of free expression, no matter how unfounded or ludicrous the professed belief may seem to others. While implicitly demanding that all freedom of expression be exercised reasonably under the circumstances, the Constitution fortunately does not require that the beliefs or thoughts expressed be reasonable, or wise, or even sensible. The First Amendment thus guarantees to the plaintiffs the right to claim that their objection to standing is based upon religious belief, and the sincerity or reasonableness of this claim may not be examined by this or any other Court. (*United States* v. *Ballard,* 322 *U. S.* 78, 86-88 (1944); *Cantwell* v. *Connecticut,* 310 *U. S.* 296, 306-307 (1940); and see *Reynolds* v. *United States,* 98 *U. S.* 145 (1878).)"

The Commissioner regrets that the teachings are such as to cause children not to participate in a common ceremony of respect to the Flag, which is itself the emblem of those freedoms which all Americans are privileged to enjoy. However, he is cognizant of the fact that those freedoms, as contemplated by Federal and State Constitutions and by State law, are broad enough to encompass the beliefs of those who, like the petitioners, claim conscientious scruples.

The Commissioner finds and determines that the children of petitioners have complied with the provisions of *R. S.* 18:14–80, *supra,* in claiming exemption from pledging allegiance to the flag on the grounds of conscientious scruples against such a pledge, being willing to stand respectfully at attention during the ceremony, and that respondent has improperly excluded said children from its schools. He directs that his order of May 10, 1963, reinstating the children of petitioners *pendente lite* be and hereby is made permanent."

46 *N. J.* 281.

VINCENT V. MASSARO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD IN THE COUNTY OF BERGEN,

Respondent.

Decided by the Commissioner of Education, June 10, 1965.

For Petitioner: Francis R. Giardiello, Esq.

For Respondent: James A. Major, Esq.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Petitioner from the decision of the Commissioner of Education rendered June 10, 1965.

It is the recommendation of the Legal Committee that the decision of the Commissioner of Education be affirmed for the reasons set forth in his opinion of June 10, 1965.

March 2, 1966.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued September 19, 1966—Decided September 23, 1966.

Before Judges Goldmann, Kilkenny and Collester.

On appeal from the State Board of Education.

Mr. Francis R. Giardiello argued the cause for appellant.

Mr. James A. Major argued the cause for respondent (Messrs. Major & Major, attorneys).

The Attorney General filed a statement in lieu of brief.

PER CURIAM

Petitioner appeals from a determination of the State Board of Education affirming the decision of the Commissioner of Education that defendant's withholding of petitioner's salary increment and adjustment for the school year 1964-65 was a proper exercise of its discretionary authority and in

accordance with its own rules. He argues, as he did below, that the local board of education did not comply with its rules and that its action was unreasonable and arbitrary in light of all the evidence adduced before the Commissioner.

Petitioner was first employed as a teacher in 1957 and acquired tenure in the school year 1960-61. The Bergenfield Board of Education had adopted a salary guide which contained rules governing salary increments and adjustments. The rules here in issue are:

> "A. Increments will not be automatic but will be granted for satisfactory services upon the recommendation of the Superintendent of Schools, subject to the approval of the Board of Education. Failure in any year to grant an increment does not create any future obligations to restore the increment.
>
> B. In any year, a teacher whose work is deemed unsatisfactory may, on the request of the Principal and the recommendation of the Superintendent of Schools, have his increment withheld and thereby lose a step on the guide. Before making such recommendation to the Board, the Superintendent of Schools shall send the teacher written notice of such intention and give him an opportunity to discuss the reason for such action.
>
> C. In any year in which there is an upward revision of the salary guide, adjustment to the proper place on the guide may be withheld in whole or in part. Before making such recommendation to the Board, the Superintendent of Schools shall send the teacher written notice of such intention and give him an opportunity to discuss the reason for such action. Future increases after withholding an adjustment will depend entirely upon the recommendation of the Superintendent and the approval of the Board of Education."

For the school year 1964-65 petitioner would have been entitled, had the school board found him eligible, to an increment of $250 and a salary adjustment of $500. The board held an executive meeting on March 3, 1964, at which time the superintendent of schools recommended that the *increment* be withheld. There was a discussion of petitioner's record, including a review of the evaluations made by his principal and the knowledge and experiences of some of the board members. The result was that the board determined to withhold not only the increment, but also the salary adjustment. The superintendent concurred in this action and the very next day conferred with petitioner, informing him of the board's intention to withhold both his increment and adjustment because it was dissatisfied with the manner in which he had dealt with parents of pupils.

