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NEW JERSEY
SCHOOL LAW DECISIONS

Indexed

January 1, 1982 to December 31, 1982

vol. 2

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

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SAUL COOPERMAN
Commissioner of Education

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUBSTANTIVE ORDER
CONCLUDING CASE
OAL DKT. NO. EDU 772-82
AGENCY DKT. NO. 3-1/82A

CLAUS SCHWARTZKOPF,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN AND CHARLES SMERIN, SUPERINTENDENT OF SCHOOLS,
Respondent.

APPEARANCES:

Allen S. Zeller, Esq. (Freeman, Zeller & Bryant, attorneys) for petitioner, Claus Schwartzkopf

Malachi J. Kenney, Esq. (Murray, Granello & Kenney, attorneys) for respondents

Record Closed June 15, 1982 Decided July 8, 1982

BEFORE AUGUST E. THOMAS, ALJ:

Petitioner appeals the determination of the Board of Education of the City of Camden (Board) which abolished his position and reassigned him with a subsequent reduction in salary.

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This matter was filed in the Office of the Commissioner of Education on January 4, 1982, and thereafter was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Filed with the Answer on January 28, 1982, is the Board's Motion to Dismiss the petition as untimely and supporting Brief. Petitioner filed a Brief in opposition to the motion.

At the continued prehearing conference on May 26, 1982, decision on the Motion was withheld pending the litigants' attempts to settle their dispute. By letter received on June 15, 1982, the administrative law judge was notified by respondent that settlement attempts had failed. Respondent requested a decision on its Motion to Dismiss; consequently, the matter is hereafter considered for Summary Decision on the pleadings, exhibits and Briefs.

The following facts are not in dispute. Petitioner is a tenured psychologist employed by the Board. For several years, petitioner has been the chief psychologist. On April 27, 1981, the Board voted in public session to abolish the position of chief psychologist, in connection with a reduction in force, effective June 30, 1981. In accordance with petitioner's seniority rights, he was reassigned on July 29, 1981, to the position of psychologist effective September 1, 1981 (Exhibits A, B, C, D). None of these listed exhibits address petitioner's salary in the new position.

On or about January 4, 1982, petitioner filed a Petition of Appeal with the Commissioner, alleging that his reassignment to the position of psychologist and the concomitant reduction in salary violated his tenure rights.

Believing that the Petition of Appeal was filed more than 90 days from the date of the action complained of, the Board and Charles Smerin, Superintendent, filed the instant Motion to Dismiss.

The Commissioner of Education has jurisdiction over this matter pursuant to N.J.S.A. 18A:6-9. In accordance with its statutory authority, Title 18A-Education, the State Board of Education has issued regulations regarding controversies and disputes arising under the school laws (N.J.A.C. 6:24-1 et seq.)

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Specifically, the regulations require that an appeal shall be filed within 90 days of any adverse action (N.J.A.C. 6:24-1.2). Considering this regulatory provision, it is necessary to examine the file to see if the 90-day time requirement has been met.

The record shows that the Board acted on April 27, 1981, to abolish petitioner's position effective June 30, 1981, and that it so notified petitioner by letter dated April 28, 1981 (Exhibit A, B). On July 29, 1981, petitioner was notified of his reassignment effective September 1, 1981 (Exhibit D).

Petitioner argues that irrespective of its action, the Board never notified him of any reduction in salary and, in fact, paid him the same salary he had been receiving through August 31, 1981. Petitioner alleges he was told by an assistant superintendent that his salary would not be reduced. (Petitioner's Brief, page 2.) Petitioner alleges further that he continued to perform essentially the duties of chief psychologist up to January 6, 1982, when he was advised by a supervisor that he should no longer perform his quasi-administrative functions (Exhibit I).

Consequently, petitioner argues that the operative date of the adverse action by the Board is not April 28, 1981, when he was notified, but rather much later, as is discussed, infra.

Petitioner asserts that he made inquiries without response about his reduced paycheck received on September 15, 1981, which represented his gross salary beginning September 1, 1981. Petitioner thereafter sought legal representation. On October 5, 1981, petitioner's attorney wrote to the Superintendent questioning the reduction. The Superintendent replied by letter dated October 19, 1981, stating, in effect, that there was no mistake in petitioner's salary (Exhibit II). Thereafter, communications occurred between petitioner's attorney and the Board attorney when the matter was forwarded to special Board counsel for a response which was sent to the Board attorney by letter dated November 23, 1981 (Petitioner's Brief, page 3). Board counsel notified petitioner by letter dated December 9, 1981, that no further action was to be taken in this matter (Exhibit III).

The Petition of Appeal was filed on January 4, 1982. Petitioner argues that the operative event of adverse action could not have been earlier than October 19, 1981,

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when he received the Superintendent's letter (Exhibit III). Consequently, he asserts that he has appealed within the 90-day time limit.

From my review of this record, I **FIND** that the operative event from which this appeal was generated occurred on September 15, 1981, when petitioner received his reduced paycheck. I make no finding concerning his alleged duties or job performance during the period July 1 through August 31, 1981. Suffice it to say that petitioner received written notice of his transfer and assignment on July 29, 1981, to be effective on September 1, 1981. This notice and petitioner's receipt of the subsequent paycheck on September 15, 1981, clearly established that his salary had been reduced.

It does not matter what petitioner believed or what he was told concerning his salary. On September 15, 1981, he had 90 days to file his appeal with the Commissioner, notwithstanding any other legal actions or inquiries he was utilizing to seek a review of his salary.

The timeliness of filing a Petition of Appeal is governed by the State Board of Education rule codified at N.J.A.C. 6:24-1.2, which provides in pertinent part:

> To initiate a proceeding before the Commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the Commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested. . . .

Justice Pashman stated in a footnote in Bd. of Ed. of Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 331 (1979):

> Under N.J.S.A. 18A:29-14, the Commissioner has been delegated the responsibility to promulgate rules and regulations concerning the manner in which an aggrieved teacher may appeal adverse Board determinations. Pursuant to this grant of authority, such rules have been adopted. See N.J.A.C. 6:24-4.1; N.J.A.C. 6:24-1.1 to 6:24-1.19. These rules require a teacher to file a petition with the Commissioner within 90 days of his receipt of notice of the Board's decision to withhold an increment. N.J.A.C. 6:24-1.2. . . . [A] teacher who proceeds to advisory arbitration is not relieved from compliance with this 90-day filing requirement. However, in order that the goals underlying our decision to permit this type of arbitration be achieved, the Commissioner must wait until the

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> arbitration is completed and an advisory decision rendered before conducting a hearing on the merits of the teacher's petition. (at 326-237)

See also: Sara Riely v. Bd. of Ed. of Hunterdon Central High School, 173 N.J. Super. 109 (App. Div. 1980).

Although petitioner was not proceeding through arbitration or any grievance procedure, he was just as obligated to file his appeal within 90 days of the operative event. Consequently, December 15, 1981, was the last date on which petitioner's appeal would have been timely.

I **CONCLUDE** that the petition of Appeal was filed out of time.

Regarding allegations that the Board's actions were violative of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., petitioner has failed to specify any violation in his petition. In his Brief, petitioner argues that the Board failed to act in effecting his transfer. I disagree. The Board acted on April 27, 1981, and advised petitioner in writing that "You will be transferred . . . [and] we will advise [you] at the earliest possible date of your new assignment" (Exhibit B). Thereafter, on July 29, 1981, petitioner was notified in writing of his transfer by the Superintendent. (Exhibit D)

I **CONCLUDE** that April 27 and July 29, 1981, are the dates of the alleged violations of the Open Public Meetings Act, and if there had been a violation, petitioner had 45 days from July 29, 1981, in which to file his appeal, N.J.S.A. 10:4-15(a). As stated earlier, his appeal was filed on January 4, 1982, more than five months later.

Consequently, this alleged violation has also been filed out of time. (Petigrow v. North Warren Regional H.S. Dist. Bd. of Ed., 1980 S.L.D. _____, decided April 24, 1981).

I **CONCLUDE** that the Petition of Appeal has been filed out of time with respect to the issue of reduced salary and the alleged violation of the Open Public Meetings Act.

The Board's motion to dismiss is **GRANTED** and the Petition of Appeal is **DISMISSED** with prejudice.

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

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

8 July 82
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

7/9/82
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 13, 1982
DATE

Ronald L. Parker/ss
OFFICE OF ADMINISTRATIVE LAW

plb

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DOCUMENTS IN EVIDENCE

Exhibit 1	The pleadings and Exhibits A - F attached to Answer
Exhibit 2	Respondent's Motion to Dismiss, with supporting Brief
Exhibit 3	Petitioner's Brief in Opposition to the Motion to Dismiss, with Exhibits I, II, III
Exhibit 4	Petitioner's Certification in Opposition to the Motion to Dismiss

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CLAUS SCHWARZKOPF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN AND CHARLES SMERIN, SUPERINTENDENT OF SCHOOLS, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

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

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

Petitioner filed with the Commissioner a notice of substitution of attorney, exceptions to the initial decision by the Honorable August E. Thomas and a motion to reopen the controverted matter.

Petitioner alleges that Judge Thomas did not have for consideration a document attached to Exhibit 3, identified in Petitioner's Brief as "Exhibit IV," when he wrote the initial decision and therefore such omission is fatal to that decision and warrants relaxing the 90-day requirement of N.J.A.C. 6:24-1.2, ante. Petitioner contends that N.J.S.A. 18A:6-10 is the functional equivalent of N.J.A.C. 6:24-1.2 providing, as it does, that no person shall be reduced in compensation without just cause and that notice be given the affected party. Petitioner alleges that he did not know that his salary would be reduced and that the Board wrongfully withheld such information from him.

The Board's reply exceptions plead otherwise. The Board rejects petitioner's exceptions and upholds the dismissal of the Petition. The Board contends that petitioner knew or should have known that his transfer to the position of psychologist in accordance with his seniority rights would have resulted in a reduction of salary accordingly. The Board argues that comparison by petitioner of his case to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, has no relevance.

The Commissioner finds no merit in petitioner's arguments nor can he consider petitioner's reply to the Board's reply exceptions, noting that there is no provision in law for such reply.

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The Commissioner has examined carefully the contents of Exhibit IV, subsequently filed, which consists of a letter dated November 19, 1975 from Board counsel to petitioner advising that petitioner was inadvertently overpaid in the 1974-75 school year. The Commissioner cannot envision the relevancy of this document to the determination by Judge Thomas that the present Petition was not filed in a timely fashion. The Commissioner so holds.

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

Accordingly, the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

August 23, 1982
PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3897-81
AGENCY DKT. NO. 18-1/81A

EAST BRUNSWICK EDUCATION ASSOCIATION ON BEHALF OF 117 EAST BRUNSWICK TEACHING STAFF MEMBERS,
Petitioners
v.
BOARD OF EDUCATION OF EAST BRUNSWICK TOWNSHIP, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

Nancy Iris Oxfeld, Esq. for petitioners (Rothbard, Harris & Oxfeld, attorneys)

Frank Rubin, Esq. for respondent (Rubin & Rubin, attorneys)

Record Closed June 16, 1982 Decided July 14, 1982

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

The East Brunswick Education Association (Association) and certain members of the teaching staff (petitioners) employed by the East Brunswick Township Board of Education (Board), appeal an action of the Board charging individual petitioners with use of one day of sick leave on June 12, 1981. The Board, in its Answer, filed June 9, 1981, admits that certain teaching staff members were charged with one day's sick leave

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entitlement for June 12, 1981. It alleges, however, that this action was within its lawful authority and that petitioners, by reason of allegedly engaging in an illegal job action, are barred by estoppel and the doctrine of unclean hands from an award of the relief sought in the form of reinstatement of one day's sick leave entitlement.

PROCEDURAL RECITATION:

When the Board failed to file a timely Answer, petitioners requested entry of an order of default on May 15, 1981. No such order of default was issued by the Commissioner. When an Answer was filed on June 19, 1981, by the Board, the matter was transferred as a contested case on June 22, 1981, to the Office of Administrative Law, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. Thereafter, at a prehearing conference held on October 13, 1981, the following issues were agreed upon:

A. Were the Board's actions charging petitioners with use of sick days, family illness days, specified and unspecified personal days for June 12 violative of their rights under education law, arbitrary or capricious within the factual context of the June 12 school closing?

B. Were the Board's actions within its lawful authority?

C. Are petitioners barred by unclean hands and/or estoppel from the relief they seek?

A procedural order, dated December 23, 1981, was issued by the undersigned, ruling on a dispute over interrogatory questions and answers.

A plenary hearing was thereafter conducted at Old Bridge, New Jersey, on March 1, 1982. Post-hearing briefing was concluded, completing the record on June 17, 1982.

UNCONTESTED FACTS:

Petitioners originally comprised 117 teachers employed by the Board at its Churchill Junior High School and its East Brunswick High School. On June 12, 1980, a large number of teachers called the substitute calling service and indicated they would be

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absent that day. They indicated that they were ill, taking a personal leave day or taking an absence because of illness in the family. Because of this large number of teacher absences, the Board closed the high school and Churchill Junior High School on June 12, 1980. The Board's other schools remained open that day.

Two stipulations were entered into prior to the hearing (J-1,2). As the result of those stipulations, claims on behalf of the following categories of petitioners were withdrawn:

1. teachers charged with use of a specified or unspecified personal day on June 12, 1980;
2. teachers who have retired or are otherwise no longer employed by the Board;
3. teachers charged with absence because of illness in the family.

All of the remaining teachers are among those who called in sick on June 12, 1980. No teacher lost pay for that day.

Teachers who did not call indicating they would be absent on June 12 did not lose pay and were not charged with use of a sick day, personal day or family illness day on the presumption that they would have reported for work had the Board not closed the school. Those who called in sick were directed to produce medical verification of illness. Both those who did produce doctors' notes verifying illness and those who did not produce such verification were charged with use of a sick day.

SUMMARY OF TESTIMONY:

The Board's Assistant Superintendent of Schools for Personnel (Assistant Superintendent), the only witness called to testify, was called and examined as an adverse witness by counsel for petitioners. She testified that early in the morning of June 12, 1980, she was alerted by the employee who receives calls from teachers for substitutes that the number of teaching staff members from the East Brunswick High School and Churchill Junior High School who were calling in was unusually high. She testified that, on this basis and on the basis of reports which she had received from teachers on June 11

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that a job action was planned for June 12, the Superintendent, who had previously been authorized by the Board to do so, closed those two schools for June 12 only.

The Assistant Superintendent testified that she then sent to 59 teachers who had called in sick that day a certified letter directing that they submit, within two weeks, proof of sickness on June 12, in the form of physicians' notes (R-2, Exhibit). She testified that 24 of those letters were returned unclaimed, that 11 teachers did submit physicians' notes, and that 18 teaching staff members submitted their own statements but no physicians' statements (P-1, 2, 3).

The Assistant Superintendent testified that, on the basis of her discussion with other administrators and her own conclusion that those who called in sick were engaged in a work stoppage, she charged each one with the use of one sick day for June 12. She also testified that she did not charge anyone who did not call in ill with use of a sick day. She testified that since the matter quickly moved to litigation, she did not reinstate a day's sick leave for any teacher for whom a doctor's certification of illness was submitted. She also testified that, after she charged others who had called in for "personal days" and "illness in the family" days with use of one of those days for June 12, she at no time restored their entitlements.

The Assistant Superintendent testified that she was personally involved with the negotiation of a teacher's agreement and that the process, after rejection of a tentative agreement in mid-April, had become acrimonious. She testified that impasse was declared on April 24 (R-1, Exhibit B), after which the Education Association gave notice on May 19 that volunteer services in the form of after school tutorial sessions, assistance at graduation and all non-compensated services would be withheld (R-1, Exhibit D). She testified that she had heard, on a number of occasions thereafter, that a job action was in the offing. In this regard, she testified that the employee who arranges for substitutes advised her early in the morning of June 12 that some who had called in had told her that a work stoppage was in process. She testified further that the school calendar was not extended as the result of the June 12 closing, but that teachers and pupils were required to be in session for one-half day on June 18, which had previously been scheduled as a non-student teacher's workshop day (P-4).

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FINDINGS OF FACT:

On the basis of a preponderance of credible evidence within the record, I FIND the following to be additional facts to be considered together with those undisputed facts set forth above when reaching a determination:

1. When the Board required medical verification for absences for illness on June 12, 11 teachers submitted physicians' verifications (P-1). Additionally, 18 teachers submitted their own statements of illness, unsupported by physicians' verifications (P-2). Although a number of the Board's certified letters directing that proof of illness be verified were unclaimed (P-3), some of that same group did submit proof of illness.

2. All who called in ill, regardless of whether they submitted medical verifications, have, to this date, been charged with use of one sick day on June 12, 1980.

3. A large number of the petitioner members of the Association, which had been at impasse in its negotiations with the Board for a successor agreement, were involved, on June 12, 1980, in a limited form of work stoppage affecting the high school and Churchill Junior High School only. This finding is grounded on the large number of teachers at these two schools only who called in sick, called in for personal days (specified and unspecified) and called in for family illness on June 12, 1980. It is also grounded on the convincing testimony of the Assistant Superintendent that she had previously been advised a number of times that a work stoppage was imminent, that the tenor of continued negotiations had become acrimonious and that the Association members were withholding services at graduation ceremonies and other noncompensated services (R-5). This finding is also made recognizing that no rebuttal to Witt's cohesive and credible testimony was offered. I am unconvinced that the plethora of sore throats, stomach viruses, minor injuries, tension headaches, nausea, congested sinuses, diarrhea, head colds, self medications, sore muscles, allergies, toothaches, chills, and unspecified sicknesses, as reported on the answers to interrogatories entered into evidence by respondent as R-6A through W, conspired to necessitate that

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58 teachers in two schools had to be absent from their teaching posts on June 12, 1980. Petitioners are content to have us believe that all of this occurred coincidentally and in conjunction with 59 other absences by teachers in those same two schools for unspecified and specified personal absences and family illnesses. To so conclude would strain credulity beyond human experience.

4. As a result of the June 12 work stoppage, June 18, which had been scheduled as a non-student teacher workshop day was rescheduled by the Board as a day on which pupils were required to be present for instruction one-half day and teachers were required to be present for a full day (P-4). No other alteration to the Board's calendar resulted (J-3, 4).

5. When the emergency situation as described above occurred on June 12, 1980, the Superintendent gained approval of the Board President and declared the schools closed on that date (J-6).

DISCUSSION AND CONCLUSIONS:

Petitioners argue that whether or not they engaged in a job action on June 12, the Board had no legal right to charge them with use of a sick leave day on a day when it ordered the schools closed. Petitioners cite as authority in this regard Joanne Oteri, et al v. Bd. of Ed. of the Borough of Magnolia, Camden County, 1980 S.L.D. ____ (decided August 18, 1980); Herbert Levitt, et al v. Bd. of Ed. of the City of Elizabeth, 1978 S.L.D. 597, aff'd on different grounds 1979 S.L.D. 847.

The Board, conversely, argues that petitioners are legally barred in this litigation by the doctrine of clean hands from receiving the relief they seek by reason of their having engaged in an illegal work stoppage.

That a work stoppage, otherwise known as a strike, in public employment is illegal under New Jersey law is well settled. The Supreme Court of this State, ruling that public employees may not strike in Bd. of Ed. of the Borough of Union Beach v. New Jersey Ed. Assoc. et al., 53 N.J. 29 (1968), stated, inter alia, the following:

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> It has long been the rule in our State that public employees may not strike . . . . And we have rejected the notion that public employees may resort to strike because they think their cause is just or in the public good . . . . But the subject is the public service, and the distinctions defendants advance are irrelevant to it, however arguable they may be in the context of private employment. Unlike the private employer, a public agency may not retire. The public demand for services which makes illegal a strike against government inveighs against any other concerted action designed to deny government the necessary manpower, whether by terminating existing employments in any mode or by obstructing access to the labor market. Government may not be brought to a halt. So our criminal statute, N.J.S. 2A:98-1, provides in simple but pervasive terms that any two or more persons who conspire "to commit any act" for the "obstruction of . . . the due administration of the laws" are guilty of a misdemeanor.
>
> Hence, although the right of an individual to resign or to refuse public employment is undeniable, yet two or more may not agree to follow a common course to the end that an agency of government shall be unable to function . . . . (at 36-38)
>
> That the conventional terminology of a "strike" nowhere appears is of no moment. The substance of a situation and not its shape must control. A doctrine designed to protect the public interest is equal to any demand upon it. It does not yield to guise or ingenuity . . . . (at 39-40)

It is equally clear from the above findings that petitioners, both as an Association and as individuals, were responsible for a concerted job action which resulted in an inability of two schools in the district to function for one day. Nowhere in the record have petitioners denied this accusation of the Board. Nor was even one witness called by petitioners to testify that a work stoppage did not occur on June 12.

In North Bergen Federation of Teachers, Local 1060, et al v. North Bergen Bd. of Ed., 1978 S.L.D. 218, at 244-245, the Commissioner cited with approval that which had been stated by the court as follows in Medical Fabrics Co. v. D.C. McClintock Co., 12 N.J. Super. 177 (App. Div. 1951):

> . . . The clean hands doctrine is an ethical concept long applied in courts of equity although not peculiar thereto. Chafee, Some Problems of Equity (1950), pp. 1, 94. In general, its requirement is not that suitors seeking relief in equity "shall have led blameless lives" (Loughran v. Loughran, 292 U.S. 216, 229, 78 L. Ed. 1219, 1227 (1934)), but rather that they shall not have acted fraudulently or unconscionably with respect to the particular controversy in issue. Precision Instr. Mfg. Co. v. Automotive M. Mach. Co., 324

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> U.S. 806, 815, 89 L.Ed. 1381, 1386 (1945); Neubeck v. Neubeck, 94 N.J. Eq. 167, 170 (E. & A. 1922). When applicable it is invoked not out of regard for the defendant or to punish the plaintiff but upon larger considerations "that make for the advancement of right and justice." Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 88 L.Ed. 814, 819 (1944). Cf. Casini v. Lupone, 8 N.J. Super. 362, 365 (Ch. Div. 1950); Hansen v. Local No. 373, 140 N.J. Eq. 586, 589 (Ch. 1947).
>
> While the doctrine is firmly rooted and naturally appeals to persons of good conscience, it may well disserve the interests of justice if applied oversensitively or as a rigid formula restraining the court's just exercise of discretion. Precision Instr. Mfg. Co. v. Automotive M. Mach. Co., supra; Chafee, supra, p. 99. Accordingly, there has been a recent wholesome tendency amongst courts to apply the doctrine flexibly in the light of the particular circumstances presented. See 60 Harv. L. Rev. 980, 981 (1947); Rasmussen v. Nielsen, 142 N.J. Eq. 657 661 (E. & A. 1948); A. Hollander & Son, Inc., v. Imperial Fur Blending Corp., 2 N.J. 235, 247 (1949); Hansen v. Local No. 373, supra . . . .

Similarly, in its partial affirmation of the Commissioner in North Bergen, supra, the State Board of Education also recognized the applicability of the clean hands doctrine in education cases as follows:

> The long-established equitable principle of "clean hands" applies to administrative proceedings as well as law cases. In the courts it means that "equity refuses to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief." 30 Corpus Juris Secundum, Equity, 93, p. 1009. The same principle applies by analogy to persons applying for relief from an administrative tribunal. See Beckhusen v. Board of Education of Rahway, 1973 S.L.D. 167, 177-178.

I **CONCLUDE** that by their illegal actions which forced the Board to close two of its schools, petitioners have "acted unconscionably with respect to the particular controversy at issue." Precision Instr. Mfg. Co., supra; Neubeck, supra. I further **CONCLUDE** that because of those actions, petitioners do not come to this litigation with clean hands and are barred by the doctrine of clean hands from an award of the relief they request.

The cases cited by petitioners are clearly distinguishable from the facts of the instant matter. For that reason, they offer no solace to petitioners. Levitt, supra is distinguishable in that the Elizabeth Board withheld pay from teachers who refused to

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work on a legal holiday which, under State law, they could not be compelled to do. The holding in Oteri, supra, is not controlling herein, since there was not in Oteri the same set of circumstances as herein, whereby the petitioners caused two schools to be closed by their illegal action.

I further **CONCLUDE** that any flexible application of the doctrine of unclean hands, as applied by the State Board in North Bergen, would be inappropriate herein, since the Board's action to charge sick leave was not unduly harsh or totally unrelated to the factual context which existed.

DETERMINATION:

In consideration of the facts and conclusions set forth above, it is **DETERMINED** that petitioners are barred from the relief they seek by the doctrine of clean hands. Accordingly, the relief requested is **DENIED** both to those who did and to those who did not submit medical evidence in support of their action. The application of the doctrine of clean hands must apply broadly to all those who are represented by the Association as the majority representative in this litigation wherein they seek to reverse the Board's action. The Petition of Appeal is **DISMISSED.**

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OAL DKT. NO. EDU 3897-81

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

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

July 14, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

July 15, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 21, 1982
DATE

Ronald L. Parker/es
OFFICE OF ADMINISTRATIVE LAW

fms

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DOCUMENTS IN EVIDENCE:

J-1 Stipulations of Settlement, dated February 12, 1981 and February 28, 1981

J-2 Stipulations of Settlement, dated February 17, 1981 and February 18, 1981

J-3 East Brunswick H. S. Calendar 1980-81

J-4 East Brunswick J. H. S. Calendar 1980-81

J-5 Board Resolution, August 20, 1980

J-6 Witt's Affidavit

R-1 Verified Complaint with Exhibits

R-2 Affidavit of Brenda Witt and David Seiden

R-3 Order to Show Cause (with immediate restraints)

R-5 Teaching Staff to Jozefowicz

R-6A-W Interrogatories and Answers

P-1 Doctors' Notes

P-2 Notes submitted by teachers

P-3 Unclaimed envelopes

P-4 Witt to Secondary Staff

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EAST BRUNSWICK EDUCATION ASSOCIATION, on behalf of 117 EAST BRUNSWICK TEACHING STAFF MEMBERS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioners except to the conclusion by the Honorable Eric G. Errickson, ALJ that they are barred by the doctrine of clean hands from making their claim for relief from the action of the Board charging them with the use of a sick leave day on June 12, 1980 when the Board closed two schools because of excessive teacher absenteeism. Petitioners in support of their stance rely on North Bergen, supra; Levitt, supra; and Sayreville Education Association, 1971 S.L.D. 197, aff'd State Board 203.

The Board's reply exceptions refute those of petitioners and affirm the decision of the Court herein barring relief for petitioners because of the doctrine of clean hands. The Commissioner finds merit in the Board's arguments.

The Commissioner finds Levitt, supra, inapposite to the matter presently controverted dealing as it does not with teacher absence on a holiday, but absence as the result of a job action by teachers that stands unrefuted on the record. Further, the Commissioner finds petitioners' reliance on North Bergen, supra, to be misplaced. Rather, in the opinion of the Commissioner, Judge Errickson properly cited North Bergen in support of the applicability of the clean hands doctrine in education cases. See the affirmation by the State Board of Education, 1978 S.L.D. 250, 251.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 25, 1982

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6010-81

AGENCY DKT. NO. 318-7/81

CLAUDE WRIGHT, JR., AND
EAST ORANGE PERSONNEL ASSOCIATION,
Petitioners

v.

EAST ORANGE BOARD OF EDUCATION,
ESSEX COUNTY,
Respondent.

APPEARANCES:

Barry A. Aisenstock, Esq. for petitioners (Rothbard, Harris & Oxfeld, attorneys)

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

Record Closed June 2, 1982 Decided July 13, 1982

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

This is an action for reinstatement of Claude Wright, Jr. (petitioner), as a custodian in the employ of the East Orange Board of Education (Board).

Petitioner alleges he enjoyed a tenure status and was terminated in violation of tenure rights. Whether this is so is the issue to be tried. The Board denies petitioner attained tenure and, therefore, it could not have violated his tenure rights.

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The matter was joined before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Hearing commenced on May 3, 1982, at the Office of Administrative Law, Newark, New Jersey. Petitioner presented documents (P-1, P-2, P-3), which were entered in evidence by consent, and rested. The Board called petitioner. On conclusion of direct examination, a conference of counsel was held. A joint stipulation of facts was produced. Petitioner was directed to move for summary judgment because no essential facts were in dispute. A schedule of brief submissions was established. The record closed on June 2, 1982, with receipt of respondent's brief in opposition to motion for summary judgment.

For the reasons set forth below, I conclude that petitioner's motion for summary judgment must be granted and the Board's action terminating his employment reversed.

I.

Petitioner was hired as a custodial employee by the Board, effective October 5, 1977. During his employment, he was part of a group covered by a labor agreement between the majority representative and the Board. Although the majority representative changed, contract language pertinent to this case did not. The pertinent article states that all members of the bargaining unit shall receive tenure after three years of employment.

Petitioner's employment was under contract for fixed periods not in excess of 12 months. The Board gave notice on or about May 20, 1981, that his employment would not be continued in the 1981-82 school year.

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II.

Petitioner contends that he acquired tenure rights and they were violated. N.J.S.A. 18A:17-3 sets forth the requirements for acquisition of tenure by a janitor or custodian. It states,

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title. [Section 18A:6-8 et seq.]

Thus a janitor employed without fixed term can gain tenure immediately upon beginning employment.

The labor agreements in effect between the Board and the majority representative at all pertinent times contain an article, presently XIII, which states, "All members of the bargaining unit shall receive tenure after three (3) years of employment."

Petitioner argues the Board would now disavow that which it legally negotiated. State of New Jersey v. State Supervisory Employees Association, 78 N.J. 54 (1978), clearly holds that a public employer and a majority representative are free to negotiate terms and conditions of public employment which have not been set by specific statute or regulation. In refining that holding, the Supreme Court found that where there is a scope within a statute that allows of negotiation, the parties are free to negotiate within that scope.

According to petitioner, an analysis of N.J.S.A. 18A:17-3 shows that the maximum benefit to be gained by janitorial employees would be tenure and the minimum benefit would be denial of tenure based upon appointment for a fixed term. This is the scope within which the parties have a right to negotiate. The labor agreements do not go beyond the limit of statute. The majority representative has obtained something better than the minimum allowed by statute for the bargaining unit.

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The Board has a right to give fixed appointments up to the completion of three years of employment. In that way, an employee who has not measured up to standards may be removed by the Board. This can be done either by a denial of the fourth contract or by termination in accordance with the termination clause of the individual employment contract.

On or about May 20, 1980, the Board entered into a contract with petitioner (annexed to P-3). Prior to that time, the Board had furnished petitioner with notices of employment. By issuing a fourth contract for fixed term, the Board subverted the entitlement gained for petitioner through collective bargaining.

Petitioner further contends the Board's action violated N.J.S.A. 34:13A-5.2 which states, in pertinent part,

> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the Commission, as authorized by this act, shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit.

Job security and the derivative rights of tenure affect terms and conditions of employment. Issuance of individual contracts violates the cited statute, and the individual contracts accordingly are void. Notices of fixed-term appointment, likewise, violate the contract provision.

The Board negotiated a labor agreement conferring certain benefits on employees. The Board acted within its statutory authority when it did so. In the present case, the Board had three years in which to observe and evaluate petitioner. It continued his employment beyond the end of the third year. Now the Board says it has retained the right to fire petitioner at will and that the labor agreement has no meaning.

Petitioner being a tenured employee, the Board has violated N.J.S.A. 18A:17-3, which directs the procedure for removal of a school janitor under tenure, and N.J.S.A. 18A:6-9 et seq., which encompass the Tenure Employees Hearing Law (N.J.S.A. 18A:6-10 through 6-18). The Board's action, even with the statement of reasons, does not comport with the statutory requirements. The termination of a tenured employee is

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beyond the powers of a board of education, no matter how good it believes its reasons to be, except by procedures complying with the Tenure Employees Hearing Law.

The Commissioner of Education has held that where procedural defects occur in the preferment of tenure charges, a board may not proceed on them but may refile them, if appropriate Newark Bd. of Ed. v. Feitel, 1977 S.L.D. 451.

Petitioner being a tenured employee, he must be reinstated with all emoluments due him together with interest.

III.

The Board also cites N.J.S.A. 18A:17-3 and observes that petitioner was appointed for fixed terms and agreed to such appointments. The 1980-81 employment contract (annexed to P-3) clearly identifies a contract period for which petitioner was employed; i.e., July 1980-June 30, 1981.

The Board notified petitioner on May 20, 1981, that it elected to terminate his employment as of July 17, 1981. The notification was clearly in compliance with the terms of the contract. He was given the 60 days' notice required.

It is conceded that the Board would not have been able to terminate petitioner's employment if petitioner had been employed other than under a fixed term contract. However, the contract between petitioner and the Board clearly shows that petitioner was appointed for a specific term and he accepted employment on that basis. Therefore, no rights survived the expiration of the fixed term.

Case law is clear that tenure for janitors, unlike tenure for professional employees, is a matter of personal privilege which may be waived by acceptance of employment for a fixed term as was done here. See, e.g., Gilliam v. Toms River Reg'l School Dist. Bd. of Ed., 1974 S.L.D. 540. Petitioner's claim to tenure flies in the face of the statute and a long series of decisions on the point.

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The Board also contends petitioner's reliance on the labor agreement is without merit and legal support. N.J.S.A. 34:13A-8.1, part of the New Jersey Employer-Employee Relations Act, specifically provides, "Nothing in this act shall be construed to annul, or to preclude the continuation of any agreement during its current term heretofore entered into between any public employer and any employee organization, nor shall any provisions hereof annul or modify any pension statute or statutes of this State." In the Board's view, this supports its position that the decision to appoint custodians for fixed terms is a managerial prerogative and cannot be bargained away.

In State v. State Supervisory Employees' Ass'n, 78 N.J. 58 (1978), the court held that the adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will preempt any inconsistent provision of same (Board's brief at 4-5). See also, Hackensack Bd. of Ed. v. Hackensack Ed. Ass'n., (N.J. App. Div., March 9, 1982, A-4996-80T1) (unreported).

While petitioner argues that the Board should be estopped from relying on N.J.S.A. 18A:17-3 because of the negotiated agreement, this contention is without merit. The subject clause in the agreement and the length of time it has been a part of the agreement are of no consequence. Neither the Board nor the majority representative was empowered to negotiate a provision in a labor agreement which modified N.J.S.A. 18A:17-3. This procedure would create a tenure status arising from circumstances neither contemplated nor intended by the Legislature.

Article XIII of the labor contract attempted to replace the discretionary authority given the Board by the Legislature. The Board's action was ultra vires. Article XIII, therefore, is unenforceable.

Even assuming the absence of the article, the parties could not have agreed validly to provide janitors with tenure status after three years in the bargaining unit if the janitors were appointed for fixed terms. Such an agreement would intrude impermissibly on matters of managerial prerogative and would contravene the specific standards established by N.J.S.A. 18A:17-3 and hence be unenforceable. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979).

Petitioner having held his position under appointment for a fixed term, the Board was within its authority to terminate his employment at any time upon proper notice.

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IV.

This matter turns on whether the Board properly bargained Article XIII of the labor agreement.

I do not read Bernards Tp. as does the Board. That case does stand for the proposition that negotiable terms and conditions of employment are matters which directly affect the work and welfare of public employees, but do not infringe upon essential managerial prerogatives delegated by the Legislature to the public employer. Bernards Tp., above, at 320-1. Neither Bernards Tp. nor the cases it draws from can be read to support the Board's argument that Article XIII is void because ultra vires.

N.J.S.A. 18A:17-3, set forth above, gives boards of education the authority to grant tenure to janitors at any time or at no time. Tenure for janitors is a term and condition of employment. Unlike tenure for professional employees of school boards, the precise terms of acquisition of janitorial tenure have not been spelled out by the Legislature. See, N.J.S.A. 18A:28-5.

I must presume that when the parties entered into the labor agreement, both were cognizant of N.J.S.A. 18A:17-3. By setting a specific period of good service as requisite to acquisition of tenure, the parties reserved to the Board a period of observation and evaluation--a period of probation--of the employee. The Board may, as petitioner points out, not renew the employment of the probationary employee or may terminate that employment upon proper notice at any time up to the end of the third full year of employment.

If neither happens, the employee acquires a tenure status and may be reduced in compensation or terminated only under the terms of the Tenure Employees Hearing Law, above. This scheme was the intention of the parties when they negotiated Article XIII.

The scheme does not take away an "essential managerial prerogative." Bernards Tp., above, at 321. The Board's agreement to it, therefore, cannot be ultra vires and, hence, void.

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In Jean Williamson v. Phillipsburg Bd. of Ed., 1981 S.L.D. ____, (decided July 9, 1981, OAL Dkt. No. EDU 1828-80) (unreported), the administrative law judge concluded, and the Commissioner of Education affirmed, that Williamson, who was not reemployed for a fourth year, was not entitled to relief for two reasons. First, a labor agreement, including an article nearly identical to that under consideration here and providing tenure for custodial employees after three years' satisfactory service, had been deleted from the labor contract before Williamson completed her third year of service. Also, relief was not found in the Board's practice of recognizing tenure for custodians after three years of satisfactory service by employing them thereafter without fixed terms of service. Second, Williamson had been employed for exactly three years at the expiration of her contract on June 30, 1979. Administrative staff had found her work during the last year to be less than satisfactory. She was not given a fourth contract. The third one-year contract expired on its own terms.

Neither circumstance exists in the present case. Article XIII is in force and effect. Petitioner Wright served for more than three years in his position.

Particularly instructive language is found in State v. State Supervisory Employees Ass'n, above, at 80-2:

> We affirm PERC's determination that specific statutes or regulations which expressly set particular terms and conditions of employment, as defined in Dunellen, for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer. All such statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit.
>
> Yet, the 1974 amendment to N.J.S.A. 34:13A-8.1 was not an empty gesture. Under Dunellen, terms and conditions of public employment whose regulation was entrusted to the Civil Service Commission by general statutes were not negotiable even though the Commission had not promulgated any rule governing a particular matter. Under the amended version of N.J.S.A. 34:13A-8.1, such a general statute will not preclude mandatory negotiation over particular terms and conditions of employment as to which the Civil Service Commission could have but has not enacted preemptive regulalations. There are many areas in which the Commission has sought to comprehensively regulate the terms and conditions of public employment. The Legislature has

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> determined that collective negotiation concerning such nonregulated terms and conditions of public employment should be mandatory and any negotiated agreement thereon valid. It must be emphasized, however, that the adoption of any specific statute and regulation setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement governing that previously unregulated matter. In short, the parties must negotiate upon and are free to agree to proposals governing any terms and conditions of public employment which have not been set, and thus preempted, by specific statutes or regulations [emphasis supplied].
>
> It is implicit in the foregoing that statutes or regulations concerning terms and conditions of public employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain the greater protection in a negotiated agreement are mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable. However, where a statute sets a maximum level of rights or benefits for employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purporting to do so would be enforceable. [Here a footnote is indicated.] Where a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum [emphasis added].
>
> . . . .
>
> Our holding permitting negotiation concerning matters not covered by a specific statute does not apply to pension statutes. . . .

The footnote indicated in the text states:

> In referring to those statutes which contain maxima, we are speaking, for example, of enactments providing that employees may receive "up to" or "not to exceed" a given level of benefits. An example is N.J.S.A. 11:13-2, which provides that where service ratings are used to determine layoffs, seniority credits, not to exceed ten points, may be added to the ratings.
>
> Our reference to statutes containing minimum employee rights or benefits relates, for example, to those enactments which provide that employees receive "at least" or "not less than" a certain level of benefits. An example is N.J.S.A. 11:26D-1, post at 88, which

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> provides a notice of "at least 45 days" be given to an employee in the classified Civil before he may be subject to layoff.
>
> Mandatory or imperative statutes ordinarily are those enactments which set up a particular scheme which "shall" be handled as directed. An example of such a statute is N.J.S.A. 18A:28-5(b), which provides that teachers "shall be under tenure during good behavior and efficiency and they shall not be dismissed * * * after employment in such district or by such board for * * * three consecutive academic years, together with employment at the beginning of the next succeeding academic year," except for specifically enumerated reasons.

N.J.S.A. 18A:17-3 does not speak in the imperative. In marked contrast to N.J.S.A. 18A:28-5(b), the use of the word shall is modified by the word unless:

> Every public school janitor . . . shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency . . . .

Thus the employing board of education has the certain measure of discretion required by State Supervisory Employees.

There is a range of rights, in this case from no tenure to instant tenure. The public employer is not barred from choosing to afford employees a greater protection than the minimum. The negotiated article does not provide a right in excess of the maximum level of rights employees could receive under the statute. "Where a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum." These considerations, too, comport with State Supervisory Employees, above.

V.

In consideration of the foregoing discussion and analysis, I **FIND:**

1. Petitioner was appointed effective October 5, 1977, by the Board.

2. Petitioner's employment was terminated by the Board as of July 17, 1981.

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3. Petitioner was appointed under successive notices of employment or contracts for fixed periods not in excess of 12 months each.

4. A labor agreement was entered into between the Board and the East Orange Personnel Association for the period commencing July 1, 1980, and ending June 30, 1982. The agreement was executed on January 21, 1981.

5. The agreement covered all head and assistant custodians employed by the Board.

6. Acticle XIII of the agreement states Tenure:

> All members of the bargaining unit shall receive tenure after three years of employment.

7. Immediately prior agreements contained the same language.

8. On July 17, 1981, petitioner had been in the Board's employ in excess of three years and nine months.

9. Article XIII was properly bargained, not contrary to public policy and comported with the requirements for negotiability of a matter involving managerial discretion laid down in State v. State Supervisory Employees Ass'n, 78 N.J. 58 (1978).

I **CONCLUDE** that the termination of employment of Claude Wright, Jr., was in violation of tenure rights he acquired on October 6, 1980, under a valid provision of the labor contract in effect between the East Orange Board of Education and the East Orange Personnel Association.

Petitioners' motion for summary judgment is **GRANTED.**

Accordingly, it is **ORDERED** that Claude Wright, Jr., be reinstated as a custodian in the employ of the East Orange Board of Education retroactive to July 17, 1981, with all rights intact and all emoluments and benefits accruing from that date,

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mitigated by earnings from other employment in the period July 17, 1981, to the date of reinstatement. Interest on any back pay due petitioner is denied. The Commissioner of Education and this court lack an express grant of authority to award interest.

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

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

13 JULY 1982
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

14 July 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

July 16, 1982
DATE

Ronald L. Tarkenpen
OFFICE OF ADMINISTRATIVE LAW

fms

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DOCUMENTS IN EVIDENCE

P-1 Custodial labor agreement between East Orange Bd. of Ed. and Local 284, Hospital Services, Laundry, Cleaners and Miscellaneous Workers Union, AFL-CIO, 7-1-75 through 6-30-77, 10 pp.

P-2 Custodial labor agreement between East Orange Bd. of Ed. and Local 284, Hospital Services, Laundry, Cleaners and Miscellaneous Workers Union, AFL-CIO, 7-1-77 through 6-30-80, 12 pp.

P-3 Answers to interrogatories propounded and served by petitioner numbers 2, 4 and 5 with annexed copy of labor contract for 7-1-80 through 6-30-82 and number 8 with annexed copy of termination notice 5-20-81, annexed copy of 1980-81 salary notice 1-4-81, annexed copy of petitioner's employment contract for 1980-81, 5-20-80 and annexed copy of petitioner's employment notice 1977-78, 10-6-77.

C-1 Joint stipulation of facts submitted 5-3-82.

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CLAUDE WRIGHT, JR. AND EAST ORANGE PERSONNEL ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Board relies on a recent decision, Walter C. Peck v. Board of Education of the Mainland Regional High School District, Atlantic County, decided April 12, 1982, wherein the Commissioner held that Peck did not acquire a tenure status as a school custodian notwithstanding that board's negotiated agreement which stated in pertinent part:

> "Tenure as a custodian may be achieved after employment in the Mainland Regional High School District for a period of three consecutive calendar years together with employment at the beginning (July 1) of the next succeeding calendar year. (attachment to Petition of Appeal)."
>
> (Slip Opinion, at p. 5)

The Commissioner finds that the factual circumstances herein are similar to those enunciated in Peck, supra, notwithstanding the Board's negotiated agreement with the Association. Accordingly, Petitioner Wright may not be accorded tenure status by virtue of the terms of the fixed contracts issued to him by the Board which expired annually on their own terms, pursuant to the provisions of N.J.S.A. 18A:17-3.

For the reasons set forth above, the Commissioner reverses the initial decision of Judge Campbell and the instant Petition is hereby dismissed.

August 30, 1982
PENDING STATE BOARD

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5655-81
AGENCY DKT. NO. 297-7/81A

CAROLE GOLDSTEIN,
Petitioner
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF WYCKOFF,
Respondent

APPEARANCES:

Robert M. Schwartz, Esq., for petitioner

Mark G. Sullivan, Esq., for respondent
(Sullivan & Sullivan, attorneys)

Record Closed June 21, 1982 Decided July 21, 1982

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, a non-tenured teacher, contends that respondent, in not renewing her contract for the 1981 - 1982 school year, failed to provide her with a statement of reasons pursuant to N.J.S.A. 18A:27-3.2, denied her certain due process rights, and acted arbitrarily, capriciously and unreasonably. Respondent denies any wrongdoing and asserts that it provided her with a valid statement of reasons for her non-renewal. Additionally, respondent urges that petitioner's damages are limited to payment for sixty-days salary as prescribed by the termination clause of her contract.

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On July 29, 1981, a Petition of Appeal was filed with the Commissioner of Education. On August 27, 1981, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on November 9, 1981, the following issues were identified:

1. Did respondent violate N.J.S.A. 18A:27-3.2 by failing to provide petitioner with a statement of reasons explaining her dismissal?

2. Was petitioner denied any "due process" rights pursuant to N.J.S.A. 18A:27-3.2 and N.J.A.C. 6:3-1.19 as a result of respondent's failure to explain why she was dismissed?

3. Was petitioner's dismissal by respondent arbitrary, carpricious and/or unreasonable?

4. What relief, if any, is petitioner entitled to?

5. Would petitioner's damages be limited to 60 days pay because of the existence of a contractual 60-day termination clause?

A hearing was held at the Office of Administrative Law, Newark, New Jersey, on June 1, 1982. The witnesses who testified and the exhibits marked into evidence are set forth in the attached appendix. The record was closed on June 21, 1982, when certain post-hearing documents were submitted.

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DISCUSSION OF FACTS

Carole Goldstein worked for the Wyckoff Board of Education from April 1979 to approximately the end of 1981, or for a period of two years and three months, as a teacher of art at Washington Elementary School. Between April 1979 and April 1981, petitioner received ten observations of her performance, seven of which were by her principal, Dr. Roger E. Clarke and three of which were by the superintendent of schools, Jon A. Lokensgard (see P-1 through P-10 and R-1). Additionally, two teacher evaluation program summary forms were completed on petitioner (P-11).

All of petitioner's observations were favorable, except for the following comments which appear in two of them:

1. The January 8, 1981 observation contains the following recommendations for improvement: "The group of boys (near the door) may need more direct guidance during the art period. They tend to lose some time during their work." (P-8)

2. The April 2, 1981 observation contains the following areas of concern and recommendations for improvement: "Several students did not have their project to work on. Some wasted much of their time. Some left the room without permission and apparently without your knowledge. Probably should circulate early in the period to check on what each one is doing--and a few more times to check their progress." (R-1)

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On April 29, 1981, the Board of Education met and voted not to renew petitioner's contract for the 1981-1982 school year. This information was conveyed to petitioner in a letter from the Superintendent of Schools, Jon A. Lokensgard, dated April 30, 1981 (P-13). As a result of receiving the letter, petitioner wrote a letter to the superintendent dated May 8, 1981 requesting a closed meeting before the Board of Education in order to learn what the reasons were for the non-renewal of her contract. (P-14) A closed meeting of the Board of Education was held on May 18, 1981, at which time petitioner presented information to the board about her work experience. The board presented petitioner with no reasons at this time why her contract was not renewed. On June 18, 1981, petitioner was advised by Dr. Lokensgard that the board reaffirmed its original vote not to renew her contract. On July 29, 1981, petitioner was sent the following letter by Robert M. Diello, Acting Board Secretary:

> Dear Carole:
>
> With regard to your request of July 2, the Board's decision not to renew your contract was based on two factors:
>
> 1. The Board believes it can obtain a better teacher in the current market.
>
> 2. If the Board were to offer you a new contract, it would have to reach a tenure decision in the middle of the 1981-1982 school year; and if it were to determine not to grant tenure, then there would be an interruption of the program.
>
> Based on the two above mentioned reasons, it was determined not to renew your contract. (P-17)

Lois Hochberg, President of Wyckoff Board of Education, testified that she was a board member in April, 1981, when the board voted not to renew petitioner's contract. Prior to the April 29, 1981, Board of Education meeting, all board members received a memorandum from Dr. Lokensgard which stated:

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> I am leaning both ways on the issue of tenure for Carole Goldstein, Art/Washington. She has operated under difficult circumstances with no art room. Next Fall, she will have one at Washington. We could grant her a contract and evaluate her after the first semester. If things are not going well, she could be terminated at that time. (She would not receive tenure until April 3, 1982.) If the board doesn't like that option, I would recommend termination now. (R-2)

Although Ms. Hochberg and other board members were familiar with and aware of Carole Goldstein's favorable observations, they were also aware of some of the concerns expressed about her control in the classroom. All board members were aware that Dr. Clarke had recommended reemployment. Ms. Hochberg testified that she voted not to renew petitioner's contract because of her concern about controlling the classroom and about the possible problem with a mid-year change in teaching assignment if the board renewed petitioner's contract in April and then decided not to grant her tenure during the middle of the following school year. She testified that she and other board members voted not to renew petitioner's contract for those reasons, and no others, stated in the letter dated July 29, 1981 (P-7). The board vote not to renew petitioner's contract was 7-0.

At the time petitioner was notified that her contract was not going to be renewed for the 1981-1982 school year (sometime around April 29, 1981), an employment contract was in effect between petitioner and the Board of Education. The employment contract contains the following language:

> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party given to the other sixty (60) days' notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term named above. (R-5)

The just-referred to discussion of uncontroverted facts is hereby adopted as this courts Findings of Fact.

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DISCUSSION OF LAW

Petitioner contends that those reasons given for the non-renewal of her contract which were set forth in the July 29, 1981 letter (P-17) are, as a matter of law, insufficient to justify the non-renewal of her contract. As such, those reasons and the board's action based on them would constitute arbitrary, capricious and unreasonable action. Respondent, on the other hand, insists that those reasons are sufficient to justify the non-renewal of petitioner's employment contract. It is undisputed that petitioner's observations were mostly favorable, except for the observation of January 8, 1981, (P-8) and the observation of April 2, 1981 (R-1). Petitioner questions how the board in light of those favorable observations and in light of the recommendation of Dr. Clarke for reemployment can disregard such material and vote not to renew her contract. Putting it another way, what kinds of reasons can a board rely upon as its basis not to renew a teacher's employment contract?

Certainly, a board of education has the responsibility and obligation to hire the best teachers available in the current market in order to assure that the youngsters in the district receive a thorough and efficient education. The hiring and renewal or non-renewal of teachers' contracts is one of a board's most important functions. Many factors should be taken into account, including the recommendations of the professional evaluators. Yet, board members are not to merely "rubber stamp" the recommendations of its evaluators. See Ronnie Abramson v. Board of Education of the Township of Colts Neck, Monmouth County, 1975 S.L.D. 418, aff'd State Board 1976 S.L.D. 424, aff'd Superior Court ofNew Jersey, Appellate Division, 1976 S.L.D. 1103, Patricia Cosgrove v. Board of Education of Haworth, Bergen County 1981 S.L.D. _____ (January 16, 1981), aff'd by Commissioner of Education, March 3, 1981. They have the obligation to consider such factors as whether or not a better teacher could be obtained in the current market and whether or not the termination of a teacher's employment in the middle of the school year would adversely affect the students' education. A board has the obligation to seek out and hire the best teachers available under all of the existing circumstances.

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The law requires that a board provide a teacher with a statement of those reasons why she was not rehired. N.J.S.A. 18A:27-3.2 states:

> Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.

On July 2, 1981, petitioner requested, in writing, that the board supply her with a copy of the reasons for her non-reemployment (P-16). On July 29, 1981, the board, in response to petitioner's request of July 2, 1981, submitted a statement of reasons.[1] The court **CONCLUDES** that this statement of reasons was in compliance with the statute and existing law. See Donaldson v. Bd. of Ed. of No. Wildwood, 65 N.J. 236 (1974)

The court understands Ms. Goldstein's obvious frustration and disappointment in not being rehired by respondent, especially in light of her favorable observations. The board was not criticizing petitioner for her classroom performance. There is no requirement that one whose classroom or professional performance is satisfactory must have his or her contract renewed. See Janet Conover and Barbara S. Priggemeier v. Board of Education of the Township of West Deptford, Gloucester County, 1978 S.L.D. 55. The court was most favorably impressed with petitioner's devotion to teaching and her skills as a teacher of art. The court has little evidence before it which would indicate that petitioner's performance, while employed by respondent, was nothing less than of the highest professional caliber. Unfortunately for petitioner, she was not reemployed because of the fortuitous circumstance that her tenure would accrue in April of the following school year. The board determined to eliminate any risk that it might decide in the following school year not to grant her tenure by not renewing her contract in the spring of 1981.

---

[1]The court **CONCLUDES** that both petitioner and respondent complied with the time requirements of N.J.S.A. 18A:27-3.2.

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This action eliminated the possible termination of petitioner prior to April, 1982 and the resulting interruption of instruction for the youngsters in the district. In light of the totality of the existing circumstances, this court **CONCLUDES** that the board's action and the reasons enunciated therefor were valid and sufficient as a matter of law.

Since petitioner was notified that her contract would not be renewed for the 1981-1982 school year on April 30, 1981 (P-13), this notice is sufficient to satisfy the sixty-days' notice provision under the employment contract (R-5). Thus, no damages would flow from that contractual provision. The court **CONCLUDES** that petitioner failed to demonstrate by a preponderance of the credible evidence that respondent breached the termination-clause provision of the contract.

All other issues set forth in the Prehearing Order are deemed to be without merit.

Accordingly, it is **ORDERED** that the petition be **DISMISSED WITH PREJUDICE.**

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

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

7-21-82
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

July 22, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 26, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

md

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APPENDIX

WITNESSES:

Carole Goldstein
Dr. Roger E. Clarke
Lois Hochberg

EXHIBITS:

P-1	Observation, April 11, 1979
P-2	Observation, May 30, 1979
P-3	Observation, October 5, 1979
P-4	Observation, February 6, 1980
P-5	Observation, October 17, 1979
P-6	Observation, February 25, 1980
P-7	Observation, October 1, 1980
P-8	Observation, January 8, 1981
P-9	Observation, February 11, 1981
P-10	Observation, February 11, 1981
P-11	Teacher Evaluation Summary of Carole Goldstein, 1979-1980
P-12	Teacher Evaluation Summary of Carole Goldstein, 1980-1981
P-13	Letter, dated April 30, 1981, from Dr. Lokensgard to Carole Goldstein
P-14	Letter, dated May 8, 1981, from Carole Goldstein to Dr. Lokensgard
P-15	Letter, dated May 12, 1981, from Dr. Lokensgard to Carole Goldstein
P-16	Letter, dated July 2, 1981, from Carole Goldstein to Board of Education members
P-17	Letter, dated July 29, 1981, from Ronald M. Diello to Carole Goldstein

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R-1	Observation, dated April 2, 1981
R-2	Memorandum from Jon A. Lokensgard to Board Members
R-3	Employment Contract, dated February 12, 1979
R-4	Employment Contract, dated June 19, 1979
R-5	Employment Contract, dated April 15, 1980

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CAROLE GOLDSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the conclusion by the Honorable Robert P. Glickman, ALJ that the Board's action not to renew her employment for the 1981-82 school year was not arbitrary and capricious. Petitioner contends that the reasons given her for her nonreemployment were impermissibly vague particularly referring to the first reason, ante, which states:

> "1. The Board believes it can obtain a better teacher in the current market."

The Commissioner finds no merit in petitioner's exceptions. The Commissioner has previously considered matters involving similar circumstances -- the nonreemployment of a nontenure teacher wherein a board claims it can get a better or more qualified teacher. Wanda Goldsworthy, 1977 S.L.D. 743:

> "***The Board argues in support of its Motion to Dismiss that petitioner's stated claim must be found to be more properly against the Bridgewater Board. The Board also asserts that it alone has the discretion to select from among its nontenure teaching staff members those whose employment shall be continued. In the instant matter, the Board argues that while petitioner may be a good teacher there were other nontenure teachers in its employ who were better qualified. Consequently, when the tenure teacher returned from maternity leave and a vacancy had to be created, petitioner was selected as the one whose employment would not be continued.

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> "The Commissioner has considered the total record herein and finds that while the stated reason of the Board for petitioner's non-reemployment is not as precise as perhaps it could have been, the reason does meet the requirements of Donaldson, supra, and N.J.S.A. 18A:27-3.2. The fact that petitioner's references do not measure up to the expected standards of the Bridgewater Board does not, in the Commissioner's judgment, give rise to a claim against the Board herein.***"
>
> (Emphasis supplied.) (at 745, 746)

Subsequently in Cathie Bedosky and Judith Ann McCormack v. Board of Education of the Borough of Sayreville, Middlesex County, decided September 11, 1981 in a hearing examiner's report adopted by the Commissioner, reference is made to Goldsworthy, supra, as follows: "***that '***the Board has the right to replace [teachers] where they [members] feel necessary or where they feel they can get a better teacher or a more qualified teacher***.' (Tr. 9)***" (Slip Opinion, at pp. 2, 3)

Based on the foregoing, the Commissioner affirms the findings and determinations as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

September 2, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7196-81
AGENCY REF. NO. 373-9/81A

MARGARET B. DI NARDO,
Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,
Respondent

APPEARANCES:

Barry A. Aisenstock, Esq., for petitioner
(Rothbard, Harris & Oxfeld, attorneys)

Thomas S. Cosma, Esq., for respondent
(Connell, Foley & Geiser, attorneys)

Record Closed July 6, 1982 Decided July 22, 1982

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

Margaret B. DiNardo, claiming to be a tenured Assistant Superintendent of schools, alleged her tenure and seniority rights were violated when the Board abolished Assistant Superintendent positions; the Board's abolition action was arbitrary, capricious and politically motivated; and her salary reduction was illegal. The Board denies the allegations and asserts it acted within its lawful authority at all times mentioned in the petition.

The matter was transmitted to the Office of Administrative Law by the Commissioner of Education as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on February 9, 1982, at which the matter was scheduled

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for plenary hearing on May 11, 12, 13 and 14, 1982. The Prehearing Order, entered on the date of the conference, incorporated specific discovery directives with a compliance schedule. Considerable delays in discovery compliance ensued and a substitution of attorney for the Board occurred. Petitioner filed a Motion for Summary Decision in her favor seeking reinstatement. The Board filed a Motion for Summary Decision in its favor as a matter of law pursuant to N.J.S.A. 18A:28-9.

The matter was briefed and the record closed on July 6, 1982 upon the filing of petitioner's reply.

The employment history of DiNardo in Jersey City is as follows:

DATES	ASSIGNMENT
September 1, 1963	Elementary Teacher
September 1, 1967	Reading Specialist
September 1, 1977	Basic Skills Coordinator
December 19, 1977	Acting Assistant Superintendent/Personnel
March 1, 1978	Assistant Superintendent/Personnel
July 2, 1979	Assistant Superintendent/Elementary
September 8, 1981	Reading Specialist

The Board abolished its seven Assistant Superintendent positions at a meeting on July 21, 1981, declaring economy and efficiency as its rationale.

The Board asserted in its second affirmative defense that DiNardo "is now and has been at all times at issue herein, without the proper credentials necessary as a legal prerequisite for the position aforesaid (Assistant Superintendent)." Her tenure status will first be addressed.

DiNardo was issued a certificate by the State Board of Examiners as Principal/Supervisor in December 1977. The court takes notice in reference to New Jersey Regulations and Standards for Certification, 22nd edition (1976), and finds

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it unnecessary to address the Board's derogation of employing DiNardo in a position for which it now claims she did not possess appropriate certification. In Regulations and Standards, endorsement as Principal states: "Holders . . . may also serve as Assistant Superintendent of schools and as Assistant Superintendent in charge of curriculum and/or instruction", at 24. Also, endorsement as Supervisor states it "authorizes appointment as an "Assistant Superintendent in charge of curriculum and/or instruction" at 29.

N.J.S.A. 18A:28-6:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

A review of DiNardo's assignments during her employment in Jersey City and the certificates held by her requires a finding she is a tenured Assistant Superintendent. I **FIND** it unnecessary to determine the applicability of her service as an acting Assistant Superintendent for this purpose.

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The authority of a Board to abolish positions and reduce its staff is undisputed. The petitioner contends, however, that such action may not be arbitrary or capricious, and further that the duties she performed may not be reassigned to one less senior under another title.

A transcript of 243 pages of the proceedings at the Board's July 21, 1981 caucus and public meetings were submitted by the Board on discovery demand, and is incorporated herein by reference. The first 60 pages of transcript were of the caucus meeting. At no time was there a discussion of the abolition of the Assistant Superintendent positions. The last utterance at caucus, however, was by President Sheeran: "I think we ought to move on, but before we dismiss from the caucus, I would like each member of the Board to have a copy of this" (the Board concludes its Caucus Meeting) at 60.

The first general reference to the Board's action in dispute here is at page 111 of the transcript when Board member Scott said: "[I]t is my official request that those resolutions which we were handed this evening when we arrived on stage be pulled for a subsequent meeting." Board member Smith then moved "... those resolutions that were handed to the Board members this evening be considered as a matter of business at this Board session" at 112.

Board member Venutolo then said at 113 and 114:

> These are pocket resolutions. I hope everybody is familiar with a pocket resolution. That means just before we walk in somebody pulled it out of his pocket and handed it to us. The pocket resolution is the abolishment of several Assistant Superintendent positions and several other positions. I will not vote on a pocket resolution. I have to see it, look at it, and think about it and no one is going to hand me a pocket resolution to vote on. I don't care who it is.
>
> Now, we are abolishing positions for economy, yet the Mayor makes a Deputy Mayor which is a position which was never there and this to me is a blood bath, it is a blood bath. This Board of Education is acting improperly, turning around and firing people or

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> lowering people into different categories. In turn they are saying they are saving money, when a person who has tenure does not lose that money, he just goes back to a different position with the same amount of money. They are not saving any money. Do not get the impression this is an economy move. They are not saving any money.
>
> The second thing I want to do. I want to ask Dr. Ross if he had any input into these recommendations.

Dr. Ross, Superintendent of Schools, said at 114: "No, I did not participate in these recommendations."

Board member Venutolo also said at 114: "These things were handed to us, not in the caucus, but as we were walking out of the caucus room. I think that is improper . . . ."

The Scott move to table for consideration was not voted on, even though he said at 119: "The point in time is needed in order to study the implications." The Smith motion to consider the resolutions passed 5-2, at 120.

Board Secretary Silvestri then read 11 resolutions abolishing many positions "submitted and approved by me." See pages 121-124.

Scott and Venutolo then questioned the propriety of the Board secretary to propose these resolutions and bypass the Superintendent. President Sheeran's response was that "Silvestri is completely within his rights and authority to do so . . . ", at 124.

Silvestri responded to a query on the process of developing the resolutions at 128:

> At 2:30 this afternoon the president of the Board discussed with me possible efficiencies. Amongst those were those resolutions that you saw and you heard me enunciate a few moments ago. It was with the Board President and myself that we did write these resolutions.

Citizen Witt interrupted the proceedings with considerable dialogue on the implications of the Board's impending action, at 129-133.

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Citizen Vasquez said at 140-141:

> Maybe I am not understanding where Mr. Smith is coming from, but I think resolutions drawn up at 2:30 in the afternoon to be approved at seven or eight o'clock in the evening do not give ample time for a clear analysis for the impact of those cuts.

Citizen Howard queried at 155: "If in the future there are replacements, will the Superintendent have any involvement in their selection?"

President Sheeran responded: "I cannot answer that question because that is so far in the future. Right now, absolutely not."

Smith's motion to adopt the pocket resolutions in its entirety was passed 5-2, at 214-215.

I find it unnecessary to elaborate further in light of the aforesaid in finding the Board's action on July 21, 1981 to be arbitrary, capricious, and an abuse of its discretionary authority. Such action should be set aside.

The court takes notice of New Jersey Education School Directory, 1981-82, wherein the Jersey City district is listed as having 6-day high schools, 35-elementary schools, and 5-evening high schools.

An affidavit, to which the First Assistant Superintendent was signatory, was by the Board in its defense of its action and is incorporated herein by reference. It states that the Board's action was taken "in light of prior criticisms, coupled with the need for economy," and further states the Board determined "that there was an excessive number of such assistants and such assistants when it determined that the school system could be well administered by the Superintendent, the Deputy Assistant Superintendent and myself as First Assistant Superintendent in Charge of Personnel."

The Board submitted several discovery documents with answers to interrogatories, which were filed with the court by the petitioner with her brief. One such document was the employment record of James Walling, a tenured teaching staff member, but non-

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tenured as an Assistant Superintendent. It is incorporated herein by reference. It reveals that Walling was a principal assigned to personnel at the Superintendent's office from July 1, 1978 through December 31, 1981, and his immediate supervisor was the petitioner here as of July 1, 1978 and the first Assistant Superintendent as of July 1, 1979. His employment from January 1, 1982 to present is listed as Principal Assigned to Superintendent at the latter's office and his immediate supervisor is the Superintendent.

A job description for the position held by petitioner at the time of the Board's action (Assistant Superintendent for Elementary Education) was also filed. It was adopted on December 19, 1979 and amended on October 15, 1980, and is incorporated herein by reference.

Job descriptions for Teacher Assigned to the Office of Superintendent/Curriculum & Planning as well as Principal Assigned to Office of the Assistant Superintendent were also filed and are incorporated by reference herein. They were adopted on December 19, 1979.

A review of all job descriptions listed above, coupled with the established fact there were but four central office administrators in existence after the Board's action (Superintendent, Deputy Assistant, First Assistant Superintendent and Principal assigned to the Superintendent) leads to the inevitable finding that Walling has been performing duties previously performed by petitioner in the administration of the relatively huge school district of Jersey City.

It is not for this court to address the wisdom of the Board's action and its impact on the thorough and efficient education to be provided the thousands of pupils in Jersey City, as the Board is responsible to its constitutents in that regard. It is, however, responsible to the Commissioner for the legality of its actions.

In Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966) the Courts have stated that:

> We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority,

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> its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable, at 332. (emphasis supplied).

See also Quinlan v. Bd. of Ed. of North Bergen, 73 N.J. Super. 40 (App. Div. 1962).

Having found the Board's action in abolishing petitioner's position to be an abuse of its discretionary authority as it was arbitrary and capricious, and having found the Board violated petitioner's tenure and seniority rights by assigning some of her duties to Walling, a Principal Assigned to the Superintendent, I **CONCLUDE** petitioner's Motion for Summary Decision **IS GRANTED**, and the Board's Cross-Motion for Summary Decision **IS DENIED.**

The Board is hereby **ORDERED** to reinstate petitioner to her position as Assistant Superintendent and compensate her for any difference in salary received and the amount she should have received as Assistant Superintendent since her reassignment.

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

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

23 July 1982
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

26 July 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

July 28, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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MARGARET B. DI NARDO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Board's primary exceptions to the initial decision by the Honorable Ward R. Young, ALJ argue that Judge Young erroneously recommended summary judgment in favor of petitioner when genuine issues of material fact exist requiring a full and complete hearing for disposition. The Board stipulated to the fact that, at the time of her job abolishment, petitioner was a tenured Assistant Superintendent but contended that Judge Young improperly relied on unsworn transcripts of a Board meeting in reaching his decision.

Petitioner's reply exceptions refute those submitted by the Board and affirm the initial decision. Petitioner argues that the Board has not raised a factual issue as to the points developed by petitioner and further argues that, once petitioner has won any one point, the need to prove one hundred others is irrelevant. Petitioner states that the Board minutes used in the initial decision were furnished Judge Young by the Board because Judge Young asked for them and accordingly should be proper and accurate documents. The Commissioner finds merit in petitioner's arguments.

The Commissioner observes that the record herein is clear; the recommendations and resolutions for the abolishment of the positions of assistant superintendents were "submitted and approved" by the Board Secretary, bypassing in entirety the Superintendent of Schools. The duties and responsibilities of the Board Secretary are enumerated in N.J.S.A. 18A:17-7, 17-8 and 17-9 as follows:

N.J.S.A. 18A:17-7

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"The secretary shall give notice of all regular or special meetings of the board to the members thereof and post and give notice of annual and special elections of the legal voters of the district required by law to be held and of the object or objects for which the election is called, record the minutes of all proceedings of the board and the results of any annual or special school election in suitable minute books."

N.J.S.A. 18A:17-8

"The secretary shall be the general accountant of the board and he shall:

a. Collect tuition fees and other moneys due to the board not payable directly to the custodian of school moneys of the district and transmit the same to such custodian;

b. Examine and audit all accounts and demands against the board and present the same to the board for its approval in open meeting, and when payment thereof shall be ordered by the board, he shall indicate the board's approval upon the same in writing with the president of the board and present the same to the district comptroller, or to the custodian of school moneys of the district; and

c. Keep and maintain such accounts of the financial transactions of the district as shall be prescribed by the state board in accordance with the uniform system of bookkeeping presented by the state board including a correct detailed account of all the expenditures of school moneys in the district."

N.J.S.A. 18A:17-9

"The secretary shall:

a. Report to the board, at each regular meeting, but not oftener than once each month, the amount of total appropriations and the cash receipts for each account, and the amount for which warrants have been drawn against each account and the amounts of orders or

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contractual obligations incurred and chargeable against each account since the date of his last report;

b. Keep and maintain in his office all contracts, records and documents belonging to the board, except such as shall be kept by the treasurer of school moneys pursuant to law, under such conditions as the board shall prescribe;

c. Perform any other duties prescribed by law."

The duties of the Superintendent of Schools are set down in N.J.S.A. 18A:17-20 as follows:

"The superintendent of schools shall have general supervision over the schools of the district or districts under rules and regulations prescribed by the state board and shall keep himself informed as to their condition and progress and shall report thereon, from time to time, to, and as directed by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him.

"He shall have a seat on the board or boards of education employing him and the right to speak on all educational matters at meetings of the board or boards but shall have no vote."

Nowhere can the Commissioner find authority for the Board Secretary to determine the need for professional personnel positions and who may or may not fill them. Surely, in making the determination of the existence, or not, of assistant superintendents, their number and duties and who shall fill each position, the superintendent who must work closely with such professional employees must perforce be consulted. To have such recommendations made by the Board Secretary without consulting the Superintendent is so highly unusual as to truly be classed as arbitrary and capricious. The Commissioner so holds.

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

Accordingly, the Board shall reinstate petitioner as Assistant Superintendent with remuneration commensurate with the position as though having served in such without interruption.

IT IS SO DETERMINED.

September 9, 1982

COMMISSIONER OF EDUCATION

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7374-81

AGENCY DKT. NO. 371-9/81A

SURREY TRANSPORTATION INC.,

Petitioner

v.

SOMERSET COUNTY EDUCATIONAL SERVICE COMMISSION, BARKER BUS COMPANY AND MAZZOCCHI BUS COMPANY, INC.,

Respondents.

APPEARANCES:

Pamela Copeland Kaufelt, Esq. for petitioner

Margaret A. Potter, Esq. for respondent Barker Bus Company (Fuerst, Singer & Yusem, attorneys)

Peter E. Henry, Esq. for respondent Mazzocchi Bus Company, Inc. (Crummy, Del Deo, Dolan & Purcell, attorneys)

Richard J. Murray, Esq. for respondent and cross claimant Somerset County Educational Services Commission

Record Closed July 12, 1982 Decided August 11, 1982

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

Petitioner Surrey Transportation Inc. (Surrey) appeals from an action of the Somerset County Educational Service Commission (Commission) which rejected Surrey's bid on a package of six pupil transportation routes and awarded contracts for those routes

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to another bidder, Barker Bus Company (Barker). Specifically, Surrey contends that Barker's bid lacked a required certificate of consent of surety and was otherwise defective, that respondents Barker and Mazzocchi Bus Company, Inc. (Mazzocchi) did not bid against each other and that both Barker and Mazzocchi bid on packages of packages, a bidding method not provided for in the bid specification.

PROCEDURAL RECITATION:

When the pleadings of both the Petition and a Counterclaim filed by the Commission were joined in October 1981, the matter was transferred to the Office of Administrative Law for processing as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. At a prehearing conference which was conducted at the Trenton office of the Office of Administrative Law on March 10, 1982, the following issues were framed:

A. Did Mazzocchi and Barker submit alternate package bids which were not in accordance with bid specifications?

B. Was the Barker bid flawed by failure to submit that bid on the bid forms provided?

C. Was petitioner, in fact, the lowest responsible bidder for the six routes for which petitioner's bid was submitted?

D. Were Barker's bids fatally flawed, as alleged, by failure to submit sufficient bonding, and/or failure to submit "Consent of Surety"?

E. Were the bids improperly awarded to Barker and Mazzocchi and, if so, is petitioner entitled to the relief requested?

F. In the event of the award of bids to petitioner, is respondent Educational Service Commission entitled to the relief requested in Paragraph 2 of the Crossclaim?

Two days of hearing were conducted on May 18 and June 3, 1982, at Greenbrook, New Jersey. At the outset of the hearing, all three respondent parties moved for dismissal. Those Motions were denied on grounds (1) that neither counsel for petitioner nor the undersigned had been notified in advance of intent to make such motions on dismissal at the outset of the hearing; (2) that many facts essential to a determination had not been established by the Stipulation of Facts (J-1) which had been submitted prior to hearing; and (3) that the documents appended to the Stipulation of Facts were not admitted for their admissibility, but only for their authenticity. When

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respondent Mazzocchi Bus Co., Inc. moved on the closing day of hearing to be dismissed as a party respondent, that Motion was granted on grounds that Mazzocchi did not bid on the routes which were bid on by Surrey Transportation Inc. A written Order to that effect was issued on July 8, 1982.

Post-hearing briefing was concluded on July 12, 1982, closing the record as of that date.

UNDISPUTED FACTS:

I **FIND** the following to be relevant facts which, having been stipulated to by the parties, reveal the contextual setting of the dispute:

1. Respondent Somerset County Educational Services Commission issued an invitation for bids for special education transportation routes (part 1) for the 1981-82 school year. A copy of this invitation, which is dated June 11, 1981, and the specifications et al. are attached to the Stipulation of Facts (J-1) as Exhibit A. The invitation for bids required that the bids be received by the Commission on or before June 22, 1981.

1a. The invitation for bids provided, inter alia, as follows:

> The Somerset County Educational Service Commission reserves the right to accept or reject any or all bids, to waive any informalities and to award contracts in whole or in part if deemed to be in the best interest of the Somerset County Educational Service Commission.

2. The invitation for bids also provided, inter alia, the following in Section I - General Instructions to bidders:

   a. PREPARATION OF PROPOSAL: Proposals must be submitted on the prescribed Forms of Bid Proposals, attached. All blank spaces for bid prices must be filled in by typewriter or in ink in a legible manner.

   b. BID BOND DEPOSIT: Each bid must be accompanied by a certified check, cashier's check, or bid bond in the amount of at least five

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percent (5%) of the annual price of the bid; however, the amount of the bid bond shall not exceed $20,000. Such deposit shall be forfeited upon refusal of bidder to execute a contract within ten (10) days after notice of award has been extended.

c. CONSENT OF SURETY: Each bid must be accompanied by a certificate of consent of surety from a corporate bonding and surety company authorized to do business in this state, stating that it will provide the bidder with the required performance bond if the bidder is successful in his bid. The performance bond shall be equal to at least the amount of the contract for one year. Personal bonds will not be accepted.

3. The invitation for bids further provided, inter alia, the following in Section II - Specifications and Requirements for Special Education Transportation:

3. BASIS OF BID: . . .

G. While individual routes may not be combined on a single vehicle to be operated as a single route, bidders are invited to offer ALTERNATE BIDS for groups of routes, if in the opinion of the bidder, the resultant bid would be at a lower cost than individual route bids.

For routes numbered 11 through 83, use ALTERNATE FORM OF PROPOSAL - Form A. "All or nothing" package bids for routes numbered 11 through 83 are limited to not more than twelve (12) routes per package.

For routes numbered 88 through 99, use ALTERNATE FORM OF PROPOSAL - Form B. "All or nothing" package bids for routes numbered 88 through 99 are limited to not more than six (6) routes per package.

. . .

6. Bidder agrees to all of the specifications contained herein and expresses agreement by submitting his sealed proposal.

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4. Petitioner (Surrey) bid on routes 88, 90, 91, 95, 96 and 99. Exhibit B is a copy of Surrey's basic bid, individual route price, submitted on the prescribed forms provided by the Commission. Exhibit C is a copy of Surrey's alternate discounted package bid for these same routes, also submitted on the prescribed forms provided by the Commission. Exhibit C-1 is a copy of Surrey's bid bond. Exhibit C-2 is a copy of Surrey's consent of surety.

5. Surrey's bid conformed in all respects with the Commission's specifications set forth in the invitation for bids.

6. Respondent Mazzocchi Bus Company, Inc. submitted, on the prescribed bid forms provided by the Commission, a basic bid, individual route price, on routes 41, 42, 43, 44, 45, 46, 47, 48, 51, 52, 53, 54, 55, 56, 81, 82, 83, 84, 85 and 86, a copy of which is attached hereto as Exhibit D.

7. Mazzocchi also submitted three alternate discounted package bids on the prescribed bid forms provided by the Commission. Exhibit E is a copy of package bid No. 1 on routes 41, 42, 43, 44, 45, 46, 47 and 48. Exhibit F is a copy of package bid No. 2 on routes 81, 82, 83, 84, 85 and 86. Exhibit G is a copy of package bid No. 4, which is a package of two package bids, package No. 1 and package No. 2.

8. Mazzocchi did not bid on routes 51, 52, 53, 54, 55 and 56 in any of its package bids.

9. Mazzocchi's basic bid, individual route price, and alternate discounted package bids No. 1 and No. 2 conformed in all respects with the Commission's specifications set forth in the invitation for bids. Whether Mazzocchi's alternate discounted package bid No. 4 was in conformity with the specifications contained in the invitation for bids, or otherwise sanctioned by the Commission, is in dispute.

10. Surrey and Mazzocchi did not bid against each other on any route or routes offered for bid on June 22, 1981, whether on an individual bid or package bid basis.

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11. Respondent Barker Bus Company submitted, on the prescribed bid forms provided by the Commission, a basic bid, individual route price, on routes 11, 12, 13, 14, 15, 21, 22, 23, 24, 31, 32, 33, 34, 35, 36, 51, 52, 53, 54, 55, 56, 61, 62, 63, 71, 72, 73, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98 and 99, a copy of which is attached hereto as Exhibit H.

12. Barker also submitted five alternate discounted package bids, on the prescribed bid forms provided by the Commission. Exhibit I is a copy of package bid No. 1 on routes 11, 51, 33, 31, 21, 14, 63, 73 and 72. Exhibit J is a copy of package bid No. 2 on routes 12, 15, 32, 34, 35, 52, 54, 55 and 62. Exhibit K is a copy of package bid No. 3 on routes 13, 22, 23, 24, 36, 53, 56, 61 and 71. Exhibit L is a copy of package bids No. 4 and No. 5. Package bid No. 4 covers routes 88, 89, 90, 91, 98 and 99. Package bid No. 5 covers routes 92, 93, 94, 95, 96 and 97. Exhibit M is a copy of "a combination of packages" including packages No. 1, No. 2, No. 3, No. 4 and No. 5.

13. Barker's "combination of packages" (Exhibit M) is set forth on Roy Barker Co. letterhead, and not on the prescribed bid forms provided by the Commission. The information set forth on Exhibit M is complete insofar as any information required to be set forth on alternate forms A and B provided by the Commission is either set forth on Exhibit M or is readily discernible from information set forth on Exhibit M.

14. Although Mazzocchi and Barker did not bid against each other on individual routes, specifically 51, 52, 53, 54, 55 and 56, Mazzocchi did not include these routes on either of its package bids or in its package of packages. Barker bid on these routes both as individual routes and as portions of its package bids No. 1, No. 2 and No. 3, which packages were included in the "combination of packages" bid. Exhibit N is a copy of the Commission's transportation bid compilation sheet, dated June 22, 1981.

15. Barker's bid bond is in the required minimum amount of five percent of the annual price of the bid. Two forms of bid bond became available through discovery. Exhibit O is a copy supplied by Barker in response to Surrey's interrogatories not signed by Barker. Exhibit O-1 is a copy

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supplied by the Commission in response to Surrey's interrogatories. This bond has a power of attorney attached, which, however, bears a certificate, dated June 22, 1981, and is limited to the sum of $300,000.

15a. Barker's basic bid, individual route price, is in the total sum of $522,121. The five separate package bids total $485,221. The total price of the "combination of packages" bid was $339,939, which represents a further discount available if all packages were awarded; however, the packages remained the same as to the number of routes in each package.

16. Barker's bid was not accompanied by a separate consent of surety form. It is disputed whether a separate consent of surety form was required by the Commission's specifications. Barker provided the Commission with a separate consent of surety form at some later date, a copy of which is attached hereto as Exhibit P, dated July 22, 1981.

17. Exhibit Q is a copy of a report from James Rick, President, LaFontaine & Budd, Inc., insurance agent and specialist, regarding bid bonds and consents of surety. Exhibit Q-1 is a copy of a report from D.E. Vine, bond manager for the Hartford, regarding bid bonds and consents of surety.

18. The Commission met on August 11, 1981, to consider, inter alia, the awarding of transportation bids. Exhibit R is a copy of a memo to the Commission from David Bishop, Supervisor of Business and Transportation, recommending that they award the contracts to Barker and Mazzocchi, stating as follows:

> One vendor, Surrey Transportation was a low bidder on some individual routes. In order to take Surrey's low bid, it would increase the total cost to the Boards by $117,648.00, thus affecting the overall bid of Barker Bus Company on routes [No.] 11-36, [No.] 51-73, [No.] 88-99, and also breaking up packages 4 and 5.

Although Surry's president, Edythe S. Dee, appeared at the meeting to present her objections to this recommendation, the Commission adopted

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it by a vote of nine yes, one no and two abstentions. Exhibit S is a copy of the minutes of this meeting.

19. Surrey is a corporation duly organized under the laws of the State of New Jersey. Its registered office is located at RD1, Surrey Drive, Belle Mead, Hillsborough Township, Somerset County, New Jersey. This property is also known as tax lot 19, block 207E and is owned by Surrey's president, Edythe Dee. Surrey itself does not own real property in Somerset County.

EDYTHE S. DEE, who is the sole corporate owner of Surrey, testified that when she attended the bid opening, she noted that there was a noticeable silence at the point when it would normally have been stated that Barker's bid contained the required certificate of Consent of Surety. She testified that after that silence, Dr. Hadden, the Commission Superintendent, who was opening the bids, stated simply that all was in order and proceeded to read bid prices quoted by Barker. Dee testified that, after all bids were opened, she examined the Barker papers and saw no consent of surety. She also testified that because she concluded Surrey was, in any event, the low bidder on the package of six routes on which it had bid, she made no protest, since she felt to precipitate a rebid could be to Surrey's disadvantage. She testified that when she received a notice two weeks later that she was not considered the low bidder, she inquired about Barker's Consent of Surety of Dr. Hadden, who told her it was "none of her business."

Dee testified further that she wrote to the Commission presenting Surrey's case. She testified that when she went to the Commission office and requested to see Barker's Certificate of Consent of Surety, she was rudely ordered out of the office by the coordinator of transportation for her insinuating that it was not there. She testified that when she went back to the Commission office on July 21 and was allowed to examine the Barker papers, she found no certificate of Consent of Surety, but did find a photocopy of a bid bond on which the power of attorney had expired and which had no raised seal thereon, as required by law.

Dee testified that when she wished to enter a bid in 1980 and 1981, she had been told by agents of the Commission that a consent of surety was an absolute requirement and that a bid bond did not suffice. She testified that, when in 1980 Surrey had submitted only a bid bond, Hadden ruled that this disqualified Surrey as a bidder. She

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testified that in order to obtain a certificate of consent of surety for her 1981-82 bid, she had been forced to borrow and place in a pass book account held by the surety company the total amount of her bid of $42,450.

When questioned on the amount of profit she expected to make on her 1981-82 bid for a package of six routes, Dee indicated that she estimated it to be $25,000, since she serves as a substitute driver and estimates that Surrey could operate the six routes with two and one-half or three vehicles and drivers. Dee testified that in computing estimated profit, she did not consider her own $1,000 monthly salary from Surrey, depreciation on wholly-owned vehicles or depreciation on the portion of her home used as an office.

Dee testified, on rebuttal, that Kadota had told her prior to the bidding that any package of bids was limited to those listed and named in the specifications.

LOIS FELBER, vice president of another transportation company operating 63 vehicles, testified that she too had attended the bid opening where she noted that bid documents were read out by Hadden, except for the Barker bid. She testified that she had accompanied Dee to the Commission offices where she too noted that the Barker bid did not contain a certificate of consent of surety, but only a bid bond. She also testified that prior to bidding, she had inquired of Kadota who told her that a consent of surety was a requirement.

HELENA KADOTA, who had been employed by the Commission until June 27, 1981, as supervisor of transportation, testified that she had helped draw up the bid specifications and was present at the bid opening. She testified that she has no recall of whether both a bid bond and a certificate of consent of surety were required. She testified that she recalls an inquiry by Dee, but cannot remember what she told her about what bid bond and/or consent of surety were required. Kadota also testified that at the bid opening, there appeared to be a document missing and that there was some comment by a representative of Barker as to whether "certain things" are really necessary. Kadota testified further that she believes that bidding on a package of packages was not precluded by the specifications, although there was no invitation to bid in that manner. She testified that the purpose of allowing bidders to bid on packages of routes was to make it attractive to smaller operators to submit bids. She testified that when the

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specifications were drawn up, she was both afraid that some bidders would bid on a combination of packages and that they would not do so.

THOMAS BARTON, who also has operated a transportation service for 15 years, testified that he has tried, but has been unsuccessful in getting contracts with the Commission. He testified that he was told by Kadota that any bid could not be considered without submission of a certificate of consent of surety.

JOHN F. HADDEN, Superintendent/Secretary of the Commission, testified that when opening bids for the Commission, he routinely looks for and states whether the following basic items are present:

1. Affirmative action statement
2. Statement of Ownership
3. Bid bond
4. Consent of surety

He testified that he then reads aloud the amounts of bids on transportation routes, asks for questions and declares the bidding closed.

Hadden testified that when he opened the Barker bid, he noted that there was not a separate consent of surety document. He testified that after Harold Chesson, a Barker owner, then stated that he understood that the bid bond and the consent of surety were one and the same, he (Hadden) stated that he did not think so, but would check with counsel and get back to him. He testified that he then proceeded to open and read the other bids. He also testified that Barker, on a later date, July 22, did submit a consent of surety document.

Hadden testified that when opening Surrey's bid, he asked for clarification of one figure he found difficult to read and noted that there was no affirmative action statement, which statement was submitted a few days later by Surrey.

Hadden testified that after all bids were received, he then conferred with consultants, counsel and the County Superintendent, met with the executive committee, and concluded and recommended that Barker was the lowest responsible bidder. In regard to his having sent a notice to bidders prior to Commission action, he testified that this

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was an attempt to be fair to unsuccessful bidders who could then bid on other routes elsewhere on the basis of knowledge that their vehicles would not be needed for the Commission's routes. In regard to the consent of surety question, he testified that he relied on advice of counsel, a letter from the Hartford Insurance Company (J-1, Exhibit Q1) and the statement of LaFontaine and Beedel Mutual Insurance Company (J-1, Exhibit Q) in concluding that Barker had submitted a valid bid.

When questioned about Barker's use of forms other than those provided, Hadden testified that he believes it to be impossible to devise a form for every eventuality, and that he would have accepted a bid if it had been submitted on the back of a tomato can label. He testified that the acceptance of Barker's and Mazzochi's combination of packages bids represented a savings of $117,648 of public funds over the cost which would have ensued had those bids not been accepted.

Hadden testified that Dee made no protest at the bid openings, that he had no recall of ever telling Dee that she must submit a consent of surety with a prior bid, that she was given the names of Commission members and that she was allowed to present her complaints at a Commission meeting.

PETER CHESSON, General Manager and part owner in Barker Bus Company, testified that when he had questioned Kadota prior to submitting a bid whether "lump sum" bidding was permissable, she had answered in the affirmative. He testified that he understands that a consent of surety is synonymous to a bid bond and that Barker, which participated in the Commission's bidding since its inception in 1978, had never submitted both a bid bond and a consent of surety. Chesson also testified that Barker had, as a successful bidder, previously engaged in "package bidding," but that this was the first year that package bidding had been set forth in the Commission's specifications.

FINDINGS OF FACT:

On the basis of a preponderance of credible evidence within the record, I **FIND** the following to be additional relevant facts to be considered together with the stipulated facts, above, when arriving at a determination:

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1. The Barker bid as submitted was accompanied by a bid bond in sufficient amount to cover five percent of the total bid, as per specifications in the invitation for bids (Exhibits A, O and O-1).

2. The Barker bid as submitted and as opened on June 22, 1981, did not contain a consent of surety form.

3. A "Consent of Surety" and a "Power of Attorney," both dated July 22, 1981, were issued in Barker's name. These limited the obligation of the issuing Hartford Accident and Surety Company for guaranteeing the performance of contracts to $300,000. Since these documents were clearly dated one full month after the opening of bids on June 22, 1981, they could not have been and were not a part of the package of bids opened on June 22 (ST-5). This finding is grounded not only on the dates on the documents, but also on the corroboration and credible testimony of Dee, and Felber.

4. The $300,000 limit on Barker's consent of surety, dated July 22, 1982, is less than Barker's $339,939 bid on its combination of packages which was accepted and awarded to Barker by the Commission.

5. In a prior year, when Surrey submitted only a bid bond and no consent of surety, its bid was disqualified for this omission. When Dee, as owner of Surrey, was told in 1981 by an agent of the Commission that a consent of surety was an absolute requirement and that a bid bond alone would not suffice, she was forced to raise and did place the total amount of Surrey's bid of $42,450 in a passbook account to secure the required consent of surety from a surety company. This finding that Dee was told that a consent of surety was an absolute requirement is grounded on the corroborative and credible testimony of Dee and Barton which was in no way convincingly rebutted by the testimony of Kadota, who stated that she could not even remember whether both a bid bond and a consent of surety were required.

6. The July 10, 1981, notification to bidders was intended to be an unofficial notification sent prior to action by the Commission as a

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courtesy to bidders to enable them to bid on other invitations in which, if successful, they could make best use of their available vehicles.

DISCUSSION AND CONCLUSIONS:

Respondents argue that petitioner Surrey Transportation, as the unsuccessful bidder, is without standing to bring this action. In support of this argument, respondents cite numerous cases including Waszen v. Atlantic City, 1 N.J. 272 (1949). I **CONCLUDE** that this argument that petitioner lacks standing must be rejected in this action. This conclusion is grounded on the ruling of the court in M.A. Stephen Construction Company, Inc. et al. v. Borough of Rumson, 125 N.J. Super. 67 (App. Div. 1973) cert. den. 64 N.J. 315 (1973). Therein, at p. 74, the New Jersey Superior Court stated:

> It is true that, as the contractor-plaintiffs point out, a bidder claiming to be entitled to the award of a contract for public work has long been held to have sufficient standing to challenge the rejection of his bid or the letting of the contract to another bidder, and to compel the award of the contract to him, McGovern v. Trenton, 60 N.J.L. 402 (Sup. Ct. 1897).

Petitioner also argues that since the 1981-82 school year has ended, the matter should be dismissed by reason of mootness. While it is true that the 1981-82 school year has ended, the laws on bidding of transportation contracts allow for renewal of contracts a second and third year if mutually agreed upon by the contracting parties. Since 1981-82 was but the first of three years that contracts could be awarded on the basis of the bidding in question, I **CONCLUDE** that this matter should not be dismissed by reason of mootness.

Respondents also contend that the Commissioner is powerless to award damages and/or legal fees as are herein claimed by petitioners. Petitioner cites as authority in this regard Jackson v. Concord, 54 N.J. 113 (1969) as evidence that the Director of Civil Rights, and by inference, the Commissioner of Education has such authority.

I **CONCLUDE** that this contention of respondent that he does not have that authority is correct. The Commissioner has long held that he does not have such authority under New Jersey education law. Fred Bartlett, Jr. v. Board of Education of the Township of Wall, Monmouth County, 1971 S.L.D. 163; Romanowski v. Jersey City Board of

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Education, Hudson County, 1966 S.L.D. 219; David v. Cliffside Park Board of Education, Bergen County, 1967 S.L.D. 192; Thomas Smith, Jr. v. Board of Education of the Township of Egg Harbor, Atlantic County, 1974 S.L.D. 430.

The Commissioner, addressing such an argument in Raymond Winter v. North Bergen Board of Education, 1975 S.L.D. 236, after analyzing the court's decision in Jackson, supra, stated:

> The Commissioner in the matter before him finds within Jackson, supra, no reason to reverse his previous position in regard to the awarding of punitive damages. Those damages which the Supreme Court determined to be within the authority of the Director to award in Jackson were those which resulted from discriminatory practices beyond the scope of lost wages. They were not, however, such as to inflict punishment or penalty as are herein sought by petitioner who is otherwise made whole regarding his lost salary and attendant emoluments.
>
> Most importantly, the Commissioner finds no comparable language in the education laws to that referred to by the Court in Jackson, supra, as "words of enlargement and not of limitation," i.e., words such as "including" and "not limited to." N.J.S.A. 18A:6-30, 30.1
>
> Jackson, supra, is thus found to be importantly distinguishable or otherwise inapplicable. Petitioner's prayers for an award for punitive damages and legal fees are denied. . . .

Given this clear precedent in education case law, petitioner's prayer for relief in the form of damages and legal fees must, in this forum, be denied. Absent authority of the Commissioner to make such an award, no useful purpose would be served in setting forth here an analysis of the dollar amounts claimed by petitioner and challenged by respondents.

I **CONCLUDE** also that, absent authority of the Commissioner to award counsel fees and damages to petitioner, the respondent Commission's counterclaim to indemnification by Barker and Mazzocchi is mooted in this forum.

The remaining overriding issue is whether the Barker bid was in material compliance with the specifications set forth in the notice and invitation to bid and whether the Commission's award of contract to Barker was legally awarded.

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The notice and invitation to bids specified that proposals must be submitted on the prescribed bid forms provided by the Commission. It is admitted that the combination of packages proposal by Barker was submitted on Barker's own stationery (Exhibit M). The Commission clearly stated, however, that it reserved the right to "waive any informalities in bidding" (Exhibit A). I **CONCLUDE** that since this portion of the information on Barker's letterhead is as readily discernible and complete as it would have been had it been set forth on the prescribed bid forms, the Commission could and did legally waive this item as an informality. I further **CONCLUDE** that since this information was set forth as clearly as it would have been on the prescribed form, it was in substantial compliance with the bid specifications.

Of greater moment are the facts concerning the required consent of surety and bid bond. Barker argues that a bid bond was issued in lieu of a consent of surety. The bid specifications unequivocally call for a separate bid bond and a separate consent of surety. The bid bond required was $20,000 or five percent of the amount bid. By contrast, the amount of the consent of surety required was for the entire amount of the bid. Surrey and Mazzocchi were in full compliance. By contrast, Barker's bid bond, the only document submitted with the bid, did not conform with the requirement of a separate consent of surety in the full amount of the bid. In Hillside Township v. Sternin, 25 N.J. 317 (1957), at 324-325, the Court stated:

> The law is clear that bids meet the terms of the notice. The significance of the expression "lowest bidder" is not restricted to the amount of the bid; it means also that the bid conforms with the specifications. . . . Minor or inconsequential variances and technical omissions may be the subject of waiver. . . . But any material departure stands in the way of a valid contract, and the defaulting person cannot be classed as a bidder at all. . . . This is because the requirements are generally considered to be mandatory or jurisdictional. . . . Substantial noncompliance cannot be waived by the municipality. . . . The reason for this bar is obvious. When the waiver occurs the bidders no longer stand on a basis of equality and the advantages of competition are lost.

Similar guidance was given by the Court in Tufano v. Cliffside Park, 110 N.J.L. 370 (1932), at 373, as follows:

> The municipal authorities should not be permitted to waive any substantial variance between the conditions under which bids are invited and the proposals submitted. If one bidder is relieved from conforming to the conditions which impose some duty upon him, or

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> lays the ground for holding him to a strict performance of his contract, that bidder is not contracting in fair competition with those bidders who propose to be bound by all the conditions. . . .

I **CONCLUDE** that Barker's bid was not in substantial compliance with the bid requirements that a separate consent of surety was required in the total amount of the bid. A similar omission had been the basis for disqualifying Surrey's bid in a prior year. That this omission was not the basis of a similar disqualification of Barker's bid for the 1981-82 year has all the earmarks of capriciousness. I **CONCLUDE** that these requirements could not legally or properly be waived as informalities when Surrey had been informed that for the 1981-82 year the consent of surety must be a separately submitted document in the full amount of the bid. To hold otherwise would be to place certain bidders on a different basis of bidding and destroy, at least in part, the advantages of equal competition. It is further apparent that the consent of surety supplied by Barker in a lesser amount than Barker's bid, one month after the opening of bids, was not in conformity with the intent of N.J.S.A. 18A:25, which states:

> When a surety company bond is required in the advertisement or specifications for a contract or agreement, every board of education shall require from any bidder submitting a bid in accordance with plans, specifications and advertisements, as provided for by law, a certificate from a surety company stating that it will provide the contractor with a bond in such sum as is required in the advertisement or in the specifications.

To assume that the consent of surety, even if sufficient, could be submitted as much as one month after the opening of bids defies the principles of sound business and bidding practices.

I further **CONCLUDE** that the bid specifications which provided for bids on individual routes or on alternate "all or nothing" packages of either six or twelve routes did not provide for bidding on combinations of packages as bid by both Barker and Mazzocchi. This conclusion is grounded on the clear language of the specification that limited package bids for routes 11 through 83 to "Not more than twelve (12) routes per package" and also limited packages on routes 88-99 to "not more than six (6) routes per package" (Exhibit A, at p. 4). It is noteworthy that the underscoring as set forth immediately above appears in the bid specifications. To award a contract in a lesser amount for a combination of two or more packages can only be interpreted as discounting the very limitations in the bid guidelines which were emphasized by the underscoring,

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since those combination bids necessarily exceeded the numbers of routes which could be bid on one package.

Kadota, who was the Commission's supervisor of transportation, testified that she was both afraid that bidders would and would not bid on a combination of packages. Such testimony by a key individual in the Commission's transportation of pupils is indicative that either the Commission or its agents, or both, had not resolved a fundamental question necessary to putting all bidders on equal footing.

While I am unable to conclude that the Commission could not legally have provided for bidding on combinations of packages, the language of the invitation to bid did not so provide. Had it been the expressed intent of the Commission to accept bids on combinations of packages, it should have said so in the specifications. Additionally, it should have announced to prospective bidders what would be the comparative basis for awarding bids when considering bids on individual routes, on packages of routes and on combinations of packages. To do so would go a long way toward obviating the necessity for costly litigation such as that engendered in this action.

DETERMINATION:

It is hereby **DETERMINED** that the Board, in waiving the consent of surety requirements and the limitations it had placed on the numbers of individual routes which could be bid in one package, abused its discretionary authority. It is true that the end result of those improper waivers was a saving to the taxpayers of over $117,000 during 1981-82. This saving alone, however, does not provide a sound basis for perpetuating in the next two years the Board's abuse of discretion in its unequal treatment of Surrey and Barker as competitive bidders. Accordingly, it is **ORDERED** that the award of contracts based on the Barker bid is declared to be null and void effective on a date to be fixed by the Commissioner, and in any event no later than December 1, 1982. This fixing of date will provide for continuation of transportation of pupils to their respective classes. It is further **ORDERED** that the Commission shall, prior to that date, rebid all of its 1982-83 transportation contracts with Barker which were fatally flawed by failure of Barker to provide a consent of surety in the full amount of the bid.

In conclusion, it is **ORDERED** that petitioner's request for relief in the form of damages and counsel fees is, for the reasons set forth above, **DENIED** for lack of

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jurisdictional authority of the Commissioner. It is further **ORDERED** that petitioner's request for an award of contract for the six routes she bid on is **DENIED.** Such an award would not rectify the inequities, the complexities of which, in this instance, require rebidding.

Lest there be any misunderstanding, the Commission is not required by this determination to rebid the routes on which Mazzocchi was successful bidder, since Mazzocchi met all the requirements of bid bonding and consent of surety. Surrey, as petitioner, has no valid claim against Mazzocchi, since Surrey chose not to bid on any route on which Mazzocchi was the successful bidder. It is further noted, and was the basis for granting Mazzocchi's motion to be dismissed as a named respondent, that Mazzocchi in its package bids was low bidder among all bidders on a single package basis. Thus, the combination of package bids by Mazzocchi, while not provided by the specifications for bidding, harmed no other bidder, but merely resulted in a lower cost to the Commission.

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

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OAL DKT. NO. EDU 7374-81

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

August 11, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

August 16, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 17, 1982
DATE

Ronald L. Parkerson
OFFICE OF ADMINISTRATIVE LAW

ms

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DOCUMENTS IN EVIDENCE:

J-1	Stipulation of Facts with keyed exhibits A through S
MA-1	Request for Admissions with Answers by petitioner
MA-2	Request for Admissions with Answers by Educational Services Commission
ST-1	Hadden to Surrey, July 10, 1981
ST-4	Combination of Package Bid by Barker, June 2, 1981
ST-5	Agreement of Surety for Barker, July 22, 1981
ESC-2	Agreement of Surety submitted by Surrey Transportation
ESC3a-g	Statement of Earnings and Income Tax Return for Surrey Transportation, 1980-81

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SURREY TRANSPORTATION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SOMERSET COUNTY EDUCATIONAL SERVICES COMMISSION, BARKER BUS COMPANY AND MAZZOCCHI BUS COMPANY, INC.,	:	DECISION
RESPONDENTS.	:	

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

The Commissioner observes that exceptions were filed by Respondent Somerset County Educational Services Commission (Commission) in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

It is noted herewith that petitioner's request for an extension of time to file exceptions was denied pursuant to the provisions of N.J.A.C. 1:1-16.6(d).

The Commissioner observes that the exceptions filed by the Commission to the initial decision by the Honorable Eric G. Errickson, ALJ do not constitute an appeal from that decision. Rather, the Commission firstly contends that the decision herein by Judge Errickson is grounded upon and permeated by petitioner's cry of discrimination. The Commission's closing exceptions largely object to Judge Errickson's use, ante, of the word "capriciousness" in describing its actions. The Commission suggests the use of other terms, contending that the word "capricious" denotes evil intent. The Commissioner finds no merit in these exceptions.

A thorough examination of the record fails to reveal to the Commissioner any basis for the Commission's contention that Judge Errickson's decision is permeated by petitioner's cry of discrimination. Nor can the Commissioner agree that the use of the word "capricious" denotes evil intent. The Commissioner will not comment on the suitability of the Commission's suggested alternative terminology, but there is no suggestion in any of the dictionaries available to the Commissioner through the New Jersey State Library that the use of the term "capricious" indicates or denotes evil intent.

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

The award of contracts based on the Barker bid is declared to be null and void. Accordingly, the Commission shall rebid all of the flawed contracts, effective as of a date set by the Commission that conforms to the requisite bidding procedures, minimizes disruption of pupil transportation and, in any event, falls no later than December 1, 1982. Petitioner's requests for relief are denied. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

September 20, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1305-82
AGENCY DKT. NO. 16-1/82A

EDWARD M. SCHMIDT and ROBERT LAIB,
Petitioners
v.
BOARD OF EDUCATION OF
THE BOROUGH OF NEW PROVIDENCE,
Respondent

APPEARANCES:

Wayne J. Oppito, Esq., for petitioner Schmidt
John F. Malone, Esq., for petitioner Laib
(O'Dwyer & Malone, attorneys)
Martin R. Pachman, Esq., for respondent

Record Closed July 30, 1982 Decided August 4, 1982

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioners, Schmidt and Laib, both tenured elementary school principals in the New Providence school district, seek a declaratory judgment, because of the anticipated closing of an elementary school, as to whether their seniority status should be determined by the number of academic years or calendar years served, irrespective of whether their position was for ten months or twelve months. Respondent, feeling that both petitioners are excellent teachers and administrators, takes no position with regard to their appeal and also seeks a determination from this court by which it will abide.

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On January 25, 1982, petitioner Schmidt filed an appeal with the Commissioner of Education. On February 18, 1982, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on April 16, 1982, petitioner Laib was added as a party to the suit. The following issue was identified at the prehearing conference:

> Should petitioners' seniority status be determined by the number of academic or calendar years served irrespective of whether their position was for ten months or twelve months?

At the time of the prehearing conference, it was agreed that the matter would be decided on the basis of a joint stipulation and briefs. No formal hearing has been scheduled nor does this court feel that one is necessary.

FINDINGS OF FACT

On May 12, 1982, the court received the following Stipulation of Facts which it adopts as its Findings of Fact:

1. Petitioner, Edward M. Schmidt, is an employee of the New Providence Board of Education and has been so employed since September 1, 1964.

2. Petitioner Schmidt's dates of employment, position and length of contract within the New Providence School District are as follows:

September 1, 1964 to June 30, 1969	Vice Principal of a K-8 building effective July 1, 1966	10 month contract 12 month contract
July, 1969 to June 30, 1978	Principal of K-8 building	12 month contract

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September, 1978 to Present	Transferred to Principal of a K-5 building	10 month contract

3. Petitioner Schmidt's Military Service is as follows:

December 1, 1954	Date of entry into active service
August 31, 1956	Effective date of separation from active service

4. Petitioner, Robert Laib, is an employee of the New Providence Board of Education and has been so employed since October 1, 1971.

5. Petitioner Laib's date of employment, position and length of contract within the New Providence School District is as follows:

October 1, 1971	Principal of K-8 building	12 month contract

6. Petitioner Laib's Military Service is as follows:

September 13, 1953	Date of entry into active service
August 4, 1957	Effective date of separation from active service

DISCUSSION OF LAW

The question of whether petitioners' seniority status should be determined by the number of academic or calendar years served irrespective of whether the position was for ten months or twelve months appears to be one of first impression in the State of New Jersey. As can be seen from the stipulation, Mr. Schmidt served for a brief period of time as a ten-month employee and for other periods of time as a twelve-month employee. On the other hand, Mr. Laib served all periods of employment in the district as a twelve-month employee, for which he seeks some advantage in terms of his seniority in the district.

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N.J.S.A. 18A:28-9, when there is to be a reduction of force, empowers the Commissioner of Education, with the approval of the State Board of Education, to establish standards for determining seniority. Pursuant to this statute, N.J.A.C. 6:3-1.10, which deals with standards for determining seniority, was promulgated. N.J.A.C. 6:3-1.10(b) states: "Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be . . . ."

Petitioner Laib argues that there is a recognized distinction set forth in the Administrative Code between the terms "academic year" and "calendar year." Laib asserts that to not recognize the difference between the two would be illogical and violative of his seniority rights. Laib suggests that the reasoning of Schwartz v. Dover Public Schools, 180 N.J. Super 222 (App. Div. 1981) should be applicable in the instant matter. Schwartz dealt with whether or not a board policy allowing sick days for employees who began employment after the beginning of the year on a pro rata basis violated the statute, N.J.S.A. 18A:30-2, which mandated a minimum of ten full sick days for all employees. The court held that a responsible interpretation of the statute is to allow a proportionate or prorated amount of sick leave for those employed less than a full year. The court interpreted the legislature's intent to grant fewer sick days to employees who only worked one or two months of the school year as contrasted to an employee who worked a full school year.

This court disagrees with Laib's contention that Schwartz is applicable in the instant matter. N.J.A.C. 6:3-1.10 speaks in terms academic years or calendar years. By analogy to Schwartz, any academic year would always be a fraction of any calendar year. Apropos, the decision in Schwartz, as attempted by Laib to be applied in the instant matter, rather than offering a means of interpretation of N.J.A.C. 6:3-1.10, seeks to rewrite it.

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The more logical and rational approach in deciding this problem is that academic years and calendar years should be afforded equal weight in calculation of seniority. One may read the applicable statutes and conclude that the failure of the legislature to enact different standards for academic year and calendar year employees within the reduction in force statutes, N.J.S.A. 18A:28-9 et seq., indicates that the employment terms are to be afforded equal weight. Clearly, a reading of N.J.S.A. 18A:28-15 indicates that the legislature was cognizant of these terms of employment in its enactment of different standards for the acquisition of tenure. In N.J.S.A. 18A:28-5 (a), "calendar years" is used as a standard; in (b), "academic years" is used as a standard; and in (c) "academic years" is used as a standard.

N.J.S.A. 18A:29-6 defines "year of employment" to mean employment by a full-time teaching staff member for one academic year. Thus, it seems clear that this section of the statute equates an academic year with one year of employment. It follows, therefore, that the legislature recognized a similarity between an academic year equaling one year of employment and a calendar year equaling one year of employment. It is reasonable to conclude, therefore, that academic years and calendar years are equivalent for the purposes of determining seniority.

Additionally, N.J.A.C. 6:3-1.10(e) states that: "Not more than one year of employment may be counted towards seniority in any one academic or calendar year." A fair reading and interpretation of this section of the code is that an academic year or a calendar year is to be counted as not more than one year of employment for the purposes of seniority. Thus, if an academic year counts as one year of employment, a calendar year may not be counted greater than one year of employment without violating this section of the code. Both the academic year and the calendar year equal one year of employment. Nothing in the statute or code says or implies that an academic year is to be thought of as a fraction of a calendar year for the purpose of determining seniority.

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Regulations pertaining to the Teachers' Pension and Annuity Fund, N.J.A.C. 17:3-1.1 et seq. support the view that academic and calendar years should be accorded equal weight. For example, N.J.A.C. 17:3-6.20 sets forth the method of computation for final compensation. Members are entitled to benefits computed on a three-year average. The regulation indicates that for ten-month employees, the three-year period is comprised of the final thirty months of service, N.J.A.C. 17:3-6.20(a)1. For twelve-month employees, the final 36 months of service comprises the three-year period, N.J.A.C. 17:3-6.20(a)2.

The arguments raised by Laib that as a twelve-month employee, he should receive additional seniority because he worked over the summer months, as compared to the ten-month employee who did not work during the summer months, is conceptually unpersuasive and without merit. A solution of this issue requires a fair and realistic interpretation of the statute and code, rather than an inquiry as to whether one principal worked over the summer and one principal did not work over the summer.

Normally, an issue dealing with the calculation of military service credit arises in the context of a teacher seeking different placement on a salary guide. N.J.S.A. 18A:29-11 provides that a teaching staff member "shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time . . ." This statute has been interpreted and calculation methods of credit have been devised which give effect to the terms "equivalent years of employment credit." Lavin v. Hackensack Bd. of Ed., 178 N.J. Super. 221 (App. Div. 1981), certif. granted 87 N.J. 402 (1981); Union Tp. Teachers' Ass'n v. Bd. of Ed. of Union Tp., Docket No. A-3065-79; Paul Blue, et als., v. Bd. of Ed. of the City of Linden, Union County, OAL Docket No. EDU 95-2/78 (June 17, 1981), adopted by Commissioner (August 4, 1981), aff'd State Bd. of Ed. (November 13, 1981). For example, in Blue, supra, an equivalent year of employment credit was awarded a petitioner whose military service was 5 months and 21 days. The initial decision and Commissioner's decision cited a footnote in Union Tp., supra, for support of the holding. The footnote stated:

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> It could be validly argued that a fractional year of military service time amounting to five months would represent one-half of an academic year and therefore entitle the staff member to a full year of employment credit. (Slip opinion at 15)

The methods of calculation of military service credit developed an interpretation of N.J.S.A. 18A:29-11 which would not be applicable in a reduction in force situation. Where teaching staff members are dismissed pursuant to a reduction in force, N.J.S.A. 18A:28-9, the determination of seniority status includes credit for military service. N.J.S.A. 18A:28-12 provides for the dismissal and reemployment rights of persons having tenure. It states:

> . . in determining seniority and in computing length of service for reemployment, full recognition shall be given to previous years of service and the time of service by any such person in or with the military or naval forces of the United States . . . .

No provision within the "standards for determining seniority," N.J.A.C. 6:3-10, deal with the calculation of military service credit. However, N.J.S.A. 18A:28-12 would afford a teaching staff member credit for his or her entire time of service. This statute does not contain the limiting language of "equivalent years of employment credit" or similar language which would necessitate the creation of and utilization of a formula for calculation.

CALCULATION OF PETITIONERS' SENIORITY

Petitioner, EDWARD M. SCHMIDT:

Employed - July 1, 1969 to present	13 years
Military Service Credit - 21 months	1 years, 9 months
Total Service in District	14 years, 9 months

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Petitioner, ROBERT LAIB:

Employed - October 1, 1971 to June 30, 1982	10 years, 9 months
Military Service Credit - 46 months, 22 days	3 years, 10 months, 22 days
Total Service in District	14 years, 7 months, 22 days

It can be clearly seen that petitioner, Edward M. Schmidt, has more seniority than petitioner, Robert Laib, by approximately one month and eight or nine days. This conclusion is reached by not applying any difference for seniority purposes between academic or calendar years or between ten-month and twelve-month positions.

Accordingly, it is **CONCLUDED** and **ORDERED** by way of declaratory judgment that petitioner, Edward M. Schmidt, has greater seniority than petitioner, Robert Laib.

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

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OAL DKT. NO. EDU 1305-82

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

Aug 4, 1982
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

August 5, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

August 5, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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EDWARD M. SCHMIDT AND ROBERT LAIB,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioners in the instant matter seek a determination of their seniority status because of the closing of an elementary school in the district in which they are employed. Both principals have military service and are tenured and each in his own right is a quality educator. Schmidt has served with both 10-month and 12-month contracts; Laib has served only with 12-month contracts.

The Commissioner observes that, in reaching a decision in the instant matter, the Honorable Robert P. Glickman, ALJ states, ante:

> "***This conclusion [of seniority status] is reached by not applying any difference for seniority purposes betwein academic or calendar years or between ten-month and twelve-month positions."

In the opinion of the Commissioner, Judge Glickman has erred in this determination.

Firstly, the Commissioner deems it important that a synopsis of definitions established by the Legislature be set down for the major terms used herein for "year," "calendar year," "academic year" and "school year." The Commissioner has previously considered these in part in Jane Williams v. Board of Education of the Township of Deptford, decided March 12, 1982; aff'd State Board July 7, 1982, wherein he stated:

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> "***Alternatively, the Commissioner notes that in N.J.S.A. 43:10-18.64a, Definitions:
>
> ***
>
> 'd. "Calendar year" means the 12-month period beginning January 1 and ending December 31.'
>
> In N.J.S.A. 1:1-2, Words and phrases defined:
>
> '***the word "year" means a calendar year.'
>
> ***
>
> "The Commissioner notes further that the Supreme Court of New Jersey 1960 in Newman v. Fair Lawn, 31 N.J. 279 said that a 'calendar year' runs from January 1 to December 31. The Commissioner notes further amplification of 'calendar year' by the Superior Court of New Jersey in Board of Education of Manchester v. Raubinger, 78 N.J. Super. 90 (App. Div. 1963) in which it was determined that a 'calendar year' is not limited to a period from January 1 to December 31 but embraces within such term a full year commencing at another time."
>
> (Slip Opinion, at pp. 19-20)
>
> Academic year is defined in N.J.S.A. 18A:1-1 as: "'Academic year' means the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation***."
>
> School year is defined in N.J.S.A. 18A:36-1 as follows: "The school year for all schools in the public school system shall begin on July 1 and end on June 30."

Judge Glickman relies on N.J.S.A. 18A:28-5 to show that academic years and calendar years should be afforded equal weight in the calculation of seniority because each is used as a standard for the acquisition of tenure. That statute states in pertinent part:

> "The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents***and such other

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> employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause***after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years;
>
> provided that the time in which such teaching staff member has been employed as such in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district or under that board but no such teaching staff member shall obtain tenure prior to July 1, 1964 in any position in any district or under any board of education other than as a teacher, principal, assistant superintendent or superintendent***."

The Commissioner notes that the standard for acquisition of tenure is not the same for three consecutive calendar years as for three consecutive academic years which indicates to the Commissioner that the Legislature did not intend that the two terms be treated identically.

Further, the Commissioner notes that in N.J.S.A. 18A:28-13 clear language therein refers to years of service as noted:

> "The commissioner in establishing such standards shall classify insofar as practi-

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> cable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both."
>
> (Emphasis supplied.)

The Commissioner notes further that the State Board in promulgating standards for determining seniority, N.J.A.C. 6:3-1.10, clearly refers to all periods of employment:

> ***
> "(b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absence.
>
> ***
>
> "(g) Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment.***"
>
> (Emphasis supplied.)

The Commissioner finds it to be the clear intent of the State Board that all service in the district be the determinative factor in seniority calculations.

For all the foregoing reasons the Commissioner finds that all service to a school district by an employee must be considered in determining seniority therein. From the facts stipulated the records of the two principals may be summated as follows:

Petitioner Schmidt

Dates	Contract	Total Months
July 1, 1969 - June 30, 1978	12 month	108
September 1, 1978 - June 30, 1982	10 month	40
Military Service Credit		21
		169

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Petitioner Laib

Dates	Contract	Total Months
October 1, 1971 - June 30, 1972	12 month	9
July 1, 1972 - June 30, 1982	12 month	120
Military Service Credit		46 + 22 days
		175
		+22 days

Accordingly, Judge Glickman's conclusion herein is set aside. The Commissioner finds and determines that Petitioner Robert Laib has greater seniority than Petitioner Edward M. Schmidt.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

September 20, 1982

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EDWARD M. SCHMIDT AND ROBERT LAIB,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, September 20, 1982

For Petitioner-Appellant Schmidt, Wayne J. Oppoito, Esq.

For Petitioner-Respondent Laib, Howard Schwartz, Esq.

For the Respondent-Respondent, Martin R. Pachman, Esq.

Petitioners are tenured elementary school principals who sought a declaratory judgment of their respective seniority status because of the closing of an elementary school in the New Providence School District. Petitioner Schmidt has served in the district since 1964 under 10 month and 12 month contracts. Petitioner Laib has served since October 1971 under 12 month contracts. The Initial Decision of the Administrative Law Judge held that Schmidt had greater seniority. The Commissioner reversed, holding Laib had greater seniority.

The Administrative Law Judge had concluded that each petitioner's seniority status should be determined by the number of academic years or calendar years served, irrespective of whether their position was for 10 months or 12 months. Finding that Schmidt served 14 years and 9 months and Laib, 14 years, 7 months, 22 days, the Administrative Law Judge held that Schmidt accrued greater seniority.

The Commissioner disagreed that the terms "academic year" and "calendar year" should be treated identically. The Commissioner held that all service should be the determinative factor. Finding that Schmidt served 169 months and Laib, 175 months, 22 days, the Commissioner held that Laib accrued greater seniority.

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The State Board of Education reverses the decision of the Commissioner and directs that the Initial Decision of the Administrative Law Judge be affirmed for the reasons expressed therein.

Attorney Exceptions are noted.

December 1, 1982

PENDING N.J. SUPERIOR COURT

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5126-81
AGENCY REF. NO. 303-7/81A

GLORY MIRABELLO,
Petitioner
v.
ROCHELLE PARK BOARD OF EDUCATION,
Respondent

APPEARANCES:

Louis P. Bucceri, petitioner
(Pincus and Bucceri, attorneys)

Robert J. Lenrow, Esq., for the Board
(Beattie and Padovano, attorneys)

Record Closed July 15, 1982 **Decided August 3, 1982**

BEFORE WARD R. YOUNG, ALJ:

Glory Mirabello, a teaching staff member employed as a supplementary and home instruction teacher, alleged she is tenured and the Board's action of nonrenewal was in violation of N.J.S.A. 18A:28-5; N.J.S.A. 18A:28-10; N.J.S.A. 18A:28-12; and N.J.A.C. 6:3-1.10 et seq. The Board asserts its action was proper and consistent with law.

Mirabello's employment terminated on June 23, 1981 as a result of the Board's determination to nonrenew. Her petition was filed with the Commissioner on July 13, 1981, and the matter was transmitted to the Office of Administrative Law as a contested case

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on August 11, 1981 pursuant to N.J.S.A. 52: 14F-1 et seq. A prehearing conference was held November 4, 1981 and hearings were held on February 4 and 5, 1982. The record was closed on June 18, 1982 upon receipt of petitioner's reply to respondent's brief.

On June 23, 1982, the New Jersey Supreme Court decided Spiewak et al. v. Rutherford Board of Education, 180 N.J. Super. 312 (App. Div. 1981) Hamilton Twp. Supplemental Teachers Association v. Hamilton Twp. Bd. of Ed, 180 N.J. Super. 321 (App. Div. 1981), affirming each.

On June 30, 1982, the Board filed a letter memorandum requesting the dismissal of the Mirabello petition, arguing the applicability of the Supreme Court's ruling in Spiewak its decision ". . . should have only prospective application to those parties who are not before the Court" (slip opinion at 32).

The record in this matter was reopened to permit petitioner to file a reply memorandum, and was again closed on July 15, 1982 upon the filing of same.

Mirabello was initially employed as a substitute in September 1973, but this dispute centers on her continuous employment as a supplemental teacher (as well as some home instruction assignments) from October 6, 1976 through June 23, 1982. Since October 6, 1976, Mirabello was compensated at an hourly rate, and received no benefits until the 1980-81 school year, when she was granted eleven sick days, five funeral days, and two personal leave days. (See Stipulation of Facts, #2.) She was not enrolled in the Teachers' Pension and Annuity Fund. (See Stipulation #4.) The workday for regular classroom teachers was 8:10 a.m. to 3:12 p.m. (See Stipulation #9.) Mirabello was issued elementary certification on 1964. (See Stipulation #12.)

It is undisputed that Mirabello was regularly and continuously employed as a supplemental teacher with occasional home instruction assignments from October 6, 1976 through June 23, 1981, albeit not always on a full-time basis. See J-1 through J-5. The

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tenure issue here is deemed to be stare decisis by the Appellate Division determination in Spiewak, which was decided on June 22, 1981, the day preceding Mirabello's last day of employment. This determination was affirmed by the New Jersey Supreme Court on June 23, 1982. Accordingly, I **FIND** Mirabello to be a tenured teaching staff member.

The Board authorized the establishment of a Resource Room in place of a Special Education Class for 1981-82 at its June 8, 1981 meeting. See C-2. It also employed a teacher-aide to be assigned to that facility at its August 10, 1981 meeting. See C-4. It is undisputed that Mirabello is not certified as a teacher of handicapped and is not, therefore, eligible for the teaching position in that facility. The position of teacher-aide was refused by her as it represented a position of less equivalent rank, as no certificate was required and service time could not accrue for seniority. The hourly rate of pay was also less. I **FIND** Mirabello's refusal to be without prejudice. See Stranzl v. Paterson Bd. of Ed., 1980 S.L.D. _____ (decided April 11, 1980).

Mirabello was employed and assigned to teach under her elementary certification. She testified that six to eight pupils were assigned to her each year. A child study team report indicates that eight pupils were assigned to her in 1978-79; seven pupils in 1979-80; and seven pupils in 1980-81. That same report indicates the pupils were classified as either perceptually impaired, neurologically impaired, multiply handicapped, or auditorially impaired. See C-1.

The Board made a distinction in hourly rates of teachers assigned to home instruction, supplementary, Title I, and compensatory education programs, although the latter two were the same. See J-9, J-13 and J-18, at 31. Hourly rates alone, however, may not be a basis for distinguishing teaching duties.

Superintendent/Principal Rothe testified supplementary instruction is provided only to pupils classified as handicapped (Tr. II, 7), and is taught on a one-to-one basis (Tr. II, 11). He also testified the Title I Program is run in conjunction with the State Compensatory Education program (S.C.E.), and distinguished between supplementary and Title I/S.C.E. as the latter provides small group instructions (Tr. II, 20, 21). Title I was

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provided in grades 1-5, and S.C.E. in grades 6-8. He also testified that no supplemental teachers were employed in 1981-82 due to the creation of the Resource Room, and the Board abolished the position of supplemental teacher (Tr. II, 30, 31). It is noted here that no such Board resolution is in the record, but it is not deemed to be significant in this matter.

I **FIND** Rothe's testimony to represent a distinction without a significant difference. No distinction is afforded supplemental teachers, whether assigned under Title I/S.C.E., or supplemental. See Spiewak and Hamilton. Rothe's testimony that Title I and S.C.E. teachers were employed in 1981-82, but that no supplemental teachers were employed, cannot be accepted as credible.

The Board apparently violated its own agreement with the Association and possibly State Board regulations by assigning Mirabello to provide supplemental instruction to handicapped pupils without an appropriate certificate. (See J-18, Article XIV "A" at 13, 14.) This, however, cannot be held to the detriment of Mirabello.

Mirabello's argument that she is entitled to be assigned to an elementary classroom position due to greater seniority is without merit. She never held an elementary position, and for reasons stated, ante, has no entitlement to a full-time position. Berkhout v. Roseland Bd of Ed., 1978 S.L.D. 534; Zubkoff v. Madison Bd. of Ed., 1980 S.L.D. _____ (decided July 2, 1980), rev'd State Board of Education, aff'd N.J. Super. (App. Div., March 27, 1981, A-4506-79) (unreported).

The employment of Barbara Alino and Gloria Pasqualino as Title I/S.C.E. teachers in 1981-82 is undisputed. Mirabello was employed prior to either.

An analysis of Mirabello's service in the district clearly establishes that she did not serve full-time until on or after January 1, 1979. See J-1 through J-5 and Stipulation #9. Therefore, her status as a tenured teaching staff member must be held to be part-time.

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The Board argues the Supreme Court determination in Spiewak is controlling, and footnote 2 at 33 of the slip opinion clearly states no back pay or rehiring for teachers not before that Court.

Mirabello argues to the contrary with reliance on Ramirez v. Amsted Industries, Inc., 86 N.J. 332 (1981), wherein the court said:

> Moreover, we conclude that on balance and as a matter of fundamental fairness, the benefit of today's rule should be extended to other similarily situated plaintiffs . . ., which suits were in progress as of November 15, 1979, the date of the Appellate Division decision. There is a basic justness in recognizing that persons who have exercised the initiative to challenge the existing law should be accorded relief if their claims — not yet resolved when the new rule of law is announced — are ultimately vindicated, at 357.

The Supreme Court in Spiewak said:

> We have previously declined to apply a new legal rule retrospectively when it constitutes a "significant change in the law." Merenoff v. Merenoff, 76 N.J. 535, 560 (1978). This policy rests on a perceived unfairness to parties that have acted in reliance on the rules established in prior case law. See Ramirez v. Amsted Industries, Inc., 86 N.J. 332, 357 (1981). (slip opinion at 31)

The court granted retrospective relief to only the litigants before it, but did not specify a time after which prospective relief should be granted to others. Is it to be the date of the Supreme Court's decision, the date of the cause of action, or the date of filing, if, in fact, relief is warranted for petitioners in litigation at the time of the court's decision?

The court reversed the Appellate determination in Point Pleasant, but affirmed Spiewak and Hamilton. It is presumed here the "significant change in the law" referred to Point Pleasant.

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Mirabello filed her petition in reliance on the Appellate Division's decision in Spiewak, and I **FIND** that determination controlling here, notwithstanding affirmation by the Supreme Court.

A distinction is nevertheless noted between rehiring and reinstatement, the latter being involuntary without Board action, the former being a deliberate, voluntary act of a Board.

In summary, I **FIND** Mirabello a tenured part-time teaching staff member, having met the precise requirements pursuant to N.J.S.A. 18A:28-5, and further **FIND** her seniority rights were violated through the employment of two less senior part-time supplementary teachers. I **ALSO FIND** Mirabello's claim for assignment as a full-time elementary teacher to be without merit pursuant to Zubkoff.

I **CONCLUDE**, therefore, Mirabello is to be reinstated to her entitlement as a tenured part-time supplementary teacher, her assignment in either the Title I or S.C.E. program a management prerogative; and is to be compensated for the 1981-82 school year to the extent she would have received had she not been illegally terminated with emoluments and benefits afforded all other teaching staff members as per the Appellate Division decision in Spiewak at 320. **IT IS SO ORDERED.**

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

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OAL DKT. NO. EDU 5126-81

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

3 August 1982
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

5 August 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

August 6, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

WITNESSES

Glory Mirabello, petitioner

Henry Roes, Board Secretary

Clarence H. Rothe, Superintendent/Principal

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EVIDENTIARY DOCUMENTS:

J-1 1976-77, Mirabello vouchers

J-2 1977-78, Mirabello vouchers

J-3 1978-79, Mirabello vouchers

J-4 1979-80, Mirabello vouchers

J-5 1980-81, Mirabello vouchers

J-6 Factual data on 1981-82 staff

J-7 Factual data on other 1981-82 staff

J-8 Blank I.E.P. instructional guide

J-9 Extracts of Board minutes of October 12, 1976; October 11, 1977; August 14, 1978; October 8, 1979; and September 8, 1980 - (2 pages)

J-10 Petitioner's application for tutorial position 10/8/73 - (2 pages)

J-11 Teacher salary guides 1976-1981

J-12 1976-1981 school opening and closing dates and petitioner's employment beginning and ending date

J-13 Hourly salary rates September 1, 1979 - June 30, 1980

J-14 Blank Supplementary Instruction Report

J-15 Blank I.E.P. instructional guide (more detailed than J-8)

J-16 September 11, 1980, Superintendent to all teachers memo re 1980-81 evaluation

J-17 Job description - supplemental teacher, September 1979 - June 1981 - (2 pages)

J-18 1980-81 negotiated board - RPEA

J-19 Petitioner's elementary certificate issued August 4, 1965

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EVIDENTIARY DOCUMENTS:

P-1 1980-81 daily schedule of petitioner

P-2 1980-81 lesson plan book for petitioner

P-3 April 15, 1980, Roes to petitioner letter re nonrenewal

P-4 April 16, 1981 Roes to petitioner letter re nonrenewal

C-1 Classification of pupils assigned to petitioner 1978-81

C-2 June 8, 1981 Board minutes

C-3 July 13, 1981 Board minutes

C-4 August 10, 1981 Board minutes

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GLORY MIRABELLO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCHELLE PARK, BERGEN COUNTY,	:	
RESPONDENT.	:	

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

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

Petitioner's primary exceptions contend that the Honorable Ward R. Young, ALJ improperly determined her tenure to be that of a part-time teacher. Petitioner argues that her seniority is to a full-time position, including that of a regular elementary teacher, with retroactive salary. The Board's primary exceptions take issue with Judge Young's characterization, ante, of the superintendent/principal's testimony of supplemental teachers' job functions as a "distinction without a significant difference." The Board's exceptions include a letter, not part of the record, dated July 21, 1982. The Board requests to reserve its "rights" to amplify its exceptions at a later date because of conflicting vacation schedules of counsel.

Petitioner's reply exceptions object to the Board's inclusion in its exceptions of the July 21, 1982 letter and objects further to the Board's attempt to expand the time period for filing complete exceptions. Petitioner affirms the initial decision as modified in its primary exceptions.

The Commissioner cannot agree in entirety with the exceptions of either party. An examination of the record and the exhibits therein convinces the Commissioner that Judge Young properly determined that petitioner acquired tenure in the district as a part-time teacher. (J-1-5) The aforelisted exhibits do not support petitioner's allegations.

The Commissioner finds nothing improper in Judge Young's characterization of the testimony of the chief school administrator. The letter submitted as part of the Board's exceptions is not part of the record and was not considered by

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the Commissioner. Nor does the Commissioner find any provision for the amplification of exceptions requested by the Board.

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

Petitioner shall be reinstated by the Board as a tenured part-time supplementary teacher with commensurate remuneration for the 1981-82 school year.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

September 20, 1982

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5252-81

AGENCY REF. NO. 279-7/81A

NEW MILFORD EDUCATION ASSOCIATION, ET AL.,

Petitioners

v.

NEW MILFORD BOARD OF EDUCATION,

Respondent

APPEARANCES:

Sheldon H. Pincus, Esq., for petitioners
(Bucceri and Pincus, attorneys)

Mark S. Ruderman, Esq., for Board
(Dorf and Glickman, attorneys)

Record Closed July 21, 1982 Decided August 4, 1982

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

Petitioners, teaching staff members in New Milford, alleged they are tenured; alleged the Board denied them tenure and seniority rights when it acted to nonrenew their employment for 1981-82; and alleged the Board improperly compensated them at less than the teachers' salary guide. The Board denied the allegations in asserting its actions were at all times proper and consistent with law.

The petition of appeal was filed on July 10, 1981, after which petitioners were renewed for 1981-82. The petition was amended seeking declaratory relief on the tenure, seniority and compensation issues.

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The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing was held on December 2, 1981, and plenary hearing was held on March 15, 16 and 17, 1982. The record was closed on June 11, 1982 upon the filing of petitioners' reply to respondent's brief. The New Jersey Supreme Court decided Spiewak, et al. v. Rutherford Bd. of Ed., 180 N.J. Super. 312 (App. Div. 1981) on June 23, 1982, wherein Point Pleasant Beach Teachers' Ass'n v. Callam, et al., 173 N.J. Super. 11 (App. Div. 1980), certif den. 84 N.J. 469 (1980) was overruled. The court also addressed the matter of prospective and retrospective relief.

This court, on its own motion, reopened the record to permit the parties to file memoranda on the applicability of the Supreme Court decision. The record was again closed on July 21, 1982.

Petitioners were employed as Title I and/or State Compensatory Education (S.C.E.) teachers. They hold the appropriate certification for their assignments, with the possible exception of Deborah Bogyo. Prior to 1978-79 school year, they were compensated only for hours worked at an hourly rate, and were not afforded the emoluments received by other teaching staff members. Beginning with the 1978-79 school year and each subsequent year, petitioners were placed under contract and were compensated according to the teachers' salary guide, and received the emoluments afforded other teaching staff members, including participation in the Teachers' Pension and Annuity Fund. All petitioners were employed on June 23, 1982, the date of the Supreme Court decision in Spiewak. The preceding recitation of facts, undisputed by the parties, is adopted as FINDINGS OF FACT.