At its regular meeting of March 10, 1964 the board adopted the salary guide and approved salary changes for the school year 1964-65, no change in salary being approved for petitioner. Thereafter, on March 24 and at petitioner's request, the board met with him and representatives of the local teachers' association. Petitioner read a prepared statement requesting an explanation of the board's denial of any salary increase and asserting that his performance as a teacher had been satisfactory. It was then pointed out to petitioner that he knew of the board's dissatisfaction with his dealings with parents, and there was some discussion of the matter. The board did not change its decision and on July 22, 1964 petitioner filed his appeal with the Commissioner.

We agree with the Commissioner's specific finding that the record does not support petitioner's allegation that the board acted arbitrarily or was motivated by prejudice or personal animosity. There is substantial support in the evidence for that finding. Petitioner called members of the board as his witnesses, and invariably they disclaimed all animus or bias. The Commissioner held that absent a clear showing of abuse of discretion by the board, he would not substitute his judgment for the board's. We concur in that determination.

As noted, petitioner also argues that the board did not act in accordance with its own rules, quoted above. *R. S.* 18:13–5 empowers boards of education to make rules governing salaries. And see *N. J. S. A.* 18:13–13.7 relating to the power of such boards to increase teachers' salaries and to withhold for inefficiency or other cause the employment increment or the adjustment increment, or both, of any teacher in any year by a majority vote of all the members. The teacher is given the right of appeal to the Commissioner of Education.

In his decision the Commissioner pointed out that he has consistently maintained the position that when a board of education adopts rules with respect to the application of a salary guide, it must apply them without bias or prejudice. He found no such bias or prejudice, and further, that the board had adhered to its rules.

At the hearing before the Commissioner, the petitioner maintained that Rules A and B are interrelated, since both refer to increments, and therefore he should have received written notice of any intention to withhold his increment and to have an opportunity to discuss the reason therefor. At oral argument of the appeal his counsel conceded that the argument was a tenuous one, and we agree. The two rules deal with entirely different situations. Rule A expressly states that increments will not be automatic but will be granted for satisfactory service upon recommendation of the school superintendent, subject to approval by the board of education. Here the superintendent made no such recommendation; indeed, he recommended that the increment for 1964-65 be withheld. On the other hand, Rule B deals with a situation where the school principal recommends withholding of the increment because of unsatisfactory service. The superintendent must concur, but before making any recommendation to the board, he must send the teacher written notice of his intention and give him an opportunity to discuss the matter. This rule clearly deals with a situation where the recommendation is not initiated by the superintendent, but by the principal, and in such circumstances provides a safeguard for the teacher. We hold that the increment was properly withheld.

As to the adjustment in salary, Rule C does provide that where the superintendent intends to recommend the withholding of the adjustment in whole or in part, he must send the teacher written notice and give him an opportunity to discuss the matter. But in this case the superintendent made no recommendation as to adjustment; as we have pointed out, his only recommendation at the March 3, 1964 board meeting related to the withholding of the increment. After the board had discussed petitioner's record, including the evaluations made by his principal and the knowledge and experiences of certain board members as to his relation with the parents of pupils, it was the *board* which concluded that the salary adjustment should also be with-

held. As the responsible administrative and policy-making agency of the local school system, the board on its own motion could conclude, as it did, that there be no salary adjustment. Its intention to do so was fully explained to petitioner on March 4; the board acted on March 10, and on March 24 petitioner was given the opportunity of fully discussing the matter with the board.

The determination of the Commissioner is accordingly affirmed.

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY.

Decided by the Commissioner of Education, April 2, 1965.

For Candidate Polhamus, J. P. Davidow, Esq.

For Candidates Tozer, Gerard, and Rafine, N. Douglas Russell, Esq.

Decision of the State Board of Education

This matter was decided by the Commissioner of Education on April 2, 1965. A hearing was held before the legal committee of the State Board of Education on December 17, 1965. Earlier hearing dates had been scheduled. The hearings were not held on these dates due to the unavailability of one or both of the counsel for the parties.

At the hearing on December 17, each of the contested ballots was examined by the members of the legal committee. Argument of counsel was heard. Additionally, the record of the entire proceedings below was examined by the members of the legal committee.

The recommendation of the legal committee to the Board was that the conclusions of the Commissioner be affirmed for the reasons set forth in his decision of April 2, 1965. The recommendation of the legal committee to this effect was unanimously approved by the State Board of Education at its meeting on January 5, 1966.

The State Board makes the following findings as to the ballots in question. The objections to ballots in exhibits C and D were not pressed before the State Board. Examination of the ballots in exhibit A indicates that in each instance the intention of the voter is clearly indicated. The Board finds that each of the ballots in exhibit A was marked in the required manner.

Exhibit B consists of three ballots. On the first of these there is no question but that the names of three candidates are properly marked. The objection is that the word "yes" appears to be written in on two of the lines made available for personal choice candidates. The Board finds the ballot to be proper and rejects the suggestion that the written words tend to identify the voter. The second ballot in exhibit B is properly marked as to two candidates. The name "A. Cimino" is written on one of the personal choice lines. No check mark is placed in the box on such line. The Board finds that this ballot is valid. The voter was apparently attempting to express his personal choice for Mr. Cimino. Since he did not complete the box next to Cimino's name, his attempt to vote for a personal choice candidate was futile. The Board rejects the contention that it is apparent on the face of the ballot that the voter's intention was to identify himself. The third ballot in exhibit

B is properly marked as to three candidates. In addition, a mark appears to the right of the name of Mr. Gerard. This mark does not invalidate the ballot.

The ballot in exhibit E contains proper markings as to three candidates. In addition, there is an erasure in the box next to the name of Mr. Veach and a short line in the box next to the name of Mr. Gant. The Board finds that the erasure is sufficiently complete to indicate the intention of the voter and that the line in the box next to Mr. Gant's name does not indicate an intention to cast a vote for Mr. Gant. The ballot is valid.

January 5, 1966.

JOHN C. MCGRATH,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,

Respondent.

Decided by the Commissioner of Education, June 15, 1966.

For Petitioner: Seymour Goldstaub, Esq.

For Respondent: Francis A. Castellano, Esq.

DECISION OF THE STATE BOARD OF EDUCATION

Petitioner appeals from a Decision of the Commissioner of Education determining that the respondent Board acted within the scope of its discretionary authority when on June 2, 1964, it removed petitioner from his position as Dean of Boys in Memorial High School, West New York, and re-assigned him to his former position as a classroom teacher. Petitioner appeals from that order. The Commissioner further held, however, that respondent's action in reducing petitioner's salary to that of a teacher was improper, and ordered respondent to restore him to his proper place on its salary scale and reimburse him for his salary lost as a result of the illegal reduction of his salary. Respondent appeals from that phase of the Commissioner's Decision.

Petitioner has been employed in respondent's school since 1928 and held tenure as a teacher in the district. Since 1960 he had held the position of Dean of Boys in Memorial High School, but did not have tenure in that position. In such capacity he carried on pupil guidance and personnel services similar to those performed in other school systems under the title of "Guidance Director" and "Guidance Cousellor." Such a position requires special training and qualification for a special certificate. The Commissioner found that petitioner possessed a proper certificate which entitled him to perform pupil guidance services as Dean of Boys.

Prior to petitioner's transfer from his position as Dean of Boys there were 3 such Deans at Memorial High School. Of the 3, petitioner had the longest

period of service both as teacher and guidance counsellor. Of crucial significance is the fact that the Board gave no consideration to such seniority when transferring him to teaching status.

In the hearing below petitioner presented considerable testimony in support of his contention that his removal as Dean of Boys was inspired by personal and political animosity on the part of his high school principal and by the political allegiance of the members of the Board of Education to the governing body of the Town of West New York. The Commissioner held below that the proofs fell short of establishing causal connection between such political motivation or animosity and petitioner's removal from his position as Dean of Boys. He further held that even if there were evidence of political motivation, since petitioner did not hold tenure in the position as Dean of Boys, it would not have invalidated his removal, citing *Barnes, et al.* v. *Board of Education of Jersey City,* 85 *N. J. Super.* 42 (*App. Div.* 1964) and other authorities. Petitioner further contended below that the removal was arbitrary, capricious and unreasonable so as to amount to an abuse of discretion. The Commissioner rejected that contention for the reason that the local Board had been given to understand by petitioner that he intended to retire and never advised the said Board that he had in fact cancelled his application for retirement. Therefore, the Commissioner held that it was not unreasonable, arbitrary or capricious for the local Board to select him for removal and to keep in employment those who, the Board had a right to anticipate, would be available for the following term.