The Board's assertion of the tenure ineligibility of Deborah Bogyo due to her possession of only a provisional certificate will first be laid to rest. In Anson, et al. v. Bridgeton Bd. of Ed., 1972 S.L.D. 638, the Commissioner said: "The Commissioner concludes, therefore, that Petitioner Henderson has tenure in the district because he holds an appropriate provisional certificate issued by the State Board of Examiners, State

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Department of Education, Trenton" (at 639). I CONCLUDE, therefore, if Bogyo is denied a tenured status, it must be for reasons other than certification held. See N.J.A.C. 6:3-1.10(d).

Relevant employment data for the petitioners, undisputed by the parties, unless noted, are adopted as FINDINGS OF FACT:

ANITA SCULT

Scult was employed as a Title I teacher at an hourly rate as follows:

February 1972	-	May 1972
February 1973	-	June 1973
October 1973	-	June 1974
October 1974	-	April 30, 1975
November 1975	-	June 18, 1976
December 4, 1976	-	June 24, 1977
October 24, 1977	-	June 23, 1978

It is noted employment from December 1971 to February 1972 and from November 1972 to February 1973, not incorporated above, is disputed as to whether Scult was a substitute or Title I teacher. I FIND it irrelevant for determining the tenure issue, and will address the matter only if deemed essential in determining a seniority issue.

Scult was unemployed as a Title I teacher under contract on the teacher's salary guide as follows:

September 1, 1978	-	June 30, 1979
September 1, 1979	-	June 30, 1980
September 1, 1980	-	June 14, 1981
September 17, 1981	-	June 30, 1982

Scult was also simultaneously employed as Title I Coordinator from March 1978 to June 14, 1981.

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LINDA MACCHIO

Macchio was employed as a Title I teacher at an hourly rate as follows:

December 7, 1976	-	June 24, 1977
October 24, 1977	-	June 23, 1978

Macchio was also employed as a Title I teacher under contract on the teachers' salary guide as follows:

September 1, 1978	-	June 30, 1979
September 1, 1979	-	June 30, 1980
September 1, 1980	-	June 14, 1981

Macchio was also employed as a S.C.E. teacher under contract on the teachers' salary guide from September 17, 1981 to June 30, 1982.

JANET FLIEGER

Flieger was employed as a Title I teacher at an hourly rate as follows:

October 1973	-	June 1974
October 1974	-	April 30, 1975
November 1975	-	June 18, 1976
December 4, 1976	-	June 24, 1977
October 24, 1977	-	November 30, 1977

She was continuously employed at an hourly rate from December 1, 1977 to June 30, 1978, but was assigned as an S.C.E. teacher.

Flieger was also employed as a Title I teacher under contract on the teachers' salary guide as follows:

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September 1, 1978	-	June 30, 1979
September 1, 1979	-	June 30, 1980
September 1, 1980	-	June 14, 1981
September 17, 1981	-	June 30, 1982

ELAINE GLINE

Gline was employed as a Title I teacher at an hourly rate as follows:

December 1968	-	May 1969
September 1969	-	June 1970
September 1970	-	June 1971
September 1971	-	May 1972
November 1972	-	June 1973
October 1973	-	June 1974
October 1974	-	April 30, 1975
November 1975	-	June 18, 1976
December 4, 1976	-	June 24, 1977
October 24, 1977	-	June 23, 1978

Gline was also employed as a Title I teacher under contract on the teachers' salary guide as follows:

September 1, 1978	-	June 30, 1979
September 1, 1979	-	June 30, 1980
September 1, 1980	-	June 14, 1981
September 17, 1981	-	June 30, 1982

DEBORAH BOGYO

Bogyo was employed as a Title I teacher at an hourly rate as follows:

October 1973	-	June 1974
October 1974	-	April 30, 1975

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November 1975 - June 18, 1976
December 4, 1976 - June 24, 1977
October 24, 1977 - June 23, 1978

She was also employed as a Title I teacher under contract on the teachers' salary guide as follows:

September 1, 1978 - June 30, 1979
September 1, 1979 - June 30, 1980
September 1, 1980 - June 14, 1981

Bogyo was also employed as a S.C.E. teacher under contract on the teachers' salary guide from September 17, 1981 to June 30, 1982.

The Board stipulates that all petitioners were employed as full-time teachers since at least the beginning of the 1978-79 school year, with the exception of Scult, who began her full-time employment in March 1978, Rb 9-14. The Board also stipulated that petitioners were granted full credit for service as regular classroom teachers, and one year credit for every three employed as Title I teachers, when it determined to place them on the teachers salary guide, Rb 8.

The Board also stipulates in its proposed findings of fact: "Beginning in 1978-79 school year, the Title I program became 'well established' in New Milford and therefore at that time the petitioners entered into tenurable employment," Rb 15.

The Board relies on Point Pleasant Beach Teachers Association, et al. v. Callam, 173 N.J. Super. 11 (App. Div. 1980) as controlling in support of its argument that the employment of petitioners as Title I teachers is not tenurable within the meaning of N.J.S.A. 18A:28-5. It additionally argues the limitations of Point Pleasant in subsequent decisions are supportive, and cites Spiewak, et al. v. Rutherford Bd. of Ed., 180 N.J. Super. 312 (App. Div. 1981), certif. granted _____ N.J. _____ (1981) and Bergenfield Education Association, et al. v. Bergenfield Bd. of Ed., 1981 S.L.D. _____ (decided May 18, 1981), aff'd in part, rev'd in part, State Board of Education (January 6, 1982).

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The parties are now aware of the decision of the New Jersey Supreme Court in Spiewak on June 23, 1982, which overruled Point Pleasant and affirmed the Appellate Division. Memoranda were filed as to the applicability of that decision to the instant matter.

The court in Spiewak said: "We therefore hold that the legal rule established by these cases shall be applied to the teachers before us, as well as prospectively to all persons not before the Court" (slip opinion at 32). It cannot be disputed that petitioners here are "persons not before the Court."

In support of its argument against back pay, the Board cites the Supreme Court's decision of June 24, 1982 in Lavin v. Board of Education, City of Hackensack, wherein retroactive salary credit for military service was denied in rejecting the statute of limitations argument and applying the doctrine of "laches." In that matter, the court granted prospective relief from the date the Petition of Appeal was filed with the Commissioner of Education.

Petitioners rely on Ramirez v. Amsted Industries, Inc., 86 N.J. 332 (1981), wherein the court said:

> Moreover, we conclude that on balance and as a matter of fundamental fairness, the benefit of today's rule should be extended to other similarity situated plaintiffs . . ., which suits were in progress as of November 15, 1979, the date of the Appellate Division decision.
>
> There is a basic justiness in recognizing that persons who have exercised the initiative to challenge the existing law should be accorded relief if their claims — not yet resolved when the new rule of law is announced — are ultimately vindicated. [at 357]

I **FIND** petitioners in this matter were employed in positions which required possession of appropriate certificates; and that each petitioner possessed an appropriate certificate; and served the requisite time to be tenured as full-time teaching staff

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members, pursuant to N.J.S.A. 18A:28-5. In the case of petitioner Bogyo, her tenure status would cease with a break in service in the event of nonrenewal of her provisional certificate in the absence of a regular certificate.

I also **FIND** back pay, if indeed any is warranted, is to be awarded prospectively from the date of filing of the Petition, July 10, 1981. It will now be determined if any back pay is warranted.

Petitioners argue they have been improperly placed on the teachers' salary guide because the Board utilized a method granting credit of one step for every three years of service.

N.J.S.A. 18A:29-4.1 states: "A board of education of any district may adopt a salary policy, including salary schedules . . ." (emphasis added).

N.J.S.A. 18A:29-6 states: " 'Year of employment' shall mean employment by a member for one academic year in any publicly owned and operated college, school or other institution of learning for one academic year in this or any other state or territory of the United States . . . ."

In Chaump v. Belleville Bd. of Ed., 1979 S.L.D. 241, the Commissioner said:

> N.J.S.A. 18A:29-6 provides no reference of equating experience credit for salary guide placement of teaching staff members employed for less than a full day. The Commissioner must conclude therefore that the Legislature had no intention of usurping the authority it granted to local boards in N.J.S.A. 18A:29-4.1.

In Chaump, the petitioner prevailed due to the absence of Board policy.

In this matter, both parties stipulated as to the method used by the Board in granting credit for service on the salary guide. However, the record is void of any Board

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policy authorizing the administrative employment of the method. Counsel for the Board was called ex parte, with the knowledge and consent of his adversary, to detemine if such a policy was ever adopted. Counsel represented it was a method used in the absence of an adopted policy.

Here, as in Chaump, petitioners must prevail in the absence of dispositive Board policy. **I SO FIND.**

The salary guide in New Milford consists of 20 steps followed by a super-max step. The latter is indicated for the MA level only. See J-3.

In summary, I **CONCLUDE:**

1. All petitioners are tenured full-time teaching staff members.

2. All petitioners are entitled to prospective salary awards from the date of filing, July 10, 1981.

3. All petitioners are entitled to be properly placed on the salary guide and to be renewed for the 1981-82 school year in the absence of a reduction in force pursuant to N.J.S.A. 18A:28-9, and for the possible exception of Bogyo as previously noted.

Accordingly, the Board is **ORDERED** to:

1. Renew the employment of all petitioners for the 1982-83 school year, with the possible exception of Bogyo, and only if she does not possess a valid certificate.

2. Place petitioners on their proper steps for the 1982-83 school year as follows:

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Scult - Step 11 (no credit for less than five months of service in the 1971-72 school year)

Macchio - Step 7

Flieger - Step 10

Gline - Step 15

Bogyo - Step 10

3. Compensate petitioners, including Bogyo, for the difference in salary received for services in the 1981-82 school year and salaries they should have received consistent with this opinion (at one step less than indicated above.)

In the absence of a reduction in force and possible violations of petitioners' seniority rights, I **FIND** no compelling reason to address the seniority issue requested by petitioners.

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

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

5 August 1982
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

8/6/82
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 9, 1982
DATE

Donald M. Parker/ss
FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

WITNESSES

Linda Macchio, petitioner

Janet Flieger, petitioner

Deborah Bogyo, petitioner

Anita Scult, petitioner

Elaine Gline, petitioner

Donald W. Rickert, Assistant Superintendent

David S. Owens, Superintendent of Schools

Thomas Hoban, Principal

Daniel Schocklos, Business Administrator

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EVIDENTIARY DOCUMENTS

J-1	-	Title I job description
J-2(a)	-	Letter from David E. Owens to Linda Macchio dated June 13, 1980
(b)	-	Letter from Anita Scult to David E. Owens dated June 19, 1980
(c)	-	Letter from David E. Owens to Janet Flieger dated July 9, 1979
(d)	-	Letter from David E. Owens to Deborah Bogyo dated July 9, 1979
(e)	-	Letter from David E. Owens to Deborah Bogyo dated June 13, 1980
(f)	-	Letter from David E. Owens to Deborah Bogyo dated September 2, 1980
(g)	-	Letter from David E. Owens to Deborah Bogyo dated September 21, 1981
(h)	-	Letter from David E. Owens to Elaine Gline dated September 21, 1981
(i)	-	Letter from David E. Owens to Janet Flieger dated September 21, 1981
(j)	-	Letter from David E. Owens to Anita Scult dated September 21, 1981
(k)	-	Letter from David E. Owens to Linda Macchio dated September 21, 1981
J-3(a)	-	Teachers' salary guide 1980-81 school year
(b)	-	Teachers' salary guide 1979-80 school year
(c)	-	Teachers' salary guide 1976-77 school year
(d)	-	Teachers' salary guide 1976-77 school year
(e)	-	Teachers' salary guide 1975-76 school year
(f)	-	Teachers' salary guide 1974-75 school year

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(h) - Teachers' salary guide 1972-73 school year

(i) - Teachers' salary guide 1971-72 school year

(j) - Teachers' salary guide 1970-71 school year

(k) - Teachers' salary guide 1969-70 school year

(l) - Teachers' salary guide 1968-69 school year

(m) - Teachers' salary guide 1977-80 school year

J-4(a) - Title I budget materials school year 1968-69

(b) - Title I budget materials school year 1970-71

(c) - Title I budget materials school year 1970-71

(d) - Title I budget materials school year 1971-72

(e) - Title I budget materials school year 1972-73

(f) - Title I budget materials school year 1973-74

(g) - Title I budget materials school year 1974-75

(h) - Title I budget materials school year 1975-76

(i) - Title I budget materials school year 1976-77

(j) - Title I budget materials school year 1977-78

(k) - Title I budget materials school year 1978-79

(l) - Title I budget materials school year 1979-80

(m) - Title I budget materials school year 1980-81

J-5 - Teacher Contracts:

(a) - Deborah Bogyo 9/1/78 to 2/28/79

(b) - Deborah Bogyo 3/1/79 to 6/31/79

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(c) - Deborah Bogyo 9/1/79 to 6/30/80

(d) - Linda Macchio 9/1/78 to 6/31/79

(e) - Linda Macchio 3/1/79 to 6/31/79

(f) - Linda Macchio 9/1/79 to 6/30/79

(g) - Anita Scult 9/1/78 to 2/28/79

(h) - Anita Scult 3/1/79 to 6/31/79

(i) - Anita Scult 3/1/79 to 6/31/79

(j) - Elaine Gline 9/1/78 to 2/28/79

(k) - Elaine Gline 9/1/79 to 6/30/80

(l) - Elaine Gline 3/1/79 to 6/31/79

(m) - Janet Flieger 9/1/79 to 6/30/80

(n) - Janet Flieger 3/1/79 to 6/30/79

(o) - Janet Flieger 9/1/78 to 2/28/79

P-4 - April 11, 1979, Wallace to Owens letter

P-5 - May 7, 1979, Owens to Zach letter

P-6 - Title I application re teacher job description

P-7 - Title I application re coordinator job description

(P-1, 2 and 3 were marked for identification only and are not part of this record)

R-1 - Title I employee data, 1967-68 through 1977-78

R-2 - June 20, 1977, Rickert to Toensmeier Adjustment Co.

(R-3 and 4 were marked for identification only and are not a part of this record)

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NEW MILFORD EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that timely exceptions and reply exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c. The Board, in its exceptions to the initial decision, contends that petitioners were employed as Title I teachers who were improperly placed on the teachers' salary guide, in the absence of Board "adopted policy" and with apparent Board inconsistency. The Board maintains the language of the collective bargaining agreement which in pertinent part states:

> "***All new teachers will be employed at a base rate not to exceed the base salary adopted by the Board of Education in the approved budget for the school calendar year plus full credit, as full steps of the salary guide for each year of recognized teaching experience or equivalent AS EVALUATED BY THE SUPERINTENDENT OF SCHOOLS."
> (Board's Exceptions, at p. 2)

The Board further contends that the language set forth in the collective bargaining agreement, ante, justified its method of placing petitioners on the teachers' salary guide and argues its document, "bylaws and policies", specifically incorporates the collective bargaining agreement when it states:

> "RESOLVED, that in the event any policy, part of a policy or section of the bylaws is judged to be inconsistent with law, inoperative by a court of competent jurisdiction or is invalidated by a policy or CONTRACT duly adopted by this Board, the remaining bylaws, policies and parts of policies shall remain in full effect."
> (Board's Exceptions, at p. 2)

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The Board further excepts to petitioners not being considered "new teachers" since they were per diem employees and were not members of the bargaining unit at the time. Consequently, they were not considered regular teaching staff members.

Petitioner Scult excepts to the computation utilized by Judge Young in his initial decision regarding her placement on the salary scale. Judge Young ignores her four years of service as a first grade teacher from September 1953 to June 1957. Consequently, since the Board had recognized this period of service and had included it originally, Judge Young's calculations are in error and should reflect an increase of four steps over step 11, placing her at step 15 for the 1982-83 school year. The Commissioner finds no merit in the argument for Petitioner Scult's past employment from September 1953 to June 1957. The issue in the instant matter has been to address teaching experience in the Title I category only.

Petitioner also argues that the initial decision precludes the service Petitioner Scult rendered during the period of December 1971 through January 1972 for being considered together with her service as a Title I teacher from February through March 1972. It is petitioner's contention that this period from December 1971 through May 1972 constitutes a period of more than five months as a Title I teacher which was not considered by Judge Young in granting her an additional step in placement on the Board's salary guide.

Petitioners except further that to deny them retroactive salary for all the years of service rendered prior to the filing of their Petition was not intended by the Court in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). Petitioners therefore aver that Judge Young's application of Spiewak is illogical and inappropriate in the instant matter.

Petitioners' reply exceptions specifically take issue with the Board's claim that there were no inconsistencies in Board policy and that all petitioners were treated alike. Petitioners contend to the contrary that they have been singled out for special discriminatory salary treatment and placement on the salary guide and are entitled to full credit for each year of Title I service.

Petitioners except further to the Board's use of any article taken from the collective agreement between the Board and the Association because the agreement in question was not entered into evidence in this matter. Consequently, it should be rejected.

The Board in its reply exceptions contends that the record totally supports and substantiates the fact that Petitioner Scult's employment as a Title I teacher was not from

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December 1971 through May 1972, but rather her employment for that period as a Title I teacher commenced as of February 1972 and continued through May of 1972. The Board maintains that Petitioner Scult was paid as a substitute teacher for the months of November and December 1971 and January 1972. The Board's exception to retroactive pay prior to the filing of the Petition is grounded upon tne reasons set forth in Judge Young's initial decision.

The Commissioner has carefully reviewed the exceptions of the parties to the initial decision. In the Commissioner's judgment he finds and determines that the exceptions taken by petitioners regarding the issue of retroactive salary benefits is without merit by virtue of the Court's decision in Spiewak, supra. The Commissioner further finds and determines that Petitioner Scult's claim for salary benefits extending to her employment service as a regular teacher during the period September 1953 through June 1957 was not an issue relevant to this matter and is therefore equally without merit.

The Commissioner is constrained to observe, however, that the record of this matter is insufficiently developed in regard to the controverted facts surrounding Petitioner Scult's employment during December 1971 and January 1972. The Commissioner recognizes that, were Petitioner Scult to prevail regarding her employment as a Title I teacher during the aforementioned months, that period of employment service when added to her employment from February through May 1972, would entitle her to an additional placement step, prospectively, on the Board's schedule.

Accordingly, for the reasons set forth herein by the Commissioner, the findings and determination of Judge Young in his initial decision are affirmed with one exception, that exception being the findings of fact and determination yet to be rendered regarding Petitioner Scult's employment as a Title I teacher during the 1971-72 school year.

Thus, this matter is remanded to Judge Young for a limited hearing and finding of fact pertaining solely to the disposition of Petitioner Scult's claim to employment as a Title I teacher from December 1971 through May 1972 for the purpose of prospective salary benefits on the Board's salary schedule. In all other respects the initial decision is hereby affirmed. The Commissioner retains jurisdiction.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 20, 1982

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6014-81

AGENCY DKT. NO. 134-4 80

(EDU 2710-80 remanded)

WASHINGTON TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,

Petitioner

v.

UPPER FREEHOLD REGIONAL BOARD OF EDUCATION, MONMOUTH COUNTY; PLUMSTED TOWNSHIP BOARD OF EDUCATION, OCEAN COUNTY; AND MILLSTONE TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,

Respondents.

APPEARANCES:

John A. Selecky, Esq. for petitioner

Peter P. Kalac, Esq. for respondent, Upper Freehold Regional Board of Education (Kalac, Newman & Griffin, attorneys)

Henry G. Tutek, Esq. for respondent, Plumsted Township Board of Education (Kessler, Tutek, Futey & Gladfelter, attorneys)

William J. Mehr, Esq. for respondent, Millstone Township Board of Education (Cerrato, O'Connor, Mehr & Saker, attorneys)

Record Closed June 22, 1982 Decided August 3, 1982

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OAL DKT. NO. EDU 6014-81

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

This matter is remanded for presentation of respondent's case. The issue remains whether withdrawal of Washington Township pupils from Allentown High School of the Upper Freehold Regional School District can be accomplished without substantial, adverse impact on the fiscal situation, curriculum or racial composition of the student body of Allentown High School, the Upper Freehold Regional School District and the districts sending pupils to the high school.

Hearing was held on January 26, April 5, 7 and 8 and May 17, 1982, at Allentown Municipal Court.

I.

At the hearing conducted on January 26, petitioner presented data collected in cooperation with the party school districts and the Lawrence Township, Mercer County, Public Schools as to minority enrollments at Allentown and Lawrence High Schools if Washington pupils were to remain at Allentown High School and if Washington pupils were to attend Lawrence High School. Counsel had stipulated in the prior hearing of this matter that the issue was, in fact, a nonissue. The minute differences have little or no statistical significance.

The State Board of Education, however, called in its remand for evidence to be taken as to the racial balance in the affected districts, before and after the proposed change.

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That evidence was admitted by consent of all parties. It may best be appreciated in tabular form:

Allentown High School

Present situation

Total black pupils	69	= 6.934%
Total pupils	995	
Total Hispanic pupils	16	= 1.608%
Total pupils	995	

Situation if Washington pupils withdrawn

Total black pupils	64	= 7.364%
Total pupils	869	
Total Hispanic pupils	16	= 1.841%
Total pupils	869	

Lawrence High School

Present situation

Total black pupils	134	= 13.567%
Total pupils	995	
Total Hispanic pupils	2	= 0.201%
Total pupils	995	

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Situation if Washington pupils withdrawn

Total black pupils	139	= 12.399%
Total pupils	1121	
Total Hispanic pupils	2	= 0.178%
Total pupils	1121	

Differences

Allentown High School if Washington pupils withdrawn

Black pupils as % of total	+0.430
Hispanic pupils as % of total	+0.233

Lawrence High School if Washington pupils enrolled

Black pupils as % of total	-1.168
Hispanic pupils as % of total	-0.023

(P-1, P-2, P-3, P-4).

Respondent Upper Freehold Regional Board of Education asked and was granted leave to petition the Commissioner of Education for a declaratory judgment concerning provisions of N.J.A.C. 6:20-3.1, Method of determining tuition rates. The respondent board asked the Commissioner to determine whether it can charge its sending districts a pro rata share of the debt service to be incurred by virtue of the roof replacement on the Allentown High School.

On March 24, 1982, the Commissioner issued a decision deciding the question in the negative.

On April 5, 7 and 8, evidence on behalf of the respondents was generally adduced. The parol and documentary evidence tended to show, among other things, that

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the average class size at Allentown High School is 20.3 pupils. Excluding band, chorus and physical education classes, 90% of all classes had fewer than 30 pupils (R-1). The annual report of the county superintendent of schools for the 1980-81 school year (R-3), while recognizing the unique roof problem, was highly complimentary of the district's curriculum and administrative procedures. On September 2, 1981, by letter from the Commissioner (R-4), the district's educational plan was approved and it facilities "interim approved." It is noted that a Statement of Assurances, dated May 3, 1982 (R-5), shows all schools within the district making satisfactory progress toward the attainment of local goals, objectives and standards and a remedial facilities plan in progress.

Nineteen of 126 (15%) Washington pupils now attending Allentown High School would lose the opportunity to take vocational agriculture courses if all Washington pupils attended Lawrence High School. If the withdrawal of Washington pupils were phased over three years, the percentage would drop. It is not determinable how many Washington pupils presently below grade nine would elect such courses if they were to attend Allentown High School under the present sending-receiving relationship. Some of the agriculture courses now offered would have to be eliminated if Washington pupils withdraw. These tend to be low enrollment courses because they are specialized, and the loss of even a few pupils could make their offering unfeasible.

According to the State Department of Education, the functional capacity of Allentown High School is 711 pupils (P-5). The functional capacity is calculated presuming 25% of total space is not in use at a given time. The school uses all space efficiently. No State Department of Education monitoring report in five years has raised the question of overcrowding. In addition, the alternative high school, vocational and work-study programs take enrolled pupils out of the building for all of or part of the day. Furthermore, certain areas were not included in the State Department calculation because they had not been approved for educational use. The district has sought and received county superintendent approval of 11 areas not included in the calculation (R-8). On-site inspection was made by the county superintendent and one of his staff. All areas were approved on July 24, 1981.

Since the 1977-78 school year, enrollment has been declining (R-6). There is no reason to expect this trend to reverse in the foreseeable future (R-7).

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The 1982-83 budget for the Upper Freehold Regional School District reflects a $442,500 increase in Current Expense (R-9). This is a percentage increase of 9.4, somewhat lower than the inflation rate of the nations economy for 1981-82.

The estimated tuition receivable for 120 Washington pupils will be $316,100, subject to adjustment. When added to $17,633 receivable for special education pupils (resource room category), the total anticipated receipts from Washington are $333,733.

Using current figures, if all Washington pupils were phased out of Allentown High School, six teaching positions would have to be abolished according to the Upper Freehold superintendent. Five regular teachers and one resource room teacher would be let go (R-10). Teacher salaries and fringe benefits saved plus pupil costs saved would equal $133,700. This produces a net loss of approximately $200,000.

Assuming Upper Freehold were willing to increase its budget by the amount of the net loss, the resulting increase in tuition charged to Millstone and Plumsted would be $236 per pupil. Again using current figures, this would add $51,851 to Millstone's tuition costs and $67,982 to Plumsted's (R-11). The remaining $80,200 would be the responsibility of the Upper Freehold District. After subtracting state aid of approximately $21,000, the local tax levy would have to be increased by about $59,000. (Ibid.).

Since the Commissioner has ruled that Upper Freehold may not pass on to its sending districts cost associated with the high school roof reconstruction project, approximately $156,000, at current borrowing rates and after deducting state aid, will be added to the school tax levy each year in addition to the $59,000 already adverted to should Upper Freehold undertake to cover the net loss resulting from withdrawal of Washington pupils (R-12, R-14). And if Upper Freehold were willing to assume the net loss, it would have to apply for a budget cap waiver.

The sending districts each presently owe Upper Freehold amounts from prior year tuition final calculations. There is no fixed schedule for payment of the arrearages. If all arrearages were paid, Upper Freehold would realize some $275,000 that would help offset current expense and bonding costs. It is not realistic, however, to expect the arrearages to be paid in one fiscal year. Even assuming their payment in two or three fiscal years, the cumulative effects of the Washington withdrawal and roof reconstruction would set in again immediately after payment.

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Evidence also was received on how the $200,000 reduction could be accomodated if Upper Freehold decided not to make it up via increased tax levy and tuition charges. The Upper Freehold superintendent testified that he would recommend the reduction of one vice principal position from full-time to 3/5 time, reduction of classroom teachers from 43 to 33, reduction of health services by 13%, reduction of field trips by 13% and, because of fewer teachers, a 13.5% saving in fixed charges would result (R-15). If more reductions in force were necessary, he would try to spread them among the various departments.

Should the maintenance charges Upper Freehold is now allowed to pass on the sending districts prove insufficient, the district would apply to the Commissioner for adjustment under N.J.A.C. 6:20-3.1(f).

As tuition costs rise, the effects of withdrawal accumulate. The Upper Freehold assistant superintendent for business projected an additional per pupil tuition cost of $56 to Millstone and Plumsted if the Washington withdrawal is delayed one year.

Over the objection of Washington, testimony was taken from the Upper Freehold auditor to the effect that the school tax rate in Allentown has increased by an average of 9.6% per year over the last four years. The same figure for Upper Freehold Township is 25.3% per year. The total tax rate in each municipality over the same span increased 8.2% and 17.4% per year, respectively. Assuming the withdrawal of Washington pupils, the auditor prepared best case and worst case projections (R-20, R-21). These show current expense increases in tax levy for the district of $59,000 and $147,000, respectively, depending on whether Upper Freehold decides to add to its tax levy and tuition charges and whether arrearages are recovered from sending districts.

Evidence adduced as to impact on educational programs and loss of staff tended to show that Washington pupils are, as a group, the brightest, highest achieving and most academically oriented in Allentown High School (R-16). Their removal from the school could change the character of the school in that it would become somewhat more homogeneous with a corresponding deemphasis on academics.

The Upper Freehold superintendent expressed the opinion that the district cannot maintain a thorough and efficient program without the Washington pupils. A

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50-pupil decrease this year led to abolition of two teaching positions but no course deletions. All reductions in force and course drops are tied to budget caps as well as enrollment declines. If a phase out of Washington pupils is accomplished, the district could not make up the net revenue loss except by increasing tax levies and tuition charges and by seeking a budget cap waiver. The superintendent also expressed the opinion that the Board would not seek a cap waiver.

Thus, a loss of 13% of pupils yields an improportional reduction in staff, perhaps as much as 30% (R-15, R-16). This, in turn, would yield larger average class size.

Extra curricular impact was not calculated because it is virtually impossible to do so. Testimony was given that it is difficult to staff extracurricular activities now. Any decrease in staff can only exacerbate the problem or require that some activities be eliminated. The superintendent would not recommend reductions in noninstructional professional staff.

The County Coordinator of School Program Improvement testified to the advances the district has made in five years. No portion of the school program is unapproved and facility upgrading is in progress. Breadth of program offerings, with the addition of some 30 courses over the last five years, is definitely approved (R-5, R-17). In the July 15, 1981, analysis of minimum basic skills data for 1978-81, the district showed good growth and was approved as to basic skills (R-19). The coordinator observed no overcrowding. Functional capacity plays an important role, but is not the be-all and end-all of pupil housing. Based on her observations of room sizes, comfort levels, availability of books and materials, high school pupils are comfortably accommodated.

Plumsted and Millstone were afforded from April 8 until April 30 to prepare board of education and auditor responses to the materials entered in evidence. Responses were directed in the form of written testimony and were so received R-22, R-23, R-24, R-25). The auditor's responses (R-22, R-25) tended to show an adverse impact on Millstone and Plumsted if Washington pupils were withdrawn. On its right reserved so to do, Washington called for and was granted cross-examination on the testimony on May 17.

On cross-examination, the Plumsted superintendent testified that the loss of Washington pupils would lead to some drop in total school achievement; that this in and of itself would not seem sufficient reason to bar the withdrawal; that the loss of teachers at

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Allentown High School would have a direct and detrimental impact on program and program offerings; that some courses would not seem to be affected but the total number of pupils withdrawn would have to lead to reductions in staff, and that reductions in staff would have to lead to reductions in program offerings.

The Millstone superintendent testified that he does not believe Allentown High School to be overcrowded; that all pupils are not in the building at any given time; that functional capacity relates more to building planning than to building use; that enrollment declines, vocational education programs and the alternative school have combined to relieve overcrowding; that his board believes smaller classes are generally desirable and sees Allentown High School as educationally desirable and economically reasonable; that he does not believe 15 teaching positions would be eliminated if Washington withdrew, but some reduction in course offerings would be inevitable even if fewer than 15 teachers were reduced upon completion of the Washington withdrawal; that some decreases in enrollment can be absorbed but there is a break-off point at which there would have to be course reductions or overcrowded classes; that a phased withdrawal of Washington pupils might seem to lessen the impact, but the total effect would be the same as a complete withdrawal; that if there are course cut-backs at Allentown High School, fewer Millstone pupils will select the college preparatory program; that if fewer pupils attend Allentown High School, total tuition costs might be less but per pupil tuition charges would have to be higher; that Millstone would have to consider withdrawal if Washington is allowed to leave; that much advanced course work has been instituted at Allentown High School and it would be imperiled if Washington withdrew both because of the higher caliber of Washington pupils and because a decline of even a few pupils can make these course offerings unfeasible, and that the removal of Washington pupils would have an immediate effect on the tuition per pupil charged his district, perhaps raising it to as much as $3,274 rather than the $2,900 estimated for 1982-83.

II.

Petitioner's arguments stress that Allentown High School is and has been using temporary classrooms in an attempt to house all students and course offerings. Construction of the new roof will not add a single instructional space. Petitioner concludes that several hundred pupils are required to use temporary facilities in order that favorable class size be maintained.

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Education cannot be separated from pupil population. Upper Freehold would seem to set aside the question of functional capacity of the building as irrelevant.

In the early 1970's, when Upper Freehold on two occasions tried to terminate the sending-receiving relationship with Washington, R-6 in evidence reveals that Washington had more pupils and a higher percentage of pupils in Allentown High School than now although total pupil population is about the same now as then. At that time there were no questions raised about educational or financial impact on Upper Freehold, and the other sending districts did not even participate in the cases. The essential facts are the same today, however. Yet respondents claim the withdrawal of 120 pupils from Washington would cause the loss of as many as 15 teachers, $200,000 in receipts, 11 courses and an increase in class size.

An enrollment decline of 50 pupils between 1980-81 and 1981-82 did not affect the school's program at all (T 111, 36-7). But, the loss of even 36 Washington pupils next year would have dire consequences (T 111, 46-7). A decrease of $200,000 in receipts does not seem to lead to the educational disaster and tuition charge increases respondents claim, especially when one considers that it represents only 3.6% of the total Upper Freehold budget. If tuition is increased, it should result in at least maintenance of the status quo.

Since the Commissioner has ruled that there now exists no formula for allocating any of the forthcoming roof costs among the receiving districts, any consideration of those costs should be excluded from consideration of the present matter.

The testimony of the Plumsted and Millstone superintendents added little to respondents' case. The pertinent facts are that Allentown High School was and is overcrowded. There are no plans for alleviation of this problem. Lawrence High School, in contrast, has a pupil population below its functional capacity and that population is declining (P-7). The number of Washington pupils attending Allentown High School has been dropping (R-6) so that now only 13.2% of the total high school population is from Washington. All of the Washington pupils now at the school would complete their studies at Allentown. It would, therefore, take three years to complete the phase out. Despite a drop in Washington pupils, the educational program at Allentown High School has made marked improvement. It should continue to do so.

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The projections made by Upper Freehold showed the very worst that could happen if all Washington pupils were withdrawn in one year. But if only the current Washington pupils in eleventh grade were not to attend Allentown next year, the loss would be about 35 pupils. The loss through natural enrollment decreases was 50 pupils last year and it caused no hardship. Certainly, the loss of 35 pupils next year would cause no grave consequences.

The enrollment decrease over the last five years equates with the number of pupils Washington proposes to withdraw. Yet, in the last five years, course offerings and the amount of money spent for school purposes rose.

The immediate past experience must be considered a better indicator than the adverse projections of respondents, and the recent history has been good.

The Washington Township Board of Education has provided an excellent facility and educational program for its elementary pupils. It wishes to continue this strong educational program in a facility that can adequately house its pupils.

III.

Upper Freehold contends that the State Board of Education, in its remand, stated, "the application rests essentially upon overcrowding at Upper Freehold Regional" (Slip Opinion at p. 2).

Initially, the parties had stipulated that the termination of the sending-receiving relationship between Washington and Upper Freehold Regional would not have a racial impact. Documentation which has now been provided the court clearly demonstrates that the racial effect resulting from a termination would be de minimus.

The effect of the termination on the curriculum, however, would be anything but de minimus. The substantial, specifically adverse effects on the curriculum as delineated in the oral testimony of the Upper Freehold superintendent when juxtaposed with the general unsupported statements of the former Washington superintendent, clearly demonstrate that the petitioner has not satisfied the statutory test of demonstrating

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"good and sufficient reasons" which would warrant a change in the allocation or apportionment of its pupils.

However, before comparing the testimony of the superintendents, the question of alleged overcrowding at Allentown High School should be addressed. As was noted, the State Board, in its decision, indicated in remanding this matter that the application rests essentially on the question of overcrowding at the school.

The Bureau of Facility Planning Services of the New Jersey Department of Education, established the functional capacity of Allentown High School as 712. Exhibit R-7 in evidence convincingly demonstrates that the morning session at the Allentown High School accomodates, if all pupils are present 837. The afternoon session accomodates, if all pupils are present, 771. The Upper Freehold superintendent testified that an average of 10% of pupils on a daily basis is absent. Thus, taking the normal absences into consideration, the school is slightly above its functional capacity in the morning session and is slightly below its functional capacity in the afternoon session. It should be noted further that the functional capacity figure established by the Bureau did not take into account additional temporary space approved by the County Superintendent (R-8).

Further, it should be noted that the Upper Freehold Regional High School is on a single unstaggered session, it has a seven-period day, the average class size is 20, and, excluding physical education, chorus, and band, 89.5% of the district's classes do not exceed 29 pupils (R-1, R-7).

If functional capacity means the number of pupils that a school can handle "comfortably," Morris School District v. Boards of Education of Harding and Madison, 1974 S.L.D. 457, at 467, then based on the foregoing, it is clear that education at the Allentown High School is being dispensed in an atmosphere of comfort. Thus, if the application herein as the State Board observed "rests essentially upon overcrowding," then it should be dismissed once again.

On page 2 of its decision, the State Board states, "We view this type of case not so much an adversary proceeding, as a search for the whole truth."

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The State Board with its concern for the whole truth on page 2 of its decision, writes on page 3:

> Since the record now contains some evidence that the proposed termination will not substantially harm the educational program or students of Upper Freehold Regional, the burden of going forward with the evidence to the contrary has now shifted to the Regional . . . .

The "some evidence" to which reference is made is alluded to on the same page of the State Board decision and reads as follows:

> The Washington Superintendent has also testified that the withdrawal of Washington would absolutely not have an adverse impact on the educational program or the student body of Allentown High School (Decision of ALJ at p. 5).

The above quotation attributed to the Washington superintendent is a portion of his testimony on cross-examination, which testimony was lifted out of context from the initial decision. The section from which it was lifted reads in toto, as follows:

> On cross-examination, the Washington Township Superintendent testified that, in his opinion, a thorough and efficient education can be provided at Allentown High School depending on how the rooms are used (TIV, 40); that in projecting the percentage of pupil loss to Upper Freehold, that is those pupils that complete eighth grade in Washington Township, but who do not attend Allentown High School for grades 9-12, he added the average for 1974-79 (22%) to the 1979-80 figure (50%) and divided by 2, giving a six year average of 36%, rather than using the figure for each year in the period and dividing by six, which would have yielded 26.6% (TIV, 45-49); that he made no study of the educational impact of the proposed termination on the Upper Freehold Regional schools (TIV, 64); that it was his opinion that the withdrawal of Washington Township pupils would absolutely not have an adverse impact on the educational program or the student body of Allentown High School (TIV, 73); that to his knowledge there is little if any difference in the teacher to pupil ratios at Allentown High School and at Lawrence High School (TIV, 76).
>
> He further testified that fiscal impact on the other sending districts had not been calculated (TIV, 102-03); that the number of pupils completing eighth grade in Washington Township has decreased in the last 12 years (TIV, 107); that certain observations he made at Allentown High School were based on class visits of three to four minutes' duration (IIV, 130); that similar observations were made at Lawrence High School and that no difference in the quality of instruction could be discerned (TIV, 133).

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It seems obvious that the reason the administrative law judge quoted the Washington superintendent's opinion relative to the want of an adverse impact on the student body at Allentown High School was to demonstrate that in the context of his total testimony, the opinion was without any basis.

On the other hand, the Superintendent of Schools of Upper Freehold Regional presented an exhaustive study of the total impact on the educational program for the remaining students in the Upper Freehold Regional district should the Washington Township pupils be permitted to leave.

The oral testimony of the Upper Freehold superintendent supplemented R-15 and R-16 in evidence, which exhibits detailed the total impact on the school program, including not only losses in the administrative and instructional areas, but also the effect on health services, transportation and fixed charges.

The combined oral and documentary evidence in this regard graphically addressed the number of teachers that would be lost, the subject areas that would be adversely affected as well as the impact on student-teacher ratios and the abolishment of programs. The adverse educational impact would not only be substantial but also is totally unwarranted. Exhibits R-3, R-4, R-5, R-17 and R-19 clearly demonstrate that the Upper Freehold Regional educational program is unquestionably commendable.

The remaining area to be addressed is the fiscal impact. The Borough of Allentown and the Township of Upper Freehold have had substantial increases in their tax levies over the past five years resulting from increases in educational costs (R-20). The additional financial burden that would be occasioned by the lost revenues to the regional school district if Washington pupils were permitted to withdraw would be devastating to the two remaining sending districts (R-10, R-11).

Upper Freehold submits the petitioner has not met the good and sufficient reason test to justify the change in allocation or apportionment of pupils. Any equitable determinations to be made on this application for such a change must necessarily, based on the proofs presented, accrue to the respondent receiving school district.

Millstone submits there are basically four criteria to be evaluated by the Commissioner of Education in determining whether a sending-receiving relationship should be terminated.

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These criteria are:

1. Racial impact on the receiving district caused by loss of transferred pupils and upon the new receiving district.

2. Capacity of the receiving district school and whether that school is overcrowded prior to the transfer.

3. Effect on curriculum and educational process if the sending district is allowed to withdraw.

4. Financial impact on the receiving district and other sending districts to the receving district school caused by the withdrawal.

The Millstone Township Board of Education believes the withdrawal of Washington pupils from the Upper Freehold Regional school district would be detrimental in three of the four above-mentioned categories.

It is obvious from the submissions made by Washington Township and corroborated by the Regional District itself, that the withdrawal of the Washington pupils would not substantially affect the current racial balance existing in the Upper Freehold Regional High School population and, therefore, this criterion is not a crucial factor in the final determination as to whether Washington Township should be permitted to withdraw.

Capacity and overcrowding are another question. The testimony of the Washington Township witnesses as to the functional capacity limits of the Allentown High School is on the record. Contrary to the functional capacity determined by the State Department of Education, which is a design criterion rather than an actual limitation on the number of students a school building can support, the Upper Freehold Regional Board of Education presented Exhibit R-7. This exhibit clearly shows that in practice, even assuming that all students were in attendance on any day, the actual number of students in physical attendance at the school building does not substantially exceed the functional capacity of the school. Testimony of the Upper Freehold superintendent shows that the school is not on double session, is not on any type of irregular hour system and that variations in class sizes are either by design for educational purposes or are due to the actual selection of courses by students causing difficulties in satisfying the students'

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course selections where there were limited numbers of certain classes available. It was these alone which caused scheduling difficulties in turn causing certain class sizes to be larger. The testimony that was given by the Millstone Township superintendent was that there have been no complaints by Millstone parents or students regarding overcrowding at the school since the Alternative School was opened. The Millstone superintendent also testified that the Millstone Township Board of Education is presently satisfied with the average class size which prevails at the high school and emphasizes that such class sizes are at an economical level which balance the economies of school financing with the educational concepts embodied in the Thorough and Efficient Education Law.

Testimony was also given by both the Upper Freehold and Millstone superintendents that future enrollment projections from the sending districts and the receiving district, even if Washington does not withdraw, show a continuous trend of decreasing enrollment which began in 1977-78 and which will, within the next two years, bring the student population actually in attendance at the school on any day substantially below the State determined functional capacity level.

If Washington is allowed to withdraw its pupils during this period of decreasing enrollment, the high school will end up with excess capacity and a less than optimum balance between the mandates of providing a thorough education at the same as providing an efficient education. It is probable that with the Washington pupils being withdrawn, the remaining student population at the school during a period of decreasing enrollment would mandate the closing of the Alternative School program which educationally has been very successful as admitted by all of the superintendents who testified. This would be detrimental to the educational process for all the sending districts and the receiving district involved.

As to curriculum and educational considerations, the Washington Township Board of Education, in direct testimony, presented no proofs as to the possible effect on the high school of their withdrawal. Contrary to that, the regional district superintendent, as summarized on Exhibits R-10, R-11 and the attachments to R-16, clearly showed the four-year effect that the withdrawal would have on the available curriculum at the school as well as the increases that would be involved in class sizes that would have a detrimental effect on the quality of education. It is true, as Washington contends, that the decision would have to be made by the Regional Board and the sending districts, although without a vote by the sending districts, as to whether the courses would

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be dropped or the receiving and sending districts would bear the costs of continuing the current educational program at its current level. It is probable that neither extreme is true; that is, neither would the school reduce all of the teachers proposed by the Upper Freehold superintendent, nor would the board of education be willing to continue the current level of education at the substantial increase in expeditures that would be involved for the surviving receiving district and the two sending districts.

What petitioner neglects to recognize, however, is that while this is going on, the projections for the total student population in the school, with or without Washington, are decreasing. This, therefore, will create additional distortions and difficulties in granting the same course selections as presently exist. Given the large amount of fixed charges involved in the operation of a school the size of the regional high school, the increased financial burden will exist on the receiving and sending districts anyway because of the decrease in student population. There is no question in the minds of the members of the Millstone Board of Education that any reduction in the current teaching staff at the high school of 30% or by any substantial percentage would have a serious, adverse affect on the diversity of course offerings and on the quality of the actual classroom situations involved.

The Upper Freehold superintendent testified that the Washington pupils in general were the brightest and most academically oriented students in the school. If these students were allowed to withdraw it would be difficult for the Upper Freehold Board of Education to continue to justify some of the advanced placement programs that presently exist at the school. The Millstone superintendent, as spokesman for the Millstone Township Board of Education, testified that if the college preparatory type of advanced educational courses were to be dropped at the high school or the course selections were to become more limited and/or class sizes were to increase, it would be likely that a larger percentage of Millstone students would elect to attend private and parochial schools in order to obtain their pre-college educations. The effect of this would be to damage further the educational process at the Upper Freehold Regional High School, since there again would be fewer academically oriented pupils in attendance, the tuition available to the regional school to support the high school would be reduced and the chain reaction caused by the Washington withdrawal would accelerate to the detriment of a thorough and efficient education at Allentown High School.

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As to financial considerations, Millstone contends that Washington did not present any testimony of value regarding the financial impact on the remaining sending and receiving districts should Washington be allowed to withdraw. The testimony of the Upper Freehold superintendent (R-10, R-11) shows a substantial increase in student tuition charges that would be occasioned by the withdrawal. R-25 and R-22 discuss the impacts after the withdrawal projected by both Plumsted and Millstone as sending districts. Both of these exhibits show a substantial increase in the tuition that would have to be paid by sending districts if any attempt were made to maintain the current school program after withdrawal. Again, Millstone emphasizes that the figures that were used for these studies all involved the last full-year actual audited tuition charges based upon the school population in existence at that time, and they do not provide for the effect that expected decreased enrollments in the future will have on tuition rates.

Washington has suggested that the Commissioner not consider the other financial factors affecting the sending and receiving districts such as the roof repair expenses at the high school and the expected new bond issue that Millstone will probably be involved with within one year (R-25). In an ideal world, one could always consider each problem in isolation from all others. In fact, however, just as it would be dealing in the abstract by the Commissioner to look only at the direct impact of the withdrawal without considering the fact that projections for the school from the remaining districts over the next several years show a decreasing enrollment, it would be equally improper for the Commissioner to consider the financial impact of a Washington withdrawal solely in the abstract and without considering other known factors affecting the sending districts. Regardless of whether or not a portion of the roof expense is allocated to the sending districts, it is a financial factor which presently exists since the contracts have been let and bond anticipation notes have been issued. These directly affect the financial integrity of the district.

In addition, it would be just as improper for the Commissioner not to be aware of the impending bond issue for the construction of a new elementary school in Millstone which may involve a capital expenditure of approximately $5,000,000, when it is the County Superintendent's office that has raised the question as to whether they will continue to certify on an emergency-use basis the two wooden school houses that are presently being used to the maximum by Millstone. The roof on the Allentown High School and the proposed bonding in Millstone are "real world" facts which exist and which complicate the financial impact of the Washington withdrawal. Regardless of whether or

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not Washington withdraws, the people who will be paying the bill for education in Millstone, Plumsted and Upper Freehold are the same people, with the same taxable ratables and with the same funds available to pay the increased educational tax burden.

For these reasons, the Millstone Township Board of Education cannot support Washington Township's request to withdraw. Millstone does agree that if all other factors involved with the withdrawal would remain constant, and if a thorough and efficient education at reasonable costs could be provided to the remaining students in the school district, that it would probably support Washington Township's desire to relocate its pupils. However, while Millstone philosophically agrees that a sending district should have the option to move its students to a receiving district of its choice, neither Millstone nor the New Jersey Legislature in their adoption of the applicable statutes regarding withdrawal can allow philosphical feelings to overcome the negative impact that the withdrawal would have on the quality of education and the cost of education that would result at Allentown High School. The main justification that Washington Township offers is theoretical, functional capacity limitation at the high school. It is clear from the uncontroverted testimony of the Upper Freehold superintendent, as supported by the sending district superintendents and the county office representative, that the high school is presently operating at an optimal actual capacity and that there is, in fact, no overcrowding, and due to the decreased enrollment projections for the future, overcrowding will not occur.

Washington Township has not proven its case that there will be little or no detrimental impact for the remaining school districts, and it should not be allowed to withdraw at this time when the result on the remaining school districts would be to affect their ability to provide either a thorough education or an efficient education.

Plumsted relies on the essential factual data as contained in Exhibits R-1 through R-20 and most particularly on those submitted into evidence during the testimony of the Upper Freehold superintendent for the purpose of showing an adverse impact, educationally and financially, on the Upper Freehold Regional School District and the consequent, related effects upon the students and the Plumsted Township School District. Its opposition to the Washington withdrawal is based on these data.

A further consideration testified to by the Upper Freehold superintendent as well as by the Plumsted superintendent, while not as graphic as the above-mentioned

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exhibits, is the "leavening" effect which the acknowledged superior quality Washington pupils have as an ingredient in the Allentown High School student body. The mixing of superior students with less outstanding students apparently raises achievement scores and classroom standards of the school and student body to which the better students are added (R-23).

The greater good accruing to Allentown Borough, Upper Freehold Township, Millstone Township and Plumsted Township pupils represented by the above factors as against the minimal benefits that may accrue to Washington pupils by their withdrawal from this regional district is an equitable consideration that must balance in favor of the respondents.

IV.

Only where educational benefits to pupils offset financial loss to the receiving district is the Commissioner clearly under a duty to grant termination of a sending-receiving relationship. Sparta Bd. of Ed. v. Newton Bd. of Ed., 1939-49 S.L.D. 30 (1946). The Commissioner will grant an application for change only when he is satisfied that benefits will accrue to the pupils thereby sufficient to overcome the claims of the receiving district to those pupils. The burden of proof rests upon the petitioning board to establish the good and sufficient reason for a change required by R.S. 18:14-7 (see now: sections 18A:38-11 to 38-14 and 38-19). Haworth Bd. of Ed. v. Dumont Bd. of Ed., 1950-51 S.L.D. 42, 43 (1950).

In In the Matter of the Application of Caldwell-W. Caldwell Bd. of Ed., 1957-58 S.L.D. 43 (1957), termination was granted where evidence showed overcrowding in the receiving district, that continuance of overcrowding would impair the educational program and that pupils of the sending district could receive adequate education in any of four nearby districts. In 1959, a termination was granted where the evidence showed facilities were inadequate "to provide a thorough and efficient system of secondary education for the predicted enrollment . . . ." In the Matter of the Termination of the Sending-Receiving Relationship Between Pitman Bd. of Ed. and Mantua Bd. of Ed., 1958-59 S.L.D. 101, 102 (1959).

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It must be considered whether the receiving district is providing school facilities and an educational program suitable to the needs of the pupils of the sending district and whether the receiving district will be seriously affected educationally or financially by the withdrawal of pupils. In the Matter of the Application of Green Brook Bd. of Ed. to Terminate the Sending-Receiving Contract with Dunellen Bd. of Ed., 1967 S.L.D. 329, aff'd State Board 1968 S.L.D. 261. In Green Brook, while the testimony showed that a new school in the sending district would give greater flexibility, it did not establish such gross inadequacies of programs or facilities in the receiving district as to be unsuitable. Other testimony showed the receiving district's program reflected student needs, class sizes were reasonable, no substandard facilities were in use and new programs were being offered as needs arose. Projected enrollment figures were unlikely to alter the situation. The evidence did not support a finding that Dunellen was not providing facilities and programs suitable to the Green Brook pupils' needs to such a degree as to warrant termination. It did, however, establish that withdrawal would result in a substantial loss in tuition and have an effect on the tax rate in the receiving district which, in turn, would affect efficiency of the school because of smaller classes.

Where the evidence amply supported a finding of overcrowding in the receiving district schools that would not be alleviated even by construction of a new school, termination was granted. In the Matter of the Application of the Franklin Tp. Bd. of Ed. to Terminate the Sending-Receiving Relationship with the Vernon Bd. of Ed., 1970 S.L.D. 317.

In In the Matter of the Application of the Boonton Bd. of Ed. for Termination of the Sending-Receiving Relationship with the Lincoln Park Bd. of Ed., 1974 S.L.D. 1023, while present overcrowding presented "some prima facie good reason" to sever the relationship, there was no viable alternative. More importantly, termination would reduce enrollment in the receiving district to a barely functional level and make it difficult to sustain diversity in course offerings. In 1978, a termination was approved where the receiving school would exceed its functional capacity in another year and severance would adversely affect neither party either financially or educationally. In the Matter of the Application of E. Windsor Reg'l School Dist. for Termination of the Sending-Receiving Relationship with Cranbury Tp. School Dist., 1978 S.L.D. 502.

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N.J.S.A. 18A:38-13 reads:

> No such designation of a high school or high schools and no allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except for good and sufficient reason upon application to the commissioner, who shall make equitable determinations upon any such applications.

N.J.S.A. 18A:38-21 provides for such applications and N.J.S.A. 18A:38-22 states, in pertinent part, "if the commissioner finds that there are good grounds for the application, as provided in this article, he shall give his consent, and the applying board of education shall thereupon be entitled to terminate the agreement . . . . "

The statutes and case law are clear. The burden rests on the petitioning board to establish the good and sufficient reason and an application will be granted only where the preponderance of evidence shows that benefits will accrue to the subject pupils sufficient to overcome the claims of the receiving district to those pupils. Haworth, above.

A two-pronged test must be applied. First, is the receiving district providing school facilities and an educational program suitable to the needs of the received pupils and, second, will the receiving district be seriously affected educationally or financially by withdrawal of those pupils. Green Brook, above.

As in Green Brook, the present matter presents facts which show no inadequacies of programs or facilities of a magnitude that renders either unsuitable. On the contrary, evidence shows good growth of programs designed to reflect pupil needs and an improving facility situation. And, as in Green Brook, the evidence does show that withdrawal would result in a loss of tuition that would have a negative impact on the tax rate in Upper Freehold, Millstone and Plumsted and, ultimately, on programs.

The net loss of tuition, some $200,000 upon completion of a phased withdrawal, does not at first appear critical in a budget of several millions of dollars. The Upper Freehold situation is unique, however. Not only is it, as are most other districts, subject to a reduction in already anticipated state aid, but its financial situation has been

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precarious for several years. The Upper Freehold superintendent's testimony that the Board would be unlikely to seek budget cap waivers in order to keep certain courses if tuition for Washington pupils were lost is completely credible. A loss of 50 pupils between 1980-81 and 1981-82 was absorbed with minimal disruption, except, of course to those staff members who were displaced. However, at this point, any further losses will have to have an effect on the program. Barring some new and dramatic approach to state aid, Allentown High School is likely to face some serious program decisions as a result of declining enrollments in the immediate future. Withdrawal of Washington pupils at the same time can only exacerbate the situation. Advanced and specialized courses will be especially vulnerable.

Here, as in Boonton, above, the State Board of Education found "some prima facie good reason" in petitioner's case. Respondents' proofs, however, weigh more heavily in the balance.

The county coordinator's testimony makes plain that the educational program at Allentown High School is thorough and efficient and, just as importantly, it is responsive to pupil needs. The program is comfortably housed. Other evidence adduced shows immediate and substantial negative effects of a withdrawal of Washington pupils, whether phased over three years or immediate. The gains for pupils realized by five years of hard work by staff of the regional district in cooperation with the State Department of Education are at some risk because of financial exigencies coupled with enrollment declines. No equitable determination can overlook how much this problem would be worsened by the loss of Washington pupils and tuition monies. In short, I am not convinced that the benefits, if any, that would accrue to Washington pupils if the application were granted outweigh the claims of the receiving district. Haworth, above; Green Brook, above.

Based upon a careful review of the full record in this matter, I **FIND:**

1. The educational program at Allentown High School is thorough, efficient and responsive to pupil needs.

2. The educational program at Allentown High School is comfortably housed in approved facilities.

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3. A comprehensive facility upgrading is in progress.

4. Racial balance of pupil population in Allentown High School and Lawrence High School would not be significantly affected if the withdrawal were approved.

5. The proofs put forward by petitioner are refuted by those advanced by respondents. The loss to the receiving district outweighs any benefits to the pupils of the petitioner district if the withdrawal were approved.

I **CONCLUDE,** therefore, that an equitable determination of this matter demands decision for the respondents.

Accordingly, the application of the Washington Township Board of Education to terminate the sending-receiving relationship with the Upper Freehold Regional Board of Education is denied and the petition of appeal is **DISMISSED.**

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

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OAL DKT. NO. EDU 6014-81

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

3 AUGUST 1982
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5 August 1982
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 9, 1982
DATE

Ronald L. Parker/pr
OFFICE OF ADMINISTRATIVE LAW

fms

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OAL DKT. NO. EDU 6014-81

DOCUMENTS IN EVIDENCE

P-1 Letter, 12-1-81, Redmond to Selecky

P-2 Letter, 12-2-81, Farinola to Selecky

P-3 Letter, 12-16-81, Kalac to Selecky

P-4 Letter, 12-18-81, Selecky to the court

P-5 Allentown High School functional capacity as measured by SDE (P-17 in record of EDU 2710-80)

P-6 Lawrence High School functional capacity as measured by SDE (P-19 in record of EDU 2710-80)

P-7 Letter, 2-3-82, Farinella to Selecky

R-1 1981-82 AHS class size analysis, 14 pp.

R-2 Distribution of Washington pupils, 8 pp.

R-3 Letter, 6-1-81, county superintendent to regional district administrators

R-4 Letter, 9-2-81, Burke to Sokolow, with attachment

R-5 Statement of assurances, UFRSD, 5-3-82

R-6 Eleven-year enrollment chart, 1971-72 through 1981-82, AHS

R-7 Enrollment and facility use 1981-82, AHS

R-8 County superintendent approval of facilities, 7-31-81, 2 pp.

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R-9 Budget information brochure, 1982-83, UFRSD, 26 pp.

R-10 Financial impact projections 1982-83, UFRSD

R-11 Calculations used as basis of financial impact projections (R-10), UFRSD

R-12 Financial impact of roof project, UFRSD

R-13 Letter, 1-11-82, Leadenham to Henderson

R-14 Financial impact of $1,643,000 roof reconstruction project, UFRSD, 2 pp.

R-15 Apportionment of $200,000 high school expenditure cut, UFRSD

R-16 Impact of loss of staff on educational program, UFRSD, 5 pp.

R-17 Letter, 4-2-82, Hughes to Sokolow, with attachment

R-18 Letter, 3-23-82, Calabrese to Henderson

R-19 Minimum basic skills memorandum, 7-15-81, county superintendent to chief school administrator, with attachment

R-20 School tax rates, Allentown Borough, Upper Freehold Tp., 1977-81

R-21 Auditor projections, best case and worst case, 4-7-82, UFRSD

R-22 Plumsted auditor written testimony as to R-1 through R-20

R-23 Plumsted superintendent written testimony as to R-1 through R-20

R-24 Millstone superintendent written testimony as to R-1 through R-20

R-25 Millstone auditor written testimony as to R-1 through R-20

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BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UPPER FREEHOLD REGIONAL, BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF MILLSTONE, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	
	:	

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

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

Petitioner's primary exceptions to the initial decision by the Honorable Bruce R. Campbell, ALJ contend that the standard for withdrawal of a school district from a sending-receiving relationship, as in the present situation, lies under N.J.S.A. 18A:38-13, ante, for "good and sufficient reason." Petitioner's second exception refers to the roof problem of Allentown High School. Petitioner further excepts to Judge Campbell's citation of Green Brook, supra, by conjecturing that the Court erred in finding that the pupils in Allentown High School were comfortably housed. Petitioner's remaining exceptions argue that Washington Township children are entitled to be housed in adequate facilities.

The reply exceptions of respondent, Upper Freehold Regional Board, and respondent-intervenor, Millstone Township Board, refute those of petitioner and affirm the initial decision. Respondent argues that Judge Campbell does not disagree that petitioner carries the burden to establish the good and sufficient reason for withdrawal from the sending-receiving relationship herein. Respondent refutes petitioner's reference to the Allentown High School roof problem as having been litigated before the Supreme Court of New Jersey. In the Matter of the Application of the Board of Education of Upper Freehold Regional School District, 86 N.J. 265 (1981) The Commissioner agrees. A thorough examination of the record herein, including

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the testimony of witnesses and the numerous documents in evidence, convinces the Commissioner that the decision herein by Judge Campbell is grounded on substantial credible evidence to support his conclusion that "the educational program at Allentown High School is comfortably housed in approved facilities." The Commissioner finds merit in respondent's exceptions and adopts the rationale developed therein.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own. The application of the Washington Township Board of Education to terminate the sending-receiving relationship with the Upper Freehold Regional Board of Education is denied. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

September 20, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5643-81
AGENCY DKT. NO. 249-6/81A

MICHAEL J. COHEN,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

APPEARANCES:

Robert M. Schwartz, Esq. for petitioner

David B. Rubin, Esq. for respondent (Rubin, Lerner & Rubin, attorneys)

Record Closed July 22, 1982 Decided: August 11, 1982

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

Petitioner, who was employed by the East Brunswick Board of Education (Board) as its "coordinator of special education" since June 15, 1978, appeals from an action of the Board terminating his services, effective June 16, 1981. Specifically, he asserts that he had acquired tenure, an assertion which the Board denies.

When the pleadings were joined, the Commissioner, on August 27, 1981, transferred the matter as a contested case to the Office of Administrative Law, pursuant to N.J.S.A. 52:14F-1 et seq. At a prehearing conference on November 2, 1981, two days

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of plenary hearing were set down for February 1 and 2, 1982. The attorneys of record, however, were successful in stipulating all relevant facts, thus obviating the necessity for a hearing. As of July 22, 1982, when all briefs and exhibits had been received, the record was declared complete.

UNCONTESTED FACTS:

The following facts as stipulated to by affidavit of the attorneys of record reveal the contextual setting of the dispute (J-1).

Petitioner was appointed to the position of coordinator of special education, effective June 15, 1978. Although petitioner did not possess an administrative certificate in June 1978, he was issued a principal/supervisor certificate during August 1978.

Prior to petitioner's appointment, the position of director of pupil personnel services, with jurisdiction over special education, guidance, and testing, existed in the district. Also, prior to petitioner's appointment, the position of director of pupil personnel services was abolished, and two new positions were created: coordinator of special education and coordinator of guidance and testing.

The creation of the two positions of coordinator of special education and coordinator of guidance and testing, and the job descriptions adopted by the East Brunswick Board of Education for said positions, were not submitted to the County Superintendent of Schools for approval and determination of an appropriate certificate for holders of said positions.

Petitioner executed initial employment contracts for the following terms: June 15, 1978 through June 30, 1979; July 1, 1979 through June 30, 1980, and July 1, 1980 through June 30, 1981. Petitioner was given actual notice by the Superintendent of Schools, Joseph J. Sweeney, that the Board would be considering an extension of his contract for the 1981-82 school year at its regular meeting of March 25, 1981.

The Superintendent, however, also advised at that time that he would not recommend petitioner for a successor contract and tenure. When the Board voted on March 25, 1981, not to grant petitioner a contract for the 1981-82 school year, it was its

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intention to deny petitioner tenure in the district. Petitioner received actual notice of the Board vote the following morning, March 26, 1981. It was petitioner's understanding, which understanding he communicated to Assistant Superintendent for Personnel Brenda Witt in discussions after the March 25, 1981 meeting, that the effect of the vote was to deny him tenure and terminate his employment as of June 30, 1981. Petitioner's understanding was based on his assumption that tenure attached after three contract years, his first contractual term of June 15, 1978 through June 30, 1979, constituting but one such contract year (J-1, Exhibit 24a).

During the 1978-79 and 1979-80 school years, petitioner received three written evaluations, conducted by the Assistant to the Assistant Superintendent for Curriculum. The positions of Assistant Superintendent for Curriculum and Assistant to the Assistant Superintendent for Curriculum were both vacant at the commencement of the 1980-81 school year, leaving the Superintendent of Schools as the sole evaluator for all subject area coordinators. The Superintendent advised the subject area coordinators, including petitioner, during the 1980-81 school year that each would be asked to prepare a self-evaluation which would be reviewed by and with the Superintendent. This procedure was invoked due to the above mentioned vacancies.

Under date of February 3, 1981, petitioner submitted his completed self-evaluation form to the Superintendent. By memorandum of March 12, 1981, the Superintendent submitted to petitioner his response to the self-evaluation, which concluded with a recommendation not to reemploy petitioner for the 1981-82 school year.

On March 31, 1981, petitioner initiated a grievance proceeding under the terms of the East Brunswick Administrators Association collective negotiations agreement by informally conferring with the Assistant Superintendent for Curriculum, Dennis Clancy, who had been appointed to fill the vacant position, effective March 9, 1981. At the meeting with the Assistant Superintendent for Curriculum, petitioner discussed the substance of his evaluation, the evaluation procedures generally, and the failure of the Board to grant him tenure and a contract for the 1981-82 school year.

By memorandum of April 1, 1981, the Assistant Superintendent for Curriculum summarized the particulars of petitioner's grievance, but declined to rule on the merits because the relevant events predated his appointment (J-1 Exhibit 10a-11a).

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Petitioner moved to the next step of the grievance procedure by filing a two-page written grievance with the Superintendent on April 13, 1981, seeking, among other things, expungement from his file of the March 12, 1981 evaluation, an alternate written evaluation and a contract — with tenure — for 1981-1982 (J-1, 12a-13a). At the time he filed his grievance with the Superintendent petitioner believed he had been "discharged from his position as of June 30th" (J-1, Exhibit 19a-20a). The Superintendent denied petitioner's grievance by letter of April 27, 1981 (J-1, Exhibit 14a). Thereafter, additional correspondence was exchanged between petitioner and the Superintendent in which each set forth his views of the grievance (J-1, Exhibit 15a-16a).

Petitioner maintained his belief that his employment would terminate on June 30, 1981, until the week of June 8, 1981, when he consulted legal counsel for the first time on the matter (J-1, Exhibit 29a).

After consulting with legal counsel, however, petitioner changed his plans to leave the district on June 30, having determined that he would acquire tenure as of June 15 (J-1, Exhibit 25a). Without informing the Board or its representatives of his change in understanding, petitioner made plans to continue working through June 30, and then to commence "some kind of litigation" to assert tenure rights to his position (J-1, Exhibit 27a-33a). On June 16, 1981, the Assistant Superintendent for Personnel, Brenda Witt, was told by the Superintendent that he heard that petitioner had told employees of the Special Services Department that he had tenure. As a result, Mrs. Witt summoned the petitioner to her office at approximately 3:30 p.m. on June 16. Petitioner arrived at Witt's office at approximately 4:20 p.m., at which time he was advised not to return to his office, except to collect his personal belongings.

By letter of June 17, 1981, Board counsel reminded petitioner of the effect of the March 25 vote as the Board, the central administration and petitioner had jointly understood it, and inquired whether petitioner intended to assert a claim to tenure in the district (J-1, Exhibit 17a). Petitioner, after replying by letter of the same date that he would at a later date advise Board counsel of his thoughts regarding tenure in the district (J-1, Exhibit 18a), filed his Petition of Appeal on June 24, 1981. Between the time of the Superintendent's letter of May 4, 1981 (J-1, Exhibit 16a) and the filing of the Petition of Appeal herein, petitioner took no steps to contest the determination of the Board not to renew his contract for the 1981-82 school year.

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DISCUSSION:

Petitioner's job description as coordinator of special education sets forth in five pages a summary of the position, and specifies duties which are both administrative and supervisory in nature. Those duties focus on the staffing and operation of the special education classes, supervisory evaluation of special class teachers, oversight of special class facilities and equipment, community relations, transportation, coordination of services utilizing other staff to benefit special education classes and pupils, in-service training of special class teaching staff members, budgeting for the special education department, and development of objectives for the future (J-1, Exhibit 1a-5a). The job description, in addition to the enumeration of specific duties, provides the following succinct summary of duties and the position:

> POSITION SUMMARY: The Coordinator of Special Education is the professional leader and managerial head of Special Education. With reference to programs for children with special needs, he is the supervisor of instruction, the coordinator of curriculum development, the principal agent for the implementation of PL 94-142, the supervisor of the core evaluation process, the placement officer for children with special needs, the coordinator of the process of integration into regular classes, the public interpreter of special education, the administrator of census and screening processes, the organizer of volunteer services for special education, the coordinator of parent and student relations, and the developer of the Department's semi-autonomous status.
>
> DUTIES: The Coordinator of Special Education has some duties commonly associated with that of Principal, and duties including the following, which he performs directly or through the proper delegation of authority, within the framework of the general laws of the State of New Jersey, the regulations of the State Department of Education, and the policies and rules of the school system.
>
> [J-1, Exhibit 1a-5a]

While the title of "coordinator" exists as a recognized title, as, for example, the title "coordinator: apprentice programs," the title of "coordinator of special education" is nowhere to be found in the body of New Jersey administrative law dealing with certification of teaching staff members or categories of employment.

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An examination of the Board's job description for its coordinator of special education causes me to conclude that, since petitioner was required to supervise teachers and assist the administration with designated facets of the Board's program of educating special education pupils, he was required to be certified by the State Board of Examiners as a teaching staff member. However, since his title was not a recognized title, the Superintendent was under obligation to submit his job description to the County Superintendent in order to determine what certificate(s) he was required to hold. Such submission is not discretionary, but is required by N.J.A.C. 6:11-3.6 which states:

> (a) School districts shall assign position titles to teaching staff members which are recognized in these regulations.
>
> (b) If a local board of education determines that the use of an unrecognized position title is desirable, or if a previously-established unrecognized title exists, such board shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his/her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year.

The mandatory nature of this procedure was emphasized by the Commissioner of Education in Frank Morra v. Jackson Bd. of Ed., 1979 S.L.D. 81 at 84 ff. and in Samuel E. Appel v. Camden Bd. of Ed., 1975 S.L.D. 562 at 568. With respect to the case therein controverted, the Commissioner stated in Morra, as follows at pp.87-88:

> The Commissioner is further constrained to caution local boards of education that they should endeavor to utilize recognized titles in staffing their schools. Furthermore, in those instances where a board believes it necessary to establish an unrecognized title, that board must follow the procedures set forth herein prior to appointment of an employee to that position. Appel, supra; N.J.A.C. 6:11-3.6
> (Emphasis added.)

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Similarly apropos is the provision set forth in N.J.S.A. 18A:17-17 which provides that "No person shall be appointed, or act as, or perform the duties of, superintendent or assistant superintendent of schools, unless he holds an appropriate certificate as prescribed by the state board."

In contravention of the requirement, the rules of the State Board and the admonition of the Commissioner set forth in case law, the Board employed and paid petitioner as a teaching staff member in a position with an unrecognized title for a period in excess of three calendar years.

There is no showing in this record that the local Superintendent or the County Superintendent, who also had the affirmative duty of checking annually to make certain that every teaching staff member held the proper certification, made such a determination in petitioner's case at any time. This affirmative duty is set forth in N.J.A.C. 6:11-3.5(a) and (b), which state:

> (a) The local superintendent of schools shall ascertain if professional staff members are properly certificated and shall report to the appropriate board of education those who are not properly certificated.
>
> (b) The county superintendent shall take measures necessary for the enforcement of the State law requiring boards of education to employ only those professional staff members who are properly certificated for the positions held.

At no time, however, did the County Superintendent notify petitioner or the local district of a deficiency in petitioner's certification. Nor is there within the record evidence that he had determined what certificate petitioner was required to hold.

At this juncture, the Board argues that it is a function of the administrative law judge and the Commissioner in this litigation to determine what certificate petitioner was required to possess. I hold otherwise. There is within the body of administrative law a procedure for making such a determination. The County Superintendent has original jurisdiction, pursuant to N.J.A.C. 6:11-3.6, to render that determination and should do so upon transfer by the Board to him of its job description for coordinator of special education. I **CONCLUDE** that neither the undersigned nor the Commissioner should usurp that original jurisdictional authority.

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Petitioner, however, was in a tenurable 12-month position by reason of the requirement that as a teaching staff member supervising and administering educational programs, he was required to hold one or more certificates issued by the State Board of Examiners. With the uninterrupted passage of three calendar years on the job, tenure would accrue in such a position. [N.J.S.A. 18A:28-5(a)]. Since petitioner in his 12-month position began working on June 15, 1978, and continued for an uninterrupted period through June 16, 1981, he worked a total of three calendar years plus two days.

Respondent argues that since petitioner did not receive his principal's and supervisor's certificate until September 1978, his service until September is not countable toward the accrual of tenure. Conversely, I **CONCLUDE** that that period does count toward tenure. This conclusion is grounded on the holding in Mildred Givens v. Newark Bd. of Ed., 1974 S.L.D. 906; Joann K'Burg v. Lower Alloways Creek Bd. of Ed., 1973 S.L.D. 636; and Veronica Smith et al v. Sayreville Bd. of Ed., 1974 S.L.D. 1095, aff'd State Board of Education, 1975 S.L.D. 1160, aff'd Dkt. No. A2654-74, New Jersey Superior Court, Appellate Division, February 27, 1976; 1976 S.L.D. 1170. As was stated in K'Burg, and cited by the Commissioner with approval in Smith, at p. 1100:

> The question of whether petitioner has or has not acquired tenure does not turn, as the Board asserts, on the date and subsequent effect of the administrative memo . . . tendered her. . . . The true test of whether a tenure status has accrued is, as articulated in Ahrensfield v. State Board of Education, 126 N.J.L. 543 (1941), whether the precise conditions laid down in the applicable statues are met. In this case, the applicable statute is N.J.S.A. 18A:28-5. In this instance, these "precise" conditions are met, because petitioner has clearly served the requisite period of time in the Board's employ and acquired possession of a standard teaching certificate during the course of the academic year while she was still employed. . . .
>
> [emphasis supplied]

The Board also argues that petitioner is estopped from asserting that he has tenure by reason of the fact that he did not notify the Board that he intended to assert a claim to tenure. Petitioner was under an affirmative obligation to honor the terms of his contract which called for his services until June 1981. Absent the giving of the required notice of resignation, he was not free to terminate his services at an earlier date. Nor do the understandings of the litigating parties as to when tenure would accrue in any way

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alter the clear language of the statute which calls only for employment for three calendar years in a position in which the holder was required to hold a proper certificate issued by the State Board of Examiners (N.J.S.A. 18A:28-5). As was aptly stated in Petitioner's Reply Letter Memorandum:

> [I] n no way is it the employee's obligation to advise the Board on how to and when to act with respect to the employee's own dismissal. We have not yet arrived at a point where the employee, whose job is on the chopping block, must advise the executioner on how to terminate his employment.

I **CONCLUDE** that petitioner is not estopped from asserting his claim to tenure. I further **CONCLUDE** that his continuous service of three years and two days meets the precise time requirement for acquisition of tenure as a teaching staff member. I **REJECT** the Board's contention that such acquisition of tenure within this context would be by inequitable means. This rejection is grounded on the fact that petitioner was simply honoring the terms of his contract until the Board unilaterally prevented him from serving after June 16, 1981. While the Board, at its option, was free to have prevented his acquisition of tenure by acting to bar his continued working on the job at any time prior to the close of the working day on June 14, 1981, it did not choose to do so.

DETERMINATION:

In consideration of the conclusions set forth above, it is **DETERMINED** that petitioner was tenured as a teaching staff member on June 16, 1981, the date the Board's agent unilaterally prevented him from continuing to fulfill the terms of his employment contract. At the end of the working day on June 14, petitioner had acquired a tenured status and could not legally be terminated, absent the filing of tenure charges, pursuant to N.J.S.A. 18A:6-9 et seq. Accordingly, it is **DETERMINED** that the Board's unilateral action was ultra vires.

In consideration of the above, it is **ORDERED** that:

1. Petitioner be reinstated to his former position;

2. The Board is to pay petitioner all lost salary less mitigation in the amount of his earnings and provide all attendant emoluments;

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3. The Board shall forthwith submit its job description for the unrecognized title of coordinator of special education to the County Superintendent of Schools for a determination, pursuant to N.J.A.C. 6:11-3.6, of the certificate or certificates required for the holder of that position.

Given the above determinations, no useful purpose would be served by addressing the arguments of law concerning the absence of three evaluations of petitioner's performance during the 1980-81 school year as required by N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19. Hence, this aspect is not addressed herein.

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

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

August 11, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

August 12, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 13, 1982
DATE

Ronald L. Parker/jes
OFFICE OF ADMINISTRATIVE LAW

ij

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OAL DKT. NO. EDU 5643-81

DOCUMENTS IN EVIDENCE:

J-1 Stipulation of Facts with Appended Exhibits

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MICHAEL J. COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Commissioner notes that pursuant to N.J.A.C. 52:14B-10(c) an Order of Extension in this matter was granted such that the time limit for the filing of the Commissioner's determination be extended until October 1, 1982.

Accordingly, the Board filed primary exceptions with reply exceptions filed thereto by petitioner. The Board filed a reply to the reply exceptions for which there is no provision in law and as such were not considered.

The Board's primary exceptions to the initial decision by the Honorable Eric G. Errickson, ALJ contend that Judge Errickson erred by finding that petitioner acquired tenure in the district as coordinator of special education. The Board attempts to reopen the case by introducing new testimony in the form of affidavits. Alternatively, the Board requests a remand of the entire matter to introduce new testimony. The Board argues that no tenure can accrue to petitioner because he was inadvertently permitted to satisfy the requirements of N.J.S.A. 18A:28-5 to acquire tenure even though it was not the intent of the Board for this to happen.

The Board contends that Judge Errickson erred by not determining which certificate is required for the unrecognized position of coordinator of special education. Petitioner's reply exceptions refute those of the Board and affirm the initial decision.

Petitioner argues that, regardless of the intent shown by the Board, he met the precise conditions needed to acquire tenure under N.J.S.A. 18A:28-5. Petitioner relies on Zimmerman

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v. State Board of Education of the City of Newark, 38 N.J. 65 (1962). Petitioner states that, although the Board did not submit to the County Superintendent of Schools a job description for his unrecognized position pursuant to N.J.A.C. 6:11-3.6, nevertheless petitioner was certified during the entire time in which he served in the position. Petitioner points to the fact that the Board never questioned his certification nor did the County Superintendent. Petitioner argues that such neglect should not work to his detriment. Petitioner pleads for affirmation of the initial decision. The Commissioner looks with favor on petitioner's pleadings and finds them appropriately applicable to the present case. A thorough examination of the entire record herein convinces the Commissioner that a sufficiency of evidence is presently extant which obviates the need for a remand.

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

The Commissioner determines that the following shall prevail: petitioner shall be reinstated in his former position with tenure and lost salary and emoluments, less mitigation. Pursuant to N.J.A.C. 6:11-3.6 the Board shall immediately submit to the County Superintendent of Schools its job description for coordinator of special education for a determination of the certification required for the position.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

September 30, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6969-81
AGENCY DKT. NO. 365-9/81A

HAZEL BELLET,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK,
Respondent

APPEARANCES:

Gregory T. Syrek, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Robert H. Greenwood, Esq., for respondent
(Greenwood and Sayovitz, attorneys)

Record Closed August 18, 1982 Decided August 18, 1982

BEFORE **ROBERT P. GLICKMAN**, ALJ:

Petitioner, Hazel Bellet, seeks to have the board's action in withholding her negotiated salary increase pursuant to N.J.S.A. 18A:39-14 set aside. She asserts that she has an entitlement to a negotiated salary increase irrespective of any alleged deficiencies in her performance. Respondent argues that it has the management prerogative pursuant to N.J.S.A. 18A:29-14 to deny petitioner her negotiated salary increase.

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On September 8, 1981, petitioner filed an appeal with the Commissioner of Education. On October 9, 1981 the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on March 9, 1982, the following issues were identified:

A) Is petitioner entitled to a negotiated salary increase irrespective of any alleged deficiencies in performance or any alleged violation of N.J.S.A. 18A:29-14?

B) Was the petition untimely filed in violation of N.J.A.C. 6:24-1.2?

C) If the petitioner should prevail, what relief is she entitled to?

Issue B, dealing with the timeliness of the filing of the petition, was withdrawn by counsel for respondent by letter dated June 16, 1982.

By agreement of counsel, the matter was to be presented to the court for its determination based on a stipulation of facts and briefs, all of which the court has received and carefully considered.

DISCUSSION OF FACTS

The following Stipulation of Facts, dated April 13, 1982, is hereby set forth so as to become part of the court's Findings of Facts:

1. Petitioner, Hazel Bellet (hereinafter referred to as the "petitioner"), is a tenured teaching staff member in the employ of respondent, Board of Education of Teaneck (hereinafter referred to as the "respondent").

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2. Petitioner had reached the maximum step on the applicable teachers' salary guide by the beginning of the 1980-81 school year.

3. On June 3, 1981, respondent resolved to withhold petitioner's salary increment and adjustment for the 1981-82 school year.

4. Based upon the respondent's action of June 3, 1981, the petitioner's salary for the 1981-82 school year was maintained at $28,678, her salary for 1980-81. If respondent had not acted in the aforesaid manner, petitioner's salary for the 1981-82 school year would have been $30,836. The difference between the two salaries is $2,158.

5. The following documents are entered into evidence:

   a) Resolution 350 to withhold petitioner's increment and adjustment for 1981-82, dated June 3, 1981 (J-1);
   b) Salary list showing petitioner's 1981-82 guide step and salary (J-2);
   c) 1980-81 and 1981-82 salary guides (J-3);
   d) Letter of June 4, 1981 (J-4);
   e) Schedule D3 - Salary Regulations taken from agreement between Teaneck Teachers' Association and Teaneck Board of Education (J-6);
   f) Letter of Business Administrator/Board Secretary to Ms. Hazel Bellet, dated May 28, 1981 (J-7)

DISCUSSION OF LAW

The narrow issue to be decided by this court is whether petitioner has an entitlement to the negotiated salary increase irrespective of any deficiencies in her

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performance or any violation of N.J.S.A. 18A:29-14. Petitioner contends that a board of education only has a right to deny a teaching staff member an employment increment or adjustment increment or both. N.J.S.A. 18A:29-14 states:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year . . .

Petitioner asserts that the board lacks any power to deny a teaching staff member a negotiated salary increase since it is not one of the increments set forth in the statute.

Respondent argues that petitioner's interpretation of the statute is overly narrow and is clearly contrary to law. In a recent decision by Administrative Law Judge Kenneth Springer, Gollob v. Board of Education of the City of Englewood, 1980 S.L.D. ____, (decided December 4, 1980), he squarely dealt with the issue of entitlement to increases of a teaching staff member who was already at the top of the salary scale. Judge Springer concluded that there was no right or entitlement to annual increases resulting from a newly negotiated top-of-the-guide salary schedule. Judge Springer opined that a board of education has a management prerogative to evaluate teacher competency which may not be bargained away. See Board of Education Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311 (1979). Judge Springer went on to say in of his Initial Decision:

> From the logic of these cases, once a teacher has reached the top of the salary scale, it is appropriate for a board to grant additional annual increments conditioned upon satisfactory performance. But it violates the intent of N.J.S.A. 18A:29-14 for a board, either by agreement or policy, to make a blanket promise to grant such increases automatically, regardless of the quality of service rendered by the recipient. Surrendering the statutory right to make individual judgments about a teacher's worthiness to receive an increment based on performance would seriously undermine the public accountability of teachers for their professional conduct. Gollob's suggestion that inadequate teachers could still be disciplined by the drastic remedy of instituting tenure charges for a reduction in salary presents a completely impractical solution. [Gollob at 8]

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The concept advanced by petitioner that she is entitled to a negotiated salary increase irrespective of her performance is illogical and unreasonable. To adopt petitioner's position would require this court to disregard the board's fundamental responsibility and statutory right to make judgments about a teacher's worthiness. A teacher's right to a salary increase is always subject to the board's right under N.J.S.A. 18A:29-14 to deny such increase in individual cases. See Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288 (App. Div. 1960); Ackerman v. Board of Education of the Borough of Kinnelon, 1978 S.L.D. 717, affirmed, State Board of Education 1979, S.L.D. 815; and Messaro v. Board of Education of Bergenfield, 1981 S.L.D. _____ (decided December 4, 1981), which holds that N.J.S.A. 18A:29-14 is applicable to teaching staff members already at the top of the guide.

Although admittedly the statutory definition of employment increment is "an annual increase of $250 granted to a member for one 'year of employment' "; N.J.S.A. 18A:29-6, this definition must be construed within the context of the instant case to include a negotiated salary increase. To hold that a negotiated salary increase is outside of N.J.S.A. 18A:29-14 and not subject to a board's withholding action is to render meaningless the board's statutory right to evaluate teacher competency and to deny increments for incompetency or inefficiency. A board cannot bargain away its fundamental right to evaluate teacher performance and deny increments through the establishment of a negotiated salary increase.

For the reasons just enunciated, it is **CONCLUDED** that petitioner has no entitlement to a negotiated salary increase which is not subject to being withheld based on deficiencies in performance or any violations under N.J.S.A. 18A:29-14. Petitioner's negotiated salary increase may be properly withheld by a board of education pursuant to N.J.S.A. 18A:29-14.

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Accordingly, the petition is **DISMISSED WITH PREJUDICE.** All other issues are deemed to be without merit.

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

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

8-14-82
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

August 23, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

August 23, 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

md

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APPENDIX

EXHIBITS:

J-1	Resolution to withhold petitioner's increment
J-2	Salary List
J-3	1980-81 and 1981-82 Salary Guides
J-4	Letter, dated June 4, 1981
J-6	Salary Regulations
J-7	Letter, dated May 28, 1981

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HAZEL BELLET,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner excepts to the application of Gollob, supra, to the instant matter by the Honorable Robert P. Glickman, ALJ and contends that Gollob is not applicable herein. The Commissioner finds no merit in petitioner's exceptions; Gollob is precisely applicable to the present matter. The Commissioner so holds.

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

Accordingly, the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

October 1, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7776-81
AGENCY DKT. NO. 416-10/81A

MYRON NOVITSKY,
Petitioner
v.
NEPTUNE TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,
Respondent.

APPEARANCES:

Michael J. Herbert, Esq. for petitioner (Sterns, Herbert & Weinroth, attorneys)

Andrew J. Wilson, Esq. for respondent (Laird & Wilson, attorneys)

Record Closed July 13, 1982 Decided August 20, 1982

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

Action by a teaching staff member for reinstatement of an adjustment increment alleging that withholding of the increment was arbitrary, capricious, unreasonable and in violation of N.J.S.A. 18A:29-14.

The matter was joined before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Hearing was held on June 23, 1982, at Neptune Township Municipal Court. Posthearing submissions were timely filed.

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I.

Myron Novitsky (petitioner), a tenured teacher in the employ of the Neptune Township Board of Education (Board), claims that his adjustment increment and hence his longevity increment were improperly withheld for the 1981-82 school year by the Board. He seeks reinstatement of the increment and back pay accordingly. The Board denies the allegations, answers that its action was proper in all particulars and asks that the petition be dismissed.

II.

Evidence adduced on behalf of petitioner tended to show that he has been employed as a secondary teacher of English since 1968. In October 1980, he received his first negative evaluation (J-2). Shortly before that he had begun seeing a physician and a psychologist because of extreme hypertension and depression. A relaxant and mood elevator was prescribed.

As the school year began, petitioner was taking the medication. It made him extremely tired and sluggish. On occasion his speech was slurred. He told his physician of the problem and the physician changed the medication to a similar but milder drug. Petitioner's functioning still was impaired. The evaluation was conducted on October 2, 1980, by the supervisor of instruction.

The contents of the evaluation report were immediately made known to petitioner at a conference with the supervisor. Although disappointed, he did not contest or attempt to refute the evaluation report. Petitioner stated that he knew there were problems, but he just could not face them.

Petitioner was evaluated on October 31 by the building vice principal (J-3). The evaluation and postconference report were positive. Still believing his ability to function was impaired, petitioner again saw his physician. A third medication was prescribed. An evaluation was made on December 17 by the supervisor (J-4). The evaluation and postconference report were not uniformly good.

Petitioner testified that while on the third prescribed medication he did not feel as sluggish as he had formerly, but his blood pressure was very high and he still was

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unable to function as he wished. In approximately the second week of February 1982 his blood pressure was extremely high and petitioner discussed a leave with the vice principal. His attending physician wrote a letter recommending such a leave. The physician's letter specified no length of leave. The administration insisted on a firm period and petitioner agreed to return on the day following Easter vacation, April 27. The vice principal recommended use of accumulated sick leave so that petitioner could be paid for all or part of the leave period. Neither the vice principal nor the supervisor expressed any objection to the leave.

On the Saturday before his leave began, petitioner met with the substitute teacher who was to take his place to discuss the courses she would be teaching.

During the first week of leave, he received "a deluge of phone calls." The substitute complained she could not handle the classes and was not being paid enough. The vice principal and principal called concerning lesson plans for the leave period. Petitioner said he could not take on that responsibility. He then received a letter from the administration insisting that he send in plans for the leave period (P-6). A compromise was reached under which petitioner submitted two weeks' plans. Petitioner testified, "I might as well have been in school if I had to write the plans." He then insisted that administrators speak to him through his union president.

Petitioner's March 1981 evaluation (J-5) was completed while he was on leave. He was called in in April and given the evaluation. Under instructional observations, the area of learning environment was marked as needing improvement, planning and presentation as unacceptable and pupil management as unacceptable. The comment appended to that section states,

> Mr. Novitsky must devote more time to the planning and presentation of lessons in order to more fully utilize classtime. Pupil management must seriously be considered if the learning environment is to become productive and positive. If Mr. Novitsky is to become successful in this instructional area, he must be more responsible for the following items of the Job Description: #1, 2, 3, 4, & 8.

The job description referred to is respondent's Exhibit 6 in this matter. The items referred to in the job description are under the heading of performance responsibilities and state that a classroom teacher:

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1. Provides for a classroom environment that is conducive to learning.

2. Prepares for classes assigned, and shows written evidence of preparation upon request of immediate supervisor.

3. Plans and adapts a program of study that meets the individual needs, interests, and abilities of the students.

4. Insures that students maintain standards of school/classroom behavior.

8. Provides a variety of instructional techniques and instructional media consistent with the limitations of the location and materials provided and the needs and capabilities of the individuals or student groups involved.

Under non-instructional areas, the areas designated A. Performs assigned duties, B. Exhibits professional responsibilities, and C. Displays student interest and concern were marked as needing improvement. The comment states:

> Mr. Novitsky has experienced some difficulty this year regarding professional responsibilities and duties. He has been reprimanded for not completing and submitting plans on a regular basis as well as missing required departmental meetings and not maintaining the physical facilities of his classroom. Items #2, 11, 14, 17 must be implemented in order to receive an "acceptable" rating in this area.

Item 2 is set forth above. The other items state that a classroom teacher:

11. Takes necessary and reasonable precautions to protect students, equipment, materials and facilities.

14. Works cooperatively with the administration in implementing Board policies, procedures and/or rules governing student life and conduct.

17. Attends staff meetings and serves on staff committees as required.

Under personal factors, public relations and maintains satisfactory parental relationship were marked acceptable. Character and personality, enthusiasm, appearance, professional attitude, and attendance and punctuality were marked as needing improvement. The comment states:

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> Problems of a personal nature, poor health and the frustrations emanating from the responsibilities of his job have caused Mr. Novitsky to request extended sick leave. Although he is pleasant and cooperative, the bottom line is that students have not received an appropriate learning experience due to the extenuating circumstances brought about by the personal factors over which Mr. Novitsky has no control.

The overall evaluation was marked as needing improvement. The comment states: "Mr. Novitsky is presently using personal illness days in an attempt to readjust [his] thinking and plan his future course. Because of this, he will be unable to sign this evaluation before the designated date."

The evaluation recommends "No employment increment adjustment increment and longevity monies." It is signed by Mr. Novitsky, the supervisor, the vice principal and the principal, but the date upon which it was reviewed with petitioner and signed by him is not indicated.

On cross-examination, petitioner testified that his 1978 evaluation (J-1j) showed need for improvement in professional responsibilities, that his 1979 evaluation (J-1k) encouraged him to be more firm in his approach to discipline and that his 1980 evaluation (J-1l) "suggested that he devote additional time to item #4 of the Teacher Job Description in an attempt to reinforce firm pupil management techniques." Item 4 is set forth above and refers to maintenance of standards of pupil behavior.

Petitioner identified and testified to the contents of his Professional Improvement Plan (PIP) for the 1980-81 school year (R-1). The plan was developed, pursuant to N.J.A.C. 6:3-1.21, and finalized on April 24, 1980, at a meeting of petitioner and the supervisor. The major goal established for petitioner for the year was to develop better classroom control in order to enhance the learning environment and academic growth of his pupils. Objectives, specific strategies and evaluative criteria were also set forth. The four criteria to be applied were:

1. Evidence of procedures/routines are to be observed by supervisor in classroom visitations and examination of planbook.

2. Examine record of discussions with students and parents regarding behavior (at request of supervisor).

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3. Upon request, supervisor will review referrals and/or record of communication regarding disruptive students.

4. Supervisor will make periodic, informal observations to verify conditions of physical environment.

Parts B and C of the PIP read as follows:

B. Classroom visitations were held on the dates indicated below and the following teaching/learning activities pursuant to the accomplishment of the stated goals (Section A) were observed: (Insert an extra page, if necessary.)

Date: October 2, 1980 Description of Classroom Activity:

Lesson observed noted the need for Mr. Novitsky to chide students for requesting passes to their lockers. Many students did not complete reading/questions assigned. Prior homework assignment was not clear. Suggestion was made to insist that all students do assigned work. It was noted that students were talking across the room and not under control.

Conference (October 2, 1980) It was suggested that Mr. Novitsky employ time management to instructional planning, academic referrals, concepts taught at Teacher Effectiveness Workshops (November 10 and 12) and calendar of assignments to maintain order and control. He was encouraged to "wield power."

October 31, 1980	Administration of grammar/literature test. Order was maintained.
Conference (October 31, 1980)	notes that test was a "challenge" which would be taken into consideration when evaluating student performance.
December 17, 1980	Class was involved in Canto III of the Inferno. Lesson utilized John Ciardi's A-V record. Students were attentive and followed reading in their texts. Suggestion was made regarding notations in planbook related to strategies, methods, processes outlined in P.I.P.
Conference December 17, 1980:	Mr. Novitsky was directed to update planbook in relationship to lesson organization and PIP documentation.

C-1 Evaluation: Teacher's summary and comments on plans for Professional Improvement Plan including reference to criteria listed under Section A.2:

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C-2 Reasons/Justification why stated objective(s) could not be accomplished.

Mr. Novitsky's poor health and subsequent absence did not provide adequate instructional time to be evaluated. Those classes observed prior to Mr. Novitsky's absence (October 2, 1980, October 31, and December 17) did not show evidence of strategies implemented as a result of goals and objectives stated in this PIP.

C-3 Evaluation: Supervisor's summary and comments:

Mr. Novitsky neglected to comply with the five strategies/ activities mutually agreed upon on April 24, 1980 as implementation of his Professional Improvement. No written class procedures and routines were provided; Disciplinary referrals were not effectively utilized; No record was kept of Pupil Performance; Parents were not contacted on a regular basis; No evidence was provided regarding group goal-setting procedures through observation or planbook documentation; The physical environment of the room indicated no improvement.

The evaluative criteria stated on page two (2) were employed. The results indicated non-compliance with the goals and objectives of Mr. Novitsky's Professional Improvement Plan.

3-31-81	/s/ Myron J. Novitsky
(Date of this Report)	*Teacher's Signature
PROFESSIONAL IMPROVEMENT PLAN PREPARED BY	/s/ Lynn P. Carhart
	Administrator/Supervisor Signature

*Teacher's signature merely indicates that teacher has read report.

Petitioner also testified on cross-examination that the instructional observation report, dated October 2, 1980 (J-2), made reference to his planbook not paralleling the lesson taught, among other things, and that the observation occurred some three to four weeks after the opening of school; that his planbook begins on September 8, 1980 (R-3); that he began taking medication in July, but does not recall discussing this fact with the supervisor or administrators prior to or at the opening of school; that he probably first mentioned it after October 2; that he had time management problems; that the second observation (J-3) was done during a period in which a test was being given; that planbook procedures called for teachers to hand in planbooks on each Thursday for the following week, to be read and initialed by head teacher of the subject area, and to be returned in time for use on the following Monday, and that he did not always submit his

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plans on time in September and October 1980. His evaluation of December 17, 1980 (J-4), although generally positive, did state a suggestion to "update planbook to reflect what has actually been taught in addition to projecting future plans" (emphasis supplied).

Petitioner further testified on cross-examination that he was on no medication in late January and early February 1981; that he received his year-end evaluation for 1980-81 (J-5) in April 1981, and that he signed the form at that time not to show agreement, but to show only that he had received it.

In response to a question as to whether he had left lesson plans, petitioner answered yes. His planbook (R-3) shows no plans for February. He also testified that on the first day of his leave, February 23, 1981, he received a telephone call from the vice principal saying, in effect, that the principal was angry, the substitute was going to resign and no lesson plans were left. Petitioner stated he knew where he was (in the course of study) by other indicators such as his grade book. He also stated that he did give plans to the vice principal two days later. They were written on plain paper because his planbook was in school. The plans covered a period of just over two weeks.

III.

The supervisor of instruction and head teacher testified on behalf of the Board. The head teacher stated that it was his responsibility to check planbooks once each week. At the time of checking, he placed his initials and the date in the upper right hand corner of the appropriate page. Where he placed the same date on two weeks' plans it indicated they were received by him on the same day, that is, one week was late and one on time. Petitioner's plans for December 1, 8 and 15, 1980, were seen by the head teacher on December 23. No plans were submitted for January and February 1981. Petitioner was absent February 20 to April 27. His plans for the week of May 4 were checked by the head teacher on May 1.

On cross-examination, the head teacher testified that he knew of petitioner's problems and accepted his explanations for them. He did finally bring the matter of the lateness of petitioner's plans to the principal's attention. The principal instructed the head teacher not to let petitioner go so long without submitting timely plans.

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The supervisor testified that she has performed observations and evaluation of petitioner since March 1978; that an acceptable rating does not necessarily mean that no improvement is needed in a teacher's performance; that the goals and objectives of the PIP were not implemented by petitioner and, further, no evidence of his compliance was provided by him or could be found; that petitioner always accepted suggestions concerning classroom management and teaching strategies, but no evidence of his implementation of the suggestions ever appeared in 1980-81; that his evaluation of March 1981 (J-5) and the letter of assistant board secretary to petitioner, dated April 30, 1981 (J-9), mentioned attendance at staff meetings; that petitioner attended the September, November and January meetings in the 1980-81 school year, but did not attend the October and December meetings; that the overall sense of his evaluation showed a weakness in pupil discipline and classroom management and a failure to implement the strategies suggested to him and in his PIP for the school year, and that when the substitute for petitioner arrived in February, the supervisor was unable to show the substitute, by a set of lesson plans, what had happened up to that point in petitioner's classes and what was planned for the immediate future.

On cross-examination, the supervisor stated that petitioner's relations with parents in conference situations was good, but his PIP called for him to take initiative in making parent contacts and he failed to do so; that his attitude towards her was good, but that this does not equal a good professional attitude; that his behavior in missing staff meetings bespoke a poor professional attitude, and that his appearance left much to be desired as the school year progressed.

In response to a question as to whether a deficiency in professional attitude (Section 111d of J-5) could have been a result of his inability to perform due to circumstances beyond petitioner's control, the supervisor replied, in effect, that she felt bad about petitioner's inability to do the job, but the reason was not her primary concern. Her primary concern was that he didn't. The supervisor also stated that she had not made up her mind about recommending a withholding in October. The decision was based on all evaluations and total job performance. The ultimate decision to recommend denial of an increment was made by the superintendent after consulting with administrators.

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IV.

Petitioner argues that the issue in this case is whether the reasons expressed in the year-end evaluation form of March 1981 (J-5) are substantiated by the record and the testimony presented at the hearing, so as to justify the denial of an increment, pursuant to N.J.S.A. 18A:29-14. That statute provides that a board may withhold an employment increment only "for inefficiency or other just cause." Petitioner submits that the year-end evaluation did not satisfy that requirement.

First, the year-end evaluation is inconsistent with the two intervening evaluations conducted by the vice principal and the supervisor of instruction herself. In cross-examination, the supervisor could not justify this inconsistency, but rather related to a plan which had been developed the previous year (R-1).

Second, the year-end evaluation itself states as follows:

> Although he is pleasant and cooperative, the bottom line is that the students have not received an appropriate learning experience due to extenuating circumstances brought about by the personal factors over which Mr. Novitsky has no control (P-5 at p. 2).

Third, the Board has not presented any testimony to dispute the version provided by the petitioner of his serious health condition involving hypertension. That testimony was corroborated by the blood pressure readings taken routinely by the school nurse (P-2). Nor has there been any contradiction of his testimony that when he decided to go on milder medication after the adverse evaluation in October 1980, he concluded that for the sake of both the children and himself, it would be better if he took a sick leave. He was encouraged to do so by school officials and was therefore unavailable from February 20 to April 27, 1981.

This is particularly important because the year-end evaluation criticized the petitioner for taking the very sick time they encouraged him to utilize. Further, the use of sick time, which theretofore had never been questioned by the Board, is expressly authorized by N.J.S.A. 18A:30-1 et seq.

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Accordingly, based on the whole record, petitioner respectively urges that the Board has not satisfied the burden of showing that there was just cause to deny the petitioner's increment, pursuant to N.J.S.A. 18A:29-14.

V.

The Board argues that petitioner's own testimony admits the deficiency in his teaching ability. In addition, the supervisor's testimony highlights the observational reports and paticularly the PIP agreed upon by both the supervisor and petitioner as well as the year-end evaluation made of petitioner's performance as a teacher in 1980-81. Notwithstanding that petitioner was taking medicines when he returned to school in September 1980 and notwithstanding the fact that he claims his poor performance was a result of his medication, he failed to notify any of his superiors that he was taking a depressant type of medicine which would affect his teaching ability and which he clearly admits did, in fact, affect his teaching ability.

The Board submits that petitioner's testimony in admitting his failure to notify his supervisor or building principal of any illness until February 1981, when he absented himself is a total disregard of his responsibility not only to the Board, but to his students. As the supervisor testified, the bottom line was his failure to perform efficiently.

While it may now be argued by petitioner that it was his physical condition that contributed to his ineffectiveness, it cannot be denied, based on the evidence, that the Board had a reasonable basis for taking the action of withholding his increment, particularly in view of his failure to report his condition. The Board urges that based on petitioner's own testimony, the PIP, the observational reports and the year-end evaluation, the Board has a reasonable basis for its factual conclusion and that petitioner has failed to show that the Board acted without a reasonable basis in withholding his increment.

VI.

It is black letter law that the legislature delegates discretion to administrators, not to reviewing courts. The principal characteristic of review of agency action is its limited nature. A reviewing court, if it can find a rational relationship between an agency action and the grant of authority from the legislature, is not ordinarily supposed to

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substitute its judgment for that of an agency. See, e.g., Robinson, et al., The Administrative Process (1980).

Similarly, in Kopera v. W. Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960), the court stated:

> Under this view of the substantive law the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had reasonable basis for its factual conclusion. (at 295).

and

> [W] e 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 on the appellant. (at 296-7).

Applying these standards, it seems clear that the underlying facts in the present matter are as petitioner's evaluations claim. This, of course, includes the comment in J-5 that, "Although he is pleasant and cooperative, the bottom line is that students have not received an appropriate learning experience due to the extenuating circumstances brought about by the personal factors over which Mr. Novitsky has no control."

The evaluator, in this case the supervisor, was aware of and made note of certain extenuating circumstances. It must be assumed that the superintendent when recommending withholding and the Board when approving withholding were aware also of the circumstances and events of the school year as to petitioner. They were satisfied that, all things being considered, withholding was warranted.

Having carefully reviewed the parol and documentary evidence in this matter, I FIND:

1. Petitioner suffered certain personal and health problems beginning in early 1980 and continuing into the 1980-81 school year.

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2. Petitioner's performance early in the 1980-81 school year was substandard in the areas of planning and classroom control.

3. At some time after the negative instructional observational report of October 2, 1980, petitioner first mentioned his problems to administrators.

4. Petitioner's performance thereafter was uneven. Planning was demonstrably deficient.

5. Petitioner was on extended sick leave from February 20 to April 27, 1981.

6. Petitioner's year-end evaluation for 1980-81 is a fair and balanced statement of his performance and problems in that school year.

7. The 1980-81 year-end evaluation forms a reasonable basis for the superintendent's recommendation and the Board's decision to withhold petitioner's increment for 1981-82.

In consideration of the foregoing, I **CONCLUDE** that the action of the Neptune Township Board of Education withholding the adjustment increment of Myron Novitsky for the 1981-82 school year was not arbitrary, capricious, unreasonable or in violation of N.J.S.A. 18A:29-14 which requires good cause for such an action.

Accordingly, the petition of appeal is **DISMISSED.**

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

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OAL DKT. NO. EDU 7776-81

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

20 AUGUST 1982
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

23 August 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 24, 1982
DATE

Ronald L. Parkerson
OFFICE OF ADMINISTRATIVE LAW

ms

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DOCUMENTS IN EVIDENCE

P-1 Board Policy 4010, Supervision of Instruction, 7 pp. and Board Policy 4010A, Philosophy of Evaluation, 5 pp.

P-2 Blood pressure readings of Myron Novitsky, 9-26-80 to 12-19-80 and 4-27-81 to 6-16-81, 5 pp.

P-3 Letter, 6-5-79, Carhart to Novitsky

P-4 Letter, 1-2-80, DeLuca to Novitsky

P-5 Letter, 6-27-80, DeLuca to Novitsky

P-6 Letter, 3-2-81, DeLuca to Novitsky

R-1 Professional Improvement Plan, Myron Novitsky, for 1980-81, 4-24-80, with attachments, 4 pp.

R-2 Memorandum, 4-2-81, DeLuca to Christie

R-3 Planbook, M. Novitsky, 1980-81, Neptune Senior High School

R-4 Lesson Plan Book Policy, undated, 2 pp.

R-5 Memorandum, 7-10-81, Lois to Lynn

R-6 Teacher Job Description, 2 pp.

R-7 Memorandum, 4-28-81, Novitsky to Christie

J-1a Teacher Evaluation Form, M. Novitsky, 3-69

J-1b Teacher Evaluation Form, M. Novitsky, 3-70

J-1c Teacher Evaluation Form, M. Novitsky, 3-71

J-1d Teacher Evaluation Form, M. Novitsky, 3-72

J-1e Teacher Evaluation Form, M. Novitsky, 3-73

J-1f Teacher Evaluation Form, M. Novitsky, 3-74

J-1g Teacher Evaluation Form, M. Novitsky, 3-75

J-1h Teacher Evaluation Form, M. Novitsky, 3-76

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J-1i Teacher Evaluation Form, M. Novitsky, 3-77

J-1j Teacher Evaluation Form, M. Novitsky, 3-78

J-1k Teacher Evaluation Form, M. Novitsky, 3-79

J-1l Teacher Evaluation Form, M. Novitsky, 3-80

J-2 Instructional Observation Report, M. Novitsky, 10-2-80

J-3 Instructional Observation Report, M. Novitsky, 10-31-80

J-4 Instructional Observation Report, M. Novitsky, 12-17-80

J-5 Teacher Evaluation Form, M. Novitsky, 3-81

J-6 Letter, 4-2-81, Puleio to Novitsky

J-7 Letter, 4-10-81, Puleio to Novitsky

J-9 Letter, 4-30-81, Puleio to Novitsky

J-10 Board Policy 413, Evaluation of Professional Staff, 2 pp.

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MYRON NOVITSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

October 4, 1982

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6443-81

AGENCY DKT. NO. 345-8/81A

GEORGE A. WOOD,

Petitioner

v.

HOBOKEN BOARD OF EDUCATION,

HUDSON COUNTY,

Respondent.

APPEARANCES:

Ezra D. Rosenberg, Esq. for petitioner (Katzenbach, Gildea & Rudner, attorneys)

Philip Rosenbach, Esq. for respondent (Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan, attorneys)

Record Closed July 30, 1982 Decided August 26, 1982

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

This is an action for recognition on the teacher salary schedule of military service credit, pursuant to N.J.S.A. 18A:29-11. The matter was joined before the Commissioner of Education and was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. The matter was heard on June 14, 1982, at the Office of Administrative Law, Newark, New Jersey. Post-hearing submissions were timely filed.

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At the hearing, petitioner Robert R. O'Keefe's claims were dismissed without prejudice on the basis that his claims were included in the petition of Michael Accetta, et al. v. Hoboken Board of Education, Commissioner of Education #196-6/77. The original petition in this matter, filed on August 13, 1981, had included Robert R. O'Keefe as a copetitioner of George A. Wood.

The following uncontroverted facts reveal the context of this dispute. Petitioner served in the active military service of the United States from November 27, 1942 until November 29, 1945. Petitioner was employed as a teacher in Hoboken in 1951. When hired, he was placed on the first step of the bachelor's salary guide. He resigned effective December 31, 1968, to take a position at Red Bank High School. He then served as assistant principal at Keyport High School and at Forestdale Elementary School in Rumson before returning to Hoboken in 1974. Petitioner was reappointed by respondent to a full-time teaching position beginning in the school year 1974-75 and continuing to the present. When rehired by the Hoboken Board, he was placed at the fifth step of the salary guide for "M.A. +30." Each application made by petitioner to respondent included information as to his three years of military service. In 1953, petitioner submitted a request to the Hoboken Board of Education for salary credits based upon veteran status, but did not receive a response. At this time, petitioner was unaware of the statute entitling him to benefits. At some time between 1974 and 1976, petitioner learned that there was a statute that might entitle him to credit for military service. Wood also knew that a claim was brought in 1977 by approximately 42 teachers against the Hoboken Board for veterans benefits. This matter is Michael Accetta, et al. v. Bd. of Ed. of the City of Hoboken, (N.J. App. Div., May 17, 1982, A-3190-80T2) (unreported), petition for certification filed by the petitioners on or about June 16, 1982. Wood did not join in this claim. In late 1978 or early 1979, petitioner consulted an attorney to try to obtain veterans' benefits, but decided not to proceed at that time. The instant petition was instituted on August 13, 1981.

I.

The parties stipulated the salaries paid to petitioner by the Board for the school years 1951-52 through 1957-58 and 1974-75 through 1981-82; the salaries which petitioner would have received had he been credited with his three years of military service, and the differences between these two amounts (petitioner's brief at pp. 2-3).

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Petitioner testified that, in addition to the Board's record of his military service, all teachers had to submit military service information to the Teachers' Pension and Annuity Fund in approximately 1953 because of a change in the pension system.

All military service information was submitted to the Teachers' Pension and Annuity Fund through the local board of education.

Petitioner also testified that when rehired in 1974, he discussed salary only with the superintendent. He was told that he would be on the fifth step on the Master's Degree +30 credits salary guide for "budgetary reasons." No mention of veterans status was made in that conversation.

Following the decision in Wall Tp. Ed. Ass'n v. Wall Tp. Bd. of Ed., 149 N.J. Super. 126 (App. Div. 1977), the Hoboken Education Association collected service information from all its members.

On September 5, 1979, the then superintendent sent a letter to all staff requesting information on veteran's status (P-5). Petitioner returned his form promptly stating his period of active service. In 1967, petitioner applied for a vice principalship. The application submitted at that time (P-6) also shows that he served in the Army Air Force, but does not set forth the dates of service.

On cross-examination, petitioner testified that at the time a pension program change was being considered by the State, he and fellow teachers attended a meeting with New Jersey Education Association representatives. Information was submitted at that time concerning veteran's status through the Board office. Petitioner was not aware, however, whether Board members actually knew of this information.

The 1977 case referred to above, Accetta, does not include petitioner Wood. The instant petition was signed on August 11, 1981, and was filed before the Commissioner on August 13, 1981. Accetta was filed on June 28, 1977.

Petitioner also testified on cross-examination that he consulted an attorney in 1979 or 1980 because nothing seemed to be happening in the Accetta matter. He assumed at that time that he was part of the Accetta group.

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The former superintendent of schools testified that every teacher hired met with him after appointment. Salary usually was set by the Board upon hiring by reference to the teacher salary guide in effect at the time. In cases of special need such as the areas of vocational education and special education, initial salary was sometimes negotiated. On entry into the system, beginning teachers were placed on step one of the guide. Experience included teaching in other districts and special work experience. The Board never had a definite policy on credit for military service.

During the 1960's, the question of salary credit for veterans came to him via union representatives. He was aware that petitioner Wood was a veteran. He was also aware that petitioner Wood was involved in trying to get salary adjustments for teaching staff members with prior military service. The former superintendent also identified a form (P-7) dated January 24, 1951, bearing the name of George Wood and stating the fact of three years of military service in the Army Air Force. He further testified that this document was for record purposes. The Board would not ordinarily see such a form unless some question or discussion about the particular staff member arose and the Board asked to see the personnel file of the individual.

The former superintendent also testified that when petitioner was rehired in 1974, he discussed petitioner's reentry salary with him. He could not recall if military credit had been a part of that discussion. He was aware of changing veteran status treatment. The fifth step on the Master's +30 credit level was negotiated with petitioner Wood at that time. No military service credit was involved. The placement on the fifth step was based on the combination of petitioner's prior experience in Hoboken and of that in other districts.

II.

The Board called its internal auditor. The auditor testified that the school fiscal year runs from July 1 to the next June 30. He also testified as to cuts from budget requests for 1980-81, 1981-82 and 1982-83. The auditor stated if petitioner were entitled to approximately $32,000, the Board would have to consider layoffs. He stated it was impossible to use any more funds from free balance.

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On cross-examination, the auditor stated he would not be responsible for the decision if more money had to be cut from the budget. There is no contingency or slack in any line item in the present budget. Free balance and investment monies are the only leeway in the existing budget. If the Hoboken Board had to pay lump sum military pay as a result of a court order, that amount would appear in the insurance and judgments account. There is currently a $20,000 line for judgments. This money is set up in that account primarily for payment of workers' compensation claims. Nothing in this account was intended for civil rights actions claims or military pay actions claims. Of the $35,000 budgeted to this account last year, $26,280 was expended. Some five to nine staff members received money from this account.

The auditor also testified that he was aware that a lump sum payment was made in July 1981, but he is not aware of any personnel now receiving adjustments because of military service.

The assistant superintendent for personnel testified that four or five staff members are now receiving military service pay adjustments. None of the persons receiving adjustments is at the maximum of his salary guide.

Petitioner moved for summary judgment in his favor. Respondent moved to strike all demands for the period prior to the date of filing of the instant petition. Decision on both motions was reserved.

III.

Petitioner argues it is undisputed that he served in the military for three years. He is, therefore, entitled to receive the amount stipulated to for the school years 1951-52 through 1955-56 and 1974-75 through the present. Petitioner also urges that his claim is not barred by the statute of limitations. The New Jersey Supreme Court in Lavin v. Hackensack Bd. of Ed., _____ N.J. _____ (Docket No. A-60, June 24, 1982), held that the statute of limitations is inapplicable to claims brought pursuant to N.J.S.A. 18A:29-11 because payment under that statute is a statutory entitlement rather than an element of the employment contract. For that reason, petitioner's claim is not barred by the six-year statute of limitations.

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Petitioner also argues that his claim is not barred by the doctrine of laches. In Lavin, the Court held that a petitioner for military service credit, pursuant to N.J.S.A. 18A:29-11, should not be granted retroactive monetary relief because her claim was barred by the doctrine of laches. Analysis of that opinion leads petitioner to the conclusion that the Court's holding does not bar his claim for retroactive relief.

In Lavin, the Court based its holding on certain facts which are not present here: (1) both the petitioner and the board of education "were apparently unaware of the statute" (slip opinion at 11); (2) petitioner's military service had occurred approximately 23 years before she was engaged as a teacher (Id.); (3) petitioner's military service "might well have escaped the attention of the Board" (Id.); (4) the board of education did not budget for the additional expense, "relying as it did on its mistaken belief that petitioner's salary had been correctly computed" (Id.).

In the present case, the Board was not unaware of the statute. The superintendent was aware that there was a veteran's benefit and so testified. In 1950, several teachers petitioned the Board for military service credit. Throughout the 1950's, the Board discussed the issue of military service credit.

Further, petitioner's military service had occurred only six years before he was hired by respondent.

Furthermore, it is clear that the Board was aware of petitioner's military service. This case, then, presents a fact situation not anticipated by the Court in Lavin. Here, there is clear evidence that the Board was aware of petitioner's military service and, as a matter of calculated policy, respondent decided not to grant military service credit despite the statutory entitlement.

Finally, petitioner argues that here, as opposed to Lavin, the Board's failure to budget for the additional expense was an intentional failure and not a result of reliance on a mistaken belief that petitioner's salary had been correctly computed.

Moreover, the testimony presented at hearing indicates that the Board does have resources from which to pay petitioner the money owed him on his claim. The Board can get the money to pay petitioner from the free balances, a source that has been used in the past to pay teachers' salaries. In addition, it is customary for the Board not to use all

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the funds allocated in any line of the budget during the fiscal year and to transfer monies from line to line during the fiscal year.

Moving to the next facet of his argument, petitioner asserts that, assuming arguendo that Lavin applies to petitioner's claim, petitioner is entitled to military service credit beginning with the school year 1977-78. In June 1977, 42 teachers petitioned the Commissioner of Education for military service credit, pursuant to N.J.S.A. 18A:29-11. Accetta, above. Since that time, therefore, the Board has been on notice that its method of calculating salaries may have been in error. Its failure to budget for the additional expense can no longer be considered a result of "innocently reducing the amount of funds to be raised by taxation" (Lavin, slip opinion at 12). The emphasis of the Lavin holding is, therefore, met as of the school year 1977-78 for all teachers within the Hoboken school system who were entitled to military service credit, including petitioner.

At the very minimum, petitioner argues he is entitled to military service credit beginning with the school year 1979-80. In September 1979, petitioner made a written demand for military service credit under the statute. Applying the most narrow interpretation of Lavin to this case, petitioner is entitled to military service credit from that date forward.

IV.

The Board argues that petitioner's claim under the statute was filed with the Commissioner of Education on August 13, 1981, some 30 years after he first became employed by the Board and seven years after he was rehired in 1974.

The Board reads Lavin, above, as barring petitioner's claim by laches. Petitioner argues that Lavin does not apply to his case. This argument is unsound both on the facts and on the law. Indeed, his case presents a far stronger circumstance for denying the claim for veterans' credits than was presented in Lavin.

Although in or about 1953, petitioner submitted a request to the Board for similar benefits, he did not file a claim against the Board until 1981, nearly 30 years later. In the meantime, in 1977, he did not file a claim for veterans' salary credits or join in the Accetta matter. Despite his knowledge of the statute in question and the pendency of

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Accetta, he stood silent. Two or three years later, petitioner continued to sit on his rights by contacting an attorney but deciding not to pursue his claim because he did not want to incur the costs involved.

In Lavin, the claimant filed her petition nine years after her employment had commenced (slip opinion at 11). Here, petitioner waited nearly 30 years. In that time, the Board has made countless budget expenditures and has been able to make these expenditures in part because the first claim, Accetta, was not asserted before 1977, in which claim petitioner did not participate. Moreover, because of the extremely tight budget situation facing the Hoboken Board, it has been required to lay off 44 staff members for the school year 1982-83 and it is likely that additional layoffs would follow the payment of retroactive veterans' benefits to petitioner. Under these circumstances, petitioner's claim is barred by laches.

Petitioner has argued that Lavin is distinguishable from this case because the Hoboken Board supposedly "was not unaware of the statute" (petitioner's brief at 7), whereas in Lavin the Board was apparently unaware. In fact, there was no evidence adduced that the Hoboken Board was aware of N.J.S.A. 18A:29-11 before the 1970's. In response to the question, "Were you aware in 1951 of the existence of a statute that could entitle Mr. Wood to military service credit?" the former superintendent testified that "I was aware that there was a veteran's benefit, but there was no specific information about that particular veteran's benefit at that time." The former superintendent also failed to indicate his awareness of the statute in 1974, when petitioner was rehired.

Petitioner has also argued that Lavin is distinguishable because of the Hoboken Board's allegedly "intentional failure" to budget for the expense of credits to which Mr. Wood claims entitlement. This argument does not take salient facts into account. The decision of the Board not to pay retroactive veterans' salary credits has been upheld by Lavin and by the Appellate Division in Accetta. Indeed, on March 4, 1981, the State Board of Education had decided in Accetta that the Hoboken Board was not required to pay retroactive benefits from before the time it was put on notice of a claim for benefits under N.J.S.A. 18A:29-11. The instant petition was not filed until August 1981. Thus the Board certainly had no reason to budget any monies to be used to pay credits to petitioner for any years prior to 1981.

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Petitioner claims that he made a written demand for salary credits on or about September 5, 1979, by submitting to the Board the letter introduced as Exhibit P-5. Examination of this letter shows that it is not a demand for credit, but the transmission of information requested by the Hoboken Board to permit it to process legitimate claims.

In any event, petitioner's attempt to distinguish Lavin must be rejected because it fails to address Lavin's clear pronouncement of the statewide general rule of law regarding retroactive claims brought under N.J.S.A 18A:29-11. As stated by Justice Schreiber for the Court:

> Moreover, this problem should not be viewed exclusively in the context of petitioner's claim. Though in petitioner's case only $20,575 would be due, when other teachers similarly situated are considered, the total cost could be substantial. There are a large number of claims of this nature throughout the State and it is estimated that over $4,500,000 is involved. See Union Township Teachers' Association v. Board of Education of Township of Union, supra. This estimate does not include claims of retired teachers on pension and of those who have otherwise left the teaching profession. We believe that it is fair and equitable to treat all claims of this nature in like manner. This bright line treatment has the additional advantage of administrative ease. Under these peculiar circumstances, wherein public entities are involved, petitioner and others situated like her should not be granted retroactive monetary relief. However, they should be granted credit for qualified military service in computing their salaries subsequent to making their claims. [slip opinion at 12-13]

Furthermore, since there were no irregular activities on the part of the Board and since there would be obvious financial detriment to the Board and the taxpayers of the City of Hoboken in the event that Wood were now to be granted retroactive veterans' benefits, Wood's claims for benefits for all year before 1981 are barred by laches.

Petitioner served in the active military service for three years. Under the statute, he was entitled at most to receive equivalent years of employment credit for his three-year period. When he was rehired in 1974, however, he was placed at the fifth step of the "M.A. +30" guide. Thus it is apparent that he has already received all credit to which he might have been entitled under N.J.S.A. 18A:29-11.

When petitioner was rehired in 1974, there was no obligation on the part of the Board to hire him at the fifth step of the applicable salary guide. Therefore, the fact is

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that he has received equivalent credit for his three years of military service, regardless of whether or not that was the specific intention of the Board or whether or not the possibility of veterans' salary credits was specifically discussed between Wood and the Hoboken Board when he was rehired in 1974. Indeed, it is unquestionable that petitioner has, in fact, received "equivalent years of employment credit for such service," as set forth in the statute. To hold otherwise would mean that the Hoboken Board, having negotiated with Wood to hire him at step five in 1974, must now, eight years later, be told that it was actually required to rehire Wood at step eight because it negotiated to hire him at step five. This would be an unfair result, especially because the Board could have rehired Wood in 1974 at step three with the specific purpose of according Wood any credits to which he might have been entitled, under N.J.S.A. 18A:29-11. For these reasons, irrespective of any laches, Wood's petition for benefits beginning in 1974 must be dismissed.

V.

Having reviewed the whole record in this matter, I **FIND** this matter to be on all fours with Lavin, above, in its essential particulars. Although it cannot be said here that the parties were unaware of the statute at all times throughout petitioner's employment, it remains uncontroverted that petitioner did not formally press a claim until August 1981. Therefore, the equitable doctrine of laches must apply to all claims or portions of claims for relief prior to that time.

Similarly, the Board was aware of the claim as of that time. It has known of the pendency of this petition for more than one full fiscal year and cannot now be heard to argue that it was unable to anticipate the possibility of a decision in some degree adverse to it. I so **FIND.**

The Lavin Court said:

> We believe that it is fair and equitable to treat all claims of this nature in like manner. This bright line treatment has the additional advantage of administrative ease. Under these peculiar circumstances, wherein public entities are involved, petitioner and others situated like her should not be granted retroactive monetary relief. However, they should be granted credit for qualified military service in computing their salaries subsequent to making their claims. [slip opinion at 12-13]

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Accordingly, I **CONCLUDE** that George A. Wood is entitled to retroactive payment of $790, which is the figure counsel have stipulated as the difference between the salary petitioner actually received in 1981-82 and the salary petitioner would have received in 1981-82 if he had been credited with three years' military service. It is so **ORDERED.**

In all other respects, the petition of appeal is **DISMISSED.**

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

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

26 AUGUST 1982
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/27/82
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 31, 1982
DATE

Ronald L. Rubenpe
OFFICE OF ADMINISTRATIVE LAW

fms

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DOCUMENTS IN EVIDENCE

P-1 Salary Guide 1948-49 through 1978-79, bachelor's degree

P-2 Salary Guide, 1974-75 through 1980-81, all degree levels

P-3 Salary Guide, 1981-82, all degree levels

P-4 Cumulative record folder cover, George A. Wood

P-4a Salaries paid to George A. Wood 1951-52 through 1954-55 and 1981-82

P-5 Letter, 9-5-79, superintendent to staff and showing response of George A. Wood

P-6 Application of George A. Wood for vice principalship

P-7 Preliminary application form, 1-24-51, Wood, George

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GEORGE A. WOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioner's primary exceptions to the initial decision by the Honorable Bruce R. Campbell, ALJ argue that Judge Campbell erred by the application of Lavin, supra, to the present matter. Petitioner contends that the circumstances of his claim are markedly different from those involved in Lavin. Petitioner argues that the application of Lavin to the instant case deprives him of his right of access to the courts, guaranteed by the First and Fourteenth Amendments to the United States Constitution, and also violates the doctrine of separation of powers. Respondent's reply exceptions refute those of petitioner and generally affirm the initial decision, except for that portion requiring the Board to make payment to the petitioner for credit for the 1981-82 school year. The Commissioner cannot agree in entirety with either party.

An examination of the record herein convinces the Commissioner of the applicability of Lavin, supra, to the facts of the present case. Accordingly, petitioner's claim for benefits for all years prior to 1981 are barred by the equitable doctrine of laches. Petitioner's argument of deprivation of constitutional rights herein has no merit. Petitioner's contention in this regard is in effect a call for the Commissioner to overrule Lavin, a plea which cannot be entertained by the Commissioner who has no jurisdiction to hear constitutional claims.

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

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The Board shall pay petitioner $790 representing the difference between his salary actually received and his salary in 1981-82 with credit for military service. Otherwise, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

October 7, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8783-81
AGENCY DKT. NO. 475-12/81A

IRVINGTON EDUCATION ASSOCIATION AND JEANNE DONADIO,
Petitioners
v.
BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,
Respondent

APPEARANCES:

Richard A. Friedman, Esq., for petitioners
(Ruhlman, Butrym & Friedman, attorneys)

William R. Miller, Esq., for the Board
(Miller & Kinney, attorneys)

Thomas M. McCormack, Esq., Intervenor

David W. Carroll, Esq., amicus curiae

Record Closed July 6, 1982 Decided August 17, 1982

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

This matter was opened by a filing of a Petition of Appeal and Application for Interim Relief with the Commissioner of Education on December 11, 1981, by the Irvington Education Association and Jeanne Donadio wherein it is alleged the respondent Board of Education of the Town of Irvington acted improperly, illegally and in violation of its

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collective bargaining agreement by contracting with the Rasmussen Agency to provide a health benefits program and cancelling the existent contracts with Connecticut General Life Insurance Company and Garden State Health Plan. Petitioner alleged this constituted a self-insurance plan which is impermissible and violative of N.J.S.A. 18A:16-13. Additionally, petitioners seek an order by the Commissioner directing the respondent to continue the health plan with Connecticut General Insurance Company and request that the respondent be restrained from complying with the provisions of Article XVII of the negotiated agreement by the utilization of what petitioners characterize as a self-funded health, prescription or dental plan. Petitioners further request that the Commissioner declare that the respondent may only comply with the provisions of Article XVII of the negotiated collective bargaining agreement by contracting for those services with a licensed insurance company, medical service organization or nonprofit hospital. Petitioners thereafter made application for interim relief and stay of local board action pursuant to N.J.A.C. 6:24-1.5.

The Commissioner transmitted the matter to the Office of Administrative Law as a contested case on January 26, 1982 pursuant to N.J.S.A. 52:14F-1 et seq.

The Board denied the allegations and averred its action was at all times proper and consistent with law.

A motion to intervene was filed by Rasmussen Agency and petitioners filed a motion to stay the Board's action.

Oral argument was heard on the motions on February 2, 1982. The motion to intervene was granted. Petitioners' motion for stay was denied on a finding that the petitioner had failed to make a showing that irreparable harm would result if not granted.

On April 20, 1982 a motion for leave to participate as amicus curiae by David W. Carroll, Esq., General Counsel, New Jersey School Boards Association (N.J.S.B.A.) was granted. Such participation was set forth to include the right to file a brief and participate in oral argument on all issues presented for decision.

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The parties agreed to submit the matter for summary decision, and also agreed to file a jointly executed stipulation of facts.

It was determined at the prehearing that the sole issue for determination by summary decision shall be:

> Was the Board's action to nonrenew its contract for health benefits through the Connecticut General Insurance Company and Garden State Health Plan and enter into an agreement with the Rasmussen Agency for the administration of the Board's Employee's Self-Funded Health Insurance Program ultra vires?

The record in this matter was closed on July 6, 1982, upon receipt of petitioners' rebuttal brief. The matter is now ripe for summary decision based on the pleadings, discovery documents, stipulation of facts, briefs, findings of fact and conclusions of law.

I FIND and adopt the following as FINDINGS OF FACT:

1. Prior to September, 1981, the Irvington Board of Education contracted with Connecticut General Life Insurance Company and Garden State Health Plan for employee health benefits pursuant to Article XVII of their collective bargaining agreement.

2. On or about September, 1981, the Irvington Board of Education considered and accepted from the Rasmussen Agency a proposal to administer a self-insurance plan.

3. This self-funded insurance plan would provide the essential health services and basic benefits which had been previously provided with the administration and processing of all claims by the Rasmussen Agency.

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4. The Rasmussen Agency is a licensed insurance agency/broker in the State of New Jersey.

5. The Rasmussen Agency provides a similar self-funded insurance program for a significant number of public employees within the State of New Jersey.

6. Any individual claim in excess of $50,000 and all other claims filed after the aggregate claims reach $900,000 will be paid by Mead Reinsurance Corporation.

7. Mead Reinsurance Corporation is properly licensed to do business in the State of New Jersey.

8. The coverage provided by this plan is consistent with and totally fulfills the obligations of the Board of Education as set forth in Article XVII of the collective bargaining agreement.

DISCUSSION OF LAW

The general powers of a board of education cannot be disputed. N.J.S.A. 18A:11-1 sets forth in pertinent part that the board shall:

(a) Adopt an official seal;

(b) Enforce the rules of the state board;

(c) Make, amend and repeal rules, not inconsistent with the title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the

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employment, regulation of conduct and discharge of of its employees, subject, where applicable, to the provisions of Title II, Civil Service of the Revised Statutes; and

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

This statute when coupled with N.J.S.A. 18A:16-13 provides a statutory framework that in no way prohibits the action taken by the Board in this matter.

N.J.S.A. 18A:16-13 states:

> Any local board of education may enter into contracts of group life, accidental death and dismemberment, hospitalization, medical, surgical, major medical expense, or health and accident insurance with any insurance company or companies authorized to do business in this State, or may contract with a nonprofit hospital service or medical service corporation with respect to the benefits which they are authorized to provide respectively. Such contract or contracts shall provide any one or more of such coverages for the employees of the local board of education and may include their dependents. A local board of education may enter into a contract or contracts to provide drug prescription and other health care benefits, or enter into a contract or contracts to provide drug prescription and other health care benefits as may be required to implement a duly executed collective negotiations agreement, or as may be required to implement a determination by a local board of education to provide such benefit or benefits to employees not included in collective negotiations units. Nothing herein contained shall be deemed to authorize coverage of dependents of an employee under a group life insurance policy or to allow the issuance of a group life insurance policy under which the entire premium is to be derived from funds contributed by the insured employee.

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The statutory language must be construed broadly because of the terminology utilized by the Legislature. The main legal issue for determination with respect to statutory authority in this matter, therefore, is whether an application of the implied powers doctrine is appropriate under the circumstances. A reasonable reading of the broad language of N.J.S.A. 18A:11-1 read in conjunction with N.J.S.A. 18A:27-4 would support the application of the implied powers doctrine. N.J.S.A. 18A:27-4 provides in pertinent part that a board of education may:

> ...make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district... .

The language of this provision clearly identifies the ability of a board of education to determine the manner in which an employee is to be compensated. In New Jersey Civil Service Association v. Mayor and City Council of the City of Camden, 135 N.J. Super. 308 Law Div. (1975), the court construed a provision for a dental plan within a collective bargaining agreement between the municipality and the employees thereof to be a form of compensation. The benefits provided for in the collective bargaining agreement between the Irvington Board of Education and the Irvington Teachers' Association are subject to similar analysis. In providing teachers with these benefits the Board is recognizing a responsibility to compensate teachers in accordance with the terms of the collective bargaining agreement.

Petitioners argue the current program, administered by the Rasmussen Agency, is inconsistent with the terms of the collective bargaining agreement. I **FIND** this argument is not supported by any tangible evidence. It is clear the Board may provide the benefits as set forth within the agreement in any fashion allowable under statutory and case law. It is also clear the Board adhered to the requirements of the collective bargaining agreement.

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A determination must be made as to whether the Board's action was ultra vires. In making a determination as to the authority of the Board to make a decision to provide a self-funded reinsurance program, an examination of all relevant statutes reveals no absolute prohibition. By virtue of the fact the Legislature is silent on this issue, it is necessary to examine the fashion in which the courts have dealt with similar issues. Such an examination provides this court with no precedent for the conclusion that the action taken by the Irvington Board was in excess of the authority the Legislature and the courts have given them. In the absence of specific language authorizing a self-funded program, other than the permissive N.J.S.A. 18A:16-13 statute, the proper application of the implied powers doctrine would validate such. Sleight v. Paterson Board of Education, 112 N.J.L. 422, 425 (E. & A. 1934); Fair Lawn Education Association v. Fair Lawn Board of Education, 79 N.J. 574 (1979).

CONCLUSIONS OF LAW

1. Rasmussen Agency provided the Irvington Board of Education with a viable option to the previous benefits program.

2. The course of action taken by the Irvington Board was not ultra vires. It in no way can be construed as acting in excess of applicable statutory authority.

3. The course of action adopted by the Board is not inconsistent with accepted case law.

4. The current program provides the Teachers' Association with all of the benefits set forth within the collective bargaining agreement and is in no way prohibited by statute or any judicial decision.

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5. The Irvington Board of Education is in no way engaging in the business of insurance, it is merely exercising authority specifically set forth in N.J.S.A. 18A:11-1, N.J.S.A. 18A:27-4 and N.J.S.A. 18A: 16-13, compensating its personnel in a legally permissible fashion.

I **CONCLUDE**, therefore, the Petition of Appeal shall be and is hereby **DISMISSED.**

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

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

17 August 1982
DATE

WARD R. YOUNG, ALJ

8/19/82
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 19 1982
DATE

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FOR OFFICE OF ADMINISTRATIVE LAW

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IRVINGTON EDUCATION ASSOCIATION AND JEANNE DONADIO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Commissioner notes that permission to participate amicus curiae was granted the New Jersey School Boards Association. Such participation was set to include the right to file a brief and participate in oral arguments. Nothing therein refers to the right to file exceptions being accorded the amicus participant; the exceptions so filed were not considered. N.J.S.A. 1:1-12.6

Petitioners primarily except to the basic conclusion by the Honorable Ward R. Young, ALJ in the present matter and the factual findings contained therein. Petitioners contend that Judge Young erroneously determined that the Board's self-insurance program was proper and in so doing ignored the Opinion of the Attorney General of June 15, 1982 without explanation. Petitioners argue that the Board may take action only if it is consistent with the statutory framework for provision of health insurance benefits. Respondent's reply exceptions refute those of petitioners and plead for affirmation of the initial decision. Respondent argues that the Opinion of the Attorney General of June 15, 1982 should not be considered in the determination of the present matter as such opinion is not legally binding on the Commissioner. The Commissioner cannot agree with respondent's affirmance of the initial decision herein but recognizes the nonbinding nature of the Attorney General's Opinion therein referenced. However, in this matter, as in other cases, the Commissioner finds the manifest expertise of the Attorney General to be strongly persuasive. As was said therein:

> "It is well established that a public employer may provide health care benefits to its employees as a mode of compensation for

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> the services provided to the employer by the employee. See Riddlesdorfer v. Rahway, 82 N.J. Super. 36 (Law Div. 1963). See also Cliffside Park Borough Bd. of Ed. v. Mayor and Council of Cliffside Park Borough, 100 N.J. Super. 490, 492 (App. Div. 1968). However, a public employer such as a local board of education has no authority to develop the means or mechanism by which such benefits are to be funded to the public employee in a manner other than as provided by law."
>
> (Opinion, at p. 1)

The Commissioner notes the present existence of two statutory mechanisms for providing health care benefits for public employees of a local board of education. N.J.S.A. 52:14-17.25 et seq. and N.J.S.A. 18A:16-12 et seq.

A local board of education in the discharge of its responsibilities derives its authority from legislative action. A search of laws enacted by the Legislature fails to reveal to the Commissioner any specific authorization for local boards of education to provide health care benefits for its employees on a self-funded basis. This conclusion is consistent with the legislative goal of fostering uniformity in this area of public interest. See New Jersey School Boards Association v. State Health Benefits Commission, 183 N.J. Super. 215 (App. Div. 1982).

The Commissioner notes with approval the paragraphs in summation of the Attorney General's Opinion, June 15, 1982:

> "Furthermore, the Employer-Employee Relations Act does not provide a local board of education with authority to offer a health benefits plan for its employees in this manner through collective negotiations agreements. Local public employers have no authority to negotiate certain employee benefits, pursuant to the Employer-Employee Relations Act, which are outside of or in addition to those benefits completely and comprehensively provided by the State through specific statutory programs. Existing statutory benefit schemes and regulations available to local public employees such as the State Health Benefits Program, N.J.S.A. 52:14-17.25 et seq. and health benefit coverage provided pursuant to N.J.S.A. 18A:16-12 et seq. are effectively incorporated by reference as terms of the collective bargaining agreement covering those employees, and the Employer-Employee Relations Act may not serve to alter or

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supplement those prescribed legislative schemes. State v. State Supervisory Employees Ass'n., 78 N.J. 546 (1978). Thus the Employer-Employee Relations Act does not provide a basis for a local board of education to provide health benefits on a self-funded basis in the absence of a statutory provision so permitting.

"You are advised that a local board of education may provide health benefits for its employees only pursuant to a plan established by statute and in conformity with its requirements. A local board of education has no authority to establish a self-funded plan of health benefits coverage for its employees."
(Opinion, at pp. 3-4)

For the foregoing reasons, the decision of the Court herein is set aside. The Board may not continue its self-funded plan of health benefits coverage for its employees. The Board is instructed to provide health benefits for its employees only pursuant to a plan in conformance to statutes. The Commissioner maintains jurisdiction herein.

It is so directed.

COMMISSIONER OF EDUCATION

October 15, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5140-80
AGENCY REF. NO. 362-7/80A

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD,
Petitioner

v.

WILLIAM T. VEROST,
Respondent

APPEARANCES:

David A. Wallace, Esq., for Board
(Aron, Till & Salsberg, attorneys)

Theodore M. Simon, Esq., for respondent
(Goldberg & Simon, attorneys)

Record Closed June 23, 1982 Decided August 12, 1982

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

Charges of insubordination and unbecoming conduct were certified by the Board of Education of the Village of Ridgewood, Bergen County, against William T. Verost on July 21, 1980 and filed with the Commissioner of the Department of Education on July 24, 1980. The charges initially numbered 16, but later amendments brought the total to 26.

Verost filed a timely answer and later an amendment to answer in which he denied all charges. He averred his alleged conduct was within constitutionally protected freedom of speech and association. He alleged amended charges 11 and 12(a) through (f) were stale.

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The matter was transmitted to the Office of Administrative Law as a contested case on August 13, 1980 pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on November 3, 1980 at which the issues were framed:

1. Are the doctrines of res judicata and/or collateral estoppel applicable to warrant a dismissal of the certified tenure charges of conduct unbecoming a teacher?

2. Are the certified charges of conduct unbecoming a teacher, if proven to be true, sufficient to warrant dismissal of the teacher or a reduction of his salary?

The first issue was decided on motion to dismiss the charges. The motion was denied on February 10, 1981.

A second prehearing conference was held on February 17, 1981 to determine procedural directions because of disagreements between the parties over discovery.

Hearings began on March 23, 1981 and were held in Newark, Hackensack, Glen Rock and Ridgewood, and were concluded 53 hearing days later on December 21, 1981.

Admitted into evidence were 297 exhibits, 163 by the petitioning Board, 130 by respondent, and 4 by the court, many of which were multiple exhibits.

The matter was briefed and the record closed with the filing of the Board's rebuttal on June 23, 1982.

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The contention of respondent that charges 11 and 12(a) through (f) were stale will be addressed first.

A review of all charges clearly reveals this dispute to be a Redcay matter . In Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944) the Court held that:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way (130 N.J.L. at 371).

Oral argument was heard on the first day of hearing on an objection to testimony about a Teacher Observation Form dated February 14, 1974. The certified charges dealt with a series of specific incidents beginning with the 1976-77 school year. The court restricted documentary and testimonial evidence to the period from Septmber 1, 1976 to the certification of tenure charges.

I **FIND** respondent's argument of staleness, therefore, to be without merit.

It is undisputed certification of tenure charges was triggered when Verost transmitted a document, P-133, to the President of the Board, the Superintendent, Principal, and department supervisor. The document represented his response to the administration's summary evaluation of his performance and was the basis for the Superintendent's recommendation to withhold his increment for the 1980-81 school year. It was described as the straw that broke the camel's back.

Verost argued his constitutionally guaranteed right of freedom of speech protected him from prosecution under tenure laws for such statements and argued the charges, therefore, should be dismissed.

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The First Amendment requires that a teacher's interest in free speech be weighed against the state's interest in having an efficient school system. This balancing of interests must be done on a case-by-case basis, whenever a school board seeks to impose disciplinary action because of speech-related activity.

The seminal case in the free speech-public employment area is Pickering v. Bd. of Ed. of Tp. H.S. Dist. 205, Ill., 391 U.S. 563 (1968). In that matter a school teacher had sent a letter critical of certain board actions to a newspaper, which published the letter. The teacher was subsequently dismissed. He then challenged his dismissal as a violation of his First Amendment rights. The Court said:

> The problem . . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees (at 568).

Maintenance of discipline, proper performance of daily duties, and freedom from interference in the regular operation of a school, are legitimate efficiency concerns. Id. at 570, 572-73. See also, Winston v. So. Plainfield, 64 N.J. 582, 588 (1974), wherein the New Jersey Supreme Court listed similar factors as legitimate state interests, including the need to maintain discipline or harmony among co-workers; the need to curtail conduct which impedes the teacher's proper and competent performance of his or her daily duties; and the need to encourage a relationship of loyalty and confidence between the teacher and his or her superiors.

On the other side of the balance, various Federal Courts of Appeals, in applying Pickering, have weighed the degree of public interest involved in a teacher's or public employee's speech. See, e.g., Foster v. Ripley, 645 F. 2d 1142, 1149 (D.C. Cir. 1981) (a federal employee's complaints regarding an organization restructuring in his department held not to be of sufficient public concern); Santos v. U.S. Customs Service, 642 F. 2d 21, 25 (1st Cir. 1981) (certain letters critical of employer did not identify particular problems needing correction, and thus were of little public concern); Nathanson v. United States, 630 F. 2d 1260 (8th Cir. 1980) (federal employee who expressed concern and disagreement

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with superiors as to the handling of certain matters relating to compliance with environmental protection laws held to be a sufficient public concern, requiring First Amendment protection).

Another factor considered in applying the Pickering balance is the tone of speech. In Pietrunti v. Brick Tp., 128 N.J. Super. 149 (App. Div. 1974), certif. den. 65 N.J. 573, cert. den. 419 U.S. 1057, a teacher made a public speech that used strong terms to denounce the actions of the school Board and administration. The Board certified tenure charges because of the speech, and the teacher subsequently challenged the Board on First Amendment grounds. The Appellate Division found the teacher's speech to be abusive, insulting, and vituperative, and held the state's interest in efficiency outweighed the teacher's interest in free speech.

Pickering and Pietrunti both involved employee speech made in a public forum. A question thus arises here as to whether the Pickering balance also applies where the communication is essentially private, i.e., between an employee and employer. The United States Supreme Court addressed the question in Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979). In Givhan, a teacher met with a school administrator and demanded changes in practices that she thought were racially discriminatory. The District Court found the school board refused to rehire her because of these demands and thus found a denial of the teacher's First Amendment rights. The Court of Appeals reversed, holding the First Amendment did not protect private communications between employers and employees. The Supreme Court overturned the Court of Appeals and remanded, holding the Pickering balance applied in such situations. The Court explained, however:

> Private expression . . . may in some situations bring additional factors to the Pickering calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the context of the employee's message but also by the manner, time, and place in which it is delivered (at 415 n.4).

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Case law dealing with public employee expressions of a private nature does not always appear to be consistent and clearly distinguishable but does exemplify the necessity of the balancing of interests on a case-by-case basis. In Mabey v. Reagan, 537 F. 2d 1036 (9th Cir. 1976), a college professor speaking at a closed faculty meeting called college administrators "jerks" and "damned liars," and the court held such speech to be protected. In Roseman v. Indiana University, 520 F. 2d 1364 (3rd Cir. 1975), cert. denied 424 U.S. 921 (1976), however, a more subdued criticism made by a college professor at a faculty meeting concerning an administrator's actions was held to be beyond First Amendment protection. The Third Circuit later said the Roseman decision was wrong because it held there was no protected speech involved because of the private character of the speech. Trotman v. Lincoln University, 635 F. 2d 216, 230 n. 10 (3rd Cir. 1980). Still, the Roseman court appeared to use a balancing method. See 520 F. 2d at 1369. In Foster, supra, a federal employee voiced objections to an internal organizational restructuring and brought the matter to the attention of another Federal agency. The court found this to be an attack upon the employee's superiors, which made it impossible for the employee to continue to perform effectively for his employer. However, in Trotman, supra, a university professor's telegram to the state governor urging removal of the university president, accusing him of being terribly irrational and destructive, inhumane, vicious, vindictive, and arrogant was held to be protected by the First Amendment. In Boyer v. Commonwealth, 51 Pa. Commw. 191, 415 A. 2d 425 (1980), a city employee sent a memorandum to his superior as a reply to past memoranda concerning the employee's lack of training and poor work attitude. The employee replied the superior was also at fault; failed to provide proper training and managerial guidance; and was possibly motivated by racial overtones. See id. at 428. However, the court found insufficient public import in the employee's memorandum and held it to be unprotected by the First Amendment.

The First Circuit said the Supreme Court in Pickering "did not deem it appropriate or feasible, given the enormous variety of fact situations, to set forth a general standard against which all statements may be judged." Santos, supra, at 25. The Pickering test requires a scrutiny of facts on a case-by-case basis, particularly when the speech involved is of a private nature. I find it necessary to consider the content and subject of the

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speech, as well as the backdrop, context, time, place and tone before deciding whether the public interest in encouraging free speech outweighs the public interest in employee discipline and harmonious faculty relations in the schools.

A review of the critical document, P-133 in evidence, reveals a venomous tone by Verost in personally attacking the character and integrity of his department chairman, Principal, Superintendent, and the Board. Verost admitted it was written in an emotional state of mind, and the thrust of his attack was to champion and vindicate his own credibility, reputation, and general well-being. A tenured school teacher with considerable experience should be expected to react in a more mature and professional manner. Nevertheless, the gravaman of the constitutional issue is the balancing test of Pickering. The Board's interest in promoting efficiency of the public services it performs; its legitimate efficiency concern for freedom from disruptive interference of an employee in the regular operation of the school; the vituperative tone of P-133; and Verost's attack on his superiors far outweigh the import of his self-interest.

Verost's freedom to express his concerns are not free of consequences, and he may not hide from them under what he perceives to be a protection of the First Amendment. I FIND his expression in P-133 not to be constitutionally protected. His risk is in defense of unbecoming conduct charges as certified by the Board, and if any or all are found to be true, he must bear the penalty imposed.

The charges will now be addressed in order.

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CHARGE #1

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION DID ON OR ABOUT MAY 9, 1980, DELIVER OR CAUSED TO BE DELIVERED BY AN UNKNOWN FEMALE PERSON A DOCUMENT TO THE PRESIDENT OF THE BOARD OF EDUCATION, THE SUPERINTENDENT OF SCHOOLS, THE PRINCIPAL OF RIDGEWOOD HIGH SCHOOL AND THE SUPERVISOR OF ART, WHICH DOCUMENT CONTAINED DELIBERATE AND FALSE CHARGES AGAINST THE BOARD OF EDUCATION AND THE ADMINISTRATION OF THE SCHOOL DISTRICT, SAID CONDUCT BEING INSUBORDINATE AND UNBECOMING A TENURED TEACHING STAFF MEMBER.

It is undisputed that Verost caused a document (P-133) to be delivered to the Board President, Superintendent, principal and department supervisor. That portion of the charge is therefore found to be true.

Verost testified the document represented his response to his 1979-80 summary evaluation, which is P-120 in evidence. He testified he voluntarily wrote P-133 and the charges incorporated in that document were indeed deliberately composed by him. That portion of the charge is therefore found to be true.

Insubordination is defined in Black's Law Dictionary, Fifth Edition (1978) as follows:

> State of being insubordinate; disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a wilful or intentional disregard of the lawful and reasonable instructions of the employer. Porter v. Pepsi-Cola Bottling Co. of Columbia, 247 S.C. 370, 147 S.E. 2d 620, 622 (at 720)

The author of P-120 was Verost's immediate superior, the supervisor of art. It was dated April 10, 1980. A concluding notation stated "I do not recommend that an increment be granted Mr. Verost for the 1980-81 school year," with a provision for approval of the principal.

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A notation on the last page stated "New Jersey Administrative Code 6:3-1.21 requires that this report be signed within five working days of the evaluation conference. The evaluatee may submit additional data or comments within ten working days of the signing." Although P-133 was dated May 7, 1980, its untimeliness was not challenged.

The negotiated agreement between the Board and Education Association, R-31 in evidence, incorporated a section on the evaluation of staff identified as Annex 24. The evaluatee's option to respond is found in Annex 24-I. Annex 24-G stated, inter alia: "The staff member may submit written comments which will be attached to the supervisor's written report. If the observer is someone other than the primary evaluator, the observer will forward a copy of the observation report to the primary evaluator."

Neither the Superintendent or Board President were observers. And yet Verost transmitted his response to them as well as his art supervisor and the principal. The extensive record in this matter is void of any policy or instructions that would preclude Verost from transmitting the document to the Superintendent and Board President. Although it may be argued that Verost exercised poor judgment in his transmittal, the absence of lawful and reasonable instructions of the employer precludes a finding of wilful or intentional disregard. I therefore find the charge of insubordination not to be true to the extent it alleged an improper or insubordinate mis-transmittal.

The Board contends the incorporation of false charges on P-133 against it and the administration served as a basis for its charges of unbecoming conduct and insubordination, and cites 28 charges and accusations by Verost in that document in support thereof. It is noted the Board is the petitioner in this dispute, Verost the respondent, and the burden of proof that Verost's conduct is unbecoming and warrants a penalty, rests with the Board. Those charges and accusations by Verost cited by the Board will be addressed here, excepting those that are also cited under other charges to be addressed later.

Because of the extensive use of the adjective "deliberate" and adverb "deliberately,"

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by Verost in P-133 and by the Board in its charges, the court finds it necessary to define them with reference to Black's Law Dictionary, Fifth Edition (1979):

> **Deliberate,** adj. Well advised; carefully considered; not sudden or rash; circumspect; slow in determining. Willful rather than merely intentional. Formed, arrived at, or determined upon as a result of careful thought and weighing of considerations, as a deliberate judgment or plan. Carried on coolly and steadily, especially according to a preconceived design; given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; slow in action; unhurried; characterized by reflection; dispassionate; not rash. People v. Thomas, 25 Cal.2d 880, 156 P.2d 7, 17, 18.
>
> By the use of this word, in describing a crime, the idea is conveyed that the perpetrator weighs the motives for the act and its consequences, the nature of the crime, or other things connected with his intentions, with a view to a decision thereon; that he carefully considers all these, and that the act is not suddenly committed. It implies that the perpetrator must be capable of the exercise of such mental powers as are called into use by deliberation and the consideration and weighing of motives and consequences. See also, **Deliberation; Premeditations.**
>
> **Deliberately.** Willfully; with premeditation; intentionally; purposely; in cold blood. Averheart v. State, 158 Ark. 639, 238 S.W. 620, 621.

CITE #3

"In its haste to not only accept this document [P-120], but to take public action based upon it, the members of the Ridgewood Board of Education as individuals, as well as a collective body must join the members of the administration in standing liable for these damages [Verost's credibility, reputation and general well-being] (P-133, page 1).

It is noted Verost signed P-120, the summary evaluation, on April 17, 1980 (P-127). The Board was noticed of the Superintendent's recommendation to withhold Verost's increment at its caucus meeting on April 14, 1980 (R-123); acted to withhold his increment

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at its regular public meeting on April 28, 1980; and Verost was noticed of the impending approval by the Board in a letter from the Superintendent under date of April 15, 1980 (P-124).

A review of R-123 clearly reveals the Board received the background information underlying the Superintendent's recommendation from the principal and art supervisor.

I **FIND** no haste on the part of the Board in its action to withhold the salary increment of Verost. The Superintendent testified he did not perceive P-133 to be Verost's optional response to P-120, which had not been identified as such.

Board members are presumed to be fully aware of the general mandatory powers and duties of the Board pursuant to N.J.S.A. 18A:11-1 "for the employment, regulation of conduct and discharge of its employees," and to "do all things . . . necessary for the lawful and proper conduct . . . of the public schools of the district," and further of the power to sue and be sued pursuant to N.J.S.A. 18A:11-2.

The tone of this portion of the communication is threatening and offensive. Such conduct can be expected to effectively stimulate the ire of an otherwise temperate Board, which acted consistently with law, and must be construed to be unbecoming a professional teaching staff member. I **SO FIND.**

CITE #11

"Tardiness is a problem which 'the administration has failed to deal with effectively'; some teachers have 'been forced to cancel class for lack of attendance'; and the principal 'has failed to respond in an effective manner' " (P-133, pages 2-3).

As previously noted, neither the Board or its administrators are respondents in this matter. Pupil tardiness was admittedly a problem in Ridgewood. Administrative efforts were made through the development of policies to eliminate the problem. This court does not find it necessary, however, to judge the effectiveness of those efforts. The issue here

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relates to the conduct of Verost in implementation of policies and directives. Verost did not always assign tardy pupils to ninth period detention pursuant to policy, and in those instances is found here to have been insubordinate.

CITE #12

"As far as my allowing students to bring refreshments to class, this is simply not true and a deliberate lie on the part of the evaluator as it is stated" (P-133, page 3).

It is undisputed that pupils brought refreshments to Verost's classroom and probably consumed them in the laboratory environment of the art class, as evidenced by wrappers found in the waste basket. Testimony clearly established that such pupils were reprimanded by Verost when he discovered the policy violation. However, the Board has failed to meet its burden of proof that Verost allowed pupils to violate the policy. I **FIND** this element of Charge #1 not to be true, but the supervisor's comment (P-120, Area I, B-1) was not a "deliberate lie." To this extent Verost's accusation is unbecoming. **I SO FIND.**

CITE #13

"Concerning class atmosphere, the evaluator deliberately presents a lie" (P-133, page 3).

The art supervisor assessed classroom atmosphere as satisfactory (P-120, Area I-D), but indicated weaknesses relating to the physical aspects and orderliness of the classroom, which in turn showed "little apparent concern on the part of the teacher." Testimony established Verost as having put forth effort to secure suitable desks and storage furniture. The supervisor's comments reflected his perception of how Verost could improve classroom atmosphere. Although I find the Board has failed to meet its burden that Verost was insubordinate, I **FIND** his accusation that the supervisor "deliberately presents a lie" to be unbecoming conduct.

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CITE #14

"You must agree that his [Mr. Becker's] having this information since November 1979 for the current requests indicates that he [Mr. Becker] deliberately lied in his comments on the summary evaluation" (P-133, page 4).

This comment refers to a request made by Verost "for approximately $1,500 worth of furniture to Mr. Becker."

Having previously found a failure by the Board to meet its burden of proof relative to insubordination, and finding a lack of recall by art supervisor Becker, concerning the Verost request, I **FIND**, nevertheless, the venomous attack on Becker to be conduct unbecoming a teacher.

CITE #15

"I believe the evaluator [Mr. Becker] in taking advantage of the lack of knowledge of lay people in order to deliberately distort the picture here." (P-133, page 5)

This comment refers to the perceived disorderliness of the art room by the supervisor as indicated in P-120, Area I, D. I **FIND** Verost to be entitled to his belief, but **ALSO FIND** his attack on his supervisor "to deliberately distort" to be vituperative and conduct unbecoming a teacher.

CITE #16

"Mr. Becker would be fair to note that if the variety of experience has diminished, it may also have something to do with student schedule, class size, lack of time allowance needed to do all the things I am expected to do not only in the art room but around the school, and the restrictions placed on the program by an administration that apparently does not care to emphasize personal and creative growth of students" (P-133, page 5).

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This response from Verost refers to P-120, Area I, E, ("Teacher Has a Command of Subject Matter.") There is no insubordination here, and I **FIND** a legitimate concern of a teacher responding to a summary evaluation. Although it could best be reserved for discussion in a post-evaluation conference, such expression does not rise to the level of unbecoming conduct. **I SO FIND.**

CITE #22

"The onus always seems to fall on the other staff member and never on Mrs. Schneider who seems to enjoy a unique protection from the administration." (P-133, page 8)

The Verost comment here refers to P-120, Area II, B, (Recognizes and Fulfills Total Professional Responsibilities), wherein he received an unsatisfactory assessment by his supervisor. Mrs. Schneider was supervisor of the media center, and the supervisor's comment referred to "Serious conflict developed between the teacher [Verost] and the media center personnel."

Verost alleged "Another false picture is deliberately presented by the evaluator" preceding the above comment (P-133, page 7).

The merits of the library conflict will be addressed later. The Verost comment itself is not supportive of the insubordination charge. Nor does the comment, again best reserved for the post-evaluation conference between teacher and supervisor, rise to the level of conduct unbecoming a teacher. **I SO FIND.**

CITE #24

"Mr. Honsinger, unfortunately takes any sincere questioning as an affront to his authority" (P-133, page 9).

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This Verost comment refers to P-120, Area II, B-5, wherein the supervisor stated the "Teacher refused to cooperate in the preparation of materials for Middle States evaluation until formally directed to do so by the principal. Even then, he resisted by threatening to contact the Middle States Association directly." Mr. Honsinger is the principal.

The "Middle States" problem will be addressed later. The Verost comment is a conclusion by him that is specious at best, as the demeanor of witnesses Verost and Honsinger indeed weighs more favorably for the latter, where I **FIND** a greater sincere seriousness of purpose. However, the comment itself is not supportive of the Board's charge of insubordination, nor does it rise to the level of unbecoming conduct. **I SO FIND.**

CITE # 26

"The fact is I have been severely harassed by the Ridgewood Administration" (P-133, page 9).

This Verost comment referred to P-120, Area II, C (Uses Evaluation for Self-Improvement), which was assessed as unsatisfactory, wherein the art supervisor stated "Teacher insists on construing suggestions for improvement as harassment."

The Board argued with reference to the supervisor's comment in Area III of the summary evaluation in support of its charge, which stated "It is necessary to question the emotional and social maturity of this teacher in light of his belligerent attitude during conferences and considering his outbursts, accusations and threats directed toward the principal, supervisor and committees."

Verost is entitled to his belief that he was harassed by the administration. The Board has not met its burden of proof that Verost's expression of that belief supports either the insubordination or unbecoming conduct charge. **I SO FIND.**

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CITE #27

"This summary evaluation clearly indicates the degree of honesty in their words and the way [Honsinger and Mr. Becker] use their words, despite their titles." (P-133, page 9)

This Verost comment again referred to P-120, Area II, C. And again, the Board has not sustained its burden of proof that the comment supports a charge of insubordination. But this comment is vituperative in its personal attack on the integrity of the supervisor and principal, which I FIND conduct unbecoming a teacher.

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CHARGE #2

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID DELIVER OR CAUSED TO BE DELIVERED ON OR ABOUT MAY 9, 1980, A CERTAIN DOCUMENT TO THE PRESIDENT OF THE BOARD OF EDUCATION, THE SUPERINTENDENT OF SCHOOLS, THE PRINCIPAL OF RIDGEWOOD HIGH SCHOOL AND THE SUPERVISOR OF ART, IN WHICH DOCUMENT HE ALLEGED THAT HIS 1979-80 SUMMARY EVALUATION WAS "DELIBERATELY FALSE AND FRAUDULENT" AND THAT IT WAS INTENDED "TO DO DELIBERATE DAMAGE TO MY CREDIBILITY, MY REPUTATION AND MY GENERAL WELL BEING," SAID DECLARATIONS AND PUBLICATIONS BEING INSUBORDINATE AND CONDUCT UNBECOMING A TENURED TEACHING STAFF MEMBER.

Charge #2 represents cites #1 and #2 incorporated in Charge #1.

CITE #1

"The 1979-80 Summary Evaluation of Myself, William T. Verost, was, in my judgment presented to the Ridgewood Board of Education in a deliberately false and fraudulent state" (P-133, page 1).

CITE #2

"The intent was clearly to do deliberate damage to my credibility, my reputation and my general well being" (P-133, page 1).

Again, the Board has failed to meet its burden of proof the cited comments support a charge of insubordination. **I SO FIND.**

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The abundant testimonial and documentary evidence, however, is overwhelmingly convincing that the summary evaluation was not presented in a "deliberately false and fraudulent state," nor was a clear intent established "to do deliberate damage . . . ." These Verost comments are indeed offensive, venomous, and vituperative, and the incorporation of same in his alleged response to the summary evaluation represents conduct unbecoming a teacher.

I FIND charge #2 relating to insubordination not to be true, but do FIND the charge relating to unbecoming conduct to be true.

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CHARGE #3

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID DELIVER OR CAUSED TO BE DELIVERED ON OR ABOUT MAY 9, 1980, A CERTAIN DOCUMENT TO THE PRESIDENT OF THE BOARD OF EDUCATION, THE SUPERINTENDENT OF SCHOOLS, THE PRINCIPAL OF RIDGEWOOD HIGH SCHOOL AND THE SUPERVISOR OF ART, IN WHICH HE ALLEGED THAT THE ADMINISTRATION OF THE SCHOOL DISTRICT WAS ABUSING THE PUBLIC TRUST AND ACTING IN A TOTALLY FALSE MANNER, SAID CONDUCT BEING INSUBORDINATE AND CONDUCT UNBECOMING A TENURED TEACHING STAFF MEMBER.

Charge #3 represents cite #4 incorporated in Charge #1.

CITE #4

"The abuse of the public trust and of power is apparent in the manner in which this document was presented" (P-133, page 1).

Verost is referring to the summary evaluation document, P-120. The body of his response, P-133, is preceded by a quotation from the Bible, Proverbs 17:4: "A wicked doer giveth heed to false lips; and a liar giveth ear to a naughty tongue."

In the absence of policy or law to prevent Verost's response, I **FIND** the charge of insubordination to be unsubstantiated, and therefore untrue.

The preparation and presentation of the summary evaluation by the supervisor to the principal, and subsequent transmittal to the Superintendent and the Board for whatever action it deemed appropriate was in accordance with law and in fulfillment of the responsibilities vested in Verost's superiors. To have acted otherwise would have been a breach of their duties. I **FIND** Verost's accusation of an apparent abuse of public trust and power to be a stinging condemnation of the professional conduct of his superiors, which is conduct unbecoming a teacher.

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CHARGE #4

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID DELIVER OR CAUSED TO BE DELIVERED ON OR ABOUT MAY 9, 1980, A CERTAIN DOCUMENT TO THE PRESIDENT OF THE BOARD OF EDUCATION, THE SUPERINTENDENT OF SCHOOLS, THE PRINCIPAL OF RIDGEWOOD HIGH SCHOOL AND THE SUPERVISOR OF ART, IN WHICH DOCUMENT HE ALLEGED THAT THE ACTIVITIES OF THE BOARD OF EDUCATION AND OF THE ADMINISTRATION WERE DESIGNED "TO DELIBERATELY DAMAGE THE REPUTATIONS OF TEACHERS, HARASS AND INTIMIDATE TEACHERS AND DEPRIVE THEM OF EMPLOYMENT," SAID PUBLICATIONS AND DECLARATIONS BEING INSUBORDINATE AND CONDUCT UNBECOMING A TENURED TEACHING STAFF MEMBER.

Charge #4 represents cite #5 incorporated in Charge #1.

CITE #5

"It has been a trademark of the current administration to start with a conclusion and build a supportive structure around it which may be totally false while being passed upon for truth. This has been done not only to gain support for administrative actions, such as the case of the fiscal management report and the high school work load report, but has been done to deliberately damage the reputation of teachers, harass and intimidate teachers and deprive them of employment" (P-133, page 1).

The Board has failed to meet its burden of proof the above quotation from P-133 supports a charge of insubordination. **I SO FIND.**

The statement, however, may best be characterized as "whistling in the wind." Extensive testimony and documentary evidence supports a finding the fiscal management and high school work load reports resulted from sincere efforts for analysis of a thorough, efficient and economic process of providing pupils with educational experiences to which

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they are entitled. Finding no sinister motives "to deliberately damage the reputation of teachers, harass and intimidate teachers and deprive them of employment," I FIND this expression of Verost to tread upon his own professional stature with venom and vindictiveness, and to be conduct unbecoming a teacher.

Concerning the fiscal management report, this was corroborated by one of Verost's own witnesses, who testified the Board or administration did not purposefully try to mislead the public, and further the subcommittee chose areas to investigate and could have added to them (Tr. 45, 172-18, 173-19, 174-15).

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CHARGE #5

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID DELIVER OR CAUSED TO BE DELIVERED ON OR ABOUT MAY 9, 1980, A CERTAIN DOCUMENT TO THE PRESIDENT OF THE BOARD OF EDUCATION, THE SUPERINTENDENT OF SCHOOLS, THE PRINCIPAL OF RIDGEWOOD HIGH SCHOOL AND THE SUPERVISOR OF ART, IN WHICH DOCUMENT HE ALLEGED THAT A NOW DECEASED EMPLOYEE, ONE ROBERT HALL, WAS DELIBERATELY RETURNED TO A CLASSROOM TEACHING SITUATION IN ORDER TO HARASS AND INTIMIDATE HIM AND TO DEPRIVE HIM OF HIS EMPLOYMENT EVEN THOUGH THE SAID EMPLOEE "WAS APPARENTLY INCAPACITATED," SAID CONDUCT BEING INSUBORDINATE AND CONDUCT UNBECOMING A TENURED TEACHING STAFF MEMBER.

Charge #5 represents cite #6 incorporated in Charge #1.

CITE #6

"My current case is one example. The prototype example was when a former employee, Robert Hall, who was apparently incapacitated, was placed back in the classroom at the expense of the students in a Russian Roulette educational setting in order to deliver an evaluation about him that would deprive him of employment" (P-133, pages 1, 2).

This statement was made in support of the allegation by Verost of the abuse of public trust and power by his superiors.

I FIND no preponderance of credible evidence in support of the charge of insubordination. The statement is a most serious attack on the professional ethics allegedly employed by his superiors. Lacking any credible evidence to factually support the truth of the statement, Verost's very own witness exonerated the administration and

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Board of any such behavior. (Tr. 52-88, 89) I FIND Verost's own professional behavior resulting from his groundless allegations to fall far below the threshold of acceptability and is here conduct unbecoming a teacher.

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CHARGE #6

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID DELIVER OR CAUSED TO BE DELIVERED ON OR ABOUT MAY 9, 1980, A CERTAIN DOCUMENT TO THE PRESIDENT OF THE BOARD OF EDUCATION, THE SUPERINTENDENT OF SCHOOLS, THE PRINCIPAL OF RIDGEWOOD HIGH SCHOOL AND THE SUPERVISOR OF ART, IN WHICH DOCUMENT HE ALLEGED THAT TEACHING STAFF MEMBERS WERE "PLACED UP FOR EVALUATION IN ORDER TO BRING PRESSURE UPON THEM AND TO REDUCE FORCE," SAID CONDUCT BEING INSUBORDINATE AND CONDUCT UNBECOMING A TENURED TEACHING STAFF MEMBER.

Charge #6 represents cites #7 incorporated in Charge #1.

CITE #7

"Simultaneously, other teachers thought undesirable by the Ridgewood System, and not necessarily because they were poor teachers, were placed up for evaluation in order to bring pressure upon them and to reduce force" (P-133, page 2).

Again, I **FIND** no insubordination here.

Assuming the truth of Verost's allegations, the administration should be commended for utilizing the evaluative process to improve the performance of its teachers. Any pressure from this process is usually self-imposed by the evaluatee when the need for performance improvement is evident. To allege an abuse of its regulatory obligation casts a sinister shadow on the administration. When the allegation is groundless, it is a serious affront to the professionalism of administrators. The allegation here is groundless. There is no evidence in the record of a reduction in force. I **FIND** the allegation without merit, and the conduct of Verost in making it, without substantiation, to be unbecoming a teacher.

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CHARGE #7

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID DELIVER OR CAUSED TO BE DELIVERED ON OR ABOUT MAY 9, 1980, A CERTAIN DOCUMENT TO THE PRESIDENT OF THE BOARD OF EDUCATION, THE SUPERINTENDENT OF SCHOOLS, THE PRINCIPAL OF RIDGEWOOD HIGH SCHOOL AND THE SUPERVISOR OF ART, IN WHICH DOCUMENT HE ALLEGED THAT THE RIDGEWOOD BOARD OF EDUCATION FULLY SUPPORTED UNETHICAL AND IMMORAL PRACTICES WHICH DISPLAYED A TOTAL DISREGARD FOR FAIR PLAY, SAID CONDUCT BEING INSUBORDINATE AND CONDUCT UNBECOMING A TENURED TEACH STAFF MEMBER.

Charge #7 represents cites #8 and #9 incorporated in Charge #1.

CITE #8

"It is apparent that this unethical and immoral practice is done with the full support of the Ridgewood Board of Education" (P-133, page 2).

CITE #9

"It is a practice which displays a total disregard for fair play and an emphatic lack of consideration for the rights of teachers as citizens as well as contempt for their loyalty and dedication to the students of Ridgewood and the community" (P-133, page 2).

I **FIND** the charge of insubordination to be untrue.

The process of evaluation utilized by the Board and its agents has been previously addressed. I **FIND** the scathing personal attack on the character of members of the Board and administration to be groundless and scurrilous, and conduct unbecoming a professional

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teaching staff member. The very existence of a school is to provide experiences for children in preparation for the achievement of success in meeting the challenge of society through mental, physical, emotional and social development. The key in this process has always been, and will always be, the teacher. Administrative and Board efforts to retire or otherwise remove teachers with less than an acceptable performance from the critical teacher-pupil relationship is subject to applause in the absence of bad faith, not condemnation.

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CHARGE #8

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID DELIVER OR CAUSED TO BE DELIVERED ON OR ABOUT MAY 9, 1980, A CERTAIN DOCUMENT TO THE PRESIDENT OF THE BOARD OF EDUCATION, THE SUPERINTENDENT OF SCHOOLS, THE PRINCIPAL OF RIDGEWOOD HIGH SCHOOL AND THE SUPERVISOR OF ART, IN WHICH DOCUMENT HE CHARGED THAT HIS EVALUATOR "DELIBERATELY PRESENTS A FALSE PICTURE BY PRESENTING WHAT CAN ONLY BE CALLED WHAT THEY TRULY ARE, LIES," SAID CONDUCT BEING INSURBORDINATE AND CONDUCT UNBECOMING A TENURED TEACHING STAFF MEMBER.

Charge #8 represents cites #10, 17, 18, 19, 20, 21, 23, 25 and 28 incorporated in Charge #1.

CITE #10

"The method employed is evident in my Evaluation Summary as the evaluator deliberately presents a false picture by presenting what can only be called what they truly are, lies" (P-133, page 2).

CITE #17

"Again, I must point out that Mr. Becker is inaccurate here and I feel his attempt is to present a deliberately false picture" (P-133, page 6).

CITE #18

"In Area II on page 74 B-4 under A-1, Mr. Becker presents a statement which is deliberately false since I took a course during the 78-79 school year in Teacher Effectiveness Training (P-133, page 6).

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CITE #19

"He [Mr. Becker] again deliberately presents a picture which is not true" (P-133, page 7).

CITE #20

"On page 74 B-5 another false picture is deliberately presented by the evaluator [Mr. Becker]" (P-133, page 7).

CITE #21

"Again, the evaluator [Mr. Becker] presents a deliberately false picture" (P-133, page 7).

CITE #23

"Regarding Item B-5, I must again insist that the evaluator [Mr. Becker] is again presenting a false picture" (P-133, page 8).

CITE #25

"This summary evaluation . . . is replete with false information" (P-133, page 9).

CITE #28

"I would be interested in hearing which committees the evaluator [Mr. Becker] is talking about. This is a deliberate lie" (P-133, page 9).

I **FIND** the charge of insubordination to be untrue for reasons previously stated.

The above cites are best characterized by the Verost allegation that Becker, his art

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supervisor and evaluator, carefully and willfully prepared his summary evaluation with inclusion of deliberately construed false statements to establish a basis upon which disciplinary action could and would be taken.

Relative to Cite #18, Verost testified as to the unawareness by Becker concerning the course taken in 1978-79. A possible error due to unawareness is indeed distinguishable from a deliberate lie.

I **FIND** the summary evaluation to be a true account of Verost's performance as perceived by Becker, without evil motivation.

An evaluation of Becker by his principal would likely include commentary to assist him in the improvement of his performance as a supervisor. However, my observation of his demeanor as a witness indicates the unlikelihood that his integrity or character would be questioned.

Verost's blatant attack on Becker's character in P-133 exemplifies a ruthless disregard of his own professional ethics. I **FIND** this charge of conduct unbecoming a teacher to be true.

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CHARGE #9

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID DELIVER OR CAUSED TO BE DELIVERED ON OR ABOUT MAY 9, 1980, A CERTAIN DOCUMENT TO THE PRESIDENT OF THE BOARD OF EDUCATION, THE SUPERINTENDENT OF SCHOOLS, THE PRINCIPAL OF RIDGEWOOD HIGH SCHOOL AND THE SUPERVISOR OF ART, IN WHICH DOCUMENT HE CAUSED TO BE INCLUDED A LIST OF NAMES INCLUDING STUDENTS WITH SPECIAL EDUCATION PROBLEMS AND DID HIGHLIGHT SAID STUDENTS WITH COMMENTS CONCERNING THEM, SAID CONDUCT BEING UNBECOMING A TENURED TEACHING STAFF MEMBER.

Verost attached a field trip list of pupils to P-133. It is marked separately in evidence as R-84. The list was initially submitted to the coordinator of special programs by Verost with a request for an indication of pupils with special problems. It was returned to Verost by the coordinator, who had circled three pupil names as "Spec. Ed. (classified)" and boxed in two pupil names with brief notations of "Spec. Problems."

The Board charges Verost with unbecoming conduct for "highlighting . . . with comments," and transmitting the list to his art supervisor, principal, Superintendent and Board President.

I **FIND** the identification and highlighting was done by the coordinator, not Verost, and was a proper response to the inquiry of a teacher for internal purposes pursuant to N.J.A.C. 6:3-2.5(d)(4). I, therefore, **FIND** the charge to be untrue to this extent.

The transmittal of the document by Verost to his supervisor, principal and Superintendent is of no great concern. They are all certified personnel within the school district, bound not to release the information contrary to N.J.A.C. 6:3-2.3. The argument by Verost that the information is not a mandated pupil record is specious, as information forming a part of a pupil record must be construed to be a record in itself governed by

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the accessibility rule.

The Board President is not an exception pursuant to N.J.A.C. 6:3-2.5(d)(8).

It would be naive for one to expect that the Board President would not share P-133 with other Board members. I FIND the incorporation of R-84 with P-133 to be an exercise of poor judgment, and technically construed to be conduct unbecoming a teacher. Standing alone, however, this transmittal, albeit in violation of the spirit and letter of N.J.A.C. 6:3-2.5, would call for little more than an administrative reprimand.

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CHARGE #10

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID ON OR ABOUT APRIL 20, 1977, CHARGE A SENIOR ADMINISTRATOR WITH BEING, "ONE OF THE MOST DISHONEST PEOPLE HE HAS EVER MET IN HIS LIFE AND CONSIDERS HIM TO BE SELF-SEEKING AND LACKING IN THE PROFESSIONAL ETHICS DEPARTMENT," SAID CONDUCT BEING INSUBORDINATE AND UNBECOMING A TENURED TEACHING STAFF MEMBER.

I **FIND** the charge of insubordination untrue for reasons previously stated.

The quotation above is attributed to Verost about his principal was undisputably uttered by him, and was triggered by a review of a record of his tardiness and absenteeism and reasons for same which he had requested (see P-14, page 8).

The high school executive secretary testified the record was compiled by secretarial personnel, responsible for recording such information, and further the principal had provided no input. She further testified the input was provided by Verost. (Tr. 52, 10-33.)

I **FIND** the testimony of the secretary to be credible, and Verost's unscrupulous attack on the character and integrity of his principal to be conduct unbecoming a teacher.

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CHARGE #11

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID ON OR ABOUT APRIL 21, 1977, IN THE RIDGEWOOD HIGH SCHOOL CAFETERIA AND IN THE PRESENCE OF OTHER TEACHERS AND STUDENTS, PUBLICLY ACCUSE ROBERT HONSINGER, PRINCIPAL, RIDGEWOOD HIGH SCHOOL OF BEING NONPROFESSIONAL IN HIS ACTIONS AND IN HIS BEHAVIOR, SAID ACTION BEING INSUBORDINATE, ABUSIVE AND CONDUCT UNBECOMING A TENURED TEACHING STAFF MEMBER.

The parties incorporated by reference their arguments presented in Charge #10 here, and need not be belabored here.

I **FIND** the charge of insubordination not true. I **FURTHER FIND** Verost made the accusation in fact, and the charge of unbecoming conduct to be true for the reasons stated in Charge #10.

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CHARGE #12 AND AMENDED CHARGE #12A

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, HAS CONSISTENTLY, REPEATEDLY AND WITHOUT CAUSE HARASSED, HARANGUED AND VERBALLY ABUSED THE RIDGEWOOD BOARD OF EDUCATION AND ITS REPRESENTATIVES, THREATENING LEGAL ACITON AND OTHERWISE, SO THAT THE EFFICIENT OPERATION OF THE PUBLIC SCHOOLS HAS BEEN INTERFERED WITH AND IMPEDED, SUCH CONDUCT BEING INSUBORDINATE AND UNBECOMING A TENURED TEACHING STAFF MEMBER. THE SPECIFIC INCIDENTS REFERRED TO ABOVE ARE:

(A) ON OR ABOUT APRIL 21, 1977, IN THE CAFETERIA OF RIDGEWOOD HIGH SCHOOL, WILLIAM VEROST THREATENED ROBERT HONSINGER, PRINCIPAL OF RIDGEWOOD HIGH SCHOOL, WITH A PERSONAL LAWSUIT.

Charge #12 was amended by 11 charges of specificity. The amended charges will be addressed separately. I **FIND** the charge of insubordination not to be true. This finding is applicable to all amended #12 charges unless otherwise stated.

A review of P-14 and the credible verifying testimony of Honsinger (T15, 69-70) supportive of the Board's charge. I **FIND** the charge of unbecoming conduct incorporated in 12A to be true.

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AMENDED CHARGE #12B

ON OR ABOUT MARCH 31, 1977, DURING THE COURSE OF A SUMMARY EVALUATION CONFERENCE HELD AMONG ROBERT HONSINGER, RUSSELL BECKER, CHAIRMAN, ART-HUMANITIES DEPARTMENT, AND WILLIAM VEROST, WILLIAM VEROST STATED THAT MR. HONSINGER AND MR. BECKER WERE GOING TO BE "SURPRISED" AND THAT HE WAS LOOKING FORWARD TO SEEING THEM IN COURT WHERE THEY WOULD HAVE TO "TESTIFY"

Verost did not deny that he may have threatened Becker and Honsinger as alleged in this charge. The testimony of Becker and Honsinger, deemed to be credible, supports the Board's charge.

I believe Verost threatened his superiors as charged, and **FIND** this to be conduct unbecoming a teacher.

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AMENDED CHARGE #12C

IN A LETTER DATED NOVEMBER 25, 1977, FROM WILLIAM VEROST TO THE RIDGEWOOD BOARD OF EDUCATION, MR. VEROST THREATENED EACH MEMBER OF THE BOARD OF EDUCATION AND THE ADMINISTRATION WITH INDIVIDUAL AND COLLECTIVE LIABILITY IF THEY INTERFERED WITH HIS EMPLOYMENT.

Verost argued the letter, P-28 in evidence, is conciliatory in tone. The Board argued it is threatening.

A careful review of P-28 leads the court to construe the document as an inquiry and a position paper with a threatening tone if the Board acted adverse to his wishes. His concern was the possible action of the Board at a public meeting "to file for a restraint of arbitration, naming myself and possibly presenting materials adverse to me." The letter was addressed to all Board members and four administrators.

The writing and transmittal of this document was an imprudent act by Verost. It verges on unbecoming conduct, and rises to that level because of its impact in threatening the institutional efficiency of the Board. I **FIND** this charge of unbecoming conduct to be true.

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AMENDED CHARGE #12D

ON OR ABOUT MARCH 31, 1977, DURING THE COURSE OF A CONFERENCE HELD AMONG ROBERT HONSINGER, RUSSELL BECKER AND WILLIAM VEROST, WILLIAM VEROST THREATENED TO "GO TO THE COMMUNITY," "GET MAXIMUM EXPOSURE" AND "MAKE SOME PHONE CALLS" IN REGARD TO HIS SUMMARY EVALUATION.

A review of P-11 and the credible testimony of Becker and Honsinger (T1, 121; T2, 6; and T15,60), without a denial of the utterances by Verost, is supportive of the Board's charge.

Whether Verost was "thinking aloud" is irrelevant. I believe he made the statements as charged. The threatening tone of these statements to his immediate supervisors can only have a detrimental impact on the administrative efficiency of the high school.

I **FIND** the charge of unbecoming conduct to be true.

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AMENDED CHARGE #12E

IN A MEMO DATED APRIL 20, 1977, WILLIAM VEROST TO ROBERT HONSINGER, MR. VEROST ACCUSED MR. HONSINGER OF BEING " . . . ONE OF THE MOST DISHONEST PEOPLE [I HAVE] EVER MET IN [MY] LIFE" AND FURTHER STATED THAT HE CONSIDERED MR. HONSINGER TO BE " . . . SELF-SEEKING AND LACKING IN THE PROFESSIONAL ETHICS DEPARTMENT."

This charge is duplicative of Charge #10, and is therefore **DISMISSED.**

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AMENDED CHARGE # 12F

ON OR ABOUT APRIL 21, 1977, WILLIAM VEROST, OUTSIDE THE OFFICE OF THE PRINCIPAL OF RIDGEWOOD HIGH SCHOOL, WARNED ROBERT HONSINGER THAT HE HAD "BETTER THINK HOW YOU'RE RUNNING THE SCHOOL."

Verost denied making the statement and also argued it to be a petty charge.

Credence is given here to the testimony of Honsinger (T19 - 46, 47, 48). I believe Verost made the statement.

I agree with Verost to the extent the charge is petty if standing alone. It must, however, be considered in an analysis of all charges found to be true.

I **FIND** the statement to be disrespectful, and the charge of unbecoming conduct to be true.

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AMENDED CHARGE #12G

ON OR ABOUT JANUARY 31, 1980, FEBRUARY 5, 1980 AND FEBRUARY 6, 1980, DURING THE COURSE OF MEETINGS HELD AMONG ROBERT HONSINGER, RUSSELL BECKER AND WILLIAM VEROST, MR. VEROST FALSELY CHARGED THE ADMINISTRATION WITH UNETHICAL, UNDERHANDED AND ILLEGAL ACTIVITIES.

Verost did not deny the accusation (T36-121, 122).

C-5 in evidence is a stipulation of settlement of a disputed matter before the Public Employment Relations Commissioner, wherein it clearly stated Honsinger's failure to permit Verost to have representation at the "Middle States Conferences" was in violation of N.J.S.A. 34:13A-5.4a(1). The Board's contention that Verost falsely charged the administration with illegal activities is not true. I SO FIND.

Honsinger believed his refusal of Verost's representation request to be proper since no disciplinary action was to be taken at the conference. (See P-12.) Such conduct by Honsinger, though perhaps illegal, cannot be deemed to be unethical or underhanded in the absence of credible evidence of such intent.

This court cannot castigate Verost for his florid use of language.

The Board's contention of false charges by Verost relied on the latter's description of initial levels of the grievance procedure as a sham and kangaroo court.

An argument can indeed be made in support of Verost's position as those initial levels involve administrative personnel who may be considered suspect and expected to support the position of a colleague. The Office of Administrative Law was created to provide full and fair adjudication of disputes to avoid the appearance of bias from inbred hearing examiners.

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Verost fails to recognize a purpose of the lower-level process in resolving disputes through settlement, and further that a grievant is not precluded from pursuing the matter beyond the administrative level.

The emotional utterance of Verost underlies the unbecoming conduct charge, which cannot vanish from the findings of truth or falsity of a specific charge, and exemplifies his disrespect and intolerance for superiors in their efforts to fulfill their administrative responsibilities.

I **FIND** the Board's charge of Verost's unbecomimg conduct concerning the latter's accusation of illegal activity related to his representation request to be untrue. In all other respects, I **FIND** the charge to be true.

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AMENDED CHARGE #12H

ON OR ABOUT MARCH 31, 1980, DURING THE COURSE OF A MEETING WITH HIS SUPERVISOR, RUSSELL BECKER, WILLIAM VEROST THREATENED TO PUBLICLY CALL MR. BECKER A "LIAR."

This is related to Charge #13, wherein Verost is alleged to have read a portion of an observation report to pupils in his class. Verost is alleged to have said to Becker "if you say that I read that whole observation report to the students, I am going to call you a liar publicly."

For clarity, the alleged reading incident occurred on March 31, 1980, and the alleged accusation occurred on April 8.

P-116 in evidence and the credible evidence of Becker and Honsinger convinces this court that Verost made the statement. Becker never said Verost read the whole observation report to his students. The Verost statement was inflammatory, intimidating and threatening to a superior, and is construed to be unprofessional and conduct unbecoming a teacher. I **FIND** the charge to be true.

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AMENDED CHARGE #12I

ON OR ABOUT JUNE 17, 1980, WILLIAM VEROST, IN THE MAIN OFFICE OF RIDGEWOOD HIGH SCHOOL, THREATENED TO SUBPOENA THE ENTIRE STAFF OF THE RIDGEWOOD HIGH SCHOOL MEDIA CENTER AND TO "INVOLVE THE ENTIRE SCHOOL SYSTEM."

A review of documentary and testimonial evidence is convincing that Verost declared his intention to subpoena the media center staff and involve the entire school system in his battle with the administration (see P-150; P-151; P-157; Tr. 7 - 99-101; T17-82; T47-12, 30).

This court has no quarrel with Verost's intention. His verbalization of it, and the tone in which this court believes it was expressed, was threatening, intimidating, and conduct unbecoming a teacher.

I **FIND** the charge of conduct unbecoming a teacher to the true.

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AMENDED CHARGE #12J

ON OR ABOUT JANUARY 31, 1980, AND AFTER REPEATED REQUESTS FROM THE ADMINISTRATION OF RIDGEWOOD HIGH SCHOOL, WILLIAM VEROST SUBMITTED, ONE MONTH LATE AND WITHOUT EXCUSE, ONLY ONE COPY OF FORM 11 OF THE MIDDLE STATES EVALUATION INSTEAD OF THE REQUESTED AND REQUIRED TWO COPIES.

Documentary and testimonial evidence, including the self-incriminating testimony of Verost, makes it crystal clear that Verost refused and failed to submit the required documents in a timely fashion (see P-82, 83, 84, 163 and 164; T5-30; T16-64; T21-103, 124; T22-67, 74-76, 80-81, 85).

The dispute developed over a requirement that staff members file two copies of a Form 11 in connection with the Middle States evaluation. Form 11, R-36 in evidence, includes "IV. Analysis of Teaching Conditions." It consists of a provision in four parts for individual staff members to express perceptions, suggestions, and opinions. It states in part: "Although responses to this section are optional, staff members are encouraged to respond to all questions . . . ." (emphasis added).

The rationale for Verost's refusal to submit the form was his understanding that Honsinger would review the documents, which Verost considered to be unfair and prejudicial to the status of the teacher. Honsinger indicated he was required to review them by the Middle States Association (MSA).

The court was left to determine if Honsinger self-imposed his review, presumably to use individual staff member's expressions detrimentally against them, or if Honsinger was in fact required by MSA to review the documents.

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The court ordered the parties to cooperatively construct interrogatories and submit same to MSA. Answers were filed by Frederick Aho, Associate Director, Commission on Secondary Schools, Middle States Association of Colleges and Schools and William H. Etsweiler, Jr., Executive Director, MSA. Sections of "Guidelines for Planning a School's Self-Study and Evaluation" by MSA were attached. The documents are marked in evidence as C-4 and C-6.

A review of the above-mentioned documents clearly establishes the authority and duty of the principal to review all MSA data, including Form 11. His review, however, is to basically determine the completeness of the data, and not to make a qualitative analysis of it.

Since Verost's conduct is the underlying charge, it is noted that Part IV of Form 11 is optional. All Verost had to do to alleviate his concern was to exercise his option not to fill in Part IV. He chose, however, to create a controversy which unquestionably resulted in a negative impact on the efficiency of the process, staff relations, and staff-administrative relations.

I **FIND** the charge of insubordination to be true. I **ALSO FIND** the charge of conduct unbecoming a teaching staff member to be true.

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AMENDED CHARGE #12K

ON OR ABOUT MAY 3, 1979, WILLIAM VEROST GAVE ROBERT HONSINGER TEN (10) MINUTES NOTICE OF A FIELD TRIP TO SOHO (NEW YORK CITY), INSTEAD OF THE REQUIRED ONE (1) WEEK NOTICE.

A review of documentary and testimonial evidence, including that of Verost, clearly establishes that Verost submitted a field trip list in an untimely fashion, contrary to administrative requirements (see R-1, P-78, T4-133), T16-41, T27-66).

For clarity, the untimeliness related to the filing of the trip list. The trip itself was not a problem.

Verost is technically guilty of insubordination and conduct unbecoming a teacher due to his noncompliance with rules, which, standing alone, would probably yield nothing more than a reprimand. I FIND the charge, as delineated herein, to be true.

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AMENDED CHARGE #13

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID DURING THE 1979-80 SCHOOL YEAR READ A PORTION OR PORTIONS OF HIS MARCH 27, 1980 OBSERVATION REPORT TO HIS STUDENTS, SAID CONDUCT BEING UNPROFESSIONAL AND UNBECOMING A TENURED TEACHING STAFF MEMBER.

This charge also formed the basis for Amended Charge #12H, wherein Verost said to Becker: "if you say that I read that whole observation report to the students, I am going to call you a liar publicly." (Emphasis added.)

A review of documentary and testimonial evidence, including Verost's own testimony, mandates a finding that Verost did in fact read a portion of his observation report to his students, and that said reading was in contravention of an administrative directive P-9C; P-110; P-117; T5-121-123; T17-47, 48, 53, 57; T26-64; T39-155.

Verost argues the administration encouraged staff members to seek input from students concerning curricular matters. There is no evidence whatsoever that said encouragement was to incorporate student input on a supervisors observation report of a teacher's performance. There is evidence which clearly establishes the observation report as a confidential and professional document, which Verost was directed not to disclose to students.

I **FIND** the charge of insubordination and conduct unbecoming a teacher to be true.

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AMENDED CHARGE #14

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION HAS SINCE APRIL 1979, OR EARLIER, EMBARKED ON A CAMPAIGN TO HARASS, VERBALLY ABUSE AND INTIMIDATE FELLOW TEACHING STAFF MEMBERS EMPLOYED IN THE MEDIA CENTER OF RIDGEWOOD HIGH SCHOOL IN THE PERFORMANCE OF THEIR DUTIES, SAID CONDUCT BEING INSUBORDINATE AND UNBECOMING A TENURED TEACHING STAFF MEMBER.

Documentary and testimonial evidence related to the library (or media center) controversy and Verost's conduct associated therewith is abundant (P49-59; P-150; P-151; P-157; P-161; P-162; R-42; T23-23, 25-27, 29-31, 33-34, 38, 43-44, 55, 62-63, 65, 69, 71-78, 96, 98-99, 101, 106, 107). I do not find it necessary to detail the extensive record related to this charge, which is clear in itself.

Suffice for the court to indicate the development of a staff relationship problem between the media center supervisor and Verost, caused by the former's fulfillment of responsibilities assigned to her by the administration and the latter's extra duty assignment to library duty. Verost was indisputably tardy on occasions and his attitude was considered less than cooperative. He indeed made unfounded accusations, and did in fact threaten and intimidate media center staff members. Verost did not relent after supervisory conferences, and created an issue far beyond reasonableness.

There is no conclusion here that pupil behavioral problems did not exist in the Ridgewood library, nor that the role of library personnel as research consultants and "librarians" vis-a-vis a monitoring role was not also present.

The issue here relates directly to Verost's conduct and manner in which he reacted to his extra duty assignment and projected himself into an evaluative role.

I FIND the charge of insubordination and unbecoming conduct to be true.

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AMENDED CHARGE #15

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID ON OR ABOUT MARCH 28, 1980, IN THE OFFICE OF HIS SUPERVISOR, RUSSELL BECKER, AND IN THE PRESENCE OF OTHERS PUBLICLY AND FALSELY ACCUSE MR. BECKER OF IMMORAL AND UNPROFESSIONAL CONDUCT, TO WIT, "ORGANIZING A PLOT TO SET HIM UP," "DELIBERATELY PLANNING TO HARASS HIM BY OBSERVING HIS CLASSROOM," "KNOWING NOTHING ABOUT TEACHING," AND "HAVING SUNKEN TO A NEW MORAL LOW," AND THREATENING HIS SUPERIORS WITH RETALIATION, SAID CONDUCT BEING INSUBORDINATE AND UNBECOMING A TENURED TEACHING STAFF MEMBER.

This charge is amply supported by reference to documentary and testimonial evidence. (P-110, P-111, T5-117, 120, 127; T17-48, 49; T27-68.) In addition, although the specific incident is of a time different from other charges, the conduct is indeed similar to that previously addressed.

Verost's own testimony is supportive of the charge.

I **FIND** Verost did make the accusations and threats to his supervisor that are cited in the charge, was not insubordinate, but I **ALSO FIND** the charge of unbecoming conduct to be true.

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AMENDED CHARGE #16

THAT WILLIAM VEROST, A TENURED TEACHING STAFF MEMBER IN THE EMPLOY OF THE RIDGEWOOD BOARD OF EDUCATION, DID ON OR ABOUT MAY 3, 1980, MAY 28, 1980, AND JUNE 3, 1980, UPON THE DIRECTION OF HIS SUPERVISOR, RUSSELL BECKER, SAY THAT HE WOULD PUBLICLY DISPLAY CERTAIN ART WORK AT, RESPECTIVELY, THE RIDGEWOOD CHAMBER OF COMMERCE ANNUAL ART EXHIBIT, THE RIDGEWOOD HIGH SCHOOL MUSIC DEPARTMENT'S SPRING RECITAL AND AT THE RIDGEWOOD EDUCATION CENTER FOR PRIMARY ELECTION DAY, AND SUBSEQUENTLY FAILED AND REFUSED TO DO SO, SAID CONDUCT BEING INSUBORDINATE AND UNBECOMING A TENURED TEACHING STAFF MEMBER.

There is ample evidence in the record that Verost had made extensive contributions to the total environment of the high school through displays of student art work.

There is also sufficient conflicting evidence as to whether Verost was directed to display, as charged, or asked to do so, if possible. A failure to display in the former would indeed be insubordinate, without a satisfactory explanation, but no so in the latter (P-136, P-137, P-138, P-140, P-141, P-142, P-143, P-145, P-146, R-10, R-11, R-12, R-13, R-14, R-15, R-17).

This court is unable to make a clear distinction in this instance, and determines this charge to be unproven. It is therefore **DISMISSED.**

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SUMMARY

A summary of findings related to the charges of insubordination and conduct unbecoming a teacher is now recorded:

CHARGE	INSUBORDINATION	UNBECOMING CONDUCT
#1		
Cite 1 (see charge #2)	-	-
Cite 2 (see charge #2)	-	-
Cite 3	Untrue	True
Cite 4 (see charge #3)	-	-
Cite 5 (see charge #4)	-	-
Cite 6 (see charge #5)	-	-
Cite 7 (see charge #6)	-	-
Cite 8 (see charge #7)	-	-
Cite 9 (see charge #7)	-	-
Cite 10 (see charge #8)	-	-
Cite 11	True	True
Cite 12	Untrue	True
Cite 13	Untrue	True
Cite 14	Untrue	True
Cite 15	Untrue	True
Cite 16	Untrue	Untrue
Cite 17 (see charge #8)	-	-
Cite 18 (see charge #8)	-	-
Cite 19 (see charge #8)	-	-
Cite 20 (see charge #8)	-	-
Cite 21 (see charge #8)	-	-
Cite 22	Untrue	Untrue
Cite 23 (see charge #8)	-	-
Cite 24	Untrue	Untrue
Cite 25 (see charge #8)		
Cite 26	Untrue	Untrue

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CHARGE	INSUBORDINATION	UNBECOMING CONDUCT
Cite 27	Untrue	True
Cite 28 (see charge #8)	-	-
#2	Untrue	True
#3	Untrue	True
#4	Untrue	True
#5	Untrue	True
#6	Untrue	True
#7	Untrue	True
#8	Untrue	True
#9	-	True (in part) Untrue (in part)
#10	Untrue	True
#11	Untrue	True
#12A	Untrue	True
#12B	Untrue	True
#12C	Untrue	True
#12D	Untrue	True
#12E	DISMISSED	
#12F	Untrue	True
#12G	Untrue	True (in part) Untrue (in part)
#12H	Untrue	True
#12I	Untrue	True
#12J	True	True
#12K	True	True
#13	True	True
#14	True	True
#15	Untrue	True
#16	DISMISSED	

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DISCUSSION

The overwhelming documentary and testimonial evidence in this matter has guided this court in narrowing reference to what is perceived to be most relevant to each specific charge. It is noted that amended charges resulted from respondent's motion for specificity, which was granted.

This court does not feel compelled to make an analysis of the behavioral pattern of Verost or his motivation, but commentary appears to be appropriate.

The inability of Verost and administrative personnel to communicate effectively indeed contributed to a deterioration of personal relationships. Verost's conduct was not always without provocation. For example, employee irritability can be expected upon receipt of three written supervisory memos in one day. The rationale for those communications appears to have been a supervisory determination that it was the only way to get a clear message to Verost. There is ample justification for this in the record.

One of Verost's own colleagues testified pointedly, and her rebuttal testimony gave weight to the credibility of supervisory personnel. In reference to Verost's testimony as to what his supervisor said, she testified "I can't believe that he [Becker] would every say it. . . . It is completely out if character for him. He is not an individual who is given to harassment or to. . ." (Tr., 52-87). In response to examination concerning Verost's contention that the administration was unfair and conspired in devious ways to deprive tenured teachers of employment, she said: "I tried to tell Mr. Verost on several occasions that he had an erroneous view of what had happened to Bob Hall. I don't know that we were ever able to go into the complete circumstances, because Bill would not listen . . . The Board of Education has been eminently fair to him. You are not completely familiar with it" (Tr., 52-88).

A document submitted by Verost as proposed goals, P-5 in evidence, perhaps exemplifies his contumacious attitude toward his superiors. A comic strip, "The Dropouts," is fixed to the cover, and the conversation depicted is as follows:

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The question: "What are you doing about the sad condition of public works?

The answer: "At this very moment, I am searching for an administrator to set it right."

The question: "Why not Alf? He's knowledgeable, innovative and absolutely honest!!

The answer: "Frankly, I'd rather have someone who's qualified."

It must now be determined whether the findings of insubordination and/or conduct unbecoming a teacher warrants dismissal or a lesser penalty.

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 Bd. of Ed, 1938 S.L.D. 614, 617 aff'd State Board of Education 618, 622, aff'd 119 N.J.L. 308 (Sup. Ct. 1938).

In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, 1966 S.L.D. 77, the Commissioner said:

> The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit (at 106).

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In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302, the Commissioner said:

> [T]hey [teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling. (at 321)

It was also stated In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, 1971 S.L.D. 284:

> A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions . . . and must accept the consequences of his actions. (at 296)

CONCLUSIONS

It is determined the charges and proofs comprise the "series of incidents" which the Court referred to in Redcay, supra, and respondent has, by his own acts, created conditions that adversely affected the operation of his school. I **CONCLUDE** that William T. Verost has forfeited the protection of his tenure which the statutes otherwise afford. I **ORDER** him **DISMISSED.**

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OAL DKT. NO. EDU 5140-80

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

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

12 August 1982
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

13 August 1982
DATE

Seymour Wiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

August 18, 1982
DATE

Ronald L. Parker/ser
FOR OFFICE OF ADMINISTRATIVE LAW

g

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IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM T. VEROST,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
VILLAGE OF RIDGEWOOD, BERGEN	:	
COUNTY.	:	
	:	

The Commissioner has reviewed the record of the instant matter including the initial decision rendered on August 12, 1982, by the Office of Administrative Law, Ward R. Young, ALJ.

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

An extension of time for good cause shown was obtained by the Commissioner for the purpose of issuing a final determination in this matter in accordance with the applicable provisions of N.J.S.A. 52:14B-10(c).

The Commissioner observes that respondent excepts to the determination and conclusions of law reached by the ALJ in their entirety. In support of his exceptions filed to the initial decision, respondent relies on his post-hearing brief submitted to the ALJ. He has specifically identified the pages in his brief which address arguments to each of the tenure charges against him upon which a determination has been rendered by Judge Young.

Also included in respondent's exceptions are those legal arguments raised with respect to his constitutionally protected right to free speech and the application of the doctrines of res judicata and collateral estoppel as equitable defenses in moving for dismissal of the tenure charges.

The Board in its reply to respondent's exceptions rejects them as an attempt to merely reiterate those arguments previously submitted in his brief to the ALJ which were determined to be without merit in the initial decision. The Board essentially relies on the findings, conclusions and determination reached by Judge Young in refuting the arguments advanced by respondent in his exceptions.

The Commissioner has reviewed the relevant portions of the record pertaining to the exceptions filed by the parties incorporated herein by reference.

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Initially, the Commissioner will address those arguments advanced with respect to the application of the legal doctrines of res judicata and collateral estoppel. Respondent's position is anchored on the fact that the Division of Unemployment and Disability Insurance, New Jersey Department of Labor and Industry, rendered a favorable determination on his claim for unemployment benefits when the presiding tribunal found him not guilty of misconduct as charged by the Board. This decision, based upon respondent's claim of July 25, 1980, was rendered on August 15, 1980 by the appeal tribunal. (See Exhibit A, attached to respondent's Notice of Motion dated December 5, 1980.)

Respondent in his post-hearing brief argues that "***[r]es judicata as a principle of law bars a party from relitigating a second time what was previously fairly litigated and finally determined***" (at p. 225) by a court of competent jurisdiction. The argument of respondent is buttressed by a whole host of court decisions upon which he relies, including the provisions of N.J.S.A. 43:21-6(c) which he deems applicable to the instant matter. (at pp. 225-233)

Respondent further contends that the doctrine of collateral estoppel also bars the Board and the Commissioner from proceeding with the tenure charges against him by virtue of the decision rendered on August 15, 1980. The administrative tribunal granted him unemployment compensation upon its determination that he was not guilty of misconduct as a result of the tenure charges. Respondent argues as follows:

> "***While frequently considered as a branch of res judicata, collateral estoppel is somewhat different in that it does not require an identity of the cause of action. Thus, even if it is found that res judicata is inapplicable because the unemployment claim and tenure case are different 'causes of action,' collateral estoppel bars relitigation of any issue which was actually determined in a prior action. State v. Gonzalez, 75 N.J. 181, 186 (1977). See Mazzilli v. Accident and Casualty Ins. Co., 26 N.J. 307, 313-314, (1958); Kelly v. Curtiss, 16 N.J. 265, 273, (1954)***" (Emphasis in text.) (at p. 234)

The Commissioner observes that both of the aforementioned legal arguments raised by respondent were initially opposed by the Board in its Brief in Opposition to respondent's Motion to Dismiss dated January 16, 1981, which Motion was denied by the ALJ on February 10, 1981.

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In the Commissioner's judgment, respondent's arguments regarding the application of the doctrines of res judicata and/or collateral estoppel are without merit by virtue of N.J.S.A. 18A:6-10 et seq. for the reasons set forth in the Board's brief, incorporated herein by reference. The Commissioner so holds.

Although a considerable portion of the record in this matter, including the initial decision, is devoted to respondent's claim of denial of his constitutionally protected First Amendment right to free speech based upon his letter of May 7, 1980 (P-133), caused by respondent to be delivered on May 9, 1980 to the Board President, the Superintendent, the high school principal and respondent's supervisor, the Commissioner finds and determines that respondent's claim did not rise to the level of a constitutional issue but, rather, it should have been more appropriately adjudicated in accordance with the applicable statutory and regulatory provisions of N.J.S.A. 18A:1-1 et seq. and N.J.A.C. 6:1-1 et seq.

In this regard the Commissioner observes that the record of this matter reveals that respondent's letter (P-133) was in fact his supplemental reply to his annual written performance evaluation for the 1979-80 school year prepared by his immediate supervisors. Pursuant to the provisions of N.J.A.C. 6:3-1.21, it is clear that respondent was entitled to file such a response and have it entered into his record. The pertinent provision of N.J.A.C. 6:3-1.21 reads as follows:

> "5. Provision for performance data which have not been included in the report prepared by the supervisor to be entered into record by the evaluatee within 10 working days after the signing of the report."

Both the timeliness of the submission of respondent's letter and the subsequent actions of the Board with respect to the review of his annual performance evaluation and the withholding of his annual increment for the 1979-80 school year were argued by the parties. The Commissioner, however, does not find the claims of the parties relevant to a proper final consideration and disposition of this matter.

In the Commissioner's judgment, the record establishes that the Board did, in fact, determine to withhold respondent's annual salary increment for the 1979-80 school year based upon the recommendations of his superiors' assessment of his annual performance evaluation prior to his written reply of May 7, 1980. (P-133) It is further established that, upon receipt of the above-referenced letter, the Board proceeded with the filing of tenure charges against respondent.

The first eight of the Board's sixteen tenure charges against respondent are based upon certain comments made by

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respondent in his letter. (P-133) and the propriety of those tenure charges will now be addressed by the Commissioner. It is unquestioned that the Board's authority to prefer tenure charges against one of its tenured teaching staff members is statutorily prescribed within the provisions of N.J.S.A. 18A:6-10 et seq. as amended. The pivotal question, however, which arises herein is whether Charges Nos. 1-8 warrant consideration as such to require an appropriate finding of fact and determination by the Commissioner of unbecoming conduct or insubordination against respondent.

In the Commissioner's judgment, the answer to this question requires a careful review of respondent's letter which served as the "triggering mechanism" by the Board to certify Charges Nos. 1-8, as well as the remaining tenure charges.

It cannot be argued that respondent's right to file a written reply to his 1979-80 annual performance evaluation is accorded to him pursuant to the provisions of N.J.A.C. 6:3-1.21(f)(5). What remains to be determined is whether the comments contained in respondent's letter were of such a nature as to rise to the level of tenure charges. Those comments were described by Judge Young as being "***venomous [in] tone***in personally attacking the character and integrity of his department chairman, principal, Superintendent and the Board.***" (Initial decision, ante)

The Commissioner has reviewed respondent's letter and makes the following findings and determinations:

1. Respondent's comments in his letter reveal that his choice of words in replying to his annual performance evaluation shows that he was in a highly emotional state of mind.

2. Some of his comments were inartfully composed, ill-advised, unwisely and intemperately worded.

3. His comments pertain to what he perceived to be injustices against him by his superiors in connection with their assessment of his teaching performance related to his 1979-80 annual performance evaluation.

4. Respondent's comments in his letter nevertheless were what he believed were the factual circumstances surrounding his unsatisfactory annual performance evaluation and which resulted in the Board taking action to withhold his salary increment for the 1980-81 school year.

5. Respondent was entitled to have the comments contained in his letter incorporated in his file pursuant to the provisions of N.J.A.C. 6:3-1.21(f)(5), ante.

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In light of the above findings and determinations, the Commissioner does not share the view expressed by the Board or the findings of the ALJ which hold that the nature of respondent's comments were venomous in tone or that they represented a personal attack upon his superiors and the Board giving rise to the tenure charges.

Finally, the Commissioner's attention has been directed to certain comments set forth in the Board's post-hearing brief which raise a procedural issue regarding what occurred during the seventh day of hearing in this matter. At that time the Board was presenting its case against respondent with respect to the tenure charges attributed to his letter reply (P-133). The Board therein states in pertinent part:

> "***On the seventh day of hearing the Board's first witness, Russell Becker, had reached the stage of his chronological direct examination where testimony pertaining to Verost's charges and accusations set forth in Exhibit P-133 was in order.
>
> "The Board commenced an effort at showing, through Becker's testimony, that Verost's accusations were totally without merit. Inasmuch as P-133 contains numerous serious charges and accusations by Verost against the Board and its Administration (particularly Becker) concerning Verost's summary evaluation (Exhibit P-120), both in terms of its contents as well as the manner in which its contents were utilized by the Administration in recommending, and the Board in acting upon, the withholding of Verost's increment, Becker was given copies of Exhibits P-120 and P-133 and was asked to testify from his own personal knowledge as to Verost's charges and accusations point by point.
>
> "The foregoing process continued for several minutes, in which Becker offered clear and unambiguous testimony as to the utter falsity of Verost's accusations generally ***and those specifically set forth on the first page of P-133 (7T3 through 7T21). When it became crystal clear what the Board was doing and that the Board was prepared to continue painstakingly along the same lines, disproving point by point the remainder of Verost's lengthy diatribe, the Court intervened and indicated that the Board was not a defendant and perhaps the Board was therefore premature in defending itself against

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> Verost's accusations without first hearing Verost's proofs in support of his accusations (7T25 and 26). After lengthy argument of counsel and a recess of deliberation, the Court ultimately ruled that the order of proof was such that the Board was not to attempt in its direct case to disprove Verost's accusations contained in P-133. Instead, first Verost would be given the opportunity of moving forward with proof of the accuracy of his own accusations, and as to any such evidence, the Board would later be able through rebuttal to offer contrary evidence tending to disprove such accusations. Naturally, at that point the direction of the trial altered substantially. The Board withheld its point by point refutation of Verost's accusations, awaiting Verost's evidence in support of his own accusations.***" (Emphasis in text.)
>
> (Board's Brief, at pp. 5-8)

The Commissioner has reviewed the transcript of the seventh day of hearing conducted in this matter by Judge Young held on April 2, 1981, which verifies the above procedural determination made by the ALJ.

In the Commissioner's judgment, the net effect of requiring respondent to testify as to the veracity of the statements he made in his letter (P-133), which serve as the basis of the Board's Charges Nos. 1-8, relieved the Board of proving the sufficiency of these charges and moved the burden of such proof to respondent who was defending himself against these tenure charges. Thus, respondent was placed in the position of testifying against himself on the Board's behalf.

The Commissioner finds and determines that this constitutes a procedural defect which fatally flaws the proceeding herein regarding Charges Nos. 1-8. The Commissioner so holds.

Accordingly, the Commissioner finds and determines that the Board's Charges Nos. 1-8 as certified against respondent are hereby dismissed from the instant proceedings.

The Commissioner will now examine the remaining tenure charges against respondent. It is observed that these charges as certified by the Board, some of which have been amended, span a period of time reaching back to the 1976-77 school year. For the purpose of clarity, the Commissioner will set forth below the charges in numerical sequence in the school years to which they are attributed by the Board.

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School Year	Tenure Charges
1976-77	10, 11, 12, 12a, 12b, 12d, 12e, 12f
1977-78	12c
1978-79	12k, 14
1979-80	9, 12g, 12h, 12i, 12j, 13, 15, 16

At this juncture the Commissioner points out that he has previously held that a board may, for purposes of establishing a pattern of behavior exhibited by a teaching staff member against whom it brings tenure charges, reasonably incorporate instances from previous school years in which such incidents were alleged to have occurred. Herein the Board has included in its tenure charges certain incidents which were alleged to have occurred from 1976-77 through 1979-80.

The Commissioner is constrained to observe, however, that the Board was apparently dissatisfied with respondent's performance during the 1976-77 school year, and thereby invoked its statutory authority pursuant to N.J.S.A. 18A:29-14, as amended, to withhold his annual salary for the 1977-78 school year. Thereafter, the Board did not act again until the 1979-80 school year to withhold respondent's annual salary increment. (R-136)

It is observed that the ALJ has found respondent guilty as charged with unbecoming conduct with respect to all of the remaining tenure charges cited above except tenure charges 12e and 16 which were dismissed. On the same tenure charges respondent was found not to be guilty of insubordination except for charges 12j, 12k, 13 and 14.

The Commissioner, upon review of the record of this matter with respect to the remaining tenure charges against respondent, finds and determines that there is sufficient credible evidence to support the findings and determination of the ALJ holding respondent guilty of insubordination and unbecoming conduct based upon the pattern of behavior which he exhibited during the school years in question.

The Commissioner adopts the findings and determination of the ALJ as his own. What remains for the Commissioner to determine is whether the remaining tenure charges of which respondent has been found guilty, standing alone, are sufficient to warrant a penalty to be imposed against him pursuant to N.J.S.A. 18A:6-16.

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In the Commissioner's judgment, respondent has been found guilty of incidents of misconduct in each of the years in which the Board's remaining tenure charges were made. Such conduct reveals a pattern by respondent which shows contempt, disregard, as well as a lack of confidence in the professional judgment of his immediate superiors.

The resultant effect of respondent's behavior creates an intolerable working relationship between himself and his immediate superiors which has interfered with the efficient management and operation of the Ridgewood School District.

In view of the foregoing, the Commissioner hereby finds and determines that the record of this matter establishes sufficient good cause to uphold Judge Young's dismissal of respondent as a tenured teaching staff member as of the date of the Board's certification of tenure charges against him. The Commissioner so holds.

COMMISSIONER OF EDUCATION

October 18, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4177-82
AGENCY DKT. NO. 71-3/82A

G.L., on behalf of D.L.,
Petitioners
v.
UPPER FREEHOLD REGIONAL BOARD OF EDUCATION,
Respondent.

APPEARANCES:

G.L., on behalf of D.L., petitioners Pro Se

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

Record Closed July 21, 1982 Decided September 7, 1982

BEFORE **DANIEL B. MC KEOWN,** ALJ:

Petitioners, on behalf of their daughter, D.L., challenge the Board's determination to expel permanently D.L. from school attendance on procedural and substantive due process grounds. The Commissioner of Education tranferred the matter to the Office of Administrative Law as a contested case, pursuant N.J.S.A. 52:14F-1 et seq. A plenary hearing was conducted in the matter on July 20, 1982, at the New Egypt Municipal Court Building, New Egypt.

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The Superintendent of Schools, by letter dated February 25, 1982, notified G.L. that the Board determined to expel D.L. from its public school, effective March 1, 1982, for "selling a controlled dangerous substance on school premises" (R-5). It is that expulsion action which is controverted here by G.L. on the grounds that the Board had insufficient evidence to support the charge that D.L. engaged in the sale of controlled dangerous substance, that the Board denied her the right to confront her accusers, and, in the alternative, that the discipline of expulsion is too severe for the offense committed.

The undisputed material facts which give rise to this dispute are these: D.L. is 16 years of age and during December 1981, she was attending the Board's Alternative High School. The Alternative School, an open space style teaching atmosphere, is an alternative to the regular structured program of academic studies. During December 1981, D.L. had sufficient credits to be considered of equal achievement of an eleventh grade pupil in the Board's regular structured program of academic studies.

On December 10, 1981, a parent of another pupil at the Alternative School reported to a teacher, Mr. Samuelson, her intercept of a note intended for her daughter, L.H., from D.L., delivered to her home by another pupil, E.A. The note is reproduced here in full:

> Dear La La [L.H.] 12/9/81
> Time 10:00 a.m.
>
> High, Whats [sic] new? Just writing to tell you to give $54.50 to Eric to give to me for those Christmas trees, I'll explain it to you, now I gave you 9 in school that day and he gave you 70 so thats [sic] why you owe me so much. Please don't fuck-up because when someone owes him money and he dosen't [sic] get it he goes crazy so please don't fuck-up. So how is Panchito have you seen him lately tell him I said high ok. So hows [sic] your vacation ya [sic] having fun or what. Listen if you can stop down this weekend will see ya then if so Take it easy, and be good I know its [sic] hard to do right.
>
> P.S. Later
> Write Diane
> Back Die
> and Die
> give the letter
> and money
> to Eric.

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L.H., who accompanied her mother during the visit, explained to Mrs. Samuelson that she had none of the pills left, but described them as white tablets with green dots. In the meantime, Mr. Anderson, another teacher at the Alternative School, joined Ms. Samuelson in receiving the report of L.H.'s mother. Mr. Anderson contacted an acquaintance at the Hunterdon Drug Awareness Center, gave the description of the pill as reported by L.H. plus the reference "Christmas Tree," and was told that the pill in question was an amphetamine, or "upper." The teachers then reported the foregoing events to the vice principal.

D.L. was absent from school December 10, 1981, a Thursday, and the following day. The vice principal spoke with D.L. the following Monday, December 14, upon her return, as well as with L.H. and E.A., the carrier of the note. During the conference, L.H., in the presence of Mr. Anderson, signed the following statement, on December 14, 1981:

December 14, 1981

> I promised to Pay $3.00 to [D.L.] for 9 (nine) Christmas Trees (White tablets with green dots). She gave them to me on Wedendsday, [sic] December 2, 1981 at the Alternative School. I received the rest (approximately 70 pills) in New Egypt. I became very ill - Heart Pounding, Arm Numb, Couldn't move my legs, Head was spinning. Those sumptoms [sic] occurred on 12/2/81, but I still went back and got some more. I don't remember that much about getting the rest of the pills.

_____
Signature

_____
Witness

_____
Witness

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The vice principal then spoke with E.A. who executed the following statement:

December 14, 1981

[D.L.] gave me a letter to deliver to [L.H.] The letter was given to me at the Alternative School and I delivered it directly to [L.] I read the letter before I gave it to [L.] The Letter was written and given to me on 12/9/81.

_____
Signature

_____
Witness

_____
Witness

Finally, the vice principal spoke with D.L. in respect of the contents of the letter L.H.'s mother intercepted. As the result of that conversation D.L. executed the following statement:

December 14, 1981

I admit to giving [L.H.] 9 Pills (Christmas Trees) at the Alternative School. I charged her $1.00 for the pills but she hasn't paid me for them. This occurred approximately 2-3 weeks ago.

_____
Signature

_____
Witness

_____
Witness

Thereafter, the vice principal notified D.L.'s mother, by letter dated December 17, 1981, that D.L. was suspended from school as of December 14, pending a pre-expulsion hearing at the high school. The vice principal advised that the reason for the suspension was that D.L. sold "a controlled dangerous substance to a student at the Alternative School" (R-8).

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The superintendent testified that Board policy establishes the process referred to as a pre-expulsion hearing. He explained that when a pupil is involved in a matter which may lead to expulsion, there is a meeting with the building administrator, teachers who know the pupil, the pupil and the pupil's parents. The purpose of the meeting is for school personnel to determine whether or not the pupil's expulsion is to be recommended to the principal. A guidance counselor who assumes the role of advocate for the student, participates in this meeting.

Such a pre-expulsion hearing was conducted in this matter on December 21, 1981. In attendance were Mrs. Samuelson, Mr. Anderson, the vice principal, a guidance counselor, D.L. and D.L.'s parents. The vice principal conducted the pre-expulsion hearing and reviewed the contents of D.L.'s letter (R-2), together with her acknowledgement that she gave L.H. nine pills and charged her $1.00 (P-2). D.L. refused to state where she got the pills. There came a point in the meeting when D.L. and her parents were asked to leave the meeting room. While D.L. and her parents remained in an adjoining room, the school officials discussed what they considered to be the evidence before them in respect of the allegation that D.L. was engaged in the sale of controlled dangerous substances in the Alternative School. The school officials concluded that D.L. did sell controlled dangerous substance in school and recommended, on December 22, 1981, to the school principal that D.L. be expelled (A-8 No. 2).

The high school principal, who was not present at the pre-expulsion hearing, advised the Superintendent, by letter dated January 4, 1982, that "as a result of a pre-expulsion hearing held . . . on December 21, 1981, and after extensively reviewing the case, I am recommending that [D.L.] be expelled for selling a controlled, dangerous substance to another student, while both were at the Alternative School" (R-8, No. 3).

The expulsion recommendation was based on his interviews with D.L., L.H., and E.A., upon D.L.'s signed statement (P-2), together with asserted threats made by D.L. to L.H. in his presence, and, presumeably, upon Mr. Anderson's report that a pill, referred to as a "Christmas tree," described as a white tablet with green dots, is an amphetamine.

D.L. did not testify before me. She did, however, explain to school personnel at the pre-expulsion hearing on December 21 that the pills referred to in her note to L.H. and in her signed statement as "Christmas Trees" were Dexatrim tablets, a weight-control pill which may be purchased over the counter, without a prescription. That D.L. entered

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this defense at the pre-expulsion hearing is established by the vice principal in a supplementary report, dated January 7, 1982, to the Superintendent (R-8, No. 6, 6A). The vice principal reported that the preexpulsion committee did not believe D.L.'s explanation of the pills in question being Dexatrim; that the preexpulsion committee recommended D.L.'s expulsion; that it was found that D.L. engaged in the sale of an illegal substance known as "Christmas Trees;" that D.L. and L.H. knew what the substance was; that D.L. sold the substance to L.H. at the Alternative School; that L.H. became very ill; and that "I [the vice principal] have requested statements from authorities as to the identity of the white tablets with green spots which are known by the slang term, Christmas trees. Their statements will be forwarded upon receipt" (R-8, No. 6A).

An observation need be made here. The use by the vice principal of the definite article the preceding "white tablets" implies that one or more of the controverted tablets or pills were in the possession of school authorities. There is no evidence before me to show that school authorities ever had in their possession, or had ever seen, the pills referred to as "Christmas Trees." D.L.'s mother did give a tablet to Mr. Anderson, which shall be discussed later.

The Superintendent, by letter dated January 8, 1982, notified all Board members that an expulsion hearing for D.L. it must conduct was scheduled for January 21, 1982, on the charge that D.L. engaged in the sale of a controlled dangerous substance at the Alternative School (R-8, No. 4).

The superintendent submitted to the Board, prior to the scheduled hearing date, documentary evidence which consisted of D.L.'s handwritten statement (R-2), D.L.'s statement of December 14, 1981 (P-2), the statement of L.H. (R-3), the statement of E.A. (R-4), and the vice principal's supplementary report.

On January 12, 1982, the superintendent advised D.L.'s parents of the expulsion hearing for D.L. scheduled for January 21, 1982 (P-1). The superintendent notified the parents of the charges and he submitted to them D.L.'s statement of December 14, 1981, together with the statements of L.H. and E.A. The superintendent advised D.L.'s parents that at the hearing the principal would testify against their daughter, together with the vice principal and Mr. Anderson. The superintendent also advised the parents that "there will be an opportunity for you or your attorney to ask questions of any individual who testifies at the hearing."

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D.L.'s hearing scheduled for January 21, 1982, before the Board was adjourned. The hearing was held on February 24, 1982.

In the interim, the Board's Child Study Team prepared a report on D.L. and conferred with D.L.'s mother on January 28, 1982. The adjournment of the hearing scheduled for January 21, 1982, is in no way related to the Child Study Team conference with D.L.'s mother on January 28, 1982, nor did the Board cause the adjournment of the hearing.

The Child Study Team set forth in its report individual findings in respect of D.L.'s social, psychological, educational and psychiatric characteristics and traits. The Child Study Team reports that D.L. has a number of friends with whom she associates on a regular basis most of whom are older than she and most of whom have not completed high school. The Child Study Team reports that notwithstanding her peer group, D.L. speaks of a desire to complete her high school education and that she had elected herself to attend the Alternative School to avoid social and academic pressures of the regular high school program. Psychologically, the Child Study Team, reports that D.L. functions within the borderline range of general intelligence and that her verbal and performance skills are at the levels equivalent to a borderline range of general intelligence. The Child Study Team reports that D.L.'s personality reveals an unhappy, anxious, socially nonconforming person with a strong need for acceptance and recognition and a tendency to obtain this recognition in a "maladaptive fashion." Educationally, the Child Study Team assesses D.L.'s achievements in reading at a 6.1 grade level, math at a 7.2 grade level, written language skills at a 10.1 grade level, and her general knowledge skills at an early 5th grade level. Psychiatrically, the Child Study Team found that notwithstanding D.L.'s antisocial behavior, she is not an aggressive person. Rather, the Team reports that D.L. "conforms to activities of her peers rather than be singled out as one who does not go along." The Team reports that D.L. is not emotionally disturbed, but that she would probably benefit from therapeutic counselling. The Team concludes that D.L., while not classifiable, exhibits significant problems both in and out of school. The Team further concludes that with counselling and exposure to alternative lifestyles, D.L. could improve her chances of living a productive, responsible life.

At the Board hearing, Mrs. Samuelson, in addition to those persons identified by the superintendent as witnesses against D.L., testified. She gave testimony at the Board hearing in respect of D.L.'s note, and the disciplinary action the committee

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recommended to be taken against D.L. The Board found D.L. engaged in the sale of a controlled dangerous substance and determined to expel her from regular school attendance. The superintendent advised D.L.'s parents on February 25, 1982, of the Board's action. He also advised them of his willingness to arrange for D.L.'s admission to a high school equivalency program. Mrs. Samuelson testified that D.L. would be accepted for a high school equivalency program in September 1982. She explained that when D.L. was expelled from the Allentown School as of March 1, 1982, it was too late for her to be enrolled in any high school equivalency program then.

L.H. did not appear to testify at the Board hearing, nor did D.L. have the opportunity to confront L.H. at any time with the school officials. The Board produced no witnesses to any sale D.L. is alleged to have made of any kind of pills in the school. School authorities confiscated none of the pills allegedly sold by D.L. Thus D.L.'s mother raises the question of whether or not D.L. can be found to have sold a controlled dangerous substance when the substance, in question has never been located. D.L.'s mother testified that when she first learned of D.L.'s involvement in the matter in December 1981, she asked D.L. whether or not she still had any of the capsules. D.L. was to have given her a capsule. D.L.'s mother testified that she took the capsule to Hartman's Pharmacy in New Egypt to determine its content. D.L.'s mother testified that the pharmacist, identified only as "Ernie," told her it was Dexatrim. D.L.'s mother testified that when she discovered this information, she took the capsule to the school authorities and gave the capsule to the vice principal.

The difficulty with this testimony, of course, is that there is no way of knowing whether or not the capsule D.L. gave to her mother was the same kind of pill to which D.L. makes reference in both her note to L.H. (R-2) and in her own statement by which she acknowledged the sale of Christmas trees to L.H. (P-2). D.L.'s mother testified that she asked D.L. where she got the pills to give to L.H. D.L. would not tell her because she, D.L., was to have said that she would wind up in the gutter.

When Mrs. Samuelson first learned of D.L.'s note to L.H. (R-2) and came upon the terminology "Christmas tree," she called the New Jersey Division of Narcotics and Drug Abuse Control at the State Department of Health to inquire of the substance known as Christmas tree. Mrs. Samuelson received from that agency, on January 7, 1982, xeroxed copies of two excerpts from a textbook referred to as Drugs A to Z. There, the

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term Christmas trees is cross-indexed to dexamyl capsules. Dexamyl is defined in the same extract as "a central nervous system stimulant of the amphetamine type combined with a central nervous system depressant. The barbituate ingredient acts to dampen down any overstimulation produced by the amphetamine ingredient without conteracting its appetite-depressant and euphoric properties" (R-8, No. 14). The extract states that dexamyl is sold in sustained-release capsules or tablets. If sold in capsules, the capsules have a green cap and clear body showing green and white pellets. The tablet form is flat, three-sided, green, and scored down the middle. The extract states that long-term use of dexamyl may result in psychic and physical dependence with increasing tolerance to both ingredients. The extract states that overdose of the pill may result in excessive stimulation or excessive depression, which may reach the point of shock in severe cases. The extract identifies "Christmas tree" as a slang expression for dexamyl and it identifies dexamyl as a Schedule II drug under the Controlled Substances Act.

When Mr. Anderson called the Hunterdon Drug Awareness Center and asked for a definition of the term "Christmas tree," he was referred to the composition known as statobex tablets and capsules. Armed with that information together with the information, received by Mrs. Samuelson in regard to dexamyl, he requested a pharmacist at Walter's Pharmacy, Allentown, New Jersey, to identify precisely what statobex and dexamyl were. The pharmacist replied, in writing, dated January 18, 1982, as follows:

> Regarding the status of the two medications listed above, both are by federal law, controlled dangerous substances. Therefore they would both come under laws which govern this type of substance. Statobex (Phendimetrazine Tartrate) is used solely for weight control and is available in both tablet and capsule form. Both forms are green and white in color. Dexamyl (SKF) brand name for Dextroamphetamine and Amobarbital is no longer being distributed to the best of my knowledge. Both substances require a physicians prescription and may not be transferred from one person to another person, all prescriptions must be so labeled.

The foregoing constitutes the essential facts of the matter, from which the following operative facts are found:

1. D.L. did send a note to L.H. on or about December 9, 1981, wherein a demand is made for payment of "Christmas trees" D.L. gave to L.H. in school.

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2. D.L. admitted at a conference with the vice-principal, giving L.H. 9 "Christmas trees" at the Alternative School and charging her $1 per pill. This conference constitutes a preliminary hearing prior to suspension. D.L. was suspended from school attendance.

3. The pills, or "Christmas trees," were never in the possession of school authorities.

4. School authorities believed they determined that a "Christmas tree" is a slang expression for a controlled dangerous substance. There is an absence of evidence that the pill referred to as "Christmas tree" by both D.L. and L.H. are the same pills the person at the Hunterdon Drug Awareness Center refers to as "Christmas trees" being a controlled dangerous substance.

5. A "Christmas tree," to the extent it refers to statobex or dexamyl, is classified as a controlled dangerous substance.

6. Dexatrim is not a controlled dangerous substance.

7. School authorities, in light of D.L.'s assertion at the pre-expulsion hearing that the pills in question were dexatrim, had no competent evidence to conclude that the pills in question were statobex or dexamyl.

8. D.L.'s suspension continued until February 25, 1982, a period of 73 days. The Board had scheduled a hearing for January 21, 1982, and had that hearing been conducted on that date, the period of suspension would have been 37 days.

9. D.L. was not afforded the opportunity of being confronted by L.H. at any time.

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10. The Board, at the hearing it conducted on February 25, 1982, had no competent evidence to show that D.L. engaged in the sale of a controlled dangerous substance, in light of her assertion that the substance was, in fact, dexatrim, nor did it have reliable hearing evidence upon which to conclude that the pills in question were controlled dangerous substances.

DISCUSSION

N.J.S.A. 18A:37-2 provides boards of education with the authority to expel pupils for good cause. Pupils who are subject to the discipline of expulsion are entitled to basic procedural and substantive due process, R.R. v. Board of Ed. of Shore Regional High School Dist., 109 N.J. Super. 337 (Ch. Div. 1970). At the very least, pupils who are to be deprived of their constitutional right to a thorough and efficient program of education in the public schools have a right to be confronted by and to examine witnesses in expulsion proceedings before the Board, Tibbs v. Board of Ed. of Franklin Tp., 59 N.J. 506 (1971). The period of time between a suspension and an expulsion hearing before the Board, at which time the pupil is entitled to received the full panolpy of due process rights, should not exceed 21 days, R.R., 109 N.J. Super. at 350. Finally, there must be a preponderance of credible evidence to establish the charge against the pupil to be true in fact, prior to the imposition of the most severe school discipline upon the pupil . . . permanent expulsion from attendance in its public school. Here, not only was D.L. denied a full hearing before the Board within 21 days from her initial suspension, she was also denied the right to confront her accuser, L.H. Furthermore, there is a lack of evidence to create the nexus between the pills exchanged between D.L. and L.H., and the pills otherwise identified as "Christmas trees," the asserted controlled dangerous substance. Under the circumstance whereby D.L. contended at the pre-expulsion hearing that the capsules in question were dexatrim, an over-the-counter pill, and absent any evidence to the contrary, the evidence simply does not exist that D.L. engaged in the sale of a controlled dangerous substance.

It is recognized that L.H., in her statement to the vice principal on December 14, 1981, suggests she became ill on or about December 2, 1981, and that, by inference, her illness was caused by ingestion of pills received from D.L. This evidence,

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of L.H.'s testimony, should have been presented to the Board at its hearing on February 25, 1982, in the presence of D.L., for it to weigh the probative value which should attach thereto. It appears that the Board, without hearing L.H., accepted her written statement to the detriment of D.L. and concluded that L.H. purchased controlled dangerous substances from D.L.

I do not question that school personnel acted in this matter in a fashion they deemed appropriate under the circumstances. D.L.'s note, intercepted by L.H.'s mother, would surely cause concern of school authorities, in addition to causing concern for the parents of the pupil for whom such a note was directed. However, even though the concern created is great, pupils may not be separated from their right to attend school in an improper manner.

D.L.'s behavior in this matter is not condoned, nor may it be tolerated. It is clear that D.L. engaged in a transaction on public school property, which had the appearance of the sale of controlled dangerous substances. She threatened L.H. in the absence of payment from L.H. for the substance sold. D.L. was given a preliminary hearing by the vice principal. D.L. admitted the sale of "Christmas trees." The school system could not function in an orderly fashion if that behavior is allowed to exist. To the extent that D.L.'s suspension of December 14, 1981, may be seen to be for the infraction of engaging in a transaction on school property which, under the circumstance, had the probable cause appearance for school authorities to believe the transaction was of dangerous controlled substances, the suspension of D.L. was taken for just cause under the authority of N.J.S.A. 18A:37-2. To the extent that a Board hearing was not afforded within 21 days from the date of that suspension, the suspension after the twenty-first day is set aside. The expulsion of D.L. must also be set aside for failure of the Board to have been presented with a preponderance of credible evidence upon which to conclude that D.L. was involved in the sale of a controlled dangerous substance, and for failure of the Board to have afforded the opportunity to D.L. to confront her accuser, L.H.

The Board is directed to instruct its school personnel to make arrangements for D.L. to be admitted immediately to regular enrollment in its public school and to provide assistance necessary for her make-up work missed between January 6, 1982, the twenty-second day of her suspension, the last date a full hearing should have been afforded her by the Board, and the end of that semester.

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OAL DKT. NO. EDU 4177-82

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

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

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

September 7, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 9 1982
DATE

OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

P-1	Letter dated January 12, 1982
P-2	Statement of D.L., dated December 14, 1981
P-3	Child Study Report
R-1	Letter dated December 17, 1981
R-2	Note dated December 9, 1981
R-3	Statement dated December 14, 1981
R-4	Statement dated December 14, 1981
R-5	Letter dated February 25, 1982
R-6	Statement dated January 18, 1982
R-7	Statement of Walter's Pharmacy dated January 18, 1982
R-8(1-18)	Documents submitted to the Board by Superintendent
C-1	Letter dated December 22, 1981

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MR. AND MRS. G.L., on behalf of D.L.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

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

The Board, through its primary exceptions to the initial decision by the Honorable Daniel B. McKeown, ALJ contends that Judge McKeown erred in setting aside D.L.'s expulsion. The Board further excepts to Judge McKeown's having made no finding with regard to D.L.'s prior disciplinary record. The Board argues that D.L. is a danger to other pupils and that it acted in good faith, noting that D.L. received homebound instruction from January 7 to February 24, 1982. Finally, the Board argues that D.L.'s expulsion should be affirmed because there was sufficient circumstantial evidence to justify the expulsion despite the failure of the Board to have in its possession for analysis the actual pills involved in the transaction. The Commissioner is not persuaded by the Board's arguments.

The Commissioner has long expressed concern for pupils in the public schools of New Jersey and their entitlement to an appropriate educational process as set forth in the Constitution. As the Commissioner said in John Scher v.Board of Education of the Borough of West Orange, 1968 S.L.D. 92, 96:

> "***Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible.***"

A close reading of the case sub judice convinces the Commissioner that Judge McKeown properly weighed and evaluated the circumstances of the present matter. The Commissioner finds

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and determines that the expulsion of D.L. was properly set aside. The failure of the Board to verify that the transaction in which D.L. engaged involved a controlled dangerous substance warrants such action. D.L.'s suspension under the authority of N.J.S.A. 18A:37-2 is affirmed.

The Commissioner finds this case inapposite to Bernard Kobb et al. v. Board of Education of the Township of Ocean, decided by the Commissioner March 17, 1980, rev'd State Board November 5, 1980, wherein the pupil's possession and sale of marijuana were undisputed.

The Board is directed to readmit D.L. immediately to attendance in its regular public school with provision for the make-up needed, if any, in addition to that received through home instruction. At this juncture, the Commissioner deems it important that D.L. and her parents understand that her return to the public school system herein mandates that her behavior conform to the rules and regulations established by the Board pursuant to law. N.J.S.A. 18A:11-1

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

October 22, 1982

PENDING STATE BOARD

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State of New Jersey

OFFICE OF [illegible]

INITIAL DECISION
OAL DKT. NO. EDU 5630-80
OAL DKT. NO. EDU 4245-79 (ON REMAND)
AGENCY DKT. NO. 354-8/79A

IN THE MATTER OF THE TENURE HEARING OF RALPH GUMA, SCHOOL DISTRICT OF THE TOWN OF SECAUCUS, HUDSON COUNTY

APPEARANCES:

Marvin A. Stern, Esq., for petitioner, Secaucus Board of Education
William S. Greenberg, Esq., for respondent, Ralph Guma
(Greenberg, Kelley & Prior, attorneys)

Record Closed August 2, 1982 Decided September 7, 1982

BEFORE ROBERT P. GLICKMAN, ALJ:

Petitioner, Secaucus Board of Education, certified 56 charges of unbecoming conduct against respondent, Ralph Guma (Guma), pursuant to N.J.S.A. 18A:6-10. In his answer, Guma denied all of the charges.

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PROCEDURAL HISTORY

Because of the involved chronology of events prior to trial, the following significant procedural history will make this case more understandable:

1. On August 29, 1979, the Secaucus Board of Education certified 56 charges of unbecoming conduct against Guma to the Commissioner of Education.

2. On September 17, 1979, Guma filed an answer denying all the allegations contained in the 56 charges.

3. On October 1, 1979, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

4. On December 6, 1979, petitioner filed a motion for summary judgment or summary decision.

5. Prior to January 8, 1980, respondent filed a motion to compel payment of respondent's salary pursuant to N.J.S.A. 18A:6-14.

6. On January 8, 1980, a prehearing conference was held from which a Prehearing Order was prepared.

7. On February 4, 1980, the court, by letter decision, ruled as follows:

   a) **DENIED** petitioner's motion for summary judgment or summary decision.

   b) **GRANTED** petitioner's motion to compel respondent to appear at depositions.

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c) **GRANTED** respondent's motion to compel payment of his salary pursuant to N.J.S.A. 18A:6-14.

8. On February 25, 1980, the court executed an Order embodying the terms and conditions of its letter decision of February 4, 1980.

9. On April 10, 1980, the court executed an Order:

a) Staying the tenure trial before it pending the termination of the criminal proceedings against respondent in Hudson County.

b) Ordering that respondent be paid salaries starting the 121st day after June 27, 1979 and ending March 22, 1980.

10. On or about May 20, 1980, respondent filed an Order to Show Cause compelling petitioner to pay his salary in compliance with this court's prior Orders.

11. On June 2, 1980, this court notified all parties that the return date of the Order to Show Cause was June 11, 1980.

12. On June 2, 1980, the Superior Court, Appellate Division, denied petitioner's application for leave to appeal.

13. On June 11, 1980, this court **ORDERED** that the tenure charges against respondent be **DISMISSED** for the board's failure to comply with the court Order of February 25, 1980.

14. On June 17, 1980, this court executed an Order dismissing the tenure charges against Guma.

15. On June 20, 1980, an Initial Decision was entered dismissing the tenure charges.

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16. On August 7, 1980, the Commissioner of Education affirmed that part of the court's Initial Decision directing resumption of salary payments, but remanded to the court for plenary hearing the matter of the tenure charges. (New remand docket number EDU 5630-80.)

17. On September 8, 1980, the remand was received at the Office of Administrative Law wherein the Commissioner directed that a plenary hearing of the tenure charges be conducted.

18. On September 26, 1980, this court entered an Order sua sponte placing the remanded case on the court's inactive list for a period of six months pending the outcome of the appeals submitted to the State Board of Education and because of the pendency of the criminal indictment.

19. On November 25, 1980, respondent filed a motion to affix the amount of salary due him pursuant to N.J.S.A. 18A:6-14.

20. On December 3, 1980, the State Board of Education affirmed the Commissioner's decision for the reasons expressed therein. Additionally, the State Board of Education's decision stated that Guma must deliver to the board within 15 days information concerning his earnings after the first 120 days of suspension.

21. On December 19, 1980, petitioner's attorney submitted a letter to the court opposing respondent's motion to affix the amount of salary due respondent.

22. On January 29, 1981, this court granted respondent's motion of November 25, 1980 and affixed that amount of salary due respondent.

23. On February 23, 1981, the court entered an Order incorporating the terms and conditions of its letter decision of January 29, 1981.

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24. Pursuant to the court's Order entered on February 23, 1981, counsel for petitioner and respondent entered a stipulation releasing the sum of $3,690.31 to Samuel DeLuca, Esq., attorney for Guma in the criminal case.

25. On March 15, 1982, counsel for Guma notified the court that respondent had successfully completed his participation in the Hudson County Pretrial Intervention Program and that all charges against him were dismissed. Counsel for respondent requested that the stay entered on March 24, 1980 be lifted and that an Order be entered commencing salary payments to Guma pursuant to N.J.S.A. 18A:6-14.

26. A second prehearing conference was conducted on May 12, 1982, at which time the court established a schedule for motions to be filed. At the second prehearing conference on May 12, 1982, the following issues were identified:

    a. Did respondent, in fact, commit those acts charged by petitioner?

    b. Do the alleged actions of respondent, Ralph Guma, constitute unbecoming conduct in violation of N.J.S.A. 18A:6-10?

    c. If the charges are found to be true, would such alleged conduct warrant a dismissal, reduction of salary or other action?

    d. Should respondent's emotional condition during the time period set forth in the charges be considered by way of defense and/or by way of mitigation of "punishment"?

    e. Is respondent entitled to payment of salary pursuant to law from March 15, 1982, the date respondent's counsel notified the court of the dismissal of the indictment? What credits, if any, would petitioner be entitled to? (This issue was decided in the court's letter decision of June 21, 1982.)

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f. Does this court have jurisdiction to award restitution of the allegedly embezzled moneys to petitioner on any basis? (This issue was decided in the court's letter decision of June 21, 1982.)

27. On June 21, 1982, the court rendered a letter decision:

a) Directing the board to resume salary payments pursuant to N.J.S.A. 18A:6-14 as of March 15, 1982.

b) **DENYING** the board's motion to terminate Guma's health insurance coverage.

c) Declaring that petitioner was not entitled to a setoff for that amount of money which respondent agreed to repay the Hudson County Pretrial Intervention Program.

d) Lifting the stay previously entered on March 24, 1980.

A hearing was held at the Office of Administrative Law, Newark, New Jersey on July 6 and 7, 1982. Post-hearing briefs were filed by the parties and the record was closed on August 2, 1982. The witnesses who testified and the exhibits marked into evidence are set forth in the attached appendix.

UNCONTESTED FACTS

The following uncontroverted, uncontested facts are hereby adopted as this court's **FINDINGS OF FACT.** The real contest in this case is not what the facts are, but rather what the court should do with such undisputed facts.

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Ralph Guma, respondent, has been employed by the Secaucus Board of Education for approximately 20 years. From 1974 until his suspension, he was the principal at the Secaucus Middle Secondary School which contained grades 7 through 12. As such, he had within the school approximately 1200 students. Also, he was in charge of approximately 86 teachers. Guma's performance as both a teacher and principal in the school district was excellent.

Part of Guma's responsibilities as principal of Lincoln Junior High School and later Secaucus Middle Secondary School was to be in charge of moneys deposited to and withdrawn from student activity accounts. The moneys in these accounts came from dollars earned by students for such activities as washing cars and selling cake. The moneys would be withdrawn from the account for such activities as the senior prom or field trips. Guma's secretary would keep a ledger of the moneys going into the accounts. Guma would write checks from the accounts, being the only authorized person to sign the checks. At the end of each year, the checkbook, with its stubs and the ledger, would be turned over to the school auditors who would audit this account each year.

Between 1976 and 1979, Guma wrote 56 checks totaling $16, 594 (P-1A through P-1DDD). These checks were drawn on either the Lincoln School Activity account or the High School Activity account and were made payable to either cash or Ralph Guma. These checks were cashed by Guma at a local bank, some of which were, in fact, cashed by Guma's neighbor, Mary Ann Gaidis, at the Trust Company of New Jersey.

It is uncontroverted that these 56 checks, each of which are the basis for a separate tenure charge of unbecoming conduct, were drawn by Guma not for school purposes and the money was used by him not for school purposes. Guma admitted this at a meeting on June 26, 1979 in the presence of the superintendent of schools, Arthur F. Couch, and the board secretary, Ronald T. Temple. Additionally, Guma admitted to his wrongful behavior when he testified in court on July 7, 1982.

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In January 1976, Guma learned that his nine year old son, Ralph, was sick. His son had a cancerous brain tumor and the prognosis was that he would only live three to four years. In January 1976, Guma was advised that his son needed immediate surgery to relieve pressure from the brain. Two operations were performed, one in January 1976 and another in February 1976. The youngster remained in the hospital for two and one-half months, had radiation therapy for six months, and chemotherapy treatment for two years thereafter. Guma visited his son everyday in the hospital.

Guma testified that he was frustrated, angry, and very bitter about the condition of his son. His behavior changed towards his other two sons, who at the time were 14 and 12. Before he learned of his son's condition, he was patient with all members of the family; afterwards, he demonstrated a great deal of impatience.

In trying to understand why he wrote checks for his own use from the student activity funds between 1976 and 1979, Guma testified that he was very angry and hurt and had a general attitude of "to hell with everyone." Most of the money from the checks was spent at the horse races. This was an activity which Guma did not engage in prior to his son's illness.

Dr. Robert Feinsod, a psychiatrist, testified that he saw Guma professionally between June 30, 1979 and September 24, 1980. During the first visit, Dr. Feinsod made a diagnosis of Guma's condition as reactive depression. Guma had symptoms such as tearfulness and crying, extreme anxiety, extreme guilt, difficulty sleeping, trouble concentrating, and an admission by Guma that he was, in fact, severely depressed. Dr. Feinsod prescribed certain antidepressants. The doctor was told by Guma of all of the events surrounding the wrongful writing of the $16,594 in checks over three years, of his son's illness, and of his being suspended from the high school. Guma related how he felt guilty, ashamed, and frustrated over the events which occurred during the period of time between 1976 and 1979.

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Dr. Feinsod rendered an opinion with a reasonable degree of medical probability that the actions of Guma in wrongfully taking and cashing the checks were because of his feeling of guilt over the illness of his son. Dr. Feinsod felt that his actions were self-destructive. Guma knew he would be caught. Such actions as writing checks from a student activities account, which is audited every year, and cashing some of the checks at a bank where a neighbor worked, were evidence of his desire to be caught. The continuation of this practice for a period of three years was like a self-flagellation. Dr. Feinsod opined that without the illness of his son, Guma never would have acted as he did nor would he have been depressed.

Although the act of writing and cashing the checks was a conscious one on his part, the unconscious reason which motivated him to do it was based on the guilt and shame he felt over the sickness of his son and his desire for self-dstruction. This was borne out not only by the absurdity of what he did, but also by gambling the money away at the race track where he had no desire to win.

DISCUSSION OF LAW

During the trial, counsel urged the court to apply beyond a reasonable doubt or clear and convincing evidence as the standard of proof in a tenure hearing. Of course, the established law indicates that the applicable standard of proof is by a preponderance of the credible evidence. See In re Polk, (N. J. Supreme Court, July 30, 1982, A-89) (unreported), which indicates standard of proof is by a preponderance of the credible evidence. Nevertheless, applying any of the three standards of proof, it is clear that the 56 charges against respondent have been proved. There is ample proof not only out of respondent's mouth at the time of trial, but also an admission by Guma on September 28, 1979 before Mr. Couch and Mr. Temple which clearly prove that Guma wrongfully wrote checks from the student activities accounts for non-school purposes. These acts by Guma constitute conduct unbecoming a teacher in violation of N.J.S.A. 18A:6-10. Such state of mind of respondent over the illness of his son does not constitute a defense to the tenure charges, but shall be considered towards mitigation of punishment.

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The court has had an opportunity to observe Guma during the trial. He appeared to be a well-dressed, intelligent, concerned, and troubled man. Several times during the trial, his voice broke with emotion when he was discussing his son's illness. He testified that he wished he had recognized his problem earlier and had gone for help. Guma seemed genuinely and sincerely contrite at what he did, which was borne by his testimony, "I regret what I did."

The problem of the punishment to be imposed on respondent is a difficult one. The court has given a great deal of careful consideration to it. It is undisputed that Guma was an outstanding teacher and principal for the past 20 years. Other than the incident which forms the basis for the present charges, Guma has led an exemplary and productive life, being highly regarded by both his colleagues and people in the community. This is borne out by the character witnesses such as Francis X. Herbert, Peter McAndrews, and Anthony Impreveduto, all of whom testified that Guma has an excellent reputation for integrity and veracity in the community. These feelings are shared by the present mayor of Secaucus, Paul Amico, who submitted an affidavit discussing Guma's unblemished character.

Under normal circumstances, this court would not hesitate for one moment to dismiss Guma for his wrongful activities. Justice, however, requires, after considering carefully all of the facts and circumstances incidental to this matter, that a punishment short of dismissal is appropriate. Dismissal of Guma would be harsh and vindictive. He has already been more than punished as a result of his trauma of going through both criminal proceedings and these proceedings. He has punished himself more severely than any court could punish him. It is clear to this court, based on the facts and circumstances before it, that his act of writing and cashing the checks was an act of self-destruction in which Guma wanted to punish himself for his feelings of guilt and shame over the serious illness of his son. Additionally, Guma is making restitution through the Hudson County Pretrial Intervention Program.

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Trial courts at any level of government must be sensitive to administer justice in an individual case. Judges must carefully take into account the interests of the different parties in arriving at a just result. Like a criminal judge at the time of sentencing who is motivated by factors in a presentence investigative report, certainly an administrative law judge has the responsibility and duty to look at all mitigating factors in meting out justice. It is undisputed that Guma's motiviation in writing and cashing the student activities checks was triggered by his emotional state of mind over his beloved son's illness involving a cancerous brain tumor. The experience of seeing his son go through two operations, two and one-half months of hospitalization, six months of radiation treatment, and two years of chemotherapy treatment must have been heartrending. This court is in no way excusing or condoning Guma's wrongful actions. Such conduct is wrong and is not to be permitted. However, Guma's unblemished record as a teacher and principal must be recognized. This court feels that there are sufficient mitigating factors to warrant a reduction of salary rather than dismissal.

The Commissioner of Education has indicated on many occasions that in setting a penalty where a teacher is charged with tenure violations, the Commissioner should consider the teacher's past good record and unquestioned teaching ability. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). The Commissioner in considering mitigating factors has imposed penalties short of dismissal. See In re Tenure Hearing of Kittell, 1972 S.L.D. 535 and In re Tenure Hearing of Bush, 1977 S.L.D. 95. See also In re Tenure Hearing of Greenberg, 1978 S.L.D. 912 and In re Tenure Hearing of Rumage, OAL Docket No. EDU 0796-80 (Decided May 29, 1980), adopted, Commissioner of Education (July 22, 1980). In each of the aforementioned cases, the Commissioner imposed a penalty short of dismissal because of the teacher's unblemished record.

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Accordingly, it is **CONCLUDED** and **ORDERED** that the 56 charges against Guma have been sustained.

It is further **CONCLUDED** and **ORDERED** that the suspension heretofore imposed against Ralph Guma be set aside and that he be reinstated to his previous employment with all of the benefits and emoluments which he is entitled to, less a reduction in compensation for each of the next three years in the amount of $2,000 per school year. It is intended that the three-year period of time in which respondent shall receive a reduction in compensation shall correspond to that three-year period of time in which he unlawfully wrote and cashed checks from the student activities accounts.

All other issues raised in the prehearing Order or this case are deemed to be without merit.

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

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

9-7-82
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

9-9-82
DATE

Seymour Wells
DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 10 19[illegible]
DATE
md

Robert P. Glickman, Esq.
FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF RALPH GUMA, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWN OF	:	DECISION ON REMAND
SECAUCUS, HUDSON COUNTY.	:	
	:	

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

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

Complainant Board takes exception to respondent's receipt of salary pursuant to N.J.S.A. 18A:6-14, to the imposition of a stay pending criminal proceedings and the dissolution of that stay and resumption of salary payments upon completion of those criminal proceedings. The Board argues that the facts as reported are uncontested, but not conceded. The Board does not take issue with the law as cited but rather with its application to the instant case. The Board's concern for respondent's complete restoral is evidenced by its search for answers to certain expressed questions:

"How is his [respondent's] return to the position of High School Principal to be explained to the students?"

"What is the lesson they will learn when the man can embezzle public money over a period of three years and be restored by judicial process to a position in which he is the moral example for his students?"

"What is the inevitable effect on student discipline if a man who has stolen their money to play horses is returned to the position of Principal of their High School?" (Exceptions, at p. 8)

Respondent's reply exceptions refute those of the Board and affirm the initial decision by Judge Glickman. Respondent argues that the decision of the Court herein is soundly based on the evidence with an imposed penalty appropriate to the circumstances. Respondent contends that, even though he is technically guilty, he should not be dismissed from his position. The Commissioner cannot agree in entirety with the exceptions filed by either party.

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The Board's expressed concern for certain procedural aspects of this matter is without merit. The Commissioner notes that such concern could be or actually was answered by prescribed appeal procedures in the law to the Commissioner, the State Board or the Appellate Court. However, the Commissioner shares the manifested concerns of the Board as expressed by its questions because those queries impact directly on pupils. The concern of the Commissioner for pupils has long been expressed over the years, as in Clinton F. Smith et al. v. Board of Education of Paramus, 1968 S.L.D. 62, affirmed State Board 69:

> "***The principle enunciated by the Court in Bates v. Board of Education, 72 P. 907 (Calif. Sup. Ct. 1903), and quoted with approval in McGrath v. Burkhard, 280 P.2d 864 (Calif. App. 1955), bears repeating here:
>
> > 'The public schools were not created, nor are they supported, for the benefit of the teachers therein, *** but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.'***" (at 67)

A case markedly similar to the present one is In the Matter of the Tenure Hearing of Abraham Altschuler, School District of the Township of Neptune, 1978 S.L.D. 419, affirmed State Board 427, wherein an administrator allegedly suffering the mental or emotional illness of a compulsive gambler cashed approximately $11,000 in checks drawn on a school activities fund for which he was responsible. The Commissioner found such conduct sufficient to warrant his dismissal from his position as a tenured elementary school principal saying:

> "***Moreover, the Commissioner has previously held In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302 in pertinent part that:
>
> > '***[T]eachers of this State *** are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and

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> influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.***' (at 321)

> "The Commissioner has previously ruled In the Matter of the Tenure Hearing of Martin Groppi, Manchester Regional School District, 1970 S.L.D. 159, that respondent's failure to account for certain class monies for which he was responsible as class advisor was sufficient to warrant his dismissal as a teaching staff member.
>
> "In the Commissioner's judgment the corollary between teachers and school administrators who share this enormous responsibility as teaching staff members in the employ of a local board of education needs no further amplification.
>
> "Accordingly, the Commissioner finds and determines that respondent, by a series of incidents of unbecoming conduct as an elementary principal, has shown his unfitness to be continued in his employment in the Neptune Township School System. The Commissioner denies respondent's request to have this matter determined on the grounds of alleged emotional or mental illness and directs that respondent be dismissed from his employment with the Neptune Township Board of Education, effective as of the date of his suspension by the Board." (at pp. 426-427)

Another case recently decided by the Commissioner involving the misuse of funds by administrators is In the Matter of the Tenure Hearing of Louis Cirangle, School District of the Borough of Maywood, Bergen County, decided February 11, 1980; aff'd State Board May 7, 1980; aff'd N.J. Superior Court, Appellate Division, Docket No. A-3967-79A, January 30, 1981; cert. den. 87 N.J. 347 (1981). The board certified thirteen charges of unbecoming conduct against the tenured superintendent who was not suspended. Such charges involved misuse of public funds entrusted to respondent.

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The Commissioner reversed the initial decision and directed that respondent be dismissed as of the date of the certification of charges.

In the matter presently controverted, the Commissioner notes respondent's reliance on both his previously unblemished record and his personal and familial difficulties to explain his misuse of over $16,000 of student activity funds spent by him over a three-year period at the race track. However, in the cases cited by respondent, the action(s) for which tenure charges were filed did not involve the direct impact on the entire student body as is the case in the present matter. The Commissioner cannot accept such rationalization, nor does it mitigate respondent's responsibility to properly administer and supervise the funds entrusted to his care by the protracted efforts of the pupils in his school. The Commissioner notes with concern the repetitive pattern of misconduct spread over a three-year period and is saddened by the pressures which respondent claims caused his actions. The Commissioner, while regretting respondent's personal problems, cannot accept them as an excuse for the gross misuse of funds exhibited by respondent. The Commissioner so holds.

Accordingly, the Commissioner finds and determines that respondent herein has exhibited unbecoming conduct of such severity as to have abrogated his tenure as a high school principal in the district. Judge Glickman's determination herein is set aside, respondent shall be dismissed from his employment by the Secaucus Board of Education, effective as of the date of this decision.

COMMISSIONER OF EDUCATION

October 25, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8440-81
AGENCY DKT. NO. 443-11/81A

GAYLE M. YOUNG,
Petitioner
v.
BELMAR BOARD OF EDUCATION,
MONMOUTH COUNT,
Respondent.

APPEARANCES:

Richard A. Friedman, Esq. for petitioner (Ruhlman, Butrym and Friedman, attorneys)

Steven A. Pardes, Esq. for respondent (Sim, Sinn, Gunning, and Fitzsimmons, attorneys)

Record Closed August 18, 1982 Decided September 10, 1982

BEFORE BRUCE R. CAMPBELL, ALJ:

This is an action for an order directing the Belmar Board of Education (Board) to place Gayle M. Young (petitioner) on a preferred eligibility list for reemployment in the Belmar School District and directing the Board to notify petitioner of her seniority status in the school district. The matter was joined before the Commissioner of Education and transmitted to the Office of Administrative Law for disposition as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

Subsequent to a prehearing conference held on March 24, 1982, petitioner moved for summary judgment in her favor on the question of the retroactive effect of the

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New Jersey Supreme Court decision in Rita Spiewak, Peggy Dabinett, Patricia O'Reilly, ____ N.J., ___ and the Rutherford Education Association v. Board of Education of Rutherford, N.J. (1982). Oral argument on the motion was heard on July 13, 1982, and post-argument briefs were timely filed.

The gravamen of petitioner's complaint is that she was improperly denied tenure status in the Belmar School District and hence seniority rights. The Board denies that respondent has a tenure status in the district and requests that the petition be dismissed.

I

Petitioner alleges and the Board admits that petitioner has been employed by the Board as a teacher in a position for which a certificate issued by the State Board of Examiners was required for the following periods:

December 1973 to June 30, 1974;
November 1974 to June 30, 1975;
October 1, 1975 to June 30, 1976;
February 1977 to June 30, 1977;
March 1, 1978 to June 30, 1978;
September 1, 1978 to June 30, 1979;
September 1, 1979 to June 30, 1980;
September 1, 1980 to June 30, 1981.

During that employment, petitioner held and continues to hold an appropriate certificate issued by the State Board of Examiners. Petitioner was advised by the superintendent of schools that the Board voted to terminate her contract effective June 30, 1981, due to uncertainty of funding and she was further advised that if funding became available in the future, she would be considered for a position. During August 1981, petitioner called the superintendent of schools and was advised that funding had not become available and that there was no position for her. On or about October 14, 1981, petitioner wrote to the superintendent of schools requesting advice as to her position on the seniority list in the school district. Thereafter, petitioner received a letter from the superintendent dated October 29, 1981, advising that since she was considered as not having tenure she would not be placed on a seniority list.

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Petitioner asserts that by reason of the employment outlined above, she enjoys a tenure status and is entitled to be placed upon a preferred eligibility list for reemployment in the Board's schools whenever a vacancy occurs in a position for which she is qualified, to be reemployed if and when such a vacancy occurs and to be notified of her seniority status.

Conversely, the Board asserts that petitioner has not gained tenure in the district and, therefore, is not entitled to placement on a preferred eligibility list for reemployment, is not entitled to be reemployed, if and when such a vacancy occurs and is not entitled to be notified of her seniority status because no seniority can accrue to a non-tenure teacher.

II

Petitioner argues that her cause is not barred by the Spiewak decision and, in the alternative, even if Spiewak were not applicable, she could assert tenure and seniority under the standard announced in Point Pleasant Beach Teachers' Association v. Callam, 173 N.J. Super. 11, certif. den. 84 N.J. 469 (1980).

The facts of petitioner's service as pertinent to this motion are virtually undisputed. Additionally, it should be noted that a teaching certificate was required at all times, that her salary was set by the Teachers' Guide and that she received all benefits including sick days and enrollment in the Teachers' Pension Annuity Fund (TPAF).

In the Spiewak decision, the Court said its decision would have prospective effect as to those not before the Court. The policy consideration for that conclusion, as announced by the Court, was set forth on page 32 of the Slip Opinion, wherein the Court stated:

> The teachers in this case should not be denied the reward for their efforts and expense in challenging both the practice of their Boards of Education and the legal principals established by the various cases criticized here.

The Court also said that the decision would apply prospectively to those not before the Court, but did not specify the meaning of the term Court. Furthermore, the Court stated that those teachers terminated before the date of the decision would not be rehired, but made no mention of those teachers terminated prior to the decision who had commenced litigation prior to Spiewak.

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It is petitioner's position that the Court intended the phrase "Court" to be interpreted in its broad sense, i.e., cases in litigation, or that the Court did not anticipate or address the status of cases in litigation prior to its decision in Spiewak. This is underscored by the policy considerations leading to the partial prospective application of Spiewak. Indeed, in In re Jamesburg High School Closing, 83 N.J. 540 (1980), the Court made clear that since the tenure statutes are plain on their face, they should construed in accord with their plain language. Thus, this court should be loath to hold that the same Court intended to deprive a teacher in litigation of a clear statutory right.

Turning to the intent of the Spiewak Court, petitioner finds it significant that nowhere does the Court mention cases in litigation or that the term Court must be limited to the Supreme Court. Indeed, such construction would be at variance with the very reason advanced by the Court for prospectivity. At footnote 2, found at page 33 of the Slip Opinion, the Court speaks of teachers who were terminated, but makes no mention of cases in litigation. Thus, the decision would obviously not apply to teachers dismissed who did not litigate their terminations, having done nothing else. They fit precisely within the Court's language. Although ommitted by the Court, those who litigated and lost, then dropped their efforts, would also be barred by the doctrine of res judicata. However, where the Court did not mention pending litigation at all, this court should not read into its decision such a drastic consequence; to cut off the rights of litigants who challenge the Point Pleasant rule prior to the Supreme Court's decision. The main rationale for the application of the decision to the Spiewak petitioner is that those who took the effort and expense to litigate should be rewarded by the decision, whereas those who took no action should suffer the consequences.

Petioner Young took specific action challenging the Point Pleasant Beach rule. In short, the Supreme Court, without mentioning cases in litigation, could not have intended such severe consequences to those such as petitioner here who meet the policy the Court's decision, and clearly meet the statutory requirements of the Tenure Act.

Further support for this is found by the very context in which the Court considered the issue in Spiewak's application. First, the litigants in Spiewak, already before the Supreme Court, were not concerned with any other pending litigation. Thus, there was no motive on their part to address that point. Therefore, it is doubtful that the Court, in an advesary system, completely considered the issue. Still further, those in petitioner's position were denied the opportunity to present their views, thereby depriving

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the Court of all pertinent considerations regarding those cases in litigation. In these circumstances, it is doubtful that the Court intended to hold its decision prospective to those in petitioner's situation.

In addition to the above, it is probable that the Court, if it actually addressed the issue of application to cases in litigation, used the term "Court" in the broad sense, i.e., all pending litigation, or did not anticipate the decision would bar pending litigants. An example of the proper approach to this case was taken by the Appellate Division in Malone v. Fender, 158 N.J. Super. 190 (App. Div. 1978), supp. at 160 N.J. Super. 221 (App. Div. 1978), rev'd. on other grounds 80 N.J. 129 (1979). There, the Appellate Division invalidated the action of the Civil Service Commission extending a promotional list for fire fighters. In a supplemental opinion (160 N.J. 221), the Court held its decision prospective, "except for the list in this case and any presently pending proceding in which the same challenge is made."

The Appellate Division's approach in Malone is the correct one for the circumstances in this case and best comports with the Court's reasoning underlying its decision regarding application of Spiewak to other Title I teachers. Although the Supreme Court reversed the Appellate Division's decision on the merits in Malone, the supplemental opinion retains its validity and provides the proper balance here. Petitioner challenged the Point Pleasant Beach rule. She was involved in pending litigation. She should not be denied the reward of her effort and expense, taken at a time when the law seemed against her.

Further support for the application of the Malone rule is required by the common sense of the situation. Under N.J.S.A. 18A:6-9, the Commissioner hears all controversies and disputes involving schools and school districts. In form, substance and legal effect, the Commissioner sits as a "Court" determining contractual, legal and equitable issues. Cf. Thompson v. Board of Education, 57 N.J.L. 628 (Sup. Ct. 1895). The term "Court," particularly in the context of a tenure controversy, must be given a reasonable construction. It is significant that in construing the Tenure Act, the Court said in Board of Education, Manchester Township v. Raubinger 78 N.J. Super. 90 (App. Div. 1963) at 97,

> Strict or literal meaning cannot be given to legislative language when it is apparent that such meaning was not intended. The rule of strict construction cannot be allowed to defeat the apparent

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> legislative design. In Wright v. Vogt, 7 N.J. 1, 7 (1951), the Supreme Court, adopting the language of a New Hampshire case, said that the will of the law giver is to be found, not by the mechanical or formal application of words and phrases, but by the exercise of reason and judgment. "Scholastic strictness of definition" cannot be adopted if it prevents a reasonable construction. See Alexander v. N.J. Power and Light Co., 21 N.J. 373, 378 (1956). In this as in other cases of statutory construction, the reason and spirit of the Act prevail over the strict letter.

Surely the Supreme Court meant no less for its own language.

The policy reasons underlying prospectivity set forth by the Court in Spiewak mandate a determination that the decision applies to all cases then in litigation. Petitioner meets the requirements of that policy. She should not be denied the fruits of her efforts, particularly where she took action at a time when the law was not necessarily in her favor. The timing of her case, filed before the Supreme Court's Spiewak decision cannot control. At the time she filed her appeal, the Point Pleasant Beach decision was that which most directly applied to Title I teachers. The existence of other teachers' cases (the Spiewak cases) cannot be turned as a weapon against petitioner merely because those cases reached the Supreme Court prior to her case.