Since there was substantial evidence before the Commissioner upon which he could base his findings of fact that the dismissal was not related to political animosity and was not unreasonable, we do not here disturb those findings. Further, our disposition of the matter as hereinafter stated does not require a consideration of those elements.

In our view, the main question involved here settles upon a construction of *R. S.* 18:13–19. More particularly, we consider the crucial question to be: Was petitioner entitled, by reason of his seniority among the Deans of Boys, to be protected against removal from that position?

The resolution of the local Board which effected the transfer of petitioner to his teaching status read as follows:

> "This Board having considered the teaching situation as created by many retirements of the teaching staff in Memorial High School, and for the betterment of the teaching service in said high school, it is hereby
>
> "RESOLVED, that the Resolution heretofore adopted by the Board of Education, dated April 5, 1960 appointing John C. McGrath Dean of Boys in Memorial High School, effective as of September 1, 1960, be and the same hereby is rescinded, annulled and revoked and the said John C. McGrath is restored to his normal position as teacher at the annual salary presently fixed and determined solely for his regular teaching duties. This Resolution relieving the said John C. McGrath of his duties as Dean of Boys in Memorial High School hereby rescinds and annuls the aforesaid Resolution of April 5, 1960 and is effective as of June 27, 1964."

It was petitioner's contention below that under *R. S.* 18:13–19 his seniority should prevail as against the other employees in the category of Dean of Boys.

In his opinion below the Commissioner recognized that the main issue herein involves 2 statutes referred to as the Teacher's Tenure Act (*R. S.* 18:13–16) and the Seniority Act (*R. S.* 18:13–19). With that we agree. The Commissioner further stated that:

> "This case turns then on the question whether the Board acted to reassign petitioner under *R. S.* 18:13–16 or 18:13–19."

With that statement we respectfully disagree.

We consider that the question as to which section the Board intended to "move" under is not important. That is a question merely of form, not of substance. The issue rather is whether either or both of said sections affords the petitioner any rights which were violated. This calls for a construction as to whether Section 19 affords petitioner seniority rights.

R. S. 18:13–16 provides protection of tenure after a probationary period of employment to teachers, principals, assistant superintendents and superintendents, and by its amendment by Ch. 231 of the Laws of 1962, to Assistant Principals, Vice Principals and to "* * * such other employees as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners, * * *," except that no employee shall obtain tenure in a position other than as teacher, principal, assistant superintendent or superintendent prior to July 1, 1964. As the Commissioner held below, it is clear that petitioner did not hold tenure in the position of Dean of Boys because he was removed from that position prior to July 1, 1964. Conceiving that the Board below acted under *R. S.* 18:13–16 the Commissioner held that it had authority under that Section to transfer petitioner from Dean to teacher without reduction in salary. We agree that, if the said Section, *R. S.* 18:13–16, were the only governing law, the Board had such discretionary authority. However, Sections 18:13–16 and 18:13–19 are in *para materia* and must be read together.

R. S. 18:13–19 provided for reductions in personnel and seniority priorities which prevail in such a case. This Section likewise was amended by Ch. 231 of the Laws of 1962. Prior to said amendment Section 19 provided that tenure rights attained by superintendents, assistant superintendents, principals or teachers pursuant to the provisions of Section 16 [prior to its amendment by Ch. 231 of the Laws of 1962] did not inhibit reduction of such personnel for reasons of economy, administrative reorganization or other good cause. It also provided that seniority priorities were to be respected. Coincident with the amendment of Section 16 to include within the class of persons entitled to tenure "such other employees * * * as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners," the Legislature likewise amended the provisions of Section 19 to include such additional persons within the protection of that Section, including seniority rights. The Commissioner below conceded that:

> "Had respondent moved under *R. S.* 18:13–19 to abolish one or more of its guidance positions, petitioner's seniority would have had to be taken into consideration and his claim would have had validity."

Analyzing the resolution adopted by the Board of June 2, 1964, the Commissioner, finding no mention or reference therein to a reduction in the number of guidance positions and finding no other evidence that the Board acted "to abolish a position or reduce the number of its guidance personnel," held that it must therefore be presumed that the Board acted under *R. S.* 18:13–16 and therefore any seniority protection afforded by *R. S.* 18:13–19 was not available to petitioner.