Finally, the correctness of this approach is demonstrated by the result in Anderson v. Summit, consolidated with Spiewak. There the State Board reversed the Commissioner's decision which held that Mrs. Anderson aquired tenure. Mrs. Anderson appealed to the Appellate Division. Thereafter, she sought direct certification to the Supreme Court. Had the timing of the Spiewak arguments precluded direct certificatio or had Mrs. Anderson not applied for direct certification, (with her case remaining in the Appellate Division) should she have been denied the benefits of her efforts because she was only in the Appellate Division? Timing of the litigation must be irrelevant. Indeed, such construction, urged by the Board here, based upon the timing of litigation, beyond petitioner's control, would violate the equal protection clause. Petitioner having commenced litigation before the Supreme Court's decision in Spiewak, is entitled to application of the rule announced therein to her case.

III

The Board argues that the sole issue before this court is the retroactivity of the New Jersey Supreme Court opinion in Spiewak to cases pending before lower courts or the Commissioner at the time the opinion was rendered.

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In general, a court has four options open to it in any decision involving retroactivity:

(1) Make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced;

(2) apply the new rule to future cases and to the parties in the case announcing the new rule;

(3) grant the new rule limited retroactivity, applying it to cases where the parties have not yet exhausted all avenues of direct review; and, finally,

(4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted. State v. Nash, 64 N.J. 464, 468-70 (1974).

In the present case, we are not concerned with options 1 and 4, since they have clearly been excluded by the ruling in Spiewak. The issue, therefore, is whether the Supreme Court's language regarding the prospective effect of its decision in Spiewak as to all persons "not before the Court" was intended to grant limited retroactivity in the sense of the second or the third options, above.

The Appellate Division, in Turner v. Aldens, Inc., 179 N.J. Super. 596, 605 (App. Div. 1981), has stated:

> The overruling of prior judicial construction of a statute is generally not given retroactive effect, even as legislative change itself normally applies only prospectively. 20 Am. Jur. 2d Courts § 234 at 562-3.

Such reversal of prior statutory construction is often given limited retroactive effect to the litigants in the case at bar, in order to avoid the possible negative effect of depriving litigants of the "incentive to challenge existing practices or prior holdings which, in the public interest, ought to be reviewed." Goldberg v. Traver, 52 N.J. 344, 347 (1968). Thus, the exception as to the prospectivity made for the litigants in the case announcing the new rule is not just to reward litigants who successfully challenge prior judicial instructions, but more fundamentally designed to assure that there will be litigants to make such challenges. That rationale does not, however, require that the exception to

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prospective effect of the decision be broadened beyond the litigants in the case announcing the new rule to encompass litigants in other pending cases. The mere fact that the first litigant to make a successful challenge will reap the fruits of his labor encourages such challenges to be made and it is not essential to similarly reward all litigants whose cases were pending. The public interest in encouraging such challenges is not advanced any farther by multiple cases than it is by a single case. Consequently, it is not uncommon for our courts to apply the new rule in a case to the litigants in that case only, and to the exclusion of litigants in other pending cases. See Pascucchi v. Vagott 71 N.J. 40, 50-1 and United States Supreme Court cases cited in Nash, above.

Petitioner in her brief stated that the timing of her case cannot control her right to rely upon Spiewak. Were the concept of rewarding the first litigant to achieve a successful outcome and deny other litigants in cases then pending so unfair, then that option, stated in Nash, above, and Pascucchi, above, and the cases cited in Nash would not even exist.

Petitioner asks that Spiewak be applied to her case based upon a force reading of the wording "not before the Court" appearing on page 33 of the Slip Opinion. She does this despite the footnote annotating the sentence in which that wording appears. Within the footnote, the following sentences clarifying the term "the Court" appear:

> Teachers not before the Court will therefore not be entitled to any back pay award. Similarly, teachers not involved in this case who were terminated prior to the date of this opinion are not entitled to be rehired.

It must be noted that the term "the Court" reappears in the first sentence of the footnote. The word "similarly" introducing the next sentence serves as a link between "the Court" in the first sentence and "teachers not involved in this case" in the second sentence, equating the two phrases and making it evident that "the Court" was intended to refer solely to the Supreme Court.

Moreover, this interpretation is further supported by the sentence in the body of the opinion itself. The complete sentence, consisting of two clauses is as follows, "We therefore hold that the legal rule established by these cases shall be applied to those teachers before us, as well as prospectively to all persons not before the Court." The second clause defines the class of individuals as to whom the decision will have prospective effect only, and if read in a vacuum, might lend itself to the reading given it

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by petitioner. When read together with the introductory clause which uses the clearly descriptive wording "teachers before us," however, it is apparent that the words "persons not before the Court" in the second phrase was intended to mean persons other than the litigants in the cases decided by the Supreme Court on that date. Had the Supreme Court intended to make the opinion applicable to other cases besides the ones before it, the Court would have expressly so stated, as the Appellate Division did in the language from Malone, above, and would not have relied on merely alluding to that determination by an ambiguous use of the words "the Court."

The Supreme Court in Spiewak specifically stated in note 2 (Slip Opinion at 33) that the tenure eligibility of currently employed teachers should be calculated on the basis of that opinion from the commencement of their employment. In the present case, petitioner had been terminated one year prior to the Supreme Court opinion and the Court's holding that "teachers not involved in this case who were terminated prior to the date of this opinion are not entitled to be rehired" applies fully to her. Also significant is that the Court, noting that the extent of reliance on the prior case law is an important consideration as it relates to retroactivity, went on to state, "we are overruling the decision in Point Pleasant. One can hardly imagine a clearer case of a clean break in the law than disapproval of a court decision that has been followed by State agencies" (Slip Opinion at 32).

The reliance factor is particularly worthy of substantial weight in the case of Mrs. Young and other similarly situated litigants who were terminated by school boards relying on the Point Pleasant case. Petitioner has performed no services whatever for the Belmar School District in the past year, since she was terminated at the end of 1980-81 school year. Yet, if the retroactivity issue is decided in her favor, she will receive one year's salary plus whatever emoluments she may ultimately be deemed entitled to as a result of the Spiewak decision. While her termination by the Board, acting under a now overruled construction of the tenure law may be unfortunate, our courts should be loath to require that taxpayers' monies be expended in instances of this nature. In M.A. Stephen Construction Co. v. Borough of Rumson, 125 N.J. Super. 67 (App. Div. 1973), it was held that an innocent claimant could be denied damages from a governmental body even where the governmental body had been at fault. In that case, damages were denied to a wrongfully denied low bidder on a municipal contract. The reasons are even more compelling for such a result in the instant case, where petitioner has wrongfully been terminated but the wrongfulness of such termination has only been determined more than a year after her termination by a radical change in the interpretation of a statute.

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IV

At the prehearing conference in this matter held on March 24, 1982, the right was reserved to each party to move for full or partial summary judgment following the New Jersey Supreme Court decision in Hamilton Tp. Supplemental Teacher's Ass'n. v. Hamilton Tp. Bd. of Ed., Mercer Cty. and Rita Spiewak, et al. v. Rutherford Bd. of Ed. At the same time the issues for determination in this matter were set forth as:

(1) Has petitioner acquired tenure in the district, and

(2) If so, (a) in what category, (b) full-time or other than full-time, (c) what is her seniority status, and (d) to what monetary relief, if any, is she entitled.

Having carefully read the decision of the Court in Spiewak and the briefs submitted by the parties in this matter, I **FIND** and **CONCLUDE** the following. There are no disputed issues of material fact in this matter. The matter, therefore, is ripe for full disposition.

Whenever the substantive law is changed, whether by legislative action or by decisions of a court of competent jurisdiction, a line is drawn. In Spiewak, the Court drew a bright line. It seems clear that the language of Note 2 (Slip Opinion at 33) answers all questions at bar. The pertinent language is, "Teachers not before the Court will therefore not entitled to any back pay award. Similarly, teachers not involved in this case who were terminated prior to the date of this opinion are not entitled to be rehired" (emphasis added).

Even if, as petitioner urges, I were to define "Court" in its broadest sense, that is, any litigation in progress at the time of this Supreme Court decision, the fact of petitioner's termination in June 1981, would control. The Court took pains to point out that those who were terminated prior to the date of its opinion are not entitled to be rehired. The remaining questions, therefore, are moot.

The termination of petitioner and the upholding of that termination by this court may seem severe and even, perhaps, unjust. However, it must be borne in mind that the termination was made in accordance with the law in effect at the time. The Spiewak

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court goes to great legnths in Section V of its opinion to explain the effect of denying retroactivity to all except those actively involved in the cases before it. The last sentence of the section, "We therefore hold that the legal rule established by these cases shall be applied to the teachers before us, as well as prospectively to all persons not before the Court" seem clear. Yet, to avoid even the possibility of misinterpretation, the Court saw fit to expand its thought in footnote 2 as recited above.

Given clear intent and plain meaning, I cannot find otherwise.

Accordingly, summary judgement is entered in favor of the Board, the Petition of Appeal is denied and is hereby **DISMISSED**. It is so **ORDERED.**

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

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

10 SEPTEMBER 1982
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

13 September 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 15 1982
DATE

Gabot Hagan Cr
OFFICE OF ADMINISTRATIVE LAW

bm

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GAYLE M. YOUNG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BELMAR, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner's primary exceptions contest the conclusion reached herein by the Honorable Bruce R. Campbell, ALJ. Petitioner relies on Fair Lawn Education Association v. Board of Education of Fair Lawn, decided by the Commissioner July 20, 1982, and pleads for a remand of this matter for consideration of the extent of tenure and seniority acquired by petitioner. The Board's reply exceptions refute those of petitioner and affirm the initial decision. The Commissioner finds merit in petitioner's arguments.

The Commissioner is constrained to remark, in agreement with the thrust of petitioner's contentions, that he has dealt even more recently with a markedly similar situation in Glory Mirabello v. Board of Education of the Township of Rochelle Park, decided September 20, 1982. Therein Mirabello was a teaching staff member employed as a supplemental and home instruction teacher who met the precise requirements of N.J.S.A. 18A:28-5. The determination in Spiewak et al. was applied and Mirabello was reinstated with appropriate remuneration. In Mirabello, the Commissioner affirmed the finding by the ALJ that, since petitioner therein was employed as of the date of the Appellate Division's decision in Spiewak and filed her appeal in reliance on that decision, she was therefore entitled to the same relief afforded all other teaching staff members as per Spiewak. (Slip Opinion, at pp. 2, 3, 6) The Commissioner finds, likewise, that Petitioner Young, herein, was a currently employed teacher at the time of the Spiewak decision and, upon termination of employment, filed her Petition in reliance on that decision and is therefore entitled to relief.

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Accordingly, the Commissioner sets aside the decision of the Court herein and remands the present matter for a determination of the extent and nature of tenure and seniority acquired by petitioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

October 7, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5807-81
AGENCY DKT. NO. 319-7/81A

VICTOR R. CICCONETTI,
Petitioner
v.
LONG BRANCH BOARD OF EDUCATION,
MONMOUTH COUNTY,
Respondent.

APPERANCES:

Thomas W. Cavanagh, Jr., Esq. for petitioner (Chamlin, Schottlan, Rosen & Cavanagh, attorneys)

Malachi J. Kenney, Esq. for respondent (Murray, Granello & Kenney, attorneys)

Record Closed July 28, 1982 Decided September 13, 1982

BEFORE **DANIEL B. MCKEOWN,** ALJ:

Victor R. Cicconetti (petitioner), employed by the Long Branch Board of Education since September 1979 as a subject area chairman, claims entitlement to a salary increase, under N.J.S.A. 18A:39-11, credit for military services. The Board contends the salary it established for petitioner does recognize his military service. The Commissioner of Education, before whom the Petition was filed, transferred the matter to the Office of Administrative Law as a contested case, under N.J.S.A. 52:14F-1 et seq. The parties agreed at a prehearing conference held January 6, 1982, to submit the matter for adjudication on cross-motions for summary decision, with accompanying briefs and stipulated facts and exhibits.

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The issue is whether, within the stipulated facts of the matter, petitioner's salary has been established by the Board in recognition of the benefit he is due under N.J.S.A. 18A:29-11.

The stipulation of facts is reproduced here as submitted by the parties:

1. Petitioner, Victor R. Cicconetti, is a licensed and certified teaching staff member employed by respondent, Long Branch Board of Education, as a subject area chairman (SAC).

2. Respondent is a political subdivision of the State of New Jersey and is the statutorily charged public body responsible for the maintenance and direction of public education in the Long Branch school district.

3. Petitioner has been employed by the Board since September 1979.

4. Petitioner served in the Air Force for three years seven months.* Subsequent to his military service and prior to his employment by Respondent, Petitioner was employed as a teacher by the Jersey City State College from October 1974 to July 1976, as a teacher by the Jersey City Board of Education from November 1976 to June 1977, and as a teacher by the Bayonne Board of Education from September 1977 through June 1979.

5. Upon his employment by Respondent, Petitioner's salary was fixed at the first step of the MA+30 column of the subject area chairmen's guide, representing a salary of $18,400.

6. At the time of Petitioner's employment by the Long Branch Board of Education, there was no discussion concerning military service credit.

7. Subject area chairmen have not always had their own salary guide. Until the 1978-79 school year, all subject area chairmen were paid in accordance with their experience including military credit and training levels pursuant to the teachers' salary guide, plus a stipend. Exhibit A, attached hereto, is an excerpt from the 1973-75 Agreement between the Board and the Subject Area Chairmen's Association and sets forth a five step schedule of stipends as follows:

*(which is treated as four years of military service for purposes of applying credit under N.J.S.A. 18A:29-11).

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Step	Stipend
1	$ 800
2	950
3	1100
4	1250
5	1400

The above amounts were paid in addition to the salaries calculated in accordance with the teachers' salary guide. Exhibit B attached hereto, is a listing of salaries for subject area chairmen in the 1977-78 school year and shows the chairmen's salaries broken down into the teacher guide salary and the SAC stipends. See also Exhibit C, a copy of the the 1977-78 teachers' salary guide.

8. For the 1978-79 school year, the Board and the Association agreed to create a new subject area chairmen's salary guide, containing complete salaries rather than stipends to be paid in addition to salaries based on the teachers' guide. See Exhibit D, a copy of the Memorandum of Agreement. Paragraph 10 of that Memorandum provides that the new salary guide "using Step 9 of that guide as Step 1 of the new subject area chairman guide, including current stipends into the base salary and increasing the salary of each employee by $1,000 inclusive of increment, over the current base salary and stipend." Paragraph 13 of that Memorandum of Agreement provides that newly appointed SAC's shall be placed on the first step of the guide, or at a higher step if necessary to guarantee an increment of at least $200.

9. The SAC salary guides for 1978-79, 1979-80 and 1980-81 are attached hereto as Exhibits E(1), (2) and (3). These guides can be compared with the teachers' salary guides for the same periods, Exhibit F. In each case, Step 1 of the SAC guide is higher than Step 9 of the teachers' guide. The differential is not a fixed, constant amount, however, since negotiations were conducted separately with each unit, and settlements were not necessarily for the same amount.

10. Petitioner's 1976-77 salary, while employed by the Jersey City Board of Education, was $12,000, representing $11,700 (MA Step 1) plus $400 ($200 for each of two years prior experience at Jersey City State College). Petitioner neither claimed nor received salary credit for his prior military service. See Exhibits G(1) and (2).

11. Petitioner's 1977-78 salary (Bayonne Board of Education) was $11,483, representing MA Step 1 on the salary guide. The Board acknowledged three years prior teaching experience and three years military service. Petitioner was, therefore, below his proper position on the Bayonne salary guide and under this system would not have reacher his proper position through adjustment increments of $150.00 per year until he had spent six years in the school system. See Exhibit H.

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12. Petitioner's 1978-79 salary was $12,993, representing $12,843 (MA +30, Step 2), plus the $150 adjustment. See Exhibit H.

Petitioner seeks summary decision that his claim for salary guide advancement, as credit for military service, is mandated by N.J.S.A. 18A:29-11, and that the benefits of such advancement, increased salary, be awarded retrospectively and prospectively. The Board seeks summary decision that petitioner's salary is established, and has been established since his employment with it, in recognition of prior military service and that to grant petitioner's requested relief would be to create an inequality between him and all other chairman which, it is said, would be contrary to the legislative purpose of the statute. The Board also asserts the defenses of waiver and estoppel to bar petitioner's claim. In the alternative, the Board contends that should petitioner prevail, relief to be afforded must be prospective.

N.J.S.A. 18A:29-11 reads in pertinent part:

> Every teacher who after July 1, 1940, has served. . .in the active military or naval services of the United States. . .shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning. . .except that the period of such service shall not be credited towards more than four employment or adjustment increments.

A restatement of the facts, as considered here, is in order. Petitioner served in the United States Air Force for a sufficient time in order to make a claim of four years' service credit, for salary purposes, under the statute. Though the facts fail to disclose whether petitioner was credited with his military experience by Jersey City State College, it is stipulated that while Jersey City Board of Education did not grant such credit, nor was such a claim made to it by petitioner, the Bayonne Board of Education did recognize his military service as creditable for salary purposes for the period of time he spent in its employ during 1977-78 and 1978-79.

Immediately subsequent to petitioner's departure from his employment as teacher with the Bayonne Board, he was employed by respondent Board in September 1979 as a subject area chairman. The title "chairman" is not recognized in N.J.S.A. 18A:1-1 et seq., Education Law nor in N.J.A.C. 6:1-1 et seq., the rules and regulations of the State Board of Education. An inference can be reasonably drawn from the stipulated facts and exhibits that the position of chairman, is, in fact, that of a supervisor, a

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recognized title. N.J.S.A. 18A:29-43; N.J.A.C. 6:3-1.10(k)22. Be that as it may, petitioner's initial salary for 1979-80 as chairman in the Board's employ was set at $18,400, the first step of the Board's subject area chairman's salary policy on the MA +30 guide. That policy provides that newly appointed chairpersons shall have their salary begin at step one, with a minimum increase of $200 over their existing salary.

Prior to 1978-79, subject area chairmen in the Board's employ had their salaries fixed according to their proper step on the appropriate teachers' salary guide, plus an annual stipend for chairperson duties performed. The stipends ranged from $800 annually, for a newly appointed chairperson, to $1,400 for a chairperson entering their fifth year in that assignment. Absent contrary evidence, it is presumed that prior to 1978-79 the base salary step, that is, the chairperson's proper step on the appropriate guide, was determined in recognition of those who possess military experience.

The Board and the Subject Area Chairmen's Association agreed that, as of 1978-79, a salary policy for chairpersons shall be adopted by which the salaries of chairpersons shall be established, according to experience, position and qualifications. The subject area chairperson's salary policy for 1978-79 through 1980-81 sets forth two guides: for those with master's degrees and for those with master's plus 30 credits. The two guides are further divided according to whether the person is a chairperson or assistant chairperson. The first steps of each policy, 1978-79 through 1980-81, are as follows:

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1978-79

Step	M.A. Asst.	M.A. Ch.	MA +30 Asst.	MA +30 Ch.
1	17,000	17,300	17,600	17,900

1979-80

1	17,500	17,800	18,100	18,400

1980-81

1	18,400	18,700	19,000	19,300

In each instance, the first step of the chairpersons' guide, assistant chairperson and chairperson, was equivalent to the salary to be paid a similarly academically qualified teacher who had 11 and 12 years' experience, respectively under the teachers' salary guide. Petitioner, it is recalled, began in 1979 and his salary was established at $18,400, the first step of the MA +30 guide. A teacher, in 1979-80, would had to have been on step 12 of the teachers' salary policy, MA +30 guide, to receive $18,612. Step 11 of the latter guide would have commanded a salary of $18,047.

Thus the Board contends that the first step of the chairperson's salary policy is sufficiently greater than the teachers' salary policy so as to have incorporated within that amount recognition of prior teaching experience and all military service credit requirements. The Board asserts that the position of chairperson is a supervisory position, which requires a supervisor's certificate, N.J.A.C. 6:11-10.9, which, in turn, presupposes that the person has had prior teaching experience. Consequently, the Board concludes that the position of chairperson is not an entry level position of employment; rather, it is a promotional position.

The Board also relies on the history of its negotiation with the Association in respect of the subject area chairperson salary policy to anchor its position that that policy was created, at least in respect of the first step, in full recognition of an appointee's prior

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teaching experience and military experience. The Board contends that to grant petitioner four years' advancement on its salary policy would be to rule that whenever a teacher receives a promotion to a position which has a separate, but higher, salary policy than that of the teachers' policy, the promotee may not be required to start at step one of the higher policy, even though the salary at step one may be thousands of dollars higher than the salary he would have earned had he remained as a teacher.

The Board contends that by virtue of petitioner's failure to raise the claim for military service credit at the time of first hire, he has waived any right to credit he otherwise might have had and is now estopped from making such claim. Finally, the Board states that it had a right to presume that petitioner's former public employees had recognized, and had granted him, the military service credits the law affords him.

Petitioner, to the contrary, contends that it is established law that one who is entitled to a statutory benefit cannot waive his right thereto, nor can estoppel be successfully invoked as a defense to that claim. Petitioner maintains that the Board has no "right" to presume that his former employees granted him military service credit; rather, it is argued, the Board has an equal duty to inquire of new employees whether they have military service so that a proper salary may be established under the law.

Petitioner contends that the relevant statute, N.J.S.A. 18A:39-11, is clear and unambiguous and that, as such, he is clearly entitled to the relief he seeks. Petitioner argues he "has never received credit, during his former employment, for any of the four years he is entitled to under N.J.S.A. 18A:29-11" (petitioner's brief, p. 1).

Lastly, petitioner argues that because the Board fails to grant him military service credit, he suffers de facto discrimination because other chairpersons have been granted such credit. Petitioner explains that the chairpersons who had been so employed from within the system had already been granted military service credit by the Board. Thus, it is argued, their salaries were higher than was petitioner's during his last year of employment with the Bayonne Board because that Board did not grant him military service credit. Petitioner contends that when the "in-bred" chairpersons were placed on the new guide, their salaries were set so as to assure them of at least $200 over the previous salary. Petitioner claims that his salary was not determined in that manner because of the absence of military credit from Bayonne.

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Discussion of Law

The New Jersey Supreme Court recently decided two cases, one of which sheds much light on this dispute. In Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982), Justice Schreiber, writing for the majority, held that:

> The legislative purpose of N.J.S.A. 18A:29-11 is to reward veterans for service for their country in time of war. The reward takes the form of crediting the military service as teaching experience even though there is no functional relationship between the two. The credit has the effect of increasing the number of dollars to which the teacher who is a veteran is entitled. The emolument is not for services rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher. [at p. 151.]

Because the benefit of N.J.S.A. 18A:29-11 is a statutory entitlement, not a contractual benefit, the six-year statute of limitations, N.J.S.A. 2A:14-1, does not apply. Laches does apply. Id., p. 153. Relief to be afforded under the statute is granted for salary purposes "subsequent to making [the] claim," p. 155. In a companion case, Union Tp. Teachers Ass'n v. Union Tp. Bd. of Ed., 90 N.J. 161, 162 (1982), the doctrine of equitable estoppel was held not to apply to claims under N.J.S.A. 18A:29-11.

Thus the issue in this case is reduced to whether petitioner has been denied military service credit under N.J.S.A. 18A:29-11 in respect of his salary as a subject area chairperson. The facts here establish that petitioner has failed to show that he has been denied the substantive benefits of the statute. When petitioner began his employment with the Board in September 1979, at a salary of $18,400, he had come from employment as a teacher with the Bayonne Board at a salary of $12,993. Contrary to petitioner's assertion that he received no credit for any of his four years of military service from prior employees, he stipulated that the Bayonne Board did recognize three years, albeit less than full recognition. But, be that as it may, if, instead of petitioner's having been employed as a teacher by Bayonne in 1978-79, he was similarily employed by respondent Board, his salary, according to the Board's teachers' salary policy, MA + 30 guide, and taking into account all prior teaching experience (four years), plus four years' military experience, would be set at the ninth step of that guide. The ninth step of the MA +30 teachers' guide for 1978-79 is $16,416. And if that amount had been petitioner's salary for 1978-79, in full recognition of all credit he would have been due had he been employed as a teacher by this Board, and then assigned as chairperson, his salary, according to the

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terms of the chairmen's salary policy would still have been set at $18,400 or a $1,984 increase.

In reality, however, petitioner's salary of $18,400 for 1979-80, set by this Board, is $5,507 than his last salary, $12,993, received from the Bayonne Board.

It is recognized that the issue here is not to be decided on the size of salary increase received by one starting with a board, compared to the salary he or she received from the prior employer. But the difference in salary received is presented merely to show that even if petitioner had been employed as a teacher by this Board prior to 1979-80, and had received full credit for teaching and military experiences, his salary would still have been set at $18,400 because 1978-79 was his first year as chairperson. That another chairperson's salary for 1979-80 may have been set at a higher step than was petitioner's, because of greater prior teaching experience with the Board, does not create a basis for petitioner to claim illegal discrimination. And, because prior employing boards did not, for whatever reason, grant military service credit to petitioner, that failure, of and in itself, creates no cause of action against this Board.

I find sufficient support throughout the record to accept as fact the earlier stated inference that the position of chairperson is a supervisory position. One cannot be a supervisor without having had, at a minimum, three year's prior teaching experience. Because teaching experience is required in order to be a supervisor, as is a separate certificate, and because the salary afforded supervisors is higher than that of teachers, the position of supervisor is found to be one of promotion.

But are the benefits of N.J.S.A. 18A:39-11 transitory? That is, do they follow a person from a classroom teaching position to a promotional position, and thence again to a higher position, ad infinitum? They do not in a situation where, as here, it can be shown that if the person had been previously employed by the Board, as a teacher, the initial salary of the promotional position, established through negotiation between the Board and the Association, would be greater than the salary he would receive as a teacher with full recognition of his years with the Board and full military credit, and when, in all other respects, the initial salary comports with the salary policy which governs the class of positions to which the promotion was made.

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If petitioner is granted the relief he seeks, he would be placed in a greater position than he would have been had he been employed by the Board in prior years. Petitioner, at least theoretically, would have been employed in 1974 as a teacher, placed on the fifth step of the appropriate salary guide in recognition of his four years' military service. Five years later, 1978-79, he would have been on the ninth step of the MA +30 guide, or at a salary of $16,416. Had he been appointed as chairperson for 1979-80 in that circumstance, there is no doubt that the chairpersons' salary guide would command he begin at step one, or $18,400. Here, petitioner demands placement on step five, or $21,400, which, if granted, would indeed be discriminatory against those chairpersons who here worked their way through the Board's system. Such a result is not equitable, not is it the result intended by the statute. The statute indicates that a teacher receives credit for up to four years of military services as if he had been teaching, those four years. Here, petitioner, by virtue of receiving a salary of $18,400 in 1979-80, which is the salary he would have received had he been appointed to the position from within the district, includes credit for his military service.

The Petition of Appeal is dismissed.

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

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

DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

September 13, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Sept. 15, 1982
DATE

Ronald L. Parker Jr.
OFFICE OF ADMINISTRATIVE LAW

bm

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VICTOR R. CICCONETTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by Daniel B. McKeown, ALJ.

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

The primary exceptions taken by petitioner contend that Judge McKeown predicated his determination upon the finding of fact that petitioner did receive his statutory benefit under N.J.S.A. 18A:29-11 as a result of past salary level and compensation attained from his former employer before accepting a supervisory position with the Board of Education of the City of Long Branch. Petitioner avers that conclusions drawn in the initial decision of this nature could be precedent-setting, and that subsequent resolution of military service credit disputes could be adversely affected if Judge McKeown's decision stands.

Petitioner contends further that the language in Lavin v. Board of Education of Hackensack, 178 N.J. Super. 221 (App. Div. 1981) indicated that equitable estoppel was not applicable in a situation where a statute is mandatory and its provisions must be superimposed where it applies, making it clear that petitioner was equitably estopped.

The Board contends that the established salary of $18,400 to which petitioner agreed was in keeping with the salary guide for chairpersons and assistant chairpersons, inclusive of teaching experience and military service credit. The Board substantiates its contention by the salary level granted petitioner by his former employer and the step on his former employer's salary guide prior to his $5,407 increase and new promotional opportunity with the Board.

The Commissioner is constrained to comment that petitioner's argument that he has been denied military service credit under N.J.S.A. 18A:29-11 has not convinced the Commissioner that this is indeed the case. Judge McKeown held, ante,

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> "***that the first step of the chairperson's salary policy is sufficiently greater than the teachers' salary policy so as to have incorporated within that amount recognition of prior teaching experience and all military service credit requirements. The Board asserts that the position of chairperson is a supervisory position, which requires a supervisor's certificate, N.J.A.C. 6:11-10.9, which, in turn, presupposes that the person has had prior teaching experience. Consequently, the Board concludes that the position of chairperson is not an entry level position of employment; rather, it is a promotional position.***"

Petitioner's claim that he is a victim of de facto discrimination as a result of an unequal application of N.J.S.A. 18A:29-11 by the Board is without merit. Petitioner's right to raise the military service credit question was not abridged and during negotiations of salary and placement step on the Board's salary guide was the time for benefits and employment requirements to be proposed. At such time, either party could have rejected proposals that were not mutually beneficial.

A close examination of the facts herein regarding the failure of the Board to grant petitioner military service credit under N.J.S.A. 18A:29-11 was more than adequately considered by the ALJ, ante, who held as follows:

> "***When petitioner began his employment with the Board in September 1979, at a salary of $18,400, he had come from employment as a teacher with the Bayonne Board at a salary of $12,993. Contrary to petitioner's assertion that he received no credit for any of his four years of military service from prior employees (sic), he stipulated that the Bayonne Board did recognize three years, albeit less than full recognition. But, be that as it may, if, instead of petitioner's having been employed as a teacher by Bayonne in 1978-79 , he was similarily (sic) employed by respondent Board, his salary, according to the Board's teachers' salary policy, MA + 30 guide, and taking into account all prior teaching experience (four years), plus four years' military experience, would be set at the ninth step of that guide. The ninth step of the MA + 30 teachers' guide for 1978-79 is $16,416. And if that amount had been petitioner's salary for 1978-79, in full recognition of all credit he would have been due had

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> he been employed as a teacher by this Board, and then assigned as chairperson, his salary, according to the terms of the chairmen's salary policy would still have been set at $18,400 or a $1,984 increase.***"
>
> (Emphasis in text.)

Accordingly, for the reasons set forth, the Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own. Petitioner's claim for additional salary increase and step placement as a result of the provisions pursuant to N.J.S.A. 18A:29-11 is hereby denied.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

October 28, 1982

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7092-81
AGENCY DKT. NO. 337-8/81A

FOSTER J. ZANETTI and
RICHARD DEXHEIMER,
Petitioners
v.
BOARD OF EDUCATION OF
LEONIA, BERGEN COUNTY,
Respondent

APPEARANCES:

Louis P. Bucceri, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Lester Aron, Esq., for respondent
(Aron, Till & Salsberg, attorneys)

Record Closed August 23, 1982 Decided September 24, 1982

BEFORE **ROBERT P. GLICKMAN**, ALJ:

As a result of the Board of Education of the Borough of Leonia's (Leonia) extending their sending-receiving relationship with the Board of Education of the Borough of Edgewater (Edgewater) whereby Leonia agreed to instruct Edgewater's seventh and eighth grade students commencing the 1981-82 school year, petitioners, Foster J. Zanetti (Zanetti) and Richard Dexheimer (Dexheimer), contend that they are entitled to be transferred for employment in the Leonia school district beginning with the 1981-82 school year pursuant to N.J.S.A. 18A:28-6.1. Respondent, Leonia, urges that under a clear reading of the previously-mentioned statute, neither petitioners meet the statutory criteria.

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On August 4, 1981, petitioners filed an appeal with the Commissioner of Education. On October 14, 1981, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

As a prehearing conference on May 19, 1982, the following issues were identified:

1. Did respondent Board violate petitioner Zanetti's rights pursuant to N.J.S.A. 18A:28-6.1 by not offering him employment?

2. Did respondent Board violate petitioner Dexheimer's rights pursuant to N.J.S.A. 18A:28-6.1 by not offering him a position as principal?

3. If petitioners should prevail, what relief are they entitled to?

By agreement of the parties, it was agreed that this matter would be decided based on the submission of a joint stipulation of facts and briefs. The record was deemed to be closed on August 23, 1982.

FINDINGS OF FACT

The following joint stipulation of fact is hereby adopted as my **FINDINGS OF FACT:**

1. Petitioner, Foster J. Zanetti, is a tenured teaching staff member employed by the Board of Education of the Borough of Edgewater. He has been continuously employed by Edgewater Board of Education since September, 1956 as a teacher of health and physical education.

2. During the 1976-77 school year Zanetti also served in an administrative capacity in the Edgewater school system on a part-time basis, one day per week. The remainder of his duties that year consisted of teaching health and physical education in grades one through eight.

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3. On June 8, 1981, the Board of Education of the Borough of Edgewater and the Board of Education of the Borough of Leonia extended their existing sending-receiving relationship whereby the Leonia Board of Education agreed to instruct Edgewater's seventh and eighth grade students commencing the 1981-82 school year.

4. During the 1980-81 school year petitioner Zanetti was assigned 560 minutes per week of instructional time with seventh and eighth grade pupils enrolled in physical education and health, and was assigned 520 minutes per week of instructional time with pupils in grades 1-6.

5. Zanetti also was assigned 40 minutes per week of non-instructional time as a library proctor and 40 minutes per week as supervisor of a study period for perceptually impaired students. This class consisted of fourteen (14) children ranging in ages from eleven (11) to fifteen (15); nine (9) of whom would have been of 7th and 8th grade age (a majority of these students were also assigned to Zanetti's 7th and 8th grade physical education classes).

6. On April 29, 1981, and prior to the Leonia Board of Education taking any final action to extend the sending-receiving relationship to include instruction of Edgewater's seventh and eighth grade pupils, petitioner Zanetti communicated by letter to the Leonia Board of Education and expressed his belief that he was entitled to transfer to the Leonia school district when and if the Board extended the sending-receiving relationship to grades seven and eight.

7. On June 8, 1981, petitioner Zanetti was informed by Charles Murphy, Superintendent of Schools for the Borough of Leonia, that it was the opinion of both the Leonia Board of Education and the Edgewater Board of Education, based on his then current work assignments, that he was not entitled to transfer to the Leonia school district for the 1981-82 school year as a result of their extension of their existing sending-receiving relationship. (See Exhibit 1 attached).

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8. Petitioner Zanetti was employed in a four-fifths (4/5) position in the Edgewater school district for 1981-82 due to declining enrollment and the transfer of the 7th and 8th grade students to Leonia. (Exhibit 2 attached).

9. For the 1981-82 school year the Leonia school district employed full time teachers of health and physical education with less seniority than Zanetti in that area of certification.

10. Petitioner Richard Dexheimer is a tenured teaching staff member employed by the Board of Education of the Borough of Edgewater. He is tenured and has seniority rights in the positions of teacher of history and as a building principal.

11. Petitioner Dexheimer has been employed by the Board of Education of the Borough of Edgewater as follows:

    (a) September, 1967 through June, 1975 teacher
    (b) Summer, 1975 through June, 1980 principal
    (c) 1980-81 teacher of history
    (d) 1981-82 principal

12. Petitioner Dexheimer was employed in Edgewater as a teacher of history in the seventh and eight grades during the 1980-81 school year. Petitioner assumed that position in September, 1980 when his position as principal was allegedly abolished by the Edgewater Board of Education.

13. On or about June 8, 1981, petitioner Dexheimer was offered a position by the Edgewater Board of Education as a principal in its school district commencing with the 1981-82 school year. Petitioner was requested to respond to that offer by the Edgewater Board of Education not later than June 10, 1981. (Exhibit 3 attached).

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14. After extending the sending-receiving relationship to include instructing Edgewater's seventh and eighth grades, the Leonia Board of Education, by letter dated June 8, 1981, offered petitioner Dexheimer a position as a teacher of social studies in grades seven and eight, commencing the 1981-82 school year. On June 10, 1981, this offer was amended to include a position as a teacher of history in the Leonia High School, as confirmed by letter of June 12, 1981. (Exhibits 4 and 5, attached).

15. On June 9, 1981, petitioner Dexheimer accepted Edgewater's offer without prejudice to his alleged right to compel the Leonia Board of Education to offer him a position as a principal in its school district.

16. On June 12, 1981, Superintendent Murphy reaffirmed the Leonia Board of Education's position that petitioner had received an appropriate offer from the Leonia Board pursuant to N.J.S.A. 18A:28-6.1, and that the offer of a position as principal tendered by the Edgewater Board rendered the entire controversy moot. (Exhibit 5 attached).

17. By letter of June 15, 1981 petitioner Dexheimer responded to Superintendent Murphy's letter of June 12, 1981 and notified Murphy that Dexheimer accepted Edgewater's offer of a principal's position because no offer of an administrative position was made by Leonia. (Exhibit 6).

18. Exhibit 7, attached hereto, sets forth the employment history, certification status and military records of all individuals employed by the Leonia school district for 1981-82 in the position of principal.

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DISCUSSION OF LAW

Both petitioners claim entitlement to employment in the Leonia school district pursuant to N.J.S.A. 18A:28-6.1 because of the extension of the sending-receiving relationship between that school district and the Edgewater school district.

N.J.S.A. 18A:28-6.1 provides:

> Whenever, heretofore or hereafter, any board of education in any school district in this state shall discontinue any high school, junior high school, elementary school or any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such schools or grades to such other district, all teaching staff members who are assigned for a majority of their time in such school, grade or grades, and who had tenure of office at the time such schools or grades are discontinued shall be employed by the board of education of such other district in the same or nearest equivalent position; . . . Teaching staff members so employed in such other district shall have their rights to tenure, seniority, pension and accumulated leave of absence, accorded under the laws of this state, recognized and preserved by the board of education of that district.

CONCLUSION OF LAW
AS TO PETITIONER ZANETTI

It is undisputed that during the 1980-81 school year, petitioner Zanetti had the following assignments:

1. 560 minutes instructional time with seventh and eighth grade pupils enrolled in physical education and health;
2. 520 minutes per week of instructional time with pupils in grades one through six;
3. 40 minutes per week as a library proctor; and
4. 40 minutes per week as supervisor of a study period for perceptually impaired students.

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Although the seventh and eighth grades were discontinued by Edgewater, its program for perceptually impaired children and its library program were not discontinued.

In determining whether petitioner Zanetti is entitled to employment in Leonia, the statutory language stating that only those "teaching staff members who are assigned for a majority of their time in such school, grade, or grades" which has been discontinued by the sending district "shall be employed by the board of education of such other district."

Petitioner Zanetti interprets the just referred to statutory language to mean the distribution of a teacher's instructional time when looking at the language "majority of their time in such school" (emphasis added). Zanetti urges that the consideration of non-instructional time is improper. Under petitioner's analysis of the statute, Zanetti had 560 minutes per week of instructional time for seventh and eighth grade students and 520 minutes per week of instructional time for grades one through six. Thus, the majority of Zanetti's instructional time was spent instructing seventh and eighth grade students. Petitioner insists that the noninstructional time spent as a library proctor and supervisor of study for perceptually impaired students should not be considered.

On the other hand, respondent argues that Zanetti spent 560 per minutes of instructional time with seventh and eighth grade pupils, and 600 minutes per week on other assignments (520 minutes per week of instructional time with pupils grades one through six, 40 minutes of noninstructional time as library proctor, and 40 minutes per week as supervisor of study period for perceptually impaired students).

It is clear that the statute says "majority of their time in such school," not majority of their instructional time. In order for this court to decide in favor of Zanetti, it must read into the statute the word "instructional," which is not there. If the legislature intended that a "majority of time" meant a majority of instructional time, it would have said so. Courts cannot ignore the plain meaning of language employed by the legislature. Singleton v. Consolidated, 64 N.J. 357 (1974). A statute must speak for itself and be construed according to its own terms. State v. A. A. LaFountain Inc., 67 N.J. Super. 285

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(Cty. Ct. 1961). In construing N.J.S.A. 18A:28-6.1, our supreme court found its terms to be clear. As stated in In Re Jamesburg High School Closing, 83 N.J. 540, 547 (1980), the court said:

> The words of the statute require exactly what they say . . . . Fundamental principles of statutory construction require that '[i]f the [statutory] language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject, the court cannot give it a different meaning.'

Based on the clear language of the statute, Zanetti was not assigned for a majority of his time to teach the seventh and eighth grades. He was assigned for only 560 minutes per week, whereas the other 600 minutes per week were spent in non-teaching assignments the seventh and eighth grade pupils. Apropos, Zanetti did not meet the statutory criteria for employment in Leonia.

Accordingly, petitioner Zanetti's petition is hereby **DISMISSED** with **PREJUDICE.** Any other arguments raised by Zanetti are deemed to be without merit.

CONCLUSIONS OF LAW
AS TO DEXHEIMER

Dexheimer also claims entitlement to a position of principal in the Leonia school district pursuant to N.J.S.A. 18A:28-6.1. Dexheimer was employed as a teacher of history in the seventh and eighth grades during the 1980-81 school year when Leonia and Edgewater agreed to extend their sending-receiving relationship to include Edgewater's seventh and eighth grades. Dexheimer accepted a position as principal in Edgewater for the 1981-82 school year. Respondent offered Dexheimer a position as teacher of social studies in grades seven and eight for the 1981-82 school year which was later amended to include a position as teacher of history in the Leonia High School for that year (See Stipulation 14). Dexheimer accepted Edgewater's offer of principalship without prejudice, contending it had a right to employment as a principal in the Leonia school district.

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Dexheimer contends that he has met the statutory criteria and should have been offered a position as principal with Leonia and not a position as social studies or history teacher. Dexheimer urges that he had six years of seniority as a principal in Edgewater as of June 1981 which should have been recognized by Leonia.

Leonia asserts that Dexheimer's acceptance of employment in Edgewater as a principal makes the instant matter moot. Additionally, Dexheimer did not comply with the standards set forth in the statute, namely, that a teacher "shall be employed by the board of such other district in the same or nearest equivalent position." At the time of the extension of the sending-receiving relationship, Dexheimer was employed as a teacher of history in Edgewater. The offer by Leonia to Dexheimer of the position of teacher of social studies, later amended to teacher of history, is in compliance with the statutory criteria of offering petitioner the same or nearest equivalent position.

The court **CONCLUDES** that a clear reading of the statute requires Leonia to only offer Dexheimer a position as teacher of history which amounts to the offer of the "same of nearest equivalent position" under the statute. An offer of a principalship by Leonia would constitute an offer of a greater position in the receiving district. Although N.J.S.A. 18A:28-6.1 also states:

> . . . Teaching staff members so employed in such other districts shall have their rights to tenure, seniority, pension, and accumulated leave of absence, accorded under the laws of this state, recognized and preserved by the board of education of that district. . . .

this shall not be construed so as to entitle Dexheimer to a position of principal in Leonia. Such a construction would give him greater rights than those tenure teachers already employed in Leonia. As stated in In re Jamesburg High School Closing, at 548:

> The statute's design is clear: to provide employment protection to tenured educational instructors transferred by consentual arrangement to another school district, and to furnish the same protection to tenure teachers in the receiving district. (emphasis added)

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Based on a careful reading of the statute, it is **CONCLUDED** that Leonia, in offering Dexheimer employment as a social studies teacher of grades seven and eight and as a teacher of history in the Leonia High School, complied with the standards established thereunder. Dexheimer has no entitlement or right to a position as principal in Leonia. Accordingly, Dexheimer's petition is hereby **DISMISSED** with **PREJUDICE.** Any others issues raised by Dexheimer are deemed to be without merit.

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

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

9-24-82
DATE

ROBERT P. GLICKMAN, ALJ

Receipt Acknowledged:

September 27, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 29 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

md

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APPENDIX

EXHIBITS:

1 Letter dated June 8, 1981 from Charles J. Murphy to Zanetti
2 Letter dated April 28, 1981 from Edward McGill to Zanetti
3 Letter dated June 8, 1981 from Thomas J. Breen to Dexheimer
4 Letter dated June 8, 1981 from Charles J. Murphy to Dexheimer
5 Letter date June 12, 1981 from Charles J. Murphy to Dexheimer
6 Handwritten letter dated June 15, 1981 from Dexheimer to Charles J. Murphy
7 Employment record of four Leonia teaching staff members

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FOSTER J. ZANETTI AND RICHARD DEXHEIMER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The primary exceptions of Petitioner Zanetti argue that the Honorable Robert P. Glickman, ALJ has imposed a hypertechnical, formalistic interpretation upon N.J.S.A. 18A:28-6.1. Zanetti contends that he should be allowed to count supervisory time as credit towards time with the 7th and 8th grades because he argues that the purpose of the statute is to preserve jobs. Petitioner Dexheimer excepts to the conclusion by Judge Glickman that he was not entitled to be offered a principal's position in Leonia for the 1981-82 school year. Dexheimer contends that Leonia's offering to him a position as history teacher is not the "same or nearest equivalent position" pursuant to N.J.S.A. 18A:28-6.1.

The Board's reply exceptions refute those of petitioners and affirm the initial decision. The Commissioner finds merit in the Board's arguments.

A close reading of the statutes and the circumstances of this contested matter convinces the Commissioner that Judge Glickman properly interpreted the law herein. The Commissioner finds the intent of the Legislature through the statute, ante, to be clear: to provide employment protection to tenured teachers assigned a majority of their time to grades which have been discontinued in the sending district by requiring that they be employed in the receiving district. The Commissioner finds that such interpretation has been properly applied by Judge Glickman to petitioners' circumstances herein.

The Commissioner so holds.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

November 8, 1982

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7198-81

AGENCY DKT. NO. 342-8/81A

ALFRED CIMINO, JOSEPH CORBI, and NICHOLAS TRABOSH,

Petitioners

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,

Respondent.

APPEARANCES:

John E. Collins, Esq. for petitioners (Selikoff & Cohen, attorneys)

Alan R. Schmoll, Esq. for respondent (Capehart & Scatchard, attorneys)

Record Closed August 12, 1982 Decided October 1, 1982

BEFORE **LILLARD E. LAW,** ALJ:

Petitioners, tenured teaching staff members in the employ of the Board of Education of the Township of Deptford (Board), assert that each individually sustained personal injury caused by accidents arising out of and in the course of their employment and allege that the Board improperly deducted sick leave days from their accumulated sick leave subsequent to these job-related injuries. The Board, by way of Answer, denies that petitioners are entitled to any relief and asserts that it has complied with all statutory and contractual obligations owed to petitioners.

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This matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

PROCEDURAL ASPECTS AND MOTIONS

On January 6, 1982, a prehearing conference was held at the Trenton Office of Administrative Law, at which time the issues to be determined were agreed upon and set forth on the record. Petitioners moved and were granted leave to amend their Petition of Appeal. Respondent was granted leave to file a Motion for Partial Summary Judgment with regard to Issues #1 and #2 as set forth in the Prehearing Order. The parties subsequently submitted their respective briefs and memoranda of law, and the record for that portion of the controversy closed on March 3, 1982.

The issues upon which the Board moved for partial summary judgment were:

1. Did the absences of petitioners constitute temporary disability within the meaning of the Workers' Compensation Act?

2. If not, is eligibility for temporary disability benefits a prerequisite for benefits under N.J.S.A. 18A:30-2.1?

The statute in controversy, N.J.S.A. 18A:30-2.1, payment of sick leave for service-connected disability, is set forth in toto and reads as follows:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

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The court, having considered the arguments of counsel, including statutory construction, case law and administrative law decisions, concluded that eligibility for temporary disability benefits is not a prerequisite for salary payments, under N.J.S.A. 18A:30-2.1. It further concluded that factual issues remained to be heard and to be determined at a full plenary hearing and, therefore, it denied the Board's Motion for Summary Judgment (Procedural Order Decision on Motion, decided March 25, 1982).

A hearing was conducted on May 11, 1982, at the Bridgeport, New Jersey, Municipal Court. Thereafter, the parties submitted post-hearing briefs of law and the record was closed on August 12, 1982.

REMAINING ISSUES TO BE DETERMINED

Pursuant to the Prehearing Order and the subsequent Decision on Motion with regard to Issues #1 and #2, the following issues remain to be determined:

3. If petitioners' absences constituted absences within the meaning of N.J.S.A. 18A:30-2.1, did the Board act unlawfully in charging petitioners accumulated sick leave for absences occurring more than 12 months from the date of the work-related injuries?

4. As to petitioner Corbi, did the episodes of January 3, 1980, June 1979 and April 10, 1981, trigger new "calendar years," under N.J.S.A. 18A:30-2.1?

5. Is the Board estopped from charging deductions from petitioners Cimino's and Corbi's accumulated sick leave for absences occurring at the direction of an agent of the Board?

6. Are the absences as set forth in Count Three, paragraph 4, the types of absences covered by N.J.S.A. 18A:30-2.1?

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STIPULATION OF FACTS

At hearing, the parties agreed to and set forth on the record the following stipulations with respect to each of the herein petitioners:

First, as to petitioner Cimino, it was stipulated at the hearing that Paragraphs 1 through 6 of Count One of the Petition of Appeal were true in fact (T5-19 to 22). These paragraphs read as follows:

1. Petitioner, Alfred Cimino, is a language arts teacher employed by Respondent, and has been so employed since on or about September 1, 1969.

2. Respondent is a body corporate and politic of the State of New Jersey empowered by law to administer the school district of the Township of Deptford, Gloucester County.

3. On or about January 3, 1980, Petitioner Cimino sustained injuries while attempting to restrain a fight among students during school time and on school property. As such, said injuries were caused by an accident arising out of and in the course of Petitioner Cimino's employment.

4. As a result of said injuries, Petitioner Cimino was absent from his duties on the following dates: January 4, 7, 8, 9, 10, 11, 14, 16, 17, 18 and 25, 1980; February 11 and 21, 1980; March 4 and 19, 1980; April 8, 24 and 25, 1980; October 17 and 29, 1980; November 10, 1980; and December 12, 22 and 23, 1980. For these dates, Respondent paid Petitioner Cimino his full salary without charging his absences to his annual or accumulated sick leave, pursuant to N.J.S.A. 18A:30-2.1.

5. As a result of said injuries, Petitioner was further absent from his duties on the following dates: February 5, 11, 25, 26 and 27, 1981; March 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 13, 14, 25, 26 and 27, 1981; April 30, 1981; and May 1 and 4, 1981.

6. On May 11, 1981, Petitioner Cimino received a letter from Mr. Donald LeVan, Respondent's Secretary, stating, inter alia, that his absences due to his work-related injuries "from February, 1981 forward are being reversed and will be charged against your accumulative sick leave" [P-1].

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Second, as to petitioner Corbi, it was stipulated at hearing that paragraphs 1 through 6 of Count Two of the Petition of Appeal were true in fact (T8-25). These paragraphs read as follows:

1. Petitioners repeat the allegations contained in Count One as if the same were more fully set forth herein.

2. Petitioner, Joseph Corbi, is a health and physical education teacher employed by Respondent, and has been so employed since on or about September 1, 1974.

3. On March 26, 1979, Petitioner Corbi injured his back while assisting a student engaged in a weightlifting activity. As such, said injury was caused by an accident arising out of and in the course of Petitioner Corbi's employment.

4. On the last day of the 1978-79 school year, Petitioner Corbi re-injured his back while rolling up a wrestling mat in the school gymnasium. As such, said re-injury was caused by an accident arising out of and in the course of Petitioner Corbi's employment.

5. On April 10, 1981, Petitioner Corbi re-injured his back while accompanying his physical education class from a school playing field to the school building. Said re-injury was caused when Petitioner Corbi stepped on soft dirt on the school grounds which caved in. As such, said re-injury was caused by an accident arising out of and in the course of Petitioner Corbi's employment.

6. On May 11, 1981, Petitioner Corbi received a letter from Mr. Donald LeVan, Respondent's Secretary, stating that more than one calendar year had passed from the date of his original injury and that Respondent had no responsibility to pay his salary for his absences due to his work-related injuries. The letter also stated that his absences for treatment of said injuries had been charged to his accumulated sick leave leaving him with zero sick leave days [P-2].

It was further stipulated at hearing that each of petitioner Corbi's injuries, occurring on March 26, 1979, June 20, 1979 and April 10, 1981, constituted "a personal injury caused by an accident arising out of and in the course of his employment," pursuant to N.J.S.A. 18A:30-2.1 (T9-1 to 9) (T52-16 to 53-7).

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Third, as to petitioner Trabosh, it was stipulated at hearing that paragraphs 1 through 5 of Count Three of the Petition of Appeal (with the exception of the second sentence of Paragraph 4) were true in fact (T12-16 to 22). These stipulated allegations read as follows:

1. Petitioners repeat the allegations contained in Counts One and Two as if the same were more fully set forth herein.

2. Petitioner, Nicholas Trabosh, is a social studies teacher employed by Respondent, and has been so employed since on or about September 1, 1971.

3. In February, 1978, Petitioner Trabosh sustained an injury to one of his eyes while attempting to restrain a fight among students during school time and on school property. As such said injuries were caused by an accident arising out of and in the course of Petitioner Trabosh's employment.

4. As a result of said injury, Petitioner Trabosh was absent from his duties on two subsequent dates for medical examinations, scheduled at Respondent's request, in connection with a Workers' Compensation claim which Petitioner Trabosh filed against Respondent.

5. On May 11, 1981, Petitioner Trabosh received a letter from Mr. Donald LeVan, Respondent's Secretary, stating that his four absences due to his work-related injury would be charged to his accumulated sick leave. [As a result of Petitioner Trabosh's abandonment of any claim regarding the two dates when he appeared in Workers' Compensation Court, only two of these four absences remain in issue herein.]

Furthermore, as to petitioner Trabosh, it was stipulated that paragraph 7 of Count Three of the Second Amended Petition of Appeal was true in fact. This paragraph alleges that:

7. The collective agreement between the Respondent and the Deptford Education Association provides at Article XV, Section 5 as follows:

> Workers' compensation awards shall be deducted from the regular salary of the employee for the days absence covered by the Workers' Compensation Act. The time lost from employment under the Workers' Compensation Act shall not be deducted from days permitted for regular sick leave allowance.

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Finally, it was stipulated by the parties that the entire contract between the Deptford Education Association and the Deptford Board of Education should be admitted into evidence as a joint exhibit (T14-6) (J-1).

TESTIMONIAL EVIDENCE

A summary of the testimony proffered by petitioners Cimino and Corbi that they relied upon statements made to them by the Board's vice principal goes to Issue #5: "Is the Board estopped from charging deductions from petitioners' Cimino and Corbi accumulated sick leave for absences occuring at the direction of an agent of the Board?"

Petitioner Cimino testified that on April 8, 1980, the vice principal advised petitioner that when he had a medical treatment appointment scheduled, or when he did not feel well because of his work-related injury, his absences would be recorded as "Workmen's Compensation-related" and would not be charged to his accumulated sick leave. Petitioner Cimino stated that the vice principal told him that "there's no need for you to come to school in any of your Workmen's Compensation-related treatments, doctor's visits, or injuries . . . because I will get a substitute, and it will be taken care of. It will be paid for by Workmen's Compensation." Petitioner Cimino testified that the vice principal's statement was made to him on a day (April 8, 1980) when petitioner had scheduled a medical appointment for a time falling during the last periods of the school day, when he had free periods. In reliance upon the vice principal's statement, Cimino thereafter followed the practice of telephoning the Board's substitute service in the morning rather than the vice principal, and reporting his absences as "Workmen's Compensation-related" on the dates when he was scheduled for treatments and on the dates when he was ill.

The number of the absences taken subsequent to January 3, 1981, the date which the respondent Board contends is the cutoff point under N.J.S.A. 18A:30-2.1, were for treatments, around which petitioner Cimino could have and/or would have reported for duty except for what he asserts was his understanding with the vice principal at the high school. The absences fitting into this category are those occurring on February 5 and 11, 1981; April 30, 1981; May 1 and 4, 1981; September 15, 1981; February 1 and 3, 1982; and May 10, 1982. The days when petitioner Cimino would have been absent, notwithstanding

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his claimed understanding, because of pain and discomfort or the need for hospitalization, were February 25, 1981 to March 9, 1981 (hospitalization); March 10, 1981 to March 30, 1981 (convalescing at home); January 21, 1982; and February 2, 1981 (pain and discomfort).

Petitioner Corbi testified that he received similar advice from the vice principal on February 13, 1981. Prior to that date, petitioner Corbi's practice had been to schedule early morning appointments with his physician on those mornings when he suffered pain resulting from his work injury. He would then attempt to report to school, missing only a first period preparatory period and a second period study hall. On February 13, 1981, Corbi testified that he experienced severe pain during the night, and he called the school at approximately 7 a.m. to report that he would be late since he needed medical treatment. Petitioner testified that as a result of the medical treatment he received from his physician, he became nervous and high-strung and that he began to experience diarrhea. When he arrived at his home, with the intention of calling the school to report his inability to report for duty, he received a telephone call from the vice principal. He testified that the vice principal advised him that he should take the whole day off, that a substitute could be procured, that he was covered by Workers' Compensation and would not lose any pay, and that the day would not be deducted from his accumulative sick leave. Relying on the vice principal's statement that his sick leave would not be jeopardized, petitioner Corbi thereafter called the teachers' registry early in the morning (instead of after his medical appointments) to report a full day's absence on those days when his pain was such that he felt he could not perform his duties.

The vice principal testified and specifically denied having any conversation with petitioner Cimino concerning the manner in which absences that result from the workers' compensation injury would be treated or charged. He stated that the determination of how an absence will be handled is not one of his responsibilities but, rather, is handled by the school district's central office, and he personally plays no role in reviewing reasons for absences. He testified that the procedure for obtaining the reason does not involve him at all, but is obtained by the principal's office from the teacher by having the teacher fill out an absence form supplied by the Board. He also stated that while he is familiar with workers' compensation, he has no knowledge as to how an absence related to it is charged.

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The vice principal stated that the only statement he made to petitioner Cimino concerning his absences was that "[i] f you do not feel well, you're sick, that is why sick days are provided." He stated that he did not consider whether petitioner Cimino may have been entitled to workers' compensation as opposed to sick days, nor was he attempting to characterize the absence as a sick day or a workers' compensation day. His major concern was that petitioner's assigned classrooms would be covered by a substitute teacher in petitioner's absence.

As to the issue regarding comments made by the vice principal to petitioner Corbi, petitioner testified that on February 13, 1981, they had a telephone conversation concerning petitioner Corbi's medical situation (prior to this time there were occasions when petitioner would unexpectedly have the need to see his doctor). Sometimes, petitioner Corbi would be able to go to work thereafter, and sometimes he could not report for duty. According to Mr. Corbi, during the course of this conversation, the vice principal advised him that he understood the situation and that it would be in everyone's best interest if he, petitioner Corbi, would take the day off under these circumstances. The vice principal allegedly went on to say that a substitute could be obtained, and that the day would be covered by workers' compensation and would not be counted against sick leave. Thereafter, the entire day was taken off.

The vice principal denied the substance of petitioner Corbi's testimony. Instead, he testified that he told petitioner that if he was going to be out because of an "unknown" sickness, he should call for a substitute. The vice principal denied that he advised petitioner that the time off would be charged to workers' compensation and would not be charged to sick days. He stated that his concern was over the fact that he could never be certain whether petitioner Corbi would be able to report for work on those days when he unexpectedly had to see his doctor, with the result that the school would be left without a substitute.

The absences of petitioner Corbi which are in dispute insofar as N.J.S.A. 18A:30-2.1 is concerned are those which occurred during the period from approximately June 20, 1980 to April 10, 1981. These dates are October 16 and 10, 1980; November 18, 1980; December 9 and 18, 1980; January 5, 6 and 7, 1981; February 4 and 13, 1981; March 12 and 19, 1981; and April 1 and 2, 1981 (T54-8 to T55-10). Of these, petitioner Corbi claims that he relied upon a conversation with the vice principal, similar to the one

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claimed by petitioner Cimino, in regard to the absences which occurred on and after February 13, 1981, and up to the time when he received the letter from the Board Secretary (see Exhibit P-2) on May 11, 1981. This covers five dates (T70-13 to T71-16).

Also in dispute are absences occurring within the 12-month period following the April 10, 1981 accident. While it has been agreed that absences within this period which are related to that workers' compensation injury are not to be charged to sick leave, the question is whether all of those dates are so related. The dates are October 15, 1981; November 23, 1981; December 3, 14, 18 and 22, 1981; January 13 and 22, 1982; and February 2, 1982.

LEGAL ARGUMENTS WITH REGARD TO ISSUE NO. 5

Petitioners argue that because of the vice principal's alleged statements to petitioners Cimino and Corbi and their reliance upon same, the Board was estopped from deducting from their sick leave time those absences occurring more than one year after their work-related injuries.

The Board, in opposition, argues that even accepting petitioners' versions of the vice principal's statements, petitioners have not established the kind of detrimental reliance with regard to all dates in controversy which must be present for the application of the doctrine of estoppel. It argues that estoppel arises specifically "where 'conduct, either express or implied, . . . reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law.'" Miller v. Teachers' Pension & Annuity Fund, 179 N.J. Super. 473, 477 (App. Div. 1981).

The Board contends that any absence which would have occurred regardless of anything the vice principal may have said does not contain the above elements. Petitioner Cimino would have been absent on the following dates whether he had ever talked to the vice principal or not: February 5 and 11, 1981; April 30, 1981; May 1 and 4, 1981; September 15, 1981; February 1 and 3, 1982. Petitioner Corbi also would have been absent regardless of what the vice principal may have said, at least on February 13, 1981.

Even as to the remaining absences, argues the Board, both petitioners still would have been absent for a portion of the workday and, therefore, cannot claim detrimental reliance upon the vice principal to the extent that they were at their doctors'

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offices. It appears at best, then, that petitioner Cimino would be entitled to restoration of approximately one-half of nine days while petitioner Corbi would be entitled to restoration of approximately one-half of four days, assuming estoppel otherwise can be applied.

It is the respondent Board's position that estoppel cannot apply in any event because the extent to which a school board is permitted to pay for absences without charging to sick leave is prescribed by N.J.S.A. 18A:30-2.1. This is a situation similar to that in cases where boards negotiated provisions in labor agreements with teacher unions which the courts later found to have been beyond the board's authority. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). In those situations, the unions certainly had relied to their detriment, and estoppel arguments could have been made. Nevertheless, the courts held that the provisions in question were invalid. Here, the Board cannot be compelled to pay beyond that which the statute permits.

DISCUSSION WITH REGARD TO ISSUE NO. 5

Petitioners urge the court to consider the credibility of the witnesses in arriving at its determination as to whether the doctrine of estoppel applies to the instant matter.

There is little doubt that the testimony of petitioners and the vice principal conflicted with regard to the remarks the vice principal was alleged to have made to petitioners that their absences would be recorded as Workmen's Compensation related. Such remarks were alleged to have been made by the vice principal to petitioner Cimino on April 8, 1980, and to petitioner Corbi on February 13, 1981.

As to the measure of credibility, it has been well established that the party who has the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. The court, therefore, must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth. Jackson v. D.L. & W.R.R. Co., 111 N.J.L. 487 (E & A 1933). The evidence is found to preponderate if it "establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct.

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1940) citation omitted. Where the standard is reasonable probability (preponderance of the evidence), the evidence must be such as to "generate the belief that the tendered hypothesis is in all human likelihood the fact." Lowe v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), certif. den. 31 N.J. 75 (1959), overruled on other grounds, 36 N.J. 487 (1962). A factor to be considered in a determination as to which party's version of an incident has the "reasonable probability of the truth" is that "[t]he interest, motives, bias or prejudice of a witness may affect his credibility and justify the jury, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952), citation omitted, certif. den. 10 N.J. 316 (1952). Further, "a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." Conleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282 (App. Div. 1958); also, In re Perrone, 5 N.J. 514 (1950).

This court can readily comprehend the apprehension of the petitioners and the vice principal when they allegedly entered into discussions concerning petitioners' future absences from duty. On the one hand, petitioners were anxious to protect their sick leave days occasioned by absences from duty as a result of their work-related injuries, while on the other hand, the vice principal needed to protect the integrity of the educational institution by ensuring that the absent teachers' classrooms were adequately covered by appropriate substitute teachers. While there were specific assertions by petitioners, and a categorical denial by the vice principal, that their absences were to be considered "Workers' Compensation related," there exists insufficient proofs, by either side, to ascertain a measure of credibility. Given, however, that petitioners have the burden of proof by the preponderance standard, and given that all favorable inferences lie with petitioners, I **FIND** it is more probable than not that petitioners understood, believed or interpreted the vice principal's remarks to mean that their future absences were to be considered Workers' Compensation related. I **CONCLUDE**, therefore, that the testimony of petitioners was credible as it relates to their understanding of the vice principal's remarks.

With regard to the doctrine of estoppel, estoppel may be either legal or equitable. The former category includes estoppel by deed which arises in cases of after acquired title. Estoppel by deed prevents a grantor who has made a conveyance, without having title, from asserting his grantee's lack of title when the grantor subsequently acquires title. Suburban Golf Club v. State Highway Commissioner, 92 N.J. Super. 125,

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139 (Law Div. 1966). The other branch of legal estoppel (estoppel by operation of law) is estoppel by record. In this situation, a person is prevented from denying the truth of matters contained in a judicial record. A party will be estopped by law from denying a fact asserted by it in its affidavit and from pressing a claim in a subsequent action wholly inconsistent with a previously entered judgment. Tabloid Lithographers, Inc. v. Israel, 87 N.J. Super. 358 (Union City Ct. 1965).

Equitable estoppel constitutes the second category of estoppel. Under the present state of the law, the terms equitable estoppel and estoppel in pais are interchangeable terms. Anske v. Borough of Palisade Park, 139 N.J. Super. 348 (App. Div. 1976). The basis for equitable estoppel is the principle that no one should be permitted to repudiate an act done or position assumed where that course would work injustice to another who, having the right to do so, detrimentally relied thereon. Id. "Estoppel connotes a change in position by a person to his detriment in reliance upon the word or conduct of another." Rossum v. Jones, 97 N.J. Super. 382, 392 (App. Div. 1967).

There are certain elements which must be established in order for the defense of estoppel to apply. There must be some conduct on defendant's part amounting to a misrepresentation or concealment of material facts. Feldman v. Urban Commercial, Inc., 70 N.J. Super. 463, 474 (Ch. Div. 1961). The requisite conduct encompasses action and language. Additionally, either silence or an omission can constitute "conduct" where there is a duty to speak or act. Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 341 (1979).

The second requirement is that the party being estopped must have knowledge of the facts, or the circumstances must be such that knowledge can be imputed to him. Feldman, 70 N.J. Super. at 474. The other side of this coin is that the party asserting the estoppel must have been unaware of this when he acted upon it. Defendant must have had the intention or the expectation that plaintiff would rely on his conduct. The absence of such an expectation, however, is not fatal where it is reasonable and probable that the party asserting the estoppel would act upon defendant's conduct. Id. The last two elements include plaintiff's actual reliance on the defendant's conduct and a subsequent injury. In order for estoppel to apply, the reliance must have been reasonable. Consequently, reliance upon non-enforcement of the law cannot give rise to an estoppel. Debold v. Township of Monroe, 110 N.J. Super. 287, 296 (Ch. Div. 1970), aff'd, 114 N.J. Super. 502 (App. Div.), certif. denied 59 N.J. 296 (1971).

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The facts in this matter demonstrate that the vice principal was not in a position of authority to commit petitioners' absences to Workers' Compensation, or for that matter, to any legally ascribed reason. Such authority was beyond his station and purview rested, rather, with the Secretary of the Board. As was said in the Debold matter supra, at 293, "[r]eliance upon representation by . . . officials which were unauthorized and contrary to law created no estoppel against the township [citations omitted]." Here, as in Debold, supra, petitioners' reliance upon unauthorized representations created no estoppel against the Board.

Accordingly, I **FIND** that the vice principal lacked any authority to advise petitioners that their absences would be charged as Workers' Compensation related.

I **CONCLUDE**, therefore, that no estoppel was created by the vice principal against the Board. Petitioners' claim of estoppel is hereby **DENIED** and **DISMISSED**.

CORRECTION OF THE RECORD WITH REGARD TO ISSUE NO. 4

The court observes that, pursuant to the Stipulated Facts set forth hereinbefore, ISSUE NO. 4 as it appears in the Prehearing Order contains a misstatement of fact. Therefore, the court now moves, sua sponte, to correct and adopt the following as though it were agreed to by the parties at the Prehearing Conference and set down in the Prehearing Order:

> 4. As to petitioner Corbi, did the episodes of [January 3, 1980] March 26, 1979, June 1979 and April 10, 1981, trigger new "calendar years," under N.J.S.A. 18A:30-2.1?

DISCUSSION WITH REGARD TO ISSUE NO. 4

The Appellate Division of Superior Court held in the matter of Theodore v. Dover Board of Education, 183 N.J. Super. 407 (1982), that a second subsequent reinjury constituted an "accident arising out of or in the course of employment." In so holding, it reversed the judgment of the trial court and ordered the defendant Board of Education to pay plaintiff the benefits to which he was entitled, pursuant to N.J.S.A. 18A:30-2.1.

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Pursuant to the statute, N.J.S.A. 18A:30-2.1 and the court's holding in Theodore, supra, I **FIND** and **CONCLUDE** that each episode of petitioner Corbi's "accident arising out of or in the course of his employment," triggered a new and subsequent 12-month period of benefits. Consequently, the first episode of March 26, 1979, did not toll until March 26, 1980; the second episode of June 20, 1979, did not toll until June 20, 1980; and the third episode of April 10, 1981, did not toll until April 10, 1982. Accordingly, any absences from duty attributable to such accidents, within one year subsequent to the accident, were and are not to be charged to petitioner Corbi's annual sick leave or his accumulated sick leave.

At hearing, the Board stipulated that it would recognize petitioner Corbi's days absence as attributal to his job-related injuries and would credit him with such sick leave days which had been so deducted. The Board now challenges petitioner's testimony and his assertion that certain days of absence were, in fact, related to his injuries. Relying upon its evidence (R-1 through R-6), the Board contends that petitioner Corbi indicated reasons other than his job-related injuries when he completed the forms entitled, "Reporting Employee Absence for Personal Illness," making specific reference to: R-1 (Sore Throat); R-2 (Head Cold); R-3 (Ear Infection); R-5 (Ear Infection); and R-6 (Personal Business).

The court observes, however, that the Board, by way of stipulation at hearing, waived cross-examination of petitioner Corbi's treating physician, who was not in attendance at hearing, subject to receipt of the physician's affidavit that he did, in fact, treat petitioner on any of the days of absence in dispute. Petitioner subsequently submitted the physician's sworn affidavit and an accompanying letter wherein the physician confirmed that he had treated petitioner Corbi on the following dates: October 15, 1981; November 20, 1981; December 14, 18 and 22, 1981; January 13 and 22, 1982 and February 2, 1982.

Notwithstanding the Board's evidence to the contrary, I **FIND** and **CONCLUDE** that those dates set forth above, sworn and attested to by petitioner Corbi's physician, are not to be deducted from his sick leave days. Accordingly, it is **ORDERED** that any or all such days so deducted are to be immediately restored and credited to petitioner. N.J.S.A. 18A:30-2.1.

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LEGAL ARGUMENTS WITH REGARD TO ISSUE NO. 3

Issue No. 3, as set forth in the Prehearing Order, is related below as follows:

> If petitioners' absences constituted absences within the meaning of N.J.S.A. 18A:30-2.1, did the Board act unlawfully in charging petitioners accumulated sick leave for absences occurring more than 12 months from the date of the work-related injuries?

Petitioners contend that, pursuant to N.J.S.A. 18A:30-2.1, they each should receive full payment without deductions from their accumulated sick leave for absences occurring more than one year subsequent to their work-related injuries, since the number of their absences totaled less than one year in the aggregate. Petitioners observe that such a contention has been rejected by the Commissioner in the matter of Jane Williams v. Bd. of Ed. of Deptford Tp., 1982 S.L.D. _____ (March 12, 1982). Petitioners herein argue, however, that the recent decision by the Appellate Division of Superior Court in the matter of Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982) casts some doubt upon the validity of the Commissioner's decision in Williams, supra.

In Williams, supra, the Commissioner rejected an in pari materia reading of N.J.S.A. 18A:30-2.1 and the Workers' Compensation Act by finding a dissimilarity of purposes underlying the statutes. The Commissioner held that the purpose of the Workers' Compensation Act is "to provide security for employees who are injured in the course of their employment" while the purpose of N.J.S.A. 18A:30-2.1 "would appear to be specifically to provide for the administration of public elementary and secondary education." (Slip opinion at p. 13). Petitioners contend that this erroneous determination has been refuted by the Appellate Division wherein it said:

> In this context, the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period. Theodore, supra, at 416.

Petitioners argue that by finding a similarity of purposes in the two statutes, the Appellate Division has mandated that the administrative law judge look to the New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., for assistance in interpreting the phrase "for the period of such absence for up to one calendar year" found at N.J.S.A. 18A:30-2.1. They contend that it is now apparent, after Theodore, supra, that

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the two statutes are inextricably intertwined. Furthermore, N.J.S.A. 18A:30-2.1 by its very terms makes numerous references to the Workers' Compensation statutes. The "arising out of and in the course of his employment" standard contained in N.J.S.A. 18A:30-2.1 is identical to the standard provided for at N.J.S.A. 34:15-7. Petitioners observe that the Commissioner of Education enjoys independent jurisdiction under N.J.S.A. 18A:30-2.1 to determine whether an injury "arises out of and in the course of one's employment." Masino v. Board of Education of the Township of West Deptford, 1981 S.L.D. _____ (decision of State Board, July 1, 1981). However, the mere fact that the Commissioner enjoys this jurisdiction does not mean that he can ignore the numerous references to Workers' Compensation Law in N.J.S.A. 18A:30-2.1 when he seeks to determine the substantive meaning of that statute.

Petitioners argue here, as was argued in Williams, supra, that N.J.S.A. 18A:30-2.1 and N.J.S.A. 34:15-1 et seq. must be construed in pari materia citing, among others, cases dealing with in pari materia construction of similar subject matter statutes. Mimkon v. Ford, 66 N.J. 426, 433 (1975); Giles v. Gassert, 23 N.J. 22, 33-34 (1956); State v. Green, 62 N.J. 547, 554-555 (1973).

Petitioners contend that the Workers' Compensation Act is to be liberally construed to bring as many cases as possible within its coverage. Hannigan v. Goldfarb, 53 N.J. Super. 190 (App. Div. 1958). New Jersey courts have been mindful that the Workers' Compensation Act is remedial social legislation and should be given liberal construction in order that its beneficent purposes may be accomplished. Torres v. Trenton Times Newspaper, 64 N.J. 458 (1974); Panzino v. Continental Can Company , 71 N.J. 298 (1976). This same element of liberal construction must be applied to N.J.S.A. 18A:30-2.1, which is also a form of remedial social legislation which, as previously mentioned, is inextricably intertwined with the Workers' Compensation Act. Theodore, supra.

Petitioners assert that the true purpose of N.J.S.A. 18A:30-2.1, apparent from its language, is to provide full security to injured employees in the amount of their full salaries. The statute's purpose is every bit as remedial and beneficent as is that of the Workers' Compensation statute; therefore, the statutes should be read in pari materia, and the Commissioner should be guided herein by prior judicial interpretations of N.J.S.A. 34:15-1 et seq., Mimkon v. Ford, supra; State v. Green, supra.

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Petitioners observe that in Williams, supra, the Commissioner concluded that "the terms 'period' and 'calendar year' are not in conflict and that the term 'period' generally indicates a continuous time period as does the term 'calendar year.'" (Slip opinion at 15). However, the issue herein is not what the terms "period" and "calendar year" mean "generally," as determined by the Commissioner. The issue in this case is the specific meaning of the phrase, "period of such absence for up to one calendar year," as used in the context of N.J.S.A. 18A:30-2.1. They assert that the key issue in the instant case is whether or not the term "period of such absence for up to one calendar year," as used in N.J.S.A. 18A:30-2.1, refers to a single or a disjunctive segment of time. Since this statute should be read in pari materia with N.J.S.A. 34:15-1 et seq., it is noted that the term "period" is used for temporary disability. See N.J.S.A. 34:15-38; Colbert v. Consolidated Laundry, 31 N.J. Super. 588 (App Div. 1954). In the Colbert case, the petitioner was injured in February 1950 and suffered a relapse in 1952. The court concluded that the "compensation for intermittent periods or for recurrent intervals of temporary disability may be recovered under the Workers' Compensation Act." Colbert, supra, at 596. In the instant case, petitioners Cimino and Corbi have also been intermittently absent over periods covering more than a year, yet the total number of their absences have still not exceeded the one-year total period established at N.J.S.A. 18A:30-2.1.

DISCUSSION WITH REGARD TO ISSUE NO 3.

While petitioners observe that the Commissioner held in Williams, supra, that the phrase "up to one calendar year" in N.J.S.A. 18A:30-2.1 referred to the 12-month period of time running from the date of injury (Bd. of Ed. of Manchester Tp. v. Raubinger, 78 N.J. Super. 90 [App. Div. 1963]), they urge this court not to apply a mechanical and rigid construction to the phrase. They request, rather, that this court interpret the statute in light of its underlying beneficent and remedial purposes and not penalize them with loss of salary and accumulated sick time for their absences which occurred subsequent to one calender year of their work-related injuries. They contend that the statute should be interpreted to permit an injured employee, as a result of a job-related injury, to be absent for a total of 365 noncontinuous days or, in the alternative, to be absent for the actual number of days the employee was required to be on duty for a given year.

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This court observes that petitioners' reliance upon Theodore, supra, is misplaced. First, the court in Theodore neither uses the term nor makes reference to in pari materia construction in its consideration of N.J.S.A. 18A:30-2.1 and the Workers' Compensation Act. (N.J.S.A. 34:15-1 et seq.). While the Theodore court held that the phrase "accident arising out of and in the course of employment" (which occurs in both statutes, to be identical and "intended to have precisely the same meaning" in both [Theodore, at 415]) may be considered in pari materia construction, it went on to say that "the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period" (Id. at 416, emphasis supplied).

Secondly, the Theodore court found, contrary to the trial court's holding, that petitioner's second and subsequent "accident" was a compensable accident which gave rise to a new 12-month period of benefits under N.J.S.A. 18A:30-2.1. This finding, coupled with the court's observation that N.J.S.A. 18A:30-2.1 provides benefits for a strictly limited time period, neither supports herein petitioners' position that the Williams decision should be overturned, or that the phrase "up to one calendar year" should have a meaning other than that held in Williams.

I **FIND**, therefore, that petitioners' claim that they each should not be charged for absences occurring more than one year from the date of their work-related injuries is without merit and contrary to law. Williams, supra.

Accordingly, I **CONCLUDE** that the relief sought by petitioners, to extend the statutory construction permitting them to be absent from duty beyond one year from the accident which gave rise to their Workers' Compensation claim, is hereby **DENIED**. Therefore, Issue No. 3 is hereby **DISMISSED**. Williams, supra.

LEGAL ARGUMENTS WITH REGARD TO ISSUE NO. 6

The issue here, not artfully drawn in the Prehearing Order, is: "Whether petitioner Trabosh is entitled to payment of his full salary, pursuant to N.J.S.A. 18A:30-2.1, for absence from duty for medical examinations scheduled at the Board's request on two separate occasions in connection with petitioner's Workers' Compensation Claim against the Board?"

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As stipulated hereinbefore, petitioner Trabosh was absent from his duties on two dates when medical examinations were scheduled at the Board's request in connection with a Workers' Compensation claim which Mr. Trabosh filed after suffering his job-related injury. Petitioner contends, pursuant to the first sentence of N.J.S.A. 18A:30-2.1, that these absences were clearly "a result of a personal injury caused by an accident arising out of and in the course of his employment." Therefore, these two absences should not have been charged to his accumulated sick leave.

Petitioner observes that it has been stipulated that the collective agreement between the respondent and the Deptford Education Association provides at Article XV, Section 5 as follows:

> Workers' compensation awards shall be deducted from the regular salary of the employee for the days absence covered by Workers' Compensation Act. The time lost from employment under the Workers' Compensation Act shall not be deducted from days permitted for regular sick leave allowance.

It is further noted that this contractual clause has not been cited by petitioners Corbi and Cimino in this case in support of their argument that their sick leave should not be reduced for absences resulting from illness occurring more than a year after the dates of their injuries. The Supreme Court has stated that "where a statute or regulation sets a maximum level of rights or benefits for employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purporting to do so be enforceable." State v. State Supervisory Employees Association, 78 N.J. 54 at 81-82 (1978). Thus as to absence resulting from disability, N.J.S.A. 18A:30-2.1 sets a maximum level of benefits which cannot be expanded by negotiated agreement. However, petitioner Trabosh's absences did not result from disability but rather from other reasons related to Workers' Compensation. Therefore, the collective agreement is relevant to his claim herein.

Petitioner Trabosh asserts that his absences caused by examinations scheduled at the Board's request, while not constituting absences resulting from disability, nevertheless constituted "time lost from employment under the Workers' Compensation Act," pursuant to the collective bargaining agreement. Therefore, by the very terms of that agreement, these two days should not have been deducted from his accumulated sick leave.

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It is the respondent Board's position that no payments are required to be made under N.J.S.A. 18A:30-2.1 unless the employee's absence constitutes temporary disability within the meaning of the New Jersey Workers' Compensation Act. The specific argument in this regard was set forth in the Respondent's Brief In Support of Motion For Summary Judgment heretofore filed in this matter and dated February 5, 1982. That Brief is incorporated herein by reference thereto.

The Board observes that since the filing of the aforesaid Brief, the case of Theodore v. Dover Bd. of Ed. supra, has been decided. The rationale used there in interpreting the phrase regarding accidents arising out of and in the course of employment applies equally here. In Theodore, the court noted that the same "verbiage" was used in both N.J.S.A. 18A:30-2.1 and in the Workers' Compensation Act. Such is also the case when referring to the phrase "temporary disability." It argues that the conclusion must be drawn that the legislature intended eligibility under N.J.S.A. 18A:30-2.1 to be measured by reference to temporary disability as defined under workers' compensation law. Accepting this, it is clear from the argument set forth under Point II of the above mentioned Brief that attendance at medical examinations made necessary because the petitioner has instituted litigation against the respondent in Workers' Compensation court is not within the provisions of N.J.S.A. 18A:30-2.1.

The Board further argues that neither is the petitioner entitled to be paid for the absences in question under the labor Agreement. Not only is Article XV, Section 5 of the Agreement specifically limited to "absence covered by Workers' Compensation Act" (which as demonstrated above does not include payment of benefits for attending an examination in connection with litigation), but the sole avenue for review under that Agreement is through the grievance procedure under Article III. Inasmuch as the petitioner has failed to file a grievance, resulting in the claim now being barred under Section 2 of Article III, he cannot obtain a review in any other form as to the application of Article XV, Section 5. Furthermore, any such interpretation would not be binding upon the respondent, as its obligation, if any, to the petitioner is solely based upon the terms of the Agreement. The Agreement, as stated, requires review by arbitration only.

The Board contends that the absences resulting from the medical examinations referred to above are not covered by N.J.S.A. 18A:30-2.1 or by the labor Agreement.

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DISCUSSION WITH REGARD TO ISSUE NO. 6

In arriving at a determination of this issue, the court resorts to other statutes in Education Law for guidance. From this review, it is evident that a local board of education is vested with wide latitude when considering the application of sick leave statutes. For example, N.J.S.A. 18A:30-6 provides for a board of education to pay the salary of an employee, less substitute pay, when that employee's annual and accumulated sick leave has been exhausted; and N.J.S.A. 18A:30-7 empowers a local board with the authority to pay the salary of an employee absent from duty under circumstances not constituting sick leave and/or provide up to fifteen days accumulated sick leave days per year (the statutory minimum being ten days per year, N.J.S.A. 18A:30-2).

With regard to physical examinations of its employees, the statutes N.J.S.A. 18A:16-2 and N.J.S.A. 18A:16-3 provide local boards with the authority to require such physical and psychiatric examinations as deemed necessary and that such costs are to be borne by the board.

Thus it has been shown that local boards of education may, by statute, exceed the minimum statutory standards with respect to sick leave and required employee physical examinations.

With regard to the instant issue, this court has found no statute or settled case or point which would support the Board's position that it may cause an employee to be absent from duty and, thereafter, penalize the employee with the loss of pay, loss of sick time, or both. Similarly, I do not find petitioner's reliance upon the collective agreement to be persuasive. It would appear from a reading of N.J.S.A. 18A:16-3 that when a board of education requires an employee to be subjected to a physical examination, the board will bear all the necessary costs including, but not limited to, the employee's salary without a deduction of sick leave time.

Similarly, when a board of education requires an employee to be absent from duty as a result of a Workers' Compensation claim against it, such board ". . . shall pay . . . the full salary or wages . . . of such absences . . . without having such absences charged to the annual . . . or accumulated sick leave . . ." N.J.S.A. 18A:30-2.1.

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Accordingly, I **FIND** and **CONCLUDE** that the Board was in error to deduct petitioner's salary and/or sick leave time for the two days petitioner was absent from duty because he was required by the Board to undergo physical examinations as the result of petitioner's Workers' Compensation claim against the Board.

It is, therefore, **ORDERED** that the Board immediately restore to petitioner Trabosh the two days' salary and/or sick leave time so deducted.

CONCLUSIONS

This court having determined that petitioners prevailed, by a preponderance of the credible evidence and the current state of law or decision, with regard to Issues numbered 1, 2, 4 and 6, the Board of Education is hereby directed to immediately comply with this court's ORDER with respect to Issues numbered 4 and 6. Issues numbered 3 and 5, accordingly, are hereby **DISMISSED.**

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

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OAL DKT. NO. EDU 7198-81

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

1 October 1982
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

1 October 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 5 1982
DATE

OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

J-1 Agreement between Deptford Township Board of Education and the Deptford Education Association — 1980-1982

P-1 Memorandum To: Alfred Cimino, From: Mr. Donald D. LeVan. Date: May 6, 1981

P-2 Memorandum To: Joseph Corbi, From: Mr. Donald D. LeVan. Date: May 6, 1981

R-1 Employee Absence, Personal Illness Reporting Form, dated February 3, 1982

R-2 Employee Absence, Personal Illness Reporting Form, dated January 18, 1982 and January 25, 1982

R-3 Employee Absence, Personal Illness Reporting Form, dated November 25, 1981 and December 4, 1981

R-4 Employee Absence, Personal Illness Reporting Form, dated December 21, 1981 and December 23, 1981

R-5 Employee Absence, Personal Illness Reporting Form, dated December 15, 1981

R-6 Employee Absence, Other Than For Personal Illness Form, dated October 16, 1981

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ALFRED CIMINO, JOSEPH CORBI AND NICHOLAS TRABOSH,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

It is further observed that the legal arguments raised by the parties in their exceptions as to the findings and conclusions reached by Judge Law herein have been addressed at some length in the initial decision. The Commissioner finds the arguments raised by the parties in their exceptions to be without merit based upon those conclusions of Judge Law as they pertain to the facts in this matter. The Commissioner so holds.

The Commissioner is constrained to observe, however, that the actual relief granted to petitioner as a result of those factual determinations reached by Judge Law is inconclusive and requires further clarification before a final determination may be rendered in this matter.

Accordingly, this matter is remanded to Judge Law for the limited purpose of establishing precisely that relief to be afforded to petitioners herein.

The Commissioner retains jurisdiction in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 15, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5645-81
AGENCY DKT. NO. 307-7/81A

JOSEPH LUTSKY,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,
Respondent.

APPEARANCES:

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

James W. Lance, Esq. for respondent (Wesley L. Lance, attorneys)

Record Closed September 9, 1982 Decided October 5, 1982

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

Petitioner, a tenured teaching staff member employed by the Clinton Township Board of Education (Board), alleges that the Board's action withholding his salary increase for the 1981-82 school year was procedurally defective, without rational basis, arbitrary and capricious. He seeks relief in the form of an order directing retroactive payment and expungement from his personnel record of any reference to the withholding of his 1981-82 salary increase. The Board denies that its action was other than a legal and sound exercise of its discretionary authority under law.

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When the pleadings were joined, the Commissioner of Education transferred the matter as a contested case to the Office of Administrative Law for processing, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. At a prehearing conference, petitioner gave Notice of Motion for Summary Decision. Briefs of respective counsel, with appended exhibits attached to the Board's Brief, were filed in compliance with the schedule set forth in the Prehearing Order dated November 2, 1981. The Motion was denied by an Order issued January 13, 1982. The reason given for the denial was that the record was insufficient to establish all relevant facts necessary to a determination of the dispute, Ruvolo v. American Gas. Co., 39 N.J. 490, 499, 189 A. 2d 204 (1963). A plenary hearing was conducted at Clinton, New Jersey on April 8, 1982. Post-hearing Memoranda were filed and the record closed on September 9, 1982, when petitioner gave notice that no Reply Memorandum would be filed.

UNCONTESTED FACTS:

I **FIND** the following to be facts which were either stipulated to by counsel of record at the outset of the hearing (J-1) or are otherwise uncontroverted within this record:

1. On or about April 28, 1981, petitioner, a tenured teacher, was advised in a letter dated April 27, 1981, that the Board had determined at a meeting held on April 20, 1981, to withhold his salary increase for the 1981-82 school year.

2. During the course of school year 1980-81, petitioner was evaluated and/or observed by his building principal, Anthony Pierro, or his building assistant principal, John Sullivan, on January 16, 1981, February 11, 1981 and March 12, 1981.

3. No other Board employee observed or evaluated petitioner during the course of the 1980-81 school year.

4. Neither the principal nor the assistant principal recommended to either the Superintendent of Schools or the Board of Education that petitioner's 1981-82 increment be withheld.

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5. On April 16, 1981, respondent's Superintendent wrote to petitioner and advised him as follows: "On Monday, April 20, 1981 at 8 p.m. in the Round Valley Library, I will recommend to the Clinton Township Board of Education that they withhold your salary increase for the school year 1981-82. Under the Sunshine Law, you are hereby notified of the meeting and that you have the right to have the discussion held in public rather than in private session. You are also advised that you have the right to representation." That letter did not contain the basis for the recommendation (P-1).

6. On April 16, 1981, the Superintendent hand-delivered the letter to petitioner Joseph Lutsky in the presence of Principal Anthony J. Pierro, and Thomas Vahalla, President of the Clinton Township Teachers Association.

7. When the Superintendent told Thomas Vahalla and Joseph Lutsky that he was going to recommend to the Board of Education the withholding of the salary increase, Thomas Vahalla asked the Superintendent McGaheran if he would discuss the situation with John Thornton, a local field representative for the New Jersey Education Association. On April 16, 1981, the Superintendent met with Thomas Vahalla and John Thornton at the Round Valley School.

8. On April 20, 1981, the Superintendent telephoned Thomas Vahalla and told him that the Clinton Township Board of Education meeting would be held that night.

9. By letter dated April 27, 1981, petitioner was advised as follows: "The Clinton Township Board of Education, at a special meeting held Monday, April 20, 1981, approved by a roll call vote of yes - 7, no - 0, absent - 2, to withold your salary increase for the 1981-82 school year." That letter contained no statement of reasons for the Board's actions (P-2).

10. By letter dated April 29, 1981, and addressed to the Board of Education, petitioner made the following request: "I would like to receive in writing reasons for withholding of my increment for the 1981-82 school year and

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would like to meet with the Board to discuss this" (P-3). That letter, directed to the Board Secretary, was never submitted to the Board of Education, but was turned over by the Board Secretary to the Superintendent of Schools for response.

11. Under date of May 5, 1981, the Superintendent responded to petitioner's request for reasons in a letter which stated, in part, the following:

> On April 30, 1981 I received a letter from you asking to receive in writing reasons for withholding your increment for the 1981-82 school year. The reasons are based on your January 16, 1981 Evaluation and Criteria Form . . . . [R-2]

12. The petitioner, Joseph Lutsky, had seen his evaluation dated January 16, 1981, had signed a disclaimer to that evaluation on January 23, 1981, and had also made further written comment concerning that evaluation.

13. The Board's stated policy No. 323 on withholding of increments, adopted on February 21, 1978, reads as follows:

> Any advancement on a salary guide, including annual increments and raises, shall not be considered automatic. Advancement on any such guide shall require favorable reports covering the employee's competence and thoroughness in the performance of assigned duties, his/her record of attendance and his/her compliance with district regulations.
>
> The final determination to withhold an increment shall be made by the Board which may choose to freeze an employee's wages for one year or to hold an employee at the same vertical step on the guide. The employee shall be notified of the Board's decision in writing and the reasons therefor within ten days of the action by the Board Secretary. The Superintendent shall prepare rules for administering this policy.
>
> An increment which is withheld does not constitute an inequity in salary and is not expected to be paid as an adjustment in any future years. [P-4]

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TESTIMONY OF WITNESSES:

Thomas Valhalla, who for the past two years has been president of the Clinton Township Teachers Association, testified that the Superintendent personally told him, at the Round Valley School on April 16, 1981, that he would meet with petitioner in a few minutes to notify him that he would recommend to the Board that no salary increase be granted for the ensuing 1981-82 school year. He testified that, when he then met in Principal Pierro's office with the Superintendent, the principal and petitioner, he saw the Superintendent hand to petitioner a letter which stated that he would recommend no salary increase for 1981-82.

Valhalla testified that he requested a subsequent meeting the same day which petitioner's N.J.E.A. Uniserve representative, John Thornton, could attend. He testified that he, petitioner and the Superintendent attended a five-minute meeting which was held with the Uniserve representative, after school hours, in the principal's office and in the hallway outside the office. He testified that the Uniserve representative requested that the proffered opportunity for a meeting between the Board and petitioner scheduled for the following Monday be delayed.

Valhalla testified that, although at that meeting there was some discussion by the Superintendent of reasons why the Superintendent was recommending that the salary increase of a teacher other than petitioner be withheld, there was no discussion in his presence of why that same recommendation was being made concerning petitioner. Valhalla testified further that the Board met on April 20, 1981, and voted to deny any salary increase for petitioner.

John Thornton, the N.J.E.A. Uniserve representative, corroborated that he had met briefly with petitioner, the Superintendent, and Valhalla on Thursday, April 16, and requested that the Board extend the date beyond Monday, April 20, for action on petitioner's salary increase. Thornton also testified that the Superintendent, in his presence, did not make reference to petitioner's evaluations or notify petitioner of the reasons for his negative recommendation.

Petitioner testified that, on the two occasions he met with the Superintendent on April 16, no mention was made of his evaluations or any other reasons why the negative recommendation would be made to the Board. He also testified that he had been

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evaluated only by his principal and the assistant principal, never by the Superintendent. In regard to the principal's January 16, 1981 evaluation, petitioner testified that he had read and signed it but stated thereon that he did not agree with parts of it and would make written responses, which responses he later submitted (R-1).

The Superintendent testified that it was petitioner's January 16 evaluation by the principal and the principal's comments that formed the basis of his recommendation to withhold petitioner's salary increase. He testified that he answered in the affirmative when Valhalla, on April 16, asked him twice if petitioner's evaluation was the basis for his decision.

In regard to the request to delay petitioner's meeting with the Board, the Superintendent testified that a ten-day notice period was required by the negotiated agreement whenever an employee was required to meet with the Board. He testified that, since petitioner was invited but not required to be present, no delay was authorized. In regard to the Board's review of petitioner's teaching performance, he testified that he had thoroughly reviewed petitioner's January 16 evaluation with the Board in executive session on both March 2 and April 16, prior to the Board's action in open public session to withhold petitioner's salary increase. He also testified that, despite a Board policy that reasons should be given by the Board Secretary (P-4), when the Board instructed him to give petitioner the reasons for their action, he did so by letter dated May 5 (R-2).

The Board Secretary corroborated in her testimony that she did not send reasons for the Board's action despite the Board's stated policy which remains in force and in effect.

Both petitioner's assistant principal and his principal testified that they had evaluated petitioner but made no recommendation to the Superintendent or the Board regarding petitioner's salary increment, since they were not authorized to do so. The principal testified that he had serious concerns over the way petitioner was conducting his classes and over the number of concerns expressed by parents that necessitated conferences. Regarding the brief meetings in his office on April 16, the principal testified that petitioner did not speak. He testified that he recalls that the word "evaluation" was spoken but that no in-depth reference to evaluations was made. When

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queried on cross-examination, the principal was unable to testify with certainty as to whether the word evaluation was used in those meetings in reference to petitioner, to another teacher whose salary increase was also withheld, or to both.

FINDINGS OF FACT:

On the basis of a preponderance of the credible evidence within this record, I **FIND** the following to be relevant facts which, together with the undisputed facts set forth above, are considered post, in reaching a determination of the dispute:

1. Neither the Superintendent nor any other administrative agent of the Board gave forthright notice to petitioner prior to the Board meeting on April 20, 1981, that the reason for recommending that petitioner receive no "salary increase" for the 1981-82 school year was his evaluation of January 16, 1981 (R-1).

2. The Board did not give petitioner the reasons for its action within ten days of April 20, 1981. It was, however, aware that the reasons for the Superintendent's recommendation to withhold a salary increase were centered on petitioner's January 16, 1981 evaluation, which the Superintendent had reviewed with them in detail on March 2 and April 16, 1981.

3. On April 20, 1981, the Board directed the Superintendent to give petitioner the reasons for withholding his salary increase for 1981-82.

4. The Superintendent did not do so within a ten-day period of April 20, 1981.

5. When petitioner, on April 29, 1981, requested a statement of reasons in writing, his letter directed to the Board through the Board Secretary was given to the Superintendent by the Board Secretary.

6. The Superintendent responded to that letter on May 5, 1981 (R-2), stating in writing that the reasons for the withholding were inherent in the text of petitioner's January 16, 1981 evaluation by the principal.

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This first forthright statement of the reasons was made 15 days after the Board's action on April 20, 1981.

DISCUSSION AND CONCLUSIONS:

Petitioner argues that the Board, in this matter, has committed fatal error by failing to comply with its own policy and with the statutory prescription to withhold an "employment increment" or an "adjustment increment" or both, as provided for by N.J.S.A. 18A:29-14 which states:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him . . . . [Emphasis added.]

The Superintendent, prior to the Board's action, notified petitioner in writing that he would recommend that the Board withhold his "salary increase" for the ensuing year. Again, on April 27, one week after the Board's action on April 20, petitioner was noticed in writing by the Board Secretary that the Board had, by a 7-0 vote, acted to withhold his "salary increase." Although he notified petitioner that he would recommend withholding of the "salary increase," he did not, prior to April 20, 1982, forthrightly inform petitioner of the reasons why he would recommend withholding of his "salary increase;" nor was there any due process right that he be so informed. In this regard, the instant matter differs from certain other increment withholding disputes wherein teachers were notified in advance by their superiors and knew why recommendations were made to withhold salary increments. Michael Law v. Parsippany Bd. of Ed., 1981 S.L.D. (decided June 1, 1982); James Martin v. Northern Highlands Regional High School Bd. of Ed., 1977 S.L.D. 886, aff'd State Board 1978 S.L.D. 1031; rev'd Superior Court of New Jersey, App. Div. Dkt. No. A2119-77 March 13, 1979 (Unp.).

A careful review of the entire record causes me to CONCLUDE that the Board determined to withhold petitioner's salary increase because of the problems which were related to the Board in detail by the Superintendent and the principal on March 2 and

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April 20, 1981. This conclusion is in full recognition that, while the Board was not provided with copies of the principal's January 16, 1981 evaluation of petitioner (R-1), the Superintendent read to them excerpts from that document (Tr. 52).

The principal's January 16, 1981 evaluation of petitioner is an extensive document wherein petitioner was forthrightly criticized for incomplete assessment of pupil needs and capabilities, incomplete or inappropriate lesson plans, lack of well-defined objectives, lack of individualized instruction, distracting classroom arrangement, poor teaching skills, failure to use available instructional aids, lack of participation in extra duty activities, and poor interaction with parents (R-1). It was these criticisms that the Superintendent testified were given to petitioner in his letter of May 5, 1982, as the reasons the Board withheld his salary increase (R-2).

I further **CONCLUDE** that, since the Board relied on March 2 and April 20 on the Superintendent's input into its discussions of petitioner's performance and accepted his adverse recommendation, it directed the Superintendent to notify him of the reasons for withholding a salary increase.

The Superintendent did not do so within a ten-day period as specified by N.J.S.A. 18A:29-14 but did provide written reasons wherein he quoted selectively from the January 16 evaluation those sections with which there was greatest concern (R-1,2). I **CONCLUDE** that those concerns and the criticisms in the January 16 evaluation were not frivolous; nor is there any showing that either petitioner's supervisors or the Board, whose decision it was to withhold the salary increase, were motivated by any other factors or were biased or prejudiced in carrying out their responsibilities.

Petitioner argues that the Board did not follow its own policy that called upon the Board Secretary to give reasons for the Board's withholding of an "increment." While the Board should have acted in accordance with its stated policy, I **CONCLUDE** that its directive assigning the Superintendent to carry out this duty did not fatally flaw its action. If a board's action can be sustained on the basis of notice of reasons given by an administrator prior to its actions as in Law, supra, and Martin, supra, it is proper to conclude, herein, that a directive on April 20 by this Board to its Superintendent, rather than to its Board Secretary, to formulate and forward written reasons after its action is sustainable.

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Petitioner argues further that the Board's action is flawed in that it did not use appropriate nomenclature as utilized and defined in the statutes as "employment increment" and "adjustment increment." The Board would have been well-advised to adhere to the recognized legal language, when one considers the costly and time-consuming litigation which has ensued. However, I **CONCLUDE** that its action is not rendered invalid because it used the term "salary increase."

It has frequently been recognized in the past that boards of education are typically composed of laymen who are not trained as attorneys and that the language employed in their actions need not be couched in refined legal terminology to be legal. Thus, the Appellate Court in Anna Gill v. Clifton Bd. of Ed., 1977 S.L.D. 1289 at 1291 found no need to differentiate between "salary increase" and "salary increment" and recognized that there was validity to the use of the term "salary increase," given the facts of that case.

This Board, on April 27, 1981, gave notice to petitioner that it had voted to withhold his "salary increase" for the 1981-82 school year. It is well settled that when there is concern over the meaning of a written pronouncement of a public body, the common meaning of the words employed shall control, Harry A. Romeo v. Madison Bd. of Ed., 1973 S.L.D. 102. The common significance which must be accorded to the clear and unambiguous language employed is that the Board intended that petitioner's salary not be increased in the 1981-82 school year beyond that which he received in the 1980-81 school year. Thus its withholding of his "salary increase" could mean only that he would receive neither a salary increment nor an adjustment increment for the ensuing school year. In this respect, the instant matter differs sharply from Otto L. Ormosi v. Kingwood Bd. of Ed., 1980 S.L.D. _____ (decided July 15, 1981), wherein the Kingwood Board was ordered to pay Ormosi an adjustment increment since it had acted to withhold only one "increment" which was, in that case, interpreted to mean Ormosi's "employment increment."

DETERMINATION:

Having reached the above conclusions, it remains to determine whether the delay of five days beyond the ten-day period provided by N.J.S.A. 18A:29-14 is sufficient reason to set aside the Board's action withholding petitioner's salary increase for 1981-82. After careful consideration and balancing of the arguments and citations of case law

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advanced by counsel, it is **DETERMINED** that the five-day delay is not sufficient reason to set the Board's action aside.

The Commissioner in Martin, supra, restored an increment for the reason that the Board had exceeded by several months the ten-day period for giving reasons. The State Board of Education affirmed. On appeal, however, the Appellate Court, in reversing the decision below, stated:

> The Commissioner of Education set aside the school board's action for failure of strict compliance with N.J.S.A. 18A:29-14 which requires a "recorded roll call majority vote of the full membership of the board of education" for a withholding of an increment and the giving of written notice of the action and the reasons therefor to the person concerned within ten days.
>
> We conclude that the Commissioner's determination was hyper-technical and that the substance of the statutory requirement is satisfied when the school board acts by public recorded roll call vote prior to the commencement of the school year involved and the individual affected is informed of the reasons for the action, whether before or after the public roll call vote. We regard the intent of the statutory requirement of notice within ten days as being to assure that the individual is apprised of the reasons for the action no later than ten days after the official action. Under all the attendant circumstances, the notice of reasons in March suffices. [1979 S.L.D. 852 at 853; Emphasis supplied.]

Martin, supra, is controlling. It is clear that petitioner, on or about May 5, 1981, knew that the reasons for the withholding of his salary increase were the criticisms he had already seen in his principal's evaluation of January 1981. Thus, he knew the reasons four months before the beginning of the ensuing school year. Given the clear direction of the court in Martin that this constitutes substantive compliance, it is **DETERMINED** that the Board's substantial compliance with N.J.S.A. 18A:29-14 validates its withholding of petitioner's salary increase for the 1981-82 school year. Accordingly, it is **ORDERED** that the Board's action is **AFFIRMED**. It is further **ORDERED** that the relief sought by petitioner in the form of a directive that he be granted a salary increment or increments for the 1981-82 school year is **DENIED**.

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OAL DKT. NO. EDU 5645-81

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

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

October 5, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

October 5, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

October 6, 1982
DATE

Ronald L. Lankford
OFFICE OF ADMINISTRATIVE LAW

plb

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DOCUMENTS IN EVIDENCE:

P-1 McGaheran to Lutsky, April 16, 1981

P-2 Cramer to Lutsky, April 27, 1981

P-3 Lutsky to Cramer, April 29, 1981

P-4 Policy No. 323 of Clinton Township Board

R-1 Evaluation of Joseph Lutsky, January 16, 1981

R-2 McGaheran to Lutsky

J-1 Stipulation of Facts

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JOSEPH LUTSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Petitioner in his primary exceptions argues that the Honorable Eric G. Errickson, ALJ erred in affirming the action of the Board in the matter presently controverted. Petitioner contends that the Board's action in voting to withhold his "salary increase" for 1981-82 without reference to increments, coupled with the Board's failure to notify him within the ten-day period provided by N.J.S.A. 18A:29-14, constitutes fatal error. The Board's reply exceptions refute those of petitioner and affirm the initial decision. The Commissioner finds no merit in petitioner's arguments.

An examination of the record herein including the information concerning petitioner's evaluation of a negative nature of January 16, 1981 given the Board by the Superintendent convinces the Commissioner that the intent of the Board is clear that "salary increase" as a term included "salary increment." Gill, supra Further, the Commissioner finds the five-day delay beyond the ten-day period set down in N.J.S.A. 18A:29-14 insufficient to set aside the action of the Board. Martin, supra

The Commissioner, while finding that the action of the Board herein did not constitute fatal error, recognizes that the boards of education throughout the state are usually composed of lay people who may lack the skills prerequisite to the artistry of legal terminology. Nonetheless, the Commissioner urges each and every board of education to hew to the nomenclature set down in statute or the board's own policy.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

November 17, 1982

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 40-82
AGENCY DKT. NO. 489-12/81A

RUSSELL ROGERS,
Petitioner
v.
BOARD OF EDUCATION OF
WALLKILL VALLEY REGIONAL HIGH SCHOOL
DISTRICT, SUSSEX COUNTY
Respondent.

APPEARANCES:

Wayne J. Oppito, Esq. for petitioner
Irving C. Evers, Esq. for respondent
(Parisi, Evers & Greenfield, attorneys)

Record Closed October 8, 1982 Decided October 8, 1982

BEFORE **ELINOR R. REINER, ALJ:**

Petitioner, Russell Rogers, appealed to the Commissioner of Education alleging that respondent, Board of Education of the Wallkill Valley Regional High School District, illegally and improperly denied him tenure and seniority rights in an administrative capacity in Wallkill Valley Regional High School. The petition was filed on December 18, 1981 and on January 5, 1982, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held in this matter on April 28, 1982 at which time the following issues were isolated:

1. Has respondent illegally and improperly denied petitioner tenure and seniority rights in an administrative capacity in the Wallkill Valley Regional High School District?

2. Does the decision of Franklin Educ. Ass'n v. Bd. of Ed. of the Wallkill Valley Reg. H. S. Dist., OAL Dockets EDU 3315-80 and EDU 3564-80 (Dec. 12, 1980), modified, Commissioner of Education (Feb. 6, 1981), affect petitioner's entitlement to tenure and seniority rights as an administrator in the Wallkill Valley Regional High School?

3. If petitioner is entitled to tenure and seniority rights, is there a position of principal in the Wallkill Valley Regional High School District to which petitioner would be entitled? If not, to what relief is he entitled?

Pursuant to the Prehearing Order, the parties provided the court with a stipulation as to all pertinent facts. They may be summarized as follows:

1. On or about November 28, 1972, voters in the school districts of Franklin, Hamburg, Hardyston Township and Ogdensburg voted to form a regional high school district serving children in grades 9-12. That district is known as the Wallkill Valley Regional High School District (hereinafter referred to as "Region").

2. At the time of the formation of the Region, all of the districts existed as Type II school districts. The school district of Franklin, at the time of the approval of the creation of the Region, was a K-12 district. The remaining districts were K-8.

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3. Following the formation of the Region, all of the districts comprising the Region continued to exist as Type II districts and continue to function as Type II districts, except that the School District of Franklin is now a K-8 district as are the remaining districts.

4. At the time of the formation of the Region petitioner was serving as a classroom teacher in the high school then being operated by the Board of Education of the Borough of Franklin.

5. Petitioner was not, at the time of the litigation in the matter of Franklin Educ. Ass'n v. Bd. of Ed. of the Wallkill Valley Reg. H. S. District, a member of the Franklin Education Association.

6. At the time of the filing of the litigation between the Franklin Education Association and the Board of Education of the Wallkill Valley Regional High School District, petitioner was a member of an administrators association which represented administrators in the Franklin School District.

7. The Region does not have a position of principal since its chief administrative officer has been designated as superintendent-principal.

8. The Table of Organization of the Region calls for two (2) vice principals.

9. Petitioner started teaching in the Franklin School System on September 1, 1962.

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10. A Limited Secondary Teacher's Certificate was issued to petitioner under date of November 30, 1962, certifying his qualifications to teach Social Studies in grades 7-12.

11. On March 7, 1966, a Permanent Secondary Teacher's Certificate was issued to petitioner certifying his entitlement to teach Social Studies in grades 7-12.

12. In November 1977, a certificate was issued to petitioner certifying that he has met all requirements for the position of principal/supervisor. That certificate was recorded in the office of the County Superintendent of Schools, Sussex County, on November 22, 1977.

13. In April 1981, petitioner was issued a Certificate as a School Administrator and that certificate was recorded in the office of the Sussex County Superintendent of Schools on May 20, 1981.

14. Petitioner was appointed to serve as assistant principal on May 16, 1977, and served for the period of July 1, 1977 through June 30, 1979.

15. On or about March 19, 1979, petitioner was appointed to serve as principal in the Franklin High School effective July 1, 1979, and he has continued to serve in that position and will complete his services in that position by the end of June 1982.

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In addition to the above stipulations, the following facts are essentially undisputed and are, thus, found as fact:

1. On or about September 1, 1982 Wallkill Valley Regional High School opened for the first time. Prior to having opened, the students that were attending Wallkill attended Franklin High School; Franklin High School is now closed and is no longer operating as a high school.

2. On or about February 28, 1980, the Wallkill Valley Board of Education adopted a resolution stating that the Board would only recognize tenure rights of those employees of Franklin High School who achieved tenure by November 28, 1972.

3. On May 20, 1980, the Franklin Education Association instituted an action on behalf of all employees of Franklin High School before the Commissioner of Education for a determination as to what tenure and seniority rights the teaching staff members and secretaries employed by the Franklin School District were entitled to in the Wallkill Valley Regional High School District (Franklin Educ. Ass'n v. Bd. of Ed. of the Wallkill Valley Reg. H.S. Dist., supra).

4. On or about December 12, 1980, Administrative Law Judge Ward R. Young made a determination in that matter. He segregated the teaching staff members and secretaries into four categories:

   Category 1 was comprised of those employees who acquired tenure on or prior to November 28, 1972, when the voters approved the regionalization of the high school district;

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Category 2 was comprised of those employees who did not acquire tenure on or prior to November 28, 1972, but did acquire tenure by law on or prior to June 29, 1978, when the voters of the regional district authorized the expenditure and bonding of $8,264,000 for the construction and furnishing of the regional high school facility;

Category 3 was comprised of those employees who did not acquire tenure on or prior to June 29, 1978, but have or will acquire tenure by law prior to the expected commencement of regional district operations with the opening of the high school facility in September 1982;

Category 4 was comprised of those employees who will not have acquired tenure by law at the expected commencement of regional district operations with the opening of the high school facility in September 1982.

Based upon this grouping, Judge Young found that all category 1, 2, and 3 Franklin High School teaching staff members were entitled to tenure and seniority rights at Wallkill Valley Regional High School. This decision was affirmed by the Commissioner of Education on February 6, 1981, and has not been appealed by respondent.

5. Respondent has advised petitioner that it will recognize petitioner's category 1 rights as a teacher and not petitioner's category 3 tenure and seniority rights as a principal and/or assistant vice principal.

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Based upon these essentially uncontroverted facts, respondent moved to strike the petition and to enter summary decision on behalf of respondent and against petitioner. In response, petitioner moved for an order striking respondent's motion and the entry of summary decision on behalf of petitioner. In essence, petitioner argues that the decision of the Commissioner of Education in the case of Franklin Educ. Ass'n v. Bd. of Ed. of the Wallkill Valley Reg. H.S. Dist., supra, is res judicata as to the issue in the instant proceeding. Specifically, petitioner contends that pursuant to Judge Young's decision, it was determined that category 3 teaching staff members at Franklin were entitled to tenure and seniority rights at respondent. In this vein, petitioner alleges that at the time of the filing of the petition in Franklin, he was a teaching staff member at Franklin High School pursuant to statute. Specifically, N.J.S.A. 18A:1-1 defines "teaching staff member" as:

> A member of the professional staff of any district or any Regional Board of Education, or any Board of Education of a County Vocational School, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position, or employment, issued by the State Board of Examiners and includes a School Nurse.

Petitioner contends that since he is a teaching staff member who has acquired tenure as an assistant principal and as a principal between 1978 and 1981, his circumstances properly place him in category 3. Since category 3 teaching staff members were granted tenure pursuant to Judge Young's decision, petitioner argues that Judge Young's decision is res judicata as to his entitlement to tenure as an assistant principal and principal.

In furtherance of petitioner's basic argument, petitioner cites North Plainfield Educ. Ass'n v. Bd. of Ed. of North Plainfield, 1981 S.L.D. (Dec. 15, 1981) wherein the requirements of the applicability of res judicata were set forth, and it was held that "for the matter to be res judicata, there must be a concurrence of four conditions:

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(1) Identity in the thing sued for;

(2) Identity of the cause of action;

(3) Identity of persons and of parties to the action; and

(4) Identity of the quality in the persons for or against whom the claim is made."

Contending that these four conditions have been met, petitioner argues specifically that the parties in this matter are the same as those in Franklin Educ. Ass'n v. Bd of Ed. of Wallkill Valley Reg. H. S. District in that the petition in that matter was brought on behalf of all teaching staff members regardless of association membership. Since petitioner was a teaching staff member at the time of the filing of the petition, the parties to both actions must be considered to be the same. Moreover, petitioner contended that the issue in the prior action as to what tenure and/or service time recognition the teaching staff members and secretaries employed by the Franklin School District are entitled to in respondent's district is identical to the issue herein.

This court cannot agree with petitioner's argument and accepts respondent's arguments in concluding that neither the parties nor the issues in this case are the same as in the prior matter. In the prior matter the only personnel involved in the controversy were teachers and secretaries. Petitioner was not a party to the prior proceeding in any manner. He was not represented in that action, nor was he a member of the Franklin Education Association, the petitioner in that matter. The reason for that is simply that the prior matter dealt only with the interests of the teachers and secretaries who were the parties to that action. Here, petitioner's interest as an administrator is the focus and he has filed his petition of appeal in that capacity.

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Not only are the parties not the same, but neither are the issues. Clearly, what was before Judge Young was the tenure rights of the teachers and secretaries in the new district. Thus, in Franklin, the issue was as to the rights of teachers and secretaries to tenure in the new district. Neither he nor the Commissioner addressed the tenure rights of administrators; specifically, neither the effect of the formation of the new district on the tenure rights of the superintendent, high school or junior high school principals or vice principals, nor the provisions of N.J.S.A. 18A:13-42 were considered in that light. To argue at this point that because petitioner is in fact a teaching staff member and, thus, was included by virtue of his being a teaching staff member in Judge Young's decision, places form over substance. This court agrees with respondent that although Judge Young used the term "teaching staff members" in his conclusion, the use of that term must be read and understood in connection with the facts of that case. Judge Young was clearly talking about teachers and not administrators, and when he used the term "teaching staff members," he apparently was considering that term interchangeably with the term teachers. In any event, his references were to the "teachers" who would fall into various categories. Since petitioner in this matter is asserting tenure rights not as a teacher, but as an administrator, the categories utilized in the prior decision have no applicability to his circumstances.

Petitioner next argues that not only is this matter, res judicata, but the doctrine of collateral estoppel applies and bars respondent from relitigating with petitioner precisely the same issue on precisely the same facts as had been addressed in Franklin, supra. It is his contention that since the Commissioner of Education has determined the issue that all category 1, 2, and 3 teaching staff members in Franklin High School had tenure and seniority rights at respondent, and since "petitioner is a teaching staff member in these categories," respondent is bound by the Commissioner's decision to recognize all of petitioner's tenure and seniority rights in the position of principal, asssistant vice principal, and teacher. This court cannot accept petitioner's argument. It seems clear that the question of the tenure and seniority rights of principals was not considered in Franklin. Rather, Judge Young only considered the tenure and seniority rights of teachers and secretaries of the district. Since the issues involved herein are not the same as those in Franklin, respondent is not bound by that decision.

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Given the finding by this court that neither the doctrine of res judicata nor collateral estoppel applies to the case herein, the question that must be addressed is the extent, if any, to which petitioner is entitled to tenure and seniority in an administrative capacity in the Wallkill Valley Regional High School District. In determining petitioner's tenure entitlement as an administrator, this court has looked to N.J.S.A. 18A:13-42, which provides as follows:

> Whenever a regional district has been created subsequent to April 1, 1951, or shall hereafter be created for high school or junior high school education, the tenure and pension rights of any high school or junior high school teacher, who, at the time of the holding of the election to create such regional district, was assigned for a majority of his time in a grade or grades from grades seven to 12 inclusive, in any high school or junior high school in any constituent districts of such regional district, shall be recognized and preserved by the board of education of the regional district in the organization and operation of any high school or junior high school in the regional district, and any period of employment in any one or more of the high schools or junior high schools of any such constituent district or districts, shall count toward the acquisition of tenure in the regional district, but nothing in this section shall be applicable to any superintendent or high school or junior high school principal.

As is clear from the terms of N.J.S.A. 18A:13-42 that statute is applicable whenever a regional district has been created subsequent to April 1, 1951. Since the Wallkill Valley Regional High School District was created subsequent to that date, N.J.S.A. 18A:13-42 would, of necessity, come into play. A reading of that statute indicates that provision is made for the preservation of the tenure and pension rights of teachers transferred to newly created regional districts. However, the terms provide that "nothing in this section shall be applicable to any superintendent, or high school, or junior high school principal." It, therefore, seems that superintendents, high school and junior high school principals are specifically exempt from that grant of tenure. This statute, therefore, apparently, acts as a bar to petitioner's assertion of tenure rights to assume the position of principal.

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Since the statute is silent, however, with respect to the tenure rights of a vice principal, at issue is the effect of the creation of the regional district on petitioner's position as vice principal. Clearly, the position of vice principal is a tenurable position pursuant to N.J.S.A. 18A:28-5 and within the definition of a teaching staff member pursuant to N.J.S.A. 18A:1.1. Since it is tenurable and not specifically excluded from the terms of N.J.S.A. 18A:13-42, it seems reasonable to conclude that petitioner is entitled to tenure in the position of vice principal within the newly created regional district pursuant to N.J.S.A. 18A:13-42. Further, to allow petitioner to claim tenure to the position of vice principal would apparently be a recognition of the employment protection which has been provided for in other tenure statutes which, while not specifically applicable herein, do lend guidance as to the approach utilized by the Legislature under similar circumstances. Thus, while not specifically applicable to the situation herein, N.J.S.A. 18A:28-15 would give teaching staff members, of which petitioner may be counted, tenure rights when there has been a change in the method of government in the school district; N.J.S.A. 18:28-17 would allow for the acquisition of tenure when a local board of education assumes the operation of a school district previously under the operation of a State agency; N.J.S.A. 18A:13-49 would allow a principal, a teacher, and an employee in the employ of any dissolving local district to be transferred to and continue in their respective employments in the employ of the regional school district and allow them to retain tenure, pension and accumulated leave of absence by their transfer to the employ of the regional school district; N.J.S.A. 18A:13-64 would allow for the regional district employees, upon the withdrawal of a district from a regional district to continue in their respective positions in the withdrawing district. Thus, it can be seen that, in essence, tenure rights have been afforded when there has been a change made in a district. Based upon this approach in parallel situations, and since N.J.S.A. 18A:13-42 makes no specific reference to vice principals, it seems reasonable to conclude that it was intended to be applicable to the instant situation. That being so, pursuant to N.J.S.A. 18A:13-42, petitioner retains tenure as a vice principal in respondent district.

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Based upon the foregoing, it is concluded that respondent has illegally and improperly denied petitioner tenure and seniority rights as a vice principal in the Wallkill Valley Regional High School District. It is therefore **ORDERED** that summary decision be granted for petitioner and that petitioner be entitled to tenure and seniority rights as a vice principal in respondent district.

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

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

October 8, 1982
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

October 12, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 13 1982
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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RUSSELL ROGERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WALLKILL VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Commissioner observes that in the matter presently controverted the parties have maximized their opportunities to file exceptions through the provisions of N.J.A.C. 1:1-1 et seq. Each party has filed primary and reply exceptions in a timely fashion.

In the primary exceptions filed by the Board it is contended that, because N.J.S.A. 18A:13-42 does not specifically mention the position of vice principal, the Honorable Elinor R. Reiner, ALJ improperly created tenure for vice principals by implication. Petitioner's reply exceptions aver that the Board errs in such argument because:

> "N.J.S.A. 18A:13-42 was enacted in 1951 as N.J.S.A. 18A:8-23. It was amended in 1955. The position of vice principal was not recognized as tenurable until 1962 when N.J.S.A. 18A:28-5 was amended to include the position. Once the position of vice principal became tenurable, it became entitled to the benefits of the statute." (Exceptions, at p. 1)

Petitioner's primary exceptions agree with Judge Reiner's decision that he is entitled to tenure and seniority rights as a vice principal in the Board's school district pursuant to N.J.S.A. 18A:13-42. Petitioner disagrees with Judge Reiner's finding that neither the doctrine of res judicata nor collateral estoppel apply to the present case. The Board's reply exceptions rely on the arguments of Judge Reiner concerning the inapplicability of the doctrines of res judicata and collateral

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estoppel herein. The Commissioner cannot agree in entirety with the exceptions of either party but finds merit in the general thrust of petitioner's arguments concerning his tenure and seniority rights as a vice principal in the Board's district. The Commissioner so holds.

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

Accordingly, the Commissioner directs that petitioner, being entitled to tenure and seniority rights as vice principal in the Board's district, shall be so employed by the Wallkill Valley Regional High School District.

COMMISSIONER OF EDUCATION

November 22, 1982

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6156-81

AGENCY DKT. NO. 317-7 81A

ALAN TENNEY,

Petitioner

v.

PALISADES PARK BOARD OF EDUCATION, BERGEN COUNTY,

Respondent.

APPEARANCES:

Anthony M. Gallina, Esq. for petitioner (Aronsohn & Springstead, attorneys)

Jack F. Govan, Esq. for respondent (Eisenstein & Govan, attorneys)

Record Closed August 31, 1982 Decided October 13, 1982

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

This is an action in which a tenured public school teacher contends that his increment was withheld for reasons that are factually incorrect.

Alan Tenney (petitioner) alleges that the Palisades Park Board of Education (respondent) noticed him on April 16, 1981, that it had withheld his employment increment for the 1981-82 school year. Petitioner states the reasons given in the letter are factually incorrect and are not in accordance with N.J.S.A. 18A:29-14. Petitioner further states that the Board's action in withholding the increment was improper in that it was arbitrary, capricious and unreasonable. Petitioner further contends that since he is at the maximum

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step of the appropriate salary guide and that N.J.S.A. 18A:29-14 does not grant a board of education authority to withhold a negotiated increase due to an employee at the top of the guide, that his increase must be awarded. Because the Board specifically withheld his "employment increment" it must pay his adjustment increment in accordance with the terms and conditions of the cited statute.

The Board admits that petitioner is a tenure employee but denies all other allegations of the petition and asks that the petition be dismissed.

I.

Petitioner contends that the four reasons contained in the April 16, 1981 letter (P-1), from the Board's secretary to him notifying him of the withholding of his employment increment for the 1981-82 school year were false. The four reasons stated are:

1. You failed to comply with appropriate school procedures and directives of the administration and assigned supervisor.

2. You failed to meet the standards for instructional effectiveness established by the Board of Education and administration for the 1980-81 academic year.

3. Sufficient progress has not been made in your teaching performance in the 1980-81 academic year as determined by the administration and assigned supervisor.

4. On March 26, 1981, you left your class unattended for a period of 23 minutes as reported by the High School Principal.

The letter also states that the decision of the Board is a result of the Superintendent's recommendation and is consistent with N.J.S.A. 18A:29-8, 29-14 and Board Policy No. 321.

Petitioner testified that on March 26, 1981, an earth science class was being taught by a student under a program known as Student Aide Day. Petitioner stated that he had worked with his student teacher on the day prior and had prepared her for the class. He felt confident that she was able to present a comprehensive lesson for that day.

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He was standing in an adjoining room which is the science department office. He stated he was looking through a closed door which contained a large window. The science room is immediately adjacent to the classroom then in use. Petitioner was able to view the entire class.

Upon hearing a noise in the classroom, petitioner immediately left the science office room and entered the classroom. He saw the high school principal standing in the doorway. He had been unable to see the principal from the science office because a fume hood blocked his vision from that angle. The principal handed petitioner an envelope which contained a letter notifying him of a meeting concerning his employment increment for the 1981-82 academic year. Petitioner was later told by the principal that he should not leave his class unattended. Petitioner responded he did not believe his class was unattended because he was able to observe and hear the entire class from the adjoining science office.

Although the principal testified that a chemistry class was then in progress and believed it to be dangerous for the chemistry class to be unattended, petitioner testified that the class in question was an earth science class and that no chemicals or open flame were being used.

With respect to his alleged failure to follow report card procedures as embodied in various memoranda marked P-5a through P-5c, petitioner testified to various facts surrounding the week in question. On Tuesday of that week, he had one period free in which to prepare his grades for report cards. On Wednesday of that week he was out of school because of illness. On Thursday and Friday he likewise had one period of free time in which to prepare the report cards. Petitioner spent Thursday afternoon after school to approximately 4:00 p.m. preparing his grades. He informed the guidance counselor on Friday, February 13, 1981, that he would not have time to finish preparing his report cards and would stay after school to complete them. He did stay after school on that date from approximately 3:15 p.m. to approximately 5:00 p.m. to work on the report cards in the guidance office. He testified that no one was present at that time and to his belief that the only one inconvenienced was himself.

Petitioner also testified that he had to prepare grades for approximately 100 students in his chemistry, earth science and physical science classes. In addition petitioner testified that the report cards were not late being distributed.

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Petitioner testified as to the purpose of an Individual Improvement Plan (IIP) as referred to in certain of his evaluations for the 1980-81 academic year. In the section entitled "Two kinds of evaluation" contained in the Palisades Park Junior-Senior High School Faculty Handbook for the school year 1981-82 (P-20), an IIP is designed to be "more personal in tone, diagnostic, instructional." This is compared to the regular observations/evaluations which are designed to be "formal and legal."

Therefore, petitioner testified that it was his understanding of the purpose of an IIP that it was to assist teachers in improving their teaching performance and was to be of an informal nature. It was not his understanding that an IIP would be used in any formal or legal sense.

With this in mind, petitioner executed an IIP for the 1981-82 academic year dated May 9, 1980 (P-2). He testified that he would not have executed the IIP if he knew that the Board had planned to utilize its contents as a basis for withholding his increment for the 1981-82 academic year.

Petitioner explained his use of a question and answer technique referred to by the principal in the principal's February 26, 1981, evaluation (P-6).

Specifically, petitioner explained his use of a teaching technique which he calls "Tenney A Day," in which students are asked questions and based upon their responses are given a grade for that particular day. Since most of his students were "not academic students" this technique had proven successful in generating interest among them. Petitioner further testified that the use of the technique was also designed to further the implementation of the content reading program which the district was employing at the time. Referring to the principal's reference in the February 26, 1981 evaluation that the use of a question and answer technique on the day in question was not in accord with the lesson plan for the day, petitioner candidly testified that he had planned and employed the "Tenney A Day" the day before but because certain students did not get a chance to answer a question on that day, he employed the same technique the following morning.

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With regard to his teaching technique in general and his use of lesson plans in particular, petitioner testified that he does not teach from his lesson plans alone but merely uses them as a guide for the day's activities. In fact, he teaches from copious notes which he has complied over the years for each class and which he produced at the time of hearing.

There are many references in the record as to alleged failures by petitioner to maintain proper lesson plans. Nonetheless, he testified that during his 12 or so years in the district he has never been reprimanded for failure to complete the required course of study in a given subject area as required by the Board. Petitioner produced his lesson plan book for the 1980-81 academic year (P-22). The book contains many handwritten notations bearing a color of ink and a handwriting which petitioner testified were that of his immediate supervisor.

The week of November 17, 1980 shows two areas which do not contain lesson plans. These were days on which school was closed. With respect to the week of November 24, 1980, petitioner explained that school was closed for two days for observance of the Thanksgiving holiday. For the week of February 6, 1981, he indicated in his plan book that the entire week would be devoted to review for final exams. The supervisor placed a notation, "The full week?" Tenney responded, "Why not?"

With respect to the weeks of February 27, 1981 and March 6, 1981, wherein the supervisor testified he believed petitioner was being repetitive in his teaching, petitioner testified that the repetition resulted because of the extensive nature of the area to be covered during the week of February 27. This body of material was not completed by his class that week. This made it necessary to teach the balance of the area during the week of March 6, 1981. In addition, petitioner testified that he felt that a certain amount of repetition of subject matter is necessary for purposes of reinforcement and review.

Petitioner's supervisor sent him a memorandum dated December 12, 1980 (P-4). The substance of the memorandum is that petitioner did not provide adequate lesson plans to cover a period of absence. Petitioner testified that on November 11, 1980, he was absent from school and called in his plans for that day via telephone. He did not recall to whom he spoke but he did speak to someone in the science department after he

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could not reach the supervisor. He testified that he gave complete plans for that day and that he received no return call that day from the substitute in question. To petitioner, this indicates that the substitute had no difficulty understanding the plans or that the plans were inadequate. In addition, he states that he, as well as every other teacher in the science department, has a complete set of plans on file for each day to be used in the event of absence.

With respect to petitioner's evaluation of March 18, 1981, his supervisor testified as to the supervisor's fourth recommendation on page three of the evaluation, that on no prior occasions had he ever used the term "erratic" as used in this evaluation.

In regard to the supervisor's memorandum dated March 26, 1981 (P-12a), stating that petitioner's lesson plan book appeared to be repetitious, the supervisor testified as to several deficiencies he noted in petitioner's plans and to several suggestions made in that memorandum for improvement of plans. Petitioner testified that he responded to that memorandum with one of his own (P-12b). Among other things, petitioner's memorandum states, "You received my plans for 3-16-81 and put no remarks on the page indicating good, bad or indifferent. However you put on my classroom evaluation that my plans were not adequate and were repetitive. I deserve to know where they are inadequate and if they were inadequate why was the information not put in my plan book."

The superintendent of schools testified that it was his recommendation to the Board that petitioner's increment for the 1981-82 academic year be withheld. He testified as to what transpired at the Board's work session meeting regarding personnel matters which was held on or about April 1, 1981. Specifically, the superintendent made his recommendation to the Board and then proceeded to permit the Board to "review" his file on petitioner.

The superintendent also testified that a memorandum dated April 1, 1981, from the high school principal to him (P-15) concerning petitioner's performance as a teacher was made available to the Board, although all of the documents referred to in the memorandum were not before the Board.

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Petitioner contends that the superintendent did not explain the fact that there were two memoranda, each dated April 1, 1981, from him to the Board (P-16, P-17) concerning petitioner.

II

The Board states that there were constant memoranda, conferences and meetings between the supervisor and petitioner concerning petitioner's planning that was not in accord with the policy of the Board. Every effort was made to assist petitioner to be aware of which requirements the administration expected its teachers to meet. The faculty handbook (P-20) sets forth these requirements. In addition, the supervisor testified that he had a number of discussions with petitioner concerning the necessity for good planning and, indeed, sent him two memoranda with reference to examples of good planning.

Petitioner acknowledged that there had been some comment on his plan book. He took the position that the administration and he disagreed with what adequate planning was.

The high school principal testified that he was present in a class under the responsibility of petitioner on March 26, 1981, and that petitioner was not present in that classroom from the time of the principal's arrival until some 23 minutes later. The principal was of the opinion that the class was unsatisfactorily supervised, and again petitioner disagreed with him.

In addition, the principal testified that on many occasions petitioner came in late and on at least one occasion signed himself in on time when the principal knew, in fact, that he was not punctual. The Board submits that it has given adequate assistance to petitioner to help him perform his duties and and observe all policies properly. It is the province of the Board to set policy and determine whether or not the policy has been adhered to. The fact that petitioner does not agree with the administrators' and the Board's opinion and decision does not alter the facts.

On the basis of the documentary and parole evidence, the Board has properly withheld the increment of petitioner.

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III.

Petitioner argues that the Board illegally withheld his negotiated salary increase for the 1981-82 academic year. The terms "employment increment" and "adjustment increment" are defined at N.J.S.A. 18A:29-6. The employment increment is the annual increase granted to a teaching staff member for one year of employment. The adjustment increment is an increase granted so long as shall be necessary to bring a member to his place on the salary schedule.

N.J.S.A. 18A:29-8 sets forth the requirements for yearly increments as follows:

> Any member holding office, position or employment in any school district of this state, shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section.