As said above, in our view, the issue is not whether the Board, procedurally, intended to act or did act under one or the other of Sections 16 or 19. Neither do we consider ourselves bound by the form in which the Board phrased its resolution, omitting therefrom, as a stated ground for its action, reduction in personnel. Rather, the question is: Does petitioner come within the provisions of Section 19 and is he entitled to the seniority rights thereby afforded?

We concede that Section 19 is somewhat ambiguous, or at least not clear, as to whether it applies to persons not having tenure rights in the position from which they may be removed. The Section is capable of a construction that it affords seniority rights only to those who have tenure in such position. If its construction were a matter of first impression here, our task would be somewhat more difficult than it is. However, we are not the first to be confronted with the less than clear language of the Section. Prior to its amendment in 1962 Section 19 expressly named in its context only superintendents, assistant superintendents, principals or teachers. In other words, only those particular positions which at that time were granted tenure under Section 16 were named in Section 19. Yet the Section, with respect to its seniority provisions, was construed by the Appellate Division in *Moresh* v. *Bayonne Board of Education,* 52 N. J. Super. 105, 110, 111 (App. Div. 1958), as applying to positions not encompassed by the specific positions in which alone a person could get tenure namely, superintendent, assistant superintendent, principal or teacher. As the Appellate Division said, "This statute * * * is not without obscurity or ambiguity" (*Idem.*, p. 110), and "Although not a model of legislative clarity," the Court held that Section 19 was broad enough to extend the coverage of its provisions to every position in the fields or categories of administrative, supervisory, teaching or other educational services which are performed in the school districts. Thus the Section was construed in *Moresh* as affording seniority privileges to a position of vice-principal was not one of the positions which, under Section 16, could carry tenure rights. The Commissioner of Education placed the same construction on Section 19 in his Decision in the case of *Lautenschlager* v. *Board of Education of the City of Jersey City, S. L. D.* 98 (1961). In that case 5 employees who, prior to July 1, 1959 held administrative and supervisory positions, contended that they were entitled to seniority rights under the Section. The Commissioner, citing *Moresh*, held that under Section 19 the said employees, though not within the categories of superintendent, assistant superintendent, principal or teacher, nevertheless were entitled to seniority protection.

Respondent Board, while stating, in *ipse dixit* fashion, that the amendment of 1962 overrides the holding in *Moresh* and in prior decisions of the Commissioner, fails to point out in what respects the amendment effects such result. The said amendment simply added to Section 19 the same category of

new positions as was brought within tenure protection by the amendment of Section 16.* If it were the intention of the Legislature to repudiate the construction of those decisions, it would appear that it would have taken pains to express such intent in clear language. Since it did not do so, we construe Section 19, as amended, as having the same meaning with respect to seniority rights as ascribed to it by *Moresh* and *Lautenschlager* before the amendment, namely, that such rights apply not only to those having tenure in a particular position, but to all others performing educational services in the system. We therefore hold that the petitioner, before his removal from Dean of Boys to teaching status, was entitled to have his seniority rights recognized. Actually, the Commissioner below construed Section 19 in the same manner, *i.e.*, that the seniority provisions apply as well to persons not holding tenure in a particular position as well as to those who have such tenure. He stated in his Decision that if respondent had "moved" under Section 19 "petitioner's seniority would have had to be taken into consideration and his claim would have had validity." But, said the Commissioner, the Board did not act under that Section and, further, there was no evidence below to show that the Board acted to reduce the number of its guidance personnel. As we have said above, the "form" under which the Board acted was not, in our view, material. Further, we find that there is ample evidence that, in fact, the Board did reduce the number of its guidance personnel in passing the resolution of June 2, 1964, even though the resolution makes no verbal reference thereto. The record reveals, from the testimony of the 1964-1965 Board members, that their purpose in relieving petitioner of his counseling duties was to reduce the number of male deans at the high school from 3 to 2 for reasons of "economy." It reveals that in January, 1964 (when the 1963-1964 Board was still in office) the local Board decided to reduce the high school guidance department in the district from 5 deans to 4 for "reasons of economy" and the school budget was prepared, eliminating the fifth guidance position. On February 1, 1964, the 1964-1965 Board was organized. It consisted of the same persons who had served on the 1963-1964 Board. According to the testimony of the Board members, they selected petitioner for removal from the Dean status because of their understanding that he was going to retire or because they thought at that time that he had less credits than the other 2 male Deans. But the record is clear that they removed petitioner in furtherance of their purpose to economize. Trustee McGill expressly testified that in May the Board discussed the petitioner's possible retirement and the fact that "we were going to have 4 deans for economy reasons." Trustee Guasconi testified that the question of the number of Deans began at budget time when "they wanted to economize" and decided that they would not need 5 Deans, but

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* The Statement attached to the bill which later became Ch. 231 of the Laws of 1962, insofar as pertinent here, clearly states that the sole purpose of the amendment was to extend the Tenure Act so that it covered most professional educators. The statement recited several examples of those who, under the amendment, would gain the protection of the Tenure Act, including "counsellors, teacher counsellors" such as petitioner here. The statement failed to mention any intent on the part of the Legislature to overrule the construction therefore ascribed to Section 19 by the case of *Moresh* v. *Bayonne Board of Education, supra* and the Decision of the Commissioner of Education in the case of *Lautenschlager* v. *Board of Education of the City of Jersey City, supra.*

would reduce them to 2—"for economy reasons, primarily." The evidence is clear that economy was the main motivation for the reduction of the number of Deans, and petitioner was selected to effect the reduction.

We therefore find that, contrary to the finding of the Commissioner below as stated in his Decision, there was substantial evidence that in transferring petitioner from his position as Dean of Boys the Board was in fact reducing the number of its guidance personnel. For this reason also we hold that petitioner was protected by the seniority provisions of *R. S.* 18:13–19. We therefore recommend that the State Board of Education order that petitioner be restored to the position of Dean of Boys without reduction of salary and that he be reimbursed for salary lost as a result of the action of the local Board taken on June 2, 1964. From this disposition of petitioner's appeal it follows that the appeal of the local Board shall be dismissed.

June 1, 1966.

IN THE MATTER OF THE SENDING-RECEIVING RELATIONSHIP BETWEEN THE BOARDS OF EDUCATION OF MIDDLETOWN TOWNSHIP AND THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY

Decided by the Commissioner of Education, April 14, 1964.

Decision of the State Board of Education

Decision of the Commissioner of Education affirmed without written opinion.

February 2, 1966.

Harold Reinish,

Petitioner-Respondent,

v.

Board of Education of the Borough of Cliffside Park, In the County of Bergen,

Respondent-Appellant.

Decided by the Commissioner of Education, April 22, 1965.

For Petitioner-Respondent: Cassel R. Ruhlman, Esq.

For Respondent-Appellant: Eznick Bogosian, Esq.

Decision of the State Board of Education

This is an appeal by the Appellant from the decision of the Commissioner of Education rendered April 22, 1965.

It is the recommendation of the Legal Committee that the decision of the Commissioner of Education be affirmed for the reasons set forth in his opinion of April 22, 1965.

March 2, 1966.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued September 19, 1966—Decided September 28, 1966.

Before Judges Gaulkin, Lewis and Labrecque.

On Appeal from Decision of the State Board of Education of New Jersey.

Mr. Cassel R. Ruhlman, Jr. argued the cause for the Petitioner-Respondent.

Mr. Eznick Bogosian argued the cause for the Board of Education of the Borough of Cliffside Park (*Messrs. Bauer, Bogosian & Whyte,* attorneys).

Mrs. Marilyn Loftus Schauer, Deputy Attorney General, appeared for the State Board of Education (*Mr. Arthur J. Sills,* Attorney General, attorney).

PER CURIAM.

The judgment is affirmed substantially for the reasons stated in the opinion of the Commissioner of Education.

GEORGE I. THOMAS,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS, IN THE COUNTY OF MORRIS,

Respondent-Respondent.

Decided by the Commissioner of Education, April 1, 1963.

Affirmed by the State Board of Education, August 12, 1964.

Affirmed by Superior Court, Appellate Division, 89 N. J. Super. 327 (1965).

DECISION OF THE SUPREME COURT

Argued March 8, 1966—Decided April 4, 1966.

Mr. Abraham Natovitz argued the cause for Petitioner-Appellant.

Mr. Bertram Polow argued the cause for Respondent-Respondent (*Mr. Robert J. Del Tufo* on the brief).

PER CURIAM.

The judgment is affirmed substantially for the reasons expressed in the majority opinion of the Appellate Division. 89 *N. J. Super.* 327 (*App. Div.* 1965). We reserve, however, the question whether *mere execution* of the three year contract of employment entered into on August 18, 1961 between Thomas and the Board of Education, even if it had been a valid one, would have given tenure to Thomas.

46 *N. J.* 581.