In the matter entitled Vincent Massaro v. Bergenfield Bd. of Ed., 1981 S.L.D. ____ (Decided December 4, 1981), one of the issues was whether N.J.S.A. 18A:29-14 grants a board of education authority to withhold a negotiated increase due to an employee at the top of his salary guide.

N.J.S.A. 18A:29-14 provides that a Board may withhold, for inefficiency or other good cause, the employment increment or the adjustment increment or both of any teaching staff member in any year. It must do so by a recorded roll call majority vote of the full membership of the Board. It must within ten days give written notice of the action together with the reasons for the action to the teaching staff member concerned.

The administrative law judge in Massaro recommended summary decision in favor of the petitioner and held that the Board in negotiating a raise for the 1975-76 salary schedule to compensate its professional employees for cost of living increases did not adjust the number of steps in its guide to which the term "increment" could be applied. (Slip Opinion at 6). The administrative law judge in Massaro noted that when one reaches the maximum step of the salary guide, one does not henceforth receive an increment but merely a proportionately higher maximum salary unless the employer specifically raises the maximum for purposes such as longevity or intentionally increases the number of steps in the schedule. Ibid.

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The Commissioner of Education did not adopt the recommendation and reversed that portion of the initial decision which "fails to conclude that the Board, did, in fact, act to withhold Petitioner's salary 'adjustment increment' in accordance with its negotiated salary guide for the 1975-76 school year." Id. at 14.

The State Board of Education affirmed summarily the Commissioner of Education.

Petitioner argues that his case is analogous to Massaro but is distinguishable on one important point. The Board, in this case, on April 16, 1981, specifically withheld petitioner's "employment increment" for the 1981-82 school year (P-1).

It is not disputed that petitioner was at the top step of his salary guide in the 1981-82 school year. Therefore, the Board could not withhold his employment increment as defined in N.J.S.A. 18A:29-6. The recorded roll call vote of the Board pursuant to that statute indicates that the Board withheld his employment increment for the 1981-82 academic year (R-1).

Hence, the Board withheld that increment which it could not legally withhold under the school laws of this State and this case is factually distinguishable from Massaro. In Massaro, the Board sought to withhold petitioner's negotiated salary increase. In this case, the Board never sought to withhold petitioner's negotiated salary increase.

J-1 in evidence, the Board's policy regarding the withholding of an increment, does not excuse the Board from failing to comply with N.J.S.A. 18A:29-14, by failing to specify by recorded roll call vote that increment which is in fact being withheld.

Petitioner further argues that the Board's action was arbitrary, capricious and unreasonable. Citing Kopera v. West Orange Board of Ed., 60 N.J. Super. 288 (App. Div. 1960), petitioner contends that review of a Board's discretionary decision to withhold a teacher's increment or salary adjustment for an ensuing school year must involve a determination as to whether the action was arbitrary, capricious or unreasonable.

In petitioner's view, the facts adduced at hearing in this matter clearly show that the Board had no genuine factual basis for withholding petitioner's negotiated salary increase for the 1981-82 academic year. Accordingly, its actions were arbitrary, capricious and unreasonable.

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The Board's conclusion that petitioner failed to comply with appropriate school procedures and directives is based primarily upon his annual performance report for the 1980-81 school year (P-19). That annual performance report is based on classroom observations conducted on February 26, 1981, by the principal and on March 18, 1981, by the supervisor.

The annual performance report indicates that petitioner's professional knowledge is adequate. The crux of the Board's criticism of teaching performance lies in lesson planning. This court has before it the lesson plan book and has heard the testimony of petitioner with respect to the various comments by his administrators. Petitioner has adequately explained and otherwise responded to the various questions and notations contained in his plan book. It is submitted that the plans are comprehensive and detailed and in petitioner's own words provided a general guideline for the teaching of his classes. Any alleged deficiencies in petitioner's lesson plan book are simply ultra-technical and are not reasonably related to his performance as a teacher.

With respect to his classroom observation of February 26, 1981, petitioner more than adequately explained his utilization of the question and answer technique carried over from the day before. The annual performance report further indicates that although student management was generally satisfactory, petitioner was reminded in his February 26, 1981 evaluation that pupils should not be allowed to call out answers from their desks constantly, especially if grades were given for their responses. Petitioner candidly testified that he was using the technique of questions and answers to stimulate interest in students who were otherwise "nonacademic." The February 26, 1981 evaluation does not indicate that the class was disruptive or that petitioner failed to otherwise maintain supervision.

With respect to student report cards and the allegation that petitioner was inconveniencing other staff members, he testified as to what transpired with respect to his grading of report cards and indicated that he had graded the report cards in the guidance office alone after school. Furthermore, it is not alleged that the report cards did not go out on time as a result of his activities. It is submitted that the alleged report card incident was not a proper basis for the Board to have considered withholding his increment for the 1981-82 year. The IIP cannot be used by the court as an admission by petitioner that his lesson plans were deficient. In point of fact, both the faculty handbook

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and the testimony of petitioner confirm that the IIP was drafted with the understanding that it would be an informal document as opposed to a formal classroom observation or annual report. As petitioner testified, had he known the IIP could ultimately be used against him, he never would have signed it.

Finally, with respect to the March 26, 1981 incident wherein it was alleged that petitioner failed to have his earth science class under supervision, the testimony of petitioner himself completely disputes the allegation that the class was unsupervised. He quite candidly testified that he had full observation of and access to his classroom during the period in question and that the student was teaching the class as part of a district program.

Petitioner concludes that he has meet his burden of proving that the Board has no genuine factual basis to support the withholding of his negotiated salary increase for the 1981-82 academic year and that the Board's action was otherwise arbitrary, capricious and unreasonable.

IV.

The Board argues that it had the authority to withhold any salary increment of any description for good cause. N.J.S.A. 18A:29-14 gives the Board authority to withhold employment or adjustment increments or both for good cause. Thus if the Board had good cause to withhold any increment, it would be immaterial how it was identified. Petitioner relies on Massaro, above, to support his position that he was entitled to an increment and the Board had no authority to withhold it. The administrative law judge in Massaro indeed so held, but the Commissioner of Education reversed the initial decision.

It is within the authority of a board of education to set policy and to determine whether or not the policy has been adhered to. The fact that petitioner does not agree with the Board's decision does not alter the fact.

In the case at bar, petitioner does not allege any bias on the part of the Board or the administration in the withholding of his increment. He merely alleges he did not agree with them. It is not a judgment for petitioner to make. The record supports the Board's action. Accordingly, it is submitted that the petition should be dismissed.

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V.

At the prehearing conference in this matter, two issues were set forth:

(1) Was there a violation of N.J.S.A. 18A:29-14 as to petitioner in this matter, and

(2) Even if the Board proceeded correctly under N.J.S.A. 18A:29-14, were the bases on which it acted factually incorrect.

It is stipulated that petitioner is and was at the top step of his salary guide at the time pertinent. In simplest terms, an employment increment is granted upon successful completion of a year of employment. The number of employment increments an employee may receive is determined by the number of steps above the entry level salary on his particular salary guide. Adjustment increments, on the other hand, are those increments necessary to put an employee at his proper place on guide when either he is off guide or the whole guide changes as a result of collective bargaining. In this case, petitioner had achieved all employment increments to which he was entitled by virtue of being at the top of his guide. The only increment he could have received was an adjustment increment. Under N.J.S.A. 18A:29-14, a board may withhold either increment for good cause. Here, assuming good cause for a withholding, the Board could have withheld petitioner's adjustment increment. There was no employment increment to withhold.

The letter to petitioner of April 16, 1981 (P-1), clearly states that the Board voted to withhold his employment increment for the 1981-82 school year. The threshold issue, therefore, is quickly resolved. The Board, by its own language, withheld something that did not exist. Therefore, if petitioner's salary was less than his expectation in 1981-82, it could only have been less because the Board withheld the adjustment increment.

To paraphrase Mr. Justice Holmes, if government expects men to turn square corners in dealing with it, it must behave in like fashion in its dealings with men. A board of education and its administrative agents may be expected to know the law. When the precision the law requires is absent, the Board may not ordinarily be heard to complain when an action is overturned.

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Petitioner's contention that this matter is distinguishable from Massaro, above, is meritorious. The recorded roll call vote of the Board, pursuant to N.J.S.A. 18A:29-14, indicates that the Board withheld the employment increment of Alan Tenney for the 1981-82 academic year. It is noted that petitioner specifically pled the employment increment-adjustment increment distinction. The Board denied the allegation. A full evidentiary hearing was held. Full opportunity was had to dispute facts and to place evidence in the record that would tend to disprove petitioner's case.

From a complete and careful review of the record in this matter, I **FIND** and **CONCLUDE** that the action of the Palisades Park Board of Education taken on April 15, 1981, as to the salary for the 1981-82 school year for Alan Tenney was a nullity.

The first issue having been decided in petitioner's favor, it is unnecessary to address the second. Accordingly, the Palisades Park Board of Education shall reinstate the monies withheld from Alan Tenney for the 1981-82 school year. It shall also reinstate those monies withheld on the same basis for the 1982-82 school year unless a separate and valid action has been taken as to that school year. It is so **ORDERED.**

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

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OAL DKT. NO. EDU 6156-81

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

13 OCTOBER 1982
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DATE

Seymour Wells
DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 18 1982
DATE

OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

P-1	Letter, Wolff to Tenney, 4-16-81
P-2	Professional Improvement Plan, Alan Tenney, 5-9-80
P-3	Memorandum, Rodin to Tenney, 10-16-80
P-4	Memorandum, Triggiano to Tenney, 12-12-80
P-5a	Memorandum, Triggiano to Tenney, 2-19-81
P-5b	Memorandum, Waack to Triggiano, 2-19-81
P-5c	Memorandum, Triggiano to Tenney, 2-19-81
P-6	Observation Evaluation, 2-26-81, earth science class, 2 pp.
P-7	Memorandum, Triggiano to Rodin, 3-10-81
P-8	Memorandum, Tenney to Triggiano, 3-10-81
P-9a	Memorandum, Triggiano to Tenney, 3-11-81
P-9b	Sample lesson plan attached to P-9a
P-9c	Memorandum, Triggiano to Tenney, 1-2-80
P-10	Observation Evaluation, 3-18-81, chemistry class, 3 pp.
P-11	Memorandum, Triggiano to Tenney, 3-24-81
P-12a	Memorandum, Triggiano to Tenney, 3-26-81, 2 pp.
P-12b	Memorandum, Tenney to Triggiano, 3-23-81
P-13	Memorandum, Rodin to Tenney, 3-26-81
P-14	Memorandum, Fasciano to Tenney, 4-2-81

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P-15 Memorandum, Rodin to Fasciano, 4-1-81, 3 pp.

P-16 Memorandum, Fasciano to Board, 4-1-81, 2 pp.

P-17 Memorandum, Fasciano to Board, 4-1-81

P-18 Memorandum, Robin to Tenney, 4-16-81

P-19 Annual Performance Report, 1981-81, 3 pp.

P-20 Faculty Handbook, 1980-81, 87 pp. plus appendix

P-21 Observation Evaulation, 2-19-80, Chemistry class

P-22 Daily lesson plans, 1980-81

P-23 Teacher salary guide, 1981-82

P-24 Memorandum, Triggiano to Tenney, 3-26-81

R-1 Excerpt, Board minutes, 4-15-81, pages 28, 29

R-2 Annual Performance Report, 1979-80

R-3 Memorandum, Triggiano to Math Science faculty and Business faculty, 12-19-79

R-5 Memorandum, Triggiano to Tenney, 1-2-80

J-1 Board Policy No. 321, withholding an increment

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ALAN TENNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

In its primary exceptions the Board disagrees with the findings of the Honorable Bruce R. Campbell, ALJ in the matter presently controverted. The Board relies on Kopera, supra, in determining that Judge Campbell may not substitute his judgment for that of the Board. The Board also relies on Massaro, supra, in its contention that it could properly withhold petitioner's increment, irrespective of the nomenclature by which it was identified. Petitioner's reply exceptions contend that the Board failed to act with the requisite precision called for under the statute and argue that, for the reasons set forth, the initial decision should be affirmed. The Commissioner finds no merit in petitioner's arguments.

An examination of the record herein, the documents in evidence and the testimony of witnesses convinces the Commissioner that Judge Campbell erred in finding that the action of the Board taken on April 15, 1981 to withhold petitioner's increment was a nullity because an employment increment was withheld.

The Commissioner cannot agree with petitioner's argument and Judge Campbell's ruling that the Board cannot withhold the increase in salary pursuant to N.J.S.A. 18A:29-14 for 1981-82 because the Board identified and named the sum of money represented therein as an "employment increment." Such a determination by the Court places form over substance. Union Beach Board v. N.J.E.A. et al., 53 N.J. 29, 39 Accordingly, the Commissioner finds Massaro, supra, directly applicable to the present matter.

The Commissioner finds contradictory testimony in the record concerning petitioner's ability to properly supervise the

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classroom on March 26, 1981, while standing in the science department office looking through the window of the closed door. The statement pertaining to that incident clearly asserts, ante, that "[p]etitioner was able to view the entire class." Yet, the Commissioner observes that petitioner failed to see the principal from the office when the principal stood in the classroom doorway for 23 minutes, "because a fume hood blocked his [petitioner's] vision from that angle." Petitioner cannot have it both ways. The Commissioner is constrained to comment that, when dealing with active high school students, any blind spot existing for 23 minutes may well be disastrous and cannot be considered to be proper supervision.

For the foregoing reasons the ruling by Judge Campbell herein is set aside. The Commissioner finds and determines that the Board on April 15, 1981 pursuant to the provisions in N.J.S.A. 18A:29-14 properly withheld the increase in monetary remuneration accorded petitioner. Petition is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

November 24, 1982

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7812-81
AGENCY DKT. NO. 394-9/81A

BOARD OF EDUCATION OF THE
CITY OF HOBOKEN, HUDSON COUNTY,
Petitioner
v.
KATHLEEN TEMPLE,
Respondent

APPEARANCES:

James P. Granello, Esq., for petitioner
(Murray, Granello & Kenney, attorneys)

Bruce D. Leder, Esq., for respondent
(Schneider, Cohen, Solomon & DiMarzio, attorneys)

Record Closed September 7, 1982 Decided October 14, 1982

BEFORE **James A. Ospenson**, ALJ:

This is a petition by the Board of Education of the City of Hoboken, Hudson County, seeking declaratory judgment of the Commissioner of Education that respondent, Kathleen Temple, presently a tenured teaching staff member, was not a teaching staff

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member during the 1972-73 school year and was not, as a consequence, entitled to a year's credit on the salary guide when first so employed at the beginning of the 1973-74 school year; and judgment that respondent's claim for back salary, presently the subject of a grievance and demand for binding arbitration, is barred by the statute of limitations (N.J.S.A. 2A:14-1 et seq.), N.J.A.C. 6:24-1.2, and by the doctrines of equitable estoppel and laches. Respondent in an answer with separate defenses alleged the Commissioner of Education lacked jurisdiction to hear the matter since sole jurisdiction rested with the Public Employment Relations Commission pursuant to N.J.S.A. 34:13A-1 et seq.

The petition was filed in the Bureau of Controversies and Disputes of the Department of Education on September 28, 1981. Respondent's answer was filed on November 6, 1981. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on November 12, 1981 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on April 1, 1982 and an order was entered reciting that the parties had agreed to stipulate updated facts concerning present status of the proceeding before PERC and agreed to stipulate all documented procedural facts concerning respondent's employment history. It was established that the matter would thereafter proceed to resolution as if on cross-motions for summary decision by the parties on the stipulated factual record and briefs, pursuant to N.J.A.C. 1:1-13.1 et seq. Such stipulations were thereafter filed in the cause by the parties, briefs were filed, and the record was closed on September 7, 1982.

STIPULATIONS and FINDINGS OF FACT

1. Respondent, Kathleen Temple, was graduated from Jersey City State College with a Bachelor of Arts Degree in Elementary Education in May, 1972. Shortly thereafter the Department of Education, State Board of Examiners, issued respondent a Teacher's Certificate in Elementary Education. Prior to her graduation from Jersey City State College, respondent applied for a teaching position with the Hoboken Board of Education.

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2. On November 21, 1972, the Board appointed respondent as a remedial teacher. The resolution reflecting the appointment stated respondent was "assigned to the parochial schools, subject to the provisions of the Nonpublic Elementary and Secondary Education Act with compensation at the rate of Eight Thousand Two Hundred Dollars per annum . . . ."

3. Respondent's appointment was confirmed by letter from the Board dated November 27, 1972. Like the aforementioned resolution, the letter advised respondent had been 'appointed [as] a remedial teacher, assigned to the parochial schools, subject to the provisions of the non-public elementary and secondary schools act with compensation at the rate of Eight Thousand Two Hundred ($8,200.00) Dollars per annum . ...'

4. Under the Nonpublic Elementary and Secondary Education Act, N.J.S.A. 18A:58-59, et seq., State aid was given to parents of non-public school students as reimbursement for the cost of secular, non-ideological textbooks, instructional materials and supplies. Amounts left over from the total appropriation under the Act after the textbook reimbursement program were assigned to non-public schools to acquire secular supplies, equipment and auxiliary services. All aid under the Act was made by the State directly to local boards of education, who then provided the requested items or services to the non-public schools.

5. Under that arrangement, respondent was hired by the Board, which then assigned her to non-public schools to provide remedial services. Beginning on or about December 1, 1972, respondent served as a remedial teacher at the St. Peter and Paul, St. Ann and Our Lady of Grace parochial schools.

6. For the remainder of the 1972-73 school year, respondent worked at those schools, providing remedial services to students identified as having learning problems in English and/or mathemantics, and who were not being serviced by the Federal Title I Program. For the remainder of the 1972-73 school year, respondent worked with between 100 and 150 students total, and worked five days a week. When school was not in session at the parochial schools, repondent served as a substitute teacher in the Hoboken School system. Similarly, when classes at the three parochial schools ended in June of 1973, respondent was utilized as a substitute teacher until the school year ended in Hoboken.

7. During the 1972-73 school year, respondent did not receive any written evaluations concerning her classroom performance, but was observed by the principals of the schools where she worked. Similarly, respondent did not receive written notification during the 1972-73 school year regarding her reemployment for the 1973-74 school year prior to the letter dated August 29, 1972, referred to infra in paragraph 9.

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8. During the 1972-73 school year respondent, although working the same hours as other teachers at the three parochial schools, was not required to order supplies and materials, supervise a homeroom, attend PTA meetings, supervise the students' lunch period or conduct corridor duty. She was, however, required to execute weekly lesson plans, conduct parent-teacher conferences and attend faculty meetings. In April of 1973 funding for respondent's remedial teacher position ceased when the United States Supreme Court ruled that the Nonpublic Elementary and Secondary Education Act was unconstitutional. No formal resolution was adopted by the Board cancelling the program or respondent's position, and no written notification as to termination was sent to respondent.

9. On August 9, 1973, the Board appointed respondent to a position as an elementary teacher and notified her by letter dated August 29, 1973. She was placed on Step I of the Salary Guide at a salary of $9,300 per year. During the 1973-74, 1974-75 and 1975-76 school years, respondent was evaluated three times each year as were all non-tenured teaching staff members. In the spring of 1976, respondent was recommended for tenure and she began her fourth year of employment with the Board as a teaching staff member, in 1976-77, with a tenure status pursuant to N.J.S.A. 18A:28-5.

10. On March 11, 1981, eight years after her appointment as an elementary teacher, respondent filed a grievance with the Board asserting that "as of the second year of employment grievant was not paid on proper step [of the salary guide]." The grievance was denied by the assistant superintendent of schools on March 30, 1981. Subsequently, the Hoboken Teachers' Association, on behalf of respondent, demanded that the grievance be submitted to binding arbitration pursuant to the parties' collective bargaining agreement. Arbitration has been stayed pending disposition of the Board's petition for a declaratory judgment filed with the Commissioner of Education on September 28, 1981.

11. Simultaneous with the filing of the petition for declaratory judgment, the Board filed a petition for scope of negotiations determination with the Public Employment Relations Commission. In the scope petition the Board asserted it was illegal to submit the controversy whether or not respondent was a "teaching staff member" entitled to credit on the salary guide in 1972-73 to arbitration because the same was a question arising under school laws and therefore had to be decided by the Commissioner of Education. The Board sought a permanent restraint of arbitration. PERC has stayed its determination of the scope petition pending the Commissioner's decision on the petition for declaratory judgment.

STATEMENT OF ISSUES

As established by prehearing conference order, at issue here are the following:

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1. Whether respondent in 1972-73, as a remedial teacher under the Non-public Elementary and Secondary Education Act (N.J.S.A. 18A:58-59 et seq., since declared unconstitutional) was a teaching staff member within the meaning of N.J.S.A. 18A:1-1 and N.J.S.A. 18A:29-1 et seq.;

2. If so, whether respondent was improperly denied a salary increment to Step II of the salary guide when, for 1973-74, she was appointed elementary teacher and whether, thereafter to date, she was improperly denied further such annual increments;

3. Whether respondent's claims for back salary, now the subject of respondent's grievance and a temporary restraint of binding arbitration before PERC, are properly and/or exclusively before the Commissioner of Education; and

4. Whether respondent's claims, assuming proper and exclusive jurisdiction of the Commissioner of Education, are nevertheless barred by the statute of limitations (N.J.S.A. 2A:14-1 et seq.), by N.J.A.C. 6:24-1.2, and/or by the doctrines of laches and/or estoppel.

DISCUSSION

It is certainly clear, in general, that an administrative agency upon request of any interested person may in its discretion make a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency. N.J.S.A. 52:14B-8. The State Board of Education has provided in N.J.A.C. 6:24-2.1 that pursuant to N.J.S.A. 52:14B-8 any interested person may petition the Commissioner of Education for a declaratory ruling with respect to applicability to any person, property of state of facts of any statute or regulation enforced or administered by the commissioner. The determination to entertain such petitions for declaratory judgments shall be within the sole discretion of the commissioner.

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On the question whether respondent in 1972-73, as a remedial teacher under the Nonpublic Elementary and Secondary Education Act, was a teaching staff member within the meaning of N.J.S.A. 18A:29-1 and N.J.S.A. 18A:1-1, it seems the issue has been laid to rest by the Supreme Court in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). Although the case involved tenure acquisition generally by employees serving as remedial and supplemental teachers, the judgment of the court was necessarily dependent upon a holding that such employees were teaching staff members within the definitional standards of N.J.S.A. 18A:1-1 and N.J.S.A. 18A:28-5. The former statute defines teaching staff member as follows:

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

That respondent here served as a remedial teacher during 1972-73 while holding at the time a teacher's certificate in elementary education is given. It seems clear as well that for such position a certificate is required. The court held the remedial and supplemental teachers in the cases decided were teaching staff members within the meaning of N.J.S.A. 18A:1-1 and were tenure-eligible. Spiewak at 73-74, 81. Upon a parity of reasoning, therefore, respondent here must be said to have been a teaching staff member under the statutory definition generally as well as under the statutory definition in N.J.S.A. 18A:29-8, which section has predicated her claims for improper placement under the salary guide and deficient annual increments thereafter, the Board having elected to adopt a salary schedule prusuant to N.J.S.A. 18A:29-4.1.

On the question whether respondent's claims for back salary, now the subject of her grievance and a temporary restraint of binding arbitration before PERC, are properly and/or exclusively before the Commissioner of Education, it should be noted that she has not advanced those claims before the commissioner. Instead they have become a subject of scrutiny because the Board, through the device of a petition for declaratory judgment, questions whether such claims, wherever they are, are not properly barred by the statute

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of limitations and/or by doctrines of laches and estoppel. The Commissioner of Education, it is said, has jurisdiction over certain disputes in the absence of an agreement or if the subject matter is not susceptible to binding agreement because it concerns major educational policy or because the issues are controlled by the school laws. Cf. S. Orange - Maplewood Ed. Assoc. v. Bd. of Ed. of S. Orange, 146 N.J. Super. 457, 462 (App. Div. 1977). N.J.S.A. 18A:6-9 gives the Commissioner jurisdiction over all controversies and disputes arising under school laws. Such jurisdiction is exclusive if the issue to be decided is purely one of substantive law involving construction of the school laws. Cf. Dunellen Bd. of Ed. v. Dunellen Ed. Assoc., 64 N.J. 17, 31 (1973); State v. State Supervisory Employees Association, 78 N.J. 54, 82 (1978); and Bd. of Education of Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311, 324 (1979). The school law squarely at issue in this case is N.J.S.A. 18A:29-8:

> Any member holding office, position or employment in any school district of this state, shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section.

Respondent's claim for improper placement, as well as the Board's claim that the claim is barred by limitations or laches, tests applicability of that statute, a school law, to respondent's specific circumstances. To that extent therefore, it cannot reasonably be characterized as an issue involving the terms and conditions of respondent's employment, as contemplated by N.J.S.A. 34:13A-5.3, and as a corollary, is not cognizable before the Public Employment Relations Commission. The issue remains one substantially and primarily affecting resolution of disputes involving school laws properly within the exclusive jurisdiction of the Commissioner of Education. Dunnellen, supra, at 29-30.

On the question whether respondent's claims, assuming proper and exclusive jurisdiction of the Commissioner of Education thereover, as suggested above, are nevertheless barred by the statute of limitations (N.J.S.A. 2A:14-1 et seq.), by N.J.A.C. 6:24-1.2 and/or by the doctrines of laches and/or estoppel, it seems clear the Commissioner's dispute resolution jurisdiction under N.J.S.A. 18A:6-9 was not invoked until the moment the Board filed its petition for declaratory judgment relief on

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September 28, 1981. Respondent's claims were not formally raised until March 11, 1981, eight years after her appointment as an elementary teacher, when she filed a grievance against the Board asserting that as of the second year of employment she was not paid on the proper level of the salary guide. She herself, of course, never raised her claims to the Commissioner of Education except later in answer to the Board's petition for declaratory judgment relief. Since respondent's claims implicate her right to annual increment deficiencies, it becomes important to note when such claims originated. They originated, it seems clear, as statutory entitlements, rather than elements of any employment contract, beginning September 1973, when first she was placed at Step I on the salary guide. To that extent, her claims bear the characteristics of claims for military service credit under N.J.S.A. 18A:29-11. The Supreme Court has held that such claims, while not barred by the statute of limitations under N.J.S.A. 2A:14-1, are nevertheless equitably barred by the doctrine of laches for reasons of equity and public policy. Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982). There the Supreme Court said:

> . . . the doctrine of laches should be applied under the circumstances present here. A claim for petitioner's military service was not made until more than nine years after her employment commenced. . . . laches should bar plaintiff's retroactive recovery of past due sums. (at 153-55.) Cf. Union Tp. Teachers Ass'n v. Union Tp. Bd. of Ed., 90 N.J. 161 (1982).

CONCLUSION

Accordingly, based on the foregoing, I hereby **CONCLUDE** as follows:

1. Respondent in 1972-73 as a remedial teacher under the Nonpublic Elementary and Secondary Education Act, N.J.S.A. 18A:29-1 et seq., was a teaching staff member within the meaning of N.J.S.A. 18A:1-1 and N.J.S.A. 18A:29-1 et seq.;

2. Respondent's claims for back salary, now the subject of respondent's grievance and a temporary restraint of binding arbitration before

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PERC, are properly and exclusively before the Commissioner of Education in the form of the Board's petition to the commissioner for declaratory judgment relief, even if not before the commissioner on respondent's own petition; and

3. Respondent's claims, wherever pending on her petition elsewhere, are nevertheless barred by the equitable doctrine of laches to the extent such claims involve those for retroactive recovery of past due sums beginning September 1973 and until September 28, 1981, the date when petition herein was filed.

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

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

October 14, 1982
DATE

JAMES A. OSPENSON, ALJ

October 18, 1982
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

OCT 19 1982
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
KATHLEEN TEMPLE,	:	DECISION
RESPONDENT.	:	

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

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

The Board in its primary exceptions disagrees with the initial decision by the Honorable James A. Ospenson, ALJ that finds Spiewak, supra, applicable to the present case. The Board argues that respondent was not involved in any activities supportive of public education. Respondent's reply exceptions affirm the applicability of Spiewak and disclaim the jurisdiction of the Commissioner in that portion of this matter involving the salary dispute. The Commissioner cannot agree in entirety with the exceptions filed by either party.

In the judgment of the Commissioner Judge Ospenson correctly determined that, because respondent was a teaching staff member working in a position which required certification, the rationale of Spiewak was applicable thereto. The Commissioner finds no merit in the Board's argument that respondent was not a teaching staff member within the meaning of N.J.S.A. 18A:1-1 and N.J.S.A. 18A:29-8, ante. The Commissioner finds Dunellen, supra, directly applicable herein. The Commissioner so holds.

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

While respondent was a teaching staff member in 1972-73 within the meaning of N.J.S.A. 18A:1-1 and while her claim for the retroactive recovery of past salary is properly before the Commissioner, nevertheless such claim is barred by the equitable doctrine of laches. Respondent's entitlement to prospective relief from the date of this matter's initiation before the Commissioner is recognized.

It is so determined.

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2323-82
AGENCY DKT. NO. 61-3/82A

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,
Respondent.

APPEARANCES:

Richard J. Murray, Esq. until July 7, 1982 and, thereafter, **Thomas H. Dilts,** Esq. (Dilts, Delancey & Welch, attorneys) for petitioner

William B. Rosenberg, Esq. for respondent (Blumberg, Rosenberg, Mullen & Blumberg, attorneys)

Record Closed September 15, 1982 Decided October 15, 1982

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

This case is a dispute between sending and receiving boards of education over payments for tuition for Branchburg's secondary pupils who were educated at Somerville High School during the 1980-81 school year.

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The petitioning Somerville Board of Education, hereinafter "Somerville," filed this matter on June 24, 1981 in the form of a civil complaint before the Superior Court of New Jersey, Chancery Division, Somerset County, Docket No. C3748 80. After respondent Branchburg Board of Education, hereinafter "Branchburg," filed its Answer and Counterclaim, Judge William A. Dreier issued an order, dated November 9, 1981, transferring the dispute to the Commissioner of Education but retained jurisdiction for the sole purpose of retransferring the matter to him should the "circumstances herein warrant an entry of a judgment for interest on the subject claim, and the Commissioner of Education determines that interest should be awarded but is beyond his authority. . . ." Thereafter, the Commissioner transferred the matter on March 11, 1982, as a contested case to the Office of Administrative Law for processing, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq.

At a conference of counsel conducted on April 19, 1982, the following issues were agreed upon:

A. Did the Branchburg Board arbitrarily withhold partial payment of tuition due during the 1980-81 school year?

B. Is the Somerville Board legally entitled to payment of partial tuition by the Branchburg Board for the 1980-81 school year together with interest and legal fees?

C. Did Somerville unreasonably or improperly fail to submit tuition rates to Branchburg prior to December 1, 1979?

D. Has the Somerville Board unreasonably refused to provide minutes of its meetings to the Branchburg Board?

E. Has the Somerville Board unilaterally revised or attempted to revise tuition charges to Branchburg contrary to applicable education law?

F. Is the Branchburg Board entitled to an order of the Commissioner directing the Somerville Board to furnish estimates of tuition rates prior to December 1 for the ensuing school year?

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G. Is Branchburg, in the event that actual enrollment is less than or in excess of estimated enrollment, obligated to pay tuition for the estimated number of tuition pupils subject to applicable statutory and administrative code adjustments?

The necessity to hold a scheduled plenary hearing was obviated by counsel's submission on June 16, 1982, of a complete stipulation of facts with appended exhibits (J-1 to J-16).

FACTS:

I **FIND** the following as stipulated by the parties or otherwise agreed upon in the record to be the facts relevant to this dispute:

Branchburg and Somerville have been involved in a long-standing sending/receiving relationship with respect to Branchburg's ninth through twelfth grade pupils. Through this sending/receiving relationship, Branchburg agrees to purchase educational services for its resident pupils from Somerville High School.

The development of any preliminary high school per pupil cost for future school budget planning purposes is based in part upon estimated enrollment forecasts by both parties, and upon formulae determined by the State Board of Education. Branchburg has no vote on the Somerville Board of Education when it determines the high school programs provided by Somerville either financially or educationally. Both Somerville and Branchburg must be in a position to establish some degree of certitude in developing an adequate source of funds during budget preparation to pay for educational services on the one hand and to anticipate sufficient revenues to properly plan for, staff and operate its high school programs on the other (J-1 through J-4).

Somerville contends this certitude must be attained by having the notification provided from Branchburg to Somerville no later than November of each school year of the estimated Branchburg pupil enrollment which it expects to be in attendance at Somerville High School during the following school year, and by having Somerville notify Branchburg no later than December of each school year of the total amount of revenue anticipated and required from Branchburg based upon estimated per pupil costs to pay its

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tuition for Somerville High School programs and operations for the services provided to Branchburg's resident pupils for the following school year. Branchburg contends this certitude must be attained by having the notification provided from Branchburg to Somerville no later than the end of November of each school year of the estimated Branchburg pupil enrollment which it expects to be in attendance at Somerville High School during the following school year, and by having Somerville notify Branchburg no later than December 15th of each school year of the estimated per pupil costs as determined under rules prescribed by the Commissioner of Education to pay its tuition for Somerville High School programs and operations for the services provided to Branchburg's resident pupils for the following school year (J-1 through J-4).

The Somerset County Superintendent of Schools is charged with the review of the budgets for both Somerville and Branchburg to determine their adequacy. In preparing the 1980-81 budget, the County Superintendent of Schools approved Somerville's budget and disapproved of Branchburg's budget and required Branchburg to revise its budget to meet the estimated tuition charges as shown by Somerville. Branchburg did revise its budget accordingly. Branchburg contends that these facts are not relevant and/or material. Branchburg was subject to a deadline and without this information the Branchburg budget was disapproved because it was based on figures which were pure conjecture. Branchburg contends that this would not have occurred had Somerville furnished the required information at the proper time.

Somerville contends that Branchburg must pay based on the total estimated tuition revenues. Branchburg contends it must pay based on the actual number of pupils in attendance based on the original tuition rate per pupil.

After the close of the fiscal year (June 30th), adjustments to tuition payments, if any, for a given year are accomplished by verification of actual average daily enrollment of high school pupils and actual contractual orders as they relate to the current expense budget for the purpose of providing for upward or downward adjustments upon receipt of approved audited figures from the New Jersey State Department of Education. These audited figures are usually not received from the Department of Education until well into the spring of the succeeding year.

Somerville contends the tuition amount due by Branchburg is payable on a quarterly basis as set forth in J-5 and the amounts were arbitrarily withheld by

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Branchburg as set forth therein. Branchburg acknowledges that J-5 is correct as to the amounts, but denies that the sums were due or overdue, and further denies that it arbitrarily withheld payment.

J-5, shown below in pertinent part, is a recap of billings by Somerville and payments by Branchburg for the 1980-81 year, and is based on quarterly enrollments of Branchburg pupils (J-10) ranging in those quarters from 515 to 519.5 full-time equivalent pupils:

	Date Billed	Amount Billed	Date Due	Date Received	Amount Received
1st Quar.	Oct. 6	$ 363,075.00	Oct. 24	Oct. 23	$ 342,475.00
2nd Quar.	Nov. 26	363,130.50	Dec. 19	Dec. 23	345,467.50
3rd Quar.	Feb. 27	362,730.12	Mar. 20	Mar. 25	344,453.00
4th Quar.	May 1	363,429.75	May 22	May 22	345,135.00
		(Rev. 5/7)			
	Total	$1,452,365.37			$1,377,530.50

Unpaid Balance Claimed by Somerville

1st Quarter	$ 20,600.00
2nd Quarter	17,663.00
3rd Quarter	18,277.12
4th Quarter	18,294.75
TOTAL	$ 74,834.87

Somerville contends that during fiscal year 1979-80, Branchburg not only recognized and acknowledged the correctness of the estimated charges as reviewed by the County Superintendent of Schools and Deputy Commissioner of Education, but also paid those charges based on the procedures hereinbefore set forth in a timely fashion and without withholding any part thereof. Somerville contends Branchburg accepted, acknowledged, and recognized the correctness of the estimated tuition charges by

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Somerville in budgeting those items and in accepting the review of the County Superintendent of Schools, and had in fact a separate account set for these tuition payments in its budget.

Branchburg denies these contentions and contends its payments were in accordance with past practice (J-6 through J-13), except for 1979-80. In 1979-80, Branchburg's "caps waiver" was based on estimated increased enrollments. When these did not materialize, Branchburg was faced with two choices: (1) pay the adjusted tuition, or (2) accept a tax levy adjustment. Branchburg chose the former.

It has been agreed by the parties that Somerville will, in the future, send copies of its minutes and agenda to the Branchburg Board of Education Secretary, and that Branchburg will do likewise. The audited per pupil tuition obligation of Branchburg to Somerville for 1980-81 was $2,800 (Schedule A attached to Petitioner's Brief).

DISCUSSION:

The controlling statute is N.J.S.A. 18A:38-19 which provides as follows:

> Whenever the pupils of any school district are attending public school in another district, within or without the state, pursuant to this article, the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board, and such tuition shall be paid by the custodian of school moneys of the sending district out of any moneys in his hands available for current expenses of the district upon order issued by the board of education of the sending district, signed by its president and secretary, in favor of the custodian of school moneys of the receiving district.
>
> [Emphasis supplied.]

Promulgated pursuant to this statute, N.J.A.C. 6:20-3.1 states in pertinent part:

> (d) A tentative tuition rate may be set by agreement between the receiving district and the sending district, and such tentative rate shall be based upon the estimated cost per pupil for the ensuing school year, as to be reflected in the proposed budget of the receiving district:

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1. If the sending district and the receiving district reach an agreement before January 1, they shall so notify the Commissioner.

2. If the sending district and the receiving district cannot reach agreement on the estimated cost per pupil by January 1, then the tentative tuition rate shall be based upon the actual cost per pupil for the completed school year immediately preceding.

[Emphasis supplied]

3. If the Commissioner later determines that the tentative tuition rate was greater than the actual cost per pupil during the school year for which the tentative rate was charged, the receiving district shall return to the sending district the amount by which the tentative rate exceeded the actual cost per pupil, or, at the option of the receiving district, shall credit the sending district with the amount by which the tentative tuition rate exceeded the actual cost per pupil.

4. If the Commissioner later determines that the tentative rate was less than the actual cost per pupil during the school year for which the tentative rate was charged, the receiving district may charge the sending district all or part of the amount by which the actual cost per pupil exceeded the tentative rate, to be paid not later than during the second school year following the school year for which the tentative rate was paid. For the school year 1979-80, the additional charge is to be paid not later than during the 1982-83 school year.

This is a case wherein the total amount of tuition for Branchburg's pupils for the 1980-81 year is not in question. That figure has been fixed by the audit of the State Department of Education at $2,800 per pupil or a total of $1,450.050. Rather, the dispute is over whether Branchburg was and is obligated to pay the amounts which Somerville billed Branchburg (J-5,10) and whether Branchburg is legally obligated to pay interest charges by reason of having paid lesser amounts than those specified on those billings.

Somerville contends that it is entitled not only to the $74,834.87 that Branchburg was billed but did not pay, and also to the interest thereon from 1980 to the present. Somerville calculates the unpaid tuition obligation as follows:

Somerville's Billings	$1,452,365.37
Branchburg's Payments	1,377,530.50
Balance	$ 74,834.87

[J-5]

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Branchburg, in turn, argues that it is obligated to pay only $72,519.50 which is the difference between the amount it paid for tuition in 1980-81 at the rate of $2,660 per pupil and the audited amount, thus:

Audited Amount	$1,450,050.00
Amount Paid	1,377,530.50
Balance	$ 72,519.50

Branchburg's initial estimate on November 5, 1979, of its full-time equivalent pupils for the ensuing school year was 546. This proved to be an overestimate of 29 pupils.

Somerville's initial estimate on January 3, 1980 of its per pupil tuition costs for 1980-81 was $2,775. It later revised this figure downward, on January 23, 1980 to $2,660.

There is no showing that the two Boards had reached an agreement by January 1, 1980 on what the tuition payments for 1980-81 would be. Since no agreement had been reached by January 1, 1980, pursuant to N.J.A.C. 6:20-3.1, the tentative tuition rate according to the State Board of Education's rule reverted to the then unaudited tuition rate for the preceding school year. Since the actual tuition rate for the prior year was as yet unaudited, it could not have been known and must be interpreted to be the actual amount paid, or $2,576 (J-9). Nevertheless, Branchburg chose to pay and did pay during 1980-81 at the higher rate of $2,660 per pupil. This rate per pupil exceeded the $2,576 rate which it had paid for the 1979-80 school year but was less than the amounts billed, none of which coincided with Somerville's January 3 estimate (J-3). It did, however, coincide with Somerville's January 23, 1980 estimate (J-4).

When a dispute arises over a matter in which there is a statutory scheme providing for the obligations of the parties, the matter must be decided in accordance with that statutory scheme. The statutory scheme in this instance must be considered to embrace the State Board's rule, N.J.A.C. 6:20-3.1 promulgated pursuant to the statute, N.J.S.A. 18A:38-19. Both the statute and the rule speak in terms of a tuition rate which N.J.A.C. 6:20-3.1 specifies shall be based on per pupil cost of the receiving district. In no instance does either the statute or the rule speak of an aggregate cost to be adapted to a

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fluctuating number of estimated or actual pupils enrolled, as petitioner suggests herein. Nor does the statute or the State Board rule rely on actions such as that taken by the County Superintendent of Schools, herein, requiring that the sending district revise its budgeted amount upward to provide for the tuition anticipated in the receiving district's budget.

It is well settled that when interpreting a statute or an agency rule, the words employed by the promulgating agency are to be given their ordinary and well-understood meaning. In this regard, see Safeway Trails Inc. v. Furman, 41 N.J. 467 (1964); U.S. v. Cheeseborough, 176 F. 778 (D.C. N.J. 1910); State v. Sperry & Hutchinson Co., 23 N.J. 38 (1956); Duke Power Co. v. Patten, 20 N.J. 42 (1955); Lane v. Holderman, 23 N.J. 304 (1957); Harry A. Romeo, Jr. v. Madison Bd. of Ed., 1973 S.L.D. 102. We are not free in such interpretation either to stray from the common meaning of the words employed or to interpret in such fashion as to render superfluous the common meaning of the words employed.

Accordingly, I **CONCLUDE** that Somerville's action adjusting its rates on several occasions throughout the year to equal its predetermined total tuition receivable from Branchburg does not comport with either the statute or the State Board rule. I further **CONCLUDE** that, absent an agreement between the Boards on or before January 1, 1980, Branchburg was obligated by law to pay no more than the rate of $2,576 per pupil which it had paid in 1979-80 (J-9). That it chose to pay at the rate of $2,660 per pupil in no way obligated it to pay at the higher rate approximating $2,800 per pupil which was billed by Somerville.

These conclusions are arrived at with full realization that the actual cost per pupil as estimated by Somerville was remarkably accurate once it learned in September 1980 of the actual number of Branchburg's tuition pupils. These conclusions are also arrived at with full consideration of the cash flow problems which can be generated in a receiving district, when a sending district overestimates the number of tuition pupils it will have in an ensuing year. The Commissioner is not at liberty to expand or alter the provisions of either a statutory provision or a rule of the State Board of Education. If a sending district consistently overestimates the number of its tuition pupils, as is alleged herein, the recourse of the receiving district is to appeal to the County Superintendent to direct that a more reasonable estimate be made. In this instance, this was not done. The County Superintendent merely directed Branchburg to

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incorporate into its tuition payable account the amount necessary to pay for the then estimate of 546 pupils at the rate of $2,660 per year. Alternatively, the receiving district may petition the Legislature or the State Board for statutory or rule changes which would alleviate the inequities it believes now exist. I **CONCLUDE,** however, that neither the complaining Board in its billing procedures nor the Commissioner in his capacity as a determiner of disputes is at liberty to supplant or enlarge upon the existing statutory scheme as augmented by the State Board rule. I further **CONCLUDE** that any action of the County Superintendent of Schools could neither alter the statutory scheme nor create an agreement between the parties as Somerville contends.

I further **CONCLUDE** that, since Branchburg's Superintendent was still objecting to certain things in the Somerville Superintendent's prior letters (J-1,3,4) until February 28, 1980 (J-12), an agreement between the parties was not in place on or before January 1, 1980. An agreement necessitates a meeting of the minds on specific responsibilities of the agreeing parties as finalized by verbal or written assent. The facts in this case fail to show that such agreement was reached before January 1, 1980, between Somerville and Branchburg. Nor was it reached thereafter. Absent such agreement by January 1, 1980, Somerville was powerless under existing education law to impose on Branchburg, unilaterally, a higher per pupil tuition rate than that of the prior year.

I also **CONCLUDE** that the fact that Branchburg in the 1979-80 school year chose to comply in full with the higher tuition rates billed by Somerville during that year does not alter the applicability of the scheme set forth in the statute and the State Board rule governing tuition payments in the ensuing 1980-81 school year.

DETERMINATION:

Having arrived at the above conclusions after considering and balancing all of the arguments set forth by counsel, I have **DETERMINED** that Somerville is not entitled to the relief it seeks in the form of an order directing Branchburg to remit the amount of $74,834.87 together with interest thereon for the intervening period of time. Accordingly, it is **ORDERED** that the relief request by Somerville be **DENIED.** Since consideration of the authority of the Commissioner to award interest charges to Somerville would serve no useful purpose, that issue is not addressed herein. It is,

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therefore, **ORDERED** that Branchburg will forthwith forward payment for its 1980-81 tuition as audited in the amount of $72,519.50 less tuition credits to which it is entitled for the 1979-80 overcharge of $19,375.25, thus:

1980-81 Tuition Balance Due	$72, 519.50
1979-80 Tuition Overcharge	19,375.25
	53,144.25

It is further **ORDERED** that a copy of this Initial Decision be forwarded to Judge Dreier who has retained jurisdiction for the limited aspect of the case dealing with the issue of interest charges.

It remains to determine whether the relief sought by Branchburg in the first count of its counterclaim shall be granted. The relief sought is an order of the Commissioner directing Somerville to provide Branchburg with its estimated tuition rate for the ensuing school year no later than December 1 of each year.

It is **DETERMINED** and **ORDERED** that that relief be **DENIED.** While it would be highly desirable to both parties that such an early date be set, the recent history of delays in announcement of amounts of State aid, and all the exigencies which can enter into the supplying of information by both the sending and receiving districts contraindicate the issuance of such an award. The parties are and shall continue to be subject to the guidance and assistance of the County Superintendent as he, in turn, represents the State Department of Education in facilitating such matters affecting the budgets of the respective schools.

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

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OAL DKT. NO. EDU 2323-82

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

October 15, 1982
DATE

Eric G. Errickson
ERIC G. ERRICKSON, ALJ

Receipt Acknowledged:

Oct 19, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

October 20, 1982
DATE

Ronald L. Lakes/jsa
OFFICE OF ADMINISTRATIVE LAW

fms

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OAL DKT. NO. EDU 2323-82

EXHIBITS IN EVIDENCE:

Stipulation of Facts with Exhibits

Exhibit J-1	Dwyer to Pastre, October 31, 1979
Exhibit J-2	Pastre to Pisauro, November 5, 1979
Exhibit J-3	Dwyer to Pastre, January 3, 1980
Exhibit J-4	Dwyer to Pastre, January 23, 1980
Exhibit J-5	Tuition Billings 1980-81
Exhibit J-6	Tuition Billings 1976-77
Exhibit J-7	Tuition Billings 1977-78
Exhibit J-8	Tuition Billings 1978-79
Exhibit J-9	Tuition Billings 1979-80
Exhibit J-10	Tuition Billings 1980-81
Exhibit J-11	Tuition Billings 1981-82
Exhibit J-12	Communication from Pastre and Dwyer
Exhibit J-13	Communication from Pastre and Dwyer
Exhibit J-15	Somerville High School Enrollments 1980-82
Exhibit J-16	Branchburg Enrollments at Somerville, 1977-83

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BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

Somerville in its primary exceptions to the initial decision of the Honorable Eric G. Errickson, ALJ, amongst other recommendations, urges an Administrative Code change which it contends would avoid such disagreements as the present one. Somerville excepts to the wording of the issues set down by Judge Errickson and suggests alternative phraseology. Somerville argues that the key fact in this litigation is the total tuition rate and not the per pupil rate, contending that the important amount relevant to this controversy is an accurate estimate of the total expenditure due it. Somerville contests Judge Errickson's interpretation of the Administrative Code and objects to the Judge's indication of the role to be played in such controversy by the County Superintendent. Somerville refers again to a proposed change in the Administrative Code.

Branchburg's reply exceptions refute those of Somerville and aver that the issues were determined in the prehearing order pursuant to the provisions of N.J.A.C. 1:1-10.1 et seq. which provide the right to object to the issues formulated, which right was not exercised.

Branchburg argues that, under present Administrative Code, the key fact is the cost per pupil as developed from actual audit figures. Branchburg avers, that irrespective of any prospective change in the code, whatever presently exists therein is binding on the parties. The Commissioner finds merit in Branchburg's arguments.

An examination of the record developed in this matter has convinced the Commissioner that his agent, the County Superintendent of Schools, played a proper and sufficient role therein

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by the discharge of his duties prescribed in rules and regulations and by his role as mediator between the parties. The Commissioner finds that the interpretation by Judge Errickson of the pertinent code items herein was a proper one.

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

Accordingly, the Commissioner finds and determines that Somerville is not entitled to the sum of $74,834.87 as requested. Alternatively, Somerville is entitled to payment of $53,144.25 by Branchburg for its 1980-81 tuition. The Commissioner notes that a copy of the initial decision has been forwarded to Judge Dreier who has retained jurisdiction for the limited aspect of the case dealing with the issue of interest charges which are beyond the authority of the Commissioner to award. Bartlett v. Wall, 1971 S.L.D. 163, aff'd State Board 166

The counterclaim by Branchburg for an early estimated tuition rate by Somerville has no merit and is denied.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

December 3, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5887-81
AGENCY DKT. NO. 341-8/81A

GRATTON BUS SERVICE, INC.,
Petitioner
v.
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

APPEARANCES:

Albert S. Parsonnet, Esq. for petitioner (Parsonnet, Duggan & Pykon, attorneys)

William J. Mehr, Esq. for respondent (Cerrato, O'Connor, Mehr & Saker, attorneys)

John A. Selecky, Esq. for intervenor W.A. Anderson Bus Company

John J. Murphy, intervenor

Record Closed September 14, 1982 Decided October 29, 1982

BEFORE **DANIEL B. MC KEOWN,** ALJ:

James A. Gratton (petitioner), president of Gratton Bus Service, Incorporated, challenges the propriety of bid solicitation and subsequent award by the Freehold Township Board of Education (Board) for 1981-82 public school pupil bus transportation. Petitioner also claims that the Board awarded at least two private school bus routes to a bidder (intervenor) whose bids for those two routes were not in conformity with its own

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specifications. The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A plenary hearing was conducted after which the Board filed a Brief in support of its position, while petitioner and intervenor filed letter memoranda, in lieu of Brief.

BACKGROUND

Petitioner, by contract award from the Board, and by its renegotiation with the Board of then existing contracts, provided school bus transportation to the Board's public and private school pupils for at least ten years. Petitioner's wife has been, and is, the person who operates their bus service enterprise on a daily basis. Petitioner, aside from the pupil transportation business, is elsewhere employed on a full-time basis. Mrs. Gratton testified in respect of the fact that, for purposes of pupil transportation with this Board, she communicated only with the Board's director of transportation (director). The sum and substance of her testimony is that the director, through his prior behavior in respect of transportation contracts held by Gratton Bus Service, created a duty upon himself to inform her that contracts then presently held were not to be renegotiated under N.J.S.A. 18A:39-3 and, instead, were to be publicly advertised for bid which asserted duty he allegedly breached in regard to 1981-82 school bus contracts.

The director caused notices of solicitation of bids for all 1981-82 public and private school pupil transportation routes (R-2, R-3) to be published by the Board Secretary in the Asbury Park Press, a daily newspaper with general circulation in Monmouth, Ocean and parts of Middlesex and Mercer counties. These notices were published on July 3, 1981, for public school routes, with a bid return, open, and award date of July 15, 1981. Private school bids were due July 22, 1981. Petitioner did not bid on the Board's public school pupil transportation solicitation. It is said that he was not notified that the routes he was awarded for 1980-81 were not to be renegotiated for 1981-82.

Petitioner contends that because of the prior dealings of the parties, in respect of notice of renegotiation or notice that no renegotiation of existing contracts would occur, he was discriminated against by the director or that there was collusion between the director and other bidders to effectuate his removal as a successful bidder. Petitioner claims that because of the prior dealings with the Board in respect of renegotiation, he failed to seek out legal advertisements published in the Asbury Park

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Press. Consequently, petitioner says, he did not see the legal advertisement of the Board on July 3, 1981, by which it solicited bids for public school pupil transportation routes for 1981-82.

PROOFS

Petitioner learned of the Board's advertised solicitation of bids for 1981-82 public and private school transportation requirements in or about the second week of July 1981. Mrs. Gratton testified that her husband, not having received word from the director in respect of renegotiation of their 1980-81 contracts, called the director. The director was to have informed petitioner then that there was to be no renegotiation because the Board had already advertised for public school transportation bids and that the date for receipt of public school bids had passed. Mrs. Gratton testified that her husband, petitioner, secured the specifications on the private school pupil transportation requirements from the director. Mrs. Gratton testified that she submitted bids to the Board concerning its 1981-82 private school pupil transportation needs on behalf of the Gratton Bus service. Though petitioner was present during the hearing, he elected not to testify.

In respect of private school pupil transportation bids, petitioner's concern here is with routes 331 and 336 because his bids appear to be the lowest. The bid award, however, was made by the Board to Murphy's Bus Service (intervenor).

Mrs. Gratton testified in respect of prior dealings between her and the director and in respect to the alleged collusion by the director and other contractors. She testified that during the ten years Gratton Bus Service held pupil transportation contracts with the Board, the director, ". . . usually by the time school was out . . ." (1T-11), would call her each year and arrange for a meeting in respect of renegotiating the contracts for the following year. If the negotiations were unsuccessful, the Board would then place the routes held by Gratton Bus out to bid. If successful, Mrs. Gratton testified that she would receive a letter from the Board in confirmation that the Gratton contract was renewed for the following year at the negotiated increase.

Mrs. Gratton testified that during these yearly negotiating sessions with the director, both public and private pupil transportation contracts were discussed because

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private pupil transportation contracts did not return sufficient money unless the private pupil contracts could be coordinated with the public school contracts. Mrs. Gratton testified that no negotiation occurred at the end of school in June 1981.

Mrs. Gratton testified that she was always notified by the director, when bids were being solicited, that the bid specifications were ready. Mrs. Gratton testified that for 1981-82 she received no such notice from the director.

Mrs. Gratton testified with respect to contracts held by Gratton Bus Service for 1980-81 that the director personally delivered the bid specifications to either her home or to her office. In fact, Mrs. Gratton testified that the only time she learned the Board was soliciting bids by seeing advertisements in a newspaper was the first year, ten years ago, which the Board awarded Gratton Bus Service its first contract. Each year thereafter, she testified, the director either would commence negotiations on existing contracts held or, in the alternative, would alert her that the Board was soliciting bids and then deliver the specifications to her.

Mrs. Gratton testified in respect of the 1980-81 private school pupil transportation contract. She testified that the Board was unsuccessful in receiving bids on several private school routes. The director had a meeting of all contractors at which, Mrs. Gratton testified, the director was told that the problem of no bids was due to the routing of the routes. Mrs. Gratton testified that she proposed that the director allow zone bussing, which he refused. Again, no bids on certain private school routes were received. Mrs. Gratton testified that the director told her that if Gratton Bus Service would submit a third bid, that he would work with her to resolve any routing problems.

Mrs. Gratton testified that she submitted a bulk bid for several routes for 600 private school pupils at $250 per pupil. Consequently, Gratton Bus Service's bulk bid of $150,000 for 600 private school pupils for 1980-81 was declared by the Board to be low bid, and the private school transportation contract for several routes was awarded it.

A bulk bid is a grand total bid on several routes without submitting individual bids on the several routes. The figure, $250 per pupil, was the maximum allowed by statute, N.J.S.A. 18A:39-3, for per private pupil transportation cost. The figure has since been increased to $325 per private school pupil, L. 1981, c. 57, § 1, effective March 3, 1981. Even with the contract awarded by the Board for 600 private school pupils,

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Mrs. Gratton testified that there were approximately 60 to 100 other private school pupils who were not receiving transportation and whose parents complained. An agreement was reached between the director and Mrs. Gratton whereby the additional pupils would be transported on Gratton busses, on a per diem basis, and they would be transported in the afternoons according to Mrs. Gratton's "zone schedule." Mrs. Gratton testified that sometime in November she asked the director whether she could not put her "zone schedule" into effect in her morning runs. She explained that he refused the request on the grounds that it was illegal to change routes once a contract is awarded and if the routes were to be changed, new bids would have to be solicited.

Mrs. Gratton testified that because she refused to submit to another bid for the private school pupils she was already transporting the director's attitude towards her changed. She explained she received "[t]elephone call after telephone call, he was harassing. He was insinuating at times and sometimes because he is an authority figure, he actually reduced me to tears. I don't think I lost my temper too many times, but there were a few" (1T-28). Mrs. Gratton testified that the attitude of the director, in respect of his efforts to eliminate Gratton Bus Service as a contractor with the Board, is demonstrated by the following letter from the director to her husband:

> Dear Mr. Gratton,
>
> This letter is to inform you that presently your Routes #69 at Howell High School and #319 at Christian Brothers Academy are running at best, erratic.
>
> Numerous phone calls have not corrected the situation satisfactorily. With the advent of extremely cold weather, many students have had to wait for too long for a bus to arrive. Normal breakdowns can and do occur. These two routes have had far too many problems.
>
> We would like to know what your plans are to attempt to resolve these problems. I feel we must remind you that performance on any of your contracts reflects upon your total operation. Any problems that exist and have not been taken care of promptly will be considered at contract renewal time or future bid awards.
>
> If this matter has not been corrected in the immediate future, the necessary steps will be recommended to terminate the contracts.

Mrs. Gratton testified, with respect to 1981-82 private school bids, that she submitted bids only on those routes she felt were "feasible" (1T-40). Intervenor submitted

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a bulk bid on fourteen private school routes, two of which petitioner had submitted bids upon. Petitioner contends that the Board's own specifications require bidders to submit individual bids for each route to be bid upon, rather than to submit bulk bids. Mrs. Gratton contends that had she known bulk bids were acceptable, she would have submitted a bulk bid at a cost less than that submitted by intervenor.

It is helpful at this juncture to reproduce the section of the Board's 1981-82 transportation specifications relied upon by Mrs. Gratton in respect of her view that bids on individual routes were required. The Instructions to Bidders' page of the specifications states:

> In submitting bids, bidders must state unit prices for each item and give extensions and grand totals. The price of each item which the bidder agrees to furnish must be written in ink or typewritten in the blank space provided for it opposite the name of the item for which the price is given. The price of each bid item must be based on the unit as given for each item in the "UNIT PRICE" column, and the total amount for the quantity indicated must be entered in the "TOTAL PRICE" column. Prices for any combination of items will not be considered unless the price for each item is shown separately. Prices submitted in any other manner will not be considered [P-3].

The specifications also advise, on another page:

> Listed below are the individual school routes to be bid upon for the 1981-82 school year. Combined routes are listed separately.

Rt.	School	
200	St. Mary's, Lakewood	* * *
201, 202	Solomon Schechter, Morganville	* * *
218, 219, 220, 221, 222	St. Veronica's, Howell	* * *
300, 301, 302	St. Joseph's, Toms River	* * *
305, 306, 307	St. Joseph's/St. John	see enclosed sheets
330-343	CBA, RBC, St. Leo, St. James, Oak Hill Academy	see enclosed sheets [P-13]

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Of importance here are the routes denominated as 330-343. The "enclosed sheets" (C-1) set forth individual routes numbered 330, 331, and so on through 343. Fourteen routes were involved. Petitioner submitted low bids only on route numbers 331 and 336. Other contractors submitted low bids on ten of the remaining twelve routes. Murphy submitted a bulk bid for all 14 routes, 330 through 343. Other than Murphy's bulk bid, no bids were received for route numbers 335 and 339.

The Board, at its bid open and award meeting, which Mrs. Gratton characterized as an unusually long meeting, compared Murphy's bulk bid for the numbers of pupils to be transported, the annual costs per pupil and per mile, and additional costs per mile to all other contractors' bids for the average costs per pupil and per mile, additional costs per mile, and numbers of pupils to be transported for the individual routes they bid upon. This calculation shows that the Board, had it awarded contracts to the individual low bidders--and without providing transportation to the ninety-four pupils on routes 335 and 339--would have expended $171,868 to transport 566 pupils a total of 70,006 miles, at an average cost of $2.46 per mile and at an average annual cost per pupil of $304. Intervenor's bid, for all 14 routes including routes 335 and 339, was in the amount of $210,000 for 660 pupils, for transporting them over 93,485 miles, at an average cost of $2.25 per mile and an annual cost per pupil of $318. Extrapolating intervenor's average annual cost per mile of $2.25 and multiplying that figure by 23,479, which is the combined mileage for routes 335 and 339, and deducting that sum from intervenor's total bulk bid, the Board determined that intervenor's bulk bid, less routes 335 and 339, would be in the amount of $157,172 for 566 pupils, at a cost per mile of $2.25 and at an annual cost per pupil of $278. Because intervenor's bulk bid included all routes, and because his bid was less than the averages of other contractors on a per mile and per pupil basis, intervenor was awarded the contract for routes 330 through 343.

The director, who has been in that position with the Board for 17 years, testified that the Board has approximately 100 school bus routes. It relies on private school bus contracts to transport about 40 percent of its public school pupils and near 90 percent of its private school pupils. The director testified that the Board uses its own equipment and personnel to transport the remaining pupils eligible for transportation.

The director testified that he has engaged in negotiation of existing contracts as held by Gratton Bus Service for the subsequent school year and that such negotiation must be done by late May. This is so because if the existing contract is not renewed, then

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he must prepare routes, bid specifications and legal advertisements, and have bids submitted and awarded prior to the start of school the following September.

The director testified that he had had much contact with Mr. & Mrs. Gratton during 1980-81 in respect of scheduling problems on their private school routes. He testified that Mrs. Gratton really did assist him in solving such problems.

The director testified that when contracts were signed for 1980-81, he informed all contractors that there would be no renegotiations for 1981-82 because of new schoolhouse additions which, in light of existing staggered sessions, would cause new routes to be established. The director denies ever notifying any contractor on the availability of bid specifications, and he denies ever mailing or personally delivering specifications which were not requested to anyone. The director testified that he would not mail unrequested specifications because of the mailing costs, and that he does not notice anyone that the Board is to bid on certain routes for fear of being charged with favoritism. The director testified that when bids are solicited through newspaper advertisement, there is generally a sufficient response from private contractors for the Board to receive what it considers the most service for the least amount of dollars.

The director testified that he reminded petitioner several times during 1980-81 that all bus routes were to be rebid (2T-144). The director testified that notwithstanding his advice to petitioner that all public school routes were to be rebid for 1981-82, not once did petitioner ask for a set of specifications. The director did testify that he has personally delivered specifications to petitioner, and to others, but only after petitioner and others had requested them.

The director testified that he was aware petitioner had not received specifications for 1981-82 public school routes but that he elected not to call him for fear of being charged with favoritism.

The Board Secretary testified that the set of specifications prepared here for 1981-82 were, for the most part, standard specifications adoptable for school bus bidding or supply bidding. The unit price command (P-3) addresses itself to extensions in respect of supplies; that is, a gross, a dozen, a sleeve, for example, of light bulbs (2T-76). Moreover, the Board Secretary testified in respect of school bus contract awards, points to the Board's reservation to itself the authority to make awards ". . . by parts or <u>in bulk</u> . . ." (emphasis supplied) (P-4).

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This concludes a recitation of the proofs submitted in the matter.

DISCUSSION

N.J.S.A. 18A:39-3 provides authority for boards of education to negotiate extensions of transporation contracts into the following year, without competitive bidding, so long as the negotiated increase does not exceed 20 percent of the original contract amount. (See also, N.J.S.A. 18A:39-2, for increases in multi-year contracts.) But, absent such extension, or multi-year contract, a board is absolutely required to "have first publicly advertised for bids" before it may award a school bus transportation contract, N.J.S.A. 18A:39-3. There is no doubt that this Board did advertise publicly for its 1981-82 public and private school pupil transportation needs. Petitioner's contention, that the prior dealings of the parties, or custom and usage of the trade, somehow led him into a false sense of security to the extent that he ignored public advertisements for bid solicitations, falls short of being supported by credible evidence.

First, both he and his wife have been in the school transportation business at least ten years. They are both experienced business persons. Regardless of how they perceived any communication from the director, they are imputed with the knowledge that their business of contracting for school transporation is governed by statutes. They, petitioner and his wife, are imputed with knowledge that absent an extension to their existing contract, that the routes for which they held contracts had to, by law, be advertised publicly for bid.

Petitioner's contention that the director always had taken the initiative to advise him that specifications were ready, without petitioner having to make the first inquiry, even if true, does not support his contention that prior dealings of the parties require the director to have notified him of the 1981-82 bid solicitations particularly where, as here, there is no evidence to suggest that the director notified all other potential bidders. In fact, the director specifically denies signaling petitioner, or any other contractor, that specifications were ready, without an inquiry from them, in response to when the specifications would be ready. Furthermore, there is uncontradicted testimony from the director that he specifically told petitioner during 1980-81 on several occasions that all contracts for 1981-82 were going to be rebid.

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Certainly in private commercial matters, prior dealings of the parties, together with custom and usage of the trade, are elements toward an understanding of contract terms. But, such elements cannot be invoked to cause a result contrary to underlying public policy in respect of the expenditure of public funds upon proper bid quotations. Petitioner had the same equal opportunity to submit a bid on the public school routes as did all other bidders. Consequently no illegal discrimination is found. Petitioner's failure to see the public advertisement in the Asbury Park Press cannot be imputed to the director. If, in fact, the director personally had told petitioner of the advertisement, without simultaneously telling all other potential bidders, then the director could be seen to be showing favoritism. Moreover, Mrs. Gratton testified that if the negotiations on existing contracts held were not successful the Board would then put the routes she held out to bid. Not having heard from the director by the second week of July 1981, when Mrs. Gratton's testimony shows she should have heard by at least June 30, 1981, or "by the time school was out" shows she, and petitioner, had reason to know the Board was going to bid.

The director's letter, dated January 9, 1981 (P-18), to petitioner, in respect of petitioner's performance on the specifically mentioned routes, does not create "collusion" on the director's part to eliminate petitioner from the Board's pupil transportation business. There is no evidence to suggest that the problem areas identified in that letter were not true. Even the letter, in conjunction with prior dealings of the parties, creates no nexus with collusion. There is no competent evidence to show that the director set out in an illegal design to eliminate petitioner from providing school bus transportation to the Board's pupils.

With respect to the Board's award of the private school routes 330 through 343 to intervenor Murphy, petitioner's reliance on the "unit price" requirement of the specifications to set aside that award is misplaced. Petitioner may not isolate one requirement of the Board's 17-page set of specifications to the exclusion of all other provisions to his benefit and to intervenor's detriment. Specifically, the Board reserved to itself the right to make awards item by item, by parts or in bulk. If the Board had the right to award in bulk, it certainly follows that bidders had the right to bid in bulk. That this is so can be seen by the listing of routes to be bid upon (P-13) where the routes 330 through 343 are stated as one: "330-343."

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Petitioner argues, that in a prior similar case in which the Colt's Neck Township Board was challenged by him in respect of contract awards, this court ruled against him by finding:

> I find that Petitioner failed to submit his bids in material compliance with the specifications. I further find that such failure is due solely to Petitioner's action.
>
> Gratton Bus Service, Inc. v. Bd. of Ed. of Colts Neck, OAL Dkt. No. EDU 5888-81 (Jan. 26, 1982), p. 6, adopted Comm. of Ed. (--).

Petitioner, by quoting that finding from the prior case, suggests that because he now allegedly followed the specifications and submitted individual low bids, that intervenor's bulk bid should be set aside. But, because he followed the specifications here, insofaras his two bids are concerned, does not create a valid inference that intervenor Murphy did not follow the specifications. Concerning the impropriety of the Board's awarding the contract on a bulk-bid basis, petitioner relies on a communication sent out sometime in April 1981 by the Department of Education's Director of Pupil Transportation which advises that contracts awarded for several routes must show a cost for each route (P-1).

Even if that advice can be seen to go to the bid, and not the subsequent contract, a later letter from the same person advised the Board Secretary that there is no basis in law or reputation for stating that "individual route costs must be shown as part of a contract that includes more than one route" (R-6). The proofs do not support petitioner's contention that the specifications forbade bulk bids.

I **FIND, DETERMINE, AND CONCLUDE** that petitioner has failed to carry his ultimate burden of proof on the issues presented and I further **FIND, DETERMINE, AND CONCLUDE** that, insofaras the proofs are before me, the Board has acted properly in respect of the public advertisement of bid solicitations for 1981-82 school bus contracts and the award, on a bulk basis, of routes 330 through 343 to intervenor. The Petition of Appeal is **DISMISSED.**

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

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

October 29, 1982
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

October 29, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 3 1982
DATE

OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 5887-81

DOCUMENTS IN EVIDENCE

P-1 Letter, 4-16-81

P-2 Legal Notice

P-3 thru 17 Bid Package Document, 7-2-81

P-18 Letter dated 1-19-81 to Gratton Bus Service from Robert Niveson

R-1 Bid Submission Form

R-2 Affidavit of Publication, 7-3-81

R-3 Affidavit of Publication, 7-11-81

R-4A Contract Sheet

R-4B Sole Proprietorship or Partnership

R-4C Corporate or Partnership Bidders must complete.....

R-4D Non-Collusion

R-4E Bid Form, Route 218

R-4F Bid Form, Routes 333-343

R-4G Certificate of Employee Information Report Approval

R-4H Blank Affidavit

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R-4I B Letter

R-4J Form Questionnaire Firemens' Fund

R-4K Bid on Proposal Bond

R-4L Agreement of Surety

R-4M Consensus Performance Bond

R-4N Firemens' Performance Bond

R-4P Route Sheet

R-5 Letter of 9-1-81 from Giesguth to Renick

C-1
& 2 Route Sheets

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GRATTON BUS SERVICE, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 13, 1982

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7774-81
AGENCY DKT. NO. 427-10/81A

BOARD OF EDUCATION OF
THE TOWNSHIP OF MAURICE RIVER,
CUMBERLAND COUNTY,
Petitioner
v.
BOARD OF EDUCATION OF THE
BUENA REGIONAL SCHOOL DISTRICT,
ATLANTIC COUNTY,
Respondent.

APPEARANCES:

Rushton H. Ridgway, Esq. for petitioner (Milstead and Ridgway, attorneys)

Michael D. Capizola, Esq. for respondent (Capizola, O'Neill and Fineman, attorneys)

Record Closed September 17, 1982 Decided November 1, 1982

BEFORE **LILLARD E. LAW**, ALJ:

The Board of Education of the Township of Maurice River (petitioner or Maurice River) has, by way of Petition of Appeal, requested the Commissioner of Education to dissolve the present sending-receiving relationship between it and the Board of Education of the Buena Regional School District (respondent or Buena Regional), for the education of elementary and secondary pupils resident in the Township of Maurice River. Respondent, by way of Answer, objects to petitioner's request and recommends that such request be denied by the Commissioner.

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Subsequent to the pleadings having been joined, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Thereafter, on April 1, 1982, a Prehearing Conference was held at which the issues to be determined were agreed to by the parties. A hearing in this matter was conducted on July 19, 1982, at the Buena Vista Township Municipal Court. The parties submitted post-hearing briefs and memoranda and the matter was closed on September 17, 1982.

STATEMENT OF FACTS

Maurice River Township is situated in the extreme eastern section of Cumberland County, bounded by Cape May County to its southeast and by Atlantic County to the east and north. To its west, the Township is bounded by Commercial Township, the City of Millville and the City of Vineland, all in Cumberland County. Petitioner operates an elementary school district, including grades kindergarten through grade eight. Maurice River has had a formal sending-receiving agreement with the Board of Education of the City of Millville to send certain of its post-eighth grade pupils to the Millville Senior High School for the education of such pupils in grades nine through twelve.

Maurice River has had a long-standing, informal sending-receiving relationship (circa 1912) with Buena Regional (and/or its predecessors) to send certain elementary and secondary pupils of Maurice River Township to the Buena Regional School District. Those certain Maurice River resident pupils attending Buena Regional, grades kindergarten through twelve, reside in an area known as Milmay, located in the northeastern section of Maurice River Township, adjacent to and contiguous with Buena Township, Atlantic County (J-1). Maurice River and Buena Regional entered into a contractual agreement for the 1981-82 school year whereby Maurice River agreed to send eighteen elementary pupils and four high school pupils to the Buena Regional School District and to pay the tuition for them (P-1).

During the 1980-81 school year, Maurice River, under its sending-receiving agreement, sent approximately 250 of its resident high school pupils, grades nine through twelve, to the Millville School District (P-2).

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ISSUES TO BE DETERMINED

The issues for determination before this court, and as set forth in the Prehearing Order, are these:

1. Whether there is good and sufficient reason to approve Maurice River Township Board of Education's application to withdraw its K-8 pupils from a sending-receiving arrangement with the Board of Education of the Buena Regional School District?

2. Whether there is good and sufficient reason to terminate the sending-receiving relationship between the Boards of Education of Maurice River Township and Buena Regional with regard to its high school pupils in grades 9-12?

It is petitioner's position that it is under no obligation to continue the sending-receiving arrangement between it and respondent, Buena Regional. It asserts, that prior to the 1981-82 school year, there was no formal written agreement between the parties, but it concedes that an implied contract of a sending-receiving relationship existed prior thereto. Petitioner contends that under the implied contract, it has the right to terminate said agreement upon reasonable notice and that it has given such reasonable notice to respondent.

In the event the termination of the sending-receiving relationship is granted, and to minimize the impact, petitioner has offered to phase out those pupils currently enrolled and attending the Buena Regional High School and to continue to pay their tuition until such time as they graduate from the program.

Respondent, in opposition to petitioner's application to terminate the sending-receiving relationship, sets forth three separate defenses as follows:

1. It is not in the best interests of the Maurice River resident pupils to be withdrawn from the Buena Regional School District.

2. Buena Regional School District constructed new high school facilities partially in reliance upon a long-standing sending-receiving relationship

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between the school districts, and to remove Maurice Township pupils would create a financial hardship on the Buena Regional School District.

3. Transporting pupils to Buena Regional School District is safe and less costly than the alternatives proposed by petitioner.

TESTIMONIAL EVIDENCE

Testifying on behalf of petitioner, the Maurice River Superintendent of Schools stated that petitioner now operates two elementary school facilities for grades K through 8, whereas it had operated three such facilities in the recent past. The Maurice River Board's Leesburg Elementary School houses grades K through two and its Port Elizabeth Elementary School contains grades three through eight. The Superintendent stated that Maurice River was experiencing a decline in its pupil enrollment. He asserted that the elementary pupils living in the Milmay section of the Township, now enrolled in the Buena Regional elementary schools, could readily be absorbed into Maurice River without the necessity of additions to its physical facilities or its professional and non-professional staffs. He contended that some of the educational and instructional services and programs now offered to Maurice River elementary pupils could be placed in jeopardy in the event that the Milmay elementary pupils were not reassigned to its school district. He asserted that the Maurice River Board paid a substantial annual tuition bill to Buena Regional for the education of its Milmay elementary pupils, and that their reassignment to Maurice River would result in a substantial savings to the Maurice River Board (P-2).

The Maurice River Elementary Principal testified with regard to the distances travelled by the Milmay area pupils to the Buena Regional School compared to the distances those pupils would have to travel if the termination of the existing sending-receiving relationship were approved. There was some dispute as to the criteria used for the measurements of the distances; however, the principal stated that the high school pupils residing in the Milmay area currently travelled eleven miles to the Buena Regional High School. If these pupils were withdrawn and sent to the Millville secondary schools, the junior high school's pupils would travel 12.3 miles while the senior high school pupils would travel 11.2 miles from Milmay to Millville. The Milmay area pupils attend two elementary school facilities, Milanesi Elementary and Cleary Elementary, in the Buena Regional School District as tuition pupils. The principal stated that the Milmay pupils attending the Milanesi Elementary School must travel 19.9 miles one way, while those

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attending the Cleary Elementary School travelled 14.9 miles one way. For these pupils to travel to the two Maurice River Schools, the K-3 pupils would travel 20.9 miles from Milmay to the Leesburg School and the pupils in grades four through eight would travel 16.9 miles from Milmay to the Maurice River Elementary School in Port Elizabeth.

The principal testified as to the educational and instructional programs offered to the Maurice River elementary pupils. Among those offerings included, but not limited to, were: full-time librarian, physical education, music instruction in vocal and instrumental music, full-time Child Study Team (CST), three full-time special education teachers, two supplemental teachers and one resource teacher, three compensatory education teachers, gifted and talented program and Student Teacher Enrichment Program (STEP) (P-3, P-4). He conceded that the Buena schools offered a home economics program and shop program that were not available to the Maurice River pupils.

Petitioner offered into evidence enrollment data from the 1977-78 school year up to and including the 1981-82 school year, demonstrating by grade level, the number of pupils in the Maurice River School and the number of Maurice River pupils attending the Millville and Buena schools.

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For convenience, only the 1980-81 and 1981-82 enrollment data are set forth below:

TOTAL ENROLLMENT OF K-12 BY GRADE LEVEL

1980-81

Maurice River		Millville		Buena	
Grade		Grade		Grade	
K	64	9	75	K	2
1	60	10	70	1	3
2	52	11	77	2	2
3	53	12	61	3	3
4	53			4	4
5	61			5	
6	51			6	1
7	71			7	1
8	64			8	3
Spl. Ed.	7			9	2
Spl. Ed.	7			10	1
Spl. Ed.	9			11	
				12	1

1981-82

K	41	9	80	K	1
1	52	10	68	1	3
2	64	11	58	2	2
3	54	12	57	3	
4	50			4	2
5	52			5	4
6	64			6	5
7	63			7	
8	54			8	2
Spl. Ed.	7			9	2
Spl. Ed.	6			10	11
Spl. Ed.	9			11	1
				12	0

[P-7]

In addition, the projected enrollments, including the Milmay area pupils, were set forth for the 1982-83 school year.

Maurice River Township Elementary Schools

Projected enrollment with Milmay students 1982-83

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Grade	Present	Added	Total	Classrooms	No. of Students	No. of Teachers
K	45	0	45	2	45	2
1	43	1	44	2	22	4
2	55	3	58	3	19	3
3	66	2	68	3	24	3
4	56	0	56	3	18	3
5	53	2	55	2	27	2
6	55	4	59	2	29	2
7	70	5	75	3	25	3
8	62	2	64	3	21	3

Millville Public School projected enrollment 1982-83 (including Milmay students Memorial Junior High School)

9	55	2	57
10	76	2	78

Millville Senior High School

11	79	1	80
12	63	1	64

[P-7]

Testifying on behalf of Buena Regional was its former Superintendent, who retired in 1977 after twenty-three years of service in that capacity, and who had served in other positions in the district since 1938. The essence of his testimony was Buena Regional's reliance upon the attendance of the Maurice River pupils from the Milmay area to the Buena Regional in its various construction projects, either to build new facilities or to expand same. The new Buena Regional High School was constructed and it opened for the 1973-74 academic year with the Maurice River pupils projected for enrollment therein. The Buena Regional expanded its Milanesi Elementary School in 1972, the original construction having been completed in 1958, with the Buena Regional projecting the attendance of the Maurice River pupils utilizing the facilities. Similarly, the Buena Regional undertook two expansions of its Cleary Elementary School in 1958 and 1968, with the Maurice River pupils considered in both construction projects. The former Superintendent stated that Maurice River pupils have continuously attended the Buena schools since 1915 or prior thereto. On cross-examination, the former Superintendent conceded that no more than four or five Maurice River pupils attended the Buena High School in any given year since its opening in the 1973-74 academic year.

The present Buena Regional Superintendent testified, among other things, as to the educational and instructional offerings provided to its elementary and middle

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school pupils, comparing its offerings with those of Maurice River (P-3, P-4). It was his opinion that the Buena Regional instructional program and support services were equal to, or better than, those offered to the Maurice River pupils in grades K-8; that the pupil-teacher ratio was better in Buena Regional and that the community of Milmay was more closely aligned to Buena Township than to Maurice River Township because of the social and economic contacts. The Superintendent testified that Buena Regional was also experiencing a decline in pupil enrollment and the withdrawal of the Maurice River pupils would necessitate a reduction in its staff.

The Buena Regional's Board Secretary-Business Administrator testified on direct and cross-examination that its total annual budget for the 1982-83 school year amounted to $7,800,000, with $6,500,000 of that amount appropriated to current expenses. Buena Regional was in receipt of $41,000 in tuition payments from Maurice River for the 1981-82 school year and it projected the receipt of $44,000 for the 1982-83 budget year. The Board Secretary stated that in the event that the Maurice River pupils were withdrawn from Buena Regional, the local taxpayers and other sending districts would be required to make up the difference of approximately $.04 per $100 valuation. The Board Secretary conceded that there was no formal sending-receiving contract between Maurice River and Buena Regional; however, he testified that Buena Regional did have formal sending-receiving contracts with other sending districts as follows:

School District	Contract Terms	No. of Pupils	Grades
Estell Manor	No termination clause	78	9-12
Newfield	10 years	125	7-12
Weymouth	No termination clause	70-75	9-12

The Board Secretary proffered testimony with regard to school bus transportation and the distances pupils travelled from the Milmay area to the Buena elementary and secondary schools. His testimony varied considerably from that of the Maurice River principal and, on his subsequent recall, the Board Secretary recounted his former testimony as to the distance travelled, asserting that his former testimony was incorrect because he had been mistakenly advised. The court, therefore, has excluded that portion of the Board Secretary's testimony to avoid any confusion with respect to the subject of the distances the Milmay area pupils are or would be required to travel.

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Two Maurice River Township residents who reside in the Milmay area testified on behalf of respondent asserting, among other things, that their social, economic, religious and educational contacts were more closely associated with Buena Township than with Maurice River Township. They opined that this was due, in major part, to geography rather than to other reasons. The Milmay section of Maurice River Township is separated from the lower portion of the Township by the Peaslee Fish and Wildlife Management Area which extends southward from Milmay for a distance of approximately nine to ten miles. This was of major concern for the Milmay area residents with regard to the transportation of its elementary pupils to the Maurice River public schools. They asserted that their K-8 children would be required to travel secondary roads, which border the Peaslee Fish and Wildlife Management Area for distances of up to 15 miles, in order to attend the Maurice River Leesburg School. They contended that these roads were not well-maintained; nor were there any houses along a major portion of this roadway at which a school bus driver could summon aid in the event of a breakdown. Both witnesses contended that the best interests of the pupils and community of Milmay would be served by denying Maurice River's application to withdraw from the sending-receiving relationship.

FINDINGS OF FACT

Having carefully reviewed and considered all of the testimony and other evidence offered in this matter and having given fair weight thereto, and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** that:

1. The Statement of Facts set forth hereinbefore is hereby adopted by reference as Findings of Fact.

2. There has been no formal written contract between the parties, setting forth terms and conditions as to a sending-receiving relationship, prior to the 1981-82 school year.

3. In the 1981-82 school year, Maurice River Board paid the Buena Regional Board tuition expenses for eighteen elementary and four high school pupils in an amount of $41,000.

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4. The tuition rate for a similar number of pupils from Maurice River to Buena Regional for the 1982-83 school year is estimated to be $44,000.

5. The $44,000 in revenue is estimated to be equivalent to $.04 per $100 valuation on the Buena Regional local taxation for school purposes.

6. Maurice River has experienced a decline in its elementary pupil enrollment and is able to incorporate those tuition pupils, now attending the Buena Regional schools, into instructional and educational programs without any addition to its staff or its physical facilities.

7. In recent experience (1957-present), and at any one time, there have never been more than four or five high school pupils attending the Buena Regional High School from the Milmay section of Maurice River Township.

8. It has been shown, save the offering of home economics and shop by Buena Regional, that the K-8 programs in Maurice River and Buena Regional are comparable.

9. The Maurice River Board has offered to phase out those pupils currently enrolled in and attending Buena Regional High School until their graduation.

10. There is no significant factor of racial balance involved in this matter.

11. There was no showing that the withdrawal of the Maurice River pupils from Buena Regional would be a significant financial determent or in any manner would jeopardize Buena Regional Board's financial status in the future.

DISCUSSION

Having found such facts, they must now be evaluated in the context of the statutory prescription which mandates that "good and sufficient" reason must be advanced

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for the termination of a sending-receiving relationship. The court observes that the statute addresses only a change or withdrawal of high school pupils in a sending-receiving relationship and that it is silent with respect to such relating to elementary pupils. In any event, the controlling statute, for the determination of this matter, is found at N.J.S.A. 18A:38-13 and provides as follows:

> No such designation of a high school or high schools and no such allocation or apportionment or pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except for good and sufficient reason upon application made to and approved by the commissioner, who shall make equitable determinations upon any such application.

Thus the test applied to the termination of a sending-receiving relationship rests upon "good and sufficient" reasons for an "equitable determination" of a severance.

It is apparent from the facts that no contractual agreement, pursuant to N.J.S.A. 18A:38.20, was in existence between the Maurice River Board and the Buena Regional Board prior to the time petitioner attempted to sever its sending-receiving relationship. The Commissioner has found, under similar circumstances and in the absences of a formal contract, a valid de facto sending-receiving relationship between boards of education. Bd. of the Borough of South Belmar v. Bd. of Ed. of the City of Asbury Park and Bd. of Ed. of the Borough of Manasquan, 1969 S.L.D. 156, aff'd State Bd. of Ed., 1970 S.L.D. 461.

Petitioner's contention that it is under no obligation to continue the sending-receiving practice that has existed heretofore between the parties, and that if there has been an implied contract, petitioner has the right to terminate such an agreement upon reasonable notice, is without a basis in statute, decisional or case law. Whether the contract was express or implied, the statute clearly provides the Commissioner with the authority to make the determination to terminate a sending-receiving relationship grounded upon "good and sufficient" reason. N.J.S.A. 18A:38-13. I **CONCLUDE**, therefore, that a de facto sending-receiving contract exists between the Boards of Education of Maurice River and Buena Regional school districts. I further **CONCLUDE** that the standards as set forth at N.J.S.A. 18A:38-13 control with respect to the termination of such sending-receiving relationships.

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With regard to Maurice River Board's application to withdraw its elementary pupils from Buena Regional, the facts reveal that with its declining enrollment, Maurice River can absorb and incorporate the approximately 18 tuition pupils in grades K-8 into its educational program without the addition to staff or of physical facilities. Moreover, the inclusion of those pupils will provide Maurice River the opportunity to continue some instructional programs it might otherwise discontinue because of its declining enrollment. The Milmay pupils are, in fact, resident pupils of the Township of Maurice River. Their parents pay taxes to support a thorough and efficient system of education in the Township of Maurice River. The withdrawal of these pupils from the tuition rolls will, in effect, benefit the pupils as well as the Township of Maurice River at large by a reduction in the Board's expenses. There has been no showing that Buena's instructional program is superior to that of Maurice River; nor has there been a showing that Maurice River's educational offerings for its K-8 pupils are inferior to those of Buena's.

Taking into account the Milmay residents' concern with respect to the transportation of its pupils over poorly maintained secondary roads passing through sparsely populated areas, I do not **FIND** that alone to be persuasive to defeat petitioner's application. Given the standards for school bus safety, construction and maintenance promulgated by the State Board of Education, coupled with the obligation and responsibility of the Maurice River Board to monitor its school bus routes and time schedules, an incident of breakdown could well be managed within a reasonable amount of time and with a minimum of disruption.

Accordingly, I **CONCLUDE** that the Maurice River Board of Education has, by a preponderance of the relevant and credible evidence, established good and sufficient reason to terminate its elementary pupil sending-receiving relationship with the Buena Regional Board.

Based on the above conclusion, it logically follows that all the pupils attending the Maurice River public schools would best be served by attending a single high school system. In the Matter of the Application of the Board of Education of the Township of Liberty for the Termination of the Sending-Receiving Relationship with the Board of Education of the Town of Belvidere, Warren County, 1975 S.L.D. 431. The benefits of efficiency, economy and the convenience of continuity of educational program and services, which now exist between the Maurice River Board and the Millville Board, convince this court that the Milmay area pupils would best be served by the termination

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of the present sending-receiving relationship. This in no manner suggests nor infers that superior educational opportunities exist in the Millville junior and senior high schools as compared with those opportunities offered by the Buena Regional Board. No such inference is intended nor made herein.

Petitioner, Maurice River Board, has offered a phased severance for its high school pupils now attending Buena Regional. This offer, made in good faith, is to minimize the effect upon those pupils now enrolled in the Buena High School with respect to their ongoing education program, their social contacts and planned graduations. To disrupt those pupils by requiring them to attend another secondary school at this juncture would serve no useful purpose and would not be in their best interests.

CONCLUSIONS AND ORDER

Accordingly, I **CONCLUDE** that the Maurice River Board of Education has, by a preponderance of the relevant and credible evidence, established good and sufficient cause to terminate its sending-receiving relationship with the Buena Regional Board of Education.

It is **ORDERED**, therefore, that those pupils residing in the Milmay section of the Township of Maurice River who are or will be eligible to enroll in grades kindergarten through grade eight will cease to be tuition pupils in the Buena Regional School District, commencing September 1, 1983, and will present themselves to be enrolled in the Maurice River public schools.

It is further **ORDERED** that those pupils from the Milmay section of Maurice River Township who will be eligible to enroll in the ninth grade commencing September 1, 1983, will present themselves to the Millville City Schools for enrollment as tuition pupils from the Township of Maurice River and pursuant to the sending-receiving relationship between Maurice River and Millville.

It is finally **ORDERED** that those tuition pupils from the Milmay section of Maurice River Township currently enrolled will continue to attend the Buena Regional High School until the time of their graduation in June 1986, when the phased severance of the sending-receiving relationship for those pupils will be completed.

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

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

1 November 1982
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

11/1/82
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 5, 1982
DATE

Ronald L. Parker, Jr.
OFFICE OF ADMINISTRATIVE LAW

ij

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EXHIBITS

For the Petitioner:

P-1 Tuition bill issued to Maurice River from Buena Regional High School District for months of February 1982, re: four high school pupils and eighteen elementary pupils.

P-2 Tuition bill issued to Maurice River from Millville Board of Education for month of March 1982.

P-3 Exhibit A-1, Support Staff.

P-4 Exhibit A-2, Basic Instructional Program. Exhibit A-3, (Continuation).

P-5 Exhibit B-1, Total Enrollment of K-12. Exhibit B-2.

P-6 Total Enrollment: Buena, Millville and Maurice River Township.

P-7 Projected Enrollment, Milmay pupils, 1982-83.

Joint Exhibits:

J-1 Map of Cumberland County with addition.

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BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own with the correction noted below. On page 6 of the initial decision in the table of enrollment data, the 1981-82 Buena Grade 10 pupil enrollment should be correctly designated as one (1) pupil.

Accordingly, the Commissioner determines that the Maurice River Board of Education has established good and sufficient cause to terminate its sending-receiving relationship with the Buena Regional Board of Education. N.J.S.A. 18A:38-13 Further, the Commissioner finds that the Buena Regional School District will not be seriously affected educationally or financially by the withdrawal of the Milmay area pupils. N.J.S.A. 18A:38-21

It is further determined that all pupils of the Milmay section of the Township of Maurice River in grades K through 8, presently enrolled or eligible to enroll in Buena Regional School District commencing September 1, 1983, shall not be in attendance at Buena Regional School District but shall be enrolled in existing Maurice River Public Schools.

It is further determined that those 9th grade pupils in the Milmay section of the Township of Maurice River commencing September 1, 1983, shall be appropriately enrolled in the Millville City Schools pursuant to the sending-receiving relationship between these two districts.

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It is further determined that those high school pupils from the Milmay section of Maurice River Township presently attending Buena Regional High School shall be permitted to complete their high school education there.

The Commissioner is constrained to emphasize the need for the thoughtful establishment and close supervision of all transportation routes necessitated by the physical characteristics of this sprawling geographical area.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

December 15, 1982

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4529-81

AGENCY DKT. NO. 269-7/81A

LAWRENCE IVAN AND
THOMAS MURRAY,
Petitioners

v.

BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT AND DR. PAUL HOUSTON, SUPERINTENDENT OF SCHOOLS; JOHN SAKALA, PRINCIPAL OF PRINCETON HIGH SCHOOL; BOTH INDIVIDUALLY AND AS EMPLOYEES OF THE PRINCETON REGIONAL BOARD OF EDUCATION,
Respondents.

APPEARANCES:

Melvin S. Narol, Esq. for the petitioners (Jamieson, McCardell, Moore, Peskin, & Spicer, attorneys)

William F. Hartigan, Jr., Esq. for the respondents (McLaughlin & Cooper, attorneys)

Record Closed September 17, 1982 Decided October 29, 1982

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

Petitioners appeal the decision of the Board of Education of the Princeton Regional School District (Board) transferring them from their teaching positions in Princeton High School to teaching positions in other schools in the district.

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The Commissioner of Education transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. After a second prehearing conference, five days of hearings were conducted (May 17-21, 1982) in the Office of Administrative Law, Trenton.

Documents were received in evidence, several witnesses testified, and briefs were filed after the hearings.

This litigation began on July 15, 1981, when the petitioners (Ivan and Murray) filed an Order To Show Cause With Temporary Restraints and Verified Complaint against the Board and Dr. Paul Houston, Superintendent of Schools, and John Sakala, Principal of Princeton High School, individually, and as employees of The Princeton Regional Board of Education, in the Superior Court of New Jersey, Chancery Division, Mercer County. Honorable William A. Dreier transferred the matter to the New Jersey State Department of Education.

After the matter was transferred to the Office of Administrative Law, oral argument was presented on August 11, 1981, on the application by Ivan and Murray for a Temporary Restraining Order to permit them to remain in their present teaching positions in the Physical Education Department at Princeton High School for the 1981-82 school year, pending a hearing on the merits of the case. By written opinion and by Order on the same date, the undersigned administrative law judge (ALJ) concluded that Ivan and Murray had presented a prima facie case that the Board acted in bad faith in deciding to transfer them from their teaching assignments at Princeton High School. The ALJ, therefore, granted the application by Ivan and Murray for a Temporary Restraining Order.

On August 13, 1981, the Board appealed the ALJ's Order to the Commissioner. The Commissioner, by written decision and by Order dated September 8, 1981, reversed the ALJ's decision and dissolved the Temporary Restraining Order.

On the same day, September 8, 1981, Ivan and Murray made an application to seek a stay and leave to appeal to the New Jersey State Board of Education. Petitioners assert that they were advised by a Deputy Attorney General that the State Board was not able to consider this emergent request in a timely manner.

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On September 9, 1981, in the Superior Court of New Jersey, Appellate Division, Ivan and Murray filed a Notice of Motion for Leave to Appeal and for Emergent Relief. Oral Argument was heard before a full panel (Honorables Robert A. Matthews and Sylvia Pressler). An Order Granting Temporary Relief in an Emergent Matter was entered granting the Notice of Motion for Leave to Appeal by Ivan and Murray and staying the Commissioner's decision and reinstating the Temporary Restraining Order which had been issued by the ALJ, permitting Ivan and Murray to remain at Princeton High School.

On September 10, 1981, the Board moved before the Supreme Court of New Jersey (Honorable Alan Handler) to vacate the Order of the Appellate Division. Following consideration by the full Court, the Court granted the Board's motion on September 10, 1981, to vacate the Appellate Division's Order and reinstate the September 8, 1981 decision and the Order of the Commissioner. Ivan and Murray were thus involuntarily transferred from their teaching assignments at Princeton High School.

Petitioners originally set forth ten issues of alleged violations, or causes of action, against the Board. After the second prehearing conference on February 5, 1982, these issues were revised, further delineated and are now summarized in petitioners' brief as follows:

1. Were the petitioner high school teachers involuntarily transferred in bad faith?

2. Were the petitioner high school teachers involuntarily transferred in violation of their due process and equal protection rights under the federal and state constitutions?

3. Were the actions by the Board of Education at its June 2, 1981 public meeting violative of the New Jersey Open Public Meetings act?

DISCUSSION

A board of education has the inherent power to tranfer teaching staff members within the scope of their certification. N.J.S.A. 18A:25-1 provides that:

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> No teaching staff member shall be transferred except by a roll call majority vote of the full membership of the board of education.

The right of a school board to transfer teachers has been upheld consistently by the courts of this State and by the Commissioner. Greenway v. Camden Bd. of Ed., 129 N.J.L. 461 (1943); Downs v. Hoboken Bd. of Ed., 12 N.J. Misc. 345 (Sup. Ct. 1934), aff'd, 113 N.J.L. 401 (E & A 1934); Cheeseman v. Gloucester City, 1 N.J. Misc. 318 (Sup. Ct. 1934). In Clark v. Bd. of Ed. of Margate, 1974 S.L.D. 678, 690, aff'd, State Board of Education 1975 S.L.D. 1082, aff'd, App. Div. 1976 S.L.D. 1134, the Commissioner stated that teachers "have no entitlement to a specific position of employment but may be transferred by formal action of the local board of education to another position within the privileges of their teaching certificates."

Therefore, the law has been established in New Jersey that the right to transfer a teacher rests in the "sound discretion of the board of education," Downs v. Bd. of Ed., supra, and that absent a clear abuse of such discretion or evidence of bad faith in such action, the board's action should be upheld. Downs v. Bd. of Ed., supra. The courts have recognized that the actions of local boards of education may be challenged, however, if bad faith can be demonstrated by the complaining party. Greenway v. Bd. of Ed. of the City of Camden, supra.

Petitioners assert that the facts in this case support the conclusion that the transfer process with respect to Ivan and Murray was arbitrary, in bad faith and was instigated by a personal and professional conflict between Murray and the Principal of Princeton High School (Principal). This conflict allegedly was triggered by the Principal's administrative change of a failing grade given by Murray to a pupil in one of his physical education classes.

Murray had been a teacher in the district for twenty-two years. He lives in Princeton and was educated in its school system. In his challenge to his transfer, Murray defended his performance, asserting in a letter to the Superintendent that every one of his evaluations, during eighteen years at the high school, had been excellent (R-4). There was no refutation of this statement by the Board.

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At the conclusion of the second unit (grading period), which ended on January 27, 1981, Murray issued a failing grade in physical education to L.M., the daughter of the President of the Board of Education, which he asserts led to his eventual transfer. Murray testified that there are 24 class meetings in a unit and that L.M. had been absent from his class on nine occasions during the first unit. Murray sent two notices to L.M.'s home regarding her absences; however, he testified that he received no response from L.M.'s parents and that L.M. received a passing grade for unit one. During the second unit, L.M. was absent from class on 19 occasions. Murray testified that he sent two notices to L.M.'s home, was in constant contact with the guidance department concerning these absences and had conferenced with L.M. Murray testified further, that L.M. was eighteen years of age and, as an adult, could write her own excuses. Murray testified also, that he had received excuses from L.M. for five absences including one that he received three days prior to the end of the second unit for an injury to her ankle. This testimony is unrefuted.

Murray testified that pupils are required by school policy to attend class even when medically excused, and that during those times the excused pupils are required to "monitor" the class. (My interpretation of this statement, in the context of petitioner's testimony, is that pupils who are unable to participate in physical education are required to observe and be knowledgeable of the activities presented.)

Murray learned later that L.M.'s failing grade had been changed administratively by the Principal who did not consult him prior to making the change. Believing that the original grade was merited and that it was in accordance with school policy and his professional judgment, a grievance was filed expressing Murray's dissatisfaction over the manner in which the change was effected. The record shows that Murray, having never before been disciplined or transferred, met with the Principal on March 20, 1981, to discuss his grievance; however, the Principal would not withdraw his administrative grade change (P-4). Copies of this memorandum by the Principal of the subject of that meeting, were sent to five persons, and Murray asserts that Ivan, who was the physical education coordinator and Murray's immediate colleague in the high school, openly and vocally supported him through the events leading to the grievance.

Prior to these occurrences culminating in the grade change, Ivan testified that the Principal called a meeting of the physical education staff in his office on January 14, 1981. Several staff members were in attendance, including both petitioners, and Ivan

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testified that the subjects addressed in that the meeting were: budget, bleachers, class load, morale, control of comments, and the return of the physical education staff for the coming year. Ivan testified that the Principal said that the members of the physical education staff would remain in their same positions for the 1981-82 school year. Ivan habitually took notes at all meetings he attended and he made notes of that January 14, 1980 meeting. (I noticed that Ivan took notes during the five days of these hearings. Also addressed in the meeting was program and attitude of staff members (P-1). Ivan's testimony was corroborated by Murray who testified that the staff, having earlier been concerned with a possible reduction in force, was pleased with the Principal's comments because they indicated that Ms. J.C., a first-year teacher, would be reemployed. Murray testified that the Principal stated that "things look good for the entire staff to return intact."

Regarding the change in L.M.'s grade, Ivan testified that school policy for absence from physical education required a medical excuse for absences of three to six days. When the pupil brought in the required note, the school nurse would call home to check it out; then the excuse was recorded in the physical education teacher's record book.

Murray testified that he received L.M.'s medical excuse two to three weeks after the marking period had ended. Ivan testified similarly that the physical education department was involved in the third unit when he became aware of L.M.'s medical excuse. The controverted medical excuse is dated January 27, 1981 (the day the second unit ended), and is reproduced below.

> L. has been ill the entire fall (since October til now) because of infectious mono hepatitus [P-2].

This note is written on a prescription sheet and signed by L.M.'s personal physician.

Murray testified further, that the Princeton Regional Education Association (PREA) filed the aforementioned grievance concerning the grade change; however, he testified that he approved of the grievance (P-3, P-5). Murray testified that he believed the grievance expressed professional concerns, not personal disagreements, and that he believed that in any event that the entire matter had been resolved by April 1, 1981, when PREA officers notified the Principal in writing of its concerns and future expectations regarding medical excuses and grade changes (P-5).

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On April 16, 1981, the Principal called Ivan and Murray to his office. The PREA building representative attended this meeting. As he usually did, Ivan made notes of this meeting. Ivan and Murray testified similarly that the Principal told them for the first time that they would be transferred from the high school. When asked why, the Principal offered a number of reasons.

Murray testified that the Principal told them that he was "not satisfied with the [physical education] program," and that he also said "Tom [Murray], you tried to cut my throat." Murray testified that the Principal stated that the Superintendent believed that a transfer would be a "good educational opportunity," that Murray could be "revitalized" and that he'd be better off in "a more structured situation." Murray testified further that he had three areas of disagreements with the Principal and that his transfer was the culmination of their differences.

Ivan testified that the Principal simply stated "Tom, you're going to John Witherspoon school," and "Larry (Ivan), you're going to Littlebrook school." When Ivan asked why, he testified also that the Principal said "because of program." Also, the Principal told him that the transfers would be good for them, and further stated that transfers would take place for "reasons of revitalization" and "rejuvenation."

Both litigants attested that prior to this meeting on April 16, 1981, there had been no meetings with the Principal, the Superintendent, nor the Board concerning any change in staffing of the physical education department for the coming 1981-82 school year.

In consideration of this statement, it is reemphasized here that Ivan was the physical education coordinator. Further, the record shows that the Board had closed an elementary school, effective at the end of the 1980-81 school year and that its entire K-6 elementary school staff had to be reassigned or handled administratively as needed. In an effort to meet the expressed desires of those elementary school teachers who would be reassigned, the administration designed a flyer for all elementary school teachers to fill out stating their individual preferences concerning reassignment. This flyer advised the elementary school teachers that their preferences would be weighed against the district's need to provide balance between male/female teachers as well as its need to consider racial balance and seniority.

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A meeting was convened in the Principal's office again on May 22, 1981. At that time, petitioners, their attorney, the Principal and the Superintendent were present. Ivan testified that, at this meeting, the Superintendent gave them the reasons for their transfers. The reasons included "need to be revitalized" and reasons of "race, sex [and] seniority." An interrogatory answer by the Superintendent stated that "industry has used the transfer of personnel for years as a method of maintaining freshness in the operation. The method has application for education also" (P-24).

The Superintendent testified that the Board had set goals for the 1980-81 school year which included concerns about the physical education department as well as about other instructional areas. He testified that the Board had looked at art, and had reorganized the mathematics and the science curricula and that a restructuring of music was underway. In support of this testimony, R-2 was introduced which states in part: "The system will begin a review of its Physical Education/Health/Family Life programs." (emphasis added)

The Superintendent testified that he was trying to find out about the philosophy of his staff, their wants and needs when the questionnaire was issued to all of the teachers in K-6 schools, in part because the Johnson Park elementary school was closing.

Regarding the January 14, 1981 staff meeting called by the Principal, the Superintendent testified that he directed that all principals call meetings for the purpose of discussing staff for the coming school year. He testified further that the principals were told not to discuss teacher assignments, but to notify teachers that there would be changes. The record shows that no such instruction occurred at that high school meeting and that the teachers left believing that staffing would be "intact" for the coming school year (P-1). Staffing was discussed by the Principal and he issued no notification of prospective changes.

Regarding L.M., the Superintendent testified further that he had not learned of any grade change as late as February 1981, and that he had had no discussions with the Principal or with L.M.'s parents regarding L.M.'s physical education grade. He testified that he was not aware of the grievance filed about the grade change until the Principal informed him about it late in March 1981. Further, he testified that even at that time he did not know what the grievance was about.

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With respect to the events leading to the transfers, the Superintendent testified that the district administrators began discussing staff changes in March 1981, and that they focused on several areas, including physical education. He testified that neither the high school Principal nor the middle school Principal was satisfied with his physical education program. The Superintendent testified that his philosophy is "that movement is good for people" and that each of the district's physical education teachers was discussed. After discussion of proposed changes giving consideration to the district's needs to maintain some sort of balance based on ethnicity, sex, and seniority, the consensus of the administration was to transfer five physical education teachers.

The Superintendent testified also that the Board first became aware in May, through comments from students and townspeople, of Ivan and Murray's allegations that their transfers were based on vindictiveness, and he testified that the Board was not even aware of the grievance until May 19, 1982.

Under cross-examination, the Superintendent testified that he had no formal meetings with the Principal concerning the transfer of Ivan and Murray; however, he had had a number of informal discussions concerning their transfer. His testimony indicated that discussions concerning Ivan came up shortly after the high school Principal first came to Princeton. The Superintendent testified that he discussed his concerns about rejuvenating a number of people. He defined rejuvenation as getting a new perspective on life — getting a different view of things — a new outlook.

Concerning Murray, the Superintendent's perception was that Murray was unhappy. He testified that he observed Murray briefly in the classroom a "couple of times" over a period of four years. The Superintendent determined that Murray was unhappy because of things he had read about him in the newspapers and that he could tell from "the look on his face" that there was a "general sourness." The Superintendent testified that Murray was "miscast in his role as a high school physical education teacher today." He testified further that Ivan needed rejuvenation because he had been in the high school a long time and was unable to adjust his program in accord with that directed by the Principal. He testified also that he had no personal knowledge that Ivan's ideas and the Principal's ideas did not coalesce and that he had not talked about that subject with the Principal.

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The record indicates that the Superintendent gleaned some of his information from newspaper reports which indicated that Murray allegedly was not happy with the "feeder" program for the high school wrestling team, that he had criticized the new gymnasium and that a lot of people had told him, since he had arrived in Princeton, that Murray was unhappy. The Superintendent testified further that these criticisms came from parents and pupils who reported that Murray's classes were like being in the army.

The Superintendent testified finally that the district administrators conveyed to him that certain staff members needed rejuvenation. When the high school Principal conveyed to the Superintendent his belief that Ivan and Murray were not happy in their positions, the Superintendent testified that he thought Murray would be happier in another school.

L.M.'s father, who was president of the board during the 1980-81 school year, testified that he may have heard his daughter mention that she had failed physical education but "I didn't focus on it." He testified further that he was aware that his daughter had not been attending class regularly.

Two board members testified and their testimony indicated that the transfers of Ivan and Murray were based on professional recommendations from district administration.

The high school Principal testified that staffing was discussed with high school physical education teachers at the meeting he called on January 14, 1981. He testified further that at the administrator's staffing discussions he made no suggestion that either Ivan or Murray be transferred from the high school, although he does not recall who made that suggestion. The Principal testified that it was possibly the middle school Principal and that he envisioned the transfers as being beneficial to the physical education program of the high school. He admitted recommending the transfers of the five teachers as a unit.

The Principal was generally critical of the program conducted by Ivan and Murray. He complained that Murray was outspoken and that, as a result, the district lost $2,000 in support from the police for bleachers because of Murray's criticism of "dead spots" on the gymnasium floor. Despite the fact that the Principal found considerable

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fault with these teachers, the administrative counsel, nonetheless, recommended that one be transferred to the middle school and the other to an elementary school. This testimony indicated that Murray and Ivan would do the job for their new Principals, and the Principal contends that their transfer was not a punishment.

Regarding the physician's note given to L.M., the Principal testified that he saw L.M. in the hallway on two occasions, and it was at one of those meetings that she became aware that she needed a medical excuse for her absences from physical education. The Principal conceded in his testimony that normal procedure would be for a medical excuse to be presented before the end of the marking period and not after a grade was given and that the note ordinarily would be handled through the school nurse who would notify the guidance department. In this instance, the Principal testified in his deposition that upon his receipt of the physician's note explaining that L.M. had been ill, he sent a written memo to the guidance department with the note attached and asked the guidance person to change L.M.'s grade to a medically excused grade (P-25). He testified further that he told Murray on January 28, 1981, that he had given L.M. a medical excuse. The grievance on Murray's behalf, filed March 20, 1981, was out-of-time according to the Principal; however, he considered it in fairness to Murray. The Principal testified further at the hearing that he was unaware of Ivan's involvement with Murray at the time of the grievance hearing in his office in March. Further, he stated that he did not know of Ivan's involvement with Murray until the end of Ivan's testimony on the first day of this hearing before the Office of Administrative Law.

Regarding the statement by Murray that the Principal said, "Tom, you've cut my throat," the Principal testified as follows: At this April 16, 1981 meeting, Murray and Ivan asked more questions although Mr. Murray asked the majority of the questions. The meeting became heated and the Principal testified that he found it difficult to stay out of that excitement. During the excitement of the moment, the Principal stated that he intended to say, "although you've cut my throat I really have no reason to take that right away from you and not give you an opportunity to speak in public and I always considered that to be your right"; however, only the words "although you've cut my throat" came out at that point. He testified that Murray then stood up from his chair, pushed it back angrily, and stormed out of the room and he believes that he stunned Larry (Ivan) and Jim (Manzer) too, because they sort of meekly followed him out of the room.

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Based on the testimony in its entirety at the hearing, the documents in evidence and the totality of the circumstances and events leading to these transfers, I **FIND** and **CONCLUDE** the following.

Ivan and Murray were transferred because of the recommendations of the high school Principal to the Superintendent who in turn recommended their transfers to the Board. The Superintendent testified that the high school Principal may have made the recommendation (P-26, p. 23). The Principal's testimony, that although he did not recall who on the administrative council made the suggestion that they be transferred, and that it was probably the middle school Principal, is simply not believable.

That statement lacks credibility because of several attendant circumstances.

a. The high school physical education staff was informed on January 14, 1982, at a meeting called by the Principal, that the physical education staff would remain intact for the coming 1981-82 school year. This staffing meeting was ordered by the Superintendent who testified that he directed the principals to tell the staff that there would be changes in the coming year. The Principal did not advise the staff according to this directive.

b. The grade change and grievance followed the change in L.M.'s grade where the positions between the Principal and the PREA became formalized and the PREA openly asserted its expectations concerning future grade changes (P-3, P-5). I **CONCLUDE** that this action was unsettling to the Principal, as shown in his testimony concerning the "excitement" of the meeting on April 16, 1981.

c. The testimony concerning the lack of a good physical education program, that Murray and Ivan were unhappy, that they needed rejuvenation, and that they needed to be revitalized, cannot be supported by the totality of the record.

The record shows that both teachers had long service with the Board (19 and 22 years) and were well thought of in the community, as evidenced by the transcript of the public meeting held on June 2, 1981. Nevertheless, the Superintendent testified about

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perceptions of Murray being unhappy and about informal discussions he had with the Principal concerning his perception of Murray and Murray's interests. The Superintendent's testimony, that he knew Murray was unhappy by "the look on his face," that there was a "general sourness" about him, and that Murray was "miscast in his role as a physical education teacher today" has a false look of genuineness.

Further, the Superintendent testified that Ivan needed rejuvenation because he had been in the high school too long and was unable to adjust his program in accordance with the program needs desired by the Principal. Nevertheless, he testified also that he had no personal knowledge that Ivan's ideas, and those of the Principal, did not coalesce.

The Principal testified that he and Murray disagreed on a number of principles. They were itemized as follows:

1. Murray was outspoken in public.
2. Murray disagreed with him on school policy.
3. Murray disagreed with him on student control.
4. Murray disagreed with him concerning more rigid procedures in the high school.
5. They disagreed about the wrestling program.
6. The Principal expressed his displeasure with the physical education program as reported to him by community members.

Concerning the many criticisms of Murray, and of the physical education program as viewed by the Principal and by the Superintendent, the record does not show that there was even one meeting with the physical education department, or a conference with the petitioners indicating any attempt to improve the ongoing physical education program. Further, there was no refutation of petitioners' testimony that they were following the Board's curriculum guides (P-9, P-10) and there were no observations or evaluations of petitioners' classes indicating in any way that their physical education programs were inappropriate. Despite all of the criticisms of and disagreements about the programs, as expressed by the Principal, he testified, incredibly, that he had observed Murray several times in the classroom during the course of the year and that he had given him good reports.

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In an overview of the entire hearing, it can be seen that Murray was described as unhappy. The Superintendent testified that there was a general sourness about him and that he could see it in Murray's face. Nevertheless, there is no indication in the record that anyone ever spoke to Murray concerning his being unhappy or generally sour. The Superintendent testified that petitioners would be revitalized and that their transfer would provide a good educational opportunity; however, prior to their notification of transfer on April 16, 1981, neither petitioner was ever told that there was a need to be revitalized. The Superintendent testified that Murray would be better off in a "structured situation"; however, no one ever told Murray that his classes lacked structure. As a matter of fact, the only evidence of observations during the entire hearing were those testified to by the Principal, and he gave Murray what he identified as a good report. Further, Murray's testimony that every evaluation of his performance over the past 18 years was excellent was unrefuted; nevertheless, the record developed by the Principal indicates that Murray's program was inappropriate.

There was no refutation of the testimony that pupils who are medically excused from physical education are nonetheless required to monitor the class activities. Here, L.M.'s failing grade was changed without any notification to or inquiry of petitioner. Murray believed that he had good reason to challenge the manner in which the change was made. Support for this conclusion is found in the Principal's own testimony in which he conceded that the regular procedure was not followed with respect to the submission of a written excuse by L.M. for missing class. This scenario leads to the conclusion that the publicity this event received through the PREA was upsetting to the Principal, and it was only after the meeting Murray had with the Principal in March, at which time he refused to change L.M.'s grade to that established by Murray, that the transfers were announced. Coincidentally, the Superintendent testified that the administrative council discussions of transfers began in March 1981.

The Superintendent testified that upgrading the physical education curriculum was one of the Board's goals in 1981-82; however, the evidence (R-2) establishes only that physical education would be reviewed. Further, without any physical education department meetings or any expression to any of the physical education teachers of dissatisfaction with the program or dissatisfaction with the performance of Ivan and Murray, a precipitous transfer was announced to them on April 16, 1982.

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The Board argument that five physical education teachers were involved in its transfer is lacking substantively in relation to that which really occurred. First, when the determination was made to remove Ivan and Murray, there was a need to replace them at the high school. Therefore, they were replaced by two teachers from John Witherspoon school with 28 and 21 years experience. Because Ivan and Murray were separated, that is, Ivan was transferred to John Witherspoon school and Murray was transferred to Littlebrook school, there developed the need to take the fifth teacher from Littlebrook and assign him to John Witherspoon, replacing one of the two senior teachers replacing petitioners.

With due respect for the district's attempts to maintain "racial/ethnic, sex, and seniority" balance, all that really happened was that two white male high school teachers with 22 and 19 years experience were transferred and replaced by two white male teachers with 28 and 21 years experience. The fifth teacher involved had 11 years experience. I find that the only legitimate attempt to maintain any balance for race, sex, and seniority purposes, was the questionnaire sent to all K-6 elementary school teachers on February 23, 1981, asking them to state their assignment preferences. The record indicates that neither Murray nor Ivan nor any teacher in any other grade -- other than those in K-6 -- in the system were given any such questionnaire (P-6).

Based on the foregoing analysis of the testimony and evidence and in consideration of the circumstances presented in this matter, I **CONCLUDE** that the Principal and the Superintendent acted arbitrarily and in bad faith by recommending to the Board that Ivan and Murray be transferred.

Based on the testimony of two Board witnesses, I believe that the Board acted in good faith, albeit on the basis of the Superintendent's arbitrary and bad faith recommendation. The Superintendent's testimony, in support of his reasons for the transfers of Ivan and Murray, is specious, and the evidence in that regard is far from persuasive.

The Board in this matter followed the recommendation of the Superintendent who testified that the recommendation for transfer was made by the administrative council and "may" have been made to him by the Principal. Consequently, the Board itself

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cannot be faulted for the action it took in transferring the two individuals. However, when a Board merely acts in affirming a recommendation of a Superintendent and that recommendation itself is based on arbitrary and unreasonable grounds, the propriety of that action must also be examined to see if it must be set aside.

The State Board of Education decision in Patricia Meyer, v. Bd. of Ed. of the Borough of Sayreville, Middlesex County, 1972 S.L.D. 673, reversing the Commissioner's decision, stated in part as follows:

> If the Board members, as they testified, merely followed the Superintendent's recommendation without any inquiry or other independent judgment, then an examination of the Superintendent's reasons for his recommendations is clearly proper in the circumstances. We cannot conceive that there is any less and unconstitutional deprivation of re-employment where a Superintendent, for an unconstitutional reason, makes a recommendation that is automatically approved, for all practical purposes, than a determination made by a Board itself for an unconstitutional reason. The constitutional protection to petitioner, in either case, is destroyed. The fear of administrative difficulty concomitant with the struggle of two union organizations for bargaining power does not stand tall against the constitutional rights of persons in public employment to organize. New Jersey constitution of 1947, ART. 1, PAR 19; Zimmerman v. Board of Newark, supra.; Burlington Co. Evergreen Park Mental Hosp. v. Cooper, 56 N.J. 579 (Sup. Ct. 1970).

In the instant matter, there is no union organization bargaining for power; nevertheless, we are confronted with an action taken by the Board which I **CONCLUDE** was based on the arbitrary and bad faith recommendation of the Principal and of the Superintendent. Consequently, the Board's action must be set aside and Ivan and Murray are entitled to be reinstated in the Princeton Regional High School.

Petitioners argue that the Board's transfer was also violative of their rights under the first amendment to the United States Constitution. Specifically, petitioners contend that it was the frankness on their part — and the fact that they made their disagreements known publicly — which led to their involuntary transfer.

The weight of the evidence gives support to petitioners' contentions that their transfers were made as a retaliation for their words and actions contesting the grade change made by the Principal. Similarly, petitioners assert that their transfers were

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violative of their rights to due process of law and equal protection under the 14th amendment to the United States Constitution and article 1 of the New Jersey Constitution. However, there is no conclusion which must be reached on these constitutional grounds issues because, as already stated, petitioners have prevailed on the facts and on the merits in the instant case.

Finally, petitioners contend that the public meeting of the Board held June 2, 1981, was conducted in violation of N.J.S.A. 10:4-12(b)(8) and that therefore their action should be declared void.

Suffice it to say again that petitioners have prevailed on the merits. Nevertheless, from my review of the Open Public Meetings Act, I cannot conclude that the statute cited gives an employee the right to a hearing or even to address the Board. The statute does provide the employee with the right to request that the matter affecting him be discussed in public. In the instant matter, the record shows that the Board did not intend to discuss these transfers in closed session. The June 2, 1981 meeting was a public meeting for which advanced notice had been given and the townspeople were aware that the subject of transfers would be discussed at that meeting. Consequently, I **FIND** no violation of the Open Public Meetings Act. (Rice v. Union County Regional High School Bd. of Ed. 155 N.J. Super. 64 (App. Div. 1977) (Olevari v. Carlstadt - E. Rutherford Bd. of Ed., 160 N.J. Super. 131 (App. Div. 1978).

Based on the testimony, the documents in evidence, and the decisional law applicable to the present matter, the Board is **ORDERED** to reinstate Ivan and Murray to the positions they held prior to their involuntary transfers from the high school.

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

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OAL DKT. NO. EDU 4529-81

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

29 October 82
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

11/1/82
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov 8, 1982
DATE

Ronald L. Parker/jm
OFFICE OF ADMINISTRATIVE LAW

ij

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DOCUMENTS IN EVIDENCE

P-1	Ivan notes of meeting with Sakala on January 14, 1980
P-2	Medical excuse by Dr. Silverman dated January 27, 1981
P-3	Statement of grievance March 20, 1981
P-4	Respónse by Sakala March 23, 1981
P-5	Document by Princeton Regional Educational Association April 1, 1981
P-6	Questionnaire to K-6 teachers February 23, 1981
P-7	Memorandum of Committee
P-8	Ivan's notes of meeting with Sakala April 16, 1981
P-9	Curriculum Guide, p. 31 1980-81
P-10	Curriculum Guide, p. 31 1981-82
P-11	Seniority list P.E. January 22, 1981
P-12	Memorandum - seniority -assignments July 29, 1981
P-13	Memorandum -transfers - (Houston) May 29, 1981
P-14	Agenda June 2, 1981
P-15	Superintendent's statement
P-16	Letter to Dr. Houston May 28, 1981
P-17	List of transfers handed out at meeting June 2, 1981
P-18	Board minutes June 2, 1981
P-19	Tape recordings (3) 90 minutes each — with the condition that a transcript will be provided.
P-19a	Transcript June 2, 1981
P-20	Agreement, PREA & Bd 1980-82

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P-21 None

P-22 Board Policy Manual

P-22a Photocopy, Equal Employment Opportunity

P-22b Photocopy, Professional Staff Assignment & Transfer

P-23 Stipulations regarding note of Dr. Silverman

P-24 Interrogatory Answers, 22 and 23

P-25 Deposition of Sakala by Narol

P-26 Deposition of Dr. Houston by Narol

P-27 Middle States Report November 1978

R-1 Deposition of Sakala by Hartigan

R-2 Administrative Goals for 1980-81

R-3 Board minutes May 19, 1981

R-4 Letter from Murray to Houston May 4, 1981

R-5 Letter from Houston to Murray May 13, 1981

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LAWRENCE IVAN AND THOMAS MURRAY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT AND DR. PAUL HOUSTON, SUPERINTENDENT OF SCHOOLS; JOHN SAKALA, PRINCIPAL OF PRINCETON HIGH SCHOOL; BOTH INDIVIDUALLY AND AS EMPLOYEES OF THE PRINCETON REGIONAL BOARD OF EDUCATION, MERCER COUNTY,	:	DECISION
RESPONDENTS.	:	

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

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

The Board excepts to the determination by the Honorable August E. Thomas, ALJ that it must reinstate petitioners to their prior positions. The Board alleges that Judge Thomas sets forth only a one-sided view favoring petitioners' stance and in so doing fails to give credence to the testimony of administrators and Board members. The Board relies on Clark v. Rosen et al., 1974 S.L.D. 678; aff'd State Board, 1975 S.L.D. 1082; aff'd N.J. Superior Court App. Div., 1976 S.L.D. 1134 wherein was said that teachers

> "have no entitlement to a specific position of employment, but may be transferred by formal action of the local board of education to another position within the privileges of their teaching certificates.***" (at 690)

The Board argues that, in the matter presently controverted, the Board while thoroughly considering the recommendations of administration also made an independent review of the transfers. Petitioners' reply exceptions refute those of the Board and affirm the initial decision by Judge Thomas. The Commissioner looks with favor on the arguments presented by the Board.

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A thorough examination of the record herein, including the documents submitted in evidence, the testimony of witnesses and the tapes of meetings of the Board, convinces the Commissioner of the propriety of the Board's action. The Commissioner views with favor and adopts as his own the arguments advanced by the Board in its exceptions:

> "The law is well settled that a presumption of validity attaches to school board action and such action will not be overturned unless it is arbitrary, capricious or unreasonable. Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd o.b. 46 N.J. 581 (1966). This rule has been adopted by and reiterated by the Commissioner of Education consistently over the years. In Bradley v. Board of Education of Borough of Freehold, 1976 S.L.D. 590, the Commissioner set forth the standard to be applied in reviewing the action of a school board to transfer teachers. He stated:
>
> > 'A Board of Education may transfer teaching staff members pursuant to N.J.S.A. 18A:25-1. Such a transfer may be based upon the board's determination that the teaching staff member, or the individual school, or the entire community or a combination thereof may individually or collectively benefit by such a tranfer. For a teaching staff member who is transferred to establish that the underlying reasons for such an action are improper or illegal requires substantial proof that the board acted in a manner which was illegal, or improper and to the exclusion of all other bonafide reasons. In the instant matter petitioner failed to sustain this burden of proof.'
> >
> > (emphasis supplied)
>
> "Such a position is consistent with the holding by the Supreme Court of New Jersey in Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144, 156 (1978), wherein the Court discussed the significance of the board's inherent managerial responsibility in connection with the assignment of its teaching staff members." (at p. 17)

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The Commissioner finds and determines that, although petitioners objected to their transfer, they were transferred within the scope of their teaching certificates and suffered no reduction in compensation, tenure or seniority rights. The Commissioner cannot agree that the Board took action in the present matter to transfer the teachers without proper and thorough discussion and analysis of the impact on the district and the reactions of teachers and parents alike. An analysis of the taped recordings of the Board meetings (P-19) clearly reveals such discussions. The Commissioner finds no evidence to prove the contention of petitioners that the Board's action in transferring them was to punish them in retaliation for the filing of a grievance.

Finally, the plethora of evidence and arguments and counter arguments in this matter convinces the Commissioner that ample opportunity has been afforded the parties to express the merits of their relative positions. Accordingly, the request for Oral Argument before him is denied.

For all the foregoing reasons, the decision of Judge Thomas ordering the reinstatment of petitioners is herewith set aside. The Commissioner finds and determines that the Board's action in tranferring teachers within the scope of their teaching certificates was a proper one and shall not be disturbed. Petition is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 16, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3329-81
AGENCY DKT. NO. 172-5/81A

ROBERT SCHWAB,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF MANASQUAN, MONMOUTH COUNTY,
Respondent.

APPEARANCES:

Thomas W. Cavanagh, Jr., Esq. for petitioner (Chamlin, Schottland, Rosen and Cavanagh, attorneys)

Vincent C. DeMaio, Esq. for respondent

Record Closed September 30, 1982 Decided November 4, 1982

BEFORE LILLARD E. LAW, ALJ:

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Borough of Manasquan (Board), alleges that he was denied an employment and adjustment salary increment for the 1981-82 school year without just cause and in violation of his procedural and substantive statutory and constitutional rights. Petitioner seeks an order from the Commissioner of Education requiring the respondent Board to pay his improperly denied adjustment salary increment for the 1981-82 school year. The Board admits that it withheld petitioner's increment; however, it denies all other allegations as set forth by petitioner.

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This matter was transmitted from the Commissioner to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. On October 20, 1981, a prehearing conference was conducted with counsel for the parties at which the issues to be determined by this court were set forth together with certain stipulations and agreement as to hearing dates. A hearing was held on February 23 and 25, 1982, at the Manasquan Municipal Court and was continued on April 28, 1982, at the Manalapan Municipal Court. The parties submitted post-hearing briefs and memoranda of law, and the matter was closed on September 20, 1982.

ISSUES TO BE DETERMINED

The parties agreed, at the prehearing conference, that the issues to be determined by this tribunal are these:

1. Whether the Board's action to withhold petitioner's employment increment was for inefficiency or other good cause, pursuant to N.J.S.A. 18A:29-14.

2. Whether the Board was required to give petitioner notice of its intention to withhold petitioner's employment increment.

3. Did the Superintendent by his affirmative representation create an obligation for notice?

THE STATUTE

The statute, N.J.S.A. 18A:29-14, under which the Board asserts grants it authority to withhold petitioner's increment and under which petitioner brings this appeal, provides as follows:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the

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action of the board of education or direct that the increment or increments be paid. The Commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

STIPULATIONS

The parties stipulated that petitioner was in receipt of the Board's action to withhold petitioner's increment within ten days of said action, pursuant to N.J.S.A. 18A:29-14. The parties also stipulated as to the factual context of Joint Exhibits marked and moved into evidence as J-1 through J-9.

TESTIMONIAL EVIDENCE

The testimony adduced at hearing demonstrated that petitioner is a mathematics teacher with 23 years' experience assigned by the Board to teach seventh and eighth grades. Prior to the 1980-81 school year, the Board had initiated a computer program for its gifted and talented pupils, employing a part-time teacher for the subject area. Sometime in May 1980, the school's principal asked petitioner to assume the responsibility for the microcomputer program in September 1980 for the 1980-81 academic year. Both the principal and petitioner were aware of petitioner's lack of experience and training in the area of microcomputers. Nonetheless, petitioner accepted the responsibility and the principal was pleased that he did so. Subsequent to the close of 1979-80 school year, petitioner went to Europe sometime during the summer of 1980. Upon his return in August 1980, petitioner borrowed a computer and computer book from the school for the purpose of familiarizing himself with the instrument and program prior to the opening of school in September 1980. Petitioner was offered assistance by the principal and area supervisor prior to and subsequent to the opening of school; however, he declined to take any additional schooling or training in the subject area of computer science and technology. The principal monitored petitioner's computer instruction and observed in November 1980 that petitioner was having difficulty with the subject matter. In December 1980, the principal held a meeting with petitioner, the area supervisor, the elementary school supervisor who had the primary responsibility for the development of the Board's gifted and talented pupil program and the Superintendent in attendance. The principal had made a commitment to the school community that the gifted and talented microcomputer offering would be continued in the instructional program and, having

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realized petitioner's problems and lack of interest, was authorized to relieve petitioner of this teaching duty and to negotiate with the teacher who had taught this course the previous year. Commencing in the latter part of January or the first part of February 1981, petitioner was relieved of this teaching duty and the previous year's teacher, a college instructor, assumed the responsibility for direct pupil instruction after school hours while petitioner remained assigned to assist pupils who wished to use the microcomputer during the school day.

Counsel for petitioner objected to this line of testimony, contending, among other things, that the Board had failed to provide a nexus between the gifted and talented pupil computer program and its documented evidence in support of its reasons to withhold petitioner's increment. The basis for petitioner's counsel's objection was grounded on the Superintendent's previous testimony in this matter, wherein the Superintendent disclaimed that the gifted and talented program played a role as to the reasons given to petitioner for petitioner's increment withholding.

The Board's policy presumedly requires the observation/evaluation of its tenured teaching staff members twice each academic year. Its observation/evaluation report rates the teacher as "satisfactory," "needs improvement," and/or "unsatisfactory" in the areas of "instructional" and "non-instructional" performance. Petitioner was observed/evaluated by the area supervisor on December 9, 1980, and on April 10, 1981 (J-2, J-6); by the Superintendent on March 24, 25 and 27, 1981 (J-4); and by the principal on March 31 and on April 1 and 9, 1981 (J-5). The area supervisor's observation/evaluation of petitioner, dated December 9, 1980 (J-2), was based upon three direct observations of petitioner's class performance and stated, in part, "By district standards, your performance to date has been satisfactory" (J-2). The document, J-2, indicated that all areas of the instructional program were rated "satisfactory" with two areas marked "needs improvement." The document, J-2, also showed that all areas of petitioner's non-instructional performance were marked "satisfactory," with one identified as "needs improvement." In his narrative, the area supervisor included three one-line sentences as to "need improvement" and three paragraphs of "recommendation" with respect thereto. The area supervisor did not rate petitioner "unsatisfactory" in areas under consideration in the observation/evaluation report (J-2), nor was there reference to an increment withholding. Petitioner submitted a rebuttal to the area supervisor's observations/evaluation on or about January 5, 1981 (J-2).

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On March 23, 1981, the area supervisor met with the Board, in closed session, with the Superintendent in attendance, at which the area supervisor submitted to the Board Staff Summary Reports (J-3). Included therein was a summary of comments made by the area supervisor with regard to petitioner's performance based upon three observations and one evaluation (J-2). Petitioner was in receipt of a copy of the Staff Summary Report together with a covering letter from the area supervisor (J-3). The Staff Summary Report indicated that petitioner's overall performance was rated as "satisfactory" for the period of September 1980 through March 1981 (J-3). The area supervisor orally reported to the Board, on March 23, 1981, that it was his conclusion petitioner was performing at the "satisfactory" level despite his expressed concerns in regard to petitioner's performance with the microcomputers and the eighth grade algebra program. The area supervisor had not formed an opinion nor was there any discussion of petitioner's increment withholding at the March 23, 1981, closed Board meeting.

On March 24, 1981, the principal met with the Board in closed session, with the Superintendent present, to discuss personnel matters. However, since petitioner's name had not appeared on the agenda for that meeting, the principal was not prepared to answer questions put to him by Board members with respect to petitioner's performance and declined to do so.

On March 24, 25 and 27, 1981, the Superintendent observed petitioner's classroom performance, subsequently filing the observation/evaluation report on April 1, 1981 (J-4). The Superintendent rated petitioner as unsatisfactory or needing improvement in: class preparation, presentation of materials and contributions to school growth. Suggestions for improvement included the areas of classroom management and professionalism. The Superintendent made nine recommendation to petitioner and concluded that he was "considering not recommending (petitioner) for a salary adjustment for the school year 1981-1982" (J-4). The observation/evaluation form further indicated that the Superintendent would consult with petitioner's supervisors and would advise petitioner of his final decision with regard to petitioner's increment. The area supervisor and the principal were not made aware of the Superintendent's observations of petitioner's classroom activities until after the occurrence.

On March 26, 1981, the principal called a meeting with petitioner, the area supervisor, the elementary supervisor and the principal to duscuss the concerns raised by Board members with regard to petitioner's teaching performance. After answering some

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of the questions placed to him, petitioner declined to answer other questions, requesting that another meeting be held at which he could be represented by a member of the Manasquan Education Association. The meeting lasted approximately one hour and it was agreed that a subsequent meeting would be held, pursuant to petitioner's request.

On March 31 and April 1, 1982, the principal conducted two of three observations, the third having been held on April 9, 1981. The results of these observations/evaluations will be developed, post.

On April 1, 1981, while the area supervisor was in consultation with the Superintendent about a budget matter for the mathematics department, the supervisor recalled the Superintendent making a casual remark that he was considering withholding petitioner's salary increment. This was a short conversation characterized by the supervisor as a "casual reference." In any event, a meeting arranged by the Superintendent and scheduled for April 8, 1981, for the administrators to discuss petitioner's evaluations was rescheduled for April 13, 1981.

Prior to a Board closed work session scheduled for April 7, 1981, the Superintendent prepared an agenda which included, among other things, item no. 4, "Recommend that Robert D. Schwab not receive a salary adjustment for the 1981-82 school year as per Board Policy No. 322 'Withholding an Increment' and that his salary remain the same as during the 1980-81 school year" (J-9). On April 8, 1981, subsequent to making his recommendation to the Board to withhold petitioner's salary increment, the Superintendent met with petitioner, the local education president and a staff representative of the New Jersey Education Association (N.J.E.A.) to discuss petitioner's status with respect to the Superintendent's observation/evaluation report of April 1, 1981 (J-4), wherein the Superintendent commented that he was considering withholding petitioner's salary increment for the 1981-82 school year. The Superintendent advised those present that he had not yet made the decision as to whether to recommend the withholding of petitioner's increment and that he would undertake a further evaluation of petitioner before he made his final determination. The Superintendent asserted that he would contact either of the two representatives prior to making his final recommendation to the Board.

Petitioner and/or his representatives wish to be advised in the event the Superintendent was to recommend the withholding of petitioner's increment in order for

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them to attend the public Board meeting on April 14, 1981, and argue against the Superintendent's recommendation. The Superintendent did not advise petitioner, the local education president or the N.J.E.A. representatives on April 8, 1981, that his recommendation to withhold petitioner's salary increment appeared on the Board's closed work session agenda on April 7, 1981, nor did the Superindentent make contact with petitioner or his representatives prior to the Board's action on April 14, 1981, to continue petitioner's 1981-82 salary at the same rate as his 1980-81 salary (J-9). The reason given by the Superintendent for his failure to notify petitioner and/or petitioner's representatives of his final decision was "the press for time."

On April 10, 1981, the area supervisor held his second observation of petitioner's teaching activities. In his observation/evaluation report, the area supervisor found petitioner to be satisfactory in two of the four instructional areas, while needing improvement in all four. The area supervisor similarily found petitioner to be satisfactory in all four non-instructional areas, but needing improvement in all four. The area supervisor did not find petitioner to be unsatisfactory in any of the above eight evaluated areas (J-6).

On April 13, 1981, the Superintendent met with the principal, the area supervisor and the elementary supervisor for the purpose of discussing petitioner's evaluations. The principal testified, among other things, that the Superintendent was concerned that his evaluations of petitioner's performance rated certain areas as "unsatisfactory" while the principal's and area supervisors' evaluations rated these same areas as "needing improvement." The principal stated that he had reviewed these areas considered unsatisfactory by the Superintendent and specifically noted that petitioner's performance was not unsatisfactory in each as indicated by the Superintendent. The principal's observation/evaluation report indicated that petitioner's performance was satisfactory in six of the eight areas to be considered with two areas needing improvement (J-5). The principal testified that the Superintendent made the decision on April 13, 1981, to withhold petitioner's increment to which he disagreed; however, the area supervisor agreed with the Superintendent as did the elementary supervisor, who performed no observations or evaluations of petitioner's performance during the 1980-81 school year. The principal stated that he was opposed to the withholding of petitioner's increment on the grounds that petitioner's work was not unsatisfactory and, further, that petitioner had not been given ample opportunity to correct these areas rated "unsatisfactory" by the Superintendent.

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On April 14, 1981, the Board voted upon the Superintendent's recommendation of a teachers' contract salary list for the 1981-82 school year, which contained, in part, the following:

Elementary School		
. . .		
Schwab, Robert D.	25B	($)22,020
. . .		

[J-9]

Subsequently, the Board's Secretary/Business Administrator forwarded a letter, dated April 15, 1982, to petitioner which stated, as follows:

> Dear Mr. Schwab:
>
> At the regular Board of Education meeting held on April 14, 1981, the Manasquan Board of Education voted to withhold your salary adjustment for the 1981-82 school year. Therefore, your salary will be $22,020.00.
>
> The Board of Education acted upon the recommendation of the Superintendent of Schools, Harry Morris, upon his observation, evaluation and consultation with your Area Supervisor, Dr. Charles Hayne, and Principal, Fred Lockenmeyer, in review of their observations and evaluations of your performance for the 1980-81 school year.
>
> The Board has taken such action for deficiencies as noted in your evaluation reports in the following areas:
>
> 1. Preparation and presentation of adequate lesson plans in a timely manner.
>
> 2. The planning and presentation of classroom instruction to provide satisfactory instruction to your students.
>
> 3. The lack of enthusiasm and variety of methodology to provide the proper motivation for the students under your instruction.
>
> The Board of Education strongly encourages you to follow the recommendations for improvement in these and other areas prescribed in the evaluation reports of Mr. Morris, Mr. Lockenmeyer, and Dr. Hayne. (J-8)

FINDINGS OF FACT

Having carefully reviewed and considered all of the testimony and other evidence offered in this matter (see Index of Exhibits attached hereto), and having given

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fair weight thereto, and having observed the demeanor of the witnesses and assessed their credibility, I FIND that:

1. Petitioner is a tenured teaching staff member with the Board, having twenty-three years teaching experience at the time of hearings in this matter.

2. In the 1979-80 school year, the Board initiated a microcomputer program for its gifted and talented pupils in grades six through eight, employing a college instructor part-time to perform the direct pupil instruction.

3. In May 1980, the principal asked petitioner to assume the responsibility for the microcomputer program commencing in September 1980 .

4. The petitioner and principal understood petitioner's lack of expertise in the area of microcomputers; nonetheless, petitioner agreed to the assignment and the principal was delighted that he had done so.

5. Petitioner travelled in Europe during the summer of 1980, and was not available to take any training in the use and instruction of microcomputers, nor was there any showing that he would have done so.

6. The principal and the area supervisor offered petitioner opportunities to take training in the use and instruction of microcomputers; however, petitioner declined such offers.

7. In January or February 1981, petitioner was relieved of his teaching duties in the microcomputer program, and the direct pupil teaching assignment was assumed by the former teacher of the program on a part-time basis.

8. The part-time teacher instructed the gifted and talented pupils enrolled in the microcomputer program during the evening hours while petitioner continued his assignment to assist the pupils with the equipment during the school day.

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9. The principal had made a commitment to the school community to continue and to maintain the microcomputer program for the gifted and talented pupils.

10. On December 9, 1980, petitioner was observed and evaluated by the Board's mathematic/science area supervisor who set forth satisfactory ratings in four of the four areas under instruction, with two of the four areas rated as needing improvement. Under the non-instructional areas, the supervisor rated all four areas as satisfactory, and one area as needing improvement (J-2).

11. The area supervisor did not rate petitioner's performance as unsatisfactory in any area observed or evaluated (J-2).

12. On March 23, 1981, the area supervisor met with the Board in closed session with the Superintendent in attendance. At this meeting, the area supervisor submitted his Staff Summary Report of petitioner's performance from September 1980 to March 1981 (J-3).

13. The area supervisor's overall rating of petitioner's performance was "S," or satisfactory (J-3).

14. On March 24, 25 and 27, 1981, the Superintendent observed petitioner's classroom performance, and on April 1, 1981, he filed an observation/evaluation report asserting that petitioner's performance was unsatisfactory or needed improvement in: class preparation, presentation of materials, contributions to school growth, classroom management and professionalism (J-4).

15. The Superintendent advised petitioner that he was considering recommending the withholding of petitioner's increment for the 1981-82 school year, and subsequent to the Superintendent's consultation with other school administrators, the Superintendent would advise petitioner as to his decision (J-4).

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16. On March 31 and April 1, 1981, the principal observed petitioner's classroom activities and rated petitioner as satisfactory in six of the eight categories, while finding that improvement was needed in two of the eight. The principal did not find petitioner's performance to be unsatisfactory in any area under consideration (J-5).

17. On April 7, 1981, the Superintendent recommended to the Board, at a closed session, that petitioner's salary adjustment increment be withheld for the 1981-81 school year (J-9).

18. On April 8, 1981, the Superintendent met with petitioner, the local education association president and a representative of the N.J.E.A. for the purpose of discussing petitioner's status with respect to the Superintendent's comment that he was considering recommending to the Board the withholding of petitioner's increment (J-4).

19. The Superintendent advised petitioner and the two association representatives that he had not made his decision to recommend petitioner's increment withholding.

20. The Superintendent asserted to petitioner and to the two association representatives that he would undertake further evaluation of petitioner's performance and would contact either of the two representatives prior to making his final recommendation to the Board.

21. The Superintendent did not inform nor advise petitioner or the two association representatives on April 8, 1981, that his recommendation to withhold petitioner's salary increment appeared on the Board's closed work session agenda on April 7, 1981 (J-9).

22. The Superintendent failed to keep his commitment to petitioner and to the two association representatives and advise them of his decision to withhold petitioner' increment prior to the regular Board meeting held on April 14, 1981.

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23. The Superintendent's failure to advise petitioner and/or his representatives of his recommendation to withhold petitioner's increment was incredible and misled them into believing that the Superintendent had not so recommended to the Board.

24. At a meeting held on April 13, 1981, with the Superintendent, the principal, the area supervisor and the elementary supervisor in attendance, the principal advised against withholding petitioner's salary increment grounded, in part, on the absence of evidence to support the withholding and on the lack of sufficient time for petitioner to make improvements based upon the Superintendent's unsatisfactory ratings.

25. On April 14, 1981, the Board, at its regular monthly meeting, approved and adopted a contract salary list of teachers' salaries for the 1981-82 school year. Petitioner's name and salary were among those so listed at the annual salary of $22,020.

DISCUSSION

There is little doubt that a board of education is vested with the authority to withhold a teaching staff member's salary increment. In so doing, the Board must comport with the statutory requirements as well as with the notice requirement embodied in the teacher's protected rights of due process.

With regard to the former, N.J.S.A. 18A:29-14 clearly provides that a "board of education may withhold, for inefficiency or other good cause, the employment increment . . . of any member in a year by a recorded roll call majority vote of the full membership of the board. . . ." and, "It shall be the duty of the board . . . to give written notice of such action, together with the reasons therefore, ..." (Emphasis added)

The record before this tribunal does not demonstrate that the Board, in fact, adopted a resolution "by a recorded roll call majority vote of the full membership of the board" to withhold petitioner's increment. The only evidence presented herein shows merely that the Board adopted a salary list upon which petitioner's name and salary appear for the 1981-82 school year. Nor is there a showing that in its action to withhold petitioner's increment that the Board stated any reasons for such action. The only

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evidence proffered in this regard is the Superintendent's recommendation, on the April 7, 1981, agenda, to withhold, absent any stated reasons whatsoever. The absence of an affirmative resolution forthrightly setting forth the Board's action to withhold a teacher's increment, coupled with the lack of its stated reasons to so withhold, does not comport with the statutory mandate. This absence of a duly adopted resolution deprives this Board—and future boards—of a clear and unmistakable record of its action. The Board's lack of a duly adopted and separate resolution withholding petitioner's salary increment for the 1981-82 school year fails to comport with the spirit and letter of the law.

While it is recognized that the statute, N.J.S.A. 18A:29-14, does not provide a teaching staff member the right to a hearing prior to an action by a Board to withhold a salary increment, it is clear that the Superintendent imposed a duty upon the Board to give notice, either to petitioner or to his representatives, prior to the Board's action on April 14, 1981. The Superintendent's affirmative assertion to petitioner and to his representatives that he would, in fact, advise them of his final determination left no doubt in their minds that the Superintendent would give them such notice.

The Superintendent's exculpating remark that he failed to advise petitioner and/or his representatives because of the "press of time" is in review of the totality of circumstances, incredible. The Superintendent's testimony was both inconsistent and conflicting. Credibility is a major factor in evaluating testimony. Both the witness and the testimony itself must be credible. Several factors enter into the decision as to which party's version of an incident has the "reasonable probability of truth." The witness must be found to be credible. Demeanor is an important consideration here. "A trier of the facts in contested or uncontested cases has a right and a duty to consider the attitude and deameanor of the witnesses as it affects the credibility of their testimony." Rains v. Rains, 127 N.J. Eq. 328, 332 (E. & A. 1940). Further, "(t)he interest, motive, bias or prejudice of a witness may affect his credibility and justify the jury, whose province it is to pass upon the credibility and justify the jury, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952) (citation omitted), certif. den. 10 N.J. 316 (1952).

In addition to the witness having to be credible, his testimony itself must also be so. "A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." Congelton v. Pura-Tex Stone Corp., 53 N.J. Super. 282,

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287 (App. Div. 1958) (citation omitted). In a decision in which the issue was whether uncontradicted testimony has to be accepted as true even if the trier finds it improvable, the New Jersey Supreme Court stated that "(t)estimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950) (citations omitted).

Thus, the Superintendent's testimony is rejected as lacking credibility.

This court makes no findings nor conclusions as to the merits of the Board's authority to withhold petitioner's salary increment for inefficiency or other good cause but, rather, confines its determination to the issues of procedural validity. On those issues and for the reasons stated hereinbefore;

I **CONCLUDE** that the Board failed to comport with the statutory requirement of N.J.S.A. 18A:29-14 by its absence of a recorded roll call majority vote of the full membership, together with the reasons to withhold petitioner's salary increment at its April 14, 1981, regular monthly Board meeting.

I **CONCLUDE,** therefore, the board's action to so withhold petitioner's annual salary increment to be null and void.

I further **CONCLUDE** that the procedure used by the Superintendent and the Board to deny petitioner his annual salary increment was, under the circumstances set forth herein, arbitrary and unreasonable.

Accordingly, it is **ORDERED** that the Manasquan Board of Education immediately restore to petitioner his 1981-82 salary increment to which he is entitled.

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

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OAL DKT. NO. EDU 3329-81

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

4 November 82
DATE

Lillard E. Law /aet
LILLARD E. LAW, ALJ

Receipt Acknowledged:

11/4/82
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 5, 1982
DATE

Ronald L. Rukenser
OFFICE OF ADMINISTRATIVE LAW

plb

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EXHIBITS

For the Respondent:

R-1 Memo to Robert Schwab from C. Hayne, dated October 29, 1980, re: Lesson Plans.

R-2 Memo to Schwab from C. Hayne dated December 18, 1980, re: Lesson Plans. Attached rebuttal by Schwab dated January 5, 1981, two pages.

R-3 Memo to Schwab from C. Hayne dated January 8, 1981, re: Lesson Plan Memo of 12/18/80.

R-4 Memo to Schwab from C. Hayne dated March 23, 1981, re: Lesson Planning, three pages

R-5 Memo to File dated March 26, 1981

R-6 Memo and reply form dated March 30, 1981, to R. Schwab from C. Hayne. Attached Chapter 10.

For the Petitioner:

P-1 Memo to Hayne, Area Supervisor from Morris Superintendent dated April 8, 1981, re: Rober Schwab's evaluation (Identification Only)

P-2 Evaluation of Robert Schwab, December 1978, January 1979, by Morris. (Identification Only)

P-3 Handwritten notes dated April 1, 1981, (Identification Only)

Joint Exhibits:

J-1 Annual performance report, May 13, 1980, of Robert Schwab

J-2 Teacher Observationvaluation Form, dated December 9, 1980

J-3 Staff Summary Report, re: Schwab. Attached to Memorandum

J-3A Staff Summary Report, dated March 23, 1981, Names of three teaching staff members, including petitioner

J-4 Teacher Observation/Evaluation Forms, dated March 23, 24, 27, 1981, by Superintendent. (Record corrected to read March 24,25, 27, 1981)

J-5 Teacher Observation/Evaluation Form dated March 31, April 1, 9, 1981, by Principal

J-6 Teacher Observation/Evaluation Form dated April 10, 1981, by Supervisor of Department

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J-7 Notice provided by Board of Education, re: April 1981, meetings concerning personnel

J-8 Letter dated April 15, 1981, for Mr. Schwab from Board Secretary/Business Administrator, re: Denial of Increment

J-9 Agenda-Work Meeting dated April 7, 1981, Manasquan Board of Education

J-10 Memo to Hayne from Morris dated April 8, 1981, re: Robert Schwab Evaluation

J-11 Evaluation of Robert Schwab, December 1978-January 1979 by Morris

Court's Exhibits:

C-1 Evaluation Guidelines

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ROBERT SCHWAB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MANASQUAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

The Commissioner, upon review of the initial decision in this matter, finds and determines that the Board's action in regard to the withholding of petitioner's adjustment salary increment for 1981-82 is in contravention of the provisions of N.J.S.A. 18A:29-14, for precisely the reasons enunciated by Judge Law in his initial decision in this matter.

Accordingly, the Commissioner concurs with the findings and determination in the instant matter and adopts them as his own.

The Board is hereby directed forthwith to restore to petitioner his 1981-82 salary and adjustment increment which it previously withheld from him.

IT IS SO ORDERED this 20th day of December 1982.

COMMISSIONER OF EDUCATION

December 20, 1982

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3664-82

AGENCY DKT. NO. 78-3/82

PHILIP HOWLEY AND
DEWEY BOOKHOLDT,
Petitioners,
v.
EWING TOWNSHIP BOARD
OF EDUCATION,
Respondent.

APPEARANCES:

John F. Malone, Esq., for petitioner Howley (O'Dwyer and Malone, attorneys)

Mark D. Schorr, Esq., for petitioner Bookholdt (Sterns, Herbert, and Weinroth, attorneys)

Robert B. Rottkamp, Jr., Esq., for respondent (Merlino, Rottkamp & Flacks, attorneys)

Record Closed August 31, 1982 Decided October 21, 1982

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was commenced on March 25, 1982 with the filing of a Petition seeking a declaratory judgment under the New Jersey School Law, N.J.S.A. 18A:6-9 and N.J.A.C. 6:24-2.1, concerning the application of the standards for determining seniority as set forth in N.J.A.C. 6:3-1.10 to Philip Howley. An Answer to the Petition was filed on behalf of the Ewing Township Board of Education (hereinafter respondent) on April 1, 1982, and the matter was thereafter transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held in this matter on July 1, 1982, at which time Mr. Malone's motion for leave to file an Amendment to the Petition adding Dewey Bookholdt as a petitioner was granted without objection. At this time it was also determined that a Counterclaim, seeking a declaratory judgment concerning the application of the military service credit statute, N.J.S.A. 18A:29-11, to the facts in this matter would be filed with the Answer to the Amendment to the Petition. Finally, it was determined at the prehearing conference that the case would be decided on stipulations of fact to be submitted with petitioners' brief on or before July 16, 1982. Respondent's brief was scheduled to be filed on or before July 23, 1982 with any reply brief to be filed by petitioners no later than August 2, 1982. A Prehearing Order setting forth the foregoing determinations was entered on July 13, 1982. Thereafter, an Answer to Amendment to Petition and Counterclaim was filed on behalf of respondent; Mr. Schorr was substituted for Mr. Malone as counsel to Mr. Bookholdt; and an Answer to Counterclaim was filed on behalf of each petitioner. Briefs were filed on behalf of all parties in accordance with the Prehearing Order, with a brief extension of time having been granted for the filing of petitioner Bookholdt's brief and for filing of supplemental briefs from the other parties as a result of Mr. Schorr's having been substituted as counsel to Mr. Bookholdt.

Oral argument was scheduled and was held on August 24, 1982, at the Trenton Office of the Office of Administrative Law. It was determined at the oral argument that the record would remain open for submission by Mr. Schorr of certain information concerning Mr. Bookholdt's military service record. That information was received on August 31, 1982, and the record, therefore, closed on that date.

FINDINGS OF FACT

The relevant facts have been stipulated by the parties. I, therefore, **FIND** the following as uncontested facts in this matter.

During the 1981-82 school year, petitioner Howley was employed by respondent as a vice principal assigned to the high school. Mr. Howley was first appointed to this position in September 1975 and has just completed his seventh year of service in that category. At the time of his appointment to the position of vice principal Mr. Howley was a tenured English teacher in respondent's school system.

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During the 1981-82 school year petitioner Bookholdt was also employed by respondent as a high school vice principal. He has recently completed his ninth year of service in that category, having been first appointed vice principal by respondent in August 1973. Prior to this appointment by respondent, Mr. Bookholdt had been employed as an administrator in another system.

Wayne Fuller, who is not a party to this action, served as middle school principal from September 1973 to June 1982, a period of nine years. Prior to his appointment as principal, Mr. Fuller served for one year (1972-73) as high school vice pincipal, one year as middle school vice principal, three years as junior high school vice principal, one year as acting principal of the junior high school and eight years as a teacher of mathmatics.

Mr. Howley has 4 years military service credit. Mr. Bookholdt served in the military for a six month period on active duty, and Mr. Fuller has ~~no military experience~~.

Respondent has commenced a reorganization of its school system, which reorganization includes the elimination of the middle school. As a result of the elimination of this school, the position held by Mr. Fuller, principal of the middle school, is being abolished. Although Mr. Fuller's employment as a middle school principal is considered, for seniority purposes, an elementary principalship, there are no elementary principals with less seniority than Mr. Fuller.

Respondent, pursuant to N.J.A.C. 6:3-1.10 et seq., determined that Mr. Fuller's previous employment of vice principal at the high school for the 1972-1973 academic year entitles him to revert to that position upon abolishment of his position of middle school principal. The Board of Education has also determined Mr. Howley has less seniority in the category of high school vice principal than Mr. Bookholdt and, thus, Mr. Fuller, upon reverting to the position of high school vice principal, bumps Mr. Howley from that position.

Petitioner Howley seeks a declaratory judgment that "the acquisition of tenure in a specific category is a necessary component of the standards of seniority which must be achieved to acquire a superior entitlement to a position within that category." Petition, p. 3. Petitioner Howley also seeks a determination that military service credit for seniority purposes attaches anew upon transfer or promotion to a position within a new category.

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Petitioner Bookholdt supports petitioner Howley's position with respect to the tenure-seniority issue but maintains that military service credit may be awarded only upon initial employment, once for salary purposes and once for seniority purposes.

Respondent's position on the military service credit issue coincides with petitioner Bookholdt's.

APPLICABLE LAW AND DISCUSSION

ISSUE A. Is the acquisition of tenure in a specific category a necessary component of the standards of seniority which must be achieved to acquire a superior entitlement to a position within that category?

The short answer to the ultimate question in this case is that respondent has correctly determined the seniority entitlements of each of the three teaching staff members involved.

Since it is impossible to obtain "tenure" in a "category," however, it is apparent that a general discussion of the law involved and definition of the relevant terms are necessary prior to a discussion of the specific issue as it has been framed by petitioners.

Petitioners are certainly not alone in their misapplication of tenure related terms. Respondent summarizes the situation fairly accurately when it states:

> It is most interesting to note that seniority is accrued in fields or "categories" of service relative to the certification held by the employee (sic). N.J.S.A. 18A:28-13 whereas the award of tenure is granted to "position" within categories of employment, albeit, after (sic) (often?) position and category are identical. Certainly, it is not clear what the boundaries of the classifications are and the the distinctions between the two, the Commissioner has held that an employee tenured in the district may obtain seniority right (sic) in the general category of teacher even though the employee has never held the position of teacher. Keane v. Board of Education of Flemington-Raritan Regional School District, 70 S.L.D. 162. Thus, the area is cloudy at best. Brief on Behalf of Respondent, pp 3-4.

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Misuse and abuse of the education vocabulary associated with the tenure law is so common that it has become the rule rather than the exception. Such imprecision has resulted in the accumulation of a body of case law which interprets and applies the tenure statutes and related regulations in a confusing and inconsistent manner. Decisions in individual cases have frequently arrived at the correct result, but, because of inadequate command of the relevant vocabulary, are unable to explain or articulate in any logical fashion how the result was reached. The following definitions, if used consistently, should not only explain the determination in this matter but should also clarify and explain the relationships among the various terms in this area of education law.

1. Definitions

Certificate

Any teaching staff member, tenured or otherwise, employed in the public schools must be "the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools . . ." N.J.S.A. 18A:26-2. Certificates are issued by the State Board of Examiners pursuant to rules and regulations prescribed by the State Board of Education N.J.S.A. 18A:6-38. A comprehensive set of regulations, N.J.A.C. 6:11-1.1 et seq., describes the various certificates which may be issued, sets forth the requirements for obtaining a particular certificate, designates which certificates are required for which positions, prescribes requirements for teacher education programs, etc.

Contrary to common usage and popular belief, the State Board of Examiners issues only three kinds of regular certificates, i.e. a certificate with lifetime validity issued to candidates who meet New Jersey standards for regular certification. Temporary certificates, provisional certificates, emergency certificates, etc. (N.J.S.A. 6:11-4.2 to 4.9) are all limited certificates issued to candidates who cannot meet the standards for regular certification. Although it is possible under some circumstances to acquire tenure without holding a regular certificate, see Anson, et. al v. Bridgeton Board of Ed., 1972 S.L.D. 638, under the tenure law, "(t)he services of any teaching staff member who is not

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the holder of an appropriate certificate, in full force and effect, issued by the state board of examiners under rules and regulations prescribed by the state board of education may be terminated without charge or trial . . ." N.J.S.A. 18A:28-14. The three regular certificates issued by the board of examiners are: a) Instructional (N.J.A.C. 6.11-6.1 et seq.); b) Administrative and Supervisory (N.J.A.C. 6:11-9.1 et seq. and 6:11-10.1 et seq.); and c) Educational Services (N.J.A.C. 6:11-11.1 et seq. and 6:11-12.1 et seq.)

Endorsements

All other "certificates" referred to in case law and rather carelessly in some places in the regulations* are actually "endorsements" on one of the foregoing three certificates. The fields in which teaching endorsements may be issued on a New Jersey Instructional Certificate are listed at N.J.A.C. 6:11-6.3: (a) specific subject field, e.g. biological science, English, mathematics, etc.; (b) Comprehensive subject field, e.g. art, business education, music, etc.; c) Handicapped; d) Elementary education; and e) Nursery school. Additional endoresments are listed under subchapter 8, New Jersey Institutional Supplement to Standards for State Approval of Teacher Education, N.J.A.C. 6:11-8.1 et seq. Pursuant to N.J.A.C. 6:11-6.2 and 6:11-8.3, each teaching endorsement is valid for all levels, except that the nursery school endorsement is valid in nursery schools and kindergartens and the elementary endorsement is valid for grades kindergarten through eight.

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* For example, three consecutive regulations use the terms alternatively and interchangeably:

> N.J.A.C. 6:11-8.8, Bilingual bicultural education, states: "This endorsement is required for teachers of bilingual bicultural education in elementary and secondary schools.
>
> N.J.A.C. 6:11-8.9, Teaching English as a second Language, states: "This certificate is required for English as a second language in elementary and secondary schools." and
>
> N.J.A.C. 6-11-8.10, Teaching of Psychology; certificate endorsement, states: "This endorsement is required for teaching Psychology in elementary and secondary schools."

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Pursuant to N.J.A.C. 6:11-10.4, the following endorsements may be issued on a New Jersey Administrative and Supervisory Certificate:

(a) School administrator: This endorsement is required for the position of superintendent of schools. The holder of this endorsement may also serve as assistant superintendent of schools, principal or supervisor.

(b) Principal: This endorsement is required for positions of principal or vice-principal. Holders of this endorsement may supervise instruction, and may also serve as assistant superintendent of schools, and as assistant superintendent in charge of curriculum and/or instruction.

(c) Supervisor: This endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. This endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction.

(d) Assistant superintendent in charge of business: This certification is required for the postition of assistant superintendent of schools in charge of business affairs.

(e) School business administrator: This certificate is required for the position of school business administrator when the local board of education is granted permission by the State Board of Education to create such a position. The holder of this certification is authorized to perform such duties as the rules of the State Board of Education shall define.

In addition, see Executive superintendent, N.J.A.C. 6:11-10.12; Assistant Executive Superintendent with Specialization in Supervision and Curriculum, N.J.A.C. 6:11-10.13 and Assistant Executive Superintendent with Specialization in Business Administration, N.J.A.C. 6:11-10.14; which are also endorsements on the Administrative Supervisory Certificate, although they are mistakenly called "certificates" in the language of the regulations.

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There are currently 18 separate endorsements (although most are referred to in the language of the regulations as "certificates," they are nevertheless endorsements and some are properly so designated) which may be issued on the regular New Jersey Educational Services Certificate, including; e.g., Professional Librarian, School Social Worker, Speech Correction, Director of Student Personnel Services, etc.

It should be noted that an endorsement is not synonomous with a "position," although in some cases they may actually be the same. For example, the endorsement "principal" entitles the holder to serve in the following "positions": principal, vice-principal, assistant superintendent of schools and assistant superintendent in charge of curriculum and/or instruction. On the other hand, some endorsements entitle the holder to one position only; e.g., the endorsement of Speech Correction, N.J.A.C. 6:11-12.11, provides that the endorsement is required for service as a speech correctionist.

Position

N.J.S.A. 18A:28-1, the first statutory provision under the chapter entitled "Tenure," provides:

> As used in this chapter the word "position" includes any office, position or employment."

Every position must have a position title which is recognized in the administrative code. N.J.A.C. 6:11-3.6(a). This position title either corresponds to one of the enumerated endorsements, is specifically designated within the endorsement description (e.g. N.J.A.C. 6:11-10.4(a) specifies that the "School Administrator" endorsement is required for the postion of superintendent of schools, and further provides that "the holder of the endorsement may also serve as assistant superintendent of schools, principal, or supervisor.") or has been specifically approved by the county superintendent who has made a determination of the appropriate certification and title for the position. N.J.A.C. 6:11-3.6(b).

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Tenure

Tenure is a legislative status, not a contractual one, and in order to be protected by the status, a teaching staff member must have met the precise conditions articulated in the statute. In order to acquire tenure in any position in the public schools in any district, the teaching staff member must be a citizen of the United States (N.J.S.A. 18A:28-3), must hold an appropriate certificate for the position, issued by the State Board of Examiners, in full force and effect (N.J.S.A. 18A:28-4) and, pursuant to N.J.S.A. 18A:28-5, must hold employment in the district for:

(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) the equivalent of more than three academic years within a period of any four consecutive academic years.

Prior to amendment in 1962, the tenure statute set forth only four tenure eligible positions: teacher, principal, assistant superintendent, and superintendent, and no rights of tenure attached to any gradation within any one of those designations. See Lascari v. Board of Education of Borough of Lodi, 36 N.J. Super 426 (App. Div. 1955), wherein it was held that the position of vice principal had no tenure, and, therefore, where the teacher, after serving as vice-principal, was transferred to regular teaching duties without loss of salary, he was not deprived of his tenure status which was merely that of a teacher. This was specifically changed by the 1962 amendment to the statute which provided in pertinent part:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation . . . . (Emphasis mine.)

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That tenure is acquired in a particular position is made clear by the effect of N.J.S.A. 18A:28-6, which was also part of the 1962 amendment, and provides:

> Any such teaching staff member under tenure or eligible to obtain tenure under this capter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purposes; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

The Appellate Division in Childs v. Union Township Board of Education, a recent, unreported decision, significantly clarified and explained the full effect of this amendment:

> The clear intent of this statute is that the right of a board of education to transfer and to re-transfer a teaching staff member is limited where "tenure in the new position" is acquired after either, (a) expiration of two consecutive years" in the new position; or (b) "employment for two academic years in the new position plus employment at the beginning of the next succeeding academic year; or (c) "employment in the new position" for the equivalent of more than two academic years in any three consecutive academic years. Again, Childs has been employed by this Board in her "new position" for five consecutive calendar and academic years. She clearly attained tenure as a guidance counselor and cannot, without proof of the grounds set forthin in N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10 (inefficienty, incapacity, unbecoming conduct or other just cause) or those in N.J.S.A. 18A:28-9 (reduction in force) be unilaterally dismissed from that position without the hearing required by N.J.S.A. 18A:6-10.

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The determination here reached finds support in the legislative history of N.J.S.A. 18A:28-6. When this statute was amended by L. 1962 c.231 (R.S. 18:13-16) the sponsor's statement, among other things, declared:

> This bill would amend the tenure of office act that applies to most professional educators by (1) requiring a 2-year probationary period when employees in a district are promoted or transferred from one tenure position to another position in which he could acquire tenure, and (2) extending coverage of the tenure act to include assistant principals, vice-principals and other professional employees in special teaching, administrative and supervisory positions by relating tenure in positions to qualification and performance under appropriate certification standards as determined by the Board of Examiners and the State Board of Education.
>
> . . . .
>
> This change should improve the over-all quality of service in our schools and also eliminate the discrimination which now works against candidates for promotion from within a district. It would also give a board of education an opportunity to observe for 2 years, a local employee in a new position, before permitting him to acquire tenure.
>
> . . . .
>
> The professional employees covered by this bill are generally in positions that have been created in recent years to meet the demands of modern education. These positions are not covered by the present law simply because they were almost nonexistent at the time of the passage of the earlier tenure acts. These professional educators should have the same tenure protection granted to teachers and the majority of school administrators.
>
> This bill would amend the tenure of office act that applies to most professional educators by extending its provisions to include assistant prinicpals and vice-principals and such other employees as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners. (Emphasis ours.)

Childs admittedly holds the "appropriate certificate issued by the Board of Examiners" to be a guidance counselor. The Commissioner and the State Board of Education correctly held that this position represents "a service category in which petitioner can acquire tenure" under the clear language of N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6. Moreover, during her service in that capacity she was so regarded. She worked for the Board as a guidance counselor within the Department of Student Personnel Services under Frank A. Morretti, director of that department. On

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> February 27, 1976 Mr. Morretti in a letter to the school superintendent noted Childs was in her second year as a counselor, was doing well in her new position and concluded that she should be "approved for tenure as a guidance counselor." In these circumstances where Childs has gone to considerable lengths to obtain her certification in the new position, has been employed and reemployed for tenure purposes for five years, it is pure sophistry to assert her "transfer"* is anything less than dismissal from her clearly tenured position. Such a view would render her statutory tenure in her "new position" meaningless. Madeline Childs v. Union Township Board of Education, App. Div., July 19, 1982, A-3603-80T1,) (unreported) pp. 5-8.

Accordingly, tenure protects an employee in a particular position, and having acquired tenure in a position, a tenured teaching staff member may not be "dismissed or reduced in compensation" except for cause in accordance with N.J.S.A. 18A:28-5 (for inefficiency, incapacity, unbecoming conduct, or other just cause), N.J.S.A. 18A:6-10 (after certification of charges and a full due process hearing) or N.J.S.A. 18A:28-9 (as a result of a reduction in force).

Transfer

"Transfer" refers to the rights of a local board, as opposed to "seniority" (infra) which refers to an employee's bumping rights upon a RIF (Reduction in Force). The power of a board of education to transfer teachers is limited only to the extent provided by the Tenure law. Childs v. Union Township Board of Ed., supra, Downs v. Board of Education of Hoboken, 12 N.J. Misc. 345 (Sup. Ct. 1934), aff'd. Flechtner v. Board of Education of Hoboken District 113 N.J.L. 401 (E & A 1934). The word "transfer" is most often used in tenure related cases in the context of the proposition that teaching staff members may be transferred within the scope of their certificates. As a blanket statement, this is not entirely correct. The cases most frequently cited in support of the proposition are Greenway v. Camden, 129 N.J.L. 46 (Sup. Ct. 1942), aff'd 129 N.J.L. 46 (E & A 1942) and Cheesman v. Gloucester City, 1 N.J. Misc. 318 (Sup. Ct. 1923). Both cases dealt with tenured teachers whose assignments were changed, in Greenway from senior high to junior high and in Cheeseman from seventh and eighth grades in one school to fifth and sixth grades in another school. Since tenure attaches to position, and the

* The Board had "transferred" Childs to her former position as teacher.

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position specified in N.J.S.A. 18A:28-5 is "teacher," a tenured teacher may be "transferred" or reasssigned within the scope of the endorsements on his or her Instructional Certificate. Tenure is not acquired in a specific assignment, and therefore the statement that a tenured teacher may be transferred within the scope of his/her "certificate" (endorsements on the Instructional Certificate) is accurate.

Greenway and Cheeseman do not stand for the proposition that a tenured principal, for example, may be transferred to any other position comparable to the one he already holds and which his certificate qualifies him to fill, however, and I, therefore, must respectfully disagree with cases such as Morra v.Board of Education of Jackson Township, 1979 S.L.D. 89, which purport to so hold. Under the tenure statutes it is clear that a person tenured in a "position" may not be transferred from that position without his or her consent. The specific language of N.J.S.A. 18A:28-6, "who is transferred or promoted with his consent to another position" makes that clear. Transfer without such consent constitutes a dismissal from the position and cannot be accomplished without compliance with the tenure hearing law. Childs, supra.

In Williams v. Plainfield Board of Education, 1979 S.L.D. 220, aff'd in part and reversed in part, State Board 79 S.L.D. _____, decided September 6, 1979, aff'd. 176 N.J. Super. 145 (App. Div. 1980), certif. den. 87 N.J. 306 (1981), the petitioner, a tenured principal, had been involuntarily transferred from high school principal to elementary school principal. The court held, inter alia, that such a transfer was not a violation of petitioner's tenure rights since she was simply "transferred from one principalship to another." 176 N.J. Super. at 163. Accordingly a tenured employee may be transferred to another assignment within his position, but may not be transferred involuntarily from one position to another.

Seniority

Seniority is a concept which only applies to certain rights of tenured personnel and only has meaning when a reduction in the employment force is necessary. The source of the concept is in the tenure law, specifically:

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N.J.S.A. 18A:28-9:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positons for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

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

> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board.

N.J.S.A. 18A:28-13:

> The commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both.

Such standards have been promulgated and are set forth at N.J.A.C. 6:3-1.10 et seq. and provide in pertinent part:

> (a) The word "employment" for purposes of these standards shall also be held to include "office" and "position."
>
> (b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absence.
>
> . . . .
>
> (g) Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment.

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(h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him.

(i) If he shall have insufficient seniority in the category to which he shall revert, he shall, in like manner, revert to the next category in which he held employment immediately prior to his employment in the category to which he shall have reverted, and shall be placed and remain upon the preferred eligible list of the next preceding category, and so forth, until he shall have been employed or placed upon all the preferred eligible lists of the categories in which he formerly held employment in the school district.

Category

Although the parties in the present case have used the phrase "tenure in a category" and that phrase has occasionally been used in the case law, the only thing which can accrue in a category is seniority. As discussed hereinabove, tenure attaches to a position.

The Commissioner has established the following specific categories in which seniority may be accrued:

1. Superintendent of Schools;

2. Director of County Vocational Schools;

3. Assistant Director of County Vocational Schools;

4. Assistant Superintendent (Each assistant superintendency shall be a separate category);

5. Local Director of Vocational Education;

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6. High School Principal;

7. Vocational School Principal;

8. Junior High School Principal;

9. Elementary Principal;

10. General Supervisor;

11. General Secondary Supervisor;

12. General Elementary Supervisor;

13. General Vocational Supervisor;

14. High School Vice-Principal or Assistant Principal;

15. Junior High School Vice-Principal or Assistant Principal;

16. Elementary School Vice-Principal or Assistant Principal;

17. Vocational School Vice-Principal or Assistant Principal;

18. Assistant to the High School Principal;

19. Assistant to the Junior High School Principal;

20. Assistant to the Elementary School Principal;

21. Assistant to the Vocational School Principal;

(Each vice-principalship, assistant principalship, or assistant to the principalship in paragraphs 14 through 21 of this subsection shall be a separate category.)

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22. Subject Supervisor;

23. Vocational, Trade and Industrial Teacher Coordinator;

24. Vocational Distributive Education Coordinator;

25. Vocational Guidance Counsellor;

26. Junior college. The words "junior college" shall included grades 13 and 14. Seniority shall apply to all subjects and fields endorsed on the certificate;

27. Secondary. The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. Any person holding a secondary certificate shall have seniority in all subjects or fields covered by his certificate, except those subjects or fields for which a special certificate has or shall be required by the State Board of Education. However, if a person has held employment in the school district in in any special subject or field endorsed on his secondary certificate, such special subject or field shall, for the purposes of these regulations, be regarded as any other subject or field endorsed upon his certificate;

28. Elementary. The word "elementary" shall include Kindergarten, grades 1-6 and grades 7-8 with or without departmental instruction, including grades 7-8 in junior high schools;

29. Evening schools. Categories for employment in evening schools shall correspond to those of day schools except that employment in the day school shall not count in determining seniority in the evening school and vice versa;

30. Additional categories of specific certificates issued by the State Board of Examiners and listed in the State Board rules dealing with Teacher Certification.

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In Dullea v. Northvale Board of Education, 1978 S.L.D. 638, 641, the Commissioner discussed the creation and purpose of categories:

> It is observed that the Legislature, pursuant to N.J.S.A. 18A:28-10, first directed the Commissioner with approval of the Board of Education to promulgate categories of teaching staff members in 1942. Thus it is clear that no such categories existed when the Supreme Court and the Commissioner issued opinions in Seidel, supra, and Horan, supra. See Maurice J. O'Sullivan v. Board of Education of Jersey City, 1961-62 S.L.D. 118. The Legislature, recognizing in 1942 the growing complexities of school systems of the State, directed the establishment of seniority standards for administrative, supervisory, teaching and other educational services. When promulgated, they stated that teaching staff members should attain seniority only in those categories of their employment with boards of education, regardless of the number of certificates held. N.J.A.C. 6:3-1.10(b) and (h). Thus, a certified teacher of secondary mathematics who also holds an elementary teacher's certificate but who never served in the category of elementary teacher may not, by seniority, claim the right to replace an experienced teacher of elementary subjects. Nor may an elementary school teacher who also holds a secondary science certificate, but who has never served in the category of secondary school teacher, replace an experiienced chemistry teacher. The wisdom of establishment of seniority categories is self-evident in the interests of a thorough and efficient system of education.

"Categories" are not synonomous with "positions," although sometimes they happen to be the same, e.g., superintendent of schools; nor are they necessarily the same as endorsements, although they may be, under N.J.A.C. 6:3-1.10k(30) which creates additional categories of 'specific certificates." Categories are nothing more than what the Commissioner has said they are and their only purpose is for determining a tenured teaching staff member's rights in a RIF. Williams v. Plainfield Bd. of Ed., 1979 S.L.D. ____, decided September 6, 1979, slip opinion pp. 8-9, aff'd 176 N.J. Super. 154 (App. Div. 1980), certif. den. 87 N.J. 300 (1981).

Rank

Although the State Board arrived at the same result in Williams v. Plainfield Board of Education, supra, as the Appellate Division did, the language and reasoning used by the State Board included such terms as "rank," "demotion," and "comparable positions:"

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Where the transfer is to a position of equivalent rank, the Board may act without the staff member's consent. Boor v. Newark Board of Education, decided by Commissioner August 31, 1979. The phrase "with his consent" appearing in section 18A:28-6 applies only to transfers which are promotions or demotions, i.e. to a different rank. We cannot rationally construe the statute in any other fashion, for a tenured staff member already enjoys tenure within his rank, albeit in no particular assignment therein. Bigart v. Paramus Board of Education., supra: Clark v. Rosen and Margate City Board of Education., 1974 S.L.D. 678, affd St. Bd. 1975 S.L.D. 1082, aff'd App. Div. 1976 S.L.D. 1134. The legislative history of the statute bears out this interpretation. Before the passage of this section as Chapter 231 of the Laws of 1962, a tenured teacher who was promoted to principal obtained tenure as a principal immediately. As observed in the Amicus brief of the School Boards Association, local boards understandably preferred to hire administrators from outside the district in order to have the benefit of a three-year probationary period in which to evaluate the new administrator. The purpose of Chapter 231, as reflected in the sponsor's statement, was to make promotions within a district subject to a two-year probationary period for tenure in the higher position to be achieved. Thus the employing board would enjoy a two-year period in which to evaluate the new administrator's performance, and at the same time internal applications for promotions would be encouraged. The consent language was inserted because the acceptance of a promotion would put the employee in a non-tenure status in the new position for two years, and the Legislature thought that the employee should not be forced into such a situation.

The law thus protects the rank or status of a tenured professional employee. It also prevents the employing board from reducing the compensation of such an employee except by proceedings under N.J.S.A. 18A:6-10 et seq. But for these two limitations, which may be said to give job security and financial security, the board of education has plenary authority, by a majority vote of the whole board, to transfer its professional personnel in good faith for the best interests of the school system. Lascari v. Lodi Board of Education, supra; Bradley v. Freehold Board of Education., 1976 S.L.D. 590, 600; DiNunzio v. Pemberton Township Board of Education, 1977 S.L.D. 24.

In determining whether a transfer is to a position of comparable rank or causes a reduction in compensation within the meaning of N.J.S.A. 18A:28-5, we believe in using a balancing test, weighing the interest of the teaching staff member in job and financial security on the one hand and the best interests of the school program on the other. . . . Slip opinion, pp. 5-6.

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Preliminarily, it should be noted that the Boor case, supra, involved a non-tenure teacher; Bigart, supra, involved a tenured teacher whose assignment was changed within the English department; Clark, supra, involved a tenured teacher whose assignment was changed from teacher of the special class for educable mentally retarded children to teacher of a class for neurologically impaired children; Lascari, supra, involved the transfer of a vice principal to a teaching position BUT at the time of the decision in 1955 "vice principal" was not a tenure eligible position, and Lascari's tenure status was merely one of teacher; in Bradley, supra, a tenured teacher was transferred from her assignment as a Kindergarten teacher to a teacher of second grade in another building; and DiNunzio, supra, involved the transfer of a tenured principal from high school principal to elementary school principal. Not one of the cited cases involved the transfer of a teaching staff member from one tenured or tenure eligible "position" to another. For this reason, it is respectfully suggested that terms such as "rank," "demotion," and "comparable position" are irrelevant and unnecessarily confusing. Pursuant to N.J.S.A. 18A:28-5 and 18A:28-6 as amended in 1962, tenure is obtained in one of the specifically enumerated positions (teacher, vice principal, principal, etc.) or in any other officially recognized "position," e.g. guidance counselor, which requires the holder to have an appropriate certificate. Once a teaching staff member acquires tenure in such a position he may be reassigned to other schools or other grade levels covered by his certification endorsements within that position, but he may not be transferred to another position without his consent.

Perhaps the terms "rank" and "demotion" and "comparable position" had some relevance prior to the 1962 amendment of the tenure law; they now have none, and the discontinuance of their use is recommended.

2. Application of Definitions

By way of example in putting the above defined terms in their proper relationships with each other, in accordance with the foregoing general scheme, a hypothetical tenured principal who holds an Administrative and Supervisory Certificate with a "Principal" endorsement and who has been assigned to the high school for 10 years and who, prior to that appointment, served for 5 years as a vice-principal assigned to the junior high school and prior to that appointment served for 10 years as a teacher assigned to teach English

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may be transferred by the Board within the scope of his tenured position (principal) to any other principal's assignment in the district; e.g., principal of the elementary school; he may not be transferred by the board to another position in the district even though it is within the scope of his endorsement; e.g., asssitant superintendent of schools or vice principal, whatever the specific assignment, without his consent. For seniority purposes, the hypothetical principal has the following:

High School Principal - 10 years;

Junior High School Vice Principal - 15 years;

Secondary (English) - 25 years;

If a reduction in force should eliminate his particular employment as high school principal he may "bump" any other high school principal in the district who has less than 10 years seniority; if there is no such high school principal, he may "bump" any junior high school vice principal who has less than 15 years seniority, and if no such junior high school vice principal exists, then, finally he may bump any secondary teacher assigned to English who has less then 25 years seniority, in which case he would be placed and remain upon the preferred eligibility lists for junior high vice principal and high school principal until a vacancy occurs in either of those categories to which his seniority entitles him.

If the hypothetical principal's Instructional Certificate also had a mathematics endorsement when he was hired for the English position,* pursuant to N.J.A.C. 6:3-1.10(k)27 he would also be able to bump a secondary teacher assigned to teach math who has less than 25 years seniority, even though the principal had never actually been assigned to teach mathematics. He would not be able to bump any other principal

---

* With respect to the need for the teacher to have the additional field or subject endorsements at the time of initial employment see Dedrick v. Hammonton Bd. of Ed., 1977 S.L.D. 1043 which held that Dedrick had gained seniority in the category of Secondary Teacher of Social Studies although he had not held employment as a social studies teacher, because the social studies endorsement had been on his certificate at the time he was hired and assigned as a Special Assignment Teacher. He did not gain seniority in the category of Driver Education teacher, however, because he obtained that endorsement subsequent to his initial employment and he had never been assigned to employment in that category.

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assigned to the elementary school or junior high school - even though he has tenure as a principal and the Board could transfer him to one of those assignments — since he has no seniority rights in the category of Elementary Principal and none in the category of Junior High School Principal, never having held employment in the district in either of those categories.

Turning now to the facts in the present matter, it should be easier to consider the arguments of counsel in the context of the foregoing definitions.

Petitioners Howley and Bookholdt assert that Mr. Fuller did not acquire tenure in the position of high school vice principal and that he should, therefore, not be entitled to any seniority rights within that category. What petitioners' position fails to consider is that a teaching staff member can never acquire tenure as a high school vice principal, but only as a vice principal. Having served at one point in time for three years as a vice principal assigned to the junior high school, Mr. Fuller did obtain tenure in the position "vice-principal." His transfer to the middle school for one year and to the high school for one year were merely changes in assignments. Accordingly, Mr. Fuller was a tenured vice principal when he served for one year as high school vice principal.

Even if Mr. Fuller had accepted the transfer to vice-principal in 1972 directly from the position of tenured teacher, pursuant to the specific language of N.J.S.A. 18A:28-6, the statute governing tenure upon transfer or promotion, when he subsequently was promoted to principal "the period of employment in such new position (would) be included in determining the tenure and seniority rights in the former position;" consequently after the conclusion of his first calendar year, or first academic year together with employment at the beginning of the next succeeding academic year, in the new position (principal), pursuant to the statute he would have then acquired tenure in the former position (vice principal) and seniority rights as high school vice principal would include the years spent in the principal position. This is so even though at the time of promotion to principal he would not have yet acquired tenure as vice principal, because the statute applies not only to teaching staff members under tenure, but also to those "eligible to obtain tenure."

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Because the period of employment in the new position is to be included in determining the tenure rights in the former position, the question arises whether the concept of tenure in the district, as opposed to tenure in position, has any meaning after the 1962 amendments.* Under the operation of N.J.S.A. 18A:28-6 where an employee transfers from a tenure eligible position prior to acquiring tenure, that employee will nevertheless acquire tenure in the former position at some point when the period of employment in the new position is included in determining the statutory period for tenure in the former position. Therefore, a tenure eligible employee will always acquire tenure within the statutory prescribed period in some position. This is not an absurd result as petitioner Bookholdt suggests at p. 6 of his brief when he states that even the briefest periods of service in a position might entitle a teaching staff member to tenure. A board of education need not transfer or promote a teaching staff member at all, and if a board does not wish for a transferred or promoted employee to obtain tenure in a new position, it should simply transfer that member back to his or her former position before the expiration of the statutory time periods. If the board wishes to have the full statutory time period within which to decide if an employee should obtain tenure in a new position, it should simply not transfer that employee to some other position prior to the expiration of the statutory period.

In accordance with all the foregoing, before consideration of the military service credit issue, the employees discussed herein have the following seniority rights to a position within the categories in question:

Fuller:	elementary principal	9 years
	high school vice principal	10 years
Bookholdt:	high school vice principal	9 years
Howley:	high school vice principal	7 years

* Compare Boeshore v. North Bergen Board of Education, 1974 S.L.D. 805 and Keane v. Flemington-Raritan Regional School District,1970 S.L.D. 162 which discuss tenure in the district as opposed to tenure in a position. This seem to be an unnecessary and confusing distinction in light of the specific language of N.J.S.A. 18A:28-6. See also Dullea, supra, which appears implicity to overrule Keane in holding that no seniority attaches to a category in which a member never held employment, and that certification alone is not enough for seniority.

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ISSUE B. Does military service credit for seniority purposes attach anew upon transfer or promotion to a position within a new category?

N.J.S.A. 18A:29-11, the statute which has been cited by each of the parties as the legislative pronouncement relevant to determination of this second issue, provides:

> Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this state, including active service in the women's army corps, the women's reserve of the naval reserve, or any similar organization authorized by the United States to serve with the army or navy, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.
>
> Nothing contained in this section shall be construed to reduce the number of employment or adjustment increments to which any member may be entitled under the terms of any law, or regulation, or action of any employing board or officer, of this state, relating to leaves of absence.

Mr. Howley suggests that this statute entitles him to four years employment credit for his time spent in the military, not only on the salary guide but also for purposes of calculating seniority. In support of this position he cites the following language from Wall Township Education Association v. Wall Township Board of Education, 149 N.J. Super 126 (App. Div. 1977).

> . . . The credit for military service entitles a teacher to a status equal to that of a teacher who has had employment credit for the same period of time up to a maximum of four years. This credit is not limited to the benefits of his status on the salary guide, but extends also to any other benefits granted to other teachers because of longevity experience in the teaching field. We find nothing in the statutes suggesting a contrary construction.

He concludes that N.J.S.A. 18A:29-11 cannot be limited solely to questions of salary matters and wage increments and reasons that seniority rights are one of the "other benefits" contemplated by the court in Wall. Petitioner Howley's brief, pp. 2-3.

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It is clear, however, from the placement of the statute in the middle of the chapter entitled "Compensation" under "Article 2, Salaries" that the benefits to which the statute refers are salary and money fringes which attach to the salary guide. Wall Township supra, does not indicate otherwise, as respondent correctly points out in its supplemental brief, p. 4:

> Petitioner's reliance upon Wall Township Education Association v. Wall Township Board of Education 149 N.J. Super 126 (App. Div. 1977), is unfounded. The Court, in a longevity salary dispute, made it clear that when a teacher with military service is advanced on the salary guide because of the statutory credit, he remains in that position for equal treatment with those on the same step of the salary guide because of teaching experience. Again, as in all other cases dealing with N.J.S.A. 18A:29-11, the dispute arose in a salary dispute concerning where (sic) (on?) the salary guide the veteran falls and concomitantly what other money fringes attach to that step on the guide.

In fact, veterans are entitled to credit for years served in the military for purposes of calculating seniority, but the relevant statutory source of such benefit is not the salary statute cited by the parties, but a tenure statute, N.J.S.A. 18A:28-12, which provides as follows:

> If any teaching staff member shall be dismissed as a result of such reduction (of force), such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified *** and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940, shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service." (Emphasis supplied.)

In Lang v. Princeton Regional Board of Education, 1979 S.L.D. 245, the Commissioner considered for the first time the issue of applicability of military service for seniority status. Citing N.J.S.A. 18A:28-12, he declared the statute clear and unambiguous; and applying the law to the stipulated facts in the matter, he held, at 247:

> It is clear that a teaching staff member is afforded seniority rights only when a tenure status has been acquired and further that a teacher's right to tenure does not come into being until the precise conditions laid down in N.J.S.A. 18A:28-1 et seq. have been met. See Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E.&A.

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> 1941) and Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962). In the instant matter petitioner was not entitled to a seniority status until his first day of employment in September 1975 when he acquired a tenure status.
>
> The Commissioner hereby directs the Princeton Regional Boad of Education to fix the seniority status of petitioner by adding his two years of military service to his total years of teaching service in respondent's school district since September 1972.

Petitioner Howley is, therefore, entitled to have his years of military service added to his years of employment by respondent for purposes of calculating seniority rights. This entitlement arose on the first day he acquired a tenure status in the district, approximately 15 years ago. Mr. Howley does not contend that he did not receive his military service credit on the salary scale when he was first employed; he also does not contend that he was not accorded 4 additional years seniority in the category of secondary teacher (English) when he first became tenured as a teacher. He does contend that he should have been accorded an additional 4 years seniority in the category of high school vice principal, presumably when he acquired tenure as a vice principal, and he further contends that such seniority credit should attach anew whenever a teaching staff member acquires tenure in a position in a new category.* According to Mr. Howley, this award could be given an indefinite number of times to the same employee, limited only by the number of new categories in which the teaching staff member becomes employed. In support of his contention he cites the following language from Ballou v. State Department of Civil Service, 75 N.J. 365, 369 (1978):

> . . . We are mindful that certain features of the current system, particularly the inexhaustible or recurrent advantage given veterans in the civil service, became a part of the veteran's preference scheme through administrative regulation sometime after the adoption of the Constitution in 1947. Nevertheless this aspect of the scheme is not inconsistent with the overall legislative methodology in according perferential treatment to veterans and it has in no way been disturbed by the Legislature." (Emphasis provided)

---

* He does not contend, however, that the military service salary credit should be given to the same employee more than once.

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The Civil Service law at issue in Ballou (N.J.S.A. 11:27-4) simply guarantees appointment to veterans whenever their names are among those certified to an appointing authority; by its terms, N.J.S.A. 11:27-4 is a veterans' preference. The benefits described by N.J.S.A. 18A:29-12 were not designed to give veterans a preference or an advantage but rather to put them on an equal footing with their collegues who had not been away from their teaching jobs or prevented from commencing a career in education because of military service.

Mr. Howley's position is without merit. The returning veteran has been placed on equal footing with his peers upon his return or upon initial employment both by being rewarded with additional compensation and by being placed on equal seniority status with his peers. Thereafter, both the veteran and non-veteran are on equal status only if military time is not tacked-on to subsequent categories of employment. Otherwise, the veteran has a continuing, unlimited advantage over his peers. Clearly, this is not the legislative intent nor the intent and purpose of the regulations contained in N.J.A.C. 6:3-1.10.

Accordingly, after consideration of additional military seniority entitlements in the categories here relevant, the parties have the following seniority in the categories at issue:

Fuller	elementary principal	9 years
	high school vice principal	10 years
Bookholdt	high school vice principal	9 1/2 years
Howley	high school vice principal	7 years

Mr. Howley's 4 year military credit for purposes of seniority attaches only to the category in which he held employment when he first obtained tenure, that of secondary teacher (English).

For all of the foregoing reasons, it is **ORDERED** that the declaratory judgment sought by petitioners is **DENIED** and that petitioners are entitled to seniority rights in the category high school vice principal in accordance with the foregoing opinion.

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

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

October 21, 1982
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

10/21/82
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

OCT 2 5 1982
DATE

OFFICE OF ADMINISTRATIVE LAW

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PHILIP HOWLEY AND DEWEY BOOKHOLDT, JR.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Firstly the Commissioner observes a correction to be made in the record wherein Petitioner Fuller, instead of "no military service", ante, has "a six month period on active duty." (C-1) Such correction adds one-half year to his seniority rights as listed.

Petitioner Bookholdt in his primary exceptions to the initial decision by the Honorable M. Kathleen Duncan, ALJ argues that he should be accorded a full year's credit for seniority purposes because of his six months' military service. Lavin v. Hackensack Board of Education, 178 N.J. Super. 221, 232 (App. Div. 1981), aff'd 90 N.J. 145 (1982) The Commissioner finds no merit in such argument.

Military service credit is molded into whole years for salary credit purposes, Lavin, supra, but seniority "***shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be***." N.J.A.C. 6:3-1.10(b) The Commissioner so holds.

At this juncture the Commissioner observes that Judge Duncan has incorporated into the initial decision a most comprehensive analysis of pertinent statutory prescription and State Board regulations affecting tenure and seniority of teaching staff members including applicable case law. The Commissioner regards the treatment of this subject as a significant contribution in placing the matters of tenure and seniority in their proper perspective.

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In the Commissioner's judgment the ALJ's analysis points out in certain instances some of the ambiguities and inconsistencies in the interpretation of existing regulations governing seniority as it relates to teacher certification and the abolishment of positions.

The Commissioner commends the ALJ for her painstaking efforts in carefully defining those terms such as "position" "endorsement" and "certificate," and for the examples given in the initial decision wherein such terminology has been accurately applied.

The Commissioner encourages local school districts to review the content of this decision in applying those criteria affecting the seniority of tenured teaching staff members whose positions are under consideration by virtue of a reduction in force.

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

Seniority rights in the category of high school vice principal are as set down herein. The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 20, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6440-81
AGENCY DKT. NO. 361-8/81A

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,
Petitioner
v.
RENEE SOKOLOW,
Respondent.

APPEARANCES:

Frank J. Rubin, Esq. for petitioner (Rubin, Lerner & Rubin, attorneys)

Lennox Hinds, Esq. for respondent

Record Closed September 21, 1982 Decided November 5, 1982

BEFORE DANIEL B. MC KEOWN, ALJ:

The East Brunswick Township Board of Education (Board) alleges that Renee Sokolow, a teacher of music with 13 years' experience in its employ, is incompetent. Ms. Sokolow (respondent) denies the allegation. The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted, after which respondent moved to dismiss the charges. The motion was denied and a plenary hearing was conducted, and was continued for ten days, until its conclusion.

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Background

Respondent has been employed as a teacher of vocal music by the Board since September 1968. Respondent has been assigned by the Board to teach grades one through six in the Memorial, Irwin, Weber and Frost elementary schools. The evidence of record shows that between the 1968-69 and 1971-72 academic years, respondent's classroom and related performance were observed and evaluated by the Irwin School principal, Ms. Addie Miller (P-69, P-68, P-67), by the succeeding Irwin School principal, Lawrence Ashley, (P-16, P-17, P-18, P-19, P-20, P-22, P-23) and by the Board's supervisor of music, J. Kupchynsky (P-27 through P-32, P-67, P-33 and P-34). Respondent was assigned to teach at the Frost elementary school, her present assignment, at the commencement of the 1972-73 academic year. The record shows that while assigned to the Frost school between 1972-73 and 1974-75, respondent's classroom and related performance were observed and evaluated by the supervisor (P-36 through P-39). Commencing with the 1975-76 year, the then newly assigned principal of the Frost school, Edward Stewart, and the music supervisor independently observed respondent's classroom and related performance through the 1979-80 academic year (P-40, P-54, P-41, P-55, P-42, P-56, P-57, P-43, P-58, P-58A1, P-58A2, P-59, P-44, P-60, P-45, P-61). It is noted that respondent was on a Board-approved leave of absence during the 1977-78 academic year.

Philip Houser became the principal of Frost school as of the 1980-81 academic year. Mr. Houser and the music supervisor, independent of each other, observed and evaluated respondent's classroom and related performance during the 1980-81 year (P-1, P-2, P-3, P-46, P-4, P-47, P-5, P-48, P-49, P-6, P-50, P-7, P-51, P-8, P-10 and P-9). Houser is an experienced school administrator, having served as such since 1975 in various assignments during his employment with the Board. Houser admits to no special training in music except for a course or two in music theory he took during his undergraduate work. Kupchynsky, who has been employed by the Board for 25 years, the last 15 of which as music supervisor, has extensive training in music and many years' experience teaching music. He is a recognized contributor for the advancement of music education and appreciation by various state and national music teacher associations. Kupchynsky claims no special expertise or practical knowledge of school administration.

During respondent's employment with the Board, she was denied a salary increment for the 1972-73 year. Respondent was notified that a salary increment would not be granted her for the 1981-82 year. In respect of the 1972-73 increment, respondent,

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after having an increment withheld for 1972-73, received an adjustment increment and salary increment for 1973-74 so that her 1973-74 salary was established as if the salary increment for 1972-73 were not withheld. In respect of the 1981-82 increment, though respondent was notified on or about May 7, 1981, of the reasons why a salary increment was to be withheld for 1981-82, the Board, prior to the commencement of the 1981-82 year, certified the present charges against respondent on August 26, 1981, and simultaneously suspended her without pay.

Prior to the Board's certification of the tenure charges, and, in fact, prior to the conclusion of the 1981-82 year, respondent and principal Houser signed an individual improvement plan on June 16, 1982, which purports to be an agreement between the parties in respect of respondent's expected performance for the 1981-82 school year (R-11).

In the circumstances whereby the Board denied a salary increment to respondent for 1981-82—and a denial of an increment could reasonably imply that the person's employment would be continued absent the occurrence of an event which would alter that status, together with a similar inference being reasonably drawn from the signed individual improvement plan of June 16, 1981 to be effective for 1981-82—it is necessary, as a preliminary step, to address the events which did occur prior to the certification of the charges.

After June 16, 1981, Houser, it seems, complained to the assistant superintendent in charge of personnel, Ms. Brenda Witt, of respondent's classroom and related performance in respect of the year then ending, and his foreboding of having respondent at the Frost school for 1981-82. Witt summoned Houser, Stewart (the former principal of Frost) and the music supervisor to discuss respondent's performance as they individually had observed and evaluated it. Miller and Ashley had left the Board's employ, but their written observations and evaluation of respondent's performance were reviewed and considered by at least Witt and, more probably than not, were reviewed by Houser, Stewart and the supervisor. A second meeting was convened by Witt in July 1981. For this meeting, Witt had prepared unexecuted affidavits over the typed names of Houser, Stewart and the supervisor. These documents, save for the affiant's name and position, contain identical susbstantive attestations as follows:

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2. Pursuant to my responsibilities and duties, I did various evaluations of respondent, copies of which are attached hereto and made a part hereof.

3. The facts as contained in said evaluations are true and [such facts] support the charges against respondent. (Emphasis added)

Witt made it clear to Houser, Stewart and the supervisor that based upon her review of all evaluations of respondent, and Houser's complaints of respondent's performance during 1980-81, she intended to file tenure charges against her. Witt advised Stewart and the supervisor that they should sign the prepared affidavits if they agreed that tenure charges against respondent should be filed. Both Stewart and the supervisor signed the prepared affidavits. Witt then filed charges against respondent with the Board, which subsequently certified them (the changes herein) for determination. Thus, the charges are considered here to be the Board's charges.

The Board conclusively charges respondent to be incompetent, which the Board alleges is demonstrated by respondent's:

1. continued inability to implement appropriate teaching techniques;

2. ongoing and consistent lack of organization and inadequate lesson preparation;

3. lack of adequate classroom management skills resulting in less than satisfactory student control;

4. inadequate interpersonal relationships with students, colleagues and parents;

5. inability to perform job responsibilities as specified in its adopted job description for the position of teacher; and

6. continued inability to implement suggestions for improvement provided by supervisory personnel.

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The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. (See In the Matter of the Tenure Hearing of Inez McRoe, 1977 S.L.D. 572, 584.) Incompetence requires proof that the affected person regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher.

Each specification shall be considered separately. The Board, in support of the first specification, continued inability to implement appropriate teaching techniques, offers 40 written evaluations of respondent's classroom performance based upon observations made by school principals Miller, Ashley, Stewart and Houser, and by supervisor Kupchynsky. (Exhibits listed in chronological order: P-25, 26, 69, 27, 28, 29, 30, 31, 67, 16, 17, 34, 22, 23, 36, 37, 38, 39, 40, 54, 55, 42, 43, 44, 45, 61, 1, 2, 46, 4, 47, 5, 48, 49, 5, 50, 41, 8, 10, 9.) It must be noted that respondent is a mobile teacher; that is, she proceeds from classroom to classroom, to teach grades one through six. In fact, throughout her employment with the Board, she has been a mobile teacher because of her grade span assignments. The evaluations cover the period October 1968, respondent's first year of employment with the Board, to June 1981, about six weeks before the Board certified the charges against her. The Board, in its statement of charges, also offers a memorandum dated February 1972, from Ashley to respondent, in respect of her lateness to meetings in January 1972 (P-20), and a memorandum dated May 1981, from Witt, in respect of the denial of a salary increment to respondent for 1981-82 (P-65). In addition, the Board offered the testimony of school principals Ashley, Stewart and Houser, supervisor Kupchynsky, and Witt to support this specification.

Houser's testimony, together with Witt's testimony, establishes that Houser initiated the process of certification of charges against respondent by voicing complaints about her performance to Witt after the close of the 1980-81 year. The Board's proofs, accordingly, shall be presented first from those in respect of respondent's 1980-81 performance, then the preceding 1979-80 year, and so on, until the earliest proofs in point of time are discussed.

It is proper here to note that by State Board rule, each board is required to adopt policies and procedures in respect of an annual performance evaluation of its

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tenured teaching staff members, N.J.A.C. 6:3-1.21. The annual performance evaluation is predicated upon (1) a mutually agreed upon individual professional improvement plan (IIP) between the teacher and the evaluator(s), N.J.A.C. 6:3-1.21(c)(6) and (f)(3) and (h)(3), and periodic evaluations of the teacher's performance, based on the evaluator(s) observation of the teacher in her classroom duties, N.J.A.C. 6:3-1.21(h)(5). The purpose of the IIP is for the teacher and evaluator to designate areas of, at least, perceived deficiencies in the teacher's performance so that the teacher may work towards improving such areas. The State Board rules became effective for the 1979-80 academic year, and this Board has adopted such policies and had such policies in place before the rule.

Houser made his first observation of respondent's classroom performance, a sixth grade class, on September 8, 1980. Houser's evaluation (P-1) of his observation states, in the section "Strong and/or Weak Points Noted," that:

> You began the class by playing a non-verbal game by having the children guess the song. In the future, consider having the class sing the notes or songs in preparation for the upcoming lesson. Basically I see the trial and error of guessing games - a waste of class time. In the future, start your classes with an activity that will warm up the voices.

Houser stated, in the "Comments and/or Suggestions for Improvement" that:

> The children throughout the lesson were talking to each other, laying on the tables and, for the most part, inattentive. In the future I expect activities that keep children interested and where discipline is maintained. I basically am of the impression that the children are not at all motivated to participate positively.
>
> Also, music books were passed out at one point during the class. The children engaged in reading the introduction aloud as a reading group. If music books are opened in the future, possibly a song could be sung or a theory activity developed. During the lesson there seemed to be a question about children having notebooks. It was my impression that this was not resolved. Be definite - either the children should have notebooks or not.
>
> Getting drinks also became an issue. Your class should not be interrupted for drinks, etc. Furthermore, discussions of this type should cease. Throughout the lesson I felt there was a lack of organization and relationship between activities. This was confirmed at the end of the class when I asked you for your plans and you informed me that they weren't done because I wasn't collecting them until the 18th. As I suggested, plans are to be done regardless. Time put into planning is important to the success of a lesson program. Overall I found the lesson to be less than satisfactory.

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In the future I expect to see:

1. Improved organization of lessons.

2. Improved coherency between activities.

3. Improved classroom management.

4. More positive involvement of the class.

5. More singing and listening activities.

Respondent filed a written reply to the evaluation and noted, among other items, that when Houser arrived, the classwork had already begun; that the guessing game was in line with Houser's former suggestion; that the observation and subsequent evaluation was not really fair in view of the fact that September 8 was but the third day of instruction into the 1980-81 year; that the pupils were distracted from her by Houser's presence; and that the lesson plan books now in use were different than former plan books used and she was not certain how to complete the plans.

This evaluation shows that Houser was concerned with respondent's lesson planning (organization and coherent lessons) and classroom management (more pupil involvement in class singing and listening).

Houser next observed and evaluated respondent's performance, in a fourth grade class, on September 30, 1980 (P-2). He noted some positive teaching areas, but he also noted that respondent moved too quickly in her presentation of subject matter to the pupils for them to comprehend, that pupils require much work in developing listening skills, and that the singing of the pupils was less than satisfactory. Houser recommended that respondent improve her classroom management, lesson organization. He further noted that respondent's techniques and methods of instruction need improvement. Respondent responded to this evaluation. Lesson planning and classroom management were the focal point of Houser's concern.

Respondent was next observed and evaluated (P-46) on October 16, 1980, in a fifth grade class, by supervisor Kupchynsky who chastized respondent for the

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"abominable" behavior of her pupils and criticized her for assigning written work to the pupils as punishment. Kupchynsky, in the same evaluation, states:

> Lesson is rather well planned and carefully put together, but cannot be fully developed due to the poor attitude, inattention and lack interest prevalent among students.

Five days later, Houser observed and evaluated (P-4) respondent in a fifth grade classroom. He noted that the "situation (lesson?) lacked structure and definition. . ." (P-4). Houser noted that while pupil involvement in some areas was pleasing, he was still concerned about the pupils not being overly enthusiastic about singing. Respondent replied to this evaluation by noting that she and Houser discussed the evaluation, and that because she felt Houser's comments about the lack of enthusiasm of the pupils was not clear, she requested Houser to videotape a class of hers so they may both critique her presentation. No such videotape was made.

Next, Kupchynsky observed and evaluated respondent, in a first grade class, on November 25, 1980 (P-47). He noted the ". . .lesson to be reasonably well constructed and moving rather smoothly. . ." Houser, on December 1, 1980, observed and evaluated respondent in a third grade class. Houser complimented respondent on pupil involvement though he noted that respondent presents too much music theory and sight reading. Houser also noted his concern that while he observed improvement in the area of pupil involvement, pupil singing was still erratic. Seven days later Kupchynsky, upon observation of respondent in a fifth grade class, evaluated (P-48) her performance by noting that pupil singing, though not adequate, has shown improvement as has, he says, pupil interest, cooperation and attitude.

After the 1980 Christmas holiday recess, Kupchynsky observed and evaluated respondent in a second grade class, on January 5, 1981 (P-49). Kupchynsky noted that pupil behavior was poor, but that such behavior may be a result of the fact that the lesson observed was during the last period of the first day back from the long Christmas recess. Kupchynsky noted that notwithstanding the "undisciplined segment of the students. . .[t] here is evidence of teacher's [respondent's] planning. Activities conducted in the class were educationally valid." Kupchynsky cautioned respondent to record progress of non-singers because the non-singers "can and should be helped." Kupchynsky also advised "that listening to serious music be given somewhat higher priority." Houser observed and evaluated respondent in a third grade class on January 8,

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1981 (P-6). Houser noted pupils were attentive; respondent applied "good" auditory discrimination activities; respondent used well-prepared visuals; respondent was applying the "Kodaly method" of music instruction which he Houser, finds exceptionally effective; and, that the pupils' singing improved, though it is still less than adequate. Houser criticized respondent for spending too much time with individual pupils (she says in her response that she spent some time with children who could not hear their own pitch to get those children involved and singing), for pupils laughing at each other when they sing (she says such laughing is not ridicule, but a nervous reaction, which she immediately stopped), for failing to give "spoken" directions for a pupil march (which she says she did give), and, for spending too much time on harmony singing at the third grade level (which she says one minute was spent upon).

Kupchynsky observed and evaluated (P-50) respondent in a sixth grade class on January 12, 1981. Here, Kupchynsky noted that he was pleased that no significant discipline problems in respect of pupils were evident; that pupils were cooperative and exhibited a wholesome attitude toward music; that the lesson was reasonably paced and included a "great deal of diversified activities, which kept students involved. . . ." Kupchynsky did remind respondent that "It is regrettable that no time [by you] has been allocated for analytical listening. . .the most important aspect of music education. . . Try to give it [analytical listening] a higher priority in your lesson plans." Respondent replied to this evaluation and observed

> I feel torn between Supervisor's recommendations that more time be devoted to listening and analyzing serious music and principal's [Houser's] constant stress on devoting more classtime to singing.

Houser, it is noted, emphasized singing and listening in his first observation and evaluation of respondent's performance (P-1), and again on September 30 (P-2).

Kupchynsky observed and evaluated (P-51) respondent, in a first grade class, on February 6, 1981. He noted that "[s]tudents were involved and responsive to different class activities. Lesson plans were clear and rather comprehensive. Lesson was reasonably well paced and adequately proportioned." (Emphasis added). Kupchynsky did caution respondent to devote more time to listening.

Houser, on March 2, 1981, observed and evaluated respondent's performance in a fifth grade and sixth grade setting (P-8). Houser notes here that it was "[g]ood to

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observe the children singing. . .popular songs. . .a positive motivator." He notes that an old stencil, apparently was used by respondent for copying purposes which resulted in unclear copies being distributed to pupils. Houser states that preplanning "will improve this area." Houser criticizes respondent for conducting breathing and scale exercises in the middle of the class rather than at the class beginning and for her attempt to determine the owner of papers submitted without names.

Houser testified to two other events which occurred in respect of respondent's performance between September 1980 and March 1981. First, Houser testified that on October 3, 1980, respondent directed a pupil to remain after school for disciplinary reasons. When the pupil reported after school to the place respondent directed, respondent was not present. Houser testified that this incident, together with one or two other such incidents, was a manifestation of respondent's lack of pupil management skills (See P-3). Second, Houser testified that a choral program, presented to the community by respondent during January 1981, was the "worst" such program he had ever seen. He testified that an insufficient number of pupils participated and that their singing was inadequate (See P-7).

Houser prepared a summary evaluation on or about March 18, 1981 (P-10), of respondent's 1980-81 teaching performance. This summary evaluation is based on Houser's and Kupchynsky's prior evaluations of their independent observations of her performance as discussed above, and upon Houser's impressions of the perceptions of pupils, other teachers and the community towards respondent. Houser notes in regard to Human Relations: Personal and Employee Attributes that:

> Ms. Sokolow [respondent] experienced serious problems in this, an area of extreme importance.
>
> My overall impression of Ms. Sokolow depicts an individual who lacks the desire and enthusiasm to effectively relate to children. Ms. Sokolow does not establish sufficient standards in the classroom and the program lacks a sufficient level of student expectations. After observing the music situation for many months, it is my distinct impression that children do not respect her nor do they relate a genuine interest to the music program.
>
> Conversations with students and members of the community have substantiated this on a number of occasions.
>
> Relationships with the staff are not positive. It is my impression that staff members' main difficulty is with her lack of organization

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and communication skills. Professional relationships are one of avoidance.

In the same summary evaluation, Houser notes in respect of respondent's Professional Effectiveness/Competence that:

Ms. Sokolow possesses good knowledge of the music field and overall is musically a talented individual. This has been confirmed by the East Brunswick Music Supervisor.

In my professional judgment this ability, for numerous reasons, has not been utilized to the benefit of students in the music program.

Ms. Sokolow has difficulty in the organization and preparation of lessons for classes.

Throughout the year I have observed an inability on her part to develop an appropriate balance of activiites and to sense when classes require assistance. Basically the timing of activities is inappropriate.

One of the major factors which attributes to a less than adequate situation is her inability to communicate with the students. In many instances I have found classes confused and unsure of expectations or directions.

I have also observed that certain expectations are made of children for which they are inadequately prepared.

The aforementioned factors, in my judgment, lead to the control and discipline problems encountered this year. The lack of student interest and desire can be directly attributed to the overall preparation, organization and communication problems.

Ms. Sokolow's implementation of suitable teaching methods and strategies leaves a great deal to be desired. She appears to lack a sense of when an alternate approach is required and when a shift in the flow of the lesson is necessary.

In respect of recommendations made to respondent for improvement in her performance, Houser states:

Recommendations:

I recommend that Ms. Sokolow be offered a contract for the 1981-82 school year.

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I do, however, recommend that she be denied a salary increase due to the following reasons:

I. Inappropriate teaching techniques as noted in Mr. Houser's observations of Sept. 8, 1980, Sept. 30, 1980, Oct. 3, 1980, October 21, 1980; and Mr. Kupchynsky's observations of October 16, October 25, and December 8, 1980 and January 12, 1981.

II. Lack of organization as noted in Mr. Houser's observations of Sept. 8, Sept. 30, Oct. 3, October 21, 1980 and Jan. 8, 1981; and Mr. Kupchynsky's observations of Oct. 16 and Dec. 8, 1980, and January 5, and Feb. 6, 1981.

Although minimum progress has been achieved, this progress was not up to the level of expectation for a music teacher in the East Brunswick school system.

III. Inadequate classroom management and student control, as noted in Mr. Houser's observations of Sept. 8, Sept. 30, Oct. 3 and Oct. 21, 1980 and Jan. 8, 1981; and Mr. Kupchynsky's observations of Oct. 16, 1980 and Jan. 5 and Feb. 6, 1981.

IV. Inadequate standards and expectations for student performance as noted in Mr. Houser's observations of Sept. 30 and Oct. 21, 1980, and January 8 and January

In a supplementary page attached to the summary evaluation, Houser also advised respondent that she does not receive "good press from the community," that she lacks common sense, and that pupils have not made satisfactory progress in music. Respondent filed a four-page typewritten reply to the summary evaluations in which she asserts that Houser himself has been the source of much difficulty because he yells at her in front of pupils; that Houser consciously attempts to intimidate her; that her lesson plan always included listening experiences; that she has no knowledge of what "conversations with students and members of the community" Houser had in respect of her relations with them, nor does she know the substance of such conversations; that she has no knowledge

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of the asserted "bad press" she receives, and that when she attempted to bring outside music programs to the school Houser discouraged her.

Witt notified respondent by letter dated May 7, 1981 (P-65), that a salary increment was not to be granted her for 1981-82 for these reasons:

1. Inappropriate teaching techniques.

2. Lack of organizational skills.

3. Inadequate classroom management and student control.

4. Inadequate standards and expectations for student performance.

On June 3, 1981, Houser observed and evaluated (P-9) respondent's teaching performance in a fifth grade and sixth grade class. Though Houser noted strong points of respondent's performance, he criticized her for moving too quickly from pupil note reading to rhythm clapping, he noted that the harmony singing of pupils needs improvement, and that her plans failed to show many activities which had been presented.

After this last observation and evaluation of respondent's performance for 1980-81, Houser testified that he directed respondent to prepare her IIP for 1981-82. Respondent's efforts in this regard were unsatisfactory to Houser. He prepared respondent's IIP for 1981-82 and directed her to sign it, which she did on June 16, 1981. (See IIP, attached to P-10). Thereafter, Houser complained to Witt of respondent's performance. Witt reviewed all evaluations of respondent's performance between 1968 and 1981. Witt concluded that respondent was incompetent based on her review of all evaluations of respondent's performance. Witt determined the specifications of the charge of incompetence. Witt informed Kupchynsky and Stewart that charges were going to be filed against respondent and, if they agree, that they should execute the affidavit. Houser apparently needed no such instruction for he believes, based on his one year evaluation of respondent, that she is, in fact, incompetent. There is no evidence before me to show that Witt ever observed respondent in a classroom setting.

It was noted earlier that the Board relies on written evaluations of respondent's performance between 1968 and 1981 to support the specification that

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respondent is incompetent because of her inability to implement appropriate teaching techniques. The evidence in this regard for 1980-81 was just addressed. The proofs between 1968 and 1979-80 will now be addressed.

Supervisor Kupchynsky, on October 14, 1968, cautioned respondent to use smooth transitions from topic-to-topic with her fourth grade pupils and more detailed lesson plans (P-25), though he recognized respondent's creativity and rapport with pupils. Respondent was evaluated on two more occasions in 1968-69 (P-26, P-29). A summary evaluation of respondent's performance for 1968-69 (P-27) by Kupchynsky shows his view to be that she is "a very competent musician and a good teacher" while recognizing that she was deficient in following proper school procedures and in class organization.

Kupchynsky evaluated respondent on three occasions in 1969-70 (P-28, 29, 30). The only weak point noted was that no piano was available for respondent. It appears respondent could have arranged with the school principal to have a lightweight portable piano provided her. In 1970-71, Kupchynsky found respondent to be in need of lesson plans (P-31), while principal Miller evaluated respondent's performance in a positive fashion, in all areas. Miller did caution respondent concerning reporting late to work and of not having lesson plans available (P-67).

In 1971-72, Ashley cautioned respondent of her lateness (P-20), her disorganization and lack of lesson plans, her poor relations with other staff (P-17), and about the need to "improve transition between activities so they do not seem disjointed" (P-16). During the same year, Kupchynsky specifically stated that respondent lacked cooperation with staff, did not sustain efforts towards improvement, and lacked preparation. (See also Ashley's evaluation dated June 30, 1972 [P-23] whereby she recommends respondent's transfer of assignment, which was accepted.)

Respondent was transferred to the Frost School as of the 1972-73 year. Kupchynsky noted that respondent's class of fifth graders which he observed was well-behaved and cooperative, that the lesson was well-planned and well-presented (P-36). Kupchynsky prepared respondent's summary evaluation (P-37) for 1972-73 wherein he noted:

> It is gratifying to notice a significant general improvement in Miss Sokolow during this school year. In order to assure a continuation of the above, the

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following areas are pointed out for consideration: 1. More careful planning. 2. Better definition of teaching objectives. 3. Participation in professional organizations. 4. Reading up-to-date professional literature. 5. Considering the possibility of taking a college refresher course in music education. 6. Establishing better chanels [sic] of communication with other members of this music department. (Share your talent with others and learn from their experiences.)

Miss Sokolow is recommended for 1973-74 contract with proper increment on the salary scale.

Kupchynsky also prepared respondent's summary evaluation (P-38) for the following 1973-74 year. He noted:

Miss Sokolow is very creative and often involves her students in creative activities, which brings favorable publicity to this school system. Her concerts are well attended and favorably received.

It is recommended that Miss Sokolow concentrate on improvement in the following areas:

1. Better attendance at the department meetings and other in-service activities.

2. Learning to be better organized.

3. More meticulous preparation for music classes and careful selection of material.

4. Clearer definition of teaching objectives.

Miss Sokolow is recommended for 1974-75 contract with increment on salary scale.

In 1974-75, Kupchynsky noted that respondent's lesson was well-prepared on December 6, 1974, but that the pupils were restless (P-39). In 1975-76, Kupchynsky noted pupil interest

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and their acceptable behavior. He admonished respondent for demanding an apology from a pupil in front of the entire class (P-40). Principal Stewart saw no weak points; he observed effective teacher-pupil relations and a well-prepared lesson (P-54).

In 1976-77, Stewart noted respondent was late for class and was disorganized (P-55). In the same year, Stewart commended respondent for her involvment in the school's Festival of Arts, though cautioning respondent that some pupils appeared not to know what to do (P-42). In 1978-79, Kupchynsky noted that respondent was patient in the classroom and used effective teaching materials, while noting the pupils were restless and inattentive (P-43). In 1979-80, Kupchynsky noted that respondent prepares lesson plans, but does not rely on them in class; that the quality of pupil singing is poor; and that "diaphragmatic breathing" should be used (P-44). Later, in the same year, Kupchynsky notes that respondent has no apparent discipline problems, but proceeds to admonish "Do not allow disruptive boys to sabotage your class" (P-45, p. 2). Kupchynsky notes his disappointment that no songs were sung during the period he observed.

School principal Stewart, in his summary evaluation (P-61) of respondent's performance for 1979-80, noted that while respondent made progress in all areas of her performance, respondent should:

1. Continue to cooperate with and work for the cooperation of other teachers and staff members.

2. Invite the music supervisor to observe the lessons which contribute to the development of particular skills or to the achievement of the performance objectives.

3. Present two evening programs for parents; one in the Winter and one in the Spring.

4. Organize an upper grade chorus early in the school year and continue to develop the chorus during the year with the chorus participating as part of the evening programs.

Ms. Sokolow is recommended for renewal of her contract for the 1980-81 school year, for the salary increase to which she is entitled and for continued assignment as a vocal music teacher.

Respondent produced a colleague, another music teacher employed by the Board, who testified that to her knowledge respondent has good working relationships with other staff members, that respondent is capable and competent in the performance of her

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duties, and that she has relied upon respondent's lesson plans for her own use on occasion. An art teacher colleague of respondent testified that, as far as she knows, respondent is an effective teacher who gets along well with people. Respondent testified in respect of her tenure of employment with the Board that she implemented all recommendations for improvement in her performance. The difficulty she had, she testified, was with what appears to be conflicting recommendations made to her by various evaluators.

Discussion

This specification alleges respondent is incompetent by virtue of her "inability to implement appropriate teaching techniques." Though there is no precise explication of the "appropriate teaching techniques" respondent allegedly failed to implement in her 13 years with the Board, or during the 1980-81 year with Houser, it is fair to presume from the proofs that the Board believed the techniques to refer to appropriate lesson plans, appropriate management techniques, appropriate standards of pupil expectations, and appropriate public relations. The difficulty, of course, is that with the possible exception of Ashley and Houser, what was, or is, appropriate in each of those areas was found to exist from time to time by Kupchynsky, Miller and Stewart. Ashley appears to have been the most direct in his view that respondent simply was not complying with the specific recommendations that he instructed respondent to follow. Consequently, he caused respondent's transfer to the Frost School. But Ashley's tenure as respondent's evaluator ended in 1972. Between 1972-73 and 1979-80, both Kupchynsky and Stewart, while finding occasions to admonish respondent, found nearly an equal number of occasions to praise her efforts, accomplishments and teaching techniques. The latter, teaching techniques, were those techniques observed by them at the time the technique was used by respondent. That is, as both evaluators observed respondent and perceived a certain process respondent applied to transfer her knowledge to her pupils, be they first graders or sixth graders, that observed process, depending upon the evaluator, was declared to be an effective or an "appropriate teaching technique." But, when either Kupchynsky, Stewart, and here, Houser, observed a process applied by respondent to transfer knowlege to pupils with which he did not agree, that process, at that time, was perceived to be inappropriate. However, the proofs are scarce that a specific significant instructional process used by respondent, which was not favorably received by an evaluator, and which could otherwise be seen as proof of incompetence, was repeated by respondent.

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In respect of lesson plans, classroom management, standards of pupil expectations, and public relations, Kupchynsky, during 1980-81, found respondent's lessons well-structured, her lesson plans acceptable and her pupils well-behaved. These findings were entered into respondent's records near contemporaneous to the time that Houser entered his findings that respondent's lesson plans were inadequate, pupil behavior was poor, classroom management techniques were lacking, and, finally, that respondent somehow receives "bad press." There is no independent proof of "bad press" reviewed by respondent, because of her performance, other that Houser's impressions.

In attempting to arrive at precisely what is meant by respondent's failure to use "appropriate teaching techniques," it is recalled that Mr. Justice Holmes observed in Towne v. Eisner, 245 U.S. 418, 425, 62 L. Ed. 372 (1918), in distinguishing the meaning of the term "income" in a revenue act from the meaning of the same word in the Sixteenth Amendment:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

An "appropriate" technique obviously differs, in the mind of school authorities, from merely a technique. It cannot be argued that respondent failed to use teaching techniques. It is contended that the techniques used were not appropriate. Stewart and Kupchynsky attest that their evaluations support the judgment that respondent is incompetent, that is, she does not have basic competencies to apply certain appropriate techniques. Yet, it is the evaluations of those two persons which speak the strongest that respondent does have the capacity to be an effective teacher, but that more improvement is necessary. Still, there is no precise meaning which attaches here in respect of the evidence, as to what techniques are considered to be appropriate that respondent does not have the capacity to implement. Each evaluator, Miller, Ashley, Stewart, Houser, and Kupchynsky, admits that respondent has demonstrated competence to improve in the areas of lesson plans, classroom management and pupil discipline. If, as the documents establish, respondent has the competence, and has used that competence, to improve, then she cannot be incompetent. At worst, the proofs shows that respondent may use that competence in an inefficient manner. Here, however, respondent may not be found inefficient for failure of the school authorities to have granted her the procedural prerequisites prior to charges of inefficiency being certified. N.J.S.A. 18A:6-11.

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The evidence before me is not persuasive that respondent is incompetent by virtue of an alleged inability to implement "appropriate teaching techniques." This finding is not grounded upon an issue of credibility of the witnesses before me. Each witness testified honestly and forthrightly in respect of his judgments as to what he believed the documentary evidence shows. The finding is made upon the basis of the near contemporaneous filing of conflicting evaluation judgments made by Houser and Kupchynsky during 1980-81; upon Houser's recommendation in his summary evaluation in March 1981, that respondent be retained for 1981-82, albeit without a salary increment; upon Houser's conviction on June 16, 1981, that respondent be retained for 1981-82 by his direction to her to sign the 1981-82 IIP; and upon the evaluations of respondent's performance over the years which, though running from high peaks to low valleys, demonstrate competence. Proof is not sufficient, which conflicts in the expressions of perceived strengths of respondent by two competent evaluators, to establish this specification of incompetence.

I **FIND** the Board failed to prove this specification of incompetence by a preponderance of credible evidence.

The Board seeks to support the second specification of incompetence, that is respondent's inability for lesson plan organization, by the evidence already discussed in the first specification, together with the following evaluations. Kupchynsky, in June 1971, acknowledged respondent as a creative teacher, whose class instruction is original and exciting. He also advised respondent to be organized and systematic in lesson preparation (P-33). Ashley, in 1972, advised respondent to be prepared totally for classes (P-18). Kupchynsky, in 1976, noted that respondent "is very talented and capable of being an effective teacher" and that "even though her planning is not always meticulous, her music classes are generally interesting and involve all students" (P-41). Stewart, in 1977, noted a need for better organization, while in the same summary evaluation, he notes that respondent plans well and that she is a competent individual (P-57). In 1979, Stewart had high praise for respondent's performance and it is difficult to see how school authorities believe this evaluation supports a charge of incompetence (P-59). In 1980, Stewart criticized respondent for changing a class schedule without permission.

The evidence before me shows that respondent's lesson plans may not have pleased all evaluators at all times for various reasons, but there is no proof that respondent is incompetent in respect of lesson plans. Respondent has demonstrated that

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she is capable of lesson planning. The Board has failed to prove by a preponderance of credible evidence the truth of this specification.

Moreover, the same proofs that the Board relied upon for specifications one and two of the charge of incompetence are presented again by the Board to show incompetence in respect of the remaining four specifications: respondent's alleged inability to impose adequate classroom management skills, her alleged inability to work well with students, colleagues and parents, her alleged inability to perform job responsibilities and her alleged inability to implement suggestions for improvement. Without discussing again in detail all the proofs already discussed, there are no specifics in respect of which classroom management skills respondent is believed to be incompetent. True, the proofs could show inefficiency in respect of respondent's use of pupil behavior skills, her organization of material presented, and her tardiness, but, as noted earlier, the charge here is of incompetence; not of inefficiency. To find a teacher incompetent, notwithstanding the teacher's academic training, her years of experience at the profession, her positive contributions made to pupils over the years as recognized by professional evaluators, and her own sense of pride with which she perceives her efforts, is to find these factors meaningless because incompetence implies a lack of basic skills and knowledge to be a member of the teaching profession.

In this case, the proofs fail to establish by a preponderance of credible evidence that respondent is incompetent. The tenure charges certified by the East Brunswick Board of Education against Renee Sokolow are hereby dismissed. The Board is directed to reinstate Renee Sokolow to her position as music teacher. The Board is further directed to compensate Renee Sokolow all back wages lost during her suspension, mitigated by outside earnings, at the rate her salary would have been for 1981-82, after the withholding of an increment action taken against her by the Board. No appeal to that action was filed by respondent. Renee Sokolow's 1982-83 salary shall be established according to the Board's salary policy and upon the proper exercise of its discretionary authority under N.J.S.A 18A:29.14.

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OAL DKT. NO. EDU 6440-81

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

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

November 5, 1982
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

November 5, 1982
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 10, 1982
DATE

OFFICE OF ADMINISTRATIVE LAW

bm

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DOCUMENTS IN EVIDENCE

P-1	Evaluation, September 8, 1980
P-2	Evaluation, September 30, 1980
P-3	Memorandum, October 3, 1980
P-4	Evaluation, October 21, 1980
P-5	Evaluation, December 1, 1980
P-6	Evaluation, January 8, 1981
P-7	Memo, January 28, 1981
P-7A	Witt's response
P-8	Evaluation, March 2, 1981
P-9	Evaluation, June 3, 1981
P-10	Summary Evaluation, March 18, 1981
P-11	Policy, Job Description
P-12	Job Description - Administrative Staff
P-13	Plan Book
P-16	Evaluation, January 3, 1972
P-17	Memorandum, January 6, 1972
P-18	Memorandum, January 14, 1972
P-19	Memorandum, January 24, 1972
P-20	Memorandum, February 18, 1972
P-22	Summary Evaluation, March 20, 1972
P-23	Summary Evaluation, June 20, 1972
P-25	Evaluation, October 14, 1968
P-26	Evaluation, October 19, 1968
P-27	Summary Evaluation, May 20, 1969
P-28	Evaluation, November 18, 1969
P-29	Evaluation, December 2, 1969
P-30	Evaluation, April 17, 1970
P-31	Evaluation, January 6, 1971
P-32	Evaluation, January 6, 1971
P-33	Summary Evaluation, June 18, 1971
P-34	Evaluation, February 3, 1972
P-35	Memorandum, June 16, 1972
P-36	Evaluation, January 24, 1973
P-37	Summary Evaluation, May 20, 1973

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P-38	Memorandum, June 24, 1974
P-39	Evaluation, December 6, 1974
P-40	Evaluation, October 16, 1975
P-41	Summary Evaluation, June 16, 1976
P-42	Evaluation, May 1, 1977
P-43	Evaluation, October 19, 1978
P-44	Evaluation, November 1, 1979
P-45	Evaluation, May 24, 1980
P-46	Evaluation, October 16, 1980
P-47	Evaluation, November 25, 1980
P-48	Evaluation, December 8, 1980
P-49	Evaluation, January 5, 1981
P-50	Evaluation, January 12, 1981
P-51	Evaluation, February 6, 1981
P-52	Affidavit
P-53	Charges
P-54	Evaluation, December 4, 1975
P-55	Evaluation, March 23, 1977
P-56	Evaluation, May 10, 1977
P-57	Summary Evaluation, June 16, 1977
P-58	Summary Evaluation, June 15, 1979
P-58A1	Response
P-58A2	Attachments
P-59	Evaluation, October 15, 1979
P-60	Evaluation, February 27, 1980
P-61	Summary Evaluation, 1979-80
P-62	Affidavit
P-64	Affidavit
P-65	Letter, dated May 7, 1981
P-66	Grievance response
P-67	Evaluation, May 15, 1971
P-68	Evaluation, February 18, 1971
P-69	Evaluation, October 28, 1968

R-4	Check list
R-5	Check list

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R-11	IIP, 1981-82
R-12	Affidavit
R-19	Evaluation, 1971

Teacher-made charts, R-20, R-21, R-22, R-23, R-24, R-25, R-26, R-27, R-28, R-29, R-30, R-32, R-33, R-34, R-35, R-36, R-37, R-38,

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IN THE MATTER OF THE TENURE	:	
HEARING OF RENEE SOKOLOW,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF EAST BRUNSWICK,	:	
MIDDLESEX COUNTY.	:	
	:	

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

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

The Board excepts to the decision by the Honorable Daniel B. McKeown, ALJ that its proofs fail to establish by a preponderance of credible evidence that respondent is incompetent. The Board contends that, both by the testimony of witnesses and by numerous pieces of documentary evidence (approximately ninety), the charges certified against respondent have been proven. The Commissioner cannot agree with such contentions by the Board.

An examination of the documents and testimony referenced by the Board reveals to the Commissioner conflicting evaluations over the years sometimes by the same individual and sometimes by different evaluators, some with knowledge and skills in the specificity of music and others versed in classroom management and techniques. The Commissioner is particularly concerned by the lack of definition of what constitutes "an appropriate teaching technique" in establishing this specification of incompetence. In the opinion of the Commissioner the credibility of witnesses is not at issue. In reaching this conclusion the Commissioner has considered "***'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility***" Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) as cited in Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973).

For the foregoing reasons the charges of incompetence certified by the Board against Renee Sokolow are dismissed. She shall be reinstated to her position as music teacher with remuneration as it would have been for 1981-82 with mitigation and the withholding of increment as action taken against her by the Board. Respondent's continued placement on the salary guide

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shall be determined by Board policy and the proper exercise of its discretionary authority pursuant to N.J.S.A. 18A:29-14.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

December 20, 1982

PENDING STATE BOARD

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6243-82
AGENCY REF. NO. 200-6/82A

LESLEY MONSEES, ET AL.,
Petitioners
v.
BLOOMINGDALE BOARD OF EDUCATION
and THEODORE LOVELL,
Respondent

APPEARANCES:

James V. Segreto, Esq., for petitioners
(Segreto & Segreto, attorneys)

Michael D. Mopsick, Esq., for respondents
(Jeffer, Hopkinson & Vogel, attorneys)

Record Closed October 25, 1982 Decided November 5, 1982

BEFORE WARD R. YOUNG, ALJ:

Petitioners alleged improprieties by respondent Lovell and some Board members prior to the Board meeting held on April 26, 1982 as well as by the Board during that meeting, and further, that Lovell and the Board acted unlawfully and in bad faith at that meeting. Respondents deny the allegations and aver in its affirmative defenses that Lovell is an improperly pleaded party respondent; the Commissioner of Education has no jurisdiction in alleged violations of N.J.S.A. 10:4-6 et seq.; the Petition is barred by N.J.S.A. 10:4-8(d); and the matter is moot pursuant to N.J.S.A. 10:4-15(a).

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The issues framed at the prehearing conference held on August 16, 1982 are as follows:

1. Is Theodore Lovell an improperly pleaded party respondent?

2. Were there prearrangements made relative to the resignation of Lekander and appointment of Lovell to fill that vacancy, and if so, did some members of the Board discuss or meet illegally, excluding Demarest and Hancox, when such arrangements were made prior to the April 26, 1982 Board meeting?

3. Was the opening statement at the Board's April 26, 1982 meeting in compliance with N.J.S.A. 10:4-6 et seq.?

4. Did the Board act unlawfully at its April 26, 1982 meeting if and when it acted on non-agenda items?

5. As the result of the Board's action at its April 26, 1982 meeting in accepting the Lekander resignation and filling the vacancy with the appointment of Lovell, did Lovell unlawfully hold two Board positions simultaneously?

6. Did the Board act in bad faith, and unlawfully, in withholding the swearing in of member Hancox until after it acted on the Lekander resignation and Lovell appointment?

A plenary hearing was held at the Prospect Park Municipal Court on September 13, 20, and 24, 1982. The matter was briefed by the parties, and the record was closed on October 25, 1982, the date established for the filing of petitioners' optional reply, which was not exercised.

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This litigation was triggered by a series of events which began on April 20, 1982, the date of the school board election. Incumbents Furino, Stiles and Lovell filed for reelection. Two other candidates, Hancox and Lyons, had also filed for election. Three vacancies existed with the expiration of the terms of incumbents.

Incumbents Furino and Stiles were reelected with 428 and 467 respective votes. Candidate Hancox was also elected with 354 votes. Incumbent Lovell was unsuccessful in his quest for reelection, receiving 249 votes, which represnted 105 votes less than Hancox. See C-6.

Board members Lovell, Stiles, Howard, Dennis and Furino retired to Saalehof's Restaurant after the election results were announced on April 20.

Between the announcement of election results on the night of April 20 and the reorganization meeting of the Board on April 26, there were innumerable conversations between Board members, excepting Demarest and soon-to-be member Hancox, concerning the defeat of Lovell and plans to continue his membership on the Board.

The Board meeting on April 26 was chaired by President Lovell prior to the reorganization of the Board. Following the flag salute and opening statement, the outgoing Board accepted the resignation of member Lekander, effective immediately, and Lovell was appointed to fill the unexpired term of Lekander, subject to his resignation from his present term. Lovell accepted the appointment and tendered his resignation from the Board to be effective upon his being sworn into office for the term left vacant by Lekander's resignation. The outgoing Board acted to accept Lovell's resignation, effective on his reappointment. The Board secretary swore Lovell into office, then swore in new members Furino, Hancox and Stiles. The secretary then conducted the election of the president. The Board elected Lovell as its president, who then presided for the remainder of the meeting. See P-3 and R-2.

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The aforementioned actions, to be later addressed, were apparently designed to avoid any gap of time in Lovell's Board membership in order to preserve his membership on the municipal planning board.

RELEVANT TESTIMONIAL EVIDENCE

Furino testified he guessed he expected two meetings on April 26 as "we always start with the old Board until the new Board is sworn in." He said he goes by the agenda.

Furino stated that President Lovell informed the Board of a resignation of a member after the flag salute and opening statement, and prior to the reorganization meeting.

Furino read a typed statement into the record, given to him by Lovell, which was a motion to appoint Lovell to fill the vacancy. He testified he was not surprised as he knew Lekander would resign and Lovell would be appointed.

Further testimony from Furino indicated he went to Saalehof's after the election, remaining with member Stiles for one to one and a half hours; Lovell, Howard and Dennis were also there. He also testified he discussed keeping Lovell on the Board with Stiles and "had a thought of resigning so that Ted [Lovell] could get back on."

On cross-examination, Furino testified that at no time at Saalehof's did the five Board members meet together, and further that from 20 to 25 patrons were at the restaurant.

Furino's response to examination by the court was that he had not been aware of the significance of the sequence of events from April 20 to April 26, but wanted Lovell back on the Board. He further indicated it had something to do with the Planning Board.

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John Dennis, Board Member

Dennis testified he discussed Lovell's destiny at the school following the announcement of election results, then went to Saalehof's where there were independent discussions between the five Board members concerning the appointment of Lovell to fill a vacancy.

Dennis also testified that Lovell gave him a prepared statement which was the motion nominating Lovell as Board president; Lovell discussed his presidential aspirations with Dennis at lunch on the Friday prior to the reorganization meeting, as well as on Sunday and at about 6:30 p.m. prior to April 26 meeting; that the outgoing Board acted to avoid any time gap in Lovell's Board membership so as not to jeopardize Lovell's position on the Planning Board; and that he was aware of Lovell's aspiration to be Mayor.

On cross-examination Dennis testified there was no meeting of the Board majority at Saalehof's but that he probably had discussions with each of the other four members; Lovell was defeated because of a noneducational issue related to his position on the Planning Board concerning town house development in the community.

On examination by the court, Dennis testified the Board acted on the Lekander resignation and Lovell appointment at the April 26 meeting without discussion.

Reneta Lekander, Board Member

Lekander testified she determined to resign from the Board when Lovell was defeated and advised Lovell of her intention by phone on Thursday or Friday preceding the April 26 meeting, which was on a Monday, agreeing with Lovell that her resignation should be immediate in order to be acted upon by the outgoing Board.

Lekander also testified as to her unawareness, during her conversations with Lovell, of the importance of resigning from the old Board rather than the new Board, but

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was fully aware when she testified at the first day of hearing. She also stated she may have resigned even if Lovell had won, and it never occurred to her to advise the Board secretary or Superintendent of her intention for the purpose of agenda revision.

Douglas Stiles, Board Member

Stiles testified he was at Saalehof's following the announcement of election results; recalled the presence of four other Board members at Saalehof's; had no recall of conversations at Saalehof's as he was inebriated; had discussed with Board members Lovell, Furino and Llewellyn, the creation of a Board vacancy through a resignation and the appointment of Lovell to fill that vacancy; is president of a political club which met at the Elks Club on April 21; was asked by Lovell and Dennis before the start of the political club meeting on April 21 to support the contemplated actions and respondend in the affirmative; discussed the contemplated action with Llewellyn on Thursday and Furino on Friday; was advised by Lovell on Saturday that Lekander would resign and he would accept the appointment to fill the vacancy; Lovell advised him the actions would occur prior to the reorganization meeting in order to retain his membership on the Planning Board which he would lose if there was a break in his Board membership; he wanted to avoid bad feelings on the Board if a time gap removed Lovell from the Planning Board and the Mayor appointed some other Board member to the Planning Board; and finally testified that he did not disclose discussions with other Board members to Board member Demarest.

On examination by the court, Dennis testified that bad feelings among Board members could be avoided if the Mayor appointed one other than Lovell to the Planning Board by the rejection of the appointee.

William Boon, Board Member

Boon testified he had knowledge of the anticipated resignation and appointment of Lovell prior to the April 26 meeting as Lovell called him for his opinion, which was

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supportive; said discussion with Lovell was prior to receipt of the agenda for the April 26 meeting; had discussed the actions with Board member Howard at a chance meeting; and had no other discussions with any Board members.

Edwin R. Howard, Board Member

Howard testified he was upset over Lovell's election defeat; called Lovell on April 21 and brought up the resignation/vacancy/appointment idea; was present at Saalehof's on election night and spoke with each Board member present; would offer his own resignation from the Board, contingent on a Lovell appointment, if no one else resigned; was aware that the scenario and sequence of events were directly related to Lovell's seat on the Planning Board; had no intention of advising Demarest of the plan; indicated that Demarest was "boxed out"; Lovell prepared the motions to be made on April 26 and asked Howard to make one, advising him as to which motion to make; and finally testified that prearrangements meant discussions to bring about a desired result.

Jean Llewellyn, Board Member

Llewellyn testified that although she personally favored Lovell, her initial response to the plan was negative due to her concern of a public outcry; changed her mind when Lovell indicated he wanted full support of Board members and at her realization that she was the only consulted member who was "out of step"; only Lovell and selected Board members knew of the planned resignation and Lovell's appointment; Lovell advised her on Saturday he would accept the appointment; and finally testified there was a departure from the published agenda by the Board at its April 26 meeting.

Grace Demarest, Board Member

Demarest testified she had no advance knowledge of the Lekander resignation and Lovell's appointment; did not support Lovell's reelection; voted for the Lovell

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appointment on April 26 after questioning the propriety of his resignation as she wanted a harmonious Board; realized she had been duped when she saw Dennis reading his motion from a prepared statement to elect Lovell as president; registered shock of the maneuvering at the April 26 meeting; retracted her affirmative votes.

Gladys B. Vanderbeck, Board Secretary

Vanderbeck testified the Superintendent prepared the April 26 meeting agenda and handles distribution; her first knowledge of the Lekander resignation was at the April 26 meeting when Lekander was recognized by President Lovell; Lovell did not seek Board authorization to deviate from the published agenda; Furino and Dennis read their motions from prepared statements; is not aware of any posting of meeting agendas; the published agenda is available to the public upon their arrival at the meeting; there was no public notice of a Board member resignation or appointment to fill the vacancy; there was no opportunity for public discussion at the meeting before the actions were taken; Lovell requested her to swear him in immediately after his appointment; it is normal to prepare motions in advance but not without an expectation for action; the pre-prepared presidential motions with the place for nominee's name left blank could only be used if Lovell was the nominee; no motions were ever prepared in advance that did not relate to matters listed on the agenda; and finally testified that she may prepare a special notice to the public on such matters as a budget hearing or school closing, but no such notices are posted and the public learns of agenda items when they appear at the meeting.

William Spreen, Superintendent of Schools

Spreen testified he prepares the meeting agenda; would produce an amended agenda if something arose after the initial agenda is produced; distributes agenda by hand delivery to Board members on Friday; agenda is available to the public when they arrive at the scheduled meeting; the agenda is not posted; Lekander advised him on April 21 of her resignation thoughts; he advised Lekander to speak to Lovell; he didn't amend the

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agenda as he had no knowledge that a resignation would be submitted or acted on; Lovell talked to him on Friday, April 23, concerning resignation procedures; resignations would normally come before the Board under "Correspondence," which is listed on the agenda after the reorganization of the Board; and finally the original April 12 reorganization meeting was changed to April 26 due to Governor Kean's intervention in the election process caused by a severe snow storm.

Theodore Lovell, Board Member and President

Lovell testified he prepared the motions to accept a resignation, to appoint a replacement, and to nominate a president, leaving the place for a name blank; placed the motions on Board member tables; was advised by Howard that his defeat was due to his vote on the Planning Board in support of town houses; he called all Board members, other than Hancox and Demarest, to get advice and determine if his appointment to fill the vacancy had full support; all Board member responses were affirmative excepting Llewellyn who thought the plan was repugnant, but later changed her mind; an appointment of a Board member to a vacancy is not of sufficient public importance to be specified on the agenda; there was no opportunity for notice since he made his decision to accept appointment at 5:00 p.m. on April 26; pre-prepared the motions because he thought Board members making them would feel more comfortable in light of the complexities of the motions; pre-prepared the motions with an expectation there would be action on them; Demarest raised the only question of legality at the April 26 meeting concerning the appropriateness of his resignation; members of the public expressed their unhappiness and displeasure, but he did not recall a question of legality; he spoke with all other Board members present at Saalehof's, but there was no resignation discussion there, although such discussions were held with Howard, Dennis and possibly Stiles after the election at the schoolhouse prior to going to Saalehof's; and finally testified that he decided that the Lekander resignation should be done at the beginning of the meeting on April 26 because he wanted to save face for the Mayor, who Lovell is opposing in the mayoralty election.

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FINDING OF RELEVANT FACTS

The following findings of relevant facts result from a thorough review of testimonial and documentary evidence, and a careful judgment of the demeanor of witnesses:

1. Theordore Lovell was an unsuccessful candidate for reelection as a member of the Bloomingdale Board of Education.

2. A written agenda for the April 26, 1982 Board meeting was prepared by the Superintendent and distributed to Board members on April 23.

3. The agenda, P-2, was not posted anywhere in the community at any time prior to the April 26 meeting nor sent to newspapers, but was available to the public at the meeting place upon arrival for the meeting.

4. The public, Board member Demarest, and newly elected Board member Hancox, were not noticed of an anticipated Board member resignation, anticipated Board action accepting the resignation, or the anticipated action of the Board in appointing Theodore Lovell to fill the vacancy at the April 26 meeting.

5. The agenda provided for flag salute, opening statement and reorganization meeting, in that order.

6. The opening statement by Lovell in compliance with the Open Public Meetings Act did not indicate the time and place of the posting of the meeting notice, or when same was sent to the newspapers, or the change from the originally scheduled date of the reorganization meeting.

7. The initial idea for the continuance of Lovell's membership on the Board of Education was planted in his mind by other Board members.

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8. The development and implementation of the plan was engineered by Lovell.

9. A thorough review of testimony and the observations at hearing of witnesses under oath, results in the following credibility determinations:

   a) The testimony of witnesses Vanderbeck, Lekander, Spreen, Boon, Howard, Llewellyn and Demarest is deemed to be credible.

   b) The testimony of witnesses Furino and Dennis is deemed to be credible with the exception of their testimony that the five Board members did not gather as a group at Saalehof's.

   c) The testimony of Lovell and Stiles did not rise to the level of credibility.

10. All Board members, other than Demarest and newly elected Hancox, discussed, had knowledge of, and vowed their support of the resignation/vacancy/appointment scheme in private intra Board member telephone and person-to-person conversations held between the election of April 20 and the reorganization meeting of April 26.

11. There were discussions between the five Board members at Saalehof's which focused on the continuation of Lovell as a Board member.

12. Lovell was determined to avoid a break in his Board of Education membership in order to protect his position on the Planning Board.

13. Lovell used members of the Board and his membership on that Board to further his own personal and political interests.

14. Lovell is a candidate for the office of Mayor in Bloomingdale.

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15. There was no discussion by the Board at its April 26 meeting relative to consideration of any nominee to fill the vacancy caused by the Lekander resignation

CREDIBILITY OF WITNESSES

Paul Furino and John Dennis

The testimony of these witnesses was deemed to be credible with the exception of the meeting at Saalehof's. The 20 to 25 patrons at Saalehof's included the five Board members. I **FIND** it inconceivable that five Board members, all admittedly emotionally upset over the defeat of Lovell and sharing a commonality of interest in Lovell's retention on the Board, could and did calculatingly avoid meeting together as a group.

Douglas Stiles

I **FIND** the inability of this witness to recall conversations at Saalehof's due to his inebriation to lack credibility and his testimony was designed to avoid answering questions about those conversations. I **ALSO FIND** his testimony concerning the avoidance of a time gap in Lovell's service as a Board member in order to avoid bad feelings among Board members, that would result from the Mayor's appointment of a Board member other than Lovell to the Planning Board, to be a shield for the true reason, which I **FIND** to be the continued membership of Lovell on the Planning Board.

Theodore Lovell

I **FIND** Lovell's testimony to be self-serving and lacking in credibility. He testified he left blank the space for a name on the motions he prepared and distributed for Board action as he did not know what name to fill in. A review of those motions clearly

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establishes that only the name of Theodore Lovell could possibly fit the motions. See R-2.

Lovell testified his calls to Board members concerning the scheme was not to solicit support but to seek advice. I **FIND** this testimony lacks credibility and represents a distinction without a difference in light of the credible testimony of other witnesses that Lovell wanted full support.

I **ALSO FIND** Lovell's testimony that the appointment to fill a vacant position on the Board of Education is not of sufficient public importance to be specified on the agenda to be incredible, in light of the extensive statutory scheme protecting the public interest. See N.J.S.A. 18A:14-1 et seq.

I **FURTHER FIND** Lovell's testimony that he did not make his decision to accept appointment until 5:00 p.m. on April 26, to lack credibility in light of the contrary testimony of credible witnesses who support him.

Lovell's testimony that he prepared the motions for other Board members to read because he thought said Board members would feel more comfortable in light of the complexities of the motions is incredible. I **FIND** his preparation of said motions to have been motivated by his great concern to avoid a time gap in his Board membership to protect his position on the Planning Board.

I **FURTHER FIND** Lovell's testimony that no resignation discussion took place at Saalehof's, to lack credibility in light of the credible testimony of other Board members present, as well as his own testimony that he was involved in such discussion with Howard, Dennis and possible Stiles at the school after the election and prior to Saalehof's.

Lovell testified his determination to have the outgoing Board act on the motions, resulted from his desire to save face for the incumbent Mayor who he is opposing in the election for the office of Mayor. I **FIND** this testimony to be totally incredible and was designed to shield his strong desire to protect his position on the Planning Board to further his political ambitions.

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I **FINALLY FIND** Lovell's testimony, of insufficient time to amend the agenda, to include the anticipated actions because he did not decide to accept appointment until 5:00 p.m. on April 26 to be incredible, in light of contrary and credible testimony of other Board members that Lovell made his decision prior to the time of receipt of the agenda and the testimony of the Board's agents relative to agenda amendments or revisions.

RELEVANT ARGUMENTS OF COUNSEL

For Petitioners

Petitioners argue in opposition to a Motion to remove Theodore Lovell as a party respondent as they seek to remove him as a Board member and president in this matter and he is therefore an indispensable party.

Petitioners argue the Board violated N.J.S.A. 10:4-18 in that the annual notice of meetings scheduled the reorganization meeting for a date other than April 26 and the Board did not amend the notice to reflect the rescheduled organization meeting.

Petitioners also argue the Board violated N.J.S.A. 10:4-10 due to its failure to incorporate in its opening statement the specificity required realtive to public notice.

The contention of petitioners, relative to the Board's failure to give notice to the public and Board member Demarest of the anticipated resignation and appointment actions, is the existence of an intention by Lovell and other Board members to conceal the preconceived scheme until the action took place.

Petitioners further argue the actions of the outgoing Board on April 26 represented a perfunctory rerun of decisions made privately by a majority of Board members in advance of the meeting; the seven Board members privy to the scheme, did not consider any appointee other than Lovell; the Board did not deliberate on its actions at the April 26 public meeting; said actions were manipulated in bad faith and designed to promote the personal and political ambitions of Theodore Lovell.

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For Respondents

Respondent Lovell supports his request for removal as a party respondent on his contention he is not a necessary party to the proceeding and cites N.J. Court Rule 4:28(a).

Relative to the other issues in this matter, respondents argue all issues related to alleged violations of the Open Public Meetings Act were rendered moot by corrective de novo action taken by the Board on October 12, 1982 pursuant to N.J.S.A. 10:4-15(a).

Respondent's contend the opening statement as reproduced in the minutes of the April 26, 1982 meeting "was merely a paraphrase and not a verbatim recording of the statement made by the president."

Respondents also argue the written agenda was not required to be published, and did not contain the disputed actions because they were not known to the Superintendent when the agenda was produced on April 23; the actions of the outgoing Board, the reorganization of the new Board, and any business conducted by the new Board on April 26 were effectively one meeting; although discussions took place among individual Board members between April 20 and April 26, the issues were never discussed by the Board as a "public body;" petitioners did not prove any deliberate attempt to "box-out" Demarest and her vote could not change the outcome of the Board's action; and finally the good faith efforts and wisdom of the Board in its actions were motivated by educational factors alone and should not be set aside for any procedural defects that may have occurred.

THE LAW

N.J.S.A. 10:4-6 et seq. is known as the Open Public Meetings Act as well as the Sunshine Law and became effective 90 days after the approval of L. 1975, c.231, 18 on October 21, 1975. It was spawned by Assembly Bill No. 1030, which incorporated the following in its Introductory Statement:

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> This bill requires that the public and the press have advance notice of and the opportunity to attend most meetings, including executive sessions, of public bodies, except where the public interest or individual rights would be jeopardized. The public's right to know the process by which governmental decisions are made and to witness that process in full detail may be obstructed by needlessly barring members of the public and the press from certain policymaking meetings of public bodies. If the public and the press cannot attend, they cannot learn of many positions that are considered or taken at such meetings by individual officials serving the public. Lack of this information can lessen public confidence in governmental decisions and impair the public's function of holding officials accountable in a democracy.

Since the enactment of the law, the courts have interpreted and applied the legislative intent and spirit perceived to be inherent.

In Polillo v. Deane, 74 N.J. 562 (1977), the New Jersey Supreme Court stated at 577 that "lack of wrongful intent cannot excuse noncompliance with the Act," and at 578 said "that strict adherence to the letter of the law is required in considering whether a violation of the Act has occurred."

The court in Accardi v. Mayor and Council of City of North Wildwood, 145 N.J. Super. 532 (App. Div. 1976) held noncompliance with the Sunshine Law when a public body merely discloses facts reached in private deliberations and taking its vote in public by reference to the clear language of N.J.S.A. 10:4-7, and said:

> The language contained therein granting the public the right to 'witness in full detail all phases of the deliberation of public bodies' [emphasis added] is clear. The term 'deliberation' includes the discussion and evaluation of facts . . . (at 541).

The Accardi court also stated at 541 that "one purpose of the Sunshine Law is to promote the public's confidence in the public bodies which govern them."

In Crifasi v. Governing Body of Oakland, 156 N.J. Super. 182 (App. Div. 1978), the court reiterated, "the Legislative intent to eliminate secrecy in public affairs" (at 187),

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and clearly held a public body may consider matters not listed on the agenda in the absence of an intention to deceive the public or made in bad faith (at 188).

In Woodbury Times v. Gloucester Cty. Sew. Auth., 151 N.J. Super. 160 (App. Div. 1977) the court said "it is the legislative intent of the Open Public Meetings Act that where meetings are held at which governmental action akin to legislative enactment is to be accomplished, the enacting body's final determination as well as the discussions of each individual member be open to the public" (at 166).

Mootness relative to de novo corrective action was addressed by the Commisisoner of Education in North Haledon v. Kiamie, 1979 S.L.D. ____ (decided December 24, 1979) when he said:

> The Board in its exceptions alleges that the decision rendered by . . . [ALJ] on November 2, 1979 is moot because of Board action taken on that date. The Commissioner does not agree. He finds that this new action of the Board forms no part of the proceedings, is not a matter of record and therefore cannot be considered, . . . (slip at 12)

DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW

ISSUE #1 - IS THEODORE LOVELL AN IMPROPERLY PLEADED PARTY RESPONDENT?

A review of the pleadings and entire record in this matter clearly reveals the purpose of petitioners is to challenge the actions of the Board and the conduct of Lovell and others in seeking relief in setting the Board actions aside to nullify the resignation of Lekander and the the appointment of Lovell to fill the vacancy as occurred on April 26, 1982. A cause of action was established against Lovell as well as others. The adjudication of this dispute will have a direct relationship on the status of Lovell as a member of Board of Education as well as a member of the Planning Board.

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I **FIND** Theodore Lovell to be a necessary and indispensable party, and **CONCLUDE**, therefore, that he is not an improperly pleaded party respondent.

ISSUE #2 - WERE THERE PREARRANGEMENTS MADE RELATIVE TO THE RESIGNATION OF LEKANDER AND APPOINTMENT OF LOVELL TO FILL THE VACANCY, AND IF SO, DID SOME MEMBERS OF THE BOARD DISCUSS OR MEET ILLEGALLY, EXCLUDING DEMAREST AND HANCOX, WHEN SUCH ARRANGEMENTS WERE MADE PRIOR TO THE APRIL 26, 1982 BOARD MEETING?

The preponderance of credible evidence overwhelmingly supports the contention of petitioners that the disputed actions of the Board on April 26, 1982 were prearranged. I **SO FIND.**

Although not all discussions and chance meetings, such as Boon/Howard, are deemed to be violative of the Open Public Meetings Act, I **FIND** the bulk of the discussions and meetings, artfully designed for the purpose of planning and implementing the scheme to retain Lovell's membership on the Board of Education and the Planning Board, were intentionally held in private and kept secret from the public, Demarest and Hancox to avoid any disruption in the process of the successful achievement of the scheme's objectives. Such discussions fly directly in the face of the legislative intent and spirit of the law and violative of N.J.S.A. 10:4-7, which states: "The Legislature finds and declares the right of the public . . . to witness in full detail all phases of the deliberation ... of public bodies, is vital to the enhancement and proper functioning of the democratic process, . . ." I **SO FIND.** See Woodbury Times, Accardi, Crifasi and the Introductory Statement.

ISSUE #3 - WAS THE OPENING STATEMENT AT THE BOARD'S APRIL 26, 1982 MEETING IN COMPLIANCE WITH N.J.S.A. 10:4-6 ET SEQ.

Petitioners did not sustain their burden of proof that the opening statement recorded in the minutes of the April 26, 1982 meeting represented the verbatim remarks

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of the president. This court is therefore precluded from determining if in fact there was a violation of N.J.S.A. 10:4-10. I SO FIND.

The court takes note that its review of opening statements recorded in the minutes of all Board meetings in the record are the same and indeed lack the specificity required, as distinguished from the opening statement memorialized in the minutes of the October 12, 1982 meeting, which is not in this record.

Board presidents and secretaries are cautioned to state and record such statements with care and awareness of the requirements of the law.

ISSUE #4 - DID THE BOARD ACT UNLAWFULLY AT ITS APRIL 26, 1982 MEETING IF AND WHEN IT ACTED ON NON-AGENDA ITEMS?

The Superintendent testified that resignations would normally come before the Board for deliberation and action under "Correspondence" on the agenda. A review of the agenda, P-2, reveals that "Correspondence" as an agenda item follows the "Reorganization Meeting."

The Board secretary testified that agenda is defined as the order of business to be conducted. She also testified as to the absence of Board action authorizing the deviation from the order of business as listed on the agenda.

A review of the agenda and the findings herein clearly reveals that no one other than selected members of the outgoing Board knew or were aware of any business to be conducted by the outgoing Board.

It is undisputed in decisional law that outgoing Boards are not precluded from taking action. The cases cited by respondents are clearly distinguishable from the case at bar by the issues and fact patterns. In Blessing v. Palisades Park and Pollotta, 1974 S.L.D. 1133, a pre-Open Public Meetings Act matter, "the sole issue to be decided is whether the appointment to membership which it made on February 15, 1973, should be set aside

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because the Board failed to follow its own policy" (at 1136). In that matter, the Commissioner said he could "find no authority that would require a board of education to be absolutely bound by its own policies" (at 1136).

Respondents also cited Nowak v. Manville, 1976 S.L.D. 43. In that matter three incumbent Board members were reelected, and the Board acted on 11 items prior to holding its reorganization meeting. The Commissioner found "no valid reason to grant the relief which petitioner seeks . . .," but also stated:

> The Commissioner deplores such casual disregard of statutory and case law as herein shown by the Board and cautions this Board and all other local boards of education to adhere rigidly to that which is prescribed by the Legislature, the State Board of Education, and the body of educational case law in conducting the important affairs of operating the public schools (at 48).

I **FIND** no listed agenda items other than the flag salute and opening statement prior to the reorganization meeting. I **ALSO FIND** no authority for the outgoing Board to deviate from the published agenda and act on an item properly to be addressed under "Correspondence" after the Reorganization Meeting by the new Board. I **FURTHER FIND** no valid educational rationale for the outgoing Board to act when it did, in light of the court's previous finding that the modus operendi was designed specifically for the retention of Lovell's position on the Planning Board.

I **FINALLY FIND** the Board's actions to have been planned and implemented in bad faith and unlawful.

ISSUE #5 - AS THE RESULT OF THE BOARD'S ACTION AT ITS APRIL 26, 1982 MEETING IN ACCEPTING THE LEKANDER RESIGNATION AND FILLING THE VACANCY WITH THE APPOINTMENT OF LOVELL, DID LOVELL UNLAWFULLY HOLD TWO BOARD POSITIONS SIMULTANEOUSLY?

A careful and thorough review of the minutes of the April 26, 1982, P-3, and the motions prepared by Lovell and submitted by others, R-2, reveals an artful creation of

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motions designed to avoid any break in the membership of Lovell on the Board of Education so as not to jeopardize his position on the Planning Board.

I **FIND** these motions to be sui generis and sufficiently complex to be clandestine; commend the creative ingenuity of the author; and deplore the self-aggrandizing and self-serving purpose underlying their development.

I **ALSO FIND** that Lovell did not hold two Board positions simultaneously as precluded by the text of the motions.

ISSUE #6 - DID THE BOARD ACT IN BAD FAITH, AND UNLAWFULLY, IN WITHHOLDING THE SWEARING IN OF MEMBER HANCOX UNTIL AFTER IT ACTED ON THE LEKANDER RESIGNATION AND LOVELL APPOINTMENT?

It is clear that the outgoing Board conducted no other business except the acceptance of the Lekander resignation and the appointment of Lovell to fill that vacancy. It is also crystal clear that newly elected Hancox was precluded from having any voice, such as demanding discussion, or any vote on an appointee to serve on the Board she was elected to serve by the public. She was as effectively boxed-out of her legal entitlement to deliberate, and to act on important public matters, as was Demarest by her exclusion from pre-meeting discussions.

I **FIND** the Board acted in bad faith and unlawfully by its exclusion of Hancox from deliberations and voting on the disputed motions.

SUMMARY

The members of the Board testified that Lovell was the best Board member and should continue his service on that Board. The qualitativeness of Lovell's capabilities and service are not at issue here, nor is the wisdom of the Board's determination. The primary issue here is legality.

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In Thomas v. Morris Township, 1963 S.L.D. 106, aff'd St. Bd. 1964 S.L.D. _____ (decided Augsut 12 1964), aff'd 89 N.J. Super. 327 (App. Div. 1965), the majority of five members of the Board privately discussed an action concerning the Superintendent, and prepared in advance a statement read at the Board meeting and acted on by the majority bloc. Three minority members of the Board registered shock and opposition at the surprise maneuver. The action at that meeting was litigated when that it was rescinded by the succeeding Board when the minority at the time of the initial action came into control following the Board election. The invalidation of the initial action was determined and upheld. In that matter, the Appellate Division reiterated at 331:

> The Commissioner found in the action taken by the board . . . "clear indication of the kind of private, final action, without full and open consideration and discussion, with timely opportunity for all members of the board and the public to be heard, which the Court condemned in Cullum . . ."

The State Board affirmed "holding that under the circumstances presented the... action of the board was shown to be an abuse of discretion, arbitrary and contrary to public policy" (at 332).

The Appellate Division held the "episode, no matter how well intentioned, . . . lacked the essential elements of notice, deliberation and fair opportunity to be heard. In short, the action was not taken in good faith" (at 334).

In the instant matter Board member Demarest stated during the meeting of the reorganized Board on April 26, 1982: "I must say I was shocked by the maneuvering that transpired here tonight. In light of the obvious prior discussion with select Board members concerning the reorganization of the Board at the obvious exclusion of certain other Board members and the subsequent reading of typed prepared statements during that portion of tonight's meeting, I therefore wish to have all actions and votes taken by me during the meeting to be changed to negative votes or abstentions." (See P-3, page 6, paragraph 4.)

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Based on the **FINDINGS** aforementioned, I **CONCLUDE** the actions of the outgoing Board in accepting the resignation of Reneta Lekander and appointing Theodore Lovell to fill the vacancy created are null and void as a matter of law, thereby establishing the membership of the Board as if the disputed actions never occurred.

This court does not feel compelled to address the Commissioner's jurisdiction in Open Public Meetings Act disputes which has been so clearly established in case law.

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

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

5 November 1982
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

9 November 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 15 1982
DATE

Donald S. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

g

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WITNESSES

For Petitioners:

Paul Furino, Board member

Gladys B. Vanderbeck, Board secretary

John Dennis, Board member

Reneta Lekander, former Board member

Theodore Lovell, Board member, president, and respondent

William Spreen, Superintendent of Schools

Douglas Stiles, Board member

William Boon, Board member

Edwin R. Howard, Board member

Jean Llewellyn, Baord member

Grace Demarest, Board member

For Respondents:

Gladys B. Vanderbeck, Board secretary

Theodore Lovell, Board member, president, and respondent

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EVIDENTIARY DOCUMENTS

P-1 April 16, 1981 Notice of Meetings

P-2 April 26, 1982 Meeting Agenda

P-3 April 26, 1982 Board minutes

P-4 May 10, 1982 Board minutes

R-1 Lovell oath as Board member on April 26, 1982

R-2 Motions prepared by Lovell

C-1 May 24, 1982 Board minutes

C-2 June 14, 1982 Board minutes

C-3 July 12, 1982 Board minutes

C-4 July 26, 1982 Board minutes

C-5 Board membership, 1981-82 and 1982-83

C-6 April 20, 1982 School Election results

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LESLEY MONSEES ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, AND THEODORE LOVELL, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

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

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

Respondents in excepting to the initial decision by the Honorable Ward R. Young, ALJ are actually moving before the Commissioner to stay Judge Young's decision, reopen the case and remand it for consolidation with a separate petition. Respondents' avowed purpose and sole motivation in seeking the consideration of such motion by the Commissioner is purportedly their expressed concern as to the the status of the various actions and decisions by the Board if the Commissioner were to approve Judge Young's decision in the present matter. Petitioner opposes the proposed motion by respondents and urges affirmation of the initial decision. The Commissioner finds merit in petitioner's arguments.

The Commissioner has previously considered the legality of a de facto member of a board of education in Claire M. Egan and Basil H. Blair v. Joseph G. Brody et al., 1970 S.L.D. 153, 154 and 155 wherein he said:

> "***It is clear that Mr. Curran was a de facto member of the Voorhees Township Board of Education at the time of the reorganization meeting and that he held title to that position until he was unseated by the decision of the Commissioner of Education on March 10, 1970.
>
> 'A de facto school officer is one who has entered into the possession of a school office and assumed to exercise the functions thereof by virtue of an apparent election or

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> appointment which is illegal or irregular.' 78 Corpus Juris Secundum, § 133, p. 876
>
> "It is also well established that the acts of a de facto officer are valid and may not be challenged and set aside on the grounds that he did not hold title de jure.
>
> 'The official acts of a de facto school officer, which a de jure officer would be authorized to do, are, if performed in the prescribed manner, as valid and binding on the public and third persons as the acts of de jure officers, and authority to act cannot be questioned collaterally. This is true even though the acts are performed pending a contest or quo warranto proceeding which subsequently terminates in the ouster of the de facto officer from office.' 78 Corpus Juris Secundum § 133, p. 877
>
> See also Oliver v. Jersey City, 63 N.J.L. 634 (E. & A. 1899). There can be no question, therefore, that, in general the actions in which Mr. Curran participated while he occupied a seat on the Board, were validly performed and are not subject to challenge by reason of the fact that he was de facto and not de jure.***"

The Commissioner, determining the present case to be similar to Egan, supra, wherein a de facto school officer took valid actions which were not subject to challenge by reason of the fact that he was de facto and not de jure, finds no need to grant respondents' motion to stay, reopen and remand the present decision; the motion is denied. The Commissioner notes that the new petition referenced herein has already been referred to the Office of Administrative Law and is scheduled for hearing before an ALJ.

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

Accordingly, the action of the Board appointing Lovell as a member is set aside. The Board shall fill the resulting vacancy by appropriate action pursuant to N.J.S.A. 18A:12-15.

The Commissioner so holds.

December 27, 1982 COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 315-82
AGENCY DKT. NO. 5-1/82A

GENEVIEVE PETERSON,
Petitioner
v.
TOWNSHIP OF LAKEWOOD,
BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Wayne J. Oppito, Esq. for petitioner

Richard K. Sacks, Esq. for respondent (Sharkey and Sacks, attorneys)

Record Closed October 1, 1982 Decided November 15, 1982

BEFORE **M. KATHLEEN DUNCAN, ALJ:**

This matter commenced on January 5, 1982, with the filing with the Commissioner of Education of a Petition of Appeal seeking a determination that Genevieve Peterson (hereinafter petitioner), a tenured teaching staff member employed by the Board of Education of the Township of Lakewood (hereinafter respondent), had wrongfully been denied employment credit on the salary guide for her three years active military service in violation of N.J.S.A. 18A:29-11 and was, therefore, entitled to be placed three steps above her current step on the Lakewood Administrators' salary guide and to have her salary adjusted retroactive to November 19, 1980. An Answer to the

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Petition was filed on behalf of respondent on January 13, 1982, and the matter was thereafter transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on April 19, 1982, and a Prehearing Order was entered on April 26, 1982, wherein the issues for determination were identified as follows:

1. Does petitioner's current salary reflect credit for her time in the military?

2. Was petitioner entitled to military credit as a beginning administrator?

3. Does the statute of limitations bar petitioner's claim?

4. Is petitioner's claim barred by the equitable doctrine of laches?

5. Is petitioner's claim barred by the equitable doctrine of estoppel?

The Prehearing Order also provided that issues 1 and 2 would be tried at hearing on June 17, 1982, and if it was still necessary after decision on issues 1 and 2 to decide the remaining issues, and if Lavin v. Board of Education of Hackensack was still pending undecided in the Supreme Court, the matter would then be placed on the inactive list to await the Supreme Court's determination in Lavin. The hearing was held as scheduled on June 17, 1982, at the Lakewood Municipal Building, Lakewood, New Jersey. At the conclusion of the hearing it was determined that the record would remain open for the filing of briefs. It was agreed that petitioner's brief would be filed within 30 days of receipt by petitioner's counsel of the hearing transcript or the date of the Supreme Court's decision in Lavin, whichever was later; respondent's brief was to be filed within 20 days of receipt by respondent's counsel of petitioner's brief, and a reply brief, if any, was to be filed by petitioner within 10 days thereafter. The Supreme Court decided Lavin on June 24, 1982. The transcript was delivered to the parties on or about July 12, 1982. Petitioner's brief was received on August 13, 1982; respondent's brief was received on September 21, 1982. No reply brief having been received on or before October 1, 1982, the record closed on that date.

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FINDINGS OF FACT

The basic facts relevant to a determination of the issues in this matter are not in dispute. I, therefore, **FIND** the following as the uncontested facts in this matter.

Petitioner served as an officer in the United States Navy from July 20, 1950 to April 30, 1953. Thereafter, she was employed as a teaching staff member by several boards of education in several states throughout the country other than New Jersey. On or about July 25, 1973, petitioner applied for the position of assistant principal at Lakewood High School. It has been respondent's policy to negotiate a starting administrator's beginning salary. Therefore, when petitioner was interviewed for the position by Dr. William Mackolin, the then Superintendent of Schools, they discussed petitioner's training, salary history, and all of petitioner's previous employment experience, including her military experience. Petitioner was informed by Dr. Mackolin that it was the district's policy to give employment credit only for administrative experience. The fact that petitioner had previously held the position of department chairman was considered, and a beginning salary of $16,000 was agreed upon. By letter dated September 6, 1973, petitioner was notified that respondent had officially appointed her to serve as an assistant principal assigned to the high school effective September 4, 1973, at a salary of $16,000 for a 12-month position. This position was her first employment in any New Jersey school district.

At the time of petitioner's initial employment, respondent was in the process of negotiating a collective bargaining agreement. At some time during the spring of 1974 negotiations were completed. The resulting contract and salary guide were made retroactive to July 1, 1973. The salary guide indicated that the starting step for an assistant principal assigned to the high school would be $16,000. The contract also called for, and petitioner received, retroactively, an additional $500 for an advanced education degree.

On November 19, 1980, petitioner wrote and sent a memo to John F. Patrick, Superintendent of Schools, which provided as follows:

> Reflection of my military service (2 years, 9 months, 11 days) has never been reflected in my placement on the salary guide. Recognition of this service has been recorded with the State Retirement System.

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> It is requested that credit for this service be granted.

On May 1, 1981, she again wrote to Mr. Patrick:

> Ref: My Letter of November 19, 1980
>
> Although I have spoken informally to Mr. Gamvas regarding subject matter request, formal acknowledgment of receipt of the referenced letter has not been received.
>
> May I ask for a progress report on this request?
>
> It should be noted that this request was made at the time I was offered this position and was denied.

By letter dated December 1, 1981, George Gamvqs, Assistant Superintendent, responded to petitioner as follows:

> The Lakewood Board of Education reviewed your request that your military experience be given consideration in the determination of your salary, and denied same.

Thereafter, petitioner filed the Petition which commenced the present matter.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:29-11, the primary statute which is relevant to these proceedings, provides as follows:

> Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this state, including active service in the women's army corps, the women's reserve of the naval reserve, or any similar organization authorized by the United States to serve with the army or navy, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.
>
> Nothing contained in this section shall be construed to reduce the number of employment or adjustment increments to which any

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> member may be entitled under the terms of any law, or regulation, or action of any employing board or officer, of this state, relating to leaves of absences.

"Member" is defined at N.J.S.A. 18A:26-6 as: "a fulltime teaching staff member as defined in this title except one who is the holder of an emergency certificate." The definition of teaching staff member is set forth at N.J.S.A. 18A:1-1:

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

Clearly, the position held by petitioner is that of a "teaching staff member" within the contemplation of the statutory definition. Nevertheless, respondent argues that the legislature never intended for N.J.S.A. 18A:29-11 to apply to administrators. The thrust of respondent's argument is that the purpose of the military service credit statute was to place a teacher, who gave military service to his country, on an equal footing with a teacher who did not serve. This rationale, respondent asserts, is not applicable to administrators:

> Notwithstanding the definition of teaching staff member in N.J.S.A. 18A:1-1, administrators are and must be viewed differently than teachers. Administrators, due to the nature of their positions, have separate and distinct bargaining units. Responsibilities and salaries are different than teachers. In most cases, the work year is longer than teachers.
>
> Starting salaries for teachers are generally based upon years of teaching experience with additional credit given for post-graduate studies. The military credit statute insures that teachers who served in the military will receive a salary equal to those who entered the teaching profession without interruption for military service.
>
> Starting salaries for administrators are based upon criteria much different than those applied to teachers. In Respondent's district, many factors are taken into account in the negotiations leading up to an agreed initial salary. Among the areas considered are teaching and administrative background, education, training, current salary and also military experience and service. The procedure followed by Respondent takes into account all prior

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> experience and background and also permits an individual to negotiate for the best possible salary. [Respondent's Brief pp. 2-3]

Respondent concludes that because petitioner's initial salary was negotiated with Dr. Mackolin, that salary refleeted all credit and adjustments to which she was entitled, including credits for her military service. Respondent asserts that if petitioner's position is accepted it would have the effect of raising petitioner three additional steps on the administrative salary guide:

> The result would not be parity with other administrators with equal experience, but rather inequality of experience and background but with equal pay and benefits. The salaries paid to administrators is [sic] based upon many more factors than mere length of service. But yet, the argument advanced by Petitioner would disregard all other criteria and raise Petitioner's salary to the level of individuals who have more experience or administrative skills or background. [Respondent's brief p. 4]

What respondent's position fails to consider, however, is the fact that military service credit as provided for by the legislature has no relationship whatsoever to teaching experience, qualifications, or skills. As the Supreme Court recently held in Lavin v. Board of Education of Hackensack, _____ N.J. _____ (1982) (Slip opinion at 7):

> The legislative purpose of N.J.S.A. 18A:29-11 is to reward veterans for service to their country in time of war. The reward takes the form of crediting the military service as teaching experience even though there is no functional relationship between the two. The credit has the effect of increasing the number of dollars to which the teacher who is a veteran is entitled. The emolument is not for services rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher.

In the facts of the present matter, petitioner had not been employed by a school district in New Jersey at any time prior to commencing her employment with respondent. Consequently, she had never received the "reward" intended for her by the New Jersey Legislature.

This being so, I **CONCLUDE** that the fact that she began her employment in New Jersey as an administrator rather than as a teacher is irrelevant to the question of whether she is entitled to military service credit. The statute is quite clear. It creates a

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statutory entitlement to a monetary reward for all those teaching staff members who have served in the military. Petitioner as a teaching staff member certainly comes within the definition of those so entitled. I also **CONCLUDE** that petitioner has never received her statutory entitlement. Petitioner asserts that she raised the question of whether she was entitled to any credit for her military service during the salary negotiations conducted between petitioner and Dr. Mackolin, and Dr. Mackolin advised her that credit was given only for administrative experience. Dr. Mackolin asserts that her military service was considered along with the rest of her background in arriving at the agreed upon salary. The exact discussion which transpired between petitioner and Dr. Mackolin about petitioner's military service is not important. It is quite obvious that when the salary guide for administrators was adopted retroactive to July 1973, petitioner's salary was at the starting step. Since the credit for military service is a statutory entitlement rather than an element of the employment contract, it cannot be subject to negotiation in salary discussions. When a teaching staff member who has military experience is first employed by a New Jersey school district, an appropriate place on the applicable salary guide should be agreed upon; it should then be determined whether that teaching staff member has ever received the statutory reward provided for by the New Jersey Legislature*, and if he or she has not yet received it, it should then be credited by advancing the member's placement on the salary guide the appropriate number of steps above the agreed upon starting salary.

N.J.S.A. 18A:28-12 also provides for credit for years of service in the military for purposes of calculating seniority:

> If any teaching staff member shall be dismissed as a result of such reduction (of force), such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified *** and in determining seniority, and in computing length of service for reemployment, full recognition shall be given

* Unlike petitioner who began her career in New Jersey as an administrator, most administrators will probably have received their statutory entitlement at some point earlier in their careers. This decision should not be interpreted to mean that someone who had received the credit as a teacher will again be entitled to receive the credit upon becoming an administrator. Nor should it be interpreted as allowing entitlement to additional credit when a teacher accepts employment in another district within New Jersey.

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> to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940, shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service." [Emphasis supplied]

In Lang v. Princeton Regional Board of Education, 1979 S.L.D. 245, the Commissioner considered for the first time the issue of applicability of military service for seniority status. Citing N.J.S.A. 18A:28-12, he declared the statute clear and unambiguous; and applying the law to the stipulated facts in the matter, he held, at 247:

> It is clear that a teaching staff member is afforded seniority rights only when a tenure status has been acquired and further that a teacher's right to tenure does not come into being until the precise conditions laid down in N.J.S.A. 18A:28-1 et seq. have been met. See Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E.&A. 1941) and Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962). In the instant matter petitioner was not entitled to a seniority status until his first day of employment in September 1975 when he acquired a tenure status.
>
> The Commissioner hereby directs the Princeton Regional Boad of Education to fix the seniority status of petitioner by adding his two years of military service to his total years of teaching service in respondent's school district since September 1972.

Petitioner is, therefore, entitled to have her years of military service credited not only on the salary guide (three years - see Lavin v. Hackensack Board of Education, 178 N.J. Super. 221, 230-233 (App. Div. 1981)), but also, since she is a tenured employee, for purposes of calculating seniority in the category high school assistant principal. Unlike N.J.S.A. 18A:29-11, N.J.S.A. 18A:29-12 does not refer to "years" of credit, and for seniority purposes it is not necessary to credit whole years. Therefore, the appropriate seniority credit is two years, nine months, eleven days.

I **CONCLUDE** that the remaining three issues were clearly and conclusively determined by the Supreme Court or the Appellate Division in Lavin, supra. Petitioner's credit should, therefore, be calculated prospectively from January 5, 1982, the date she filed the within action. Although petitioner first requested in writing that respondent credit her military service on November 19, 1980, and some argument could be made for making this determination retroactive to that date because respondent did not officially

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reply until December 1, 1981, I **CONCLUDE** that petitioner could have filed her action much earlier without waiting for an official written response, and, consequently, I **CONCLUDE** that the date of filing of the petitioner is the appropriate beginning date for the calculations.

For all of the foregoing reasons, it is **ORDERED** that petitioner be awarded salary and seniority credit in accordance with the foregoing opinion.

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

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

November 15, 1982
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

November 15, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 18, 1982
DATE

Ronald L. Parkinson
OFFICE OF ADMINISTRATIVE LAW

plb

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EXHIBITS

P-1 in evidence	Report of Separation from the Armed Forces of the United States
P-2 in evidence	Letter from William D. Mackolin, Superintendent of Schools, to petitioner, dated September 6, 1973
P-3 in evidence	Letter from Milton Showell, Superintendent of Schools, to petitioner, dated June 12, 1974
P-4 in evidence	Memo to Mr. John F. Patrick, Superintendent of Schools, from petitoner, dated November 19, 1980
P-5 in evidence	Memo to Mr. John F. Patrick, Superintendent of Schools, from petitioner, dated May 1, 1981
P-6 in evidence	Letter from George Gamvas' Assistant Superintendent, to petitioner, dated December 1, 1981
R-7 in evidence	Salary Guide for Administrators in the Lakewood School District, July 1, 1973 effective date
R-1 in evidence	Lakewood Public School System Application for Professional employment (4 pages)
R-2 in evidence	Minutes of Board of Education
R-3 in evidence	Cover page summary with 12 pages of Board minutes

WITNESSES

For petitioner:

Genevieve Peterson

Joseph C. Attardi

For respondent:

Dr. William Mackolin

George Gamvas

John Patrick

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GENEVIEVE PETERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

Petitioner asserts in her primary exceptions that calculations for retroactive pay should begin on the date of November 19, 1980, the date on which her claim was presented to the Board, as opposed to January 5, 1982, the date upon which her petition was filed. Petitioner contends further that the delay in affording her rights to military service credit was due to the unresponsive attitude of respondent. The Commissioner cannot agree. Judge Duncan has disposed of such argument in her initial decision.

Respondent argues that, when petitioner's initial salary was negotiated, military service credit was included, and, if petitioner were to be advanced now, the equivalent of three years' military service credit or three steps on the salary guide, this advancement would not be fair to other administrators who outrank petitioner in experience and background.

The Commissioner observes the arguments advanced herein and concludes that he places no reliance on respondent's argument in that N.J.S.A. 18A:29-11 speaks for itself as held in Lavin v. Board of Education of Hackensack, 90 N.J. 145 (Sup. Ct. 1982). Petitioner herein, having never been credited with her military service as statutorily prescribed, is entitled to such recognition pursuant to Lavin, supra. The Commissioner so holds.

The Commissioner observes that Judge Duncan has reached a legal determination and conclusion with respect to petitioner's seniority in the instant matter. Such determination was not framed as one of the issues in this controversy and therefore exceeds the scope of these proceedings.

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Therefore, while the Commissioner affirms Judge Duncan's decision herein with respect to petitioner's entitlement to prospective military service credit, such affirmance of this decision may not be construed to either affirm or reject Judge Duncan's ruling on seniority.

Accordingly, the Commissioner affirms the findings and determination as rendered in the initial decision and accepts them as his own. The Commissioner hereby directs the Board to compensate petitioner prospectively as of January 1982, placing her on the appropriate step of the salary guide in recognition of three years' military service credit.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 29, 1982

PENDING STATE BOARD

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 9037-82
AGENCY DKT. NO. 314-8/82A

ROBERT BLAKE,
Petitioner
v.
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,
Respondent.

APPEARANCES:

Barbara E. Riefberg, Esq. for petitioner (Selikoff & Cohen, attorneys)

A. Paul Kienzle, Jr., Esq. for respondent (Casarow, Casarow & Kienzle, attorneys)

Record Closed November 5, 1982 Decided November 17, 1982

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Robert Blake (petitioner), a teacher in the employ of the Bridgeton Board of Education (Board) since 1964, challenges the scope of an action taken by the Board to withhold a salary increment from him for 1982-83. The Board contends that petitioner has failed to state a cause of action and that the scope of its action to withhold an increment for 1982-83 is proper under N.J.S.A. 18A:1-1 et seq. and the rules of the State Board of Education, N.J.A.C. 6:1-1 et seq.

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The Commissioner transferred the matter to the Office of Administrative Law on October 6, 1982, as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Thereafter, petitioner moved for summary decision on the point of law raised and upon the grounds that there are no material facts in dispute.

Facts

The material facts, as pleaded and as admitted, are these:

1. The Board, on May 11, 1982, determined to withhold "the salary increment and salary increases of Petitioner 'for the school year 1982-83 and to have this withholding of increment and salary increases maintained in all subsequent salaries to be received by you' [petitioner]." (Petition of Appeal, para. 3; Answer, para. 3)

2. The Board admits notifying petitioner by letter dated May 12, 1982, of its action to withhold a salary increment and salary increases from him. Petitioner pleads, but the Board does not reply by admission, denial, or leaving petitioner to his proofs, that the same letter also advises that "this withholding was to be maintained in all subsequent salaries." (Petition of Appeal, para. 4; Answer, para. 4)

Petitioner's contention is accepted as fact that this Board determined that future boards of education, which become the employer of petitioner, may not restore to him the present increment or other salary increases now withheld. Petitioner moves for summary decision on the grounds that "[t]he sole issue to be decided herein is whether the ad infinitum maintenance of such action is violative of various New Jersey statutory provisions and case law." (Petitioner's brief at p. 2) To the extent that petitioner does not challenge the substantive action of the Board to withhold an increment " 'and salary increases' " (adjustment increment?) from his 1982-83 salary, and to the extent petitioner challenges only what appears to be this Board's attempt to bind future boards in light of the absence of disputed material fact, a motion for summary decision is appropriate, Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954).

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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, Skiadzien v. Bayonne Board of Education, 12 N.J. Misc. 603 (Sup. Ct. 1934), aff'd 115 N.J.L. 203 (E. & A., 1935); Evans v. Gloucester City Board of Education, 13 N.J. Misc. 506 (Sup. Ct. 1935), aff'd 116 N.J.L. 448 (E. & A., 1935).

A board of education has statutory authority to withhold a salary increment from a teacher. N.J.S.A. 18A:29-14 provides:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers of such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment. [Emphasis added]

Salary increments are not automatic; they must be earned by the teacher. Should the board determine that the teacher did not earn a salary increment, because of inefficiency or other just cause, it may withhold the salary increment, adjustment increment, or both. The affected teacher may appeal an adverse action in this regard to the Commissioner.

The statute plainly states that "[i] t shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment." The phrase "the board of education," in recognition of the long-established principle that a board of education is a noncontinuous body, refers to the future board of education. That is, the board following the board which withheld a salary or adjustment increment, or both, is under no duty to increase automatically the teacher's salary, by way

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of adjustment increments, to bring the salary to the level at which it would have been had the former board not withheld the teacher salary or adjustment increment, or both. While the future board is under no duty to increase automatically the affected teacher's salary, the plain meaning of "It shall not be mandatory upon the board" gives the future board the discretionary authority to determine whether the teacher's future performance warrants the award of such an adjustment increment. This discretionary authority cannot be seen to rest with the present board, for the statute addresses "any future year." The present Board shall cease to exist at the conclusion of its official life, the 1983 reorganization meeting. And there is clearly no authority for the present board to modify the future board's discretionary authority in this regard.

I **FIND** that the Board, while it has authority to withhold currently petitioner's salary or adjustment increment, or both, lacks authority to prohibit future boards of education from the proper exercise of discretionary authority under N.J.S.A. 18A:29-14. I **CONCLUDE**, therefore, that as much as the Board's action here seeks to bind future boards that that action is beyond the scope of its authority and is, accordingly, set aside. The Board's action, insofar as petitioner's 1982-83 salary, is **AFFIRMED**.

Summary decision is granted petitioner on the single issue of law that this Board may not legally bind a future board in respect of a future board's discretionary authority at N.J.S.A. 18A:29-14. This issue being the sole issue presented in the Petition, the prehearing conference scheduled for December 1, 1982, is cancelled.

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

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OAL DKT. NO. EDU 9037-82

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

November 17, 1982
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

November 18, 1982
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

Nov. 18, 1982
DATE

Ronald L. Parker Jr.
OFFICE OF ADMINISTRATIVE LAW

ij

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ROBERT BLAKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c. There being no provision in law for a reply to reply exceptions, such were not considered.

Respondent excepts to the decision by the Honorable Daniel B. McKeown, ALJ contending that Judge McKeown's decision was founded on an "erroneous assumption of material facts." Respondent contends that the Board is entitled to withhold the employment increment and adjustment increment of petitioner in perpetuity. Respondent relies on Garibaldi v. Toms River Regional School District, 1977 S.L.D. 192 which respondent alleges holds that a board of education may withhold an increment permanently. Petitioner's reply exceptions refute respondent's arguments and aver that a board of education cannot prospectively withhold an increment permanently. Petitioner contends that respondent mistakenly relies on Garibaldi, supra, because in that case the board therein was taking action each year to maintain the increment withholding. The Commissioner looks with favor on petitioner's arguments.

The Commissioner has previously considered similar circumstances in Elmwood Park Education Association v. Board of Education of Elmwood Park, Bergen County, decided August 10, 1981 wherein he affirmed Judge Campbell who said:

> "***The Association's argument that the policy illegally takes from successor boards their power to restore a withheld increment is a compelling one. It is, indeed, not mandatory upon the board to pay the denied increment in any future year (N.J.S.A. 18A:29-14), but a future board cannot be denied the right to make restoration if, in its judgment, that is appropriate.

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> "That a board is free to modify or repeal existing policy is not the issue. What is central to this matter is that an action ought not to be taken in the first place unless authorized by statute, when its effect exceeds the life of the current board and binds future boards.***" (Emphasis in text.)
> (Slip Opinion, at p. 4)

Accordingly, the action of the Board on petitioner's 1982-83 salary is affirmed. However, this Board may not by policy or present action legally bind a future board in the proper exercise of its discretionary authority under N.J.S.A. 18A:29-14.

The Commissioner so holds.

COMMISSIONER OF EDUCATION

December 30, 1982

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BERGENFIELD EDUCATION ASSOCIATION, ET AL.,

PETITIONERS-APPELLANTS,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, : DECISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, May 18, 1981

For the Petitioners-Appellants, Bucceri & Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Greenwood & Sayovitz
(Robert H. Greenwood, Esq., of Counsel)

This is another appeal involving the tenurable nature of employment in various categories of Title I, supplemental and compensatory education programs. An outline of the status of each of the six petitioners here involved is as follows:

Helen M. Casazza was employed as a Title I/ Compensatory Education Instructor for approximately one-half of the 1978/79 school year and for the entire 1979/80 school year, such employment having occurred while her previous contract position had been eliminated through reduction in force. For the first half year she taught in an experimental, pilot program for first grade pupils only, which was not repeated. The next year she gave remedial instruction to third, fourth and fifth grade students.

Joan Moore was employed from 1973 through June 1980 as a Supplemental/Compensatory Education Instructor, whose duty was to teach perceptually impaired and emotionally disturbed children referred to her by the child study team.

Mary McEwan was employed as a Supplemental/ Compensatory Education Instructor from October 1975 to June 1979. She thereafter went to the Title I program on October 10, 1979 and left on December 21st of that year for maternity reasons. As a Compensatory Education Instructor she did remedial work

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and perceptual instruction to handicapped children. Under the Title I employment, she taught reading or mathematics.

Elaine Nicholas was employed as a Supplemental Instructor for the school years 1969 through June 1980, with duties similar to those of McEwan in that capacity.

Beverly Katz served in the same capacity and with the same duties as Nicholas from 1973 to 1980.

Claire Kingsley was a Compensatory Education Instructor from November 28, 1977 through May 1978 and a Title I/Compensatory Education Instructor from September 15, 1978 to June 13, 1980. She taught primarily mathematics and reading to children needing remedial work.

According to the findings of the Administrative Law Judge, all of the foregoing teachers received individual termination notices at the end of each school year informing them that, due to possible fluctuation in funding and changing needs, they could not assume that they would be employed for the coming year. When the funding was committed and programs planned for the coming year, the petitioners received employment notices informing them that their new employment was only to the end of the ensuing year or earlier. Thus each of the petitioners was clearly aware of the year-to-year, non-guaranteed nature of her employment and accepted it on these terms.

The Administrative Law Judge and the Commissioner dismissed the appeals of all the petitioners. In addition, the Commissioner held that the petition was filed too late under the 90-day rule of N.J.A.C. 6:24-1.2, and for that reason it should be dismissed. We agree with the Administrative Law Judge that the above-cited rule does not bar this proceeding, for the reasons set forth in the Judge's initial decision.

We find considerable difficulty in reconciling the decision of the Appellate Division in Spiewak v. Rutherford Board of Education, decided June 22, 1981, Docket No. A-4853-79-T2 with the decision of the same court (but a different part) in Point Pleasant Beach Teachers Association v. Callam, 173 N.J. Super. 11 (App. Div. 1980), cert. denied 84 N.J. 469, particularly with respect to the petitioner in Spiewak who had been employed under Title I. Moreover, the approach taken by the opinions in Spiewak and in Hamilton Township Supplemental Teachers Association v. Hamilton Township Board of Education, decided by the Appellate Division July 10, 1981, Docket No. A-667-80-T1, appear substantially different from some of the reasoning in the Point Pleasant Beach opinion. However, we think Point Pleasant Beach

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controls here with respect to the two petitioners employed in the Title I program, especially where, as here, the Board took pains each year to make the teachers aware of the temporary nature of their employment and it was accepted by the teachers with full knowledge of such temporary nature. We believe therefore that Petitioners Casazza and Kingsley did not accrue time toward tenure when employed under Title I.

With regard to Petitioners Moore, Nicholas and Katz, all of whom were Supplemental Instructors in programs for the handicapped which were mandated by state law, we believe their cases to be controlled by the Appellate Division decisions in Hamilton Township and Spiewak, particularly as Petitioner Nicholas had worked in that position and program since 1969 and Petitioner Moore and Petitioner Katz since 1973. We are also of the view that Petitioner McEwan, likewise a Supplemental Instructor doing remedial work for handicapped children from October 1975 to June 1979, obtained tenure after serving in her position for the statutory period prescribed by N.J.S.A. 18A:28-5. Thus, when she was assigned in the fall of 1979 to the Title I program, she already had the rights of a tenured supplemental teacher.

For the foregoing reasons the State Board affirms the Commissioner's decision in the cases of Casazza and Kingsley, but reverses the Commissioner's decision as to the four other petitioners, holding that each of them had tenure as supplemental or compensatory education teachers and any rights, therefore, which the petitioners may claim have been denied them by the Board of Education.

It is noted that the following Board members opposed that part of the State Board's decision as it relates to Petitioners Casazza and Kingsley: Jack Bagan, Sonia Ruby and Robert Wolfenbarger.

Attorneys Exceptions are noted.
January 6, 1982

Pending N.J. Superior Court

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BERNARDS TOWNSHIP EDUCATION ASSOCIATION, PATRICIA WOHLLEB, ELSIE DRAGONETTI, MARYANN MC ELVOGUE, IRIS WATTS AND CECILIA VALERI,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT-CROSS-APPELLANT.	:	

Decided by the Commissioner of Education, September 29, 1981

For the Petitioners-Appellants, Ruhlman & Butrym (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Cross-Appellant, Lucid, Jabbour, Pinto & Rodgers (Michael E. Rodgers, Esq., of Counsel)

The petitioners herein alleged that the respondent Board violated the law in not reemploying a certified school nurse and by assigning nurse duties to uncertified personnel. The Commissioner upheld the Board but with one exception: he ordered that from the list of duties of the medical assistants there be deleted the dispensing of medication under direction of the school nurse.

We heartily endorse the Board's objective of relieving its school nurses of routine and clerical duties in order to expand their teaching roles in the school system, however, this must only be done consistently with the legal requirements reviewed in the decision below.

We note in particular that under N.J.S.A. 45:11-23, the only school personnel legally authorized to administer medication are certified school nurses holding the appropriate credentials.

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

Mr. Brandt dissents from that portion of the State Board decision which holds that medical assistants may not supervise the taking of medication previously dispensed in accordance

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with a doctor's permission and intructions. He observes that the policy statement of the State Board of Nursing cited by the Commissioner is neither a statute nor a regulation having the effect of law. He agrees with the following statement from the appellant Board's brief:

> "The task of supervising the taking of medication as described above is clearly ministerial in nature and could be performed adequately by a parent, a teacher, a building principal or a baby sitter. Obviously a medical assistant, having medical training and acting under instructions from a certified school nurse, is qualified to perform this task. There would seem to be no basis in logical or public policy to restrict this function to certified school nurses."

Ruth H. Mancuso, John T. Klagholz and P. Paul Ricci concur with Mr. Brandt.
April 7, 1982

Pending N.J. Superior Court

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KATHLEEN CARLSON,

Appellant,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,

Respondent.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education, January 16, 1981

Decided by the State Board of Education, May 6, 1981

Argued March 9, 1981 -- Decided March 24, 1982

Before Judges Fritz, Ard and Trautwein.

On appeal from the State Board of Education.

Louis P. Bucceri argued the cause for appellant (Bucceri & Pincus, attorneys; Mr. Bucceri, of counsel; Gregory T. Syrek, on the brief).

James F. Kervick argued the cause for respondent (Sauer, Kervick, Mulkeen & Keefe, attorneys; Mr. Kervick, of counsel and on the brief).

Irwin I. Kimmelman, Attorney General, filed a statement in lieu of brief on behalf of the State Board of Education (James R. Zazzali, former Attorney General, and Catherine A. Walker, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

This is an appeal from a decision of the New Jersey State Board of Education which affirmed the decision of the Commissioner of Education. The matter was initiated before the Commissioner by the filing of a petition of appeal pursuant to N.J.S.A. 18A:6-9, in which the appellant alleges that her tenure and seniority rights had been violated by the respondent.

After issue was joined, the matter was referred to the Office of Administrative Law and an Administrative Law Judge by operation of N.J.S.A. 52:14F-1 et seq. Each party then filed a motion for summary judgment. The Initial Decision of the Administrative Law Judge found that appellant achieved tenure in

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a half-time capacity upon her first day of service in September 1976 and consequently is not entitled to relief for the school years 1976-77 and 1977-78. Her petition of appeal was dismissed. After exceptions to the Initial Decision were filed by the appellant, the matter came before the Commissioner of Education who ruled that the exceptions were not filed in a timely fashion by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c. He affirmed the findings and determination of the Initial Decision. Subsequently, this determination was affirmed by the State Board of Education.

The thrust of Carlson's appeal is that she obtained full-time tenure rights after serving the first day of her fourth year, notwithstanding that day was as a half-time teacher. We disagree.

The essential facts were undisputed. Appellant, certified to teach grades kindergarten through eight, was employed by respondent as a full-time teacher for the three school years between September 1973 and June 1976. After proper notice she was terminated at the end of the 1975-76 school year for reasons of economy and decreasing enrollment.

Subsequently, respondent determined that a half-time kindergarten teacher would be needed for the 1976-77 school year; appellant applied for that as well as for other full-time positions, and she was hired for the half-time position. She was again hired as a half-time teacher for the 1977-78 school year, this time at another school within the district. During her two years as a half-time teacher, appellant continually expressed interest in full-time positions; respondent employed nontenured teachers in certain full-time positions during that period. Beginning with the 1978-79 school year and continuing through the present, appellant has been employed in a full-time position as a kindergarten teacher.

In rejecting her claim the administrative law judge ruled that appellant had achieved tenure for the 1976-77 school year as a half-time teacher only, and thus she had no claim to tenure or seniority as a full-time teacher during the two years in question.

Appellant argues that by serving as a full-time teacher during all three years of her probationary period, she achieved tenure as a full-time teacher at the start of her fourth year, even though she was only a half-time teacher in that year. Otherwise, she reasons, a local board could avoid having any full-time tenured teachers by reducing a teacher's status to part-time after three years. As a remedy, she claims entitlement to the difference in salary between what she earned during her two half-time years and what she would have made had she been employed in a full-time position.

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Respondent counters that when appellant was terminated after her third year, she had not yet achieved tenure. Thus, in applying for the part-time position for the next year, appellant was on an equal footing with all other potential applicants; she had no greater legal expectancy to that job than a stranger to the district. Hence respondent had no obligation to hire appellant to one of the full-time positions.

Under N.J.S.A. 18A:28-5(b), a teacher acquires tenure, not after completing three years, but upon reemployment at the start of a fourth year. Zimmerman v. Board of Education of Newark, 38 N.J. 65, 75 (1962), cert. den. 371 U.S. 956 (1963); Capella v. Bd. of Ed. Camden Cty. Voc. Tech. Sch., 145 N.J. Super. 209, 211 (App. Div. 1976).

The Administrative Law Judge correctly ruled that appellant acquired tenure as a half-time teacher only. It is length of service in a single position, not length of service in the district in any capacity, which determines tenure in that position. See Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154, 159 (App. Div. 1980), certif. den. 87 N.J. 306 (1981); Viemeister v. Bd. of Education of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). When appellant was terminated at the end of her third year, she had not yet achieved tenure. Upon employment in a half-time position for her fourth year, she acquired tenure as a half-time teacher, since she then had worked the equivalent of more than three years as a half-time teacher (a full-time position necessarily encompassing a part-time one). Appellant cannot use her seniority (in terms of number of years of service) to acquire greater tenure rights than those to which she was entitled. We note that the Commissioner of Education has consistently held that tenure in a part-time position does not entitle a teacher to a full-time position. Cohen v. Board of Education, 1979 S.L.D. 439, 440; Woodbridge Township Federation v. Board of Education, 1974 S.L.D. 1201, 1206. This interpretation by the agency charged with applying its expertise in implementing the school laws is entitled to great weight by a reviewing court. Radiological Society of N.J. v. Sheeran, 175 N.J. Super. 367, 379 (App. Div. 1980), certif. den. 87 N.J. 311 (1981).

Finally, we observe that appellant knowingly and without protest signed contracts for the two years in question and did not act until late in her second half-time year to claim entitlement to a full-time position. Thus appellant should not now be heard to disavow her half-time status. See Driscoll v. Board of Education of Clifton, 165 N.J. Super. 241, 247 (App. Div. 1977), aff'd o.b. 79 N.J. 126 (1979) (similarly holding with regard to a substitute claiming the status of a regular teacher).

Affirmed.

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CARLSTADT TEACHERS ASSOCIATION AND ROBERT CILIENTO,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF CARLSTADT, BERGEN COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, April 14, 1980

Decided by the State Board of Education, November 5, 1980

Argued December 15, 1981 - Decided March 26, 1982

Before Judges Fritz, Ard and Trautwein.

On appeal from the New Jersey State Board of Education.

Sheldon H. Pincus argued the cause for appellants (Goldberg & Simon, attorneys; Theodore M. Simon, of counsel; Mr. Pincus on the brief).

Peter H. Fornabai argued the cause for respondent Borough of Carlstadt (James V. Zimmermann, attorney and on the brief).

A statement in lieu of brief on behalf of New Jersey State Board of Education was filed by James R. Zazzali, Attorney General, attorney for respondent State Board of Education (M. Kathleen Duncan, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

This appeal deals with the validity of a teachers' dress code (Code). Carlstadt Teachers Association and its president (Association) appeal from a decision of the New Jersey State Board of Education (State Board) upholding the Code adopted by the Board of Education of the Borough of Carlstadt (Carlstadt Board).

The procedural steps underlying the appeal commenced with an Administrative Law Judge (ALJ) conducting a hearing on Association's appeal from the Carlstadt Board to the Commissioner of Education (Commissioner). The ALJ rendered his initial decision upholding the Code but remanding the matter to the Carlstadt Board for revision of the Code's enforcement provisions. Commissioner adopted the findings and conclusions of the ALJ and remanded the matter accordingly. The Association and Carlstadt Board appealed to

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the State Board which upheld the Code but reversed the Commissioner's decision to remand. In doing so the State Board promulgated standards for determining the reasonableness of a public teachers' dress code. Association's appeal follows:

The State Board's standards are as follows:

1. The dress code must be substantially clear and concrete; otherwise it will not be enforceable.

2. The code should impose no undue financial burden on any individual teacher.

3. The code should not unduly limit an individual's right of selection and freedom of expression; several options as to styles or modes of dress should be available to both men and women.

4. The code should be reviewed periodically, so it will conform from time to time with changing community attitudes.

5. The code should be consistently interpreted and enforced.

At a prehearing conference before the ALJ the parties agreed that the issues presented were:

1. Can or cannot the Board establish a dress code for teachers?

2. If yes, is the instant dress code reasonable?

The Code in its entirety provides as follows:

PERSONNEL DRESS CODE

1. Recognizing that students look to their teachers to set examples, the Carlstadt Board of Education expects its personnel to be dressed in a manner that adds dignity to the education profession.

2. Acceptable attire for female personnel shall consist of the following: (A) Dresses. (B) Skirts with blouses and/or sweaters. (C) Pants Suits. (D) Slacks with blouses or sweaters.

3. Acceptable attire for male personnel shall consist of the following: (A) Suits with shirt and tie. (B) Leisure suits with or without ties. (C) Slacks with shirt and tie

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with or without jacket or sweater. (D) Slacks with turtleneck shirt/sweater and jacket.

4. The attire of all employees is expected to be clean and neat.

5. The use of uniforms by Physical Education teachers during the course of carrying out their duties in such capacities shall not be deemed to constitute a violation of this Code.

6. The wearing of smocks or other special attire by teachers in the performance of their duties in specialized subject areas, such as Industrial Arts, Home Economics, Science, Art and Kindergarten, shall not be deemed a violation of this Code, With [sic] the safety of a child and teacher being the prime factor, teachers may not be expected to wear ties, for example, when working around equipment where such attire might be considered to be dangerous.

7. Whenever any teacher is desirous of wearing a form of attire concerning which the teacher may have concerns as to whether or not such attire is appropriate, a ruling may be sought of the Superintendent who shall issue a ruling within two (2) school days of the date a written request for a ruling is submitted.

In rendering a ruling, the Superintendent shall be guided as fully as possible by the provisions of this Dress Code.

Appeals may be taken from a ruling of the Superintendent to the Board of Education. Such appeals shall be taken within five (5) school days of the date of the ruling of the Superintendent and the Board shall render its ruling within fifteen (15) days of the date of the appeal from the decision of the Superintendent.

Addressing issue No. 1, the ALJ found that authority to establish a teachers' dress code was conferred on Boards of Education by virtue of N.J.S.A. 18A:11-1 and N.J.S.A. 18A:27-4. Appellant does not challenge that determination upheld by the Commissioner and State Board nor does it question the standards of the State Board for determining reasonableness of a dress code. Moreover, it seems abundantly clear that a local board of education should have the right to enact dress codes for teachers in order to create an atmosphere of respect for them within a dignified environ-

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ment conducive of discipline and learning. East Hartford Education Association v. Board of Education, 562 F. 838 (2d Cir. 1977) (en banc).

With regard to issue No. 2 -- the reasonableness of the code -- our careful examination of the record persuades us that the findings and conclusions of the State Board are supported by sufficient credible evidence. Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474 (1974).

Appellant quarrels with the fact, in its view, that the finding of reasonableness lacked a preliminary finding of a rational relationship between each item of clothing and the stated objective behind the Code. We reject this approach as being totally unreasonable and totally unsupported by legal authority. An analysis of the Code presents at least 15 items or combinations of items of wearing apparel determined by the Carlstadt Board to be acceptable. Illustrative of appellants' approach to testing reasonableness was counsel's delving into the type of material making up the various items of dress in exquisite and irrelevant detail. We can only conclude that the 15 combinations of acceptable dress were adopted to provide a commendable flexibility and specificity demonstrating Carlstadt Board's sensitivity to the individual tastes and inclinations of teachers.

The stated object of the Code was to assure that teachers dressed "...in a manner that adds dignity to the education profession." The Carlstadt Board recognized "...that students look to their teachers to set example,..." The record bears out, by substantial credible evidence, the ALJ's finding that the Code bore "...a relationship to the furtherance of educational goals in that teachers are undeniably role models to their pupils." Thus, the necessary nexus between the object of the Code and that which the Code required to achieve its objective was established.

Affirmed.

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JON CAROSELLI,	:	
PLAINTIFF-APPELLANT,	:	
V.	:	SUPERIOR COURT
UPPER FREEHOLD REGIONAL BOARD OF EDUCATION,	:	APPELLATE DIVISION
DEFENDANT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 19, 1981

Decided by the State Board of Education, May 6, 1981

Argued September 21, 1982 - Decided October 5, 1982

Before Judges Polow and Brody.

On appeal from final decision of New Jersey State Board of Education.

James F. Schwerin argued the cause for appellant (Greenberg, Kelley and Prior, attorneys; William S. Greenberg, of counsel and John B. Prior, Jr. on his brief).

Howard M. Newman argued the cause for appellant (Kalac, Newman and Griffin, attorneys; Peter P. Kalac, of counsel and Mr. Newman on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education (Jaynee LaVecchia, Deputy Attorney General, of counsel and on the statement; No one appeared for argument on behalf of the State Board).

PER CURIAM

Appellant was a school psychologist employed by respondent school district. He began his employment in September 1974 as a ten month employee for the 1974-75 school year. Two years later, his contractual relationship with respondent changed somewhat. He became a twelve month employee beginning July 1 and ending June 30 of the subsequent year. The contract for the period involved in this dispute was executed by appellant on May 1, 1979 for the next school year, July 1, 1979 through June 30, 1980. Appellant performed the services required of him during the month of July 1979 and tendered his resignation on August 31, 1979 effective September 1, 1979. Pursuant to the terms of his agreement, incorporating provisions of his prior contract and the underlying collective bargaining agreement, he was to be paid in twenty-four equal, semi-monthly installments. Hence, he received two installments

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during July 1979 and two more during August when he apparently performed no services.

Sometime after Caroselli's resignation, the superintendent of schools demanded reimbursement of $1,508, representing the excess of salary actually paid during July and August 1979 over the aggregate per diem rate for 20 days of summer work (the number of days appellant worked during July 1979). On appeal, the Commissioner of Education and the State Board ordered reimbursement of the alleged overpayment, rejecting an initial decision of an administrative law judge to the contrary.

Caroselli appeals urging that as a twelve month employee he was entitled to receive bi-monthly payments for the entire contract term until his resignation. The school board argues that he was an eleven month employee and not entitled to payment for the month of August 1979 when he performed no services. It insists that payment to Caroselli of compensation during the month of August when he did not work would violate public policy and contravene a previous ruling of the State Board of Education to the contrary. We conclude that appellant was a twelve month employee, was entitled to receive compensation in equal bi-monthly payments until he resigned and may not be required to reimburse the school district.

It is evident that the April 26, 1979 contract between Caroselli and the Board of Education was for the year commencing July 1, 1979 and terminating June 30, 1980. It "reestablishes and continues for the 1979-1980 school year the conditions of the [previous] contract . . ." between the parties. It also incorporates by reference the collective bargaining agreement negotiated between the Board and the teacher's association. An analysis of those agreements supports the conclusion, which is not controverted in the record, that Caroselli's total salary for the 1979-1980 school year was to be paid in twenty-four equal semi-monthly installments during each of the twelve months of the period between July 1, 1979 and June 30, 1980. The amount of his salary for that year is also not disputed. He was entitled to a yearly salary of $21,298 payable in twenty-four equal semi-monthly payments of $887.42 each. The four salary payments he received during July and August 1980 were each for the sum of $861.

In his decision, the Commissioner concluded that Caroselli had been overpaid $1,507.82 which was required to be refunded. He rejected the determination of the Administrative Law Judge that Caroselli was a twelve month employee "compensated as such by the Board." Rather, the Commissioner found that appellant's "salary was contractually agreed upon by the parties by employment to be rendered for eleven months . . . ." Based upon that finding, it was determined "that the sum of $1,507.82 is owed to the Board by petitioner . . . ."

Although there is no doubt that the contract contemplated work during eleven of the twelve months of its term, it was nonetheless a twelve month contract. It specifically ran from July 1 until the subsequent June 30 of each school year, a period of twelve

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months. We recognize that in the previous agreement between Caroselli and the Board there was a footnote which read "eleven month contract - (206 working days)." The Board interprets that footnote as conclusive. Presumably, that interpretation if carried to its logical conclusion would mean that, despite the specific contractual dates and the relevant provisions of the underlying collective bargaining agreement, this psychologist was employed during the month of July, not employed during the month of August, and then reemployed as of September 1 through June 30.* Such an interpretation is neither logical nor supported by the documents and the actions of the parties. The underlying collective bargaining agreement provides for two types of work year, the ten month work year and the twelve month work year. Obviously, the twelve month work year is intended to include those employees who work 20 days during July. Nevertheless, they are recognized as twelve month employees and paid in equal installments twice each month during the entire year. If the footnote on the April 20, 1978 contract with Caroselli can be interpreted as making him an eleven month employee it contravenes the master agreement and is subject to the following overriding clause:

> C. Compliance between Individual Contract and Master Agreement
>
> Any individual contract between the Board and an individual teacher, heretofore or hereafter executed, shall be subject to and consistent with the terms and conditions of this Agreement. If an individual contract contains any language inconsistent with this Agreement, this Agreement, during its duration shall be controlling.

We acknowledge the concern of the Board and the Commissioner of Education. Appellant gave no advance notice of his intention to resign but waited until he had received the two salary installments for the month of August 1980 during which he performed no services. Still, the Board contracted firmly and unambiguously to make twenty-four equal semi-monthly installments during each and every month of the one year term. It could have provided that the payments be divided over eleven months in twenty-two equal installments, omitting payments during August when no services were rendered. If it had, this problem could not have arisen. Nevertheless, the clear, contractual provision may not be ignored. We must give meaning to the overall, dominant provisions of the contract which are not subject to interpretation. See Newark Publishers Ass'n v. Newark Typographical Union, 22 N.J. 419 (1956). In addition, if ambiguities exist, they are construed against the drafts-

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*It would appear that the footnote "eleven month contract - - - (206 working days)" provided the method for calculating appellant's annual salary rather than a limitation upon his contract term.

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man. Terminal Const. Corp. v. Bergen County, etc., Dist. Authority, 18 N.J. 294, 302 (1955). Here the draftsman was the school board.

Normally we will not interfere with the findings of an administrative agency which could reasonably have been reached on sufficient credible evidence in the record as a whole. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). However, we are not "bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 93 (1973). We cannot find that the agency's factual determination that Caroselli was an eleven month employee is supported by the evidence in the record before us. Nor do we agree with the agency's legal conclusions. Hence, we reverse the order for reimbursement of alleged overpayment to Caroselli.

The Administrative Law Judge found that Caroselli would have been entitled to an additional sum of $105.68 during the months of July and August 1979. In this context, we note appellant's argument for the application of equitable principles. He urges that the payment and receipt of salary during July and August should not be subject to recalculation because the payments were made and accepted without condition or qualification. He concludes that "[i]t is inequitable for the Board to . . . create the impression that all is well and subsequently assert a claim that . . . should have been made . . . prior to the acceptance of petitioner's resignation." Thus he concludes that equitable estoppel prevents further relief to the Board. Applying the same rationale, Caroselli tendered his resignation without giving the contractually required thirty days notice. Apparently, he received payment for the month of August 1979 without performing any services. He accepted the payments and resigned without any objection concerning the amounts paid despite his knowledge that a new contract for increased compensation was still under negotiation. Hence, we apply equitable principles and deny appellant's claim for additional compensation.

The decision of the State Board of Education is reversed insofar as it requires reimbursement from appellant and affirmed insofar as it denies appellant's demand for additional compensation.

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MADELINE CHILDS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	SUPERIOR COURT
UNION TOWNSHIP BOARD OF EDUCATION,	:	APPELLATE DIVISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 29, 1980

Decided by the State Board of Education, April 1, 1981

Argued June 8, 1982 - Decided July 19, 1982

Before Judges McElroy and J.H. Coleman.

On appeal from State Board of Education.

Howard Schwartz argued the cause for appellant.

Gregory Syrek argued the cause for respondent (Bucceri & Pincus, attorneys; Louis P. Bucceri, of counsel).

Paula A. Mullaly argued the cause for Amicus Curiae, New Jersey School Boards Association (Christine D. Weger, General Counsel).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for New Jersey State Board of Education, filed Statement in Lieu of Brief (James R. Zazzali, former Attorney General of New Jersey and Jaynee LaVecchia, Deputy Attorney General, on the brief).

PER CURIAM

Respondent-appellant Union Township Board of Education (Board) appeals a decision of the State Board of Education affirming a determination of the Commissioner of Education which held petitioner-appellee Madeline Childs acquired tenure as a guidance counselor and could not be transferred by the Board to her former, and equally tenured position, as a teacher in the same school system. The matter was initially decided by an Administrative Law Judge who held, among other things, that "the transfer of a guidance counselor to a classroom teaching position constitutes a 'demotion' to a job of lesser rank, which cannot be accomplished without the affected individual's consent, a reduction in force or a tenure hearing." The Commissioner affirmed the judge's initial decision

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but rejected the view that a guidance counselor holds rank superior to that of a teacher. He therefore modified so much of the decision which held petitioner's transfer in position to be a "demotion." The Commissioner held:

> [T]he position of guidance counselor represents a service category in which petitioner can acquire tenure and from which a transfer cannot be made without the affected individual's consent, a reduction in force or a tenure hearing. The contention that it is, perforce, a position of higher level in the educational hierarchy than that of classroom teacher is a distinction without a difference and cannot be sustained.

We agree with the Commissioner's determination and the State Board of Education's adoption of that decision. Accordingly, we affirm the decision from which this appeal is taken.

The facts are not complex nor are they disputed. Madeline Childs has been employed by the Board since November 1971. Prior to her appointment as a guidance counselor she worked as a teacher and is tenured as such. In 1974 Childs qualified for and acquired a Student Personnel Services Certificate entitling her to be appointed as a students' guidance counselor. She was employed by the Board for five years in that capacity, doing no teaching, until May 1979 when the Board unilaterally, and without any hearing, transferred her to a teaching position. The decisions below found as a fact that Childs' transfer created a vacancy in the guidance counselor position which the Board sought to fill with another counselor. There is no contention here by the Board that this is not so and the evidence amply supports this fact.

The legal question as to whether Childs acquired tenure as a guidance counselor is answered by analysis of two statutes. N.J.S.A. 18A:28-5 in pertinent part provides:

> The services of all teaching staff members . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation . . . . (Emphasis ours.)

Childs, pursuant to the requirements of N.J.A.C. 6:11-12.13, acquired a Student Personnel Services Certificate from the State Board of Examiners. In order to do so she had to demonstrate that she (1) had a teacher's certificate; (2) had at least one year of successful teaching experience, and (3) had successfully completed graduate courses in areas involving guidance, counseling, interviewing techniques and matters of like nature. This type of training involved a requirement of "30 semester-hour credits of

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post-baccalaureate work." N.J.A.C. 6:11-12.13(b)4ii. Alternatively, the requirement was proof of a "graduate curriculum approved by the New Jersey State Department of Education as a basis for issuing this certificate." N.J.A.C. 6:11-12.13(b)4i. N.J.S.A. 18A:28-5, quoted in part above, clearly states that a person holding such a certificate "shall be under tenure during good behavior and efficiency" after employment for "(a) three consecutive calendar years; or (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or (c) the equivalent of more than three academic years within a period of any four consecutive academic years." N.J.S.A. 18A:28-5(a) (b) and (c). It is beyond factual dispute that Childs holds the appropriate certificate "issued by the board of examiners" as a guidance counselor and has been employed by the Board in such capacity for five consecutive calendar and academic years. Consequently she has tenure as a certificated service employee as determined by the Commissioner and the State Board of Education. We note that although the Board does not directly admit this unavoidable conclusion in its brief, the brief of the New Jersey School Boards Association, amicus curiae, concedes it and also admits that Childs as a tenured guidance counselor cannot be dismissed or reduced in compensation except in accordance with N.J.S.A. 18A:28-5, N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-9. The argument advanced by the Board and by amicus curiae is that Childs was not "dismissed," because she is still a teacher; that the Board, pursuant to N.J.S.A. 18A:25-1, has an unqualified right to "transfer" her and she can only complain if she is "dismissed" or "reduced in compensation." This approach ignores the effect of N.J.S.A. 18A:28-6 which concerns "Tenure upon transfer or promotion" and provides:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

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> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

The clear intent of this statute is that the right of a board of education to transfer and to re-transfer a teaching staff member is limited where "tenure in the new position" is acquired after either, (a) "expiration of two consecutive years" in the new position; or (b) "employment for two academic years in the new position" plus employment at the beginning of the next succeeding academic year; or (c) "employment in the new position" for the equivalent of more than two academic years in any three consecutive academic years. Again, Childs has been employed by this Board in her "new position" for five consecutive calendar and academic years. She clearly attained tenure as a guidance counselor and cannot, without proof of the grounds set forth in N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10 (inefficiency, incapacity, unbecoming conduct or other just cause) or those in N.J.S.A. 18A:28-9 (reduction in force) be unilaterally dismissed from that position without the hearing required by N.J.S.A. 18A:6-10.

The determination here reached finds support in the legislative history of N.J.S.A. 18A:28-6. When this statute was amended by L. 1962 c. 231 (R.S. 18:13-16) the sponsor's statement, among other things, declared:

> This bill would amend the tenure of office act that applies to most professional educators by (1) requiring a 2-year probationary period when employees in a district are promoted or transferred from one tenure position to another position in which he could acquire tenure, and (2) extending coverage of the tenure act to include assistant principals, vice-principals and other professional employees in special teaching, administrative and supervisory positions by relating tenure in positions to qualification and performance under appropriate certification standards as determined by the Board of Examiners and the State Board of Education.
>
> . . . .

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> This change should improve the over-all quality of service in our schools and also eliminate the discrimination which now works against candidates for promotion from within a district. It would also give a board of education an opportunity to observe for 2 years, a local employee in a new position before permitting him to acquire tenure.
>
> . . . .
>
> The professional employees covered by this bill are generally in positions that have been created in recent years to meet the demands of modern education. These positions are not covered by the present law simply because they were almost nonexistent at the time of the passage of the earlier tenure acts. These professional educators should have the same tenure protection granted to teachers and the majority of school administrators.
>
> This bill would amend the tenure of office act that applies to most professional educators by extending its provisions to include assistant principals and vice-principals and such other employees as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners. [Emphasis ours.]

Childs admittedly holds the "appropriate certificate issued by the Board of Examiners" to be a guidance counselor. The Commissioner and the State Board of Education correctly held that this position represents "a service category in which petitioner can acquire tenure" under the clear language of N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6. Moreover, during her service in that capacity she was so regarded. She worked for the Board as a guidance counselor within the Department of Student Personnel Services under Frank A. Morretti, director of that department. On February 27, 1976 Mr. Morretti in a letter to the school superintendent noted Childs was in her second year as a counselor, was doing well in her new position and concluded that she should be "approved for tenure as a guidance counselor." In these circumstances where Childs has gone to considerable lengths to obtain her certification in the new position, has been employed and reemployed for tenure purposes for five years, it is pure sophistry to assert her "transfer" is anything less than dismissal from her clearly tenured position. Such a view would render her statutory tenure in her "new position" meaningless.

The foregoing and the holding from which this appeal is taken comport with the settled view that our tenure laws "represent important expressions of legislative policy which should be given liberal support, consistent, however, with legitimate demands for governmental economy." Viemeister v. Prospect Park Bd. of Educ., 5

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N.J. Super. 215, 218 (App. Div. 1949); Williams v. Plainfield Bd. of Educ., 176 N.J. Super. 154, 159 (App. Div. 1980); certif. den. 87 N.J. 306 (1981). See as well Spiewak, et als. v. Bd. of Educ. of Rutherford, 90 N.J. 63, 74 (1982).

There is, in our view of the matter, no need to consider, as did the Administrative Law Judge, whether the initial transfer of Childs to the position of guidance counselor was a promotion and thus, the subsequent transfer back to a teaching position a demotion. Such contention is, as the Commissioner noted, "a distinction without a difference." The applicable legislation, particularly N.J.S.A. 18A:28-6 contemplates that a tenured "teaching staff member," or one eligible for tenure, may be transferred to a different certificated position and, upon meeting the statutory requirements, obtain tenure in that new position. What is important is that the certifications for teachers and for guidance counselors are based upon different qualifications.* This case does not present, as was true in Williams v. Plainfield Bd. of Educ., supra, a transfer back to a position where "the certification required is the same." 176 N.J. Super. at 158. Childs earned her right to tenure in her separately certificated position as guidance counselor. She cannot, without proper statutory grounds established at a statutory hearing, be removed or dismissed from that position.

---

*The Commissioner and the State Board of Education in this case relied upon their decisions in Stegemann v. Bd. of Educ. of the Township of Union, 1980 S.L.D. 303, aff'd 1980 S.L.D. 309. Respondent-appellant directs our attention to the fact that another panel of this court in an unreported per curiam decision reversed those determinations. Stegemann v. Bd. of Educ. of the Township of Union (A-4737-79T2, decided October 7, 1981, certif. den. 89 N.J. 437 (1982). The facts in that case (as they appear in the initial decision of the Administrative Law Judge) disclose that Stegemann simultaneously taught industrial arts and acted as an unpaid coordinator of cooperative industrial education. The school board terminated Stegemann from the latter separately certificated and tenured position but continued him in his equally tenured role as a teacher. This court held that such termination (which was not a reduction in force) "quite obviously was not a dismissal." That opinion makes no reference to the fact that Stegemann was separately certified as a coordinator of cooperative industrial education and held that position for five years prior to his termination. The initial decision of the Administrative Law Judge in that case, which was adopted by the Commissioner and the State Board, held that by reason of N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6 Stegemann was tenured in his position and was improperly terminated in that role. The Appellate Division did not, in its opinion, discuss the effect of N.J.S.A. 18A:28-6 and concluded, without discussion, that Stegemann had neither been "'dismissed' nor 'reduced in compensation'" and that therefore "the transfer was in no way violative of the prohibition of the cited tenure statute [N.J.S.A. 18A:28-5]." To the extent that Stegemann may be regarded as espousing a view contrary to the position we adopt in this opinion, we are compelled to disagree with the determination in that case.

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In our view of the matter the decision entered by the State Board of Education is fully sustainable on the single ground that Childs was improperly removed, i.e., dismissed from her tenured position as guidance counselor. To the extent that decision and that of the Commissioner may be construed as holding the opinion that Childs sustained a reduction in compensation, we do not see any necessity to reach that issue. Nevertheless, because Childs was improperly terminated in her tenured position, she is entitled to the salary loss occasioned by such removal.

Affirmed.

[Cert. den. October 25, 1982]

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CARL COHEN ET AL., :

PETITIONERS-RESPONDENTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY, : DECISION

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, October 2, 1981

Decided by the State Board of Education, January 6, 1982

For the Petitioners-Respondents, Newman, Herman, Saltman, Levitt & Feinson (Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Appellant, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

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

S. David Brandt, John T. Klagholz and P. Paul Ricci opposed in the matter.

February 3, 1982

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CUMBERLAND REGIONAL EDUCATION ASSOCIATION,	:	
APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT,	:	APPELLATE DIVISION
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, January 11, 1980 and March 18, 1980

Decided by the State Board of Education, November 5, 1980

Argued December 15, 1981 -- Decided January 8, 1982

Before Judges Fritz, Ard and Trautwein.

On appeal from the New Jersey State Board of Education.

Joel S. Selikoff argued the cause for appellant (Selikoff & Cohen, attorneys; Mr. Selikoff and Henry S. Maurer, Jr., on the brief).

A. Paul Kienzle, Jr., argued the cause for respondent (Casarow, Casarow & Kienzle, attorneys; Mr. Kienzle, on the brief).

A statement in lieu of brief on behalf of New Jersey State Board of Education was filed by James R. Zazzali, Attorney General, attorney for respondent New Jersey State Board of Education (Erminie L. Conley, Assistant Attorney General, of counsel; Richard M. Hluchan, Deputy Attorney General, on the statement).

PER CURIAM

The Cumberland Regional Education Association (Association) filed a petition of appeal pursuant to N.J.S.A. 18A:6-9 alleging that the Board of Education of the Cumberland Regional High School District (Board) acted arbitrarily in enforcing its dress code for teachers. Specifically, the Association complained that the Board's superintendent improperly interpreted the code to require all male teachers to wear ties or turtleneck shirts and jackets.

After issue was joined, the Association moved for summary judgment and the matter was transferred to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. The administrative law judge granted the Association's motion for summary

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judgment. This decision was based on the following which the administrative law judge characterized as uncontested factual contentions:

> The Association contends that on or about May 12, 1976, the Board adopted a Policy Statement Concerning Staff Conduct and Dress which provided in pertinent part as follows:
>
> > "Responsibility for acceptable conduct and dress will rest primarily with the employee as a professional individual.
> >
> > "The Board expects teachers to enforce a standard of personal conduct in the school building and on and off school-grounds which shall be above reproach and which shall contribute to a high morale in the school and a wholesome school reputation.
> >
> > "Employees of the Cumberland Regional School District shall be neatly attired and groomed while discharging their responsibilities to the district. Grooming and attire shall not affront community tastes nor standards."
>
> The Association contends that, subsequent to its adoption and without formal Board action, the Superintendent of Schools issued a written interpretation of the Board's dress code to all teaching staff members as follows:
>
> > "STAFF DRESS CODE:
> >
> > "The Board expects teachers to enforce a standard of personal conduct in the school building and on and off school grounds which shall be above reproach and which should contribute to a high morale in the school and a wholesome school reputation.
> >
> > "All staff will be required to be neatly attired and groomed while discharging their responsibilities to the school. Grooming and attire shall not affront community tastes nor standards.
> >
> > "Although the responsibility for acceptable dress will rest primarily with the employee as a professional individual, men will wear a tie and women will wear the attire generally accepted in a place of business."

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> The Association further asserts that, thereafter, the Superintendent issued an oral interpretation of the Board's dress code which permitted men teaching staff members to wear turtleneck sweaters or shirts in lieu of neck ties.

The administrative law judge found these facts undisputed and further noted that a turtleneck shirt would comply with the superintendent's interpretations only when worn with a jacket. Based on these facts, he made the following findings of law:

(1) The Board's defense of laches is unfounded.

(2) The matter presents no disputed facts and thus is ripe for summary judgment.

(3) The Board enjoys discretionary authority under N.J.S.A. 18A:11-1 and 18A:27-4 to establish reasonable rules for its own governance and has not abused this discretion by establishing the dress code.

(4) The superintendent of schools exceeded the clearly stated policy of the Board when interpreting the dress code to require male teaching staff members to wear neckties and/or jackets with turtleneck shirts.

(5) Conclusion: The superintendent's interpretation mandating the wearing of neckties by male teaching staff members is unreasonable and set aside.

After exceptions were filed, the commissioner of education rejected the exceptions of both parties and adopted the findings of the initial decision. The subsequent motion by the Association to amend the initial decision was denied on the ground that the commissioner's decision was final. On January 31, 1980 the Association filed a petition of appeal and an order to show cause with temporary restraints accompanied by a supporting affidavit.

The Association sought to restrain the Board from adopting a revised dress code scheduled to go into effect on February 4, 1980. The new code provided in pertinent part:

> Grooming and attire shall meet the following criteria:
>
> a. males shall wear shirts and ties with jackets.
>
> b. males may wear turtle neck shirts or sweaters with jackets in lieu of shirts and ties.

The Association's application for preliminary restraints was denied, and thereafter another administrative law judge granted a temporary restraint from enforcement of the dress code. The Association filed

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a notice of appeal to the State Board of Education. The legal committee of the State Board of Education issued a report on July 30, 1980 recommending that the commissioner's decision be reversed. On November 5, 1980 the State Board of Education issued its decision reversing the commissioner on the ground that the dress code as interpreted was within the wide latitude afforded local school districts in such matters. On December 10, 1980 an administrative law judge dissolved the temporary restraints against enforcement of the dress code. This appeal followed.

It appears clear that it is within the broad authority of the local district to enforce a dress code. N.J.S.A. 18A:11-1; 18A:27-4. Notwithstanding this authority, there remains the question of whether the code is reasonable and designed to achieve legitimate aims. In Angell v. Bd. of Ed. of Newark, 1960 S.L.D. 141, 143 the commissioner held that a dress code, like other rules of boards of education, must be reasonable; not inconsistent with other provisions of Title 18A of the statutes or the rules of the State Board of Education, and must contribute toward the maintenance and support of a thorough and efficient system. The question of reasonableness is an issue of fact which can only be resolved through the vehicle of a plenary hearing.

Summary judgment is a stringent remedy and should not be granted unless the pleadings, affidavits and other papers show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. R. 4:46-2. In evaluating such a motion we are guided by the standards set forth in United Advertising Corp. v. Metuchen, 35 N.J. 193 (1961) which stated:

> Although it must be recognized that the summary judgment procedure has a needful place in our judicial system as a protection "against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention," Robbins v. Jersey City, 23 N.J. 229 (1957), sight should never be lost of the fact that such procedure is no substitute for a full plenary trial. Battle v. General Cellulose Co., 23 N.J. 538 (1957). Only where it is palpably disclosed that there is no genuine issue of fact and the movant is entitled to a judgment as a matter of law should the motion be granted, R.R. 4:58.[1] It is the movant's burden to exclude any reasonable doubt as to the existence of a genuine issue of material fact. All inferences of doubt are drawn in favor of the opponent of the motion. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954); Frank Rizzo, Inc. v. Alatsas, 27 N.J. 400 (1958). [at 195-196]

[1]Now R. 4:46

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In resolving the motion, the moving papers and all inferences therefrom are to be considered in a light most favorable to the party opposing the motion. All doubts are to be resolved against the movant. Ruvolo v. American Cas. Co., 39 N.J. 490, 499 (1963); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). As stated in Brenner and Co. v. Perl, 72 N.J. Super. 160 (App. Div. 1962):

> The factual issues . . . involved cannot be resolved on the basis of affidavits and depositions where inferences for and against the truth of facts grounding the existence of a cause of action arise therefrom, no matter how strongly they point in one direction or the other.
> [at 167-168; citation omitted]

Under the tests which have been articulated, we conclude that the issues raised were not appropriate for summary judgment and must be tested in the caldron of a plenary hearing. Without an evidentiary hearing, we cannot understand how the administrative law judge could make a determination that the dress code bore a rational relationship to the objectives of the Board. Evidence must be adduced in order that an intelligent evaluation be made as to whether a particular dress code enforced by the local board is any way useful in meeting the legitimate objectives of education. The parties are entitled to submit evidence concerning the question of reasonableness as well as the contrary contentions of arbitrariness and capriciousness. The question of the validity of a dress code for public school teachers necessitates an evidentiary record to be considered by the initial fact finder when resolving the issue as well as the appellate body being required to review a decision. In East Hartford Ed. Ass'n. v. Bd. of Ed. of East Hartford, 562 F. 2d 838 (2 Cir. 1977) (en banc) the full court found that a dress code promulgated by the East Hartford School Board passed First Amendment and due process muster. However, in his dissent on the petition for rehearing, Judge Oakes questioned the propriety of resolving the issue in a summary manner:

> . . . I agree fully with the en banc majority that the third and last interest asserted by the board--involving discipline, respect, and decorum in the classroom--is a proper one. The point made by the panel majority was that this interest did not seem furthered in any rational way by the teacher dress code at issue here. The en banc majority opinion makes no attempt whatever to address this critical analytical point. Instead, its logic appears to be: "The interest is furthered by the dress code because the school board says that it is." Whatever argument might be made that the school board's ends are furthered by its means, the en banc majority does not make it, and certainly the essential connection between means and ends is not here self-evident. [562 F. 2d at 864; footnotes omitted.]

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Writing for the three judge panel majority, in the opinion on the original hearing, Judge Oakes explained his apprehension of resolving the constitutionality of the dress code via summary judgment:

> . . . It is far from clear, however, that a tie code like that in issue here has any connection with respect or discipline. Indeed, appellant puts forward the seemingly more reasonable proposition, which we must accept at this stage, that being tieless helps him to maintain his students' respect. Teenagers, who are so often rebellious against authority, may find a tieless teacher to be a less remote, more contemporary individual with whom they can more easily interact, and hence to whom they are better prepared to listen with care and attention. It is highly questionable, and certainly not established in this motion for summary judgment, that the Board's valid end of promoting discipline is substantially, or even incrementally, furthered by its tie regulation.
>
> [562 F. 2d at 845; footnotes omitted.]

The panel majority vacated the district court's grant of summary judgment for the school board and remanded for a hearing on the merits. Notwithstanding the en banc court's subsequent affirmance of the trial court, we deem the plenary procedure suggested by Judge Oakes to be essential in this case. The determination below is reversed and the matter is remanded for a full evidentiary hearing. We do not retain jurisdiction.

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IN THE MATTER OF THE TENURE :
HEARING OF CLAIRE DE KRAFFT, : STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF CHERRY HILL, CAMDEN COUNTY. :
:

Decided by the Commissioner of Education, December 4, 1981

For the Petitioner-Respondent, Davis & Reberkenny
(Kenneth D. Roth, Esq., of Counsel)

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

The State Board of Education grants Motion to Strike Exhibit "A" and affirms the Commissioner's decision for the reasons expressed therein. Oral argument is denied.

S. David Brandt abstained in the matter.
May 5, 1982

Pending N.J. Superior Court

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EARMOND DE MARCO, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

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

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, September 21, 1981

Decided by the State Board of Education, February 3, 1982

For the Petitioner-Appellant, Richard F. Berkey, Esq.

For the Respondent-Respondent, Trimble & Master (John W. Trimble, Esq., of Counsel)

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

March 3, 1982

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PATRICIA DERILLO AND MARY ANN DE SARNO,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, May 21, 1981

For the Petitioners-Respondents, Klausner & Hunter
(Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Appellant, O'Dwyer, Malone & Conover
(John F. Malone, Esq., of Counsel)

Both petitioners in this case allege that the respondent Board illegally refused to allow them to use accumulated sick leave of 35 and 31 days, respectively, prior to April 16, 1980, which was the date when their Board-approved maternity leaves began. The Administrative Law Judge ruled against the petitioners, finding that they had failed to present reasonably detailed evidence of disability. The Commissioner, however, overruled the Administrative Law Judge and directed the Board to pay both petitioners the sick leave requested.

In our view the Commissioner erred in his decision with respect to Petitioner Derillo, but was correct in finding in favor of Petitioner DeSarno. We will therefore consider the two cases separately.

The respondent Board had a policy in its negotiated agreement with its professional employees which provided, among other things, that the Board could require an employee to produce a certificate from a physician to support the requested leave period in maternity cases. We think this policy was reasonable and proper in view of N.J.S.A. 18A:30-4. The issue in the two cases here presented is whether in each instance the doctor's certificate was sufficiently specific with respect to the nature of the disability.

In Derillo's case, she requested a maternity leave for the period April 16, 1980 through June 30, 1981, and additionally requested permission to use 35 accumulated sick leave days commencing February 19, 1980. When the Superintendent, on behalf of the Board, asked for a physician's certificate to establish disability for the 35 extra days commencing February 19, 1980, petitioner's doctor simply stated that Derillo's disability would

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last from February 19 to April 15, 1980 and that during this period she would be unable to perform her normal duties due to pregnancy. Although Derillo actually gave birth on April 12, 1980, the doctor made no mention of the expected date of birth.

We think that Derillo was entitled to use her sick leave for the period of 30 days prior to the actual birth of her baby, i.e., from March 12 to April 12, in accordance with the presumption of disability which has been established by our earlier decisions. See Hynes v. Board of Education of Bloomfield, decided by this Board on December 3, 1980. However, for any sick leave claimed beyond 30 days before or 30 days after the date of birth, the Board is entitled to a more specific finding of disability on the part of the physician. Since none was forthcoming from Derillo's physician, the use of her sick leave prior to March 12, 1980 was properly denied.

With respect to Petitioner DeSarno, her doctor certified that she would be disabled as of February 25th because her expected date of delivery was March 25th. This certification of her expected delivery date sufficed to establish her disability as of one month earlier, in accordance with our decision in Hynes, supra. She was therefore entitled to sick leave from February 25 to March 25, as requested in her petition.

For the foregoing reasons the State Board affirms the Commissioner's decision, except that in regard to petitioner Derillo the decision should be modified so as to limit to 30 days that sick leave period for which she should be paid prior to her delivery date.

We would further remark that if teaching staff members or their respective physicians would notify their respective boards of education as to anticipated delivery dates, much controversy and litigation may well be avoided. We therefore urge all school systems and their professional staff to cooperate in the production of adequate certificates of disability whenever sick leave is sought in maternity cases.

Attorneys Exceptions are noted.
January 6, 1982

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STEPHEN DORE,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 30, 1980

Decided by the State Board of Education, January 22, 1981

Argued May 25, 1982 - Decided July 23, 1982

Before Judges Matthews, Pressler and Petrella.

On appeal from the Final Decision of the State Board of Education.

Richard A. Friedman argued the cause for appellant (Ruhlman and Butrym, attorneys).

William B. Rosenberg argued the cause for respondent (Blumberg, Rosenberg, Mullen & Blumberg, attorneys).

Jaynee LaVecchia argued the cause for the State Board of Education (Irwin I. Kimmelman, Attorney General, attorney; James R. Zazzali, former Attorney General and Erminie L. Conley, former Assistant Attorney General, of counsel).

The opinion of the court was delivered by

MATTHEWS, P.J.A.D.

This is an appeal from a decision of the State Board of Education dismissing an action filed by petitioner with the Commissioner of Education. In his petition of appeal, petitioner, a non-tenured teacher, challenged the propriety of the action of the Board of Education of the Township of Bedminster in choosing not to reemploy him as a teacher for a third contract year. Specifically, petitioner contends that since three evaluations of him were not conducted during the 1975-76 school year, it was improper and unlawful for the board not to re-employ him. Petitioner also asserts that the board's action of not re-employing him was arbitrary and capricious and that he should be reinstated to his former position as a teaching staff member in the district. The board had voted not to renew the teaching contract of petitioner, and upon petitioner's request, informed him that his employment would not be continued:

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> ...due to insufficient positive evidence of teaching effectiveness; particularly poor teaching methods as evidenced by poor grading procedures, lack of structured classroom and not providing student materials (textbooks, homework assignments), lack of continued assessment of student progress.

These criticisms were not contained in petitioner's formal evaluations. They were the reasons articulated by board members as the basis for their dissatisfaction with petitioner and were based on the personal observations of board members, knowledge acquired through having a child in petitioner's class or acquired from members of the public and parents of petitioner's pupils. Petitioner requested and received an informal appearance before the board to rebut the board's reasons for its determination. The board did not change its decision; this action ensued.

A plenary hearing was conducted before a representative of the Commissioner of Education. The hearing examiner's report ordered petitioner's reinstatement. The hearing examiner concluded that the reasons for nonre-employment provided to petitioner were "not at all related to the evaluations of his performance in the classroom." He found the true reason for petitioner's nonre-employment was petitioner's "perceived abrasiveness to the Board at public meetings."

The Commissioner adopted the remedy recommended but rejected the premise implied in the hearing examiner's report that "boards of education are bound to predicate renewal decisions affecting nontenured teaching staff members on evaluations conducted pursuant to N.J.S.A. 18A:27-3.1 and implementing regulations." The Commissioner ordered reinstatement nevertheless because the reasons for nonrenewal furnished petitioner were not supported by the evaluations and no other reasons were given to him to explain the board's decision. The Commissioner also commented that the unarticulated reason for the decision of the board, that is, the attitude petitioner allegedly displayed toward the board at public meetings of the board, might be constitutionally vulnerable.

The State Board reversed the Commissioner's decision and dismissed petitioner's petition of appeal. Noting that there were some favorable reports regarding petitioner before the local board when it made its decision, namely the evaluations, the State Board determined that the local board had sufficient information to support both its decision not to re-employ petitioner and its statement of reasons for doing so. The State Board emphasized the considerable discretion afforded to local boards in employing teaching staff members. The State Board concluded that the local board's action was not so arbitrary and capricious as to warrant the extraordinary remedy of overriding the managerial prerogative of a local board and requiring it to employ a teacher it does not want on its staff.

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The ultimate administrative decision-maker for controversies arising under the school laws is the State Board of Education. N.J.S.A. 18A:6-27. Quinlan v. No. Bergen Tp. Bd. of Ed., 73 N.J. Super. 40, 51 (App. Div. 1962). Appeals may be taken to the State Board from any determination of the State Commissioner of Education. N.J.S.A. 18A:6-27, 28. In passing upon matters on appeal, the State Board is not restricted to review of issues of law. Winston v. So. Plainfield Bd. of Ed., 125 N.J. Super. 131, 139-140 (App. Div. 1973), aff'd 64 N.J. 582 (1974); Quinlan v. No. Bergen Tp. Bd. of Ed., supra, 73 N.J. Super. at 51. It is well recognized that the State Board may make its own independent findings of fact. Id.

Petitioner suggests that the proper scope of review for the State Board to apply when reviewing a determination of the Commissioner is the standard articulated for the Commissioner of Labor and Industry in Delesky v. Tasty Baking Co., 175 N.J. Super. 513 (App. Div. 1980). That standard requires the Commissioner of Labor and Industry to adopt the findings of a judge of compensation if the judge's finding could reasonably have been reached based upon sufficient credible evidence in the record. 175 N.J. Super. at 517. The standard enunciated in Delesky was overruled in Lewicki v. N.J. Art Foundry, 88 N.J. 75, 82 (1981).

It is well settled that the appropriate standard of review to be applied by an appellate court reviewing the final decision of an administrative agency is for the court to examine the record to determine whether sufficient or substantial credible evidence exists therein to support the agency decision. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Silberman License Suspension, 169 N.J. Super. 243, 255-256 (App. Div. 1979), aff'd 84 N.J. 303 (1980); In re Grossman Tenure Hearing, 127 N.J. Super. 13, 22-23 (App. Div. 1977). The agency determination is not to be vacated in the absence of a showing that the decision is arbitrary or capricious, that it lacks support in the record or that it violates legislative policies expressed or fairly to be implied in the statutory scheme administered by the agency. See Campell v. Civil Service Dep't, 39 N.J. 556, 562 (1963). Furthermore, should there be substantial evidence in the record to support more than one result, it is the agency's choice which governs. See New Jersey Bell Tel. Co. v. State, 162 N.J. Super. 60, 77 (App. Div. 1978). Here it is the State Board's decision which deserves deference.

We conclude that the State Board correctly rejected the decision of the Commissioner. The decision of the Commissioner recognized a local board's right to base its decision not to re-employ on matters outside of a teacher's evaluations due to a board's virtually unlimited discretion in hiring or renewing non-tenured teachers. Nevertheless, the decision unduly penalized the board herein because its statement of reasons was not supported by the evaluations. See Donaldson v. No. Wildwood Bd. of Ed., 65 N.J. 236, 241 (1974); Winston v. So. Plainfield Bd. of Ed., 125 N.J. Super. 131, 143 (App. Div. 1973), aff'd 64 N.J. 582 (1974). The State Board's decision properly recognized the board's right to

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reach its conclusion about a nontenured teacher on a broad base of input received from a variety of people including members of the public, parents of students, and a board member's own knowledge of a teacher even if that knowledge is acquired through having a child in the teacher's class.

Petitioner also raised before the State Board an additional reason for his reinstatement not contained in the pleadings or pretrial order: that his nonrenewal was for constitutionally impermissible reasons. The argument stems from a comment of the Commissioner in his decision that the unarticulated reason for the board's decision, the attitude the petitioner allegedly displayed toward the board, may be constitutionally vulnerable. This comment went beyond the parameters of the pleadings and the pretrial order in this matter and should not be considered on this appeal.

Nor is any constitutional vulnerability suggested by the record. Examination of the testimony of the board members reveals that petitioner misunderstands the statements made by local board members at the hearing. While recognizing petitioner's right to comment during public meetings of the board, the expressed concern of the board members was the churlish manner or attitude displayed by one of the board's employees at a public meeting of the board. Specifically, petitioner was described by more than one board member as sarcastic, disruptive, snide and belligerent. A board may expect a member of its professional staff to maintain a deportment appropriate to a public meeting of a local government entity. See Pietrunti v. Brick Tp. Bd. of Ed., 128 N.J. Super. 149, 163-166 (App. Div. 1974), certif. den. 65 N.J. 573 (1974), cert. den. 419 U.S. 1057, 95 S. Ct. 640, 42 L. Ed. 2d 654 (1974). Upon the employee's failure to do so, a board may properly consider such behavior in reaching a conclusion as to the continued employment of such person. We are satisfied that even if this constituted the sole reason for the local board's decision not to renew petitioner's contract, it does not rise to the stature of a violation of First Amendment privileges as suggested by petitioner.

Petitioner also argues that the fact that the local board failed to evaluate him in accordance with the dictates of N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19, the implementing regulation, requires that he be reinstated. We do not regard the lack of strict compliance with N.J.S.A. 18A:27-3.1 to be a sufficient reason to afford petitioner either reinstatement or financial reward. The provisions of that statute, and of N.J.S.A. 18A:27-3.2, a related statute, read:

> 18A:27-3.1.
>
> Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester. Said evaluations

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> are to take place before April 30 each year. The evaluations may cover that period between April 30 of one year and April 30 of the succeeding year excepting in the case of the first year of employment where the three evaluations must have been completed prior to April 30. The number of required observations and evaluations may be reduced proportionately when an individual teaching staff member's term of service is less than one academic year. Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence.
>
> 18A:27-3.2.
>
> Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.

These sections were added to the education law of our State by the Legislature following the decision of our Supreme Court in Donaldson v. No. Wildwood Bd. of Ed., 65 N.J. 236 (1974).

In Donaldson, Justice Jacobs, speaking for the majority of the court, said the following:

> It appears evident to us that on balance the arguments supporting the teacher's request for a statement of reasons overwhelm any arguments to the contrary. The teacher is a professional who has spent years in the course of attaining the necessary education and training. When he is engaged as a teacher he is fully aware that he is serving a probationary period and may or may not ultimately attain tenure. If he is not reengaged and tenure is thus precluded he is surely interested in knowing why and every human consideration along with all thoughts of elemental fairness and justice suggest that, when he asks, he be told why. Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the nonretention was due to factors unrelated to his professional or classroom performance and its availability may aid him

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> in obtaining future teaching employment; perhaps it will serve other purposes fairly helpful to him as suggested in Drown [Drown v. Portsmouth School District] (435 F.2d at [1182] 1184-1185); and perhaps the very requirement that reasons be stated would, as suggested in Monks (58 N.J. [238] at 249), serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers.[1]

Implicit in this language is the recognition by the court that absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board. The statutes quoted above neither add to nor detract from the tenure rights of teachers in this State. The first section sets forth a procedure to be followed for evaluating teachers but does not provide for any penalty in the event a local board fails to follow the prescribed procedures. The second statute clearly adopts the final line of Donaldson and "urges" local boards of education to give reasons to employees who are being terminated -- ostensibly for the reasons set forth by Justice Jacobs in Donaldson. Compare Wyckoff Twp. Bd. of Ed. v. Wyckoff Ed. Ass'n., 168 N.J. Super. 497 (App. Div. 1979), certif. den. 81 N.J. 349 (1979).

Since there is no power to impose a penalty for noncompliance with the two statutes in question, power to reinstate or penalize cannot be arrogated by the Commissioner to himself. He functions under those powers granted to him by the Legislature and such other powers as may be necessarily implied in the grant. We agree completely with the determination of the State Board in this case. We hope that the Commissioner's office in the future will cease imposing fines or ordering reinstatements under these statutes without further legislative amendment thereto.

Affirmed.

[185 N.J. Super. 447]

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[1] Drown v. Portsmouth School Dist., 435 F.2d 1182 (1 Cir. 1970), cert. den. 402 U.S. 972, 91 S. Ct. 1659, 29 L. Ed. 2d 137 (1971); Monks v. N.J. State Parole Board, 58 N.J. 238 (1971).

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KATHY DYSON, :

PETITIONER-APPELLANT, :

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE, BERGEN COUNTY, : APPELLATE DIVISION

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, July 21, 1980

Decided by the State Board of Education, March 4, 1981

Argued January 11, 1982 - Decided February 8, 1982

Before Judges Milmed, Joelson and Gaulkin.

On appeal from New Jersey State Board of Education.

Sheldon H. Pincus, argued the cause for appellant (Bucceri & Pincus, attorneys).

Irving C. Evers argued the cause for respondent, Board of Education of the Borough of Montvale.

Jaynee LaVecchia, Deputy Attorney General, argued the cause for New Jersey State Board of Education (James R. Zazzali, Attorney General of New Jersey, attorney; Andrea M. Silkowitz, Deputy Attorney General, of counsel and Ms. LaVecchia, on the brief).

PER CURIAM

This is an appeal from a decision of the State Board of Education which affirmed the decision of the Commissioner of Education dismissing petitioner's appeal from respondent's action in granting her maternity leave commencing September 1, 1979, rather than on or about October 18, 1979. We affirm.

It is undisputed that by letter dated May 25, 1979, petitioner notified respondent that she was expecting a child in the fall of 1979, but that she planned to return to her teaching duties in September, 1979 (presumably after the summer vacation), and to continue until no longer able to do so. Her letter further stated that she would resume teaching on January 2, 1980. On June 11, 1979, her doctor wrote a letter to the respondent

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indicating that petitioner's estimated date of childbirth was October 18, 1979. It was stipulated that petitioner was physically able to perform her teaching duties in September. Her baby was born on October 28, 1979.

Respondent passed a resolution June 27, 1979, which provided in pertinent part as follows:

> RESOLVED, that the application for maternity Leave submitted by Mrs. Dyson to commence on or about October 18, 1979 to January 1, 1980 be rejected and that a maternity leave of absence be granted from September 1, 1979 through January 1, 1980, and
>
> BE IT ALSO RESOLVED, that said period be approved by reason of the necessity of avoiding any disruption of the educational process...

While not disputing the continuity of instruction as a valid educational goal, petitioner asserts in the brief submitted on her behalf that "the issue concerns itself with whether a woman, bearing child, can be discriminated against concerning terms and conditions of her employment." She further argues that the policy of maintaining the continuity of instruction was not consistently adhered to by the board.

In Cleveland Board of Education v. La Fleur, et al. and Cohen v. Chesterfield County School Board, et al., 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d. 52(1974), the Supreme Court recognized the continuity of student instruction as a legitimate goal, id. at 641-642, but found sweeping regulations that teachers must cease teaching at the end of the fourth or fifth month of pregnancy to be "overly restrictive." Id. at 640. Similarly, in Castellano v. Linden Board of Education, 79 N.J. 407 (1979), the New Jersey Supreme Court, while striking down as sex discrimination a board policy which provided generally for a mandatory one year maternity leave, recognized the need for continuity of classroom instructions as "a legitimate goal for a Board to consider." Id. at 412.

In Gilchrist v. Board of Education of Haddonfield, 155 N.J. Super. 358 (App. Div. 1978), we stated:

> We deem it a perfectly rational goal for the Board to be vitally interested in avoiding, where possible, the interruptions in the continuity of classroom instruction that would arise from teachers' absences. Moreover, we deem it to be nondiscriminatory treatment, if it be the Board's policy, not to renew the contract of any nontenured teacher, male or female, who gives the Board

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> advance knowledge of an anticipated absence of substantial duration in the coming school year for any reason. The avoidance of a detrimental interruption in the continuity of classroom instruction is an admirable goal whether the interruption be caused by pregnancy, laminectomy, orchiectomy, prostatectomy or any non-medical reason. Such a policy must be considered even-handed, and obviously it is not subject to the claim of disparate treatment. [Id. at 368.]

The holding in Gilchrist was recognized in Castellano, where the court distinguished the facts in Gilchrist from those in the case it was considering. In discussing the holding, it said that Gilchrist "emphasized that the Board's policy was not limited to disability and absence resulting from pregnancy but applied to anticipated absence of substantial duration from teaching duties, for any reason." Castellano, supra, 79 N.J. at 412. In the case now before us, the initial decision of the Administrative Law Judge which was adopted by the Commissioner of Education, found as follows:

> Proofs presented by petitioner failed to establish that Dyson was treated any differently than any man or non-pregnant woman would have been treated under similar circumstances.

Concerning petitioner's further argument that the policy of maintaining continuity of instruction was not consistently applied, the initial decision stated:

> Similarly, there has been no persuasive showing that Dyson has been treated differently than other pregnant women under comparable conditions. None of the pregnancy leaves cited by Dyson involved teachers who informed the Board prior to the commencement of the school year that they wanted to work only six weeks or so before taking a maternity leave. Rather, these other examples involved teachers who either irresponsibly neglected to give the Board advance notice, or who only learned of their pregnancy after the school year had already begun. In either case, the Board did not have an opportunity to apply its valid educational policy of reducing the number of times a different teacher is assigned to a given class.

Finally, as to the basic issue of continuity of instruction, the Administrative Law Judge found as follows:

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> The practice of permitting a teacher to start teaching for several weeks at the commencement of a new school year, stop teaching for a few months, and then start teaching again would have an unnecessarily disruptive impact on the continuity of the children's education.

Where, as here, a determination is founded upon sufficient credible evidence seen from the totality of the record and, on that record, findings have been made and conclusions reached involving agency expertise, the agency decision should be sustained. Gerba v. Public Employees' Retirement System Trustees, 83 N.J. 174, 189 (1980); Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).

The decision under review is affirmed.

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E.N. AND R.N., IN BEHALF OF THEIR SON, C.N.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, September 4, 1981

For the Petitioners-Appellants, E.A.N., Pro Se

For the Respondent-Respondent, Henry F. Gill, Esq.

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

March 3, 1982

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IN THE MATTER OF THE CLASSIFICATION APPEALS OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
S.S., ON BEHALF OF HER DAUGHTER, D.S.,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 26, 1981

For the Petitioner-Respondent, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

For the Respondent-Appellant, Theodore A. Sussan, Esq.

The child involved in the classification matter was originally determined by the East Brunswick Board's staff as neurologically impaired (N.I.). In 1978 she was reevaluated by the Child Study Team (CST) and classified as educable mentally retarded (EMR), whereupon she was enrolled in the District's EMR class for the school year 1978-79. While D.S. had done well in the N.I. class, she suffered and regressed in the EMR group, eventually becoming suicidal. These facts were communicated to the CST, but to no avail. The child's mother thereupon removed D.S. from the district and placed her in the New Grange School in Princeton, where she again did well as a N.I. pupil.

The child's mother then sought reimbursement from the district for tuition and transportation. Upon denial by the Board, she requested a hearing before the chief classification officer, who determined after a full hearing that the judgment of the CST was erroneous and that the child's proper classification was N.I. He awarded tuition from the fall of 1979 through June 1981. The Commissioner reversed the monetary award, ruling that the parent had voluntarily placed D.S. in the private program. He further directed that a new I.E.P. be developed and implemented for D.S.

In the foregoing exceptional set of circumstances, we believe that the monetary award should stand. Where, as here, the pupil is on the verge of self-destruction because of what is

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later determined on appeal to have been an erroneous classification, the act of the parent in removing the child from that situation can hardly be termed "voluntary." S.S. is entitled to reimbursement of tuition and transportation expenses for the school years 1979-80 and 1980-81.

We agree with the Commissioner that a new I.E.P. should be worked up. If the Board now has a N.I. program available within the district, the pupil could be assigned there. Furthermore, S.S. should not receive reimbursement for the school years after 1980-81, because on April 1, 1981 the classification officer directed the parties to prepare a new I.E.P. for the 1981-82 school year; the parent refused to participate and chose instead to continue placement at the New Grange School. She thereby waived her right to have her child educated at the Board's expense after June 1981.

The State Board directs that the Commissioner's decision be modified in accordance with the views above expressed. Board's request for oral argument is denied.

Attorney Exceptions are noted.

June 2, 1982

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BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, December 30, 1980 and June 15, 1981

For the Petitioner-Appellant, Board of Education of the Township of Egg Harbor, Perone & Perone (A. Ralph Perone, Esq., of Counsel)

For the Respondent-Respondent, Board of Education of the Greater Egg Harbor Regional School District, Donio & Greco (Louis J. Greco, Esq., of Counsel)

For the Respondent-Respondent, New Jersey State Department of Education, Jaynee LaVecchia, Deputy Attorney General

This controversy arose when, subsequent to withdrawal from Greater Egg Harbor Regional School District, the Board of Education of the Township of Egg Harbor (hereinafter petitioner), sought equitable distribution of the Regional's current expense, capital outlay, debt service revenue and Title I carry over funds as well as a proportionate share of State transportation aid payable to the Regional during the 1979-80 school year for transportation expenses incurred in the 1978-79 school year.

Pursuant to N.J.S.A. 18A:13-51 the County Superintendent of Schools made an investigation and report dated March 16, 1977, as to the advisability of allowing petitioner to withdraw from the Greater Egg Harbor Regional School District. He suggested that the Districts remaining in the Regional assume all of the debt service and liabilities of the Regional and further assume its building, grounds and other assets; and conversely the report recommended that the withdrawing District relinquish any claim to assets of the Regional and be relieved of all responsibility for its debt service and liabilities. When the Commissioner approved the withdrawal proposal on March 17, 1978, he authorized it to be presented to the electorate with a statement that subsequent to the withdrawal the Petitioner would assume no further debts or liabilities of the Regional and would not acquire any of its assets, and likewise that all of the remaining

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assets and liabilities of the Regional would be shared proportionately among the remaining constituents of the Regional. The voters of all the Districts concerned, in a special election held June 27, 1978, approved the withdrawal on the terms recommended by the County Superintendent and approved by the Commissioner as above set forth.

In view of the foregoing proceedings the Administrative Law Judge and the Commissioner concluded that Petitioner had agreed to the conditions above mentioned for its withdrawal from the Regional and had thereby waived its right to any further share in the Regional's assets.

We think the Commissioner's decision was correct and should be affirmed. There was an irregularity in the proceedings in that the County Superintendent failed to file a written report at the end of the school year 1978-79 which among other things would make a division of the assets and liabilities between the withdrawing District and the Regional pursuant to N.J.S.A. 18A:13-62. The County Superintendent maintained that he did not have to file such a report in this case because Petitioner was not entitled to receive any portion of the Regional's assets or be responsible for any of its liabilities. We believe that in spite of that fact, the report should have been filed in accordance with the statute. Nevertheless, the electorate in each District was well aware of the terms of the withdrawal, and the irregularity in question does not warrant a division of assets and liabilities different from that approved by the voters.

For the foregoing reasons the decision of the Commissioner is affirmed.

January 6, 1982

Pending N.J. Superior Court

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BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR,	:	
APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT AND STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,	:	APPELLATE DIVISION
RESPONDENTS.	:	

Decided by the Commissioner of Education, December 30, 1980 and June 15, 1981.

Decided by the State Board of Education, January 8, 1982.

Argued: September 29, 1982 - Decided: October 18, 1982.

Before Judges Matthews, Antell and Francis.

On appeal from the final decision of the State Board of Education.

William C. Todd, III, argued the cause for appellant (Tort, Jacobs, Gross & Todd, attorneys; A. Ralph Perone, of counsel).

Louis J. Greco argued the cause for respondent Board of Education of Greater Egg Harbor &c. (Donio & Greco, attorneys).

Jaynee LaVecchia, Deputy Attorney General, argued the cause for respondent Department of Education (Irwin I. Kimmelman, Attorney General, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

PER CURIAM

The Board of Education of the Township of Egg Harbor (Egg Harbor) appeals from a final decision of the State Board of Education involving the division of assets and liabilities of the Greater Egg Harbor Regional High School District upon Egg Harbor's withdrawal from that district.

Prior to June 30, 1979, the Greater Egg Harbor Regional High School District (Regional District), which is a limited

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purpose regional school district, was comprised of five member local districts. The Regional District owned one building located in Hamilton Township. On October 25, 1976, pursuant to N.J.S.A. 18A:13-51, Egg Harbor resolved to apply to the Atlantic County Superintendent (Superintendent) [to request him] to investigate the advisability of Egg Harbor's withdrawal from the Regional District. Such an application is the first step in the process of withdrawal set forth in N.J.S.A. 18A:13-51 to 18A:13-65.

The Superintendent, pursuant to N.J.S.A. 18A:13-52, issued his report on March 16, 1977:

> Report of county superintendent. The county superintendent shall, within 60 days after such request, file with the governing bodies of the municipalities constituting the regional district and the boards of education of all of the constituent school districts and the board of education of the regional school district a report containing a statement of the current assets and operating expenses of the regional district for the then current year and such financial, educational and other information as he may deem necessary to enable said governing bodies and local boards of education and regional board of education to form an intelligent judgment as to the advisability of the proposed withdrawal and the effect thereof upon the educational and financial condition of the withdrawing district and the regional district and setting forth the amount of indebtedness, if any, to be assumed by the withdrawing and the regional districts, calculated as hereinafter provided.

Item X of the Superintendent's report set forth the "Amount of Indebtedness to be Assumed." It listed each constituent district's share of the Regional District's "debt service" for 1976-1977 and then listed the share of the 1976-1977 "debt service" that each district would have been required to pay, if Egg Harbor had not been a member of the Regional District during that school year.

Item XI of the Superintendent's Report was entitled "Assets and Liabilities." Here the Superintendent noticed that if Egg Harbor's withdrawal was approved, N.J.S.A. 18A:13-62 would require him to make a report and to divide the Regional District's assets and liabilities in the following manner, as provided in N.J.S.A. 18A:8-24:

> The county superintendent in a written report filed by him at the end of the school

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> year preceding that in which the new district is created shall make a division of the assets, except school buildings, grounds, furnishings and equipment, and of the liabilities, other than the bonded indebtedness of the original district, between the new district and the remaining district on the basis of the amount of the ratables in the respective districts on which the last school tax was levied, and in determining the amount of assets to be divided, he shall take into account the present value of the school books, supplies, fuel, motor vehicles and all personal property other than furnishings and equipment. In the case of any vehicle used for the transportation of school children, the original cost of the vehicle, less any state aid appropriated therefor, shall be deemed to be the present value.

The Superintendent noted that based on 1976-1977 statistics Egg Harbor would be entitled to 31.65% of the assets and responsible for 31.65% of the liabilities. He concluded:

> It would be appropriate for the division of assets and liabilities to be made based upon the following:
>
> 1. The remaining Districts would assume the remaining debt service and liabilities of the District.
>
> 2. The remaining Districts would assume the buildings, grounds, and assets of the District.
>
> 3. The withdrawing District would relinquish any claim to any assets of the District, including buildings and grounds.
>
> 4. The withdrawing District would not be responsible for any debt service or liabilities.

Following the submission of the Superintendent's report, pursuant to N.J.S.A. 18A:13-54, Egg Harbor petitioned the Commissioner of the Department of Education for permission to submit the issue of withdrawal to the voters. Although that statute allows the petitioner to request a reduction or increase in the amount of "Indebtedness to be assumed" the petition did not do so.

The Commissioner submitted Egg Harbor's petition to the Board of Review, which is comprised of the Commissioner, the state treasurer or his designee and the director of the division

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of local government services. On September 2, 1977, the Board of Review conducted a hearing on the petition, granted Egg Harbor's petition and authorized the Superintendent to fix a date for a special election on Egg Harbor's proposed withdrawal. See N.J.S.A. 18A:13-56.

The Board of Review's decision included the following finding:

> [Egg Harbor] does not seek to acquire any building, furnishings, or equipment assets if it is permitted to withdraw; therefore, it assumes that it will not incur any liabilities and that all remaining assets and liabilities will be assessed proportionally to the remaining District.

The Board of Review specified that the question submitted to the voters

> shall contain a statement that, subsequent to withdrawal, the Township Board [Egg Harbor] shall not assume any further debts or liabilities of the Regional District; neither shall it acquire any of the assets of the Regional District, and that all remaining assets, debts and liabilities shall be shared proportionately among the remaining constituents in the Regional District.
>
> The percentage of debt assumption will increase for the remaining constituents, but not so much so as to be declared excessive or unreasonable.

The decision referred to the Superintendent's duty, pursuant to N.J.S.A. 18A:13-62, to divide assets between the withdrawing and Regional District after the election if the voters approved the withdrawal. The Board of Review then adopted verbatim the Superintendent's four part recommendation for such a division that is quoted above.

The decision concluded:

> The costs for the conduct of the election are clearly prescribed by statute as are the division of assets and liabilities and the seniority entitlement for teaching staff members of the withdrawing and remaining districts. All special elections "***shall be called in the manner provided for the calling of the annual school election.***" N.J.S.A. 18A:14-3.2. Tenure of office and

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> rights pertinent thereto are subjects of legislative determination specifically regarding withdrawals by a constituent district from a regional district. N.J.S.A. 18A:13-64. The County Superintendent is authorized to divide assets and liabilities. N.J.S.A. 18A:13-62.

The following question was submitted thereafter to the voters:

> PROPOSAL
>
> Shall the Egg Harbor Township School District withdraw from The Greater Egg Harbor Regional High School District, in the County of Atlantic, in accordance with the provisions of N.J.S. 18A:13-51, et seq., with no debt to be assumed nor any assets acquired by the withdrawing district, and the remaining debt of $1,844,000.00 to be assumed by and all assets acquired by The Greater Egg Harbor Regional High School District, with said debt to be proportionately shared by the remaining constituent districts of The Greater Egg Harbor Regional School District.
>
> [emphasis added]

On June 27, 1979 the voters approved the withdrawal. The Commissioner, pursuant to N.J.S.A. 18A:13-59, fixed the date of withdrawal as June 30, 1979.

On August 6, 1979 Egg Harbor requested the Superintendent to set up a meeting for the purpose of distributing the Regional District's assets and liabilities pursuant to N.J.S.A. 18A:13-62. The Superintendent refused by letter dated August 9, 1979. He stated it was not necessary for him to submit a report or to divide assets. He based his refusal and claim on his conclusion "that all assets and all liabilities remain with the Regional District and Egg Harbor...acquires no assets and assumes no debt--this is indeed what the voters approved." [emphasis in original]

On March 6, 1980 Egg Harbor petitioned the Commissioner to compel the Regional District to pay Egg Harbor a distributive share of the Regional District's surplus budget for the 1978-1979 school year. Specifically, Egg Harbor sought its proportionate share, as calculated pursuant to N.J.S.A. 18A:8-24, of: $7,715.57 (the excess balance of monies appropriated for that year's capital outlay); $55,804.14 (excess balance of monies appropriated for that year's operating expenses); $14,518.16 (excess balance of monies appropriated for that year's debt service); $831, 532 (monies paid by the State of New Jersey to the Regional District pursuant to N.J.S.A. 18A:58-7 representing 90% of the Regional District's transportation costs). Egg Harbor

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also sought to compel the State Department of Education to pay it its rightful share of unpaid funds. In addition Egg Harbor sought a share of $43,788, the excess and carryover Title I funds provided by the Federal Government. In this instance Egg Harbor sought a percentage based on the number of Title I students from Egg Harbor who attended the Regional District High School.

On July 2, 1980 the Commissioner referred Egg Harbor's petition to an Administrative Law judge as a contested case. N.J.S.A. 52:14F-1 et seq.

The judge held a prehearing conference on July 2, 1980, and hearings were held on October 15 and 16, 1980. The State Department of Education (Department) moved to dismiss Egg Harbor's claim against it on the basis of its failure to state a claim on which relief might be granted and it was dismissed with prejudice. The Regional District's motion to dismiss was denied, as was Egg Harbor's motion for summary judgment. The judge's written decision on these motions was issued on October 23, 1980. On November 1, 1980 the Department made its final transportation reimbursement payment for the 1978-1979 school year to the Regional District. On December 30, 1980, the Commissioner affirmed the Administrative Law judge's decision dismissing Egg Harbor's claim against the Department and ordered that claim dismissed.

On March 19, 1981 the judge closed the record on Egg Harbor's claim against the Regional District, and on April 27, 1981 rendered his initial decision.

He found that Egg Harbor waived any claim to the assets of the Regional District by acquiescing to the Board of Review's approval of the election which was given on the condition that Egg Harbor neither assume any further debts or liabilities nor acquire any assets. He further concluded that the quasi-judicial function of the Board of Review rendered Egg Harbor's claim res judicata, and concluded that Egg Harbor's petition should be dismissed.

Egg Harbor filed exceptions to this initial decision on May 11, 1981. The Commissioner affirmed the finding and determination of the Administrative Law judge on June 19, 1981. Egg Harbor appealed to the State Board of Education on July 13. The State Board affirmed the Commissioner and the Administrative Law judge, but modified their decisions to indicate that the Superintendent should have filed a report on the Regional District's assets and liabilities even though Egg Harbor was not entitled to a share of those assets.

Egg Harbor argues that the language of N.J.S.A. 18A:13-62 mandated distribution of all assets other than school buildings, grounds, furnishings and equipment, and provides the sole means for distribution for those assets. It provides:

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> The county superintendent in a written report filed by him at the end of the school year preceding that in which the withdrawal becomes effective shall make a division of the assets and liabilities between the withdrawing district and the regional district in the same manner as provided in N.J.S. 18A:8-24.

N.J.S.A. 18A:8-24 provides for a division of the "assets, except school buildings, grounds, furnishings and equipment...on the basis of the amount of the ratables in the respective districts..."

Here both the Superintendent and the Board of Review considered that the debt service for the remaining districts would increase if Egg Harbor withdrew. In that context, both determined that Egg Harbor should not acquire assets of the Regional District at the time of final distribution of those assets.

Egg Harbor with full knowledge, or at least with sufficient notice, remained inactive; it failed to protest, and freely acted as if it recognized the terms of the Board's approval of its withdrawal. The Regional District, the voters, and the remaining constituent districts were induced to suppose that Egg Harbor agreed to relinquish its assets. As the Commissioner and Department found, this amounts to acquiescence. Taner v. Atlantic Cas. Ins. Co. of Newark, 37 N.J. Super. 9, 12 (App. Div. 1955). Egg Harbor is now estopped from requesting a distribution of assets because of its acquiescence, it allowed the voters to approve a plan under which it was required to relinquish a claim to any assets of the Regional District.

The language of the question submitted to the voters was clear. Egg Harbor should have raised its objection to any ambiguity prior to that election. Two Guys from Harrison, Inc. v. Furman, 32 N.J. 199, 205 (1960).

The resolution of the issue on Egg Harbor's acquiescence in the relinquishment of its right to assets obviates the need for deciding whether the issue of the distribution of the assets in res judicata. In addition, the decision of the State Board of Education did not rest on res judicata and we find it unnecessary to reach that issue.

The State Department of Education has paid the Regional District all monies owing for the 1978-79 school year. Egg Harbor's claim for a share of unpaid funds is moot. Humble Oil and Refining Co. v. Woytcha, 48 N.J. 562 (1967).

Affirmed.

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LILLY FEIT,

Petitioner-Appellant,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,

Respondent-Respondent.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education, December 8, 1980

Decided by the State Board of Education, April 1, 1981

Argued November 3, 1982 - Decided November 16, 1982

Before Judges Joelson and Petrella.

On appeal from final determination of the New Jersey State Board of Education.

Louis P. Bucceri argued the cause for appellant (Bucceri & Pincus, attorneys; Gregory T. Syrek on the brief).

Allen P. Dzwilewski argued the cause for respondent.

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for the State Board of Education, filed a Statement in Lieu of Brief.

PER CURIAM

Petitioner Lilly Feit appeals from a final determination of the State Board of Education ("State Board") upholding her termination by the Board of Education of the Borough of Roselle ("Roselle") as not violative of the tenure laws.

The facts were stipulated and submitted to an Administrative Law Judge who ruled in favor of Feit. That determination was set aside by the Commissioner of Education, and his decision was affirmed by the State Board. At issue is the scope of Feit's tenure rights upon termination of her employment as an art teacher because of a reduction in force ("RIF"), and whether those tenure rights affect her subsequent employment as a sixth grade teacher.

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Feit obtained her Teacher of Fine Arts certificate in June 1969 and was employed as an art teacher by Roselle from September 1, 1969 until June 30, 1975. She thus achieved tenure in that position. However, the position of art teacher was abolished in June 1975 (see N.J.S.A. 18A:28-9), and Feit did not work for Roselle in the 1975-1976 school year. That action has not been challenged on appeal.

In April 1976 Feit acquired an Associate Educational Media Certification; then in July 1976 she was certified as an elementary (K-8) teacher. She then returned to the Roselle school system for the 1976-1977 and 1977-1978 school years as a sixth grade teacher. In April 1978 Feit was notified by the Roselle Board secretary that she was not being offered a contract for the 1978-1979 school year.

Petitioner argues that Roselle violated her tenure rights and that she is thus entitled to reinstatement and back pay. She contends that upon her reemployment for the 1976-1977 and 1977-1978 school years she was still cloaked with tenure with eight years of seniority as an art teacher and two years of seniority as an elementary teacher. Her point is that her earlier period of employment gained her tenure and that her reemployment, even if pursuant to a new certification and in a new teaching position, should be "tacked" to her earlier tenure term. She thus argues that upon reemployment as an elementary school teacher in the sixth grade in 1976 she immediately had tenure and could not be terminated except in accordance with the statutes, that is, only upon a RIF or good cause. See N.J.S.A. 18A:28-9; N.J.S.A. 18A:6-10. On the other hand, Roselle takes the position that the two terms of employment were separate and so the tenure rights of the first did not attach to the subsequent position.

Tenure being a creature of statute, can only be acquired by compliance with the statute. Thus, three consecutive calendar years, or three consecutive academic years (and renewal for continuing employment), or three academic years within four calendar years must be served for tenure to attach. N.J.S.A. 18A:28-5. Cf. N.J.S.A. 18A:28-6 (tenure upon consensual transfer after two years). Tenure cannot be obtained without compliance with the statute. See, e.g., Zimmerman v. Newark Bd. of Ed., 38 N.J. 65, 72 (1962), cert. den. 371 U.S. 956, 83 S.Ct. 508, 9 L.Ed. 2d 503 (1963).

If this were a question of transfer, generally considered a managerial prerogative, such action could not be used to avoid tenure. Downs v. Hoboken Bd. of Ed., 113 N.J.L. 401 (E. & A. 1934) aff'g o.b. 12 N.J. Misc. 345, 171 A. 528 (Sup. Ct. 1934). The rights and incidents of tenure would be retained even upon a transfer. Cf. Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980) and Greenway v. Camden Bd. of Ed., 129 N.J.L. 461 (E. & A. 1942) aff'g 129 N.J.L. 46 (Sup. Ct. 1942).

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However, the question here is not one of transfer but of the tenurial relationship, if any, between the former position of fine arts teacher and the subsequent position of sixth grade elementary school teacher.

We are of the view that the present case has to be viewed as a matter of tenure under multiple certifications. Petitioner was certified and tenured as a fine arts teacher and was removed because of a RIF. She subsequently attained a certification as an elementary school teacher and accepted new employment under that certification. Feit did not have her elementary teaching certification when she was an arts teacher, and she did not teach an elementary grade prior to her return to employment. N.J.S.A. 18A:28-5 does not permit Feit to acquire tenure under her elementary school certification until after teaching three school years under it. Hence, even though Roselle properly put plaintiff on their preferred eligibility list for the fine arts position as required by N.J.S.A. 18A:28-12, tenure did not attach with respect to her employment under her elementary certification merely by employment to teach sixth grade. Nor does N.J.S.A. 18A:28-6 which deals with tenure upon transfer apply because Feit was not "transferred or promoted with her consent to another position."

One of the purposes of a probationary period under the tenure statute is to give a local board the opportunity to observe the professional performance of each teacher. If Feit were automatically tenured as a sixth grade teacher by reason of her previous art teacher experience, Roselle would not have the opportunity to evaluate her as a sixth grade teacher before she acquired tenure. We are satisfied that the position of art teacher and sixth grade teacher are separate and apart and that the regulations which give the respective guidelines for a teacher's training in art and elementary education confirm the distinction. See N.J.A.C. 6:11-7.16 and N.J.A.C. 6:11-7.20.

We are persuaded, given the deference accorded the administrative agency, Mayflower Sec. Co. v. Sec. Bureau, 64 N.J. 85, 92-93 (1973) the State Board correctly applied the tenure statutes to Feit's situation.

Affirmed.

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PAUL FITZPATRICK, ET AL.,	:	
PETITIONERS-CROSS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, June 13, 1980

Decided by the State Board of Education, March 4, 1981

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

For the Respondent-Appellant, Krieger & Chodash
(Brian Flynn, Esq., of Counsel)

The March 4, 1981, decision of the State Board of Education in this matter was appealed to the Superior Court of New Jersey, Appellate Division, by both parties. The State Board's decision was reversed as to Paul Fitzpatrick, affirmed in all other respects. See Paul Fitzpatrick, James Furno, Harry Untereiner and Thomas LaFronz v. Board of Education of the Township of Weehawken, Superior Court of New Jersey, App. Div., Docket No. A-3278-80T3, decided June 16, 1982.

The Court held that Paul Fitzpatrick was entitled to retain his teaching position for the 1976-1977 school year, and should not have been terminated. In accordance with the Order of the Superior Court, the State Board of Education hereby orders that the Weehawken Board of Education pay Petitioner Fitzpatrick the amount of salary he would have earned during the 1976-1977 school year, mitigated by other earnings.

September 8, 1982

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PAUL FITZPATRICK, JAMES FURNO, HARRY UNTEREINER and THOMAS LA FRONZ,

Petitioners-Appellants,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN,

Respondent-Cross-Appellant.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education, June 13, 1980

Decided by the State Board of Education, March 4, 1981

Argued May 25, 1982 - Decided June 16, 1982

Before Judges Antell and Furman.

On appeal from the State Board of Education.

Louis P. Bucceri argued the cause for the appellant (Bucceri & Pincus, attorneys; Mr. Bucceri of counsel; Gregory T. Syrek, on the brief).

Brian N. Flynn argued the cause for the respondent (Krieger & Chodash, attorneys; Mr. Flynn of counsel and on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education (James R. Zazzali, former Attorney General of New Jersey; Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the statement) filed a statement in lieu of brief.

PER CURIAM

Appeal and cross-appeal are brought from a decision of the State Board of Education affirming the Commissioner of Education. Petitioners contend that their termination, effective in September, 1976 upon respondent board of education's reorganization of the seventh and eighth grade curricula, infringed their seniority rights as teachers.

Petitioners Furno, Fitzpatrick and Untereiner had been employed as junior high school social studies teachers with

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secondary social studies certifications. Petitioner La Fronz had been employed as a junior high school psychology teacher with secondary psychology and general business certifications. They were terminated for the 1976-1977 school year because of a reduction in the number of teaching positions. Fitzpatrick was rehired in September 1977, the other three were rehired or offered reemployment in September 1978. All four petitioners claim a right to back pay retroactive to the beginning of the 1976-1977 school year, based upon greater seniority than that of several teachers employed by respondent board of education during the 1976-1977 and 1977-1978 school years.

In cross-appealing from the State Board of Education decision in favor of Furno, respondent board of education challenges the factual determinations below that, during the two year period, social studies instruction was de facto departmentalized and that teachers with less seniority rights than Furno's had taught social studies in the seventh and eighth grades. Those factual determinations were reasonably reached on sufficient credible evidence present in the record and, with due regard to administrative expertise, should be sustained on appeal. Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 28-29 (1981); Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973).

Parallel facts are applicable to Fitzpatrick's claim for back pay for the 1976-1977 school year. Five sections of social studies, a full teaching schedule, were taught by teachers with less total seniority than Fitzpatrick's, in view of the factual determination that Buda, who taught eighth grade social studies, had only one year's seniority as a social studies teacher. Despite that factual determination, together with the factual determination that social studies instruction was departmentalized, the State Board of Education denied Fitzpatrick's claim for back pay. That denial was error as a matter of law under the factual findings reached below. We reverse and direct the entry of an order awarding back pay to Fitzpatrick for the 1976-1977 school year.

Still remaining are the claims of petitioners Untereiner and La Fronz for two years' back pay. In support of these claims petitioners urge that, upon a reduction in work force, respondent board of education was obligated to protect seniority rights by working out all the possible permutations in assignments for which available teaching personnel had credentials and, thus, to restructure, if necessary, its entire teaching staff. According to this argument, for example, upon a reduction in the number of social studies teachers from two to one, if the senior social studies teacher was also certified in English and the other social studies teacher had more seniority than any one or more of the English teachers, the senior social studies teacher would be reassigned to teach English in order to preserve the next senior teacher's employment. Petitioners

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present a complex pattern of transfers which would have accomplished the preservation of Untereiner's and La Fronz's employment.

No statutory or decisional law authority is cited by petitioners other than the long established precedents that, upon abolition of a tenured teacher's position, that tenured teacher is entitled to fill a position for which he is qualified, which is held by a non-tenured teacher. E.g., Downs v. Board of Education, Hoboken, 12 N.J. Misc. 345 (Sup. Ct. 1934), aff'd 113 N.J.L. 401 (E. & A. 1934); Seidel v. Bd. of Education of Ventnor City, 110 N.J.L. 31 (Sup. Ct. 1933), aff'd 111 N.J.L. 240 (E. & A. 1933).

We reject petitioners' argument. We are of the view that the obligation to protect seniority rights goes no further than that recognized in Downs and Seidel and that any requirement of working out the possible permutations in assignments, which might, for example, result in reassignment of a highly skilled and successful teacher in one academic field to another academic field, would infringe unduly on respondent board of education's predominant responsibility to maintain a thorough and efficient system of education, N.J.S.A. 18A:7A-1 et seq.

Apart from this argument, the appeals by Untereiner and La Fronz also fail because of the resolution of facts against them by the State Board of Education. The factual determinations that Untereiner and La Fronz were not entitled by seniority to teach social studies and psychology, respectively, in the 1976-1977 and 1977-1978 school years were reasonably reached on sufficient credible evidence in the record. The legal determination that La Fronz was not entitled by his general business certification to teach typewriting was in accordance with the applicable administrative regulation. N.J.A.C. 6:11-8.4(b) (23).

We reverse on the appeal by Fitzpatrick and remand for entry of an order awarding back pay to Fitzpatrick for the 1976-1977 school year. We otherwise affirm. We do not retain jurisdiction.

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RICHARD GINCEL,	:	
RESPONDENT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	APPELLATE DIVISION
APPELLANT.	:	

Decided by the Commissioner of Education, August 11, 1980

Decided by the State Board of Education, November 5, 1980

Argued April 27, 1982 - Decided May 12, 1982

Before Judges Matthews and Pressler.

On appeal from Final Decision of the State Board of Education.

R. Joseph Ferenczi argued the cause for appellant.

George W. Conk argued the cause for respondent.

A Statement in Lieu of Brief on behalf of New Jersey State Board of Education was submitted by Irwin R. Kimmelman, Attorney General of New Jersey (James R. Zazzali, former Attorney General, and M. Kathleen Duncan, Deputy Attorney General, of counsel and on the Statement).

The opinion of the court was delivered by

MATTHEWS, P.J.A.D.

This is an appeal from the final determination of the State Board of Education ordering the Edison Township Board of Education (hereinafter Board) to reassign Richard Gincel to the position of elementary principal with back pay and benefits.

Gincel was employed by the Board from 1955 to 1962 as an elementary school teacher and from 1962 to 1976 as an elementary school principal. In February 1976, he requested a transfer to an elementary vice-principalship and served in that capacity from September 1, 1976 until June 30, 1979. This position, along with three other vice-principal positions, however, was abolished by the Board on April 9, 1979. Though there were a number of principals employed in the district with less seniority in that position than Gincel had previously accrued, in a letter dated May 29, 1979 he was informed that he had been reassigned to the position of elementary school teacher. Gincel remains in that position under protest.

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On May 10, 1979 Gincel filed a grievance with the Edison Principals Association challenging his assignment to the classroom.[1] His request to have the matter resolved through binding arbitration was opposed by the Board, however, which viewed the controversy as beyond the scope of negotiations and thus non-arbitrable. Consequently, on September 19, 1979 the Board filed a scope of negotiations petition with the Public Employment Relations Commission to enjoin the arbitration. At this point, Gincel withdrew his demand for arbitration.

On October 5, 1979 Gincel instead filed a Petition of Appeal with the Commissioner of Education. The petition essentially alleged that his reassignment as an elementary teacher violated his tenure and seniority rights. In relief, he sought reinstatement to the position of elementary principal with back pay and benefits retroactive to July 1, 1979. The Board, in defense, asserted that the claim was out of time since it had not been filed within 90 days of the notice of reassignment as required by N.J.A.C. 6:24-1.2. Alternately, the Board maintained that Gincel had no statutory right to a principalship and, moreover, that his request to transfer to an elementary vice-principalship effectively constituted a resignation from the position of elementary principal.

Cross motions for summary judgment were heard by an administrative law judge and granted in favor of Gincel. In an opinion dated June 26, 1980, the judge explained that, though Gincel had in fact filed his petition out of time pursuant to N.J.A.C. 6:24-1.2, N.J.A.C. 6:24-1.19 permitted the "commissioner,"[2] "in his discretion," to relax or dispense with the 90-day rule "in any case where a strict adherence thereto may ... result in injustice." Finding that Gincel had not delayed in asserting his claim but had merely chosen the wrong forum and that there was no prejudice to the Board, the judge concluded that to bar Gincel "from an interpretation of his statutory rights of tenure and seniority by what appears a misdirected but good faith effort to resolve the matter under terms of the negotiated agreement, would be to place form over substance." Consequently, the judge considered the merits of Gincel's claim. In this regard, he found that the statute and regulations very clearly provided that "in the event of the abolishment of a position of a tenured teaching staff member resulting from a reduction in force, the tenured employee shall revert to the previous category of employment." Moreover he found no merit,

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[1]Though Gincel was officially notified of this assignment by letter dated May 29, 1979, he had received notice of the abolition of his vice-principal position in a letter dated April 10, 1979. Moreover his grievance submission indicates that he met with the Assistant Superintendent to discuss his assignment for the 1979-80 school year and learned of the possibility of a teaching assignment at that time. This probably explains the filing of the grievance before the official notice of reassignment.

[2]As defined in N.J.A.C. 6:24-1.1, "commissioner" as used in these rules includes "a hearing officer assigned to conduct the proceedings in any case."

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either in fact or in law, to the Board's contention that Gincel's requested reassignment to an elementary vice-principalship constituted a divestiture of the seniority rights he had accrued as an elementary principal. Thus the judge ordered that Gincel be appointed to an elementary principalship at an early date and that he be awarded any difference in salary and benefits which he would have been entitled to during the period of his reassignment as a classroom teacher.

The Board received a copy of this decision on July 7, 1980 and filed exceptions with the Commissioner on July 16, 1980. Once again the Board asserted that the petition had been untimely filed and that Gincel had no statutory right to the position of principal. These exceptions, however, were not considered by the Commissioner who observed that they were not timely filed pursuant to N.J.A.C. 6:24-1.17(b). Both the Commissioner and the State Board of Education affirmed the findings and determination of the administrative law judge.

The Board asserts that the Commissioner erred in finding that its exceptions to the administrative law judge's determination, which were filed within 10 days of its receipt, were out of time. Clearly, pursuant to N.J.A.C. 1:1-16.4(a), the Board's exceptions had been filed in time. That section provides:

> (a) Within 10 days from the receipt of the judge's initial decision, any party may file exceptions thereto in writing with the agency head and with the clerk, serving a copy thereof on all other parties.[3]

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[3]N.J.A.C. 1:1-16.4(a) is found in the rules of general application for all contested cases. N.J.A.C. 1:1-1(a) explains that "in the event of conflict between this chapter and any other agency rule, this chapter shall prevail."

Interestingly enough, N.J.A.C. 6:24-1.17(b), upon which the Commissioner relied in finding that the Board's exceptions had been untimely filed, provides:

> (b) Whenever a determination of a controversy or dispute shall incorporate findings of fact and/or conclusions of law prepared by a hearing examiner appointed by the commissioner, copies of the report of the recommended findings of fact and/or conclusions of law shall be delivered or mailed to all parties to the controversy or dispute who may, concurrently within 15 days of such delivery or 18 days of mailing, file written exceptions, objections or replies thereto with the commissioner.

Even under this provision, the Board's exceptions, filed within 15 days of delivery and within 18 days of mailing, were timely.

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Moreover, though the original letter accompanying the administrative law judge's decision informed the Board that it had 10 days from the "mailing date" to file any exceptions, a second letter corrected the first, explaining that it had 10 days from "receipt."

While we find that the Commissioner erred in not considering these exceptions, we regard a remand as unnecessary. The exceptions taken by the Board -- that Gincel's petition had been untimely filed and that he had no statutory right to the position of principal -- had been raised before the administrative law judge and discussed in his opinion. Thus both the Commissioner and the State Board, in adopting the law judge's recommendations, decided the merits of the appeal. In fact, though it is not clear whether the State Board actually considered them, since it affirmed on the basis of the Commissioner's decision, the Board did file the same exceptions with that body as well. Finally, on this appeal the Board raises these same issues. Since the questions raised involve either the review of discretionary action on the part of the administrative law judge or pure statutory issues, this court is clearly competent to resolve the matter. Cf. Pietrunti v. Bd. of Ed. Brick Tp., 128 N.J. Super. 149, 160-161 (App. Div. 1974), certif. den. 65 N.J. 573 (1974), cert. den. 419 U.S. 1057 (1975) (Though finding that Commissioner erred in not affording the parties an opportunity to object to the hearing officer's decision, this court elected to consider the exceptions on appeal.)

Preliminarily the Board maintains that the State Board erred in not dismissing Gincel's appeal since his petition had not been filed within the time limits prescribed by N.J.A.C. 6:24-1.2. That regulation provides, in part, that:

> Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is required.

It is undisputed that Gincel, who received official notice of his reassignment to the classroom on May 29, 1979 and who filed his petition with the Commissioner on October 5, 1979, failed to comply with the requirements of this rule. However, the strict application of the rule had been relaxed by the administrative law judge, in his discretion, pursuant to N.J.A.C. 6:24-1.19, which provides:

> The rules herein contained shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of, the commissioner in connection with the hearing and determination of controversies and disputes under the school laws. They may be relaxed or dispensed with by the commissioner, in his discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

The basic question facing this court, then, is whether the relaxation of the 90-day rule in this case was an abuse of discretion.

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Framed in this manner, it is clear that the Board's reliance upon Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980), is misplaced. There an untenured teacher had filed a petition with the Commissioner 14 months after she had been notified that her contract had not been renewed. In the interim her claim had been submitted to binding arbitration with unfavorable results. The Commissioner rejected the school board's contention that the petition was out of time holding instead "that it had been filed within 90 days of the arbitrator's award and was therefore timely." 173 N.J. Super. at 112. This court reversed, finding that although N.J.A.C. 6:24-1.2 had not been in effect at the time the petitioner had been notified of her dismissal, the administrative practice had been to require such filing within 90 days of the promulgation of that rule. Measured from this date petitioner's claim was still out of time. We also noted the Supreme Court's recent decision in Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Ass'n., 79 N.J. 311 (1979), wherein it explained the procedural relationship between arbitration and administrative appeal as follows:

> Under N.J.S.A. 18A:29-14, the Commissioner has been delegated the responsibility to promulgate rules and regulations concerning the manner in which an aggrieved teacher may appeal adverse Board determinations. Pursuant to this grant of authority, such rules have been adopted. See N.J.A.C. 6:24-4.1; N.J.A.C. 6:24-1.1 to 6:24-1.19. These rules require a teacher to file a petition with the Commissioner within 90 days of his receipt of notice of the Board's decision to withhold an increment. N.J.A.C. 6:24-1.2. A teacher who proceeds to advisory arbitration is not relieved from compliance with this 90-day filing requirement. However, in order that the goals underlying our decision to permit this type of arbitration be achieved, the Commissioner must wait until the arbitration is completed and an advisory decision rendered before conducting a hearing on the merits of the teacher's petition.
>
> [79 N.J. at 326-327, n. 4; emphasis supplied.]

Proceeding with a claim to arbitration does not toll the 90-day period for filing an appeal with the commissioner. Such appeals must be filed within 90 days of notice of the action appealed from whether or not the claim is first submitted to arbitration. No claim is made here, however, that by virtue of his attempt to have the matter resolved by arbitration, Gincel has somehow fulfilled the requirements of N.J.A.C. 6:24-1.2. Instead the judge plainly found that the appeal was late but that to enforce strictly the time limit in this case would result in injustice. In this regard he acted not under N.J.A.C. 6:24-1.2 but rather pursuant to N.J.A.C. 6:24-1.19.

The question remains whether the judge mistakenly exercised his discretion in relaxing the application of the 90-day rule. We think he did not. In ruling as he did, the judge found that Gincel had not delayed in asserting his claim; that he had merely chosen

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the wrong forum in good faith; that after withdrawing his demand for arbitration he had promptly filed his petition with the Commissioner (within days); that the Board had not been prejudiced by the delay, and that the Board had waited nearly two months to file its petition to enjoin the arbitration. Compare this to Riely, where the petitioner had waited two months after receiving an unfavorable arbitration award before filing an appeal with the Commissioner.

We do not conclude that the administrative law judge acted arbitrarily or mistakenly exercised his discretion in relaxing the strict application of the 90-day rule.

In determining that by virtue of his tenure and seniority rights Gincel was entitled to the position of elementary principal, the administrative law judge relied upon the plain language of N.J.A.C. 6:3-1.10. In pertinent part that rule provides:

> (b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absence.
>
> ....
>
> (g) Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment.
>
> ....
>
> (h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him.
>
> ....
>
> (k) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:

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....

9. Elementary Principal;

....

16. Elementary School Vice-Principal or Assistant Principal; ....
[emphasis supplied]

The judge found the intent of this regulation clear that "in the event of the abolishment of a position of a tenured teaching staff member resulting from a reduction in force, the tenured employee shall revert to the previous category of employment." As applied to Gincel's circumstances, since he had insufficient seniority in the position of vice-principal to remain in that capacity, pursuant to this regulation he was entitled to revert to his previous position as elementary principal. In this regard the law judge found that in 1979, when his position as vice-principal was abolished, at least 12 principals in the district had less seniority in that position than Gincel. Consequently he concluded that Gincel was entitled to a principalship.

The Board contests this determination on two grounds. The first essentially challenges the validity of N.J.A.C. 6:3-1.10 to the extent that it expands upon the limitations contained in N.J.S.A. 18A:28-6. The latter section provides:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said

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> board of education, such teaching staff member shall be returned to his former position at the salary which he would have reached had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion. [emphasis supplied]

The Board interprets this provision as evidencing a legislative intent to limit the availability of reversion to that factual situation where tenure has not been acquired in the new position. Thus since the regulation relied upon by the law judge permits reversion even where tenure has been acquired in a new position, the Board contends that this rule is an invalid alteration of a legislative enactment.

The basic flaw in this argument is its premise that N.J.A.C. 6:3-1.10 was adopted pursuant to N.J.S.A. 18A:28-6. The regulation itself, however, cites as the source of its authority N.J.S.A. 18A:28-9 to 18A:28-13. In pertinent part, those sections provide:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article. [18A:28-9]
>
> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board. [18A:28-10]
>
> In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status, ... [18A:28-11] [emphasis supplied]

These provisions plainly empower the commissioner to establish standards for the dismissal or reclassification of employees due to necessary reductions in force. N.J.S.A. 18A:28-6, on the other hand, speaks only to the acquisition of tenure upon transfer. Though it does authorize reversion where a position is abolished before tenure is acquired in that spot, it contains no prohibition against reversion in other circumstances. In light of the broad

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grant of authority found in N.J.S.A. 18A:28-9 to 18A:28-13, N.J.S.A. 18A:28-6 clearly cannot be viewed as a limitation upon that authority.

We can think of no sound policy to be served in attributing such an intention to the Legislature. To prohibit the commissioner from reassigning tenured employees upon reductions in force unnecessarily hampers the performance of these statutory functions and effectively frustrates the purpose of the tenure and seniority system.

We conclude that N.J.A.C. 6:3-1.10 does not exceed its legislative authorization and should be given full effect by this court.

The Board also concludes that by voluntarily requesting a transfer to a vice-principalship Gincel effectively abandoned his seniority rights in the higher position of principal. The Board, however, cites no law in support of its theory of constructive abandonment. The cases cited all contain a specific finding of intentional resignation. No evidence indicating that Gincel intended to relinquish his seniority rights in the position of principal was introduced in this case. Nor did the administrative law judge find such an intent.

The administrative law judge refused to enforce an unstated condition to the seniority regulations explaining that "had it been their intention to except from the applications of these statutes or rules an employee who voluntarily requested or accepted reassignment to a position subordinate to the one previously held, the promulgating body would or should have so stated."

The Board has not demonstrated either in fact or in law that Gincel in any way intended to relinquish his rights in the position of principal when he requested a transfer to a vice-principalship.

Affirmed.

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JOHN GISH,	:	
APPELLANT-CROSS-RESPONDENT,	:	
V.	:	SUPERIOR COURT
THE SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	APPELLATE DIVISION
RESPONDENT-CROSS-RESPONDENT.	:	

Decided by the Commissioner of Education, October 27, 1980

Decided by the State Board of Education, July 1, 1981

Argued November 8, 1982 -- Decided December 16, 1982

Before Judges Ard, King and McElroy.

On appeal from final decision of the State Board of Education.

Emil Oxfeld argued the cause for appellant-cross-respondent (Rothbard, Harris & Oxfeld, attorneys; Mr. Oxfeld, of counsel).

Joseph A. Rizzi argued the cause for respondent-cross-appellant (Winne, Banta & Rizzi, attorneys; Mr. Rizzi, of counsel and Robert M. Jacobs, on the brief).

Jaynee LaVecchia, Deputy Attorney General, argued the cause for the New Jersey State Board of Education (Irwin I. Kimmelman, Attorney General, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Ms. LaVecchia, on the brief).

PER CURIAM

Appellant, a tenured English teacher, appeals the decision of the New Jersey State Board of Education (State Board) which affirmed that portion of the October 27, 1980 decision of the New Jersey State Commissioner of Education (Commissioner) which ordered the dismissal of appellant from his teaching position due to possession of marijuana and LSD.

Originally 18 charges were leveled against appellant, which charges stemmed from appellant's conduct as president of the Gay Activist Alliance of New Jersey and from the aforementioned narcotics law violations lodged against him after the execution of a search warrant at his residence. Appellant argues on appeal that there was insufficient evidence to justify the State Board's finding a narcotics law violation. In addition, he urges the sanction of

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termination of his tenure position to be invalid. The School District of the Borough of Paramus (Board) cross-appeals from the State Board's determination that the charges found on appellant's Gay Activist Alliance activities were invalid as they violated appellant's First Amendment rights.

This appeal is but another step in a tortured history of litigation between the parties. The local Board initially instituted charges against appellant in 1973. A psychiatric evaluation of appellant was ordered pursuant to N.J.S.A. 18A:16-2. Appellant resisted the order and challenged the aforementioned statute's constitutionality. While challenging the psychiatric order, the original charges were dismissed without prejudice. Subsequently the attack on the required examination was lost but not before exhausting all rights of appeal from the State Board to the United States Supreme Court. Gish v. Board of Education of the Borough of Paramus, 1974 S.L.D. 1150, aff'd State Board of Education, 1975 S.L.D. 1085, aff'd 145 N.J. Super. 96 (App. Div. 1977), certif. den. 74 N.J. 251 (1977), cert. den. 434 U.S. 879 (1977).

During the course of the litigation concerning the psychiatric examination, appellant's residence was searched for controlled dangerous substances pursuant to a search warrant. Drugs were found, and the appellant was arrested and subsequently indicted on counts of unlawfully possessing marijuana in an amount over 25 grams contrary to N.J.S.A. 24:21-20a(4) (count 1) and unlawfully possessing LSD contrary to N.J.S.A. 24:21-20a(1) (count 2). Further proceedings were then suspended in order that he receive supervisory treatment pursuant to N.J.S.A. 24:21-27. The court ordered the supervisory treatment for a period of two years under the aegis of the Bergen County Probation Department.

On January 9, 1978, 18 tenure charges were certified by the Board against the appellant Gish. Most of the allegations were based on the Board's concern for Gish's support of gay rights. One charge, however, was unrelated to the gay rights involvement. Charge 13 pertained to his arrest, indictment and placement upon two-year probation with supervisory treatment for illegal possession of marijuana and LSD in violation of N.J.S.A. 24:21-20a(1) and (4).

The hearing was referred to an administrative law judge. Sixteen days of hearings were conducted. The administrative law judge found that charge 13 dealing with appellant's unlawful possession of drugs was true in fact and stated:

> ...I CONCLUDE that respondent was guilty of unbecoming conduct as a teaching staff member in regard to his possession of controlled dangerous substances, which possession resulted in his arrest, arraignment, pretrial intervention and two-year period of probation with supervisory program. [Emphasis original]

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He also found Gish guilty of 13 of the remaining 17 tenure charges concerning insubordination, unfitness and conduct unbecoming a teacher.

The Commissioner adopted the findings of fact and conclusions of law of the administrative law judge and relying on In the Matter of the Tenure Hearing of Jeffrey Wolfe, A-1610-80-T2 (decided October 5, 1981), found:

> ...clear and compelling reasons to hold that respondent's [Gish] total conduct was unbecoming a teaching staff member. The Commissioner is constrained to note that while attention in this matter may focus almost exclusively upon respondent's sexual orientation, he was also arrested, indicted, and voluntarily placed upon probation in a supervisory treatment program for possession of controlled and dangerous substances. Charges of similar nature have in and of themselves been held by the Commissioner to be sufficient grounds for the removal of tenure.

On appeal, the State Board affirmed the determination on charge 13 and further determined that this charge alone was sufficient to warrant the dismissal of Gish from his tenured teaching position. Gish has appealed this portion of the State Board's decision. The State Board reversed the remaining 13 tenure convictions, in effect holding that upon a balancing of Gish's right to speak freely on a controversial issue against the Board's duty to run a thorough and efficient education program, Gish's First Amendment rights would prevail. The Board has filed a cross-appeal from this portion of the State Board's decision.

After a careful and principled consideration of the agency record and findings, we are satisfied these findings could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, and we will not disturb them. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973).

In urging error, the appellant makes two arguments. He contends that the evidence adduced at the hearing cannot support a finding that he was guilty of possession of narcotics and, second, even if the evidence is sufficient, termination of appellant's tenured position was an unwarranted sanction or penalty. In light of these contentions, a brief review of the factual background with respect to the narcotics charge is necessary.

John Gish lived in a house at 32 Bridge Street which he shared with one John Hanna since 1972. The first floor of the house consisted of a living room, bathroom, kitchen and a bedroom which was located directly off the kitchen. This bedroom was occupied by Gish. A second bedroom was used by Hanna and was located upstairs. On April 9, 1975 the Hackensack Police Narcotic Squad executed a search warrant at 32 Bridge Street. When the officers entered the

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house to execute the search warrant, they found four people sitting in the kitchen: Robin McMurray, Charles Kalfas, John Gish and John Hanna. A search of the house revealed a quantity of marijuana and LSD as well as narcotics paraphernalia. In the bedroom used by Gish, the officers searched a dresser and found a 35 millimeter film container with six orange tablets and one green tablet of LSD in the top right-hand drawer. In the top left-hand drawer of the dresser was a plastic bag containing marijuana. A search of the kitchen revealed a bowl containing a strainer having seeds; a green glass jar containing "finely manicured" marijuana; a wooden smoking pipe with marijuana residue; a black and white plastic container containing two orange tablets (LSD), and a brown glass bottle containing a clear liquid, amylnitrate, in the refrigerator. Fine green vegetation (marijuana) was found on the piano. Three smoking pipes containing marijuana residue were found on the hutch in the kitchen. Additional controlled dangerous substances were found in the upstairs bedroom occupied by Hanna.

When the officers decided that all four men would have to go to headquarters, Gish became concerned and asked why McMurray and Kalfas had to come. Three of the officers who conducted the search testified that Gish claimed that everything found on the premises belonged to himself and Hanna; the other two men were visitors and had nothing to do with substances found in the house. After indictment for possession of controlled dangerous substances, Gish was admitted into a pretrial intervention program and eventually was given a conditional discharge.

Gish denied possession of the drugs including those found in the dresser in the room he occupied. He denied the use and possession of any marijuana or LSD. He could not account for the presence of the drugs in his house since he claimed that he did not know they were there and that they were never used in his presence.

In a case of this nature, our appellate role is a limited one. The agency's determination will be reversed only if the appellant can demonstrate that the decision was arbitrary, capricious or unreasonable or that the decision is not supported by the substantial credible evidence in the record as a whole. Henry v. Rahway State Prison, 81 N.J. 571, 579-580 (1980); Campbell v. Department of Civil Service, 39 N.J. 556, 562 (1963).

As we have indicated, we are satisfied the findings could reasonably have been reached on sufficient credible evidence present in this record. Moreover, the administrative law judge found appellant's and Hanna's testimony that only Hanna had control over and use of the dresser in appellant's bedroom to be incredible. Furthermore, the presence of the marijuana smoking devices belied Gish's assertion that he had no knowledge of the drugs being present in the house or in his bedroom. Lastly, Detective Medaska specifically testified that Gish admitted everything in the house belonged to himself and Hanna. In light of these findings, we have no doubt that constructive possession of the controlled dangerous substances was established. The law recognizes that possession may be constructive as well as actual. A person who, with knowledge of its

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character, knowingly has direct physical control over a thing, at a given time, is in actual possession of it. Constructive possession occurs in a situation where the property, not physically on one's person, is so located that he is aware of the presence of the property and is able to exercise intentional control over it. Moreover, the law recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint, that is, if they knowingly share control over the article. See State v. Brown, 80 N.J. 587 (1979); State v. Davis, 68 N.J. 69 (1975); State v. Reyes, 98 N.J. Super. 506 (App. Div. 1968), certif. den. 51 N.J. 582 (1968). Thus, joint possession with Hanna would not exculpate Gish. Based on our review of the record, the proofs were more than sufficient to warrant the finding of possession.

Appellant next argues that tenure termination is too severe a sanction. We again disagree. It is a matter of public knowledge that the problem of illegal drug use pervades our entire school system. School boards, educators and administrative personnel are in a constant unremitting war to stamp out this blight. Our Legislature, through a series of statutes, has made it plain that the public policy in this State is to do everything possible to stamp out the use of illegal drugs in the school system and to inculcate in students the necessity of avoiding any involvement with illegal drugs. N.J.S.A. 18A:4-28.4 through N.J.S.A. 18A:4-28.11 describes a drug education program which the schools are directed to implement. Teachers are trained to teach the drug education program to other secondary school teachers and to develop a curriculum and recommended drug education unit to be incorporated into the ongoing health education curriculum of students in secondary schools (N.J.S.A. 18A:4-28.5). Workshops and training programs are authorized. The sanction invoked in this case must be considered within this context. Gish, a tenured teacher, responsible for the education of students in the public school system, demonstrated an attitude which was contrary to the goals of education. Unquestionably, he lost credibility with his students. We find the reliance of the administrative law judge, the Commissioner and the State Board on our unreported decision in In the Matter of the Tenure Hearing of Jeffrey Wolfe, supra, well founded.

In Wolfe, supra, the teacher was arrested and charged with growing marijuana on his premises and with possession of more than 25 grams of marijuana. He was charged by the local school board with engaging in conduct unbecoming a teacher, which charges were certified and forwarded to the Commissioner and formed the basis of tenure proceedings. Like appellant in the present case, Wolfe was conditionally discharged as a first offender under N.J.S.A. 24:21-27. The tenure proceedings took place after Wolfe successfully obtained an order of expungement of the records of his arrest and the disposition of the narcotics charges. The hearing on the tenure charges resulted in a finding that the charges were true and a recommendation that Wolfe be dismissed, a recommendation which the Commissioner and the State Board affirmed. On appeal to the Appellate Division, Wolfe claimed, among other things, that the Commis-

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sioner mistakenly exercised his discretion when he dismissed Wolfe from his tenured position. Wolfe argued that there was no proof that his possession of marijuana related to his teaching or had any impact upon the performance of his teaching duties, his relationship with students or fellow professionals. We disagreed noting the strong legislative policy prohibiting drugs in public schools and noting as well that a teacher's unfitness for a position in a school system is not based exclusively upon classroom proficiency, but is based upon a broad range of factors. We refuse to rule that the sanction imposed by the State Board was a mistaken exercise of discretion.

Appellant attempts to distinguish Wolfe on the ground that the charges in Wolfe "involve the cultivation, growth and possession of narcotics [which is] an entirely different matter" from the situation in his case. He is mistaken. The crucial factor in Wolfe was not the cultivation or distribution of marijuana but rather conduct which evinced an attitude which undermined the goals of the school system. Like Wolfe, appellant's transgression involves a very serious matter of public importance, namely, illegal narcotics activity. It is clear that the State Board not only has a valid interest, but also a mandate to insure that its teachers are fit to espouse the public policy and carry out the functions required by the Legislature with respect to education concerning narcotics use and abuse. We therefore affirm the State Board's determination that appellant's dismissal was warranted solely on the basis of the narcotics charges which were, as already indicated, supported by substantial credible evidence in the record.

In light of our determination affirming the action of the State Board, we need not consider the Board's cross-appeal from that part of the decision of the State Board which held that appellant's dismissal could not be justified on the ground that his public advocation of a gay life-style constituted unbecoming conduct. The State Board ruled that to do so would violate appellant's First Amendment rights.

It has long been held that our courts will not reach and determine a constitutional issue unless it is absolutely imperative to the disposition of the litigation. Donadio v. Cunningham, 58 N.J. 309, 325-326 (1971); Ahto v. Weaver, 39 N.J. 418, 428 (1963). In light of our determination that appellant's involvement with illegal narcotics is sufficient in and of itself to justify appellant's dismissal from his tenured teaching position, we need go no further. An appellant court need not decide a case on every ground urged by a litigant; "resolution of controversies on constitutional grounds is to be avoided where possible." Schaad v. Ocean Grove Camp Meeting Association, 72 N.J. 237, 250-251 (1977), overruled on other grounds sub nom State v. Celmer, 80 N.J. 405, 418 (1979), cert. den. 444 U.S. 951 (1979). In the instant case, the judgment can be sustained on non-constitutional grounds, and consequently, we need not and will not evaluate it in terms of any constitutional issue raised below.

Affirmed.

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ANDREW HORUN,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, March 23, 1981

Decided by the State Board of Education, June 3, 1981

For the Petitioner-Respondent, Klausner & Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Buttermore, Mullen, Jeremiah & Phillips (William S. Jeremiah, Esq., of Counsel)

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

February 3, 1982

Pending N.J. Superior Court

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JOSEPHINE KLINE,

PLAINTIFF-APPELLANT,

V.

BOARD OF EDUCATION OF VOORHEES TOWNSHIP,

DEFENDANT-RESPONDENT.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education, May 1, 1981

Decided by the State Board of Education, September 3, 1981

Argued October 13, 1982 - Decided October 27, 1982

Before Judges Botter and Polow.

On appeal from the final decision of the State Board of Education.

Ezra B. Rosenberg argued the cause for appellant (Katzenbach, Gildea & Rudner, attorneys; Arnold M. Mellk of counsel and on the brief).

Robert F. Blomquist argued the cause for respondent (Davis & Reberkenny, attorneys; Mr. Blomquist on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the Statement).

PER CURIAM

Petitioner, a school nurse, received compensation in an amount less than the minimum applicable salary schedule for five years prior to filing her petition in December 1977. The sole issue on appeal is whether her claim for back pay for the period prior to institution of this petition is barred by laches as determined by the State Board of Education. Since the determination from which this appeal is taken and subsequent to filing of briefs on appeal, the Supreme Court has ruled that a demand for unclaimed teachers' veteran's benefits may be barred by laches and thus may not be recoverable retrospectively. Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982). Here, petitioner claims she had previously been placed on the wrong level of the salary scale. There is no basis for distinguishing these facts from those in Lavin. Hence, we cannot conclude that application of laches in this case was unreasonable.

Affirmed.

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RICHARD KLINGER,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, January 8, 1981

For the Petitioner-Appellee, Morgan & Falvo (Joseph F. Defino, Esq., of Counsel)

For the Respondent-Appellant, Golden, Shore, Zahn & Richmond (Philip H. Shore, Esq., of Counsel)

For the Amicus Curiae, David W. Carroll, Attorney for the New Jersey School Boards Association (William G. Wallen, on the brief)

This is another case which pits tenure and seniority rights against the authority of a board of education to abolish full-time positions and create part-time ones in their stead. We believe that the Commissioner erred here in not upholding the Board's authority to make such changes in its professional staff when it deemed them advisable in the best interests of the school system.

The Petitioner was a tenured physical education teacher who held one of the two full-time physical education positions in the Cranbury District; the incumbent of the other was non-tenured. Because of declining enrollment and budgetary problems, the school principal recommended that the Board reduce its physical education staff to seven-tenths of one full-time position for the 1979-80 school year. The Board subsequently decided to approximate more closely the 1978-79 program by employing two physical education teachers, but both on a seven-tenths time basis. The reduction from full-time to part-time was necessitated primarily by a decline of enrollment in the past 10 years from 414 to 239.

The Administrative Law Judge and the Commissioner both held that where the Board chose to continue to provide for more than the equivalent of one full-time instructional position in physical education, and where one of the incumbents had tenure, it was obligated to continue to employ and compensate the incumbent (Petitioner) on a full-time basis.

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The law is well established that unless the local board's action to reduce full-time positions to part-time was taken in bad faith or constituted an abuse of discretion, its determination to abolish or change positions may not be disturbed by the Commissioner or the Courts. Boult and Harris v. Board of Education of Passaic, 1939 S.L.D. 7, 13, affirmed State Board of Education 15, affirmed 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E. & A. 1948); Bierman v. Board of Education of the Borough of Glen Rock, decided by Commissioner July 17, 1980. We do not find it arbitrary for a local board to decide, when having to reduce its physical education program, to have two part-time teachers rather than one full-time. The tenure and seniority rights of an incumbent cannot prevail against the authority of the board when exercised in good faith and with some rational basis. The mere fact that Petitioner was qualified to handle the entire physical education program on his own is not material; nor is the fact that the Board might have organized its physical education program differently.

The foregoing decision accords with other precedents set by the Commissioner and State Board of Education in disallowing tenure claims to an abolished full-time position when its functions were continued with an equivalent amount of money and work but with a different staff organization. See for example Bick v. Board of Education of Montclair, decided by Commissioner February 20, 1980, affirmed by State Board of Education September 3, 1980; Belvidere Education Association v. Board of Education of Belvidere, decided by Commissioner December 1, 1980.

We also deem it appropriate to repeat here the oft-quoted principle that "The public schools were not created, nor are they supported, for the benefit of the teachers therein *** but for the benefit of the pupils and the resulting benefit to their parents and the Community at large." Smith v. Board of Education of Paramus, 1968 S.L.D. 62, 67

For the foregoing reasons the State Board reverses the Commissioner's decision and dismisses the petition.

Attorney Exceptions are noted
January 6, 1982

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RICHARD KLINGER,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANBURY, MIDDLESEX COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 8, 1981

Decided by the State Board of Education, January 6, 1982

Argued October 25, 1982 - Decided November 10, 1982

Before Judges Bischoff, J.H. Coleman and Gaulkin.

On appeal from a judgment of the New Jersey State Board of Education.

Cassel R. Ruhlman, Jr. argued the cause for appellant (Ruhlman, Butrym and Friedman, P.A., attorneys; Joseph F. Defino on the brief).

Philip H. Shore argued the cause for respondent (Golden, Shore, Zahn and Richmond, attorneys; John B. Wolf and Mr. Shore on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education filed a Statement in Lieu of Brief (Jaynee LaVecchia, Deputy Attorney General, of counsel on the Statement).

David W. Carroll filed an amicus brief for the New Jersey School Board Association (Susan Galante on the brief).

The opinion of the court was delivered by

BISCHOFF, P.J.A.D.

The issue in this appeal is whether the reduction in petitioner's duties as a teacher from full-time to 7/10-time with a corresponding reduction in salary violated his tenure and seniority rights.

In the 1978-79 school year respondent Board of Education of the Township of Cranbury (board) employed two full-time physical education teachers. Petitioner had been employed full time in that capacity with the board for 21 years and Dora Bennett, a nontenured

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teacher employed in the same capacity, was in her third year of employment. Both teachers taught the same classes at the same time.

In April 1979 the board notified petitioner that as a result of a continued decline in enrollment, the resulting need for program reorganization and budget CAP constraints, his position for the 1979-80 school year would be reduced to 3 1/2 days a week and he would be paid seven-tenths of his full-time salary. The bona fides of the asserted reasons for the reduction in classes is not challenged.

Despite the recommendation of the principal to the contrary, the board determined to hire a second part-time teacher with the same reduced teaching load. Dora Bennett, the nontenured teacher, was hired for this part-time position. As in prior years, both teachers taught the same classes at the same time. The classes varied in size from a minimum of 15 to a maximum of 34 and it is undisputed that the same 3 1/2-day program could have been managed by a single teacher.

In August 1979 petitioner challenged the board's decision by filing a petition of appeal to the Commissioner of Education alleging that by reason of his tenure and seniority the board was required to retain him in a full-time position rather than employing both him and Dora Bennett as part-time teachers. The appeal was referred to an administrative law judge who held, after a hearing, that since the board had chosen to employ two 7/10-time teachers, it was obligated to retain petitioner as a full-time teacher. The administrative law judge recommended petitioner be reinstated to his full-time position and paid for his loss of salary (subject to mitigation for earnings received from alternative employment). The Commissioner adopted the recommendations of the administrative law judge. On appeal to it, the State Board of Education reversed, stating:

> The law is well established that unless the local board's action to reduce full-time positions to part-time was taken in bad faith or constituted an abuse of discretion, its determination to abolish or change positions may not be disturbed by the Commissioner of [sic] the Courts. [Citations omitted.] We do not find it arbitrary for a local board to decide when having to reduce its physical education program to have two part-time teachers rather than one full-time. Th [sic] tenure and seniority rights of an incumbent cannot prevail againt [sic] the authority of the board when exercised in good faith and with some rational basis. The mere fact that Petitioner was qualified to handle the entire physical education program on his own is not material; nor is the fact that the Board might have organized its physical education differently.

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This appeal followed.

We were advised at oral argument that commencing with the school year 1980-81 the board reduced the number of physical education teachers to one, and petitioner was now teaching physical education classes 3 1/2 days a week alone.

On this appeal petitioner does not contest the board's right to reduce his position from full-time to part-time for reasons of economy, nor does he question the bona fides of the reason given for the reduction, that is, declining enrollment and budget constraints. Rather, petitioner concedes the budget concerns of the board are legitimate and contends it was arbitrary for the board to keep two part-time physical education teachers when the evidence is undisputed that one teacher could handle all the classes. He argues that since he had tenure and greater seniority he should have been retained as a full-time teacher and placed in charge of the entire program. We disagree.

The board in April and May 1979 terminated its full-time physical education program and replaced it with a 3 1/2-day program taught by two 7/10-time teachers. Whether of tenured or nontenured teachers, reduction in force is entirely within the authority of the board if done for reasons of economy. N.J.S.A. 18A:28-9 and N.J.S.A. 18A:28-10. In re Maywood Board of Education, 168 N.J. Super. 45, 55 (App. Div. 1979), certif. den. 81 N.J. 292 (1979). Reduction in hours of employment is considered a reduction in force. Popovich v. Bd. of Ed., 1975 S.L.D. 737, 745.

When the board abolished all full-time physical education teaching positions, there were no positions to which petitioner had a superior right by reason of seniority. N.J.S.A. 18A:28-10; cf. Seidel v. Ventnor City Bd. of Ed., 110 N.J.L. 31 (Sup. Ct. 1933), aff'd o.b. 111 N.J.L. 240 (E.&A. 1933); Kearny Bd. of Ed. v. Horan, 11 N.J. Misc. 751 (Sup. Ct. 1933). Since Bennett received no better treatment than petitioner, his seniority rights were not violated.

The board had chosen dual instruction in its physical education program for years. The fact that it preferred two teachers instead of one is no concern of the courts and so long as petitioner was not treated inferiorly upon reduction in force, he has no legitimate complaint.

Had the board elected to use one instead of two physical education teachers, it is not at all clear that the schedule would have provided full-time as opposed to part-time employment for petitioner. In fact, later experience demonstrated it would not.

We find petitioner's challenges to alleged procedural deficiencies to be without merit.

The judgment of the State Board of Education is affirmed.

[190 N.J. Super. 354]

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WESLEY A. KOCH ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOLS, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, April 14, 1980 and October 19, 1981

Decided by the State Board of Education, March 4, 1981

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

For the Respondent-Respondent, Greenberg & Covitz
(Morton R. Covitz, Esq., of Counsel)

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

March 24, 1982
Pending N.J. Superior Court

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THOMAS KUC,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 29, 1980

Decided by the State Board of Education, March 4, 1981

Argued March 8, 1982 -- Decided March 22, 1982

Before Judges Bischoff, King and Polow.

On appeal from the State Board of Education.

Thomas W. Cavanagh, Jr., argued the cause for petitioner, (Chamlin, Schottland, Rosen & Cavanagh, attorneys).

Robert H. Otten argued the cause for respondent, (Crowell & Otten, attorneys).

No one appeared on behalf of the State Board of Education. Irwin I. Kimmelman, Attorney General of New Jersey, filed a statement on behalf of the State Board of Education (James R. Zazzali, former Attorney General of New Jersey, and Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the statement).

PER CURIAM

Petitioner, Thomas Kuc, appeals from the decision of the State Board of Education dismissing his claim of sex discrimination in the selection by respondent Board of Education of a female assistant girls' track coach for the 1979 spring season.

Petitioner, a tenured teacher, had been employed by respondent for 16 years and was a teacher at Raritan High School at the time of the hearing. He had been assistant girls' track coach during the 1978 season and he held the same position during the 1980 season. It is his non-appointment for the 1979 season which is in issue.

Petitioner applied for the position in January of 1979 and since he held the position in 1978, assumed he would receive the appointment. There were five applicants for the position, two of

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whom were females. The position was given to a female with no prior coaching experience.

The petitioner contends that the appointment of a female instead of him constituted illegal sex discrimination under N.J.S.A. 18A:6-6. He argues respondent's preference for a less qualified female because of prior underrepresentation of female coaches constitutes reverse discrimination which is prohibited by law. In response, the Board argues that it selected a female for valid educational reasons citing total supervision including locker-room supervision and the need for a female role model that the female students could emulate and to whom they could come to for counsel and guidance. Respondent also points out that the only qualification for a coach is certification as a teacher, N.J.A.C. 6:29-6.3, and the woman chosen was as qualified as petitioner.

Upon appeal to the Commissioner of Education a hearing was held by an administrative law judge who found:

(1) Petitioner and the female appointed were equally qualified, petitioner's experience being irrelevant.

(2) Petitioner had no expectancy to reappointment for the 1979 season.

(3) Respondent's desire to have a female coach was within its discretion and consistent with its affirmative action policy.

(4) There was no illegal discrimination.

The decision of the administrative law judge was adopted by the Commissioner. Petitioner appealed to the State Board, and while that appeal was pending he sought a remand to the administrative law judge for the purpose of presenting the testimony of Frank Farrell, the athletic director who recommended coaching candidates. The State Board denied the motion and affirmed the Commissioner.

On this appeal petitioner concedes that on the record presented the determination of the administrative law judge is unassailable. He argues however that it was error to deny his motion for a remand since the testimony of Farrell would disclose illegal discrimination.

We affirm. No valid reason appears why Farrell was not called at the hearing. In fact Farrell was present as part of one of the hearings and left before he was called by petitioner. He was not subpoenaed and was therefore free to leave. No formal request for a continuance of the hearing was made, and furthermore the absence of Farrell was ascertained during the April 8th hearing and no attempt was made to produce him at the adjourned hearing of May 29th. No exceptions were filed to the decision of the administrative law judge and it was not until two months after the Commissioner's decision that petitioner sought a remand.

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While the State Board has the undoubted power to reopen and remand, N.J.A.C. 1:1-16.5(c), it would subvert the orderly adjudicatory process to do so here. Counsel acquiesced in the situation at the hearing by resting without seeking a continuance; indeed, his quandary was largely of his own making in failing to contact Farrell directly or to timely seek and serve a subpoena. Having remained silent despite various opportunities to rectify his oversight before the Commissioner ruled, petitioner should not now be heard to assert that circumstance as error. See State v. Pontery, 19 N.J. 457, 471 (1955); State v. McNeil, 164 N.J. Super. 27, 33 (App. Div. 1978), certif. den. 79 N.J. 497 (1979).

Furthermore, we have examined the affidavits in which the proposed testimony of Farrell is set forth and we are convinced that even if his testimony were added to the record, it would not change the result.

Affirmed.

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CHARLES H. LANZA,	:	
PETITIONER-CROSS-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT,	:	

Decided by the Commissioner of Education, October 23, 1981

For the Petitioner-Cross-Appellant, Newman, Herman, Saltman, Levitt & Feinson (Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Appellant, Gagliano, Tucci & Kennedy (Eugene A. Iadanza, Esq., of Counsel)

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

June 2, 1982

Pending N.J. Superior Court

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

MARJORIE A. LAVIN, :

Appellant, :

V. : SUPREME COURT

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, :

Respondent. :

:

Decided by the Commissioner of Education, June 6, 1979

Decided by the State Board of Education, March 5, 1980

Argued February 8, 1982 -- Decided June 24, 1982

On certification to the Superior Court, Appellate Division, whose opinion is reported at 178 N.J. Super. 221 (1981).

Louis P. Bucceri argued the cause for appellant (Bucceri & Pincus, attorneys; Louis P. Bucceri and Gerald M. Goldberg, of counsel; Louis P. Bucceri and Gregory T. Syrek, on the briefs).

E. Gerard McGovern argued the cause for respondent.

Jaynee LaVecchia, Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Erminie L. Conley, former Assistant Attorney General; of counsel).

Paula A. Mullaly, Associate Counsel, submitted a brief on behalf of amicus curiae New Jersy School Boards Association (Christine D. Weger, General Counsel, attorney).

The opinion of the Court was delivered by SCHREIBER, J.

This case involves the retroactivity of a school teacher's claim for employment credit for military service rendered long before the teacher's employment began.

Petitioner, Marjorie A. Lavin, served in the Armed Forces between January 2, 1943 and October 20, 1945. Twenty-three years later she was hired as a teacher by the Hackensack Board of Education. Because of her military service, she was at that time entitled to employment credit pursuant to N.J.S.A. 18A:29-11, which reads in pertinent part:

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> Every [teacher] who after July 1, 1940, has served ... in the active military or naval service of the United States ... in time of war ... shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated ... school or institution of learning ... except that the period of such service shall not be credited toward more than four employment or adjustment increments.

When translated into wage increments, these service credits would affect a teacher's salary. See N.J.S.A. 18A:29-8. A teacher is entitled annually to an employment increment until the maximum salary is reached. For example, a teacher with one year's military service would be treated as if he or she had completed one year of teaching.

Petitioner did not claim credit for the military service when her employment began. It was not until October 14, 1977, nine years later, that she wrote to the Superintendent of Schools of the Hackensack Board of Education. Receiving no relief, she filed a petition with the Commissioner of Education. The Commissioner found in her favor and awarded her $20,575 based on three years' military credit for salary claims retroactive to her initial employment in 1968.

Upon appeal, the State Board of Education held that the retroactive claim was limited by the six year statute of limitations and was barred in its entirety for the period of time prior to September 1978 on the basis of laches and estoppel. However, the State Board awarded petitioner two years' military service credit to be applied beginning with the 1978-79 school year. The Appellate Division affirmed, except that it held that petitioner was entitled to three years' credit, 178 N.J. Super. 221 (1981). We granted Lavin's petition for certification, 87 N.J. 402 (1981), in which she sought review of the applicability of the doctrine of laches and the statute of limitations. We granted the New Jersey School Boards Association leave to file a brief as amicus curiae. The Board of Education did not seek review of the Appellate Division's determination of the number of years of service credit to which she is entitled and that issue is not before us.

The statute of limitations applicable to a "recovery upon a contractual claim or liability" is six years. N.J.S.A. 2A:14-1 (emphasis added). The core of the issue is whether the credit for military service, N.J.S.A. 18A:29-11, is an essential term of the petitioner's employment contract or whether it represents a statutory entitlement granted by the State in return for military service in time of war.

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The legal relationship between petitioner and the Board of Education was that of employer and employee and the terms of her employment were embodied in her contract of employment. Miller v. Board of Chosen Freeholders, Hudson County, 10 N.J. 398 (1952). Petitioner claims that the statute awarding her service credit for time spent in the military was incorporated as a matter of law as a provision in the employment agreement. This would undoubtedly be so if the additional compensation for military service was for work rendered or to be rendered in her position as a teacher.

An example illustrative of that situation may be found in Miller v. Board of Chosen Freeholders, Hudson County, supra. A statute enacted in 1938 provided that the minimum salary for prison guards was $2,000 per annum. Miller, who had been a guard since 1931, was being paid a salary of $1,750 per annum at the time the new law became effective. The County continued to pay him at that rate until his death in May 1939. The administratrix of his estate sued in 1949 to recover the shortfall. The Court held that the six-year statute of limitations applied because of the contractual nature of the claim. The statutory provision, requiring that guards were to receive $2,000 minimum annual salary for their work, was deemed to be incorporated in the employment contract and the Court observed that the claim was one for the reasonable value of the services rendered as a guard. Justice Brennan, joined by Justice Heher, dissented. He contended that the salary increase did not result from an agreement between the parties, but was mandatorily established by the Legislature. Thus the statutory entitlement was something apart from the employment agreement.

Whether the benefit flowing from a statute is to be considered a statutory entitlement or a term of the public employee's contract of employment depends upon the nature of the benefit and its relationship to the employment. Stating the problem in terms of incorporation in the employment contract or as a statutory benefit begs the question. Rather, attention should be directed to the purpose of the statute and its relevance and materiality to the employment.

When tested by this approach the Miller result is sound. There the dollars fixed in the statute were directly related to the services to be rendered. The implicit incorporation of such a provision in the employment contract was appropriate, since it went to the essence of the contract, namely, rate of pay for services to be performed. The only purpose of the statute was to fix the pay for prison guards.

This situation is to be differentiated from those in which there is no such nexus. Where benefit is not directly related to the employment service, but is being awarded for a totally unrelated reason, the recipient is truly the beneficiary of a statutory entitlement quite apart from the employment as such. One could articulate the legal theory that every statutory provision having

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some effect on the employee has been impliedly incorporated into the contract, so that failure to comply with that provision constitutes a breach of the employment agreement. Yet, when viewed realistically the emolument bears no relationship to the services to be rendered as an employee. That is particularly true in this case.

Certainly the value of petitioner's services as a school teacher are not greater than that of the services of a colleague who had the same training and was teaching the same educational course over the same period of time. There would be no basis from a teaching standpoint for paying a lower salary to the petitioner's twin, who did not have the same military service. The legislative purpose of N.J.S.A. 18A:29-11 is to reward veterans for service to their country in time of war. The reward takes the form of crediting the military service as teaching experience even though there is no functional relationship between the two. The credit has the effect of increasing the number of dollars to which the teacher who is a veteran is entitled. The emolument is not for services rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher. Accordingly, the payment should be considered as a statutory entitlement, rather than as an element of the employment contract. That being so, the statute of limitations is inapplicable.

We turn next to the doctrine of laches, an equitable defense that may be interposed in the absence of the statute of limitations. The time constraints of laches, unlike the periods prescribed by the statute of limitations, are not fixed but are characteristically flexible. Pomeroy defines laches as "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." 2 Equity Jurisprudence Sec. 419 at 171-172 (5th ed. 1941). This expansive notion of laches has been articulated in some of our case law.

In Atlantic City v. Civil Service Commission, 3 N.J. Super. 57, 60 (App. Div. 1949), the court in describing laches quoted the following language approvingly:

> "Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right ***." 30 C.J.S., Sec. 112, pp. 520, 521.
>
> "Long lapse of time, if unexplained, may create or justify a presumption against the existence or validity of plaintiff's right and in favor of the adverse right of defendant; or a

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> presumption that if, plaintiff was ever possessed of a right, it has been abandoned or waived, or has been in some manner satisfied; or that plaintiff has assented to, or acquiesced in, the adverse right of defendant; or a presumption that the evidence of the transaction in issue has been lost or become obscured, or that conditions have changed since the right accrued; or a presumption that the adverse party would be prejudiced by the enforcement of plaintiff's claim." 30 C.J.S. Sec. 166 b, p. 538.

Hall v. Otterson, 52 N.J. Eq., 522, 535 (Ch. 1894), adopted the language of a leading English opinion, Lindsay Petroleum Co. v. Hurd, L.R. 5 P.C. 221, 239-40 (1874):

> ... the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defense must be tried upon principles substantially equitable. Two circumstances always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

The length of delay, reasons for delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs. Pavlicka v. Pavlicka, 84 N.J. Super. 357, 368-69 (App. Div. 1964). The length

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of the delay alone or in conjunction with the other elements may result in laches. Obert v. Obert, 12 N.J. Eq. 423, 428-30 (E. & A. 1858).[1] It is because the central issue is whether it is inequitable to permit the claim to be enforced, that generally the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant. That is why some courts have stated that the mere lapse of time is insufficient, though, as indicated above, that is an overstatement of the principle. Inequity, more often than not, will turn on whether a party has been misled to his harm by the delay. Norfolk and New Brunswick Hosiery Co. v. Arnold, 49 N.J. Eq. 390, 397 (Ch. 1892); West Jersey Title and Guaranty Co. v. Industrial Trust Co., 27 N.J. 144, 153 (1958); Hinners v. Banville, 114 N.J. Eq. 348, 357 (E. & A. 1933). It is with these principles in mind that we turn to the facts of this case.

We agree with the Appellate Division that the doctrine of laches should be applied under the circumstances present here. A claim for petitioner's military service was not made until more than nine years after her employment commenced. Both she and the Board of Education were apparently unaware of the statute.[2] Her military service, which occurred approximately 23 years before she was engaged as a teacher, might well have escaped the attention of the Board. If the parties' ignorance of the statute were the only circumstance, we would probably not invoke the doctrine. However there are additional important elements.

---

[1]Where a legal and an equitable remedy exist for the same cause of action, equity will generally follow the limitations statute. See Cole v. Brandle, 127 N.J. Eq. 31, 38 (E. & A. 1940). Where the equitable cause of action is analogous to the one at law, laches may depend solely on the comparable statute of limitations. See discussion in Story, 1 Equity Jurisprudence 61-62 (13th ed. 1886).

Because laches is an equitable principle aimed to promote justice, conditions or circumstances may make it inequitable to prosecute a claim after a period shorter than that fixed by the statute of limitations. Thus where there has been an unreasonable delay, laches has been applied to defeat a claim despite the fact that the time fixed by the analogous statute of limitations has not passed. Patterson v. Hewitt, 195 U.S. 309, 319, 25 S. Ct. 35, 37, 49 L.Ed. 214, 218 (1904). Even if the cause of action in this case were deemed to be similar to a claim for breach of contract, it would be appropriate to consider the applicability of laches.

[2]The record in the companion case, Union Township Teachers' Association v. Board of Education of Township of Union, 90 N.J. 161 (1982), discloses that the New Jersey Education Association, an organization representing public school teachers throughout the State, and the Boards of Education believed that the statute did not require that the military service credit be applied when the school district had established a salary schedule which exceeded the minimum.

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The Board of Education did not budget for the additional expense, relying as it did on its mistaken belief that petitioner's salary had been correctly computed. This, of course, implicates the Board's financial requirements and may have serious tax consequences. The situation is compounded when such budgeting occurred over a nine-year period.

Municipal financing is predicated on a pay-as-you-go principle. See Passaic v. Local Finance Board of the Department of Community Affairs, 88 N.J. 293, 301 (1982); Giorno v. Township of South Brunswick, 170 N.J. Super. 162, 166 (App. Div. 1979). The governing body must prepare a budget "on a cash basis." N.J.S.A. 40A:4-3. This entails a listing of proposed expenditures. By understanding its expenses, the Board of Education was innocently reducing the amount of funds to be raised by taxation. This situation was aggravated because the underestimating occurred for ten years. To rectify the error would necessitate including in the current budget the full aggregate amount claimed. This could have the dual effect of causing some other service to be diminished because of the limitations imposed by the Cap law, N.J.S.A. 18A:7A-25, and of imposing the complete tax burden on the existing taxpayer for costs that should have been distributed over a ten-year period.

Moreover, this problem should not be viewed exclusively in the context of petitioner's claim. Though in petitioner's case only $20,575 would be due, when other teachers similarly situated are considered, the total cost could be substantial. There are a large number of claims of this nature throughout the State and it is estimated that over $4,500,000 is involved. See Union Township Teachers' Association v. Board of Education of Township of Union, supra. This estimate does not include claims of retired teachers on pension and of those who have otherwise left the teaching profession. We believe that it is fair and equitable to treat all claims of this nature in like manner. This bright line treatment has the additional advantage of administrative ease. Under these peculiar circumstances, wherein public entities are involved, petitioner and others situated like her should not be granted retroactive monetary relief. However, they should be granted credit for qualified military service in computing their salaries subsequent to making their claims.

A somewhat comparable situation arose in Giorno v. Township of South Brunswick, supra. There a police officer, who had been employed by the Township of South Brunswick in 1967, sought prior service credit in 1977 for employment as a Middlesex County Park police officer pursuant to N.J.S.A. 40A:9-5. The Appellate Division, after observing that municipal governments operated on a cash basis and that it was desirable to have the issue of transferred service credits resolved before employment commences, concluded that it was equitable to allow the claim only from the date of the filing of the complaint. Cf. Kloss v. Township of Parsippany-Troy Hills, 170 N.J. Super. 153 (App. Div. 1979).

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We agree with the Appellate Division that laches should bar plaintiff's retroactive recovery of past due sums. We agree with the Appellate Division that it is appropriate to allow prospective application of the petitioner's military credit as of September 1978.

The judgment is affirmed and the matter remanded to the Commissioner of Education for disposition in conformity with this opinion.

PASHMAN, J., dissenting.

N.J.S.A. 18A:29-11 provides that any teacher who has served in the military "shall be entitled to receive equivalent years of employment credit for such service." Petitioner Marjorie Lavin was not awarded such credit from the time she was hired in 1968 until 1978 when respondent awarded her the appropriate credit by order of the State Board. Respondent does not dispute that Lavin was improperly denied military credit to which she was entitled. As a result of this denial, she was paid $20,575 less than she should have received.

Lavin filed a petition with the Commissioner of Education seeking payment of the money due her. The only defenses raised were statute of limitations and laches. These are the two issues raised on this appeal. The majority concludes that the six-year contract statute of limitations, N.J.S.A. 2A:14-1, does not apply but that petitioner is barred by laches from receiving any of the money improperly denied to her by respondent. I differ with the majority's resolution of both issues.

STATUTE OF LIMITATIONS

N.J.S.A. 2A:14-1 provides a six-year limitation period for "recovery upon a contractual claim or liability, express or implied." If petitioner's claim is contractual, it is subject to the statute; if the claim is statutory, there is no applicable statute of limitations. Conceptually, the legal claim can be placed in either category: without either the contract or the statute, there would be no liability. However, this question has been definitively resolved by prior cases.

In Miller v. Board of Chosen Freeholders of Hudson Cty., 10 N.J. 398 (1952), the Court addressed a suit by a prison guard who alleged that he had been paid less than the statutory minimum wage. Construing the predecessor to the current limitations statute, the Court concluded that the suit was covered by the statute. The Miller Court explained:

> [T]he present case is clearly within the rule of Ross v. Bd. of Chosen Freeholders of the County of Hudson, [90 N.J.L. 522 (E. & A. 1917)], under which doctrine the jail guards whose salaries are the basis of this action stand in a contractual

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> relationship to the county; and the provisions of the statute constitute provisions of the contract of employment. [Id. at 410]

The majority seeks to distinguish Miller by arguing that only where the statutory benefits are "directly related to the employment service," ante at 150, is the claim contractual. That distinction, however, finds no support in either the Miller decision or subsequent cases construing Miller. Rather, we held in State v. Atlantic City Electric Co., 23 N.J. 259 (1957), that the contract statute of limitations applies unless "the liability is dependent solely upon statutory provisions." Id. at 270 (emphasis added). Further, three Appellate Division panels have held that the contract statute of limitations, as construed by Miller, applies to claims such as Lavin's. Greenwald v. Bd. of Ed., City of Camden, A-1051-77 (App. Div. 1978) (unpublished); Vitiello v. Bd. of Ed., City of Newark, A-4822-79 (App. Div. 1981) (unpublished); Lavin v. Hackensack Bd. of Ed., 178 N.J. Super. 221 (App. Div. 1981).

Nor do I understand the reasons underlying the majority's imaginative interpretation of N.J.S.A. 2A:14-1 and Miller. The majority opinion does not explain why the relation between the statutorily imposed terms of Lavin's contract and the services she performs bears any relevance to the desirability of applying the statute of limitations to her claim. Statutes of limitation "are based on the goals of achieving security and stability in human affairs and ensuring that cases are not tried on the basis of stale evidence." Zaccardi v. Becker, 88 N.J. 245, 256 (1982); Galligan v. Westfield Centre Service, Inc., 82 N.J. 188, 191-92 (1980). It is not clear why these goals are any less important when the statutory benefits are not "directly related to the employment service." Any claim by the majority that its resolution is based on strict construction of statutes of limitation would be wholly disingenuous in light of its aggressive use of the laches doctrine to deny petitioner's claim in its entirety.

LACHES

I disagree with the majority's application of the equitable doctrine of laches to the facts of this case. Perhaps more importantly, I am concerned about the wide and unprecedented scope the majority position gives to the laches doctrine. Laches has long been applied in an individualized manner in particular cases. Its availability has depended on weighing the peculiar facts of the case. The majority has transformed laches into an absolute defense against monetary damages for municipalities that disregard their statutory obligations to their employees. The majority pays mere lip service to the long established rule that laches requires a balancing of the equities on both sides, see ante at 152, citing Lindsay Petroleum Co. v. Hurd, L.R. 5 P.C. 221, 239-40 (1874). Its wholesale approach to laches precludes such balancing.

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The ultimate question is whether it is just to allow plaintiff to vindicate this particular legal claim. As in all equitable matters, that determination requires an examination of the conduct of both parties. Auciello v. Stauffer, 58 N.J. Super. 522 (App. Div. 1959); Pierce v. International Telephone & Telegraph Corp., 147 F. Supp. 934 (D.N.J. 1957). "[T]he Court must consider the rights of each [party] -- of plaintiff to obtain a remedy for an alleged wrong, of defendant not to be sued now, by one whose previous action, or inaction, has misled it. In other words, the court of equity must, as usual, balance ... the equities." Pierce v. ITT, 147 F. Supp. at 937. The laches defense "depends upon the facts of the individual case." Donnelly v. Ritzendollar, 14 N.J. 96, 107 (1953). It is a "question of fact to be determined from all the evidence and circumstances adduced at trial." Dobbs, Remedies, Sec. 2.3 at 43-44 n.19 (1973), quoting Lake Development Enterprises, Inc. v. Kojetinsky, 410 S.W.2d 361 (Mo. App. 1966).

The wholesale application of laches to all claims for retroactive military service credit payments in the summary manner sanctioned by the majority here totally belies these basic and longstanding premises. The Court took no evidence to determine why respondent failed to give petitioner the service credit to which she was entitled. Nor did the Court consider whether that failure was knowing and calculated. The Court did not consider how extensively respondent will be prejudiced by the necessity of paying Lavin's statutory entitlement retroactively. How does the amount owed compare to respondent's annual budget? Will taxes have to be raised? We do not know. Finally, the Court gave no thought to whether respondent's particular duty as a municipality to obey and enforce New Jersey statutes should affect the balance of equities. The only factor considered by the majority is that respondent is a municipality subject to the "cap" laws. This is not equity as I know it.

The majority's rule allows municipalities to escape their statutory obligations simply by ignoring them. If they are caught, they are required to comply with their duties, but retroactive payment of the amounts withheld will never be required because of the hardship of the "cap" laws. By contrast, I believe that municipalities are subject to a greater duty, not a lesser duty, to apply New Jersey law.

Looking at the facts of this case, it appears that both parties were simply unaware of the military credit statute. Petitioner clearly did not knowingly delay her claim in order to injure respondent. Her error was innocent. I assume similarly that respondent did not knowingly deny petitioner her statutory entitlement. However, respondent is charged with knowledge of statutes it is legally obligated to apply. In equity especially, a government entity should not be allowed to hide behind its ignorance of New Jersey statutes binding upon it. As between petitioner, a layperson with no particular knowledge of education law, and respondent, a public entity bound to apply that law, respondent ought to bear the burden of their mutual neglect.

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I understand the majority's concern with the fiscal ramifications of allowing retroactive awards here. Ironically, those ramifications are increased dramatically by the majority's erroneous construction of the statute of limitations. Applying the statute as I would, municipalities would be liable only for arrears dating six years or less prior to the bringing of suit. The floodgates of unlimited municipal liability would not be open. In specific cases where hardship remains, equity would not be powerless to alleviate the problem. Perhaps, for example, after evidence showing special fiscal hardship, the retroactive payments could be ordered spread over several years. Such a result would be far more reasonable than denying redress altogether.

CONCLUSION

I would hold that the contract statute of limitations applies to military service credit claims, but that the laches defense should be rejected.[1] Not only would this result be more consistent with New Jersey law, but it would effect a reasonable compromise between the petitioner's entitlement and respondent's fiscal constraints. Limiting claims to six years and applying within those years a flexible equitable approach is much fairer than the majority's unbending denial of all liability.

Justice Clifford and Justice Handler join in this opinion.

For affirmances - Chief Justice Wilentz and Justices Schreiber, Pollock and O'Hern - 4.

For reversal and remandment - Justices Pashman, Clifford and Handler - 3.

[90 N.J. 145 (1982)]

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[1]This result would in no way be incorporated with our decision in Spiewak v. Bd. of Ed. of Rutherford, 90 N.J. 63 (1982). There, we ordered that our interpretation of the tenure act be applied prospectively only. We denied retroactive relief because respondents had relied on several Appellate Division decisions contrary to our holding. Here, by contrast, there is no "sharp break" in the law. The military service credit statute, N.J.S.A. 18A:29-11, is clear and unequivocal, and has not been materially changed since at least the 1950's.

Laches, the issue here, was not raised in Spiewak.

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SHIRLEY K. LICHTMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	APPELLATE DIVISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, June 10, 1980

Decided by the State Board of Education, October 1, 1980

Argued March 8, 1982 -- Decided March 23, 1982

Before Judges Allcorn, Francis and Morton I. Greenberg.

On appeal from New Jersey State Board of Education.

Peter N. Peretti, Jr., argued the cause for the appellant (Riker, Danzig, Scherer & Hyland, attorneys).

David A. Wallace argued the cause for the respondent Board of Education of Ridgewood (Aron, Till & Salsberg, attorneys; Mr. Wallace, of counsel and on the brief).

A statement in lieu of brief was filed by the Attorney General on behalf of the State Board of Education.

PER CURIAM

A review of the entire record, in light of applicable law, satisfies us that all issues of law raised are clearly without merit. R.2:11-3(e) (1) (E).

Affirmed.

Pending New Jersey Supreme Court

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BEVERLY MICCICHE,

PETITIONER-RESPONDENT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT HOLLY, BURLINGTON COUNTY, : DECISION

RESPONDENT-APPELLANT.

Decided by the Commissioner of Education, November 30, 1981

For the Petitioner-Respondent, Selikoff & Cohen (John E. Collins, Esq., of Counsel)

For the Respondent-Appellant, Parker, McCay & Criscuolo (Stephen J. Mushinski, Esq., of Counsel)

The Petitioner here has sought a determination of her seniority and has attacked the Board's denial to her of seniority credit for three months of alleged disability following the birth of her child. In January of 1978 Petitioner had requested unpaid maternity leave for the balance of the school year 1977-78, which would remain after the anticipated birth (which actually occurred on March 27), and the Board granted this request in February of 1978. Approximately two years later Petitioner sought a determination by the Board as to her seniority credit for the final three months of the 1977-78 school year, and when the Board decided to deny such credit she grieved the matter through the Board level, finally filing her Petition before the Commissioner on April 23, 1980. By the time she filed her grievance in January 1980, her purported disability in the spring of 1978 had long since come to an end. At a hearing before the Administrative Law Judge Petitioner offered in evidence a doctor's note stating that she was disabled for three months following the birth. The Judge admitted the note in evidence for the sole purpose of showing that it had been attached to the grievance papers which Petitioner had submitted to the Board; he declined to accept the note "without more" as proof of Petitioner's disability. Accordingly, the claim of disability was never substantiated by medical proof nor was it tested in litigation.

The Administrative Law Judge held that the Board's action in advance of an actual reduction in force was ultra vires and that the matter was not yet ripe for adjudication. The Commissioner ruled, however, that since the Board had in fact acted and taken a position contrary to Petitioner's interest, the controversy was justifiable. He went on to accept the claim of three months' disability and to hold that said period counted toward Petitioner's seniority.

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We think the Commissioner committed error in so holding. The three months of unpaid leave of absence after Petitioner's delivery did not add to her seniority credit. Berkowicz et al. v. Board of Education of Scotch Plains-Fanwood Regional School District, 1980 S.L.D. (July 29, 1980). Petitioner failed to assert disability at the time of requesting her unpaid leave of absence. Since the Board would now have no way of proving the contrary, it would at this late date be unfair, both to the Board and to other teachers who might be affected, to grant additional seniority to Petitioner based on her claimed disability.

For the foregoing reasons the State Board of Education reverses the Commissioner's decision and dismisses the Petition.

Ruth H. Mancuso opposed in the matter.

Attorney Exceptions are noted.

June 2, 1982

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MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION EDUCATION ASSOCIATION,

PETITIONERS-APPELLANTS,

V.

BOARD OF DIRECTORS OF THE MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 30, 1981

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

For the Respondents-Respondents, Stanley C. Gerrard, Esq.

The April 30, 1981 decision of the Commissioner is affirmed for substantially the reasons set forth therein. We are also persuaded as to the correctness of dismissing the instant Petition of Appeal upon examination of the purpose underlying a county educational services commission. The idea was to permit establishment of an entity to provide a service function which would be responsive to the client, namely participating public and nonpublic schools and their eligible pupils. While the service function is permanent during the lifetime of the commission, the program and resources are not because they must relate to the changing needs of the client. The Legislature had imbued the educational services commission with flexibility which should not be restricted. Furthermore, we note specifically that constituent districts of a commission may withdraw at any time prior to the expiration of the term of a county educational services commission, in accordance with N.J.S.A. 18A:6-64, and take over the provision of the commission's services within its own district. Accordingly, we agree that the instant Petition of Appeal should be dismissed.

Attorney Exceptions are noted.

John T. Klagholz and Robert J. Wolfenbarger opposed in the matter.

March 24, 1982

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MARY ELLEN MONACO,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RIVER EDGE, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 8, 1981

For the Petitioner-Appellant, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Parisi, Evers & Greenfield
(Irving C. Evers, Esq., of Counsel)

This is another case presenting the question of whether a full-time compensatory education teacher can count her service in that capacity toward the accrual of tenure as a teaching staff member. The Petition here was employed initially for the school year 1976-77 as an elementary school teacher. For the 1977-78 school year she was employed as a State compensatory education teacher and compensated on an hourly basis. For the two years after that she was again a full-time teaching staff member, but her contract was not renewed at the end of that period. The only question here, therefore, is whether she accrued tenure during her service as State compensatory education teacher in the 1977-78 school year.

Petitioner began her 1977-78 employment at the opening day of school with all other teachers. Her school day began and ended at the time as regular full-time teachers. She was provided with preparation time, ordered supplies and took inventory at the end of the year, was required to keep a plan book, and prepared daily lesson plans that were reviewed by the principal. The notable differences between her job and that of the regular classroom teacher were that she received an hourly wage, did not enjoy health insurance or sick leave benefits, and taught pupils on a one-to-one basis or in small groups of two to four, rather than in a normal class. She taught reading and math according to the needs of specific pupils based upon testing provided primarily by the Child Study Team. She was not assigned to any supervisory duties outside classes, such as on the playground, in the halls or in the lunchroom. She taught right up to the last day of the teaching year, the same as the regular classroom teachers.

The Administrative Law Judge and the Commissioner held that this case was governed by the decision of the State Board in Hamilton Township Supplemental Teachers Association v. Hamilton Township Board of Education, decided by the State Board

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October 1, 1980, and by the decision of the Appellate Division of the Superior Court in Point Pleasant Beach Teachers Association v. Callam, 173 N.J. Super. 11 (App. Div. 1980), cert. den. 84 N.J. 469. In the Hamilton case we reaffirmed the established principle that supplemental or compensatory education teachers do not enjoy the status of regular professional staff members who have the primary responsibility for classroom instruction, educational planning and curriculum. In accordance with the two cases just cited, the Commissioner held that Petitioner was not a regular teaching staff member during the 1977-78 school year and therefore the time spent as compensatory education teacher during that year had not counted toward tenure for the Petitioner.

Subsequent to the decisions cited above, the Appellate Division reversed the State Board in the Hamilton case by a decision rendered July 10, 1981, Docket No. A-667-80-T1. On June 22, 1981 the Appellate Division also decided Spiewak v. Rutherford Board of Education, Docket No. A-4853-79-T2, which limited the scope of the Point Pleasant decision to cases where the employment was only temporary in nature and was so understood by both employer and employee. The law now appears to be that a supplemental or compensatory teacher is eligible for tenure if he or she regularly teaches in an established instructional program, especially one which is mandated by the State, such as a remedial reading program. The State Board so held in Richardson v. Lawnside Board of Education, decided October 7, 1981, a case very similar to the instant controversy, where we ruled that Petitioner could accrue tenure in the position of Title I/Compensatory Education teacher.

In the matter now before us, we think that Petitioner's employment for the year 1977-78 as a full-time compensatory education teacher possessed enough elements of regularity to constitute her a teaching staff member for the purposes of tenure accrual, even though she was only paid by the hour rather than by a contract salary.

In view of the current state of the law, the State Board reverses the decision of the Commissioner and holds that Petitioner acquired tenure upon the first day of continued service in the district after her completion of three academic years with the Respondent Board. Petitioner is further entitled to her salary and other benefits for the period she was illegally deprived of her tenured employment with respondent Board, less mitigation for sums earned or that could have been earned by petitioner during that time. Mullen v. Board of Education of the Township of Jefferson, 81 N.J. Super. 151, 159 (App. Div. 1963); Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 149 (1965).

February 3, 1982
Pending N.J. Superior Court

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MARY O'HARA,	:	
PETITIONER-RESPONDENT-CROSS-APPELLANT,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL IN THE COUNTY OF CAMDEN,	:	APPELLATE DIVISION
RESPONDENT-APPELLANT-CROSS-RESPONDENT,	:	

Decided by the Commissioner of Education, January 26, 1981

Decided by the State Board of Education, December 2, 1981

Argued November 16, 1982 - Decided December 30, 1982

Before Judges Matthews, Antell and Francis.

On appeal from a final decision of the New Jersey State Board of Education.

Mary O'Hara argued pro se.

Robert F. Blomquist argued the cause for Board of Education of the Vocational School of Camden County (Davis & Reberkenny, attorneys).

Irwin I. Kimmelman, Attorney General of New Jersey, submitted a brief on behalf of the New Jersey State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the brief).

PER CURIAM

This is an appeal and cross appeal from a final decision of the State Board of Education affirming the decision of the Commissioner of Education ordering the appellant, Camden County Vocational School, to reinstate respondent, Mary O'Hara, as a librarian but denying her request for a title change and additional salary. The respondent's cross appeal is from the latter denial.

Respondent was hired as a librarian by appellant in September 1973 and served in that capacity through the 1977-78 school year. She was approved for sick leave for the entire 1978-79 school year and did not return to work until December 17, 1979. Several months of the delay were caused by respondent's failure to

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procure and submit a physician's certificate of satisfactory recovery pursuant to N.J.S.A. 18A:16-1 to 22.[1]

In September 1979 appellant abolished one of its two librarian positions. The library functioned with substitutes until October 10, 1979 at which time appellant reassigned a social studies teacher, who had previously handled library duties and possessed the requisite certificate, to the remaining library position.

When respondent returned in December 1979, she was assigned to a mathematics teaching position in compensatory education, a position for which she was qualified. No librarian positions were available at the time. Respondent challenged this procedure arguing that she should have been placed in the librarian position because she had more seniority as a librarian than the incumbent. She also contended that the librarian title should be changed to multi-media specialist with retroactive salary adjustments back to September 1973.

The appellant contends that the assignment of respondent to the position of mathematics teacher is justified by its authority to transfer its employees to any position within their respective certifications to meet the educational needs of the school district. See N.J.S.A. 18A:25-1.

It contends that that section permits such a transfer where no adverse impact has accrued to the respondent's tenure in the district, such as demotion or a reduction in salary. The appellant also contends that the respondent is not entitled to additional back salary, there being no significant change in the duties and responsibilities of the librarian position.

The Administrative Law Judge (ALJ) held that respondent had to be reinstated to the librarian position because she had more seniority than the incumbent. However, he also ruled that no additional or back salary was to be paid to respondent. The Commissioner adopted the recommendation and holding of the ALJ. The State Board affirmed, with one dissent and two members abstaining. We reverse the decision of the State Board of Education as to the appeal and affirm as to the cross appeal.

We agree with appellant that statutory authority exists to justify its action in transferring a teaching staff member, as here, to any position within that teacher's certification. N.J.S.A.

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[1]In a previous action O'Hara challenged the Board's requirement that the physician issuing the certificate of recovery be approved by the Board. See N.J.S.A. 18A:16-3. She had supplied a certificate executed by a physician who had not been approved by the Board. Ultimately appealed to the Appellate Division, the Board's determination was affirmed in an unpublished opinion. O'Hara v. Bd. of Ed. of the Vocational School of Camden, No. A-578-80T3 (App. Div., Oct. 2, 1981).

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18A:25-1. The State Board and the Commissioner affirmed the action of the ALJ essentially for the reasons expressed by the ALJ. We believe the ALJ erred in his ultimate conclusion and in his reliance on the previous Initial Decision in Stolte v. Willingboro Bd. of Ed., 1980 S.L.D. 315. In that matter the Commissioner rejected in toto the decision of the ALJ. The ALJ in Stolte cited Downs v. Hoboken Bd. of Ed., 126 N.J.L. 11 (Sup. Ct. 1940), aff'd sub nom. Schlank v. Hoboken Bd. of Ed., 127 N.J.L. 602 (E&A 1942) as authority as follows:

> It is well established in this State that a teaching staff member with a tenure status and seniority rights cannot be transferred or dismissed upon the abolition of his position for statutorily permitted reasons, while another teaching staff member with lesser experience is assigned that very same position.
> [1980 S.L.D. at 316].

This was an incorrect interpretation of Downs. That case says nothing about a transfer of a teacher within that teacher's certification. It held that the rights of both tenured and non-tenured teachers are totally controlled by statute. The ALJ in the instant matter was therefore incorrect in relying on Stolte. The Commissioner's decision as well as that of the State Board were also incorrect in that they in turn relied on the reasons expressed by the ALJ.

Respondent also relies on N.J.A.C. 6:3-1.10. The section furnishes no support for the respondent. That section of the Administrative Code relates to dismissals only. The authority for that portion of the Code is derived from N.J.S.A. 18A:28-9 to 13. These statutory provisions relate only to dismissals occasioned by a reduction in force upon persons under tenure. The determination of the State Board is reversed insofar as its awarding the librarian position to respondent.

On her cross-appeal the respondent lists five points as follows:

(1) equality in compensation under N.J.S.A. 18A:6-6 retroactive to September 1, 1973 with the "male" media specialist who received recognition and designation of "rank" to media specialist;

(2) compensation for the loss of income under her tenured Educational Media Specialist category for one summer month for the years 1978, 1979, 1980, 1981 and any subsequent year in which summer employment was available in her tenured occupation;

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(3) damages for continuing retribution and harm suffered by Ms. O'Hara after having made a proper and lawful request for equality in compensation during the school year 1977-78;

(4) appropriate disposition of the alleged unethical, immoral, and criminally indictable acts by agents of the Appellate Board who by their refusal to allow "due process" rights to petitioner respecting her 1978 claim for equality in compensation caused undue litigation and substantial professional, social, mental and emotional harm needlessly to petitioner who was merely claiming equality rights which are statutorily protected rights; and

(5) any other appropriate remedies and/or relief, such as remand of the case being cross-appealed for a de novo hearing.

The ALJ determined as to respondent's first point that the record did not support a determination that the respondent's librarian duties were substantially the same as those of a media specialist. This finding was affirmed by the Commissioner and the State Board. There was substantial credible evidence on the record to support it and we will not disturb it. Campbell v. Dep't of Civil Service, 39 N.J. 556, 562 (1963).

The second, third and fourth points of respondent's cross appeal go beyond the bounds of the prehearing order in this case and will not be heard on this appeal. As to respondent's fifth point, we find no basis in the record that warrants either a remand or a de novo hearing as to matters set forth in the appeal or cross appeal.

Reversed as to the appeal. Affirmed as to the cross appeal.

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OLD BRIDGE EDUCATION ASSOCIATION AND JOSEPH SCHULTZ,

PETITIONERS-APPELLANTS,

V. : SUPERIOR COURT

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY, : APPELLATE DIVISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, April 24, 1981

Decided by the State Board of Education, July 1, 1981

Argued February 9, 1982 -- Decided February 23, 1982

Before Judges Michels and McElroy.

On appeal from the State Board of Education.

Sanford R. Oxfeld argued the cause for appellants (Rothbard, Harris & Oxfeld, attorneys; Mr. Oxfeld, of counsel and on the brief).

Gordon J. Golum argued the cause for respondent (Wilentz, Goldman & Spitzer, attorneys; Mr. Golum, of counsel and on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, submitted a statement in lieu of brief on behalf of the New Jersey State Board of Education (James R. Zazzali, former Attorney General, and Catherine A. Walker, Deputy Attorney General, of counsel; Ms. Walker, on the statement).

PER CURIAM

Petitioners Old Bridge Education Association (Association) and Joseph Schultz (Schultz) appeal from the decision of the State Board of Education affirming the decision of the Commissioner of Education in which it was held that Schultz was not entitled to 30 days' termination pay following his discharge for cause.

The facts giving rise to this appeal are not in dispute. Schultz was employed by respondent Board of Education of the Township of Old Bridge, Middlesex County (local board), as a custodian pursuant to an employment contract. The contract ran from July 1, 1978 until June 30, 1979 and provided that it could be terminated at any time by either party upon 30 days' written notice of the intention to terminate. In the absence of such notice the contract would run for the full year term. On July 11, 1978 Schultz

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was notified by the local board that his workers' compensation claim was not being honored pending the compensation insurance carrier's investigation into an allegation that Schultz had falsified the claim and pending the local board's own hearing on the matter.

On July 19, 1978, following a hearing on the charge, at which hearing Schultz was represented by counsel, the local board dismissed Schultz for cause. On August 11, 1978 Schultz requested 30 days' termination pay in accordance with the terms of his employment contract. The local board denied the request and the Association and Schultz appealed to the Commissioner pursuant to N.J.S.A. 18A:6-9. They claimed that the local board refused to comply with the termination provisions of the contract and requested that the Commissioner order the local board to pay Schultz 30 days' wages. The matter was referred to an administrative law judge, who on cross-motions for summary judgment, granted the local board's motion and dismissed petitioner's appeal. The Commissioner, after reviewing the entire record, affirmed the findings and determination set forth by the administrative law judge in his initial decision and adopted them as his own. On appeal to the State Board, the Commissioner's decision was affirmed. Petitioners contend on this appeal that Schultz was entitled to 30 days' pay in accordance with the terms of his employment contract with the local board. We disagree.

We are entirely satisfied from our review of the record and the arguments presented that the decision of the Commissioner is supported by sufficient credible evidence in the record as a whole and that all issues of law raised are clearly without merit. R. 2:11-3(e) (1) (D) and (E). We emphasize that there is a distinction between termination of employment on notice and dismissal for good cause. In the latter case the dismissed employee is not entitled to compensation. It is fundamental that a public employer has the right to dismiss an employee for good cause without being liable for termination compensation.

Accordingly, the decision of the State Board is affirmed substantially for the reasons expressed by Commissioner Burke in his decision of April 24, 1981 which affirmed and adopted the findings and determination set forth in the initial decision of Administrative Law Judge Campbell dated March 11, 1981.

Affirmed.

Cert. denied 91 N.J. 210

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MR. & MRS. JOSEPH OLIVE, JR., on behalf of their son, J.O.,	:	
APPELLANTS,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,	:	APPELLATE DIVISION
RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, June 30, 1980

Decided by the State Board of Education, February 4 and July 1, 1981

Submitted November 1, 1982 -- Decided December 2, 1982

Before Judges Ard and McElroy.

On appeal from final decision of the New Jersey State Board of Education.

Nancy L. Heath, attorney for appellants.

John D. Jordan, attorney for respondent.

A statement in lieu of brief was filed on behalf of the New Jersey State Board of Education by Irwin I. Kimmelman, Attorney General, attorney (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the statement).

PER CURIAM

Appellants (parents) dispute a determination that the Board of Education of the Township of Pennsville (Board) can offer an adequate special education class within its own district for their son (J.O.) who was classified as having a learning disability. In September 1979, the parents requested the Department of Education to grant a hearing on the question of whether the Board should be required to pay J.O.'s education at a private school. The classification officer found that the Board should pay J.O.'s educational expenses for the school year 1979-1980, and that J.O. would begin at the township school in September 1980.

The Board's appeal to the commissioner of education was denied, however, the final decision of the State Board of Education reversed the ruling below, holding that the parents were not

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entitled to reimbursement for educating J.O. at a private school during the 1979-1980 school year. This appeal followed.

The issues are basically factual, and consequently a brief review of the testimony is pertinent. J.O.'s early education through the fourth grade proceeded without any indication of a learning problem. His parents, wanting J.O. "...to go to a Christian school," enrolled him in Pennsville Christian Academy for the fifth grade, the 1978-1979 school year. He performed poorly at the private school, and in March 1979, was demoted to the fourth grade. It was also suggested that J.O. be tested. After being advised by the Board that testing might be delayed until September, the parents had their son tested by a private firm at a cost of $340. The test revealed that J.O. had "a learning disability" and was reading only at the second grade level. The report characterized his intelligence as average but noted that he had "poor visual-perceptual skills" and deficient "auditory functioning." It was recommended that he be placed in a class of no more than five or six pupils taught by a learning disability specialist. The testing firm recommended a private Delaware school, the Pilot School. In April 1979, the parents visited the Pilot School and were favorably impressed. They also investigated the Board's program and visited a perceptually impaired class in May 1979 but apparently were disappointed. At the hearing below, they alleged they were told by the teacher that the class was "a dumping ground for kids" and that they would be better off sending J.O. to a private school. The teacher denied ever making such a comment.

In July the Board conducted its own evaluation of J.O. and classified him as perceptually impaired, recommending placement within the school system. The parents accepted the classification but disputed the decision to place him within the school district, being convinced that the Pilot School offered a better program for their son. On August 24, 1979, the Board formally denied the parents' request to underwrite the expenses of sending J.O. to the Pilot School contending its own program was adequate to meet his needs.

Notwithstanding the Board's position, the parents enrolled J.O. in the Pilot School in September 1979 at a yearly tuition of $3,950. J.O.'s father contended his progress at the Pilot School was excellent, and for the first time he was having positive experiences in school.

Concurrent with J.O.'s enrollment in the Pilot School, the parents requested the aforementioned hearing in the State Department of Education. Prior to the hearing, in October 1979, a State review team issued a report based upon its own investigation concluding that the Board had committed various procedural improprieties in determining J.O.'s classification and directed that the process be redone according to certain guidelines which it enumerated. The deficiencies were corrected by November 1, and in December the State review team, investigating the Board's school as well as the Pilot

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School, found that the Board's program for J.O. would be appropriate if certain conditions were met. At the hearing the director of the local district's child study team testified that those conditions could be satisfied. On appeal the parents dispute the sufficiency of the evidence with respect to three findings of the State Board: (1) that petitioners' choice to enroll J.O. in the Pilot School was voluntary; (2) that the Board's child study team had classified J.O. and prepared the required individualized education program (I.E.P.) before the 1979-1980 school year, and (3) that the Board's proposed plan for J.O. was "appropriate." Essentially the parents claim that their decision to enroll J.O. in the Pilot School was involuntary and caused by the lack of an "appropriate" program in the Board's school, and therefore, they are entitled to reimbursement.

In reversing the commissioner of education, the State Board held:

> Since an appropriate free public education was available to J.O. in the Pennsville School District for the 1979-80 school year, there is no basis to require the Board to now pay the tuition and transportation costs incurred by the parents of J.O. in sending J.O. to an approved out-of-state private school for the 1979-80 school year. N.J.A.C. 6:28-4.8.... This unilateral action does not require reimbursement.
>
> [Citations omitted]

We agree. Our study of the entire record supports the findings and conclusions of the State Board of Education. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-93 (1973) The Board decision was consistent with the established body of school law holding: "...While parents have a right to make a choice between private and public school placement, they do not have a right to require that public school districts pay tuition costs to private schools in the event that this is the parental choice. (Citations omitted)." Woodstein v. Bd. of Ed., Tp., of Clark, 1970 S.L.D. 220, 224. Our standard of review in supporting the Board's action is simply to determine whether its finding was fairly supported by the evidence and was not arbitrary, capricious or unreasonable. East Windsor Reg'l. Bd. of Ed. v. State Bd. of Ed., 172 N.J. Super. 547, 552 (App. Div. 1980). We find no error in the State Board making findings of fact contrary to those made by the hearing officer and affirmed by the commissioner. The State Board is entitled to disagree with the commissioner and make its own findings subject to the aforesaid standard of review. Cf. Winston v. Bd. of Ed. of So. Plainfield, 125 N.J. Super. 131, 139 (App. Div. 1973), aff'd 64 N.J. 582 (1974).

Nor do we find fault with the determination that the course of action of the respondent did not constitute an "unreasonable and unjustified delay" in classifying J.O. Formal action was impeded by the absence of a child study team during the summer. At any rate,

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the classification of "perceptually impaired" was accepted by the parents as early as July 30. The tentative I.E.P. prepared at that time, though later held to be technically void, did not prejudice appellants. The final I.E.P. completed in November was substantially the same. We conclude that the State Board's decision was supported by he evidence.

Affirmed.

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BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
MR. AND MRS. GERALD VAN DECKER, ON BEHALF OF THEIR SON, T.V.D.,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, June 23, 1981

For the Petitioner-Appellant, Green & Dzwilewski
(Allan P. Dzwilewski, Esq., of Counsel)

For the Respondents-Respondents, Bernard A. Schwartz, Esq.

The State Board of Education denies request for oral argument and affirms the Commissioner's decision for the reasons expressed therein.

February 3, 1982

Pending N.J. Superior Court

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MICHAEL ROSAMILIA, JAMES SILVESTRI, ARTHUR PICO, JOSEPH GROSCH, MICHAEL NARDIELLO, GEORGE NUCERA, FRANK SCELBA, AUSTIN MAC ARTHUR, MARIO DI MAGGIO, NICK PETTI AND JOHN WESTLAKE,	:	
PLAINTIFFS-APPELLANTS,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
THE BELLEVILLE BOARD OF EDUCATION,	:	
DEFENDANT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 6, 1981

Decided by the State Board of Education, August 5, 1981

Submitted October 13, 1982 - Decided October 27, 1982

Before Judges Botter and Polow.

On appeal from the final decision of the State Board of Education.

Katzenbach, Gildea & Rudner attorneys for appellants (Alan G. Kelley on the brief, Greenberg & Mellk attorneys).

Schwartz and Pisano attorneys for respondent (Lawrence S. Schwartz and Nathanya G. Simon on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel and on the Statement).

PER CURIAM

In April 1980, eleven teachers, all of whom had been continuously employed by the Belleville Board of Education for many years, filed a petition seeking past and future military service credits pursuant to N.J.S.A. 18A:29-11. Apparently, the teachers and the Board of Education had previously interpreted the statute incorrectly. They were unaware that military service credits are applicable irrespective of whether the salary schedule exceeds the minimum.

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The State Board of Education ruled that petitioners are barred by laches "from all relief except prospective from the date of the filing of the petition of appeal." Since that determination, the Supreme Court has ruled that application of the laches doctrine, under similar circumstances, is not unreasonable. Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982). We find no basis for distinguishing the present controversy from Lavin and, thus, will not disturb the State Board ruling.

Affirmed.

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S.W. AND D.W.,	:	
PLAINTIFFS-MOVANTS,	:	
V.	:	SUPREME COURT
THE BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	ORDER
DEFENDANT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, August 22, 1980

Decided by the State Board of Education, March 4, 1981

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is granted, the order of the Appellate Division is summarily reversed and the matter is remanded to the Appellate Division for supplementation of the record. We do not intimate what weight should be given to the supplemental material.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, This 8th day of June, 1982.

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MELVIN SANDERS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 13, 1981

For the Petitioner-Appellant, Newman, Herman, Saltman, Levitt & Feinson (Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, Love & Randall (Melvin Randall, Esq., of Counsel)

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

S. David Brandt and Mateo F. DeCardenas opposed in the matter.
March 24, 1982

Pending N.J. Superior Court

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ANGELA SGRO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 5, 1981

For the Petitioner-Appellant, Chamlin, Schottland, Rosen & Cavanagh (Thomas W. Cavanagh, Esq., of Counsel)

For the Respondent-Respondent, Gagliano, Tucci & Kennedy (Alexis Tucci, Esq., of Counsel)

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

March 24, 1982
Pending N.J. Superior Court

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LOIS SHELKO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 11, 1981

For the Petitioner-Respondent, Ruhlman & Butrym (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Henry E. Kirchoff, Esq.

The question here is whether petitioner became a tenured employee of the Mercer County Special Services School District by virtue of having served as a regular teacher in the Ewing Township School System for two years and then in the respondent School District for the next two years, during all of which she was assigned to a "Project Child" program. The Administrative Law Judge and the Commissioner reached opposite determinations on the issue, and the case is not free from difficulty. We have concluded that the Administrative Law Judge was right and that the petitioner did not acquire tenure as claimed.

Starting as a substitute teacher with the Ewing Board in September of 1976, petitioner was employed under a regular teacher's contract effective October 1 with that Board for the remainder of the 1976-77 academic year. She was also employed by Ewing under a regular teacher's contract for the following academic year, 1977-78. During all of her employment under the regular contracts, petitioner was assigned to a program called "Project Child." This was a multifaceted program, funded annually through State or Federal grants, to provide instruction to multiply handicapped infants, preschoolers and kindergarten children. The Director of Special Services in Ewing submitted annual applications for the program funds, which the Ewing Board acted as the local education agency for carrying out the program. No support for it was provided by the Ewing Board from its current expense operating budgets. The pupils enrolled in Project Child were residents of districts throughout Mercer County, including Trenton, Ewing, the Windsors, Hamilton and Hopewell.

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Project Child was discontinued by the Ewing Board at the end of the school year 1977-78. In the previous November the Mercer County Board of Freeholders had created the respondent Special Services School District and sometime thereafter it had engaged the Director of the Ewing Project Child as a consultant. The Director applied for a grant on behalf of the County District to continue a program similar to that which he had operated at Ewing. During the spring of 1978, the Director notified the Ewing Board and the Project Child staff that the County District would be operating Project Child. The Ewing Board thereupon made no further application for Project Child funds and terminated its connection with that program at the end of June. The following autumn the County proceeded with a "Project Child" program similar to that previously in effect at Ewing. Pursuant to a contract offered by the County Board to petitioner and accepted by her, she went to work for the County and continued with Project Child under contract until the end of the school year 1979-80. The County Board refused to renew her employment thereafter.

The Administrative Law Judge determined that there was no statute under which petitioner acquired tenure with the respondent Board. He reviewed N.J.S.A. 18A:28-16, which provides for the carryover of tenure rights when "an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, *** or any officer, board or commission under his, its or their authority shall undertake the operation of any school previously operated by a school district in this State." The Judge found this statute inapplicable, and we agree; Project Child was not a "school" within the meaning of section 18A:28-16. The same tribunal also considered N.J.S.A. 18A:28-6.1, which provides, insofar as pertinent here, that whenever any board of education shall discontinue any school "or any one or more of the grades from kindergarten through grade 12 in the district and shall, by agreement with another board of education, send the pupils in such *** grades to such other district," the tenure rights of the teachers of the discontinued grade or grades carryover to the receiving district. The Administrative Law Judge found that no agreement had been reached by the Ewing Board and the respondent Board for the latter to take over Ewing's Project Child program. He also decided that no other statute cited by petitioner applied so as to give her tenure under the circumstances of this case.

The Commissioner overruled the initial decision on the ground that the facts spelled out "a tacit understanding and agreement" between Ewing and respondent that the program in which petitioner was employed was being transferred with Ewing's cooperation to respondent's district. In our view, the course of events did not establish an agreement of the type contemplated by N.J.S.A. 18A:28-6.1. Furthermore, we believe that Project Child as administered by both Ewing and respondent was not a "grade"

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within the meaning of the statute just cited. As already noted, it was a special program for multiply handicapped children ranging in age from infants up to first grade, taking in children from many other districts beside Ewing, and founded entirely upon grants from State or Federal sources. The facts that a few multiply handicapped kindergarten children from Ewing may now be in the County District does not mean that Ewing has discontinued a "grade"; it still operates its kindergarten. Ewing has simply discontinued acting as the local education agency for the purpose of administering funds from other sources for a program which Ewing was not required to operate. Cf. Capella v. Board of Education of Camden County Vocational Technical School, 145 N.J. Super. 209, 214 (App. Div. 1976).

To summarize, petitioner worked in two different school districts between 1976 and 1980, but not long enough in either to acquire tenure. Her time in Ewing could not be "tacked on" to her service in the respondent's district so as to give her tenure in the latter. The fact that she taught in a similar special project in both districts is not material. Her case does not fall within the protection of any existing statute, and we have no power to create substantive laws governing teacher tenure. In re Jamesburg High School Closing, 83 N.J. 540, 550 (1980).

For all of the foregoing reasons, the State Board of Education reverses the Commissioner's decision and dismisses the petition herein.

S. David Brandt, Ruth Mancuso, Jack Bagan and Robert Wolfenbarger opposed in the matter.
Attorney Exceptions are noted.
May 5, 1982
Pending N.J. Superior Court

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RITA SPIEWAK, PEGGY DABINETT, PATRICIA O'REILLY and the RUTHERFORD EDUCATION ASSOCIATION,

Respondents,

V.

BOARD OF EDUCATION OF RUTHERFORD,

Appellant.

HAMILTON TOWNSHIP SUPPLEMENTAL TEACHERS ASSOCIATION et al.,

Respondents,

V.

HAMILTON TOWNSHIP BOARD OF EDUCATION,

Appellant.

CONSTANCE ANDERSON,

Appellant,

V.

SUMMIT BOARD OF EDUCATION,

Respondent.

SUPREME COURT

Argued March 23, 1982 -- Decided June 23, 1982

Alfred E. Ramey, Jr., Deputy Attorney General, argued the cause for appellant and respondent State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Erminie L. Conley, former Assistant Attorney General, of counsel; Mr. Ramey and Mary Ann Burgess, Assistant Attorney General, on the briefs).

H. Ronald Levine argued the cause for appellant Board of Education of Rutherford (Irving C. Evers, attorney; Mr. Evers, on the brief).

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Henry F. Gill argued the cause for appellant Hamilton Township Board of Education.

Gilbert E. Owren argued the cause for appellant Constance Anderson (Drummond and Owren, attorneys).

Steven B. Hoskins argued the cause for respondent Summit Board of Education (McCarter & English, attorneys; Gerald C. Harvey and Hinda B. Simon, on the briefs).

Arnold M. Mellk argued the cause for respondents Hamilton Township Supplemental Teachers Association, et al. (Katzenbach, Gildea & Rudner, attorneys; James F. Schwerin, on the brief).

Louis P. Bucceri argued the cause for respondents Rita Spiewak, et al. (Bucceri and Pincus, attorneys).

Susan Galante, Assistant Counsel, argued the cause on behalf of amicus curiae New Jersey School Boards Association (David W. Carroll, General Counsel, attorney).

The opinion of the Court was delivered by PASHMAN, J.

Today we decide whether public school teachers who provide remedial and supplemental instruction to educationally handicapped children may acquire tenure. This question requires us to interpret and apply the tenure statute, N.J.S.A. 18A:28-5. The Court also considers a recent Appellate Division decision, Point Pleasant Beach Teachers' Ass'n v. Callam, 173 N.J. Super. 11, certif. den. 84 N.J. 469 (1980), which has been subject to contradictory interpretations in the state agencies and courts below. We overrule Point Pleasant and hold that remedial and supplemental instructors acquire tenure if they meet the qualifications in the statute.

I

FACTS AND PROCEDURAL HISTORY

A. Spiewak v. Rutherford Board of Education

Rita Spiewak has worked for the Rutherford Board of Education since 1971 as a "Beadleston" supplemental instructor.[1] She

1 Beadleston supplemental instructors are public school teachers who staff a supplemental academic program for educationally handicapped children. These programs are mandated by legislation initially sponsored by State Senator Beadleston. See N.J.S.A. 18A:46-1 to -46.

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holds an appropriate teaching certificate issued by the State Board of Examiners, as required by N.J.S.A. 18A:26-2. Spiewak provides special educational assistance on a tutorial basis to students with learning disabilities. These children are identified by a professionally staffed child study team that produces a "prescription"for appropriate academic assistance suited to each student's individual needs. N.J.S.A. 18A:46-3.

Spiewak has been employed by the Rutherford Board of Education for each academic year since 1971. Her teaching duties typically have started two or three days after opening day in September and ended two or three days before the official close of the school year in June. When Spiewak was first hired in 1971, she taught for three hours each day. Her employment expanded to between four and five hours in her second year and to six hours by 1975. She was not assigned certain ancillary duties required of most regular teachers, such as homeroom, hall duty or playground supervision. These responsibilities were not required of a number of tenurable teaching staff positions, such as teachers of art, music and physical education, as well as guidance counselors and school psychologists.

Except for the 1973-1974 academic year when she received an annual contract, Spiewak has been paid by the hour. She receives no pay for a scheduled instruction period if a student is absent or fails to appear, and no pay whenever school is unexpectedly closed. Until 1976, she was not compensated for any time devoted to lesson preparation, record keeping or report making. She has never received sick leave, personal days, health insurance, holiday pay, vacations or pension benefits. Her rate of pay is significantly lower than the effective hourly rate received by contract teachers paid in accord with the salary guide.

Peggy Dabinett began work as a supplemental teacher at Rutherford in the spring of 1969. She has been employed by the board regularly and without interruption since then. Like Spiewak, she holds a state-issued teaching certificate appropriate to her position. Her teaching duties, method of instruction and workload are identical to Spiewak's, as are her compensation and terms of employment.

The board has retained two other supplemental instructors under contract. They are not parties to this case. They are eligible for tenure and the higher pay scale required by the contract. Their duties are not materially different from those of Spiewak and Dabinett. The Superintendent of Schools admitted that the school board employs some supplemental teachers on an hourly basis rather than a contract basis solely for economic reasons.

Patricia O'Reilly has been employed by the Rutherford Board as a remedial reading teacher since 1973. The board compensates her with federal funds received for that purpose under Title I of the Elementary and Secondary Education Act, 20 U.S.C.A. Sec. 236 to Sec. 241-1 (Title I). Like Spiewak and Dabinett, O'Reilly holds a

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state-issued certificate appropriate to her position. Her duties are similar to those of Spiewak and Dabinett. Since 1974 she has provided 25 hours of instruction per week. Her schedule requires her to be present in school from 8:30 a.m. until 3:00 p.m., the entire period for which students are in attendance. She works the full academic year. Her compensation and other terms of employment are identical to those of Spiewak and Dabinett, except that she receives Blue Cross/Blue Shield benefits.

Spiewak, Dabinett and O'Reilly filed a petition with the Commissioner of Education pursuant to N.J.S.A. 18A:6-9 on January 7, 1977. They sought a declaration of their employment status and tenure eligibility, as well as prorated salary and benefits. The Administrative Law Judge issued an initial decision on October 26, 1979. He held that petitioners were teaching staff members entitled to tenure under N.J.S.A. 18A:28-5. He further found that these teachers were entitled only to the salary and emoluments offered by the board and accepted by them, with the exception of sick leave, which was statutorily mandated for all steadily employed persons by N.J.S.A. 18A:30-2.

The Commissioner of Education rendered his decision on December 18, 1979. Although he generally accepted the findings of the Administrative Law Judge, the Commissioner concluded that the petitioners were not only eligible to attain tenure but also entitled to all the emoluments and benefits afforded other teaching staff members employed by the board although on a prorated basis. He noted that sick leave cannot under law be prorated.

The school board appealed to the State Board of Education. While that appeal was pending, the Appellate Division decided Point Pleasant Beach Teachers' Ass'n v. Callam, 173 N.J. Super. 11, certif. den., 84 N.J. 469 (1980). In that case, the Appellate Division upheld a board of education's refusal to grant tenure to teachers who staffed the district's remedial reading program. That program was funded by Title I, 20 U.S.C.A. Secs. 236 to 241-1. The court held that the teachers in that case could not be considered "teaching staff members" within the meaning of N.J.S.A. 18A:1-1 and 18A:28-5 since they had been hired on a temporary basis.

Following the decision in Point Pleasant, the State Board of Education reversed the Commissioner's decision in Spiewak on July 2, 1980. The State Board based its reversal on Point Pleasant. However, the State Board did not explain why it concluded that Point Pleasant mandated such a result.

On appeal, the Appellate Division reversed the State Board of Education and reinstated the Commissioner's determination. 180 N.J. Super. 312 (1981). The court found that the teachers' employment qualified them as "teaching staff members" presumptively eligible for tenure under N.J.S.A. 18A:28-5. The court interpreted Point Pleasant to hold that

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> where employment is offered and accepted on a temporary basis and where its temporary nature is understood by both employer and employee to be one of its essential predicates, such employment cannot then be relied on by the employee as the basis of tenure. [180 N.J. Super. at 318]

The court found that the source of funding for the teachers' salary had no independent significance but was merely indicative of the intent of the parties on the nature of the employment. Id. Applying that test, the Appellate Division found that although the parties may initially have understood their employment to be temporary, it had in fact become regular and continuous. The court remanded the case to the Commissioner to determine when tenure accrued and what retroactive benefits were owed to petitioners.

This Court granted the State Board of Education's petition for certification on November 10, 1981, 88 N.J. 502 (1981).

B. Hamilton Tp. Supplemental Techers Ass'n. v. Hamilton Tp. Board of Education

Petitioners here are twenty-six Beadleston supplemental instructors employed by the Hamilton Township Board of Education. They all hold the required state-issued teaching certificates. Their duties are identical to those performed by Spiewak and Dabinett. Their compensation and terms of employment differ from Spiewak's and Dabinett's in the single respect that they receive ten paid sick days per year.

On September 24, 1979, an Administrative Law Judge found that petitioners were regularly employed teachers in programs required by State statute and the State Constitution. He further found that they fell within the statutory definition of "teaching staff member," N.J.S.A. 18A:1-1. Based on these findings, the judge concluded that any petitioner who had served the requisite length of time had acquired tenure under N.J.S.A. 18A:28-5.

The Commissioner of Education affirmed the Administrative Law Judge's initial decision on November 30, 1979. As in Spiewak, the State Board of Education reversed on October 3, 1980 on the basis of Point Pleasant.

The Appellate Division reversed and held that petitioners were eligible for tenure. 180 N.J. Super. 321 (1981). The court found the Hamilton Tp. situation indistinguishable from Point Pleasant with one exception, which it found to be dispositive. The court concluded that the Hamilton Tp. teachers, unlike those in Point Pleasant, were not employed in a federally funded program. Since they were not employed in programs contingent on uncertain federal funding, they were therefore entitled to tenure under N.J.S.A. 18A:28-5. The court suggested that Title I teachers could not receive tenure under N.J.S.A. 18A:28-5 because of the tenuous nature of their federal funding. This conclusion contradicts the

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assertion of the Appellate Division in Spiewak that Title I teachers are eligible for tenure under some circumstances. See 180 N.J. Super. at 318.

This Court granted the State Board of Education's petition for certification on November 10, 1981, 88 N.J. 503 (1981).

C. Anderson v. Summit Board of Education

Constance Anderson worked as a teacher in the Summit public school system from February 1976 through June 1979. When the Summit Board of Education then failed to renew her contract, Anderson contested that decision. She claimed that she had already qualified for tenure by working the statutorily required period of more than three years within a span of four consecutive academic years. N.J.S.A. 18A:28-5. The school board contended that Anderson's initial four months on the job as a federally funded Title I remedial reading instructor did not count toward her tenure, leaving her just short of tenure when it terminated her employment. The sole issue in this case is whether Anderson should receive tenure credit for the time spent as a remedial reading instructor in a federally funded program under Title I.

On February 29, 1980, the Administrative Law Judge found that Anderson's employment as a remedial reading instructor in the federally funded Title I program counted toward determining her tenure eligibility. Thus, the judge concluded that the board had improperly terminated her. The judge ordered the board to reinstate Anderson to her teaching position.

The Commissioner of Education adopted the Administrative Law Judge's findings on April 30, 1980. The Commissioner ordered Anderson's reinstatement. He further ordered reimbursement of full salary and benefits from the time of the improper termination, mitigated by the amount Anderson had earned from other employment during that time.

On appeal, the State Board of Education reversed on the authority of Point Pleasant. The State Board held on December 3, 1980 that Anderson's service as a remedial instructor did not count towards tenure.

Anderson filed a notice of appeal with the Appellate Division on February 20, 1981. This Court granted direct certification on February 2, 1982. 89 N.J. 405 (1982).

II

State statutes grant teachers in New Jersey the right to tenure. Zimmerman v. Newark Board of Education, 38 N.J. 65, 70-72 (1962), certif. den. 371 U.S. 956, 83 S.Ct. 508, 9 L.Ed. 2d 502 (1963); Ahrensfield v. State Board of Education, 126 N.J.L. 543 (E.

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& A. 1941). The Tenure Act, N.J.S.A. 18A:28-1 to -18, specifically defines the conditions under which teachers are entitled to the security of tenure. The statute makes tenure a mandatory term and condition of employment. It therefore supersedes contractual terms. In the Matter of Local 195, IFPTE, AFL-CIO v. State, 88 N.J 393, 403-04 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 82 n. 7 (1978); Red Bank Regional Ed. Ass'n v. Red Bank Reg. High Sch. Bd. of Ed., 78 N.J. 122, 141 (1978); Zimmerman v. Newark Bd. of Ed., 38 N.J. at 70-72. The question of whether remedial teachers are entitled to tenure must be answered by interpretation of the relevant statutes.

The Tenure Act was originally enacted in 1909. L. 1909, c. 243. Since then, it has undergone numerous amendments. However, its purpose has not changed. The tenure statute prevents school boards from abusing their superior bargaining power over teachers in contract negotiations, Trenton Bd. of Ed. v. State Bd. of Ed., 125 N.J.L. 611, 614 (S. Ct. 1941). It protects teachers from dismissal for "unfounded, flimsy or political reasons." Zimmerman v. Newark Bd. of Ed., 38 N.J. at 71.

This case concerns N.J.S.A. 18A:28-5, which provides in part:

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

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> (c) the equivalent of more than three academic years within a period of any four consecutive academic years....

"Teaching staff member" is defined at N.J.S.A. 18A:1-1:

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

By the express terms of these statutes, an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time.

There is no question that the teachers in this case fall within the express terms of the statute. They are therefore presumptively eligible for tenure unless a statutory exception applies. The only statutory exception possibly relevant here is N.J.S.A. 18A:16-1.1. That statute denies tenure rights to substitute teachers. It provides that

> ... [a] board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee ... [However,] no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.
> [N.J.S.A. 18A:16-1.1]

Although this statute denies tenure to temporary employees, it extends only to those who "act in place of" another employee who is absent or disabled. None of the teachers in this case was a temporary replacement as defined by the statute.

Since the wording of N.J.S.A. 18A:28-5 is clear and unambiguous, we will apply it as written in the absence of any evidence of a contrary legislative intent. As Justice Clifford stated in construing a different portion of the Tenure Act:

> Fundamental principles of statutory construction requires that "[i]f the [statutory] language is plain, unambiguous and uncontrolled by other

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> parts of the act or other acts upon the same subject the court cannot give it a different meaning." [Citation omitted.] ...
>
> * * * * *
>
> Our duty is to construe and apply the statute as enacted. We are not at liberty to presume the legislature intended something other than what it expressed by its plain language. This Court will not engage in conjecture or surmise which will circumvent the plain meaning of the act. [In re Jamesburg High School Closing, 83 N.J. 540 (1980)]

Moreover, because of its remedial purpose, the Tenure Act should be liberally construed to achieve its beneficent ends. Barnes v. Jersey City Bd. of Ed., 85 N.J. Super. 42, 45 (App. Div. 1964). Accord, Manchester Bd. of Ed. v. Raubinger, 78 N.J. Super. 90, 101 (App. Div. 1963); Viemeister v. Prospect Bd. of Ed., 5 N.J. Super. 215, 218 (App. Div. 1949). Cf. Capella v. Bd. of Ed. of Camden County Voc. Tech. Sch., 145 N.J. Super. 209, 214 (App. Div. 1976).

We find no evidence of legislative intent to exclude remedial and supplemental teachers from the express language of N.J.S.A. 18A:28-5, and therefore conclude that they are eligible for tenure.

We find further support for this conclusion in the statutes which mandate that remedial and supplemental services be provided to children who need them. The Public School Education Act of 1975, N.J.S.A. 18A:7A-1 to -33, enacted in response to this Court's ruling in Robinson v. Cahill, 69 N.J. 133 (1975), specifically requires public schools to provide "[p]rograms and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs." N.J.S.A. 18A:7A-5(e). See also N.J.S.A. 18A:7A-6; N.J.A.C. 6:8-2.1; 6:28-3.2. We agree with the Appellate Division in Spiewak which stated:

> We deem it beyond cavil that elementary school children unable to read at grade level are included within this mandate and that remedial programs for such children are encompassed by this legislative directive. Certainly the programs prescribed by N.J.S.A. 18A:46-1 et seq. are also generally encompassed within the definitional scope of this directive. [180 N.J. Super. at 319]

We have previously alluded to the strong legislative policy of providing adequate remedial education to students with special needs. See e.g., Levine v. Institutions & Agencies Dept. of N.J., 84 N.J. 234, 249-50 (1980). Such programs are a permanent part of New Jersey's system of "thorough and efficient education." N.J.S.A. 18A:7A-2.

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As noted earlier, the State Board of Education has relied on Point Pleasant to deny tenure to remedial teachers in these cases. The various boards of education here rely almost exclusively on Point Pleasant for their position that supplemental teachers may not acquire tenure. We therefore consider the reasoning and the holding in that case.

III

In Point Pleasant the Appellate Division held that certain Title I teachers were not "teaching staff members" as defined by N.J.S.A. 18A:1-1 and therefore not eligible for tenure under N.J.S.A. 18A:28-5. The court acknowledged that the teachers in that case "fall within the literal terms of N.J.S.A. 18A:1-1 and 18A:28-5, and therefore could be considered eligible for tenure." 173 N.J. Super. at 16. Nonetheless, the court concluded that teachers were unprotected by the statute if they had been offered and had accepted "temporary employment" Id. at 17, 18. The court held:

> Whether a professional employee of a board of education qualifies as a teaching staff member eligible for tenure depends upon the nature of the employment tendered and accepted. This determination can only be made after an examination of the terms, conditions and duties of the employment and a consideration of the conduct of the parties. [Id. at 17 (emphasis added)]

Analyzing the conduct of the parties, the court concluded that the teachers in that case had entered into contractual relationships with the board of education that were intended by the board and understood by the teachers to be temporary. They were thus not entitled to tenure.

The decision in Point Pleasant relies on the wrong legal principles. By focusing on the contractual relations between the parties and not the statutory criteria for tenure, the court in Point Pleasant overlooked the authority which holds that tenure is a legal right governed by statute rather than contract.

It is now well settled that public employees and employers may not agree to contractual terms that contravene a specific term or condition of employment set by a statute. "If the Legislature establishes a specific term or condition of employment that leaves no room for discretionary action, then negotiation on that term is fully preempted." In re IFPTE Local 195 v. State, 88 N.J. at 403. We have specifically stated that the tenure provisions of N.J.S.A. 18A:28-5 constitute a mandatory contractual term that may not be waived or bargained away.

> Mandatory or imperative statutes ordinarily are those enactments which set up a particular scheme which "shall" be handled as directed. An example of such a statute is N.J.S.A.

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> 18A:28-5(b), which provides that teachers "shall be under tenure during good behavior and efficiency and they shall not be dismissed *** after employment in such district or by such board for *** three consecutive academic years, together with employment at the beginning of the next succeeding academic year," except for specifically enumerated reasons. [State v. State Supervisory Employees Ass'n, 78 N.J. at 82 n. 7]

Whether certain teachers are entitled to tenure never depends on the contractual agreement between the teachers and the board of education. Tenure is a "statutory right imposed upon a teacher's contractual employment," Zimmerman v. Newark Bd. of Ed., 38 N.J. at 72. It may not be forfeited or waived, Red Bank Ed. Ass'n v. Red Bank Bd. of Ed., 78 N.J. at 141.

The "temporary employment" exception to N.J.S.A. 18A:28-5 created by the court in Point Pleasant not only erroneously focuses on the subjective intent of the parties rather than the objective statutory criteria, but it contradicts an express statutory provision. As noted above, the tenure statute itself contains an exception for "temporary employees." N.J.S.A. 18A:16-1.1. However, that exception is limited to employees hired to take the place of an absent teacher. The courts are not free to expand that exception by judicial fiat.

The cases relied upon by the court in Point Pleasant do not support its creation of a new exception to the tenure statute. Schulz v. State Bd. of Ed., 132 N.J.L. 345 (E. & A. 1945); Biancardi v. Waldwick Bd. of Ed., 139 N.J. Super. 175 (App. Div. 1976), aff'd o.b., 73 N.J. 37 (1977); Capella v. Camden Cty. Voc. Tech. Sch. Bd. of Ed., 145 N.J. Super. 209 (App. Div. 1976). None of these decisions justifies the departure in Point Pleasant.

In Schulz v. State Board of Education, the Court of Errors and Appeals held that the tenure statute did not apply to substitute teachers. At the time Schulz was decided, the predecessor statute to N.J.S.A. 18A:28-5, R.S. 18:13-16, provided that "all teachers" were eligible for tenure. The tenure statute nowhere defined the phrase "all teachers." Confronted with that ambiguous term, the court looked to other statutes dealing with teachers' conditions of employment. The pension law, R.S. 18:13-25 [now N.J.S.A. 18A:66-2(p)], provided that "[n]o person shall be deemed a teacher within the meaning of this article who is a substitute teacher...." In the absence of any other indication of legislative intent regarding the types of "teachers" eligible for tenure under the tenure statute, the court relied on the pension statute as well as related statutory provisions to conclude that substitute teachers were ineligible for tenure. Id. at 351-52.

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Schulz does not stand for the proposition that courts may create exceptions to the clear terms of the tenure statute. At the time the case was decided, the statute did not define which "teachers" were eligible for tenure. It was reasonable for the Court to look to related statutes to determine the legislative intent. Since the Schulz decision in 1945, the Legislature has amended the Tenure Act specifically to define which teachers are covered by it. N.J.S.A. 18A:28-5 grants tenure to all "teaching staff members" who meet the conditions of the statute. That version of the statute was not in effect at the time Schulz was decided. Moreover, in 1967 the Legislature adopted the statutory provision that defines "teaching staff members," N.J.S.A. 18A:1-1, L. 1967, c. 31. There is therefore no longer any need to look outside the Tenure Act to discover which teachers the Legislature intended to be protected by it.

The court in Point Pleasant mistakenly assumed that Schulz interpreted the same statute that the Point Pleasant court had before it. But that statute had been materially altered after Schulz was decided. A case that construes and applies a statute does not necessarily express the correct law once the Legislature has changed that statute. This is common sense. To decide whether or not a teacher is protected by tenure, we must construe the current statutory provisions.

Reliance on Biancardi v. Waldwick Board of Education, supra, is also misplaced. Citing Schulz for the proposition that substitute teachers were ineligible for tenure, 139 N.J. Super. at 177, the Biancardi Court erroneously stated that Schulz "is binding upon us until overruled by competent authority." Id. At the time Biancardi was decided in 1976, the tenure statute construed in Schulz had been materially amended. The new definition of "teaching staff members" had been added in 1967. Moreover, the Legislature had enacted a specific statute that denied tenure to substitute teachers. N.J.S.A. 18A:16-1.1. Thus, by reaffirming the Schulz substitute teacher exception, Biancardi in effect did no more than restate the express legislative exclusion of substitutes from tenure eligibility.

Finally, in Capella v. Camden Cty. Voc. Tech. Sch. Bd. of Ed., the Appellate Division held that teachers in an adult evening school program were ineligible for tenure. That court again incorrectly relied on Schulz. 145 N.J. Super. at 212-13. At the time Capella was decided, the statute construed in Schulz was no longer in existence. However, the Capella court did act correctly in examining the various tenure provisions in the current statute to determine whether the Legislature intended to grant tenure to teachers in adult evening school programs. Referring to related provisions of the Tenure Act, the court concluded that those teachers were not within its protection. Id. at 211, 214. See N.J.S.A. 18A:28-6.1.

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The Point Pleasant court also relied on Capella for the proposition that an employee is not entitled to tenure if the program in which she is employed "requires a flexibility in operation which would be impeded if its instructors were granted tenure." 173 N.J. Super. at 18. See Capella v. Camden Cty. Voc. Tech. Sch. Bd. of Ed., 145 N.J. Super. at 214-15. This is incorrect for several reasons. First, the Legislature has determined that the utility of tenure to improving education outweighs any costs in decreased "flexibility." That is a policy determination that has been made by the Legislature. It is not proper for courts to override that determination on the basis of their independent policy conclusions. Second, the tenure statute in no way deprives a school board of flexibility. A board can deny tenure to a teacher simply by dismissing her before she has completed the required years of service. Finally, the Legislature has expressly provided that tenured teachers may be dismissed if the board deems it advisable to reduce the number of teaching positions for economic reasons or because of reduction in the number of pupils or other good cause. N.J.S.A. 18A:28-9. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 51-52 (App. Div. 1979).

To summarize, neither Schulz nor Biancardi nor Capella holds that courts may themselves define exceptions to N.J.S.A. 18A:28-5. To the extent those decisions imply that the right to tenure derives from contract rather than statute, they are wrong. To the extent they suggest that courts may create exceptions to the clear language of N.J.S.A. 18A:28-5 based on policy considerations, they are disapproved.

As a practical matter, the protection of tenure would be greatly reduced if it were subject to contract principles. If tenure were subject to contract, it would be available to teachers only if school boards agreed to grant it to them. But the Legislature has explicitly mandated that teachers be granted tenure under certain conditions as a means to improve public education. Neither school boards nor teachers are free to disobey that mandate. Tenure is not dependent on agreement between the parties. Teachers are entitled to tenure because the Legislature has granted them that right.

The unfairness of making tenure subject to contract negotiations is apparent from these cases. In Spiewak, for example, the school board has hired two supplemental teachers on a contract and tenurable basis. It has also hired several teachers on a hourly, non-tenurable basis. Yet their duties are nearly identical. If tenure were a matter of contract, its protection would be available only to those employees that the boards choose to favor with it. This practice is obviously inequitable.

In short, we find no justification for the result in Point Pleasant. The language of N.J.S.A. 18A:28-5 is clear and unambiguous. The Legislature has granted the right to tenure to teaching staff members who fulfill the objective conditions listed in the statute. This right is not dependent on an agreement between the parties.

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We therefore overrule Point Pleasant. We hold that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1. The remedial and supplemental teachers in the cases decided today are covered by the statutory language. We find no exception in any statute that would deny them eligibility for tenure. We hold that those teachers who have satisfied the statutory conditions are entitled to tenure, no matter what the source of the funding for their salaries.

IV

We next address the question whether Title I teachers may acquire tenure. The Point Pleasant court suggested that the source of funds to pay for teachers' salaries was relevant to determining whether they had been hired on a temporary basis. 173 N.J. Super. at 18. The Appellate Division in Spiewak held that Title I teachers may acquire tenure if their employment has in fact become permanent. 180 N.J. Super. at 318-19. The Appellate Division in Hamilton Tp., on the other hand, stated that Point Pleasant had held that Title I teachers could never acquire tenure under N.J.S.A. 18A:28-5 because of the tenuous nature of the funding. 180 N.J. Super. at 323.

Given our holding today that contract principles do not determine eligibility for tenure, this conflict among various Appellate Division decisions may be quickly resolved. The intent of school boards to hire Title I teachers on a temporary basis cannot deprive those teachers of tenure. The only question is whether any provision of the Tenure Act itself would deny its protection to teaching staff members whose jobs are funded by federal rather than state money. We find no such provision.

The Appellate Division in Hamilton Tp. asserted: "It tortures common sense to believe that the Legislature intended tenure in potentially transient teaching situations such as state programs dependent on never certain federal funding." 180 N.J. Super. at 323. However, the court recognized that no provision of the statute itself excluded teachers in federally funded jobs. Id. Moreover, the tenuous nature of any funding should be irrelevant to a tenure decision since school boards have the power to dismiss tenured teachers for good faith economic reasons. N.J.S.A. 18A:28-9. See 180 N.J. Super. at 319 n.2. There is no reason to believe that the Legislature in fact intended to exclude Title I teachers from the scope of N.J.S.A. 18A:28-5. They are "teaching staff members" under N.J.S.A. 18A:1-1 and teaching staff members acquire tenure if they satisfy the objective criteria in N.J.S.A. 18A:28-5. We find no exception in the statute that would deny tenure to Title I teachers. In the absence of any evidence of legislative intent to the contrary, we hold that Title I teachers are eligible to acquire tenure if they meet the conditions stated in N.J.S.A. 18A:28-5.

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V

The various schools boards involved in these suits urge that in the event that we overrule Point Pleasant, we grant only prospective relief. We have previously declined to apply a new legal rule retrospectively when it constitutes a "significant change in the law." Merenoff v. Merenoff, 76 N.J. 535, 560 (1978). This policy rests on a perceived unfairness to parties that have acted in reliance on the rules established in prior case law. See Ramirez v. Amsted Industries, Inc., 86 N.J. 332, 357 (1981). It is also intended to avoid any possible confusion in the administration of statutes and the execution of the law. Tomarchio v. Greenwich Tp., 75 N.J. 62, 78 (1977.

It is apparent from the Appellate Division decisions below, as well as those in Biancardi, Capella, and Point Pleasant, that for some time the law on the tenurability of part-time, remedial and supplemental instructors has been in doubt. More importantly, we are overruling the decision in Point Pleasant. One can hardly imagine a clearer case of a clean break in the law than disapproval of a court decision that has been followed by state agencies. We therefore conclude that this decision should have only prospective application to those parties who are not before the Court.

However, we believe that the teachers here have the right to application of this new rule developed as a result of the litigation they commenced. We have often allowed litigants to benefit from application of a rule that is applied prospectively as to all other persons. E.g., Ramirez v. Amsted Indus., 86 N.J. at 357; Merenoff v. Merenoff, 76 N.J. at 560; Pascucci v. Vagott, 71 N.J. 40, 50-51 (1976). The teachers in this state should not be denied the reward for their efforts and expense in challenging both the practice of their boards of education and the legal principles established by the various cases criticized here. See Ramirez v. Amsted Industries, 86 N.J. at 357.

We therefore hold that the legal rule established by these cases shall be applied prospectively to all persons not before the Court as well as to the teachers before us.[2]

---

2 Teachers not before the Court will therefore not be entitled to any back pay award. Similarly, teachers not involved in this case who were terminated prior to the date of this opinion are not entitled to be rehired. However, all currently employed supplemental and remedial teachers should have their tenure eligibility calculated on the basis of this opinion from the beginning of their employment.

As to the teachers involved in this litigation, they are all entitled not only to tenure but also to retroactive payment of any benefits that they would have received if they had been awarded tenure properly. Further, Anderson is to be reinstated to her tenured position and to receive all retroactive benefits.

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VI

We hold that public school teachers who provide part-time remedial or supplemental instruction to educationally disabled children may acquire tenure if they meet the specific criteria in N.J.S.A. 18A:28-5. Point Pleasant Beach Teachers' Ass'n v. Callam, 173 N.J. Super. 11 (App. Div. 1980), is overruled. We affirm the judgment of the Appellate Division in Spiewak v. Rutherford Bd. of Ed. and remand that case to the Commissioner of Education to determine when tenure accrued and what retroactive benefits are owed to the teachers. We affirm the judgment of the Appellate Division in Hamilton Tp. Supplemental Teachers Ass'n v. Hamilton Tp. Bd. of Ed. that all supplemental teachers who meet the criteria of N.J.S.A. 18A:28-5 are eligible for tenure. We remand the case to the Commissioner of Education to determine what retroactive benefits are owed to the teachers. We reverse the decision of the State Board of Education in Anderson v. Summit Bd. of Ed. and reinstate the judgment of the Commissioner of Education in that case. Anderson is to be reinstated to her tenured position and given all salary and other benefits that were rightfully due her from February 26, 1979 to the present time mitigated by her earnings, if any, during the time of the litigation.[3]

For affirmance and remandment in Spiewak and Hamilton Twp. Supplemental Teachers Ass'n and reversal in Anderson - Chief Justice Wilentz and Justices Pashman, Clifford, Schreiber, Handler and O'Hern - 6.

Opposed - None.

[90 N.J. 63 (1982)]

3 We do not decide what, if any, additional benefits the teachers in these cases are entitled to, either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record. Further, the parties for the most part did not brief this question and the Appellate Division did not address it. We therefore remand to the Commissioner of Education to make that determination in accord with the principles laid down in this opinion.

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IN THE MATTER OF THE TENURE	:	
HEARING OF ORAZIO TANELLI, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE TOWN OF MONTCLAIR,	:	DECISION
ESSEX COUNTY.	:	
	:	

Decided by the Commissioner of Education, September 18, 1981 and October 26, 1981

For the Petitioner-Respondent, McCarter & English (Lois M. Van Deusen, Esq., of Counsel)

For the Respondent-Appellant, Katzenbach, Gildea & Rudner (Arnold M. Mellk, Esq., of Counsel)

The Montclair Board certified a charge of unbecoming conduct against the respondent teacher herein, stating that he had placed a series of harassing telephone calls to an administrator. Upon conviction of respondent in municipal court for that offense, the Commissioner granted the Board's motion for summary judgment terminating respondent's employment and tenure.

The Commissioner ruled that the offense of which respondent was convicted was one "involving or touching" his "position or employment", and under N.J.S.A. 2C:51-2 respondent automatically forfeited his position by reason of such conviction.

While we concur that said statute, if applicable, would have that result, we agree with respondent's contention that Title 2C does not apply here because the offense in question occurred prior to September 1, 1979, the effective date of that title. Section 2C:1-1 provides, with exceptions not here material, that the new code does not apply to offenses committed before "its effective date and the disposition of such offenses shall be governed by the prior law." We must therefore dispose of this case without reference to N.J.S.A. 2C:51-2. Furthermore, respondent did not automatically forfeit his position by operation of N.J.S.A. 2A:135-9 because his offense did not rise to the level of a misdemeanor, as specified in that statute.

We believe that this matter should be remanded to the Commissioner for hearing pursuant to the Tenure Employees Hearing Act, N.J.S.A. 18A:6-10 et seq. In such a hearing respondent should not be permitted to relitigate the facts established by his trial and conviction in the Montclair Municipal Court; his guilt is res judicata. Matter of Tenure Hearing of Emil J.

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Guasconi, 1977 S.L.D. 513, aff'd. State Board 1977 S.L.D. 517. In substance, the sole purpose of the hearing will be to allow respondent to present mitigating facts and arguments as to whether, under all the circumstances, respondent has been guilty of conduct unbecoming a teacher and, if so, what penalty should be imposed.

The State Board of Education remands this case to the Commissioner for further proceedings in accordance with the foregoing opinion.

Attorney Exceptions are noted.
May 5, 1982

Pending N.J. Superior Court

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ROBERT P. TUCKER,

Appellant,

V.

BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,

Respondent.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education, June 18, 1980

Decided by the State Board of Education, March 4, 1981

Argued: March 30, 1982 - Decided: April 7, 1982

Before Judges Matthews, Pressler and Petrella.

On appeal from the Final Decision of the New Jersey State Board of Education.

Carl John Kerbowski argued the cause for appellant.

Harvey C. Johnson argued the cause for respondent.

Jaynee LaVecchia, Deputy Attorney General, argued the cause for State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James R. Zazzali, former Attorney General and Erminie L. Conley, former Assistant Attorney General, of counsel).

PER CURIAM

We affirm the State Board of Education in its determination that petitioner should not be reinstated as Administrative Principal in the school district of the Borough of Lawnside substantially for the reasons expressed in the Board's decision dated March 4, 1981.

Since the Board of Education of the Borough does not contest the award of 60 days pay to petitioner, we do not reach the question of the propriety of assessing a penalty in the form of an award of 60 days pay, considering the provisions of N.J.S.A. 18A:27-3.2 which are silent in that regard.

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UNION TOWNSHIP TEACHERS ASSOCIATION et al.,

Appellants,

V.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,

Respondent.

SUPREME COURT

Decided by the Commissioner of Education, August 27, 1979

Decided by the State Board of Education, November 8, 1979 and March 5, 1980

Decided by the Superior Court, Appellate Division, March 9, 1981

Argued February 8, 1982 -- Decided June 24, 1982

On certification to the Superior Court, Appellate Division.

Sanford R. Oxfeld argued the cause for appellants (Rothbard, Harris & Oxfeld, attorneys).

Howard Schwartz argued the cause for respondent.

Jaynee LaVecchia, Deputy Attorney General, argued the cause for respondent State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney).

Paula A. Mullaly, Associate Counsel, submitted a letter in lieu of brief on behalf of amicus curiae New Jersey School Boards Association (Christine D. Weger, General Counsel, attorney).

The opinion of the Court was delivered by

SCHREIBER, J.

The Union Township Teachers' Association (Association) filed a petition with the Commissioner of Education requesting that the Board of Education of the Township of Union be ordered to credit 54 teachers with the time they had served in the military, pursuant to N.J.S.A. 18A:29-11, and to award them back pay accordingly. The Commissioner, based on the pleadings, some documents and the briefs, held that the defenses of statute of limitations and laches were inapplicable. He also adopted a formula whereby "military service of six months or more shall be construed to be one year of salary credit." Applying that formula, the Commissioner dismissed 29

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claims and awarded back pay of $135,385 to the 25 qualifying teachers.

The State Board of Education held that the statute of limitations barred all claims for years earlier than the six years before the petition was filed, and held that recovery for those years within the statute was barred because of equitable estoppel. It also rejected the Commissioner's formula for rounding off less than a full year's service.

Both the Association and the Board appealed to the Appellate Division. The Appellate Division affirmed that part of the judgment which denied the teachers any back pay, holding that both the statute of limitations and the doctrine of laches applied. However, the teachers were to be allowed prospective application of their military service credit. It concluded that the Commissioner's method of computing credit for fractional years of military service was correct and also remanded for further hearing 26 of the 29 claims which had been dismissed, because the record was unclear with respect to the military service credit allowed for these teachers.

We granted the Association's petition for certification which raised two issues: the applicability of the doctrine of laches and the statute of limitations. Those issues have been decided this day in the case of Lavin v. Board of Education of Hackensack, 90 N.J. 145 (1982). The judgment of the Appellate Division is therefore affirmed, as modified herein, and the cause remanded to the Commissioner to determine the open military service question referred to above and the calculation of the amount prospectively due.

PASHMAN, J. dissenting.

I dissent from the Court's decision regarding the applicability of laches and the contract statute of limitations to this case, for the reasons expressed in my dissent in Lavin v. Board of Education of Hackensack, 90 N.J. 145 (1982). I would hold that the statute of limitations applies, but not laches.

Justice Clifford and Justice Handler join in this opinion.

For modification and affirmance - Chief Justice Wilentz and Justices Schreiber, Pollock and O'Hern - 4.

For reversal and remandment - Justices Pashman, Clifford and Handler - 3.

[90 N.J. 161 (Sup. Ct. 1982)]

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UNION TOWNSHIP TEACHERS ASSOCIATION, ON BEHALF OF JOSEPH CALIGUIRE, JR. ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT-CROSS-APPELLANT.	:	

Decided by the Commissioner of Education, August 27, 1979

Decided by the State Board of Education, November 8, 1979

Decided by the Superior Court of New Jersey, Appellate Division, March 9, 1981

Decided by the Supreme Court of New Jersey, June 24, 1982

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Cross-Appellant, Simone & Schwartz (Howard Schwartz, Esq., of Counsel)

For the Amicus Curiae New Jersey School Boards Association, David W. Carroll, Esq. (Paula A. Mullaly, Esq., on the Brief)

Pursuant to Union Township Teachers Association, Etc. v. Board of Education of Union Township, Etc., Supreme Court of New Jersey, Docket No. A-122, decided June 24, 1982, this matter is remanded to the Commissioner of Education for disposition in conformity with the opinion of the Court.

September 8, 1982

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WASHINGTON EDUCATION ASSOCIATION on behalf of PAUL C. ENNICO, et al.,	:	
PETITIONERS-APPELLANTS,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
BOARD OF EDUCATION OF THE BOROUGH OF WASHINGTON,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 11, 1981

Decided by the State Board of Education, October 7, 1981

Submitted: November 16, 1982 - Decided: November 30, 1982

Before Judges Joelson and Petrella.

On appeal from Final Decision of the State Board of Education.

Rothbard, Harris & Oxfeld, attorneys for appellants (Arnold S. Cohen, of counsel and on the brief).

Robert L. Schumann, attorney for respondent (Schumann, Seybolt & Broscious, attorneys; David J. Gallagher on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey attorney for the State Board of Education (Jaynee LaVecchia, Deputy Attorney General of counsel and on Statement in Lieu of Brief).

PER CURIAM

A teachers' union and certain teachers seek in this appeal to have letters of reprimand removed from their personnel files. Appellants essentially claim that the Washington Borough Board of Education (Board) did not have authority to put those letters into their files and that they were afforded no hearing prior to the issuance of the letters of reprimand.

The Commissioner of Education upheld the authority of the Board to discipline the employees and that decision was affirmed on appeal by the State Board of Education (State Board). We affirm.

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The controversy arose because of the refusal of the teachers to attend an honors program in which they had participated in previous years. The refusal was apparently because of some problems in an ongoing contractual negotiation.

We reject the argument of the union that the applicable statutes (see N.J.S.A. 18A:6-10; 18A:28-5, and 18A:28-6) only provide for dismissal or reduction in compensation, and then only upon compliance with certain mandated statutory procedures, and, therefore, that is the sole mode of discipline. There was no question that there was a refusal to attend the May 1980 honors program in which the teachers had participated in past years, and that such refusal was communicated to the Board in advance. Under these circumstances there was clearly no abuse of discretion by the Board in imposing such minor disciplinary sanction. The determination of the State Board is supported by sufficient credible evidence in the record. See Campbell v. Civil Serv. Dept., 39 N.J. 556, 562 (1963).

In view of the outright refusal of the teachers beforehand to participate in the honors program, there was not only no requirement for a hearing, but the action of the Board in issuing the letters of reprimand was a matter of inherent managerial prerogative. See State v. Local 195 IFPTE, 179 N.J. Super. 146, 152-153 (App. Div. 1981), certif. den. 89 N.J. 433 (1982). Such sanction by the Board was a nonnegotiable exercise of a management prerogative. See generally, e.g., Ridgefield Pk. Ed. Ass'n. v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144, 160-161 (1978), State v. State Supervisory Employees Ass'n., 78 N.J. 54, 79-80 (1978); Demarest Bd. of Ed. v. Demarest Ed. Ass'n., 177 N.J. Super. 211, 216-217 (App. Div. 1980).

Affirmed.

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WATCHUNG HILLS REGIONAL EDUCATION ASSOCIATION, on behalf of GABRIELLE TESTA, et al.,	:	
Petitioner-Appellant,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	APPELLATE DIVISION
Respondent-Respondent.	:	

Decided by the Commissioner of Education, April 10, 1980

Decided by the State Board of Education, February 4, 1981

Argued January 4, 1982 - Decided January 12, 1982

Before Judges Allcorn and Morton I. Greenberg.

On appeal from the State Board of Education.

Sanford R. Oxfeld argued the cause for appellant (Rothbard, Harris & Oxfeld, attorneys).

William S. Jeremiah argued the cause for respondent (Buttermore, Mullen, Jeremiah & Phillips).

PER CURIAM

The decision of the State Board of Education dated February 4, 1981 is affirmed substantially for the reasons set forth therein.

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JOHN T. WHITING,	:	
Appellant,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	APPELLATE DIVISION
Respondent.	:	

Decided by the Commissioner of Education, August 26, 1980

Decided by the State Board of Education, January 22, 1981

Submitted: March 30, 1982 - Decided: April 7, 1982

Before Judges Matthews, Pressler and Petrella.

On appeal from the Final Decision of the New Jersey State Board of Education.

Carl John Kerbowski, attorney for appellant.

Blumberg, Rosenberg, Mullen & Blumberg, attorneys for respondent (William B. Rosenberg, on the brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for State Board of Education (James J. Zazzali, former Attorney General, and M. Kathleen Duncan, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

The decision of the State Board of Education which adopts the conclusion of the Commissioner of Education is affirmed substantially for the reasons expressed by the Commissioner.

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IN THE MATTER OF THE TENURE	:	
HEARING OF PORTIA WILLIAMS,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	STATE BOARD OF EDUCATION
OF RED BANK, MONMOUTH COUNTY.	:	DECISION
	:	

Decided by the Commissioner of Education, August 27, 1981

Decided by the State Board of Education, February 3, 1982

For the Petitioner-Appellant, Reussille, Cornwell, Mausner & Carotenuto (Martin M. Barger, Esq., of Counsel)

For the Respondent-Cross-Appellant, Katzenbach, Gildea & Rudner (Arnold M. Mellk, Esq., of Counsel)

The decision of the Commissioner of Education in this matter dated August 27, 1981 holds that respondent should be continued in her tenure status as a teaching staff member within the school district and be denied her salary increment for the 1980-81 school year. This holding taken alone leaves in doubt the extent of the penalty which respondent is to suffer. The question is whether respondent is to suffer the loss of income from her withheld increment for one year only or, in the alternative, remain one increment behind on the salary scale for the duration of her employment with the school district.

It is our view that the Commissioner has an obligation to affirmatively decide the proper penalty to be imposed (Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). The penalty should not be so unclear as to permit disagreement between the parties. When the Commissioner decides a controversy or dispute arising under the school laws, it must be a final decision even as to the penalty. However, a remand of this matter to the Commissioner for further disposition is unnecessary because his decision taken as a whole gives us sufficient guidance concerning the parameters of the penalty which he imposed. We understand his decision to mean that the withholding of the increment is for one year only. When respondent's increment is considered for the 1981-82 school year, respondent should be treated as if she had been allowed the salary increment for 1980-81 so that it will be possible for her to regain her position on the salary scale after the passage of the 1980-81 school year.

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With this clarification, the Commissioner's decision is affirmed for the reasons stated therein.

S. David Brandt, Jack Bagan, John T. Klagholz and Sonia B. Ruby opposed in the matter.

March 24, 1982

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IN THE MATTER OF THE TENURE :
HEARING OF PORTIA WILLIAMS, :
SCHOOL DISTRICT OF THE BOROUGH :
OF RED BANK, MONMOUTH COUNTY. :

RED BANK BOARD OF EDUCATION, : SUPERIOR COURT
APPELLANT, : APPELLATE DIVISION
V. :
PORTIA WILLIAMS, :
RESPONDENT-CROSS-APPELLANT. :

Decided by the Commissioner of Education, August 27, 1981

Decided by the State Board of Education, February 3, 1982

Argued November 15, 1982 - Decided December 15, 1982

Before Judges Milmed, Morton I. Greenberg and Furman

On appeal and cross-appeal from a final decision of the State Board of Education.

Martin M. Barger argued the cause for appellant (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys; Mr. Barger on the initial and reply briefs).

Arnold M. Mellk argued the cause for respondent-cross-respondent (Katzenbach, Gildea & Rudner, attorneys; Mr. Mellk, of counsel; Ezra D. Rosenberg, on the initial brief and reply letter-brief).

Irwin I. Kimmelman, Attorney General of New Jersey, attorney for the State Board of Education, submitted a Statement in lieu of brief on behalf of said Board (Jaynee LaVecchia, Deputy Attorney General, of counsel and on the Statement).

PER CURIAM

Appellant, the Red Bank Board of Education, challenges a decision of the State Board of Education which, in affirming with clarification a decision of the Commissioner of Education, determined that respondent Portia Williams (found guilty of using corporal punishment in violation of N.J.S.A. 18A:6-1) be continued

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in her tenure status as a teaching staff member within the Red Bank School District but denied her salary increment for the 1980-81 school year only. The State Board made clear that when her increment "is considered for the 1981-82 school year, respondent should be treated as if she had been allowed the salary increment for 1980-81 so that it will be possible for her to regain her position on the salary scale after the passage of the 1980-81 school year." Appellant contends that the penalty assessed against respondent is "totally inadequate" and asks that we modify it. Respondent cross-appeals asking that we reverse those portions of the agency decision: (a) which determined that she committed corporal punishment; and (b) which imposed a one-year's loss of increment.

The Commissioner of Education (Commissioner) upon his review of the record in the case, had concurred in the findings, determination and recommendation set forth in the initial decision of the Administrative Law Judge who conducted the hearing on the charges "of unbecoming conduct" which were made against respondent by the Superintendent of Red Bank Public Schools and certified to the Commissioner by the Red Bank Board of Education. The charges were three in number, viz.: (1) that on several occasions she "struck pupils in her class with a ruler," such conduct being "in direct violation of N.J.S. 18A:6-1, which specifically prohibits corporal punishment of pupils"; (2) that on several occasions she "publicly humiliated one of her pupils in front of the entire class, questioning his cleanliness and health habits"; and (3) that at a "Board of Education public meeting, held on March 11, 1980, at the Primary School in Red Bank, [she] did make racist and Anti-Semitic remarks...directed at the Administration of the Red Bank Board of Education...." At the close of the local Board's proof, the Administrative Law Judge, on respondent's motion to dismiss all three charges, concluded that a prima facie case had been established as to charge "1", but not as to charges "2" and "3"; and that, accordingly, the motion to dismiss be denied as to charge "1" and granted as to charges "2" and "3." On review, the Commissioner affirmed the findings and determinations of the Administrative Law Judge, dismissed charges "2" and "3", and directed that the "matter proceed to determination on the sole remaining charge."

At the conclusion of the hearing on charge "1", the Administrative Law Judge found from the proofs, among other things, that:

> Ms. Williams hit various students in her class lightly on the hand with a ruler for disciplinary purposes during both the 1978-79 and 1979-80 school years.
>
> None of the students was hurt.
>
> Ms. Williams had good rapport with her students during the 1978-79 and 1979-80 school years and the students were not afraid of the respondent.

On all of the evidence, the judge concluded that respondent was "guilty of the use of corporal punishment" and recommended that she

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"be continued in her tenure status as an employee of the [Red Bank School District] and that she be denied her salary increment for the 1980-81 school year."

Following his review of the record and the exceptions and "reply exceptions" to the initial decision of the Administrative Law Judge which were filed by counsel, the Commissioner determined that the findings and determination of the Administrative Law Judge were:

> ...sufficiently documented in the record of this matter for a determination to be reached herein that respondent is guilty of the charge of corporal punishment, notwithstanding the fact that such evidence is based solely upon the testimony of pupil witnesses.

He concluded:

> In the Commissioner's judgment there is no question that the actions of respondent with respect to incidents leading to the guilty charge of corporal punishment are serious and may not be condoned. However, in light of respondent's prior record, length of service and the sincere concern she has shown for the pupils in her classes, the Commissioner does not find the charge of corporal punishment sufficiently flagrant to warrant her summary dismissal. The Commissioner so holds.

He adopted the findings, determination and recommendation of the Administrative Law Judge and directed "that respondent be continued in her tenure status as an employee of the Board and that she be denied her salary increment for the 1980-81 school year." As indicated above, the State Board affirmed, with clarification, the Commissioner's decision "for the reasons stated therein."

From our review of the record we are satisfied that the determination of the State Board of Education, in all respects, has ample support in the evidence and is, in the circumstances, clearly not arbitrary, capricious or unreasonable, or violative of any legislative policy expressed or implicit in the laws governing the administration of schools or other educational institutions. We discern no sound reason or justification for disturbing that determination.

The decision of the State Board of Education under review, affirming with clarification the decision of the Commissioner of Education, is affirmed substantially for the reasons expressed by the Administrative Law Judge in her initial decision of July 10, 1981 and the reasons expressed by the Commissioner in his decision of August 27, 1981.

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ROBERT WOLDIN,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, March 26, 1981

For the Petitioner-Respondent, Mandel, Wysoker, Sherman, Glassner & Weingartner (Jack Wysoker, Esq., of Counsel)

For the Respondent-Appellant, Lucid, Jabbour, Pinto & Rodgers (Michael E. Rodgers, Esq., of Counsel)

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

Anne S. Dillman, S. David Brandt, Mateo F. DeCardenas and P. Paul Ricci opposed in the matter.
March 24, 1982

Pending N.J. Superior Court

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WYCKOFF EDUCATION ASSOCIATION,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
WYCKOFF BOARD OF EDUCATION, BERGEN COUNTY,	:	DECISION
RESPONDENT-CROSS-APPELLANT,	:	
AND THE BERGEN COUNTY SUPERINTENDENT OF SCHOOLS,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 5, 1981

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

For the Respondent-Cross-Appellant, Wyckoff Board of Education, Sullivan & Sullivan (Mark G. Sullivan, Esq., of Counsel)

For the Respondent-Respondent, Jaynee LaVecchia, Deputy Attorney General

The essential holding of the Commissioner's decision herein is that the respondent Board could properly employ clerical aides to perform a number of functions not requiring professional skill and judgment, although these functions (such as taking temperatures, applying bandages and sending ill pupils home) are often performed by a certified school nurse. The pertinent statute (N.J.S.A. 18A:40-1) concerning the employment of school nurses requires only that the Board employ "one or more" of them; it does not mandate that there be one nurse for every school.

The State Board affirms the decision below for the reasons stated therein.

We take this opportunity, however, to express our view that good health - physical, mental and emotional - is essential if a pupil is to obtain the thorough education contemplated by the Public School Education Act of 1975, and that school nurses provide one of the important "supportive services" called for by

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N.J.S.A. 18A:7A-5, especially teaching in areas related to health. Their training in such fields as child development, mental health, sociology and psychology suitably equip them to deal with problems of development of the whole child not just the brain.

We therefore urge all Boards to make greater use of the professional skills and training of school nurses when deciding upon school programs and the personnel to administer them.

Affirmed.

May 5, 1982

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JUANITA ZIELENSKI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF GUTTENBERG, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, June 18, 1981

For the Petitioner-Appellant, Moser, Roveto, McGough & von Schaumberg (William V. Roveto, Esq., of Counsel)

For the Respondent-Respondent, John Tomasin, Esq.

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

Robert J. Wolfenbarger opposed in the matter.

February 3, 1982

New Jersey State Department of Education
225 West State Street
Trenton, New Jersey 08625

